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INTERNATIONAL CONFERENCE

ON ELECTORAL LEGISLATION AND PRACTICE IN COUNCIL OF EUROPE MEMBER STATES

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OPENING REMARKS

Mr Gianni BUQUICCHIO
Secretary of the Venice Commission

Dear President,
Dear Ladies and gentlemen,

It is a pleasure for me to address you on the occasion of the conference on Electoral law and practice in Council of Europe Member States co-organised by the Venice Commission and the Institute of European Law.

This is the second time that the Commission co-organises an activity in the Moscow State University of International Relations and I am pleased that during these two days we will have the possibility to discuss different issues of European co-operation and Council of Europe standards in the electoral field in this famous and prestigious research and educational institution.

The Venice Commission has been co-operating with different institutions in your country for many years. We have a long-standing special relationship with the Constitutional court and we have conducted several activities with the Central Electoral Commission of the Russian Federation.

We are ready not only to pursue co-operation between the Venice Commission and Russia but also to strengthen it. This is true in the already mentioned fields of elections and constitutional justice, but also in the rest of the Venice Commission's field of activities, that is constitutional law intended broadly.

What is the Venice Commission?

As you probably already know, the Venice Commission is the Council of Europe's independent advisory body in constitutional matters. Its members are appointed by the Commission's Member States, that is all member states of the Council of Europe and several non-European countries (Chile, Republic of Korea, Kyrgyzstan, as well as Morocco and Algeria).

Other States are observers: Argentina, Canada, the Holy See, Japan, Kazakhstan, Mexico, the United States and Uruguay. South Africa has a special co-operation status similar to that of the observers. Belarus is an associate member.

Field of activity

The Venice Commission is well known as an expert body in the field of constitutional law giving advice in matters of constitutional reform.

However, the scope of competence of the Venice Commission is larger. The Commission also deals with para-constitutional laws which directly embody constitutional principles. Such para-constitutional laws comprise, for example, laws on the constitutional court, the ombudsman institution or laws on minority protection. Most importantly for our Conference today, electoral legislation falls into this category.

Over time, electoral law has become a central field of expertise of the Venice Commission. We have given opinions on amendments in a number of countries in Europe.

Moreover, the Commission has identified, better defined and consolidated general standards in electoral law and has thus enriched the Common Constitutional Heritage of Europe.

One of the most important achievements in this field is clearly the Code of Good Practice in Electoral Matters which includes the main principles based on Council of Europe standards applicable to electoral legislation and practice.

Two political bodies of the Council of Europe, the Parliamentary Assembly and the Congress of Local and Regional Bodies, found the Venice Commission's advice important enough to establish of a joint body with the Commission, the Council for Democratic Elections.

Nevertheless, the respective roles of these political organs of the Council and of the Venice Commission clearly differ: while the political bodies lay emphasis on the standards of the Council of Europe through the political dialogue and observe elections in the countries, the Venice Commission provides legislative expertise only and remains strictly within the field of the law.

Working methods

The Venice Commission's activity may be divided into transnational activities, including comparative studies and seminars as well as standard-setting for the Council of Europe Member States, and activities directed **towards a specific** country.

I. Transnational activities

Transnational activities include *international seminars* as well as *comparative studies* which help in defining common trends or standards and possibly identifying major problems.

1. Seminars and comparative studies

The most recent *seminars* in the electoral field dealt with the pre-conditions for democratic elections and the organisation of elections by an impartial body.

The Venice Commission is also responsible for the European Conference of Electoral Management Bodies. In 2006 the 3rd conference which took place in Moscow was organised in co-operation with the Central Electoral Commission of the Russian Federation.

Comparative studies address in particular issues such as restrictions on the right to vote; electronic and distance voting; the role of political parties in the electoral process and other topics.

Comparative studies identify current challenges and problematic issues in the electoral field, on the basis of the experience of the various bodies of the Council of Europe (in case of the Venice Commission studies are extremely useful for providing opinions, for the Parliamentary Assembly and the Congress of Local and Regional Authorities when observing elections).

2. Standard-setting

The most important aspect of transnational activities is however *standard-setting*.

In the electoral field, the main reference documents are the Code of Good Practice in Electoral Matters and the Code of Good Practice on Referendums. The Code of Good Practice in Electoral Matters, which dates back to 2002, is now the Council of Europe's reference document in this field and is quoted frequently by national authorities as well as by the European Court of Human Rights.

Copies of the *Code of Good Practice in Electoral Matters* are at your disposal. In short, this document firstly defines the fundamental norms of the European electoral heritage: universal, equal, free, secret and direct suffrage, as well as frequency of elections; it also defines the framework conditions necessary for the organisation of proper elections, such as respect for human rights, particularly in

the political field, organisation of elections by an impartial body and an effective system of appeal.

Whereas everybody seems to agree with these principles at first view, it is different when one looks in more detail at what they should actually mean in order to be really effective.

The best example is free suffrage: it includes not only freedom of voters to express their wishes, but also freedom of voters to form an opinion; in its turn, freedom of voters to form an opinion includes the neutrality of authorities and, in particular, of public media – as you may be aware this is not yet common practice.

The issue was raised whether the Code of Good Practice in Electoral Matters could be a basis for a Convention, for a binding instrument in the electoral field, and, more generally, whether such a binding instrument could be adopted in the Council of Europe.

According to the Committee of Ministers – and the Venice Commission agrees with its point of view – for the convention to have any added value, its standards would have to be no less exacting than those in the Code. As member states' systems, for historical reasons, differ to a large extent in the field of elections and electoral campaigns, it may prove difficult to draft a legal instrument (particularly a binding one) on this matter.[1]

More concretely, the risk would be that a convention accepted by all member states would not go further than Article 3 of the Additional Protocol to the European Convention on Human Rights and be short of the standards recognised in the Code of Good Practice in Electoral Matters.

II. Application of standards

Let us now move from standard-setting to the *application of standards* in the case of individual countries. Standards are applied in different ways: through opinions on electoral legislation and, from time to time, on electoral practice; through specific training; through assistance to Central Election Commissions; and through legal assistance to the Parliamentary Assembly and, possibly, the

[1] See CM/AS(2003)Rec1595 final (reply of the Committee of Ministers to the Parliamentary Assembly's recommendation).

Congress of Local and Regional Authorities of the Council of Europe when observing elections.

1. Opinions

Drawing up legal *opinions* is the *core activity* of the Venice Commission. Most of them are drafted at the request of national authorities, but some are requested by the Assembly or the Congress.

The Commission makes comments on draft legislation not only on the basis of European electoral standards, but also by focusing on the main problems already identified during election observation in a given country. I would like to underline that we prefer to examine "draft legislation" and not "legislation" in force because our aim is to advise on changes before legislation enters into force. As a general rule opinions in the electoral field are drawn up in co-operation with OSCE/ODIHR. Members (or experts) of the Venice Commission and experts from OSCE/ODIHR draft comments which are then consolidated into a draft opinion. This text is sent for adoption first to the Council for Democratic Elections and then in the plenary session of the Venice Commission. Dialogue takes place with the authorities, and meetings are held when necessary.

I would like to stress here the co-operation aspect. I have already mentioned our co-operation with OSCE/ODIHR in drafting opinions. Another very important aspect of co-operation is the work of the Council for Democratic Elections.

As I already explained, the Council for Democratic Elections is made up of representatives of the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe. In addition, the Office for Democratic Institutions and Human Rights regularly takes part in the Council's work as an observer.

The Council for Democratic Elections has also encouraged the European Parliament, the European Commission, the Parliamentary Assembly of the Organisation for Security and Co-operation in Europe (OSCE), as well as the Association of European Election Officials (ACEEEO), to join in its work as observers.

2. Assistance activities.

The Venice Commission holds training workshops on the organisation of elections which are aimed at those responsible for implementing electoral legislation: that means election commissions, representatives of political parties, NGOs - in particular those in charge of election observation -, judges responsible for electoral disputes, lawyers, etc.

So far, such workshops have been organised in Albania, Armenia, Azerbaijan, Georgia, Moldova, "the former Yugoslav Republic of Macedonia" and Ukraine.

Ladies and gentlemen, colleagues,

In the last six months the Russian Federation has held two important elections. As happens in any European country any vote gives a unique opportunity to evaluate which areas of electoral legislation and practice meet the expectations of national institutions, civil society and individual voters and identify areas where some improvements are possible or needed.

I am delighted that we will have an opportunity to discuss different aspects of the constitutional right to vote and to be elected. This seminar will be a good opportunity for us to present to you our experience in the field of electoral standards and for you to share with us your experience and your approaches to this subject.

I am sure that our discussions here today and tomorrow will help us to continue and may be even broaden our co-operation with the Russian Federation in the electoral field.

Thank you very much for your attention.

DEVELOPMENT OF ELECTORAL LAW IN THE EUROPEAN UNION COUNTRIES

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Persons with the right to vote / voters, who in aggregate are called electorate, are playing key role in the electoral process. The number of voters, who possess active voting right, significantly increased during history. The greatest progress in this field was provision of the right to vote for women. In Europe women achieved the voting right only during the last century. In Germany it was provided only after the revolution in 1918, in England – in 1928, and Switzerland really only in 1971. Politics including participation in democratic activities was considered to be the privilege of men. Today such view is eradicated in Europe, however in Islamic states (such as Saudi Arabia) yet there are discussions about provision of voting rights for women, at least on local level.

The second stage of the proliferation of voting rights, in contrast to the provision of voting rights for women developed evolutionary. It is connected with age electoral qualifications. For example, in Germany it was consecutively abated first to 21 years and then to 18 years. In other countries of the European Union age qualification for active voting rights abated in the same way. Today it is 18 years in all countries of the European Union. Frequently age qualification for passive electoral right is higher. For example to get the position of the President in Italy one should attain 50 years.

Usually to get active electoral rights it is demanded to attain the required age on the day of the elections. For example, according to the third sentence of the §2 in Chapter 3 of the Swedish constitutional law "Polity" dating 1974 during elections in Riksdag the right to vote have those people , who have attained the age of 18 on election day or before the election day". In Austria according to the first sentence of the first part, article 26 of the Federal constitutional law, the voting right belongs to male and female, who have attained 18 years until January 1 of the election year.

There is no upper age limit for being elected in the governmental bodies or staying in office in the countries of the European Union. Record of recent decades in such countries as Germany, France and Italy has examples of individuals over seventy, eighty or even ninety who occupied chief positions in states (head of state or head of the government), and worked successfully.

In the most of the EU countries the voting rights of the individual are acknowledged only after he has lived in this country or in the specific place for certain period of time. For example, in France for voting during any elections there is qualifying period of residence lasting six months (it is necessary to live in the commune which is the local territory entity). According to the §12 of the German electoral law active electoral right is provided for all Germans, who have habitation or live in Germany for at least three months in any other legal way. At the same time in Great Britain there is no qualifying period of residence.

Legislation in the EU countries establishes different reasons for deprivation of electoral rights. The following reasons are typical in this case: service of judicial sentence in a penitentiary; staying in a mental hospital for compulsory treatment; or official acknowledgement of the person as legally incapable. In several EU countries there are specific grounds for deprivation of electoral rights. For example, in Great Britain according to the Act about public representation dating 1983 individuals who were convicted during the last five years for corruption or offences in the field of electoral legislation are not allowed to participate in elections.

It is also necessary to notice that there is such specific limitation of electoral rights in the legislation of EU countries as incompatibility. It means that there is a prohibition to elect an individual, who occupies certain position (if he is planning to occupy it further), or some elected post (if he is planning to keep it) or has some specific employment (if he is planning to retain it). For example, the French electoral code establishes the whole range of incompatibilities. Particularly, regular military personnel and officials with equal status cannot become members of National Assembly and councillors (members of the representative bodies of local government), as a rule holding of more than two elective offices is not allowed, one cannot be member of the National assembly and senator, deputy of the Parliament and member of the Economic and Social Council or civil servant and etc. at the same time.

Another limitation of the passive electoral right is non-electiveness. For example, the same French electoral code specifies that general inspectors of administrative bodies with special assignments cannot be elected in any constituency of the same department, where they exercise their function or have exercised it during the last year before the elections. In the EU countries usually there is a distinction between absolute and relative non-electiveness. The first type means that it is prohibited to be a candidate in any single constituency, the second provides limitation only in certain constituencies, in which potential candidate has specific official relations.

The problem of participation for those individuals who are not citizens of the state in elections is rather urgent in the EU countries. Until the last decade of the previous century the matter of provision of the right to vote and to be elected in representative bodies of the country for foreigners had been settled everywhere definitely: only the citizens of the state could exercise the sovereign rights and individuals who didn't have the citizenship of that states were debarred. However in some EU countries foreigners were given the right to vote on local elections under certain circumstances even earlier: in Ireland in 1963, in Sweden in 1976, in Denmark in 1981, in Netherlands in 1985. In France socialists in 1981 proposed to provide similar right, but the draft law did not get support in National Assembly due to the negative reaction of the public.

Meanwhile in history the Jacobinic Constitution of 1793 (which did not come into force) in Article 4 established that the foreigner, who was 21, lived in the country for more than a year, earned his living in France, had purchased property or married Frenchwoman or adopted the child or maintained an old person, having in the judgment of the Legislative corps sufficient services to the humanity, was to be awarded with the rights of a French citizen.

Today it is impossible to say that in the EU countries only the citizens of the state are provided the electoral rights. Former legal attitudes were shaken by new approaches, which arose first in the acts of the Council of Europe and then in recommendations of the European Union. According to the Convention on the Participation of Foreigners in Public Life at Local Level signed in Strasbourg on 5 February 1992 "every contracting party … commits to provide voting right and the right to be elected at local elections to every foreigner-resident if he comes within the same conditions as the citizens and if in addition he lives usually and legally in appropriate country for 5 years before the elections" (Article 6).

A new step towards provision of the electoral right for foreigners- citizens of the EU member countries was made in Maastricht treaty in 1992. This Treaty established so called European citizenship, which allows every European citizen to participate in the elections of local bodies of self-government in his place of residence in any country of the European Union.

However French legislation includes certain limitation of this right: foreigners cannot work as mayors or deputy mayors or participate in the appointment of senators' electors and election of senators.

Every citizen of the European Union, resident of certain state, where he is not national, possesses passive as well as active electoral rights at the elections of the European Parliament under the same conditions as the citizens of this state (item 2, Article 8 of the Maastricht treaty). The provision of this right for the foreigners can be explained by the fact that legal grounds for the activity of the European Parliament are established by international treaties rather than Constitutions of member states.

ELECTORAL SYSTEMS
IN THE COUNCIL OF EUROPE MEMBER STATES

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An earlier version of this paper was presented at a conference on Electoral Laws and Practice in the Council of Europe Member States, at the Moscow Institute of International Relations, April 2008. I am grateful to the participants for their feedback and comments. The usual disclaimer applies.

This paper has two main purposes:

– First, it outlines the electoral systems currently in use for electing the national (lower house) parliaments of Council of Europe member states, and

– Second, it examines the main areas of variation between these electoral systems – notably, aggregate proportionality, and degrees of 'openness' – and assesses what consequences this has for the wider political system.

The Electoral Systems of Council of Europe Member States

The electoral systems that are used across the member states of the Council of Europe cover the full ambit of electoral system families used by all the world's democracies. Before looking at the general, aggregate trends, it is worthwhile dealing with each of the six main types of electoral systems, where they are used, and their main features of operation.[1]

First, there is the **single member plurality (SMP) system**.[2] This is one of the classic electoral systems that tended to predominate in the first part of the last century. It is most closely associated with the United Kingdom, and while this may be the only Council of Europe member state to actually use SMP, it should be noted that the system remains pretty prominent in other non-member countries, especially those that were former colonies of the UK. Its abiding features are single-member districts (or constituencies), with a simple ballot structure design

[1] The bulk of this paper draws on material reported in Farrell (2001).

[2] See Figure 1 p. 23.

(see Figure 1 p. 23) in which the act of voting consists of placing an 'X' next to one candidate's name. The candidate with the most votes – even if not an overall majority of the vote – wins the seat. The fact that the politicians are elected in single-seat districts and that the electoral formula is a plurality of the vote makes this the quintessential non-proportional system.

Another prominent example of a non-proportional electoral system is the **two-round electoral system**, most closely associated with France, which indeed is the only Council of Europe member state to use this system. It is, however, a prominent electoral system in presidential systems, particularly in Latin American democracies. This system shares some of the features of SMP, notably the fact that politicians are elected in single-seat districts, and that the ballot structure is very simple (In this case, each party produces its own ballot paper and the voting act consists of selecting the ballot paper of the preferred party and popping it in the ballot box.). The main point of difference is that the system is attempting to produce a majority, in the sense that the candidate who gets elected should normally have an overall majority of the vote in the district. This can happen in one of two ways: first, a candidate might secure an overall majority of the vote in the election, or second, (more normally the case) if there is no candidate with an overall majority, then there is a second round of voting a week or so later in which a smaller number of candidates of eligible to run. There are different ways of determining candidate eligibility in the second-round. In the case of France's presidential elections, the procedure is simply that only the top two vote winners in the first-round are allowed to go through to the second. Since there are only two candidates in the race, then inevitably the winner will have an overall majority of the vote. The situation is less straightforward in the case of France's legislative elections, in which those candidates in the first-round winning a vote total that is equivalent to 12.5 percent of the registered voters are deemed eligible for the second-round. This can result in tri-angular contests, which, though relatively rare, does not guarantee a majority; nevertheless, it is still possible for the victorious candidate in such an election to claim that they have a mandate from a significant proportion of the electorate in the district.[3]

[3] In passing, it should be noted that there is another majority electoral system that is not in use by Council of Europe member states – the Alternative Vote, which is most closely associated with Australia.

The next three electoral systems are proportional systems, in the sense that (to varying degrees) they seek to produce an election result in which the proportion of seats that a party ends up with in the parliament maps on to the proportion of votes the party receives in the election. A rather exotic example of this is the **Single Transferable Vote** (STV),[4] which is used in Ireland and Malta (actually the only two countries to use this electoral system for lower house national elections across the world's democracies). Figure 2 (p. 24) provides an example of a ballot paper from a recent Irish election (for more details on STV in other cases, see Farrell and McAllister 2006), in which (like in the British SMP case) the parties' candidates are listed in alphabetical order. But in this instance, as a proportional electoral system, we are dealing with multi-member districts (generally between 3-5 MPs per district), with the larger parties fielding more than one candidate. The voter is invited to rank-order the candidates (in the Irish case, at least, ranking as few or as many as they wish). An electoral quota is calculated (known as the Droop quota, which is based on the numbers of votes and seats in each district) that determines the amount of votes a candidate must secure in order to be elected.

The election count (which can take some time) occurs in a series of stages. First, all the number 1 votes are counted, which may or may not result in the election of one or several candidates. One of two things happens next. In the event that a candidate (or candidates) is elected with a significantly large proportion of votes – i.e. a vote total that significantly exceeds the amount required to pass the electoral quota – then the next stage of the count is to transfer those votes (on a proportionate basis) that are in excess of the electoral quota to the candidates remaining in the race, based on the number of second preference votes expressed for those candidates on the ballot papers involved. If, however, no candidate was elected in the first count or any candidates that were elected only narrowly exceeded the quota (so that the proportions of votes involved cannot materially affect the result for the remaining candidates), then the next stage of the count consists of eliminating the candidate with the least votes and transferring all of that candidate's ballot papers to the remaining candidates based on the second preferences. And so the count continues, either transferring vote surpluses or the ballot papers of eliminated candidates until all the seats have been filled by those candidates achieving the electoral threshold. It is the combination of multi-member districts and the electoral formula used to determine which candidate wins (i.e. the Droop quota) that marks STV out as a proportional system.

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[4] See. Figure 2 p. 24.

By far the most commonly used electoral system among Council of Europe member states (used by a far higher proportion that is the norm across the world's democracies) is the **list system**,[5] currently being used by the following member states: Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Iceland, Italy, Latvia, Liechtenstein, Luxembourg, "the former Yugoslav Republic of Macedonia", Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine. Also a proportional system (using proportional electoral formula combined with multi-member districts), the list systems come in a range of different forms. The main points of distinction are:

- District magnitude, which refers to the number of MPs elected per district. This can range from relatively small electoral districts, such as used in Spain to the extreme case of the Netherlands in which there is just one national district.
- Electoral formula, which boils down to either a quota-based formula (such as Hare) or a divisor-based formula (such as d'Hondt).
- Ballot structure, which varies in terms of how much choice is given to the voters (i.e. how 'open' it is; see below for more details).

It is the last feature, ballot structure, which gives this family of electoral systems its name. At its basis is the notion of a party's list of candidates (drawn up by each of the parties' own internal candidate selection processes). At its simplest (see Figure 3 p. 25) is the case of Portugal's 'closed' ballot structure, in which the voter simply chooses their preferred party. The proportion of votes a party receives determines the proportion of seats it is awarded, with those candidates placed towards the top end of the candidate list securing election. At the other extreme, is Switzerland's *panachage* in which votes can vote for a range of candidates from all of the parties on the ballot paper (for more details, see Shugart 2005), in which those candidates receiving a high number of 'personal' votes have the greatest chance of securing election.

The third family of proportional electoral systems is also the newest – the **mixed member proportional (MMP) system**.[6] Until relatively recently this electoral system was unique to (West) Germany; in the past twenty years or so, it has been adopted by a number of democracies, with Albania and Hungary joining

[5] See Figure 3 p. 25.

[6] See Figure 4 p. 26.

Germany as the three member states of the Council of Europe to use this system for national elections to the lower chamber of their parliaments. As its title suggests (and as Figure 4 indicates) this is a mix of the SMP and list electoral systems in one, in which the list element of the election is used to balance the disproportional tendencies of the SMP element. While this may sound simple enough in principle, it can actually be quite complex, and can also vary in the details from one country to the next (on the complexities of the Hungarian electoral system, see Benoit 2005). It is the mix of single-seat SMP districts electing geographically-grounded 'constituency politicians' together with multi-seat list districts producing proportional results (thus ensuring that smaller parties win seats) that cause some prominent scholars to raise the question over whether this electoral system may be 'the best of both worlds' (Shugart and Wattenberg 2003).

The final electoral system in use in the Council of Europe's member states bears a large resemblance to the one just dealt with. Referred to as the 'parallel' or **mixed member majority (MMM) system**, this electoral system has one significant difference from its MMP counterpart, as a result of which it is probably most accurately characterised as a 'semi-proportional' electoral system. The key difference is that the proportional element of the election is not used to compensate the disproportional result in the SMP element; in other words the two parts of the election are treated as separate, parallel processes. The Council of Europe member states that use this system are: Andorra, Armenia, Azerbaijan, Georgia, Lithuania, and Monaco. Until recently Russia and Ukraine also used MMM, before switching to the list system.

Figure 5 (p. 27) reports the summary trends regarding the use of our six main forms of electoral systems across the 46 member states of the Council of Europe. As we can see, by far the most prominent are the list systems, much more commonly used among the member states (virtually three-quarters of the cases) than is the norm across the world's democracies generally. The recent electoral reforms in Russia and Ukraine mean that the proportion of countries using the MMM system has dipped, although it is still being used by more than one-in-ten cases (13 percent). For the remaining four electoral systems, the trends are pretty even.[7]

[7] It is interesting to see how similar the trends are to what held among the original core members of the Council of Europe (including West Germany). Then the spread was as follows: list 73 percent; and SMP, two-round, STV and MMP each 6.7%. At that stage, MMM did not exist.

Electoral System Variations and their Consequences

As can be inferred from the discussion in the previous section, one of the main features of variation in electoral system design is over degrees or proportionality. In Figure 6 (p. 28), the six electoral systems are arranged on a continuum that distinguishes each in terms of its average proportionality, with SMP and the two-round systems on one extreme and list and MMP on the other, and MMM located at the mid-point as a semi-proportional system. As has long being known in the theoretical literature, the proportionality of an electoral system has important consequences for the wider political system, in at least two main respects: the numbers of parties winning seats in the parliament, and the numbers of MPs elected to the parliament who are women and/or who represent ethnic minorities.

Figure 7 (p. 29) illustrates the first of these points, showing how the effective number of parties in a parliament (a measure of the number of parties that takes account of variations in terms of the numbers of seats they hold in parliament) is directly related to the aggregate proportionality of the electoral system (as measured by the Gallagher Index [GI] of disproportionality). The graph shows how as proportionality decreases so do the numbers of parties in parliament. The second main consequence of electoral system proportionality is over the nature of the parliamentarians elected. This point is best encapsulated in John Adams' classic reference to parliament as a 'microcosm of society'. Here the suggestion is that as proportionality increases we should expect to see more women MPs and also more MPs from relevant ethnic minority groups in parliament. The academic literature generally provides evidence in support of this contention. A simple way of showing this is by examining variations in the proportions of women MPs across the world's democracies in 2000. The average overall was about 17 percent. In proportional systems this increased to 20%, whereas in non-proportional systems it dropped to just 10 percent.

In recent years the electoral systems literature has started to turn its attention to another significant way in which electoral systems can vary, in this case with most attention devoted to the design of the ballot papers that voters use to elect their politicians (for details, see Farrell and McAllister 2006; Farrell and Scully 2007). The point of contention is that there are important differences between those ballot papers that simply allow voters to tick a box for their preferred party list (i.e. a 'closed' ballot structure) and those that allow voters to express a wide range of options such as in the case of the STV system where voters can rank-order all candidates on the ballot paper (i.e. an example of an 'open' ballot structure). A summary of how electoral systems can vary on this dimension is provided in Figure 8 (p. 30). Here we see quite a different constellation of

electoral systems, this time with STV at one extreme (as the most 'open' of electoral systems) and list on the other, with the various mixed systems roughly located at the mid-point.

This dimension of variation in electoral system design can have important consequences for how politicians behave both with regard to their representative roles (i.e. how they represent their voters) and also in how they campaign at election time. A recent study of the representative activities of members of the European Parliament shows conclusively a greater emphasis on individual voter contact among those politicians elected under 'open 'electoral systems than is the case in the more 'closed' electoral systems (Farrell and Scully 2007). Figure 9 (p. 31) provides an interesting illustration of how ballot paper design can impact on the campaign styles of parliamentary candidates, in this case referring to survey evidence from the 2004 European Parliament elections. Here we see that the more open electoral systems are associated with greater degrees of candidate contact with individual voters, greater numbers of candidate leaflets being sent out to voters, and a feeling among those voters that they had more access overall to the information that they needed to make up their mind on how to vote.

Conclusion

This paper has demonstrated just how much electoral systems can vary, and do vary across the member states of the Council of Europe. As we have seen, these variations have important implications for the way in which democracy operates, with regard to:

- the numbers of parties elected into parliament,
- the types of individuals elected as MPs, and
- the representative and campaign activities of those individuals.

The final point to note, however, is that each electoral system has its strengths and its weaknesses; there is no such thing as 'the perfect' electoral system. When designing or reforming an electoral system decisions have to be taken (normative and/or practical) on which features to privilege and which to down play. Ultimately, it is a policy decision as to which actual decision is deemed best for a given political system. This is best advice a political scientist can give to an electoral engineer seeking to consider electoral reform (see, for example, Katz 1997), and it is entirely consistent with the Venice Commission's Code of Good Practice in Election Matters which explicitly rules out favouring any particular electoral system. A wise decision.

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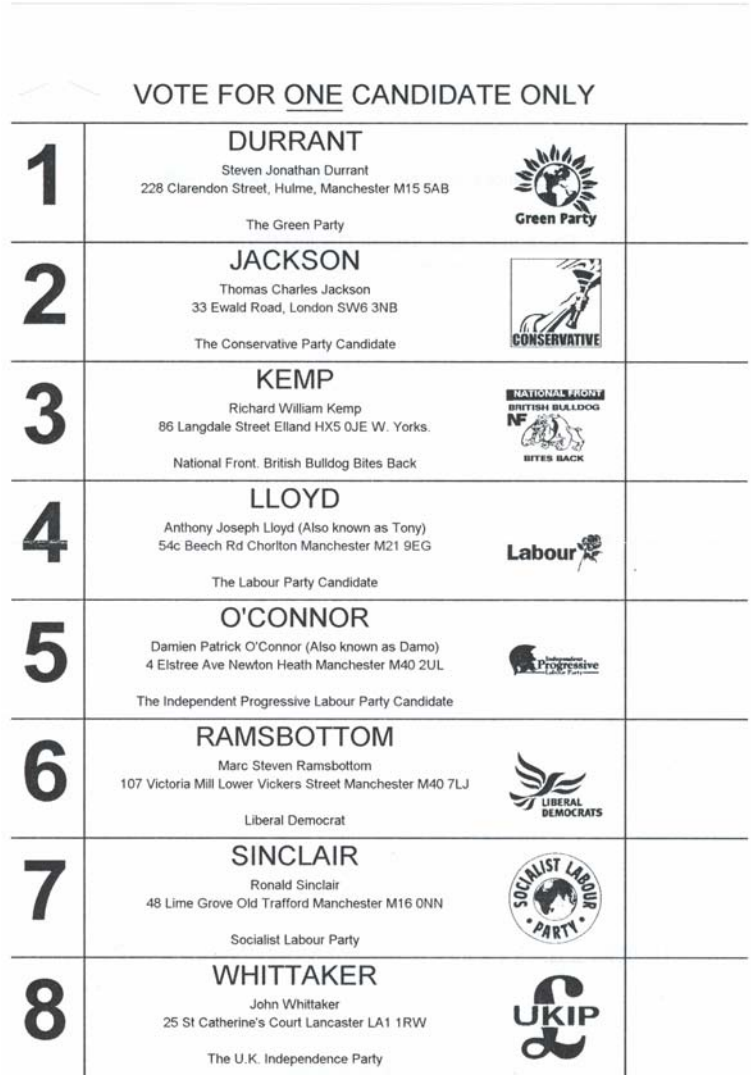
Figure 1: A British Single Member Plurality Ballot Paper



VOTE FOR ONE CANDIDATE ONLY

1	DURRANT Steven Jonathan Durrant 228 Clarendon Street, Hulme, Manchester M15 5AB The Green Party	Green Party
2	JACKSON Thomas Charles Jackson 33 Ewald Road, London SW6 3NB The Conservative Party Candidate	CONSERVATIVE
3	KEMP Richard William Kemp 86 Langdale Street Elland HX5 0JE W. Yorks. National Front. British Bulldog Bites Back	NATIONAL FRONT BRITISH BULLDOG NF BITES BACK
4	LLOYD Anthony Joseph Lloyd (Also known as Tony) 54c Beech Rd Chorlton Manchester M21 9EG The Labour Party Candidate	Labour
5	O'CONNOR Damien Patrick O'Connor (Also known as Damo) 4 Elstree Ave Newton Heath Manchester M40 2UL The Independent Progressive Labour Party Candidate	Independent Progressive Labour Party
6	RAMSBOTTOM Marc Steven Ramsbottom 107 Victoria Mill Lower Vickers Street Manchester M40 7LJ Liberal Democrat	LIBERAL DEMOCRATS
7	SINCLAIR Ronald Sinclair 48 Lime Grove Old Trafford Manchester M16 0NN Socialist Labour Party	SOCIALIST LABOUR PARTY
8	WHITTAKER John Whittaker 25 St Catherine's Court Lancaster LA1 1RW The U.K. Independence Party	UKIP

Figure 2: An Irish Single Transferable Vote Ballot Paper

TREORACHA

1. Féach chuige go bhfuil an marc oifigiúil ar an bpáipéar.
2. Marcáil an figiúr 1 sa bhosca le hais ghrianghraf an chéad iarrthóra is rogha leat, marcáil an figiúr 2 sa bhosca le hais ghrianghraf an iarrthóra dó dhara rogha, agus mar sin de.
3. Fill an páipéar ionas nach bhfeicfear do vóta. Taispeáin *cúl an phaipéir* don oifigeach ceannais, agus cuir sa bhosca balóide é.

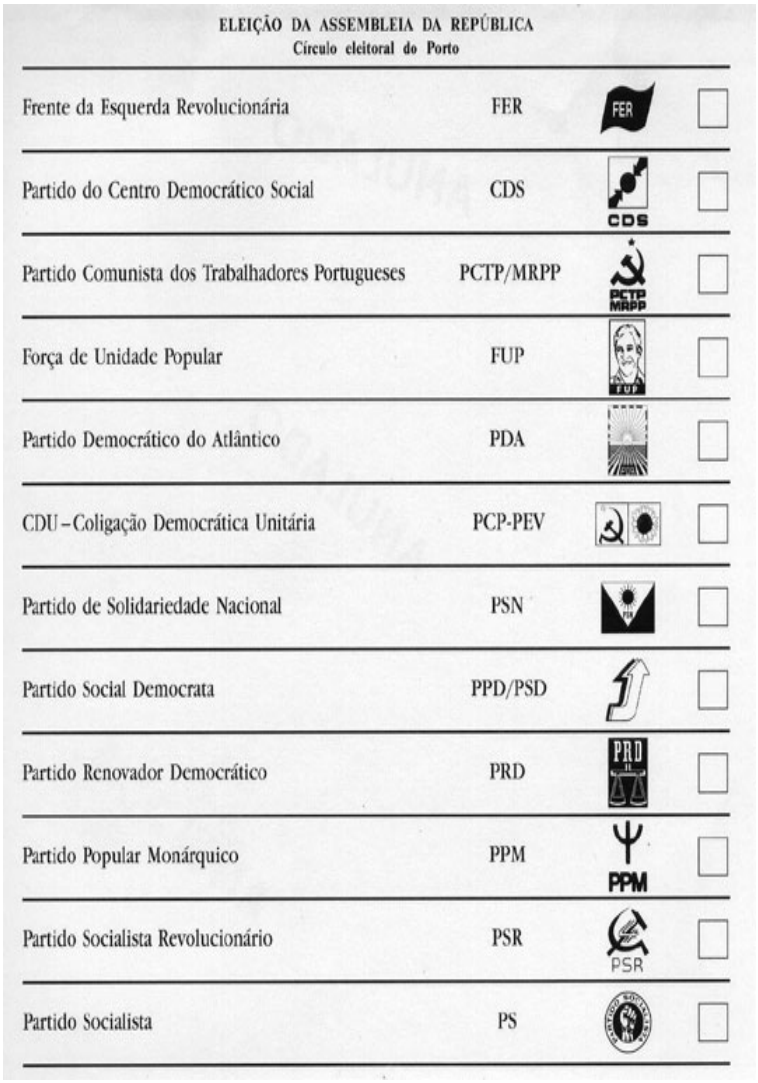
INSTRUCTIONS

1. See that the official mark is on the paper.
2. Mark 1 in the box beside the photograph of the candidate of your first choice, mark 2 in the box beside the photograph of the candidate of your second choice, and so on.
3. Fold the paper to conceal your vote. Show the *back of the paper* to the presiding officer and put it in the ballot box.

Specimen

FIANNA FÁIL	AHERN — FIANNA FÁIL (BERTIE AHERN of 'St. Luke's', 161 Lower Drumcondra Road, Dublin 9; Taoiseach)	
Labour	COSTELLO — THE LABOUR PARTY (JOE COSTELLO of 66 Aughrim Street, Dublin 7; Public Representative)	
FIANNA FÁIL	FITZPATRICK — FIANNA FÁIL (DR. DERMOT FITZPATRICK of 80 Navan Road, Dublin 7; Medical Doctor and Public Representative)	
	GREGORY— NON PARTY (TONY GREGORY of 5 Sackville Gardens, Ballybough, Dublin 3; Full-Time Public Representative)	
Sinn Féin	KEHOE — SINN FÉIN (NICKY KEHOE of 30 Finan Road, Cabra, Dublin 7; Bricklayer)	
fine gael	MITCHELL — FINE GAEL (JIM MITCHELL of Leinster House, Dubin 2; Full-Time Public Representative)	
	O'DONNELL — NON PARTY (PATRICK NOEL O'DONNELL of 14 Cliftonville Road, Glasnevin, Dublin 9; Businessman)	
	O'LOUGHLIN— COMHAR CRÍOSTAÍ - CHRISTIAN SOLIDARITY PARTY (PAUL THOMAS O'LOUGHLIN of Flat 4, 255 North Circular Road, Phibsborough, Dublin 7; Shop Assistant)	
	PRENDEVILLE — NON PARTY (TOM PRENDEVILLE of 52 Goldsmith Street, Phibsborough, Dublin 7; News Reporter)	
GREEN PARTY	SIMPSON —GREEN PARTY - COMHAONTAS GLAS (TOM SIMPSON of 3 Hampstead Avenue, Glasnevin, Dublin 9; FÁS Instructor)	

Figure 3: A Portuguese List Ballot Paper



ELEIÇÃO DA ASSEMBLEIA DA REPÚBLICA
Círculo eleitoral do Porto

Frente da Esquerda Revolucionária	FER	☐
Partido do Centro Democrático Social	CDS	☐
Partido Comunista dos Trabalhadores Portugueses	PCTP/MRPP	☐
Força de Unidade Popular	FUP	☐
Partido Democrático do Atlântico	PDA	☐
CDU – Coligação Democrática Unitária	PCP-PEV	☐
Partido de Solidariedade Nacional	PSN	☐
Partido Social Democrata	PPD/PSD	☐
Partido Renovador Democrático	PRD	☐
Partido Popular Monárquico	PPM	☐
Partido Socialista Revolucionário	PSR	☐
Partido Socialista	PS	☐

Figure 4: A German Mixed Member Proportional Ballot Paper

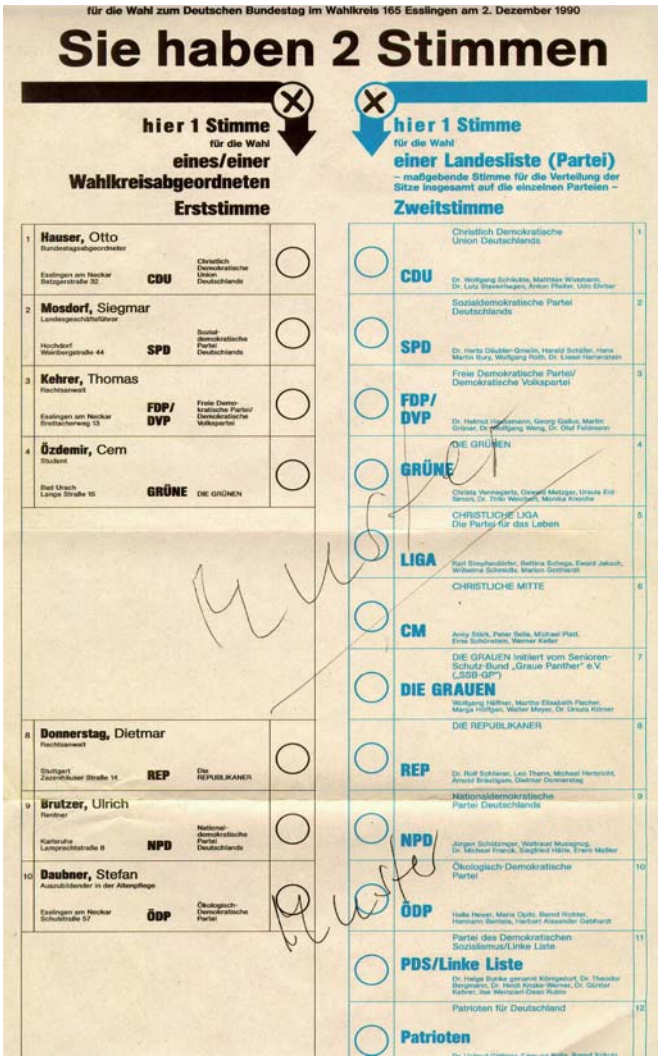
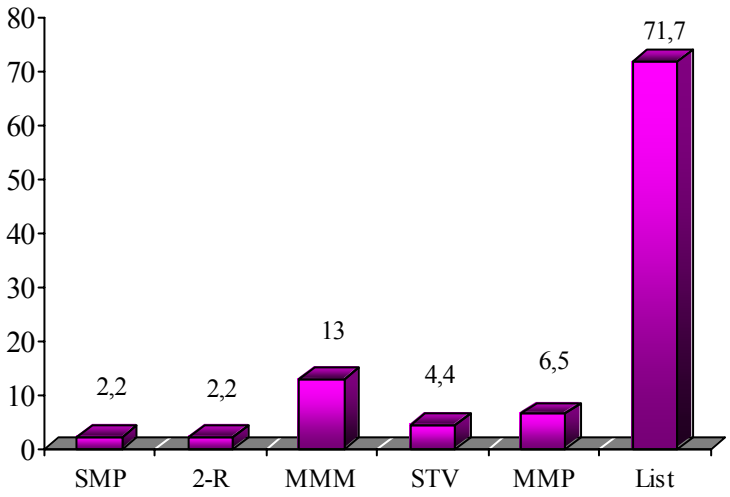
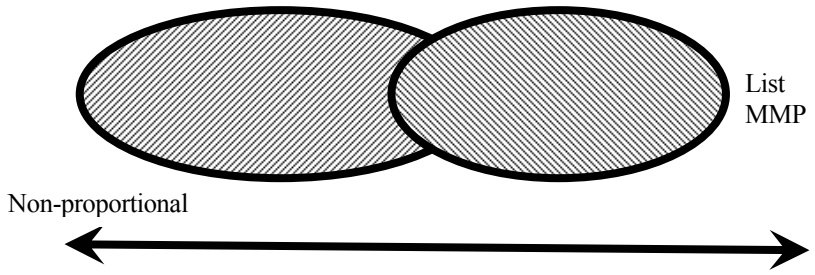


Figure 5: The Electoral Systems of Council of Europe Member States



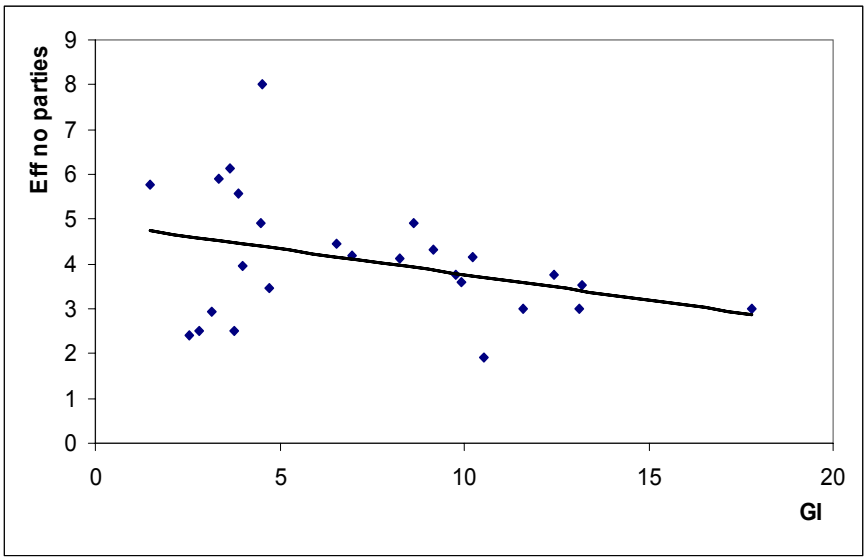
Note: The figures report the percentage of member states using each of the six different electoral systems.

Figure 6: Plotting Electoral Systems with regard to Proportionality



Proportio

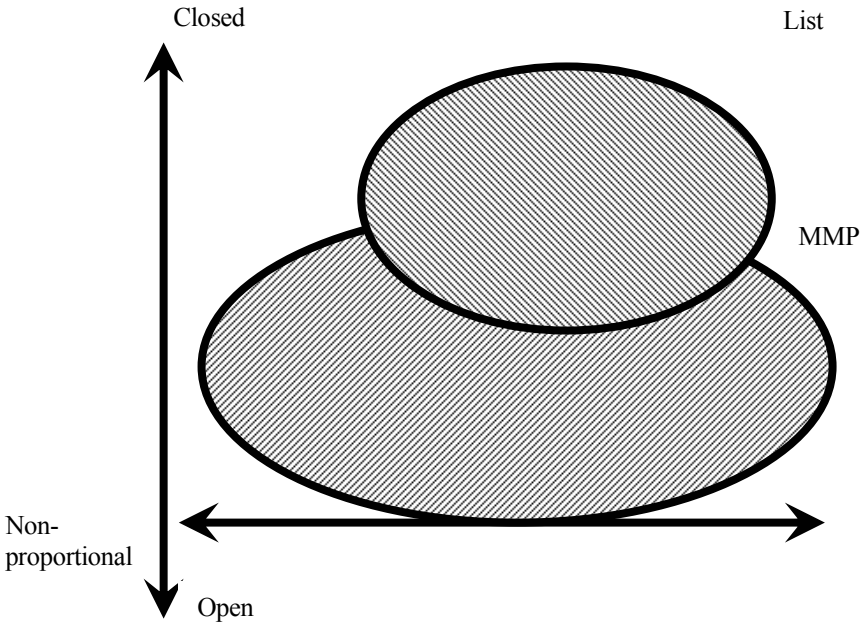
Figure 7: Electoral System Proportionality and the number of Parties in Parliament



Note: This is an example of how differences on proportionality can impact on the numbers of parties elected. It reports the trends for the most recent European Parliament election among the various member states of the EU, in which there is much variation with regard to degrees of proportionality.

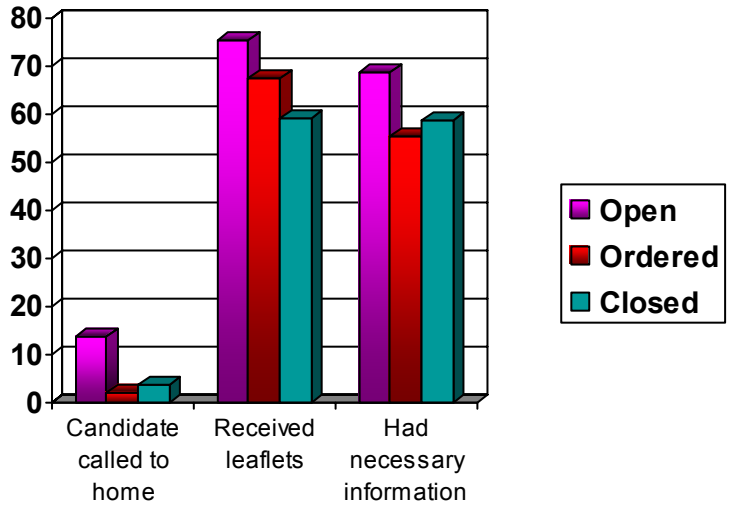
Source: Farrell and Scully (2007)

Figure 8: Plotting Electoral Systems with regard to Proportionality and Degrees of 'Openness'



Note: This figure is, of necessity, an over-simplification. In particular, it takes no account of the large range of variations in the list family of electoral systems, which in some cases (e.g. Finland or Switzerland) can produce a ballot papers as 'open' as in the case of STV systems.

Figure 9: European Parliament Electoral Systems and Voter Linkage in 2004



Source: Flash Eurobarometer: Post European Elections 2004 Survey

Mr Ugo MIFSUD BONNICI
President Emeritus
Member of the Venice Commission, Malta

Human communities can be governed either by imposition or by consent. At times imposition seemed to provide a simpler, more direct and perhaps even, at times, more efficient way. In history it was found that consent was not only more in conformity with human dignity, but also safer, more satisfactory and more enduring in practice. The ancient Greeks made the choice after experiment and experience. Their philosophers discussed what was involved when the choice was made between democracy and autocracy, and distinguished between so many types and structures within these categories. Their politicians practiced both, with successes and failures. The lessons were passed on by culture or by tradition, lost and found again, so many times in the last two thousand and five hundred years.

When we quote the Greek classical experience, it is not as if we were inferring that democracy can only be practiced and make sense in small city states with a homogeneous citizen population. Some even today seem to think that democracy can be practiced in some places or by some peoples, in small, or otherwise easily manageable communities, not in others. Of course the problems for democracy in Switzerland are different from those in India. However Democracy and imposition relate to what is inherent in the human condition. With all the differences in culture, tradition, history and geography, the basic question remains that given each human being's free will, governance through consent and collaboration is preferable to imposition exercised with intimidation and force.

Simpler said than implemented. The larger and the more heterogeneous the *polis,* the more complex become the methods of mustering the consent of the citizens. Direct democracy is still possible in some of the Swiss Cantons. It is impossible, not only impracticable, in almost all other dimensions. Representation has to be resorted to, both for the election of those delegated with executive action as well as for the election of those who are to be chosen to exercise close control of the executive together with the legislative function. So if it is true that democracy is a way of life and a habit not simply a periodical process of selection of those who rule and those who establish the rules, yet this process of election is vital to the

life of democracy and must be given maximum attention, as wrong choices might endanger the functioning and continued existence of democracy itself.

When we speak of human dignity, what we are really considering is the transcendental value of human liberty of choice. Is man, every man and woman, master of his/her destiny, because able to make a choice; in fact to select a course of action or inaction leading to his/her own destiny? Is liberty merely an individual's right or is it also a collective right? That democracy is close to the essential identity of human beings, that Democracy is really the most natural and human of political regimes is grounded in this fulcrum: in any community, leadership and management has to be collectively delegated, with the widest possible participation. If a regime implies imposition and coercion its content in human dignity and indeed humanity, is diminished. The greater the deference, in a particular regimen and state of affairs, to choice and conscious delegation by all its components, the thicker is the specific density of human dignity and the greater the conformity to human nature. Democracy is not the dictatorship of a momentary or permanent majority: without the respect for the human rights of all, it is not a true democracy at all.

Thus, Democracy is not only a Government by the people – the *demos*- it is also a government for the people. Choice designates the men and women who govern. However the conditions attached to the manner of this designation are as important as the designation itself. The procedure of choice and then the parameters within which it is done, are of the utmost importance. The rule of law is a prerequisite of a democracy, because without the rule of law, the will of the majority cannot really be identified and the fundamental human rights are in the lap of whim, convenience, interest, might and circumstance. In Europe we the people have come to believe that respect for human rights, the rule of law and the practice of democracy are essentially intertwined and the basis for civilized governance.

The democratic procedures are not merely ancillary in a democracy. Inasmuch as democracy is also a legal, reasoned and well phased management of change in the political process, the rules of the whole method become part of the essence of democracy itself. That is why well fashioned Constitutions and electoral laws are so important. It has to be emphasized that Constitutions and electoral laws are best wrought through an evolution in the country within which they will operate. Constitutions and electoral laws must needs be native. Democracy cannot be imposed. This is not to say that one country cannot and should not learn from the experiences undergone in other countries. There are no ready made models *prêt a porter,* but as human nature is a constant, there are many universalities and *sine*

*qua non*s. This is much more apparent when one makes comparative studies of the democratic history of the various European countries. For although, as I believe, democracy is the most natural way of governance, its affirmation has come about through agony and struggle, with the acquisition of certain common features after a common experience of considerable travail.

It is more than worthwhile to invest all available intellectual and moral energies into devising the optimal ways of ensuring that elections are conducted in the best way possible. On their outcome depends our common good. If the will of the citizen is precious enough to warrant democracy, than care must be taken for the election process to be such as to express this will freely, without fraud and manipulation or undue pressure. The will must be well informed to be able to make a proper choice. It is not some eccentric fetish that the formula of free and fair elections has to be strictly adhered to.

The formula "free and fair" is shorthand (стеноярафия) for a large mass of concepts and practices. The Venice Commission's Code of Good Practice in Electoral Matters" adopted in 2002 is an attempt at describing the underlying principles of Europe's electoral heritage and their legal basis. The hard core of the European electoral heritage consists mainly of international rules. Democracy and elections are no European monopoly.

Law alone cannot produce democracy, but one cannot have democracy without law. Good law facilitates the practice and strengthens democracy, bad law obstructs its progress and creates crises for it. The laws and rules have been elaborated after trial and error, but there is now a common *thesaurus* of fundamental principles, which are part of the common cultural heritage of our continent. The principles might have received different formulation, but we have arrived a certain international *jus commune* of fundamentals, albeit in a whole gamut of different forms. The Commission of the Council of Europe, officially known as Democracy through Law, and commonly the Venice Commission, was founded with the precise aim of helping the foundation and the practice of democracy through law. What law are we referring to ? There exists, admittedly, no dogmatic blueprint of Constitutional or Electoral Law which the Commission can evoke as its tool in helping democracy in any given country. There is however a common *acquis,* and common standards.

The Venice Commission compiled this Code at the request of the Standing Committee of the Parliamentary Assembly, and it had to include "rules on the run up to the elections, the election themselves and the period immediately following the vote; as well as to compile a list of the underlying principles of European Electoral systems by co-ordinating, standardizing and developing current and planned surveys and activities".

The Code tackles, in different chapters, a number of essential fundamental principles, that is Universality, Equality, Freedom, Secrecy, Direct Exercise and periodicity of the Suffrage. It also contains separate chapters concerning the conditions for implementing the principles; the respect for fundamental rights, during the electoral process; the regulatory levels and the stability of electoral laws; as well as the procedural safeguards. Although by no means exhaustive or definitive, it is a formidable piece of work. It is not lacking in practical detail. It forms a reliable statement and a compendium of the "hard core" of the international rules as can be found in:

a. Article 21 of the 1948 Universal Declaration of Human Rights;
b. Article 25(b) of the 1966 International Covenant on Civil and Political Rights;
c. Article 1 of the 1952 Convention on the Political Rights of Women;
d. Article 5(c) of the 1965 International Convention on the Elimination of all forms of Racial discrimination;
e. Article 7 of the 1979 Convention on the Elimination of all forms of discrimination against women;

as well as in the specifically European Convention on Human Rights [Protocol 1,Article 3], the Convention on the participation of foreigners in Public Life at Local Elections; and the cases decided by the European Court of Human Rights.

What would be the juridical status of the Code ? It is surely "soft law" in that though not formally enacted in any member State it has considerable weight as representing what the member States themselves opine should be the law. It is International Law in formation. It takes in the *opinio juris* of the various member states concerning Electoral Law and practice. It provides the basic criteria for observation missions of the elections in the member states. It is used continuously by the Venice Commission as a yardstick when examining laws and situations and when providing advice to States concerning these laws and the course which should, as a matter of best practice, be taken in the particular circumstances.

The Code was elaborated by scholars, and has a background of academic research into the matter. If the Code originally drew on these resources, it is now being repeatedly quoted in legal and political studies faculties in universities and academies. A subsequent (2005) publication by the Commission in the Series which bears the title: the Science and Technique of Democracy, demonstrates clearly how the Code encapsulates the European standards of Electoral Law in contemporary International Constitutional Law.

Some of the most experienced judges made contributions to the Code, and we are now seeing that the Code is finding itself being quoted in submissions to the Courts and in the jurisprudence.

As in the case of most human social activities Democracy improves by practice and interaction, so that the standards achieved are the result both of elaboration of principle as well as of experience. Every country has to evolve its own way of democratic practice, though certain fundamentals if not observed, would render the whole process undemocratic. Wisely, however, no country can, close its eyes to what has happened elsewhere. One notes that in the same year that the Venice Commission's Code of Practice was adopted, that is 2002, the Convention on the Standards of Democratic Elections ,Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States was signed in Kishinev, capital of Moldova, on October 7. There is a lot in common between the Code and the Convention.

Although the electoral experience gathered in the countries which form part of the Commonwealth of Independent States may have features which relate to particular circumstances not found elsewhere, there are rich lessons to be learnt. The problem of management of elections in geographically large and ethnically diverse conglomerates have been tackled when societies have moved forward in Information Technology, and where the political philosophy has left behind a long period of Marxist monism without as yet digesting completely the Liberal, Social democrat or Christian democrat alternative political philosophies of the west.

Many countries, in the old and the new democracies, and many countries in the agony of the change from periods of imposition to democratic practice are bound to learn from the difficulties encountered and the solutions found in the Commonwealth of Independent States.

The 2002 Convention in itself is indicative of the spirit with which the Commonwealth sought to maintain standards in practice as well as in theory, and what store was set on the achievement of optimal democratic results, against the background of the partly still unsettled issue of a minimum political consensus. This is indeed a precious addition to the democratic *acquis* of Europe and of the whole world.

ELECTORAL LAW: PRACTICE OF ENFORCEMENT AND THE NEW ROLE OF NATIONAL PARLIAMENTS IN THE EUROPEAN UNION

Mr Mikhail BIRUKOV
Head, Chair of European Law, MGIMO

The creation of the European Union in 1992 led to the changes of and amendments to the Fundamental laws of the member state. The Maastricht Treaty posed two crucial problems, which required urgent revisions in the constitutional law. And both of them were connected with the ensuring of election rights for foreigners, precisely to the citizens of other member state. These include:

1. provision of the right to participate in the elections on the local level to the citizens of the member state (foreigners), who are residents of the other members of the Union;
2. provision of the right to vote and to be elected in the European Union to the citizens of the other member state.

Both problems were partly connected with the state sovereignty and were solved in different EU countries in different ways.

Until recently, the question of provision to the foreigners of the right to vote and to be elected was settled unambiguous: only country's "own" citizens could exercise their sovereignty and non-citizens might not participate in the elections. In history only the Constitution of France, dating 1793, in its Article 4 established that foreigners who reached the age of 21 and fitted with some other criteria were acknowledged to exercise some rights of the French citizen. It is necessary to note, this Constitution never entered into force.

Today it is impossible to say that election rights are provided only to the country's "own" citizens. For example, according to the Convention on the Participation of Foreigners in Public Life at Local Level of the Council of Europe of 5 February 1992, foreign residents under certain circumstances are allotted with active election right and the right to be elected on local level. To get these rights the foreigner has to live in the respective place for certain period of time before elections.

Probably today it is also relevant to remind, that in several countries, which are now members of the European Union, foreigners were provided with voting rights under certain circumstances even before the signing of the European convention mentioned above and before the Maastricht treaty to enter into force. For example, in Ireland in 1963, in Sweden in 1976, in Denmark in 1981, in Netherlands in 1985.

Maastricht treaty also established the European Union citizenship. It is necessary to say a few words about this institute.

So the Union has its own citizenship. It is derivative from the national citizenship of member states. Every person, who is the citizen of any member state, automatically acquires the citizenship of the Union. The loss of nationality in member state entails loss of the citizenship in the EU. It is necessary to note that the EU citizenship complements rather than substitutes the national citizenship. The state of the EU citizen creates several rights and obligations. According to the agenda of our discussion we are interested, first and foremost, in the issues connected with electoral law.

Every citizen of the Union regardless of the member state where he stays has a right to participate in the elections to the institutions of local government and the European Parliament. At the same time the foreigners are not admitted to the elections in national Parliaments, yet. And it is important to take this fact into consideration during analyses of the legal nature of the European Union.

Regarding the local elections, the respective requirement of the EU election law acts differently in different countries. For example, in France after the revision of national Constitution provoked by the ratification of the Maastricht treaty the new constitutional regulation contains following restrictions: foreigners, who are citizens of the EU, cannot act as mayors or their deputies, take part in the nomination of senators' electors or in elections of senators.

Among the sources of the EU electoral law during the period after Maastricht treaty it is necessary to mention also Council's Directive 94/80 of 19 December 1994, which established the conditions for provision of the EU citizens with the election rights on local level in the country were they are not nationals. The Directive provides a possibility to impose restrictions for foreigners to occupy leading positions in the executive institutions of local government (Art. 5). In addition according to Article 12 of this Directive the EU member state can establish limiting measures on local elections within its territory for foreigners. If the number of the foreigners who are members of the EU and reached the voting

age, exceeds 20%, than the state can undertake several protective measures. In other words if 1/5th of the voters is represented by the EU citizens, but not country's own citizens, than the state is able to use protective measures, aimed to prevent significant influence in the local bodies of the citizens from other EU countries.

It was mentioned earlier about provision with the election right of the EU citizens on the elections of the European Parliament. This norm brings certain limitations, empower the EU states to place divergent provisions, when they are justified by specific problems of the EU states. The right to take part in the elections of the European Parliament doesn't affect national sovereignty of member states. The electoral procedure does not serve the goal to elect foreigners, who would exercise national sovereignty of the country, in which they are living during the period in office. Initial legal foundations for election in the European Parliament are Founding treaties rather than national Constitutions of member states. The Founding treaties define the main authorities of the Parliament as well.

Regarding the changes in the electoral law of certain member states as a result of the establishment of the European Union, as it was noted above, several amendments were made to the fundamental laws. For example, in French Constitution 1958 were included appropriate provisions about the EU.

I use France as an example mostly, because during my previous work in Paris and in Strasburg at the Council of Europe and then as part of my research activity I studied the law of this EU country.

So here I mean chapter XV named "About European Communities and European Union". It contains Articles from 88-1 to 88-4. This chapter was included in 1992 with changes in January 1999 and March 2005. Specifically Article 88-3 of the Constitution of the French Republic introduces as condition for participation of foreigners in local elections compliance with the reciprocity principle.

In the law dating 1 March 2005 institutes the regulation, according to which for decision the issue of entry of a new state in the Union the referendum became obligatory.

It is interesting to mention, that according to the Article 3 of that Constitutional law No. 2005-204 of 1 March 2005 in the case of coming into effect of the well-known Treaty, which had to establish Constitution for Europe, the chapter XV of the French Constitution, examined above, should undergo certain changes. Unfortunately, the European Constitution did not enter into force, but studying of

these changes has some sense, as, from my point of view, these changes will be included in the chapter XV of the French Constitution after entering into force of the Lisbon Treaty.

Regarding the electoral law on the local level, according to the Constitutional law 2005 in the Article 88-3 the reciprocity principle disappears. However the provision that the EU citizens, who are living in France, but have citizenship of another member state cannot act as mayors or their deputies, take part in the nomination of senators' electors or in election of senators.

Then, under the Article 88-4 of the current version of the French Constitution, the French government while sending draft legislation of the EU to the Council of the European Union pass them to the National Assembly and the Senate, which are the upper and lower chambers of the French Parliament. Here you have to take into consideration, that national Parliaments in this situation the French Parliament are informed about draft legislation, of the EU institutions through their governments.

According to the studied Constitutional law of France dating 1 March 2005 the provision that the Parliament is informed about projects of European legal acts is preserved, but the Article 88-5 is included in new version. It says that the upper and the lower chambers of the Parliament may give reasoned resolutions about conformity of the legal act with the principle of Subsidiarity.

Whom do the send it? Such resolution is directed to the Speaker of the European Parliament, Presidents of the Council and the Commission. The government of the country concerned is informed about that fact. According to that Article in the case of violation of the principle of Subsidiarity each Chamber can refer to the court.

In the whole the problem concerning the role of national Parliaments in the decision-making procedure of the EU institutions is extremely important and the mentioned changes, which the most likely to act in all member states after the ratification of the Lisbon treaty, require to study this issue in more details. It is important for analyses and definition of the new Lisbon treaty, attracts interest from the point of view of European law theory as well as important for research and teaching of the EU law.

Due to the Lisbon treaty the national Parliaments of member states become new participants in the decision-making process in the Union as well as a new additional element of its institutional structure.

There is a hope that acknowledgement in the new Treaty of the crucial role and authority of national Parliaments in the decision-making on the level of the Union should bring to an end the period, which was usually characterized in the literature on the topic as the time of traditional distrust, opposition and competition in there relations with the European Parliament. According to the words of a famous French author Etienne de Poncins, the European Parliament, which was in constant search of the possibilities to strengthen its legitimacy, because of the weak voting turnout during European elections, however posed itself as the "keeper of the European temple" and, in fact, denied the right of the national Parliaments to participate in European activities. The national Parliaments, being proud of their historical record and obvious democratic legitimacy were displeased with the fact that they were excluded from the decision-making processes in the institutions of the European Union and through this were deprived from their inherent privileges.

As it is known, that for the first time in the history of European integration the national Parliaments through their representatives took part in the creation of structural reforms of the European Union during the work of European Convent for elaboration of the Constitution treaty in 2004. Convent met from 28 February 2002 till 18 July 2003 in Brussels. It is necessary to note that joined work within Convent sessions of the delegates of national Parliaments and their colleagues – members of the European Parliament largely contributed to the elimination of prejudice and overcome contradictions between them.

Let not forget, that among 105 official delegates to the Convent apart from ministers of member states and candidate states (mostly ministers of foreign affairs) there were 56 members of national Parliaments and 16 members of the European Parliament. Every of them had a deputy. Hence the real number of members of national Parliaments and the European Parliament who took part in the work of the Convent was twice more and their joint contribution in elaboration of provisions about future role of the national Parliaments can be hardly overestimate.

The main provisions about the role of the national Parliaments of member states in the European structure moved to the Lisbon treaty from the project of the European Constitution.

As provided by the project of the European Constitution 2004 national Parliaments would have gained the right to participate in the decision-making procedure of the institutions of the European Union. Thereby they would have got the right to control more effectively activities of their government on the

European level. They also could exercise direct control over adherence to the principle of Subsidiarity in the law of the European Union. If the European Parliament along with the Commission and the Court of the EU embodies the supranational principle, the involvement of the national Parliaments to the decision-making can be interpreted as a step towards strengthening international nature of the EU governance.

According to the former rules the Commission directed legislative proposals to the governments of member states, which should inform their national Parliaments about them. This placed the Parliaments of member states in unequal position with the governments and weakened their position in the European structure. To correct this situation, according to the "Protocol on the role of national Parliaments in the European Union", attached to the Constitutional treaty, Commission became in charge for provision of national Parliaments with all documents it direct to the European Parliament and the Council of Ministers. Thus for the first time in the history of European integration process the national Parliaments were empowered to approve or to block the proposals of the European Commission. For this purpose in the Article 4 of the Protocol mentioned above, there is a period of six weeks provided for the national Parliaments to react and inform the Speaker of the European Parliament and Presidents of the Council and the Commission about adherence of the draft Union legal act to the principle of Subsidiarity (or violation of this principle). In the case of disagreement the "procedure of early warning", which is stipulated by the following, also attached to the draft Constitution, Protocol on the application of the principles of Subsidiarity and Proportionality, is implemented.

The essence of the "procedure of early warning" is following. The Article 7 of this Protocol contained the provision that in the case of disagreement with the proposal of the Commission, any national Parliament or either of its Chambers can adopt a motivated resolution about failure to adhere of the draft legal act of the European Union to the principle of Subsidiarity. Every national Parliament under this procedure possessed two votes. This comes from the fact that most of national Parliaments usually have two Chambers. So every Chamber has one vote.

If the motivated resolution on failure to adhere to the principle will come from one third or more votes of national Parliaments the draft should be reconsidered. For certain drafts the number of negative votes from national Parliaments for the start of the procedure mentioned above is decreased to one forth.

After reconsideration appropriate institute of the Union which initiated the draft legislation (usually Commission), can insist on it or make amendments or renounce it.

In the final analyses the national Parliament (or either Chamber) could appeal to the Court of the European Union. As it is well-known, the Constitutional treaty was rejected during ratification and did not enter into force, however, as it was mentioned above, its main provisions about national Parliaments were included into following Lisbon treaty. This justifies my small digression in history of the European Constitution preparation.

The Lisbon treaty (let us hope that it will not join the fate of the European Constitution) for the first time visibly and obvious includes national Parliaments in the system of European institutions. The Article 12 of the new Treaty of the European Union (hereinafter the TEU) is fully devoted to this issue.

According to this article, "national Parliaments actively contribute to the proper functioning of the Union". This occurs through:

a. informing of national Parliaments by the Union's institutions about draft legal acts;
b. control of national Parliaments over adherence to the principle of Subsidiarity;
c. their participation in evaluation of the EU policy in the field of freedom, security and justice, in political control over Europol and evaluation of Eurojust activity;
d. participation in procedures of revision of Founding treaties;
e. informing of the national Parliaments about applications for joining the Union;
f. participation in inter-Parliamentary cooperation between national Parliaments and the European parliament as well as between national Parliaments.

Thus, as we see, the Lisbon treaty includes national Parliaments in many European procedures. The applications to join the EU and draft revisions of Founding treaties are directed to them. Any national Parliament can protest against alterations in internal policy of the EU in simplified way. In the case of the proposal to change the decision-making procedure (from unanimity to the qualified majority) the Parliament of every member state is within the right block that. There crucial role is also confirmed in the field Justice and internal affairs. As we see the Article 12 of the Lisbon treaty leads to the situation, where national

Parliaments take part in the political control over the activity of Europol and Eurojust, as well as in overall evaluation of their activity. This is confirmed also by Articles 88 and 85 of the Treaty about functioning of the European Union (TFEU), which contains regulations about assignments of the mentioned European institutions.

The role and authorities of national Parliaments in the studied context is closely connected with the problem of subsidiarity. These legislative bodies fairly considers that the violation of this principle not only harms the whole European law and order, but also enables the EU institutions to avoid control from the member countries. Hereafter the participation of national Parliaments in the decision-making in EU institutions is closely connected with the problem of control over the adherence to the principle of Subsidiarity.

The principle of Subsidiarity was included in the EU law by Maastricht treaty. It specifies the most appropriate level of intervention, when the authorities are shared between the Union and member states, as well as institutions of local government. In the case of joint or competitive competence the activity on the level of the European authorities is justified only if the Union can really act more effective, than member states individually.

The notion subsidiarity is based on the idea, according to which the competences should be exercised on the level which is the closest to the citizens. Only if the local or national authorities cannot resolve the question satisfactorily, it is brought to the Union level.

This principle is often mentioned by the national Parliaments regarding the functioning of the European Union.

Under current legislation the control over protection of subsidiarity principle in legal acts is exercised by institutions themselves. For example the Commission itself decide on this question, when introducing proposals.

However it is necessary to have a look on what is exactly said about subsidiarity principle in the Lisbon treaty.

In the item 3 of the Article 5 it is noted that in adherence to the principle of Subsidiarity of the Union in the areas, which do not fall within its exclusive competence, acts only when and to that extent in which the objectives of the proposed measure cannot be sufficiently achieved by the member states on the national, regional and local levels. The Union acts when due to the scale and

consequences of the proposed measure, its objectives can be better achieved on the level of the Union.

After that the Treaty says the institutions of the Union implement subsidiarity principle according to the Protocol on the application of the principles of Subsidiarity and Proportionality. National Parliaments are supervising over implementation of this principle according to the procedure proposed on the mentioned Protocol.

Here it is necessary to note, that these provisions of the Lisbon treaty duplicate the similar text on this topic, contained in the draft European Constitution.

While commenting upon the Lisbon treaty on the studied topic, it is important to mention, Subsidiarity and Proportionality are fundamental principles, which laid into foundations of the division of competences among the EU and member states.

It is necessary to note also that along with the Article 12 of the Lisbon treaty mentioned above, these problems are extensively studied in two Protocols attached to the Treaty: "Protocol on the role of national Parliaments in the European Union" and "Protocol on the application of the principles of subsidiarity and proportionality". In fact these Protocols duplicate the provisions of the similar Protocols attached to the European Constitution.

The adherence to these principles according to the Lisbon treaty is ensured twofold: through preventive mechanism and jurisdictional (judicial) control.

The main innovation of the Lisbon treaty, regarding our topic, is that the national Parliaments are directly involved into control over implementation of the principle of subsidiarity. At their response they have the possibility to start "early warning procedure" every time, when they consider that the principle of subsidiarity is violated.

Summing up everything that contains in the main text and Protocols to the Lisbon treaty on the authorities of national Parliaments and control over subsidiarity, will get the following. The Lisbon treaty:

- makes national Parliaments the addressee of all European draft laws;
- unambiguously acknowledge their role in control over the principle of Subsidiarity;

- establish the "early warning procedure", which allows every national Parliament (or even every of its Chambers) to compose in eight week period reasoned resolution, which includes the reasons why they consider that the proposal of the Commission violates the principle of Subsidiarity.

The Lisbon treaty provides procedure of indirect application of national Parliaments to the Court of the EU. The idea is that every member state can appeal to the Court in the name of its national Parliament according to its own legislation. Obvious advantage with these new provisions is that national Parliaments are included in decision-making process at the stage of preparation of legal acts.

The Protocol on the role of national Parliaments in the European Union attached to the Lisbon treaty ensures direct provision to the national Parliaments of:

- expert findings of the Commission (Green papers, White papers and Communications);
- annual legislative programmes and other documents connected with programming of legislative activity or political strategy;
- draft legal acts, addressed to the European Parliament and Council, that are proposals of the Commission, initiatives of groups of member states (for example in the field of justice and internal affairs), initiatives of the European Parliament, requests of the Court of the EU, recommendations of the European Central Bank and requests of the European Investment Bank on the adoption of the legal act.

Every draft legal act should contain an insert (a card) with the detailed information, which enables to make a conclusion whether the principles of Subsidiarity and Proportionality ensured. This list according to the Article 5 of the Protocol provides a period of eight weeks for national Parliaments to pass to the Commission (European Parliament or Council) the reasoned resolution, contesting the draft legal act due to the violation of the principle of Susidiarity.

The Protocol on the application of the principles of subsidiarity and proportionality in Article 8 provides for member states a power to apply to the Court of the EU in the case of violation of the principle of Subsidiarity in legal act. The Article 263 of the TFEU defines a two month period from the moment of publication of the legal act for this. States can apply with such a complaints in the name of their national Parliaments or either of its Chambers.

The Committee of Regions can appeal the legal acts on the same foundations. This include the acts, adoption of which requires consultations with this Committee according to TFEU.

Finally under the Article 9 of the Protocol the Commission is in charge for provision of the European Council, European Parliament and national Parliaments with the annual report on implementation of the Article 5 of the Lisbon treaty. This report is transferred to the Committee of Regions and Economic and Social Committee.

Regarding the other provisions on enhancing the role of national Parliaments in the European integration it is necessary to note the following. They will be able to protest against any state-candidate applying to join the EU, make proposals in the case of revision of founding treaties, exercise control over proposals and legal initiatives, presented within cooperation of police and judicial bodies, from the point of view of their adherence to the principle of Subsidiarity according to the studied Protocol, participation of national Parliaments in the area of freedom, security and justice.

Thus the Parliaments of the member states are involved by the Lisbon treaty in the political life and decision-making processes of the United Europe. They will not be able further, as it was before, to rest the whole responsibility for this or that legal act on the "Brussels authorities". The Lisbon treaty enables national Parliaments to oppose to the initiatives from Brussels and Strasbourg, which, from their point of view, exceed the authorities of the Union. Besides the voting citizens of the EU, and as a result of enhancing the role of the national Parliaments, different non-governmental organisations will get additional opportunities to make the entire European community to hear their voice.

THE RIGHT TO VOTE AND THE RIGHT TO STAND FOR ELECTION

Mr André KVAKKESTAD
Lawyer, Norway
Member of the Council for Democratic Elections

Often the right to vote and the right to stand for election are linked together. One usually needs to be able to vote in the election in order to be able to be a candidate at the same election. On the other hand it might be possible to vote in an election even if one is not calcified to be a candidate. This is due to the fact that some countries might have extra conditions for standing as a candidate.

One example is that in the Constitution of Norway § 62 it is stated that members of the Supreme Court and those employed in ministries are not able to stand for election to the parliament, but they are able to vote.

On other example is that in Ukraine one needs to be a citizen to vote, but one also has to be residing in Ukraine for 5 years to be eligible to be elected a Member of Parliament.

In Latvia a candidate needs to have sufficient knowledge of the official language.

European standard

A European standard regarding elections does have its basis in the European Convention on Human Rights and thru that guarded by the European Court of Human Rights.

One also has the Code of Good Practice in Electoral Matters witch is guidelines by the Venice Commission. One does see that The Code of Good Practice is also given importance by the Court of Human Rights. This is not because it is regarded as a law or provision, but because it is regarded as being a good structure to understand the rights and obligations regarding electoral matters in Europe. (Cases: *Hirst v. UK* and *Melnychenko v. Ukraine*).

There are also other conventions and agreements that regulates and make up what is known as European standards.

Right to participation

The right to participate and by democratic means influence the society is an essential part of the human rights in a developed country.

The European Convention on Human Rights states in Article 10 the right to freedom of expression. In article 11 it is stated that one has the right to political association with others.

When put together, this to articles makes sure that one has the right to state opinions and work together with others in order to promote views, and thru this be able to influence and make an impact on the governing of the country. This gives the right both to organise one self thru organisation or by open meetings. One can have organisations promoting particular topics or things in general and naturally organise political parties.

Elections

The most concrete regulation regarding the need to hold elections is in **Protocol number 1 to the Convention Article 3.**

> "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."

First of all one has to make it clear that the protocols to the Europeans Convention on Human Rights are as binding to the member states of the Council of Europe as the Convention it selves.

Article 3 does have a special kind of wording. First the European Court of Human Rights had to figure out whether or not the article gave any rights towards individuals or not. Some argued that the rights and obligations towards Article 3 on were given between the signing countries themselves.

In 1987 the case *Mathieu-Mohin and Clerfayt v. Belgium* the European Court of Human rights established that the article gave rights to individuals living inside the signing states. The rights include the right to vote and to stand for election.

In fact the Court stated that the unusual wording in Article 3 gave the countries a special obligation to active move towards free elections.

In 1998 the case *United Communist Party of Turkey and Others v. Turkey* stated that the rights guaranteed under Article 3 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.

Protocol 1, Article 3 - Only regarding legislature bodies

As stated in Protocol 1 Article 3 the article gives rights regarding elections to legislative bodies.

Parliaments are in all countries a legislative body that falls under Protocol 1, Article 3.

The European Parliament also falls under the same article. (*Matthews v. the United Kingdom* 1999)

Advisory bodies and bodies that execute legislative decisions are not falling under Protocol 1, Article 3.

The Court, and earlier the Commission, has in rulings 1985 *Clerfayt, Legros v Belgium* and *Booth-Clibborn v the United Kingdom* and in a ruling in 2000 *Malarede v France* clarified that not all elected political bodies are being recognised as a legislative body under Article 3.

One can conclude that in general local elected bodies are not to be regarded as legislative bodies. This is in any case the situation for municipal councils in Belgium, the metropolitan country council in United Kingdom and regional Councils in France. This councils get there power by legislations given by others. They then are regarded more like administrative bodies executing the obligations given by parliaments and others.

This does not mean that only parliaments are regarded as legislative bodies. It does depend on whether or not the body is needed as a real participant in the making of legislation. One can probably come into situations where regional bodies, particularly powerful bodies in a federation, might be so that they fall under the provision of Article 3.

Head of State

A question is if Head of State is regarded as a legislative body or not.

To answer this one need to look into the powers and rights of the head of state in the different countries.

In 2004 the case *Guliev v Azerbaijan* it came clear the power to issue decrees, edict orders and ordinances, as well as to sign or veto legislative acts does not by it selves make the head of state a legislative body.

In 2004 the Court also stated in the case *Boskoski v. "the former Yugoslav Republic of Macedonia"* that the question is if the head of state has the "power to initiate and adopt legislation or enjoy wide power to control the passage of legislation or the power to censure the principal legislation setting authorities".

In 2007 *the Georgian Labour Party v Georgia* the Court considered in details the powers of the Georgian President. The Court was not sure that the presidential here would fall outside Article 3. (But the Georgian Labour Party was not to be found status as victim in the case.)

It might seem like that the Court is showing a careful move towards regarding heads of state with quite a lot of power as falling under Article 3. Never the less, offices of heads of state with more ceremonial positions is not to be put under the provisions of Article 3 in Protocol 1.

One could then have a different opinion regarding the President of Iceland who is mostly a ceremonial figure and the President of France with his powers.

The right to vote

The general rule is that everyone that has a citizenship and otherwise fills the requirements to vote is able to vote. A criterion that every country has beside citizenship is the need to be of a minimum age.

When the Convention and its Protocols guarantees that the governing of the convention states shall be done by the statement of the people, the right to vote and then to influence the composition of the legislative power is a essential human right.

If someone wants to limit a person there essential human rights this has to be done only when needed and with the greatest caution.

Deny voting

Even if someone does meet the conditions for being able to vote it might be circumstances that do it possible to deny the person the right to vote.

Then the Commission of Human Rights declared in 1979 that the standards of tolerance does not prevent a democratic society from taking steps to protect it selves against activities intended to destroy the rights of freedoms set forth in the Convention of Human Right.

In this context, a case where a former member of Waffen SS convicted of treason in 1945 was unable to participate in the election to the European Parliament in 1989. This was regarded as an acceptable limitation in democratic rights. It is important also to bear in mind that the person wanted to stand for an election as a candidate advocating extreme right wing policies that is contradictory to a democratic society.

Never the less if on want to limit an individuals right to ordinary democratic rights there has to be proportionality between the reason for the denial of the right and the reason behind doing so.

Hirst v. the United Kingdom

The case in 2005 *Hirst v. the United Kingdom* raised two questions. The first question is if convicted persons can lose the right to vote due to a general provision that all convicted persons in jail are prevented form voting, and the second question is if someone can be denied the right to vote due to the fact that he/she has been convicted of a crime as serious as manslaughter. This again has to be viewed in relation to the principle of proportionality.

The conclusion of the Court of Human Rights was that preventing Hirst from voting was a violation of the Convention of Human Rights, Protocol 1, Article 3. This verdict might be a bit controversial, and it was also made with 12 against 5 votes in the Camera.

General ban on voting for prisoners?

The Court of Human Rights clearly stated that an automatic blanked ban on the right to vote imposed all convicted prisoners regardless its effects laced proportionality.

In this case the United Kingdom argued that the ban in United Kingdom only had an effect on some 48,000 prisoners. The United Kingdom also argued that the provision was proportional because the ban was in fact restricted in its application as it affected only those convicted of crimes serious enough to warrant a custodial sentence and not include those detained on remand, for contempt of court or default in paying of fines. In that sense there was proportionality between the seriousness of the crime and the conviction on one hand and the losing of the right to vote on the other hand.

The Court found that there had not been a substantive debate by the legislatures on the effects in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoner to vote.

In a multi-party Speaker's Conference in 1968 unanimously recommended that a convicted prisoner should not be able to vote. But this could not be reckoned as a standard more then 35 years later. The standards of human rights and democracy develop with time.

The Court found that the disputed part of the United Kingdom act imposes restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention tight must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No.1.

Serious crime – preventing from voting?

The Divisional Court of the United Kingdom stated that the nature of the restrictions for convicted prisoners to vote was a matter for the Parliament and not for the courts. That meant that the court it selves did not undertake any assessment of proportionality of the measure it selves.

The Court did not state that a country could not restrict or ban a convicted prisoner from voting.

The Court of Human Rights leaves it to the national legislatures to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1.

This does probably indicate that the legislative powers can determent that some convictions regarding specific crimes can result in the situation where a prisoner is prevented from voting. To be able to do this the legislature must take into consideration the developments of human rights and democracy when deciding on the choice of means. If one wants to be on the safe side the legislatures could make there national courts to undertake a concrete decision when finding a person guilty to a crime. If the legislatures limit the prohibiting of voting to certain specific crimes, preferably crimes against human rights and democratic rule, and at the same time make it up to the national court to decide whether or not it would be a proportional loss of human right, The Court of Human Rights probably can come to the conclusion that that would be acceptable under the Convention of Human rights and its Protocols.

In this case the court did not declare that it was disproportional to prevent a person convicted for manslaughter from voting. On the other hand it did not state that it was proportional ether. Since the Court found a violation of Article 3 of Protocol No. 1, the Court did not need to go into that question.

Right to stand as a candidate

Criteria: habitation
In 2004 the case *Melnychenko v. Ukraine* the Court looked into the question of the requirement of needing to have lived inside the country for a certain period of time in order to be able to stand as a candidate.

The rule of 5 years habitation for being able to stand as a candidate for parliament was not by it selves a violation for Article 3 of Protocol No. 1.

The Court stated:

> "However, the Court accepts that stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility (see the Venice Commission's election guidelines, paragraph 29 above). Hence the Court would not preclude outright a five-year continuous residency requirement for potential parliamentary candidates. Arguably, this requirement may be deemed appropriate to enable such persons to acquire sufficient knowledge of the issues associated with the national parliament's tasks."

The problem here was that the person had been outside the country due to medical treatment for 2 years and that he had fled the country due to his personal safety.

At the same time there were problems regarding the registration of habitation inside Ukraine.

The Court saw that the period of being outside Ukraine was to do with circumstances that were needed. This should not prevent him from executing his right to stand as a candidate to the legislative power. In fact the departure from Ukraine the second time had to do with the fact that he was an active politician in position and had reason to fear for his safety for that reason.

If a country have a regulation that might prevent someone to execute a fundamental human right, the country also have the obligation to reassure that the regulation is carried out in a credible and understandable manner.

"The Court observes that the only proof of official registration of residence at the material time was in the ordinary citizen's internal passport, which did not always correspond to the person's habitual place of residence."

When it came to the registration of habitation, there was no distinction made in the law between "official" and "habitual" residence. His official residence was regarded as to have been inside Ukraine; inside his official passport the residence was not changed.

A question is if there are any logical links and proportionality regarding problem and sanction.

The Court of Human Rights found that there had been a violation regarding Article 3 of Protocol 1.

Criteria: Knowledge of the official language

In 2002 the case *Podkolzina v. Latvia* the question was if a citizen could be denied the right to stand for election du to lack of knowledge of the official language of the country.

The Latvian law on election section 5 states: "The following persons may not stand as candidates in an election or be elected to Parliament:" (nr 7) "persons who do not have a command of the official language at the third (upper) level of knowledge."

The Court of Human Rights stated that the countries have a possibility to draw up additional requirements for those standing for election to legislative powers:

> "In particular, States have broad latitude to establish constitutional rules on the status of members of parliament, including criteria for declaring them ineligible. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of electors, these criteria vary in accordance with the historical and political factors specific to each State; the multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another. However, the State's margin of appreciation in this regard is limited by the obligation to respect the fundamental principle of Article 3, namely "the free expression of the opinion of the people in the choice of the legislature."

As one also sees, the level of development of the country can be used as an argument. On the other hand it might be difficult for a Council of Europe member state to argue that they are less developed then there neighbouring countries.

In this case the person was approached by an examiner at work and asked different questions. There was no written part of the exam and no one else present to observe the examination. The Court saw that

> "the way in which such a verification was carried out and the almost total freedom enjoyed by the examiner made it easy to strike out of the list any person whose mother tongue was not Latvian."

Again it is of great importance that if a country has special restrictions on the possibility to enjoy ones fundamental democratic rights, this limitation has to be carried out in a credible and understandable way.

The Court of Human Rights found that Latvia did not have a sufficient way of dealing with the question of establishing the knowledge of the Latvian language. The Court then found that the dismissal of a person to stand for election based on a method with lack of certainty was regarded a violation of Article 3 of Protocol 1.

The right to vote for prisoners – some thoughts

One of the problems regarding a rule that prisoners don't have the right to vote or stand for elections is that it sometimes would seems like a lottery of who is effected or not. If someone is convicted for a shorter sentence of 1 or 2 month it might be unforeseen if there is an election going on at the time of serving the sentence or not. If one bear in mind the fact that there often is a long queue for getting into serve time in jail this underlines this fact even more. This "flexibility" also makes it possible to arrange the dates of sentencing in order to decide who should be able to vote in the election and who do someone want to prevent doing so.

Based on the problems of uncertainty regarding when one might have the right to vote and stand for election and when for a period of time losing it, one ought to find a way to make this more predictable. One possible way to do so is to make the national courts define the dates and timeframe. This could for instance be 2 month from the ruling is legally binding or set to a specific date. Then one would have a decision regarding the need of preventing someone from the rights and not a question on when one is called to serve the sentence in jail.

It might also be less then proportional if one is convicted to 2 month in jail and one looses the right to vote or to stand for election in an election held 1 year later do to the fact that it was at that time the person was called to serve the sentence.

Voting v. standing as a candidate

The Court of Human Rights, due to the principle of proportionality, demands stronger reason to deny somebody to vote then for somebody to stand for election. This has to do with the fact that the impact on a democratic society is lager when one has the possibility of being elected then only being able to vote.

This is also what the Court stated in the Melnychenko judgment, and in the Case against Ukraine 2004.

Some concluding thoughts…

The Court of Human Rights seems to be of the opinion that a withdrawal of fundamental democratic rights must be based on fair and predictable provisions and not on uncertainty or random.

The question of proportionality is of course of grate importance in these matters. This indicates that crimes done against democratic values or conducting of democratic processes might be a stronger argument if wanting to deny a person his democratic rights then crimes without this implications.

THE VENICE COMMISSION
in co-operation with
THE EUROPEAN STUDIES INSTITUTE
AT MOSCOW STATE INSTITUTE OF
INTERNATIONAL RELATIONS (UNIVERSITY)

Programme of the International Conference
"Electoral Legislation and Practice in the Countries of the Council of Europe"
MGIMO, April 28-29, 2008, Room 1039

28 April 2008

9.30 – 10.00 Registration.

10.00 – 10.45 **Opening of the Conference**

Moderator: Mark ENTIN – Director, European Studies Institute at MGIMO University of the MFA of Russia

1. Gianni BUQUICCHIO (Secretary General, Venice Commission) «The role of the Venice Commission in the development of electoral standards in Europe ».
2. Valery ZORKIN (President, Constitutional Court of the Russian Federation; Member, Venice Commission) «The role of the Constitutional Court of the Russian Federation in protection of electoral rights of citizens»
3. Vladislav GRIB (Member, Public Chamber of the Russian Federation)
4. Representative, Central Election Commission of the Russian Federation

10.45 – 13.30 **Session 1. Evolution of electoral law and practice in comparative perspective**

Moderator: Gianni BUQUICCHIO – Secretary General, Venice Commission

1. Yuri LEIBO «Development of electoral law in the countries of the Council of Europe»

2. David FARRELL «Comparison of electoral systems in the countries of the Council of Europe»
3. Nikolay VASILIEV «Record of human political rights protection of Ombudsman in the Russian Federation: problems and prospects»

13.30 – 14.30 *Lunch*

14.30-17.30 **Session 2. The Right to vote and to be elected: international standards.**

Moderator: Oleg BARABANOV – Head, Chair of politics and functioning of the EU and the Council of Europe, European Studies Institute at MGIMO University of the MFA of Russia

1. Ugo E. MIFSUD BONNICI «Electoral standards of the Council of Europe»
2. Mikhail BIRUKOV «Implementation of the electoral law in the European Union»
3. Alexander KYNEV «Russian political practice in the context of international electoral standards»
4. Yuri CHERNYSHOV «Regional practice in the Altai Territory»

17.30 *Reception*

29 April 2008

10.00 – 13.00 **Session 3. Judicial and civic protection of electoral rights**

Moderator: Mikhail BIRUKOV – Head, Chair of European law, MGIMO.

1. Vladislav GRIB «Practice of the Public Chamber of the Russian Federation» (invited)
2. Andre KVAKKESTAD «Judicial protection of the right to vote and to be elected – national experience and international standards»
3. Artem MALGIN «Electoral standards in the CIS»
4. Ksenia BORISHPOLETS «Electoral legislation and record of political competition in Central Asia states »
5. Leonid GUSEV «Electoral Legislation in Kazakhstan»

12.15 – 12.30 **Closing of the Conference.**

12.30 *Coffee-break*

APPENDIX 1

Strasbourg, 23 May 2003 **CDL-AD (2002) 23 rev**
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Opinion no. 190/2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

CODE OF GOOD PRACTICE IN ELECTORAL MATTERS

GUIDELINES AND EXPLANATORY REPORT

Adopted by the Venice Commission
at its 52nd Plenary Session
(Venice, 18-19 October 2002)

Introduction

On 8 November 2001 the Standing Committee of the Parliamentary Assembly, acting on behalf of the Assembly, adopted Resolution 1264 (2001) inviting the Venice Commission:[1]

> *i. to set up a working group, comprising representatives of the Parliamentary Assembly, the CLRAE and possibly other organisations with experience in the matter, with the aim of discussing electoral issues on a regular basis;*
>
> *ii. to devise a code of practice in electoral matters which might draw, inter alia, on the guidelines set out in the appendix to the explanatory memorandum of the report on which this resolution is based (Doc. 9267), on the understanding that this code should include rules both on the run-up to the election, the elections themselves and on the period immediately following the vote;*
>
> *iii. as far as its resources allow, to compile a list of the underlying principles of European electoral systems by co-ordinating, standardising and developing current and planned surveys and activities. In the medium term, the data collected on European elections should be entered into a database, and analysed and disseminated by a specialised unit.*

The following guidelines are a concrete response to the three aspects of this resolution. They were adopted by the Council for Democratic Elections – the joint working group provided for by the Parliamentary Assembly resolution – at its second meeting (3 July 2002) and subsequently by the Venice Commission at its 51st Session (5-6 July 2002); they are based on the underlying principles of Europe's electoral heritage; lastly and above all, they constitute the core of a code of good practice in electoral matters.

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[1] Item 6; see Doc. 9267, Report by the Political Affairs Committee; Rapporteur: Mr Clerfayt.

The explanatory report explains the principles set forth in the guidelines, defining and clarifying them and, where necessary, including recommendations on points of detail. The report was adopted by the Council for Democratic Elections at its 3rd meeting (16 October 2002), and subsequently by the Venice Commission at its 52nd Session (18-19 October 2002).

The code of good practice in electoral matters was approved by the Parliamentary Assembly of the Council of Europe at its 2003 session – 1st part and by the Congress of Local and Regional Authorities of Europe at its Spring session 2003.

As requested in the Parliamentary Assembly's resolution, this document is based on the guidelines appended to the explanatory memorandum to the report on which the Assembly resolution was based (Doc. 9267). It is also based on the work of the Venice Commission in the electoral field, as summarised in Document CDL(2002)7.

GUIDELINES ON ELECTIONS

adopted by the Venice Commission
at its 51st Plenary Session
(Venice, 5-6 July 2002)

I. Principles of Europe's electoral heritage

The five principles underlying Europe's electoral heritage are *universal, equal, free, secret and direct suffrage.* Furthermore, elections must be held at regular intervals.

1. Universal suffrage

1.1 Rule and exceptions

Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions:

a. Age:
   i. the right to vote and to be elected must be subject to a minimum age;
   ii. the right to vote must be acquired, at the latest, at the age of majority;
   iii. the right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25, except where there are specific qualifying ages for certain offices (e.g. member of the upper house of parliament, Head of State).

b. Nationality:
   i. a nationality requirement may apply;
   ii. however, it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence.

c. Residence:
   i. a residence requirement may be imposed;
   ii. residence in this case means habitual residence;

iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;
iv. the requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities;
v. the right to vote and to be elected may be accorded to citizens residing abroad.

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

1.2 Electoral registers

Fulfilment of the following criteria is essential if electoral registers are to be 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.

1.3 Submission of candidatures

i. The presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures;
ii. The law should not require collection of the signatures of more than 1% of voters in the constituency concerned;
iii. Checking of signatures must be governed by clear rules, particularly concerning deadlines;
iv. The checking process must in principle cover all signatures; however, once it has been established beyond doubt that the requisite number of signatures has been collected, the remaining signatures need not be checked;
v. Validation of signatures must be completed by the start of the election campaign;
vi. If a deposit is required, it must be refundable should the candidate or party exceed a certain score; the sum and the score requested should not be excessive.

2. Equal suffrage

This entails:

2.1 Equal voting rights: each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes.

2.2 Equal voting power: seats must be evenly distributed between the constituencies.

i. This must at least apply to elections to lower houses of parliament and regional and local elections:
ii. It entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including

minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged.

iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.

iv. The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity).

v. In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside election periods.

vi. With multi-member constituencies, seats should preferably be redistributed without redefining constituency boundaries, which should, where possible, coincide with administrative boundaries.

vii. When constituency boundaries are redefined – which they must be in a single-member system – it must be done:

- impartially;
- without detriment to national minorities;
- taking account of the opinion of a committee, the majority of whose members are independent; this committee should preferably include a geographer, a sociologist and a balanced representation of the parties and, if necessary, representatives of national minorities.

2.3 Equality of opportunity

a. Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to:

i. the election campaign;

ii. coverage by the media, in particular by the publicly owned media;

iii. public funding of parties and campaigns.

b. Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time, public funds and other forms of backing.

c. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.

d. Political party, candidates and election campaign funding must be transparent.

e. The principle of equality of opportunity can, in certain cases, lead to a limitation of political party spending, especially on advertising.

2.4 Equality and national minorities

a. Parties representing national minorities must be permitted.

b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.

c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.

2.5 Equality and parity of the sexes

Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis.

3. Free suffrage

3.1 Freedom of voters to form an opinion

a. State authorities must observe their duty of neutrality. In particular, this concerns:
i. media;
ii. billposting;
iii. the right to demonstrate;
iv. funding of parties and candidates.

b. The public authorities have a number of positive obligations; inter alia, they must:
i. submit the candidatures received to the electorate;
ii. enable voters to know the lists and candidates standing for election, for example through appropriate posting.
iii. The above information must also be available in the languages of the national minorities.

c. Sanctions must be imposed in the case of breaches of duty of neutrality and voters' freedom to form an opinion.

3.2 Freedom of voters to express their wishes and action to combat electoral fraud

i. voting procedures must be simple;
ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:
iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;
iv. electronic voting should be used only if it is safe and reliable; in particular, voters should be able to obtain a confirmation of their votes and to correct them, if necessary, respecting secret suffrage; the system must be transparent;

v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;
vi. mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud;
vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;
viii. voting slips must not be tampered with or marked in any way by polling station officials;
ix. unused voting slips must never leave the polling station;
x. polling stations must include representatives of a number of parties, and the presence of observers appointed by the candidates must be permitted during voting and counting;
xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;
xii. counting should preferably take place in polling stations;
xiii. counting must be transparent. Observers, candidates' representatives and the media must be allowed to be present. These persons must also have access to the records;
xiv. results must be transmitted to the higher level in an open manner;
xv. the state must punish any kind of electoral fraud.

4. Secret suffrage

a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.

b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.

c. The list of persons actually voting should not be published.

d. The violation of secret suffrage should be sanctioned.

5. Direct suffrage

The following must be elected by direct suffrage:

i. at least one chamber of the national parliament;
ii. sub-national legislative bodies;
iii. local councils.

6. Frequency of elections

Elections must be held at regular intervals; a legislative assembly's term of office must not exceed five years.

II. Conditions for implementing these principles

1. Respect for fundamental rights

a. Democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties.

b. Restrictions of these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.

2. Regulatory levels and stability of electoral law

a. Apart from rules on technical matters and detail – which may be included in regulations of the executive –, rules of electoral law must have at least the rank of a statute.

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

3. Procedural guarantees

3.1 Organisation of elections by an impartial body

a. An impartial body must be in charge of applying electoral law.

b. Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c. The central electoral commission must be permanent in nature.

d. It should include:
i. at least one member of the judiciary;
ii. representatives of parties already in parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.
It may include:
iii. a representative of the Ministry of the Interior;
iv. representatives of national minorities.

e. Political parties must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality may be construed strictly or on a proportional basis (see point I.2.3.b).

f. The bodies appointing members of electoral commissions must not be free to dismiss them at will.

g. Members of electoral commissions must receive standard training.

h. It is desirable that electoral commissions take decisions by a qualified majority or by consensus.

3.2 Observation of elections

a. Both national and international observers should be given the widest possible opportunity to participate in an election observation exercise.

b. Observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting.

c. The places where observers are not entitled to be present should be clearly specified by law.

d. Observation should cover respect by the authorities of their duty of neutrality.

3.3 An effective system of appeal

a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.

b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.

c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.

d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.

e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h. The applicant's right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

4. Electoral system

Within the respect of the above-mentioned principles, any electoral system may be chosen**.**

EXPLANATORY REPORT

adopted by the Venice Commission
at its 52nd Plenary Session
(Venice, 18-19 October 2002)

General remarks

1. Alongside human rights and the rule of law, democracy is one of the three pillars of the European constitutional heritage, as well as of the Council of Europe. Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status.

2. These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the "European electoral heritage". This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met. The text which follows – like the foregoing guidelines – is therefore in two parts, the first covering the definition and practical implications of the principles of the European electoral heritage and the second the conditions necessary for their application.

I. The underlying principles of Europe's electoral heritage

Introduction: the principles and their legal basis

3. If elections are to comply with the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, they must observe five fundamental rules: *suffrage must be universal, equal, free, secret and direct*. Furthermore, elections must be held *periodically*. All these principles together constitute the European electoral heritage.

4. Although all these principles are conventional in nature, their implementation raises a number of questions that call for close scrutiny. We would do well to identify the "hard core" of these principles, which must be scrupulously respected by all European states.

5. The hard core of the European electoral heritage consists mainly of international rules. The relevant universal rule is Article 25 (b) of the International Covenant on Civil and Political Rights, which expressly provides for all of these principles except direct suffrage, although the latter is implied.[1] The common European rule is Article 3 of the Additional Protocol to the European Convention on Human Rights, which explicitly provides for the right to periodical elections by free and secret suffrage;[2] the other principles have also been recognised in human rights case law.[3] The right to direct elections has also been admitted by the Strasbourg Court, at least implicitly.[4] However, the constitutional principles common to the whole continent do not figure only in the international texts: on the contrary, they are often mentioned in more detail in the national constitutions.[5] Where the legislation and practice of different countries converge, the content of the principles can be more accurately pinpointed.

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1 See Article 21 of the Universal Declaration of Human Rights.

2 Article 3, Right to free elections: "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".

3 Where universality is concerned, cf. ECHR No. 9267/81, judgment in Mathieu-Mohin and Clerfayt vs. Belgium, 2 March 1987, Series A vol. 113, p. 23; judgment in Gitonas and others vs. Greece, 1 July 1997, No. 18747/91, 19376/92; 19379/92, 28208/95 and 27755/95, Collected Judgments and Decisions, 1997-IV, p. 1233; re. equality, cf. aforementioned judgment of Mathieu-Mohin and Clerfayt, p. 23.

4 ECHR No. 24833/94, judgment in Matthews vs. the United Kingdom, 18 February 1999, Collected Judgments and Decisions 1999-I, para. 64.

5 E.g. Article 38.1 of the German Constitution, Articles 68.1 and 69.2 of the Spanish Constitution and Article 59.1 of the Romanian Constitution.

1. Universal suffrage

1.1 Rule and exceptions

6. Universal suffrage covers both active (the right to vote) and passive electoral rights (the right to stand for election). The right to vote and stand for election may be subject to a number of conditions, all of which are given below. The most usual are *age* and *nationality*.

a. There must be a minimum age for the right to vote and the right to stand for election; however, attainment of the age of majority, entailing not only rights but also obligations of a civil nature, must at least confer the right to vote. A higher age may be laid down for the right to stand for election but, save where there are specific qualifying ages for certain offices (senator, head of state), this should not be more than 25.

b. Most countries' legislations lay down a *nationality* requirement. However, a tendency is emerging to grant local political rights to long-standing foreign residents, in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level.[6] It is accordingly recommended that the right to vote in local elections be granted after a certain period of residence. Furthermore, under the European integration process European citizens have been granted the right to vote and stand for election in municipal and European Parliament elections in their EU member state of residence.[7] The nationality criterion can, moreover, sometimes cause problems if a state withholds citizenship from persons who have been settled in its territory for several generations, for instance on linguistic grounds.

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6 ETS 144.

7 Article 19 of the Treaty establishing the European Community.

Furthermore, under the European Convention on Nationality[8] persons holding dual nationality must have the same electoral rights as other nationals.[9]

c. Thirdly, the right to vote and/or the right to stand for election may be subject to *residence* requirements,[10] residence in this case meaning habitual residence. Where local and regional elections are concerned, the residence requirement is not incompatible *a priori* with the principle of universal suffrage, if the residence period specified does not exceed a few months; any longer period is acceptable only to protect national minorities.[11] Conversely, quite a few states grant their nationals living abroad the right to vote, and even to be elected. This practice can lead to abuse in some special cases, e.g. where nationality is granted on an ethnic basis. Registration could take place where a voter has his or her secondary residence, if he or she resides there regularly and it appears, for example, on local tax payments; the voter must not then of course be registered where he or she has his or her principal residence.

The freedom of movement of citizens within the country, together with their right to return at any time is one of the fundamental rights necessary for truly democratic elections.[12] If persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence.

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[8] ETS 166, Article 17.

[9] The ECHR does not go so far: Eur. Comm. HR No. 28858/95, judgment 25.11.96 Ganchev vs. Bulgaria, DR 87, p. 130.

[10] See most recently ECHR No. 31891/96, judgment 7.9.99, Hilbe vs. Liechtenstein.

[11] See Eur. Comm. HR No. 23450/94, judgment 15.9.97, Polacco and Garofalo vs. Italy (re. Trentino-Alto Adige).

[12] See Chapter II.1 below.

d. Lastly, provision may be made for *clauses suspending political rights*. Such clauses must, however, comply with the usual conditions under which fundamental rights may be restricted; in other words, they must:[13]

- be provided for by law;
- observe the principle of proportionality;
- be based on mental incapacity or a criminal conviction for a serious offence.

Furthermore, the withdrawal of political rights may only be imposed by express decision of a court of law. However, in the event of withdrawal on grounds of mental incapacity, such express decision may concern the incapacity and entail *ipso jure* deprivation of civic rights.

The conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them, as the holding of a public office is at stake and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.

1.2 Electoral registers

7. The proper maintenance of *electoral registers* is vital in guaranteeing universal suffrage. However, it is acceptable for voters not to be included automatically on the registers, but only at their request. In practice, electoral registers are often discovered to be inaccurate, which leads to disputes. Lack of experience on the part of the authorities, population shifts and the fact that few citizens bother to check the electoral registers when they are presented for inspection make it difficult to compile these registers. A number of conditions must be met if the registers are to be reliable:

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[13] See e.g. ECHR No. 26772/95, judgment in Labita vs. Italy, 6 April 2002, paras. 201 ff.

i. There must be permanent electoral registers.

ii. There must be regular updates, at least once a year, so that municipal (local) authorities get into the habit of performing the various tasks involved in updating at the same time every year. Where registration of voters is not automatic, a fairly long time-period must be allowed for such registration.

iii. The electoral registers must be published. The final update should be sent to a higher authority under the supervision of the impartial body responsible for the application of the electoral law.

iv. There should be an administrative procedure – subject to judicial control – or a judicial procedure enabling electors not on the register to have their names included. In some countries, the closing date for entry in the supplementary register may be, for example, 15 days before the election or election day itself. The latter case, whilst admirably broad-minded, relies on decisions made by a court obliged to sit on polling day, and is thus ill-suited to the organisational needs on which democracies are based. In any event polling stations should not be permitted to register voters on election day itself.

v. Furthermore, inaccuracies in electoral registers stem both from unjustified entries and from the failure to enter certain electors. A procedure of the kind mentioned in the previous paragraph should make it possible for electors to have erroneous entries corrected. The capacity for requesting such corrections may be restricted to electors registered in the same constituency or at the same polling station.

vi. A supplementary register can enable persons who have changed address or reached the statutory voting age since the final register was published to vote.

1.3 Submission of candidatures

8. The obligation to collect a specific number of *signatures* in order to be able to stand is theoretically compatible with the principle of universal suffrage. In practice, only the most marginal parties seem to have any difficulty gathering the requisite number of signatures, provided that the rules on signatures are not used to bar candidates from standing for office. In order to prevent such manipulation, it is preferable for the law to set a maximum 1% signature requirement.[14] The signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample;[15] however, once the verification shows beyond doubt that the requisite number of signatures has been obtained, the remaining signatures need not be checked. In all cases candidatures must be validated by the start of the election campaign, because late validation places some parties and candidates at a disadvantage in the campaign.

1. There is another procedure where candidates or parties must pay a deposit, which is only refunded if the candidate or party concerned goes on to win more than a certain percentage of the vote. Such practices appear to be more effective than collecting signatures. However, the amount of the deposit and the number of votes needed for it to be reimbursed should not be excessive.

2. Equal suffrage

9. Equality in electoral matters comprises a variety of aspects. Some concern equality of suffrage, a value shared by the whole continent, while others go beyond this concept and cannot be deemed to reflect any common standard. The principles to be respected in all cases are numerical vote equality, equality in terms of electoral strength and equality of chances. On the other hand, equality of outcome achieved, for instance, by means of proportional representation of the parties or the sexes, cannot be

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[14] CDL (99) 66, p. 9.

[15] CDL-INF (2000) 17, pp. 4-5; CDL (99) 67, pp 7-8.

imposed.

2.1 Equal voting rights

10. *Equality in voting rights* requires each voter to be normally entitled to one vote, and to one vote only. Multiple voting, which is still a common irregularity in the new democracies, is obviously prohibited – both if it means a voter votes more than once in the same place and if it enables a voter to vote simultaneously in several different places, such as his or her place of current residence and place of former residence.

11. In some electoral systems, the elector nonetheless has more than one vote. In, for example, a system that allows split voting (voting for candidates chosen from more than one list), the elector may have one vote per seat to be filled; another possibility is when one vote is cast in a small constituency and another in a larger constituency, as is often the case in systems combining single-member constituencies and proportional representation at the national or regional level.[16] In this case, equal voting rights mean that all electors should have the same number of votes.

2.2 Equal voting power

12. *Equality in voting power*, where the elections are not being held in one single constituency, requires constituency boundaries to be drawn in such a way that seats in the *lower chambers* representing the people are distributed equally among the constituencies, in accordance with a specific apportionment criterion, e.g. the number of residents in the constituency, the number of resident nationals (including minors), the number of registered electors, or possibly the number of people actually voting. An appropriate combination of these criteria is conceivable. The same rules apply to regional and local elections. When this principle is not complied with, we are confronted with what is known as *electoral geometry*, in the form

[16] See, for example, Article 64 of the Albanian Constitution and Section 1 of the German Federal Elections Act.

either of "active electoral geometry", namely a distribution of seats causing inequalities in representation as soon as it is applied, or of "passive electoral geometry", arising from protracted retention of an unaltered territorial distribution of seats and constituencies. Furthermore, under systems tending towards a non-proportional result, particularly majority (or plurality) vote systems, gerrymandering may occur, which consists in favouring one party by means of an artificial delimitation of constituencies.

13. Constituency boundaries may also be determined on the basis of geographical criteria and the administrative or indeed historic boundary lines, which often depend on geography.

14. The maximum admissible departure from the distribution criterion adopted depends on the individual situation, although it should seldom exceed 10% and never 15%, except in really exceptional circumstances (a demographically weak administrative unit of the same importance as others with at least one lower-chamber representative, or concentration of a specific national minority).[17]

15. In order to avoid passive electoral geometry, seats should be redistributed at least every ten years, preferably outside election periods, as this will limit the risks of political manipulation.[18]

16. In multi-member constituencies electoral geometry can easily be avoided by regularly allocating seats to the constituencies in accordance with the distribution criterion adopted. Constituencies ought then to correspond to administrative units, and redistribution is undesirable. Where a uninominal method of voting is used, constituency boundaries need to be redrawn at each redistribution of seats. The political ramifications of (re)drawing electoral boundaries are very considerable, and it is therefore essential that the process should be non-partisan and should not disadvantage national

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[17] See CDL (98) 45, p. 3; CDL (99) 51, p. 8; CDL(2000)002, p. 5; CDL-AD(2002)009, para. 22.

[18] CDL-AD(2002)009, para. 23.

minorities. The long-standing democracies have widely differing approaches to this problem, and operate along very different lines. The new democracies should adopt simple criteria and easy-to-implement procedures. The best solution would be to submit the problem in the first instance to a commission comprising a majority of independent members and, preferably, a geographer, a sociologist, a balanced representation of the parties and, where appropriate, representatives of national minorities. The parliament would then make a decision on the basis of the commission's proposals, with the possibility of a single appeal.

2.3 Equality of opportunity

17. *Equality of opportunity* should be ensured between parties and candidates and should prompt the state to be impartial towards them and to apply the same law uniformly to all. In particular, the *neutrality* requirement applies to the *electoral campaign* and *coverage by the media,* especially the publicly owned media, as well as to *public funding* of parties and campaigns. This means that there are two possible interpretations of equality: either "strict" equality or "proportional" equality. "Strict" equality means that the political parties are treated without regard to their present strength in parliament or among the electorate. It must apply to the use of public facilities for electioneering purposes (for example bill posting, postal services and similar, public demonstrations, public meeting rooms). "Proportional" equality implies that the treatment of political parties is in proportion to the number of votes. Equality of opportunity (strict and/or proportional) applies in particular to radio and television airtime, public funds and other forms of backing. Certain forms of backing may on the one hand be submitted to strict equality and on the other hand to proportional equality.

18. The basic idea is that the main political forces should be able to voice their opinions in the main organs of the country's media and that all the political forces should be allowed to hold meetings, including on public thoroughfares, distribute literature and exercise their right to post bills. All of these rights must be clearly regulated, with due respect for freedom of expression, and any failure to

observe them, either by the authorities or by the campaign participants, should be subject to appropriate sanctions. Quick rights of appeal must be available in order to remedy the situation before the elections. But the fact is that media failure to provide impartial information about the election campaign and candidates is one of the most frequent shortcomings arising during elections. The most important thing is to draw up a list of the media organisations in each country and to make sure that the candidates or parties are accorded sufficiently balanced amounts of airtime or advertising space, including on state radio and television stations.

19. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.

20. The question of funding, and in particular of the need for it to be transparent, will be considered later.[19] Spending by political parties, particularly on advertising, may likewise be limited in order to guarantee equality of opportunity.

2.4 Equality and national minorities

21. In accordance with the principles of international law, the electoral law must guarantee equality for persons belonging to national minorities, which includes prohibiting any discrimination against them.[20] In particular, the national minorities must be allowed to set up political parties.[21] Constituency delimitations and quorum regulations must not be such as to form an obstacle to the presence of persons belonging to minorities in the elected body.

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[19] See below, Chapter II.3.5.

[20] Article 4.1 of the Framework Convention for the Protection of National Minorities (ETS 157).

[21] Re. bans on political parties and similar measures, see CDL-INF (2000) 1.

22. Certain measures taken to ensure minimum representation for minorities either by reserving seats for them[22] or by providing for exceptions to the normal rules on seat distribution, eg by waiving the quorum for the national minorities' parties[23] do not infringe the principle of equality. It may also be foreseen that people belonging to national minorities have the right to vote for both general and national minority lists. However, neither candidates nor electors must be required to indicate their affiliation with any national minority.[24,25]

2.5 Equality and parity of the sexes

23. If there is a specific constitutional basis,[26] rules could be adopted guaranteeing some degree of balance between the two sexes in elected bodies, or even parity. In the absence of such a constitutional basis, such provisions could be considered contrary to the principle of equality and freedom of association.

24. Moreover, the scope of these rules depends on the electoral system. In a fixed party list system, parity is imposed if the number of men and women who are eligible is the same. However, if preferential voting or cross-voting is possible, voters will not necessarily choose candidates from both sexes, and this may result in an unbalanced composition of the elected body, chosen by voters.

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22 As is the case in Slovenia and Croatia.

23 As is the case in Germany and Poland. Romanian law even provides for representation of minorities' organisations if they have secured a number of votes equivalent to 5% (only) of the average number of validly cast votes required for the election of a deputy to the lower house country-wide.

24 Article 3 of the Framework Convention for the Protection of National Minorities (ETS 157).

25 Re. electoral law and national minorities, see CDL-INF (2000) 4.

26 See Article 3.2 of the French Constitution; cf. judgment of 18 November 1982, Recueil des décisions du Conseil constitutionnel, 1982, pp. 66 ff.

3. Free suffrage

25. Free suffrage comprises two different aspects: free formation of the elector's opinion, and free expression of this opinion, i.e. freedom of voting procedure and accurate assessment of the result.

3.1 Freedom of voters to form an opinion

a. *Freedom of voters to form an opinion* partly overlaps with equality of opportunity. It requires the *state* – and public authorities generally – to honour their duty of even-handedness, particularly where the use of the mass media, billposting, the right to demonstrate on public thoroughfares and the funding of parties and candidates are concerned.

b. Public authorities also have certain positive obligations. They must submit lawfully presented candidatures to the citizens' votes. The presentation of specific candidatures may be prohibited only in exceptional circumstances, where necessitated by a greater public interest. Public authorities must also give the electorate access to lists and candidates standing for election by means, for instance, of appropriate billposting. The information in question must also be available in the languages of national minorities, at least where they make up a certain percentage of the population.

Voters' freedom to form an opinion may also be infringed by *individuals*, for example when they attempt to buy votes, a practice which the state is obliged to prevent or punish effectively.

c. In order to ensure that the rules relating to voters' freedom to form an opinion are effective, any violation of the foregoing rules must be punished.

3.2 Freedom of voters to express their wishes and combating electoral fraud

3.2.1 In general

26. *Freedom of voters to express their wishes* primarily requires strict observance of the *voting procedure*. In practice, electors should be able to cast their votes for registered lists or candidates, which means that they must be supplied with ballot papers bearing their names and that they must be able to deposit the ballot papers in a ballot box. The state must make available the necessary premises for electoral operations. Electors must be protected from threats or constraints liable to prevent them from casting their votes or from casting them as they wish, whether such threats come from the authorities or from individuals; the state is obliged to prevent and penalise such practices.

27. Furthermore, the voter has the right to an accurate assessment of the result of the ballot; the state should punish any election fraud.

3.2.2 Voting procedures

28. Voting procedures play a vital role in the overall electoral process because it is during voting that election fraud is most likely to occur.

29. In some countries the implementation of democratic practices requires a radical change of attitudes, which must be actively promoted by the authorities. In this respect some measures have to be taken to control the habits and reflexes which have a negative impact on the elections. Most of these irregularities, such as "family voting"[27] occur during the voting procedure.

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[27] See section I.4 below.

30. All these observations lead us to the following conclusion: *the voting procedure must be kept simple. Compliance is therefore recommended with the criteria set out in the ensuing paragraphs*.

31. If the polling station officials represent a proper balance of political opinion, fraud will be difficult, and the fairness of the ballot should be judged by two main criteria alone: the number of electors who have cast votes compared with the number of ballot papers in the ballot box. The first measure can be determined by the number of signatures in the electoral register. Human nature being what it is (and quite apart from any intention to defraud), it is difficult to achieve total congruity between the two measures, and any further controls such as numbering the stubs of ballot papers or comparing the total number of ballot papers found in the ballot box plus those cancelled and unused with the number of ballot papers issued to the polling station may give some indication, but one should be under no illusion that the results of these various measures will coincide perfectly. The risk in multiplying the measures used is rather that the differences in the totals, and in the end the real irregularities, will not be taken seriously. It is better to have strict control over two measures than slack – and hence ineffective – control over a larger number of variables.

32. Any unused ballot papers should remain at the polling station and should not be deposited or stored in different premises. As soon as the station opens, the ballot papers awaiting use must be in full view on the table of the senior station official for instance. There should be no others stored in cupboards or other places.

33. The signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot.

34. The voter should collect his or her ballot paper and no one else should touch it from that point on.

35. It is important that the polling station officials include multi-party representatives and that observers assigned by the candidates be present.

36. Voters should always have the possibility of voting in a polling station; other means of voting are, however, acceptable on certain conditions, as indicated below.

3.2.2.1 Postal voting or proxy voting in certain circumstances

37. Postal voting and proxy voting are permitted in countries throughout the western world, but the pattern varies considerably. Postal voting, for instance, may be widespread in one country and prohibited in another owing to the danger of fraud. It should be allowed only if the postal service is secure – in other words, safe from intentional interference – and reliable, in the sense that it functions properly. Proxy voting is permissible only if subject to very strict rules, again in order to prevent fraud; the number of proxies held by any one elector must be limited.

38. Neither of these practices should be widely encouraged if problems with the postal service are added to other difficulties inherent in this kind of voting, including the heightened risk of "family voting". Subject to certain precautions, however, postal voting can be used to enable hospital patients, persons in custody, persons with restricted mobility and electors resident abroad to vote, in so far as there is no risk of fraud or intimidation. This would dispense with the need for a mobile ballot box, which often causes problems and risks of fraud. Postal voting would take place under a special procedure a few days before the election.

39. The use of *mobile ballot boxes* is undesirable because of the attendant serious risk of fraud. Should they nonetheless be used, strict conditions should be imposed to prevent fraud, including the attendance of several members of the polling station election commission representing different political groupings.

3.2.2.2 Military voting

40. Where servicemen cannot return home on polling day, they should preferably be registered at polling stations near their barracks. Details of the servicemen concerned are sent by the local command to the municipal authorities who then enter the names in the electoral list. The one exception to this rule is when the barracks are too far from the nearest polling station. Within the military units, special commissions should be set up to supervise the pre-election period, in order to prevent the risk of superior officers' imposing or ordering certain political choices.

3.2.2.3 Mechanical and electronic voting methods

41. Several countries are already using, or are preparing to introduce mechanical and electronic voting methods. The advantage of these methods becomes apparent when a number of elections are taking place at the same time, even though certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. Clearly, with this kind of voting, it is important to ensure that ballot papers are designed in such a way as to avoid confusion. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. Whatever means used should ensure the confidentiality of voting.

42. Electronic voting methods must be secure and reliable. They are secure if the system can withstand deliberate attack; they are reliable if they can function on their own, irrespective of any shortcomings in the hardware or software. Furthermore, the elector must be able to obtain confirmation of his or her vote and, if necessary, correct it without the secrecy of the ballot being in any way violated.

43. Furthermore, the system's transparency must be guaranteed in the sense that it must be possible to check that it is functioning properly.

3.2.2.4 Counting

44. The votes should preferably be counted at the polling stations themselves, rather than in special centres. The polling station staff are perfectly capable of performing this task, and this arrangement obviates the need to transport the ballot boxes and accompanying documents, thus reducing the risk of substitution.

45. The vote counting should be conducted in a transparent manner. It is admissible that voters registered in the polling station may attend; the presence of national or international observers should be authorised. These persons must be allowed to be present in all circumstances. There must be enough copies of the record of the proceedings to distribute to ensure that all the aforementioned persons receive one; one copy must be immediately posted on the notice-board, another kept at the polling station and a third sent to the commission or competent higher authority.

46. The relevant regulations should stipulate certain practical precautions as regards equipment. For example, the record of the proceedings should be completed in ballpoint pen rather than pencil, as text written in pencil can be erased.

47. In practice, it appears that the time needed to count the votes depends on the efficiency of the presiding officer of the polling station. These times can vary markedly, which is why a simple tried and tested procedure should be set out in the legislation or permanent regulations which appear in the training manual for polling station officials.

48. It is best to avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention.

3.2.2.5 Transferring the results

49. There are two kinds of results: provisional results and final results (before all opportunities for appeal have been exhausted). The media, and indeed the entire nation, are always impatient to hear the initial provisional results. The speed with which these results are relayed will depend on the country's communications system. The polling station's results can be conveyed to the electoral district (for instance) by the presiding officer of the polling station, accompanied by two other members of the polling station staff representing opposing parties, in some cases under the supervision of the security forces, who will carry the records of the proceedings, the ballot box, etc.

50. However much care has been taken at the voting and vote-counting stages, transmitting the results is a vital operation whose importance is often overlooked; it must therefore be effected in an open manner. Transmission from the electoral district to the regional authorities and the Central Electoral Commission – or other competent higher authorities – can be done by fax. In that case, the records will be scanned and the results can be displayed as and when they come in. Television can be used to broadcast these results but once again, too much transparency can be a dangerous thing if the public is not ready for this kind of piecemeal reporting. The fact is that the initial results usually come in from the towns and cities, which do not normally or necessarily vote in the same way as rural areas. It is important therefore to make it clear to the public that the final result may be quite different from, or even completely opposite to, the provisional one, without there having been any question of foul play.

4. Secret suffrage

51. Secrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure – and particularly the casting and counting of votes. Voters are entitled to it, but must also respect it themselves, and non-compliance must be punished by disqualifying any ballot paper whose content has been disclosed.[28]

52. Voting must be individual. Family voting, whereby one member of a given family can supervise the votes cast by the other members, infringes the secrecy of the ballot; it is a common violation of the electoral law. All other forms of control by one voter over the vote of another must also be prohibited. Proxy voting, which is subject to strict conditions, is a separate issue.[29]

53. Moreover, since abstention may indicate a political choice, lists of persons voting should not be published.

54. Violation of the secrecy of the ballot must be punished, just like violations of other aspects of voter freedom.

5. Direct suffrage

55. Direct election of one of the chambers of the national parliament by the people is one aspect of Europe's shared constitutional heritage. Subject to such special rules as are applicable to the second chamber, where there is one, other legislative bodies, like the Parliaments of Federate States,[30] should be directly elected, in accordance with Article 3 of the Additional Protocol to the European Convention on Human Rights. Nor can

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[28] CDL (2000) 2, p. 9.

[29] See above, Chapter I.3.2.2.1.

[30] See ECHR No. 9267/81, judgment Mathieu-Mohin and Clerfayt vs. Belgium, 2 March 1987, Series A No. 113, p. 23; Eur. Comm. HR No. 27311/95, 11.9.97, Timke vs. Germany, DR 82, p. 15; No. 7008/75, 12.7.76, X vs. Austria, DR 6, p. 120.

local self-government, which is a vital component of democracy, be conceived of without local elected bodies.[31] Here, local assemblies include all infra-national deliberative bodies.[32] On the other hand, even though the President of the Republic is often directly elected, this is a matter for the Constitution of the individual state.

6. Frequency of elections

56. Both the International Covenant on Civil and Political Rights[33] and the Additional Protocol to the European Convention on Human Rights[34] provide that elections must be held periodically. General elections are usually held at four- or five-yearly intervals, while longer periods are possible for presidential elections, although the maximum should be seven years.

II. Conditions for implementing the principles

57. The underlying principles of European electoral systems can only be guaranteed if certain *general conditions* are fulfilled.

- *The first, general, condition is* respect for fundamental human rights*, and particularly freedom of expression, assembly and association, without which there can be no true democracy;*

- *Second, electoral law must enjoy a certain stability, protecting it against party political manipulation;*

- *Last and above all, a number of procedural guarantees must be provided, especially as regards the organisation of polling.*

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31 Article 3 of the European Charter of Local self-government (ETS 122).

32 Article 13 of the European Charter of Local self-government..

33 Article 25 b.

34 Article 3.

58. Furthermore, elections are held not in a vacuum but within the context of a specific electoral system and a given party system. This second section will conclude with a number of comments on this aspect, particularly on the relationship between electoral and party systems.

1. Respect for fundamental rights

59. The holding of democratic elections and hence the very existence of democracy are impossible without respect for *human rights*, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital particularly during election campaigns. *Restrictions* on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality.

60. The fact is that many countries have legal limitations on *free speech*, which, if restrictively interpreted, may just be acceptable – but may generate abuses in countries with no liberal, democratic tradition. In theory, they are intended to prevent "abuses" of free speech by ensuring, for example, that candidates and public authorities are not vilified, and even protecting the constitutional system. In practice, however, they may lead to the censoring of any statements which are critical of government or call for constitutional change, although this is the very essence of democratic debate. For example, European standards are violated by an electoral law which prohibits insulting or defamatory references to officials or other candidates in campaign documents, makes it an offence to circulate libellous information on candidates, and makes candidates themselves liable for certain offences committed by their supporters. The insistence that materials intended for use in election campaigns must be submitted to electoral commissions, indicating the organisation which ordered and produced them, the number of copies and the date of publication, constitutes an unacceptable form of censorship, particularly if electoral commissions are required to take action against illegal or inaccurate publications. This is even

more true if the rules prohibiting improper use of the media during electoral campaigns are rather vague.

61. Another very important fundamental right in a democracy is freedom of movement within the country, together with the right for nationals to return to their country at any time.

2. Regulatory levels and stability of electoral law

62. Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy.[35] Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections.

63. In practice, however, it is not so much stability of the basic principles which needs protecting (they are not likely to be seriously challenged) as stability of some of the more specific rules of electoral law, especially those covering the electoral system *per se*, the composition of electoral commissions and the drawing of constituency boundaries. These three elements are often, rightly or wrongly, regarded as decisive factors in the election results, and care must be taken to avoid not only manipulation to the advantage of the party in power, but even the mere semblance of manipulation.

64. It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.

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[35] On the importance of credibility of the electoral process, see for example CDL (99) 67, p. 11; on the need for stability of the law, see CDL (99) 41, p. 1.

65. One way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.

66. For the rest, the electoral law should normally have the rank of statute law. Rules on implementation, in particular those on technical questions and matters of detail, can nevertheless be in the form of regulations.

3. Procedural safeguards

3.1 Organisation of elections by an impartial body

67. Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.

68. In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures. It is therefore both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior.

69. However, in states with little experience of organising pluralist elections, there is too great a risk of government's pushing the administrative authorities to do what it wants. This applies both to central and local government - even when the latter is controlled by the national opposition.

70. This is why *independent, impartial electoral commissions* must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least remove serious suspicions of irregularity.

71. According to the reports of the Bureau of the Parliamentary Assembly of the Council of Europe on election observations, the following shortcomings concerning the electoral commissions have been noted in a number of member States: lack of transparency in the activity of the central electoral commission; variations in the interpretation of counting procedure; politically polarised election administration; controversies in appointing members of the Central Electoral Commission; commission members nominated by a state institution; the dominant position of the ruling party in the election administration.

72. *Any central electoral commission* must be *permanent*, as an administrative institution responsible for liaising with local authorities and the other lower-level commissions, e.g. as regards compiling and updating the electoral lists.

73. The composition of a central electoral commission can give rise to debate and become the key political issue in the drafting of an electoral law. Compliance with the following guidelines should facilitate maximum impartiality and competence on the part of the commission.

74. As a general rule, the commission should consist of:

- a judge or law officer: where a judicial body is responsible for administering the elections, its independence must be ensured through transparent proceedings. Judicial appointees should not come under the authority of those standing for office;

- representatives of parties already represented in parliament or which have won more than a certain percentage of the vote. Political parties should be represented equally in the central electoral commission; "equally" may be interpreted strictly or proportionally, that is to say, taking or not taking account of the parties' relative

electoral strengths.[36] Moreover, party delegates should be qualified in electoral matters and should be prohibited from campaigning.

75. In addition, the electoral commission may include:

- representatives of national minorities; their presence is desirable if the national minority is of a certain importance in the territory concerned;

- a representative of the Ministry of the Interior. However, for reasons connected with the history of the country concerned, it may not always be appropriate to have a representative of the Ministry of the Interior in the commission. During its election observation missions the Parliamentary Assembly has expressed concern on several occasions about transfers of responsibilities from a fully-fledged multi-party electoral commission to an institution subordinate to the executive. Nevertheless, co-operation between the central electoral commission and the Ministry of the Interior is possible if only for practical reasons, e.g. transporting and storing ballot papers and other equipment. For the rest, the executive power should not be able to influence the membership of the electoral commissions.[37]

76. Broadly speaking, bodies that appoint members to electoral commissions should not be free to recall them, as it casts doubt on their independence. Discretionary recall is unacceptable, but recall for disciplinary reasons is permissible - provided that the grounds for this are clearly and restrictively specified in law (vague references to "acts discrediting the commission", for example, are not sufficient).

77. In the long-standing democracies where there are no electoral commissions but where another impartial body is competent in electoral matters, political parties must be able to observe the work of that body.

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[36] See above, Chapter I.2.3.

[37] Cf CDL-AD (2002) 7, para. 5, 7 ff, 54.

78. The composition of the central electoral commission is certainly important, but no more so than its mode of *operation*. The commission's rules of procedure must be clear, because commission chairpersons have a tendency to let members speak, which the latter are quick to exploit. The rules of procedure should provide for an agenda and a limited amount of speaking time for each member – e.g. a quarter of an hour; otherwise endless discussions are liable to obscure the main business of the day.

79. There are many ways of making decisions. It would make sense for decisions to be taken by a qualified (e.g. 2/3) majority, so as to encourage debate between the majority and at least one minority party. Reaching decisions by consensus is preferable.

80. The meetings of the central electoral commission should be open to everyone, including the media (this is another reason why speaking time should be limited). Any computer rooms, telephone links, faxes, scanners, etc. should be open to inspection.

81. Other electoral commissions operating at regional or constituency level should have a similar composition to that of the central electoral commission. Constituency commissions play an important role in uninominal voting systems because they determine the winner in general elections. Regional commissions also play a major role in relaying the results to the central electoral commission.

82. Appropriate staff with specialised skills[38] are required to organise elections. Members of central electoral commissions should be legal experts, political scientists, mathematicians or other people with a good understanding of electoral issues.

83. Members of electoral commissions have to receive standardised training at all levels of the election administration. Such training should also be made available to the members of commissions appointed by political parties. There have been several cases of commissions lacking qualified and trained election staff.

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[38] See CDL (98) 10, p. 5.

84. The electoral law should contain an article requiring the authorities (at every level) to meet the demands and needs of the electoral commission. Various ministries and other public administrative bodies, mayors and town hall staff may be directed to support the election administration by carrying out the administrative and logistical operations of preparing for and conducting the elections. They may have responsibility for preparing and distributing the electoral registers, ballot papers, ballot boxes, official stamps and other required material, as well as determining the arrangements for storage, distribution and security.

3.2 Observation of elections

85. Observation of elections plays an important role as it provides evidence of whether the electoral process has been regular or not.

86. There are three different types of observer: partisan national observers, non-partisan national observers and international (non-partisan) observers. In practice the distinction between the first two categories is not always obvious. This is why it is best to make the observation procedure as broad as possible at both the national and the international level.

87. Observation is not confined to the actual polling day but includes ascertaining whether any irregularities have occurred in advance of the elections (e.g. by improper maintenance of electoral lists, obstacles to the registration of candidates, restrictions on freedom of expression, and violations of rules on access to the media or on public funding of electoral campaigns), during the elections (e.g. through pressure exerted on electors, multiple voting, violation of voting secrecy, etc.) or after polling (especially during the vote counting and announcement of the results). Observation should focus particularly on the authorities' regard for their duty of neutrality.

88. International observers play a primordial role in states which have no established tradition of impartial verification of the lawfulness of elections.

89. Generally, international as well as national observers must be in a position to interview anyone present, take notes and report to their organisation, but they should refrain from making comments.

90. The law must be very clear as to what sites observers are not entitled to visit, so that their activities are not excessively hampered. For example, an act authorising observers to visit only sites where the election (or voting) takes place could be construed by certain polling stations in an unduly narrow manner.[39]

3.3 An effective system of appeal

91. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

92. There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;

- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experience with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

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[39] Re. election observation, see Handbook for Observers of Elections, Council of Europe, 1996.

93. Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

94. Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

95. The procedure must also be simple, and providing voters with special appeal forms helps to make it so.[40] It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

96. It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different

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[40] CDL (98) 45, p. 11.

courts – e.g. the ordinary courts and the constitutional court – are not clearly differentiated.

Example:

Central Election Commission → Supreme Court
↑
Regional commission → Appeal Court
↑
Constituency Election commission
↑
Polling station (on election day)

97. Disputes relating to the electoral registers, which are the responsibility, for example, of the local administration operating under the supervision of or in co-operation with the electoral commissions, can be dealt with by courts of first instance.

98. Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.

99. The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.

100. The *powers* of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.

101. Where higher-level commissions are appeal bodies, they should be able to rectify or annul *ex officio* the decisions of lower electoral commissions.

102. Some points deserve to be developed.

3.4 Organisation and operation of polling stations

103. The quality of the voting and vote-counting systems and proper compliance with the electoral procedures depend on the mode of organisation and operation of the polling stations. The reports of the Bureau of the Assembly on the observation of elections in different countries have revealed a series of logistical irregularities. For example, significant differences between polling stations across different regions of the same State were noted.

104. Assembly observation missions have also noticed several cases of technical irregularities such as wrongly printed or stamped ballot boxes, overly complex ballot papers, unsealed ballot boxes, inadequate ballot papers or boxes, misuse of ballot boxes, insufficient means of identification of voters and absence of local observers.

105. All these irregularities and shortcomings, in addition to political party electioneering inside the polling station and police harassment, can seriously vitiate the voting process, or indeed undermine its integrity and validity.

3.5 Funding

106. Regulating the funding of political parties and electoral campaigns is a further important factor in the regularity of the electoral process.

107. First of all, funding must be *transparent*; such transparency is essential whatever the level of political and economic development of the country concerned.

108. Transparency operates at two levels. The first concerns campaign funds, the details of which must be set out in a special set of carefully maintained accounts. In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled. The second level involves monitoring the financial status of elected representatives before and after their term in office. A commission in charge of financial transparency takes formal note of the elected representatives' statements as to their finances. The latter are confidential, but the records can, if necessary, be forwarded to the public prosecutor's office.

109. In unitary states, any expenses incurred by local authorities in connection with the running of a national election, the payment of election commission members, the printing of ballot papers, etc, should normally be borne by the central state.

110. It should be remembered that in the field of *public funding* of parties or campaigns the principle of equality of opportunity applies ("strict" or "proportional" equality).[41] All parties represented in parliament must in all cases qualify for public funding. However, in order to ensure equality of opportunity for all the different political forces, public funding might also be extended to political formations that represent a large section of the electorate and put up candidates for election. The funding of political parties from public funds must be accompanied by supervision of the parties' accounts by specific public bodies (e.g. the Auditor General's Department). States should encourage a policy of financial openness on the part of political parties receiving public funding.[42]

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41 See section I.2.3 above.

42 For further details on funding of political parties, see CDL-INF (2001) 8.

3.6 Security

111. Every electoral law must provide for intervention by the security forces in the event of trouble. In such an event, the presiding officer of the polling station (or his or her representative) must have sole authority to call in the police. It is important to avoid extending this right to all members of the polling station commission, as what is needed in such circumstances is an on-the-spot decision that is not open to discussion.

112. In some states, having a police presence at polling stations is a national tradition, which, according to observers, does not necessarily trigger unrest or have an intimidating effect on voters. One should note that a police presence at polling stations is still provided for in the electoral laws of certain western states, even though this practice has changed over time.

Conclusion

113. Compliance with the five underlying principles of the European electoral heritage (universal, equal, free, secret and direct suffrage) is essential for democracy. It enables democracy to be expressed in different ways but within certain limits. These limits stem primarily from the interpretation of the said principles; the present text lays out the minimum rules to be followed in order to ensure compliance. Second, it is insufficient for the electoral law (in the narrow sense) to comprise rules that are in keeping with the European electoral principles: the latter must be placed in their context, and the credibility of the electoral process must be guaranteed. First, fundamental rights must be respected; and second, the stability of the rules must be such as to exclude any suspicion of manipulation. Lastly, the procedural framework must allow the rules laid down to be implemented effectively.

APPENDIX 2

Strasbourg, 19 March 2007 **CDL-AD(2007)008**
Study No. 371 / 2006 **Or. Fr.**

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

CODE OF GOOD PRACTICE ON REFERENDUMS

adopted by the Council for Democratic Elections
at its 19th meeting
(Venice, 16 December 2006)
and the Venice Commission
at its 70th plenary session
(Venice, 16-17 March 2007)

on the basis of contributions by
Mr Pieter van DIJK (member, the Netherlands)
Mr François LUCHAIRE (member, Andorra)
Mr Giorgio MALINVERNI (member, Switzerland)

INTRODUCTION

1. In response to a request from the Parliamentary Assembly, the Council for Democratic Elections and subsequently the Venice Commission adopted the Code of Good Practice in Electoral Matters in 2002.[1]

2. This document was approved by the Parliamentary Assembly at its 2003 session (first part) and by the Congress of Local and Regional Authorities of the Council of Europe at its Spring 2003 session.

*3. In a solemn declaration dated 13 May 2004,*2 *the Committee of Ministers recognised "the importance of the Code of Good Practice in Electoral Matters, which reflects the principles of Europe's electoral heritage, as a reference document for the Council of Europe in this area, and as a basis for possible further development of the legal framework of democratic elections in European countries".*

4. As democracy spreads through Europe, both pluralist elections and the use of referendums has become increasingly common.

5. Accordingly, for several years the Parliamentary Assembly has taken an interest in the issue of referendums and good practice in this area. Its work led, on 29 April 2005, to the adoption of Recommendation 1704 (2005) on "Referendums: towards good practices in Europe."3 The Assembly worked in co-operation with the Venice Commission in this connection; the latter submitted comments on the aforementioned recommendation at the Committee of Ministers' request4 and drew up a summary report based on replies to a questionnaire sent to its members on the issue of referendums. This

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1 CDL-AD(2002)023rev.

2 CM(2004)83 final.

3 See also doc. 10498, containing the Political Affairs Committee's report (Rapporteur: Mr Mikko Elo, Finland, Socialist Group), to which is appended a working paper prepared by the Research and Documentation Centre on Direct Democracy of the Geneva Law Faculty.

4 CDL-AD(2005)028.

report is entitled: "Referendums in Europe – An analysis of the legal rules in European States"5.

6. It was decided that a Council of Europe background paper on referendums should be drafted to accompany the Code of Good Practice in Electoral Matters. The Council for Democratic Elections took on this task, on the basis of contributions by three members of the Venice Commission, Mr Pieter van Dijk (Netherlands), Mr François Luchaire (Andorra) and Mr Giorgio Malinverni (Switzerland).

7. The guidelines on the organisation of referendums were adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and by the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006).

8. These guidelines are accompanied by an explanatory memorandum, which was adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007).

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[5] CDL-AD(2005)034; see also the questionnaire, CDL(2004)031, the replies, CDL-EL(2004)011, and the tables summarising the replies to the questionnaire, CDL-AD(2005)034add and CDL-AD(2005)034add2.

GUIDELINES ON THE HOLDING OF REFERENDUMS

Adopted by the Council for Democratic Elections
at its 18th meeting
(Venice, 12 October 2006)
and the Venice Commission
at its 68th plenary session
(Venice, 13-14 October 2006)

I. Referendums and Europe's electoral heritage

1. Universal suffrage

1.1. Rule and exceptions

Universal suffrage means in principle that all human beings have the right to vote. This right may, however, and indeed should, be subject to certain conditions:

a. Age:
The right to vote must be subject to a minimum age but must be acquired, at the latest, at the age of majority;

b. Nationality:
i. a nationality requirement may apply;
ii. however, it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence.

c. Residence:
i. a residence requirement may be imposed;
ii. residence in this case means habitual residence;
iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;
iv. the requisite period of residence should be reasonable and, as a rule, should not exceed six months;
v. it is desirable that the right to vote be accorded to citizens residing abroad.

d. Deprivation of the right to vote:

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

1.2. Electoral registers

Fulfilment of the following criteria is essential if electoral registers are to be reliable:

i. electoral registers must be permanent or refer to a register that is constantly updated (population register or register of births, marriages and deaths);
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 public;
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 as a result of a decision taken by the polling station on election day;
v. a similar procedure should allow voters to have incorrect inscriptions amended within a reasonable time;
vi. provision may be made for a supplementary register as a means of giving the vote to persons who have moved or reached statutory voting age since final publication of the register.

2. Equal suffrage

2.1. Equal voting rights

Each voter has in principle one vote; where the electoral system provides voters with more than one vote (for example, where there are alternatives), each voter has the same number of votes.[6]

2.2. Equality of opportunity

a. Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This entails a neutral attitude by administrative authorities, in particular with regard to:

i. the referendum campaign;
ii. coverage by the media, in particular by the publicly owned media;
iii. public funding of campaign and its actors;
iv. billposting and advertising;
v. the right to demonstrate on public thoroughfares.

b. In public radio and television broadcasts on the referendum campaign, it is advisable that equality be ensured between the proposal's supporters and opponents.

c. Balanced coverage must be guaranteed to the proposal's supporters and opponents in other public mass media broadcasts, especially news broadcasts. Account may be taken of the number of political parties supporting each option or their election results.

d. Equality must be ensured in terms of public subsidies and other forms of backing. It is advisable that equality be ensured between the proposal's supporters and opponents. Such backing may, however, be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate. If equality is ensured between political parties, it may be strict or

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[6] See, however, I.2.3.

proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections.

e. Financial or other conditions for radio and television advertising must be the same for the proposal's supporters and opponents.

f. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the referendum campaign and to advertising, for all participants in the referendum.

g. Political party and referendum campaign funding must be transparent.

h. The principle of equality of opportunity can, in certain cases, lead to a limitation of spending by political parties and other parties involved in the referendum debate, especially on advertising.

i. Sanctions must be imposed in the case of breaches of the duty of neutrality.

2.3. Equality and national minorities

a. Special rules providing for an exception to the normal vote-counting rules, in a proportional way, in the case of a referendum concerning the situation of national minorities do not, in principle, run counter to equal suffrage.

b. Voters must not find themselves obliged to reveal their membership of a national minority.

3. Free suffrage

3.1. Freedom of voters to form an opinion

a. Administrative authorities must observe their duty of neutrality (see 1.2.2.a. above), which is one of the means of ensuring that voters can form an opinion freely.

b. Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes must be prohibited.

c. The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote.

d. The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report or balanced campaign material from the proposal's supporters and opponents should be made available to electors sufficiently in advance, as follows:

i. they must be published in the official gazette sufficiently far in advance of the vote;

ii. they must be sent directly to citizens and be received sufficiently far in advance of the vote;

iii. the explanatory report must give a balanced presentation not only of the viewpoint of the executive and legislative authorities or persons sharing their viewpoint but also of the opposing one.

e. The above information must be available in all the official languages and in the languages of the national minorities.

f. Sanctions must be imposed in the case of breaches of the duty of neutrality and of voters' freedom to form an opinion.

3.2. Freedom of voters to express their wishes and action to combat fraud

a. Voting procedure

i. voting procedures must be readily understandable by citizens;
ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:
iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;
iv. electronic voting should be in conformity with Committee of Ministers' Recommendation Rec(2004)11 on Legal, operational and technical standards for e-voting. In particular, it should be used only if it is safe, reliable, efficient, technically robust, open to independent verification and easily accessible to voters; the system must be transparent; unless channels of remote electronic voting are universally accessible, they shall be only an additional and optional means of voting;
v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;
vi. mobile ballot boxes should only be allowed under strict conditions that avoid all risks of fraud;
vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;
viii. voting slips must not be tampered with or marked in any way by polling station officials;
ix. unused and invalid voting slips must never leave the polling station;

x. polling stations must include representatives of a number of parties, and the presence of observers appointed by the latter or by other groups that have taken a stand on the issue put to the vote must be permitted during voting and counting;
xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;
xii. counting should preferably take place in polling stations;
xiii. counting must be transparent. Observers, representatives of the proposal's supporters and opponents and the media must be allowed to be present. These persons must also have access to the records;
xiv. results must be transmitted to the higher level in an open manner;
xv. the state must punish any kind of electoral fraud.

b. Freedom of voters to express their wishes also implies:

i. that the executive must organise referendums provided for by the legislative system; this is particularly important when it is not subject to the executive's initiative;
ii. compliance with the procedural rules; in particular, referendums must be held within the time-limit prescribed by law;
iii. the right to accurate establishment of the result by the body responsible for organising the referendum, in a transparent manner, and formal publication in the official gazette.

4. Secret suffrage

a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.

b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.

c. The list of persons actually voting should not be published.

d. There should be sanctions against the violation of secret suffrage.

II. Conditions for implementing these principles

1. Respect for fundamental rights

a. Democratic referendums are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes, including freedom to set up political parties[7].

b. Restrictions on these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.

2. Regulatory levels and stability of referendum law

a. Apart from rules on technical matters and detail (which may be included in regulations of the executive), rules of referendum law should have at least the rank of a statute.

b. The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law.

c. Fundamental rules include, in particular, those concerning:
- the composition of electoral commissions or any other body responsible for organising the referendum;
- the franchise and electoral registers;

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[7] In particular, street demonstrations to support or oppose the text submitted to a referendum may be subject to authorisation: such authorisation may be refused only on the basis of overriding public interest, in accordance with the general rules applicable to public demonstrations.

- the procedural and substantive validity of the text put to a referendum;[8]
- the effects of the referendum (with the exception of rules concerning matters of detail);
- the participation of the proposal's supporters and opponents to broadcasts of public media.

3. Procedural guarantees

3.1. Organisation of the referendum by an impartial body

a. An impartial body must be in charge of organising the referendum.

b. Where there is no longstanding tradition of administrative authorities' impartiality in electoral matters, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c. The central commission must be permanent in nature.

d. It should include:
   i. at least one member of the judiciary or other independent legal expert;
   ii. representatives of parties already in Parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.
   It may include:
   iii. a representative of the Ministry of the Interior;
   iv. representatives of national minorities.

e. Political parties or supporters and opponents of the proposal put to the vote must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality between political parties may be construed strictly or on a proportional basis (see I.2.2.d.).

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[8] See sections III.2 and III.3.

f. The bodies appointing members of commissions must not be free to dismiss them at will.

g. Members of commissions must receive standard training.

h. It is desirable that commissions take decisions by a qualified majority or by consensus.

3.2. Observation of the referendum

a. Both national and international observers should be given the widest possible opportunity to participate in a referendum observation exercise.

b. Observation must not be confined to election day itself, but must include the referendum campaign and, where appropriate, the voter registration period and the signature collection period. It must make it possible to determine whether irregularities occurred before, during or after the vote. It must always be possible during vote counting.

c. Observers should be able to go everywhere where operations connected with the referendum are taking place (for example, vote counting and verification). The places where observers are not entitled to be present should be clearly specified by law, with the reasons for their being banned.

d. Observation should cover respect by the authorities of their duty of neutrality.

3.3. An effective system of appeal

a. The appeal body in referendum matters should be either an electoral commission or a court. In any case, final appeal to a court must be possible.

b. The procedure must be simple and devoid of formalism, in particular where the admissibility of appeals is concerned.

c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). The law must specifically designate the competent body in each case.

d. The appeal body must be competent to deal with the sphere covered by these guidelines, in particular with:
- the franchise and electoral registers;
- the completion of popular initiatives and requests for referendums from a section of the electorate;
- the procedural and, where applicable, substantive validity of texts submitted to a referendum: the review of the validity of texts should take place before the vote; domestic law determines whether such review is obligatory or optional;
- respect for free suffrage:
- the results of the ballot.

e. The appeal body must have authority to annul the referendum where irregularities may have affected the outcome. It must be possible to annul the entire referendum or merely the results for one polling station or constituency. In the event of annulment of the global result, a new referendum must be called.

f. All voters must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters against the results of a referendum.

g. Time-limits for lodging and deciding appeals must be short.

h. The applicant's right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

3.4. Funding

a. The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding.

b. The use of public funds by the authorities for campaigning purposes must be prohibited[9].

III. Specific rules

1. The rule of law

The use of referendums must comply with the legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction.

2. The procedural validity of texts submitted to a referendum

Questions submitted to a referendum must respect:

- unity of form: the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle;

- unity of content: except in the case of total revision of a text (Constitution, law), there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link; the revision of several chapters of a text at the same time is equivalent to a total revision;

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[9] See point I.3.1.b. above.

- unity of hierarchical level: it is desirable that the same question should not simultaneously apply to legislation of different hierarchical levels.

3. The substantive validity of texts submitted to a referendum

Texts submitted to a referendum must comply with all superior law (principle of the hierarchy of norms).

They must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

Texts that contradict the requirements mentioned under III.2 and III.3 may not be put to the popular vote.

4. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution)

a. Everyone enjoying political rights is entitled to sign a popular initiative or request for a referendum.

b. The time-limit for collecting signatures (particularly the day on which the time-limit starts to run and the last day of the time-limit) must be clearly specified, as well as the number of signatures to be collected.

c. Everyone (regardless of whether he or she enjoys political rights) must be entitled to collect signatures.

d. If authorisation is required in order to gather signatures for popular initiatives or requests for a referendum on public thoroughfares, such authorisation may be refused only in specific cases provided for by law, on the basis of overriding public interest and in accordance with the principle of equality.

e. Payment from private sources for the collection of signatures for popular initiatives and requests for referendums should, as a rule, be prohibited. If permitted, it must be regulated, with regard to both the total amount allocated and the amount paid to each person.

f. All signatures must be checked. In order to facilitate checking, lists of signatures should preferably contain the names of electors registered in the same municipality.

g. In order to avoid having to declare a vote totally invalid, an authority must have the power, prior to the vote, to correct faulty drafting, for example:

i. when the question is obscure, misleading or suggestive;
ii. when rules on procedural or substantive validity have been violated; in this event, partial invalidity may be declared if the remaining text is coherent; sub-division may be envisaged to correct a lack of substantive unity.

5. Parallelism in procedures and rules governing the referendum

a. When the referendum is legally binding:

i. For a certain period of time, a text that has been rejected in a referendum may not be adopted by a procedure without referendum.
ii. During the same period of time, a provision that has been accepted in a referendum may not be revised by another method.
iii. The above does not apply in the case of a referendum on partial revision of a text, where the previous referendum concerned a total revision.
iv. The revision of a rule of superior law that is contrary to the popular vote is not legally unacceptable but should be avoided during the above-mentioned period.

v. In the event of rejection of a text adopted by Parliament and put to the popular vote at the request of a section of the electorate, a similar new text must not be put to the vote unless a referendum is requested.

b. When a text is adopted by referendum at the request of a section of the electorate, it should be possible to organise a further referendum on the same issue at the request of a section of the electorate, after the expiry, where applicable, of a reasonable period of time.

c. When a text is adopted by referendum at the request of an authority other than Parliament, it should be possible to revise it either by parliamentary means or by referendum, at the request of Parliament or a section of the electorate, after the expiry, where applicable, of the same period of time.

d. It is advisable for constitutional rules relating to referendums to be put to a referendum, compulsorily or at the request of a section of the electorate.

6. Opinion of Parliament

When a text is put to the vote at the request of a section of the electorate or an authority other than Parliament, Parliament must be able to give a non-binding opinion on the text put to the vote. In the case of the popular initiatives, it may be entitled to put forward a counter-proposal to the proposed text, which will be put to the popular vote at the same time. A deadline must be set for Parliament to give its opinion: if this deadline is not met, the text will be put to the popular vote without Parliament's opinion.

7. Quorum

It is advisable not to provide for:

a. a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no;

b. an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.

8. Effects of referendums

a. The effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law.

b. Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.

EXPLANATORY MEMORANDUM

GENERAL REMARKS

1. This explanatory memorandum is intended to elaborate on those aspects of the above guidelines that are specific to referendums. Accordingly, it does not comment on the principles and general rules applicable to both elections and referendums. The explanatory memorandum to the Code of Good Practice in Electoral Matters[10] may be referred to in this connection. As far as possible, the guidelines on the holding of referendums echo the Code of Good Practice in Electoral Matters. Not every aspect of the guidelines will be discussed in detail.

2. A number of textual adjustments were necessary, such as replacing the word "election" with "referendum". Others, resulting from the specific nature of referendums, will not be further discussed. For instance, no reference is made to the right to stand for election (see point I.1.1.a, for example), the submission of candidatures[11] or the distribution of seats between the constituencies (equal voting power)[12]; the possibility of electors casting more than one vote relates to alternatives rather than preference vote or cross-voting (point I.2.1); election (or rather referendum) observation must be extended to the signature collection period (point II.3.2.b).

3. In addition, the Code of Good Practice in Electoral Matters has been clarified in response to questions raised in connection with its application. For instance, the requirement for permanent electoral rolls is satisfied if they refer to a register that is constantly updated (population register or register of births, marriages and deaths) (point I.1.2.i); it is expressly stated that observers must be able to go wherever referendum-related operations are taking place (point II.3.2.c).

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[10] CDL-AD(2002)023rev, pp. 19 ff.

[11] Cf. CDL-AD(2002)023rev, I.1.3.

[12] Cf. CDL-AD(2002)023rev, I.2.2.

4. Other points take into account the adoption of new texts by the Venice Commission[13] or by Council of Europe organs.[14]

5. It should be made clear that the guidelines apply to all referendums – national, regional and local – regardless of the nature of the question they concern (constitutional, legislative or other). Each reference to Parliament also applies to regional or local assemblies.

I. Referendums and Europe's electoral heritage

1. Universal suffrage

1.1. Rule and exceptions

6. The conditions for according the right to vote are normally the same for both referendums and elections. In particular, a period of residence requirement may be imposed on nationals solely for local and regional referendums, and should not exceed six months other than in exceptional circumstances (point I.1.1.c.iii-iv).

7. It is desirable that the right to vote be accorded to citizens residing abroad, at least for national referendums. It is important to ensure that this does not lead to fraud, however. Accordingly, it is preferable not to record such people on the same register as residents, but to allow them to vote abroad or from abroad; in addition, this will help ensure that they exercise their right to vote, which is unlikely if they have to return to their home country for the sole purpose of voting (point I.1.1.c.v).

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[13] CDL-AD(2005)043, Interpretive Declaration on the Stability of the Electoral Law.

[14] Recommendation Rec(2004)11 of the Committee of Ministers on legal, operational and technical standards for e-voting.

2. Equal suffrage

2.2. Equality of opportunity

8. Respect for equality of opportunity is crucial for both referendums and elections. While in elections equality must be ensured between parties and between candidates, simply replicating this principle in the case of referendums may lead to an unsatisfactory situation. In countries with popular initiatives or optional referendums, these are often not instigated by a political party, and may even propose an option that is rejected by the largest parties – such as reducing the number of members of Parliament or public funding of parties. Accordingly, the guidelines emphasise equality between the supporters and opponents of the proposal being voted on notably as concerns the coverage by the media, in particular in news broadcasts, as well as public subsidies and other forms of backing; in this framework, account may be taken of the number of political parties supporting each option or their election results (points I.2.2.a-e).

9. It would be unrealistic to require a perfect balance between a text's supporters and opponents in all cases. It may be that a degree of consensus emerges in one direction or the other – particularly in the case of a mandatory referendum on a proposal having required a qualified parliamentary majority. Supporters and opponents must always be guaranteed access to the public media, however. As long as this requirement is satisfied, account may be taken of the number of political parties supporting each option or of their election results, especially in news broadcasts (point I.2.2.c).

10. Similarly, it is advisable to ensure equality between the proposal's supporters and opponents in terms of public subsidies and other forms of backing. Such backing may be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate, provided that the support received by each side is balanced. If equality is ensured between political parties, it may be proportional, taking account of their election results. Allocating funds to the parties alone is not the ideal solution, however, as explained above (point I.2.2.d).

2.3. Equality and national minorities

11. As in the case of elections, there may sometimes be grounds for taking into account the specific circumstances of national minorities. In particular, this would apply to a referendum on self-government for a territory with a relatively high concentration of a minority population: a double majority of electors within that territory and throughout the country may be required.

3. Free suffrage

3.1. Freedom of voters to form an opinion[15]

12. In the case of elections, intervention by the authorities in support of a list or a candidate is unacceptable: their duty of neutrality is absolute. An authority must not use its position, or public funds, to stay in power; nor must it do so on behalf of its supporters in another organ.

13. The situation is different in the case of referendums, since it is legitimate for the different organs of government to convey their viewpoint in the debate for or against the text put to the vote. They must not abuse their position, however. In any event, the use of public funds for campaigning purposes must be prohibited in order to guarantee equality of opportunity and the freedom of voters to form an opinion. In addition, the public authorities at every level (national, regional or local), must not engage in excessive, one-sided campaigning, but show neutrality. Clearly, this does not mean they will not take a stand, but they must provide a certain amount of necessary information in order to enable voters to arrive at an informed opinion. Voters must be able to acquaint themselves, sufficiently in advance, with both the text put to the vote and, above all, a detailed explanation (point I.3.1.d):

- the best solution is for the authorities to provide voters with an explanatory report setting out not only their viewpoint or

[15] The term "voter" is used here in the broad sense: it refers to citizens (who may be foreign nationals) entitled to participate in a referendum.

that of persons sharing it, but also the opposing viewpoint, in a balanced way;

- another possibility would be for the authorities to send voters balanced campaign material from the proposal's supporters and opponents – corresponding, *mutatis mutandis*, to candidates' election addresses made available to citizens prior to some elections.

14. Both the text and the explanatory report or balanced campaign material must be sent directly to citizens sufficiently in advance of the vote (at least two weeks beforehand).

15. The clarity of the question is a crucial aspect of voters' freedom to form an opinion. The question must not be misleading; it must not suggest an answer, particularly by mentioning the presumed consequences of approving or rejecting the proposal; voters must be able to answer the questions asked solely by yes, no or a blank vote; and it must not ask an open question necessitating a more detailed answer. Lastly, electors must be informed of the impact of their votes, and thus of the effects of the referendum (is it legally binding or consultative? does a positive outcome lead to the adoption or repeal of a measure, or is it just one stage in a longer procedure?) (point I.3.1.c).

3.2. Freedom of voters to express their wishes

16. The paragraph on electronic voting has been brought into line with the new standards introduced by the Council of Europe through the adoption of Recommendation Rec(2004)11 of the Committee of Ministers on legal, operational and technical standards for e-voting (point I.3.2.a.iv).

17. Given the distinctive nature of referendums, in that they divide not only parties but also other groupings not seeking representation within elected organs, representatives of the proposal's supporters and opponents – including representatives independent of the parties – and observers appointed by both sides should have access to polling stations during both the voting itself and counting (points I.3.2.a.x and xiii).

18. The guidelines also emphasise another aspect of voters' freedom to express their wishes, which is also necessary in elections but is more likely to be violated in the case of referendums: voters must be allowed to express their wishes in accordance with rules prescribed by law, and have the right to accurate establishment of the result (see point I.3.2.b). In particular, the time-limit prescribed by law must be observed. In the case of a referendum or a popular initiative requested by a section of the electorate, the authorities may actually be tempted to draw the process out until the question is no longer relevant.

II. Conditions for implementing these principles

2. Regulatory levels and stability of referendum law

19. The wording of the guidelines is slightly less restrictive than the Code of Good Practice in Electoral Matters[16] as regards the requirement that all rules of referendum law – apart from rules on technical matters and detail – should have the rank of a statute, using the term "should" rather than "must". Where a referendum is requested by the executive, it is conceivable that the latter could set the rules for it. Such a situation is not entirely satisfactory, however, and the requirement for a procedural statute is the norm (point II.2.a).

20. The list of fundamental aspects of referendum law, which should not be open to amendment less than one year before a referendum, at least if they are set out in ordinary legislation, takes into account the specific nature of referendums by including rules on the procedural and substantive validity of texts put to a referendum and the effects of referendums. It also emphasises the need for rules on the franchise and electoral registers, and access to the public media for the proposal's supporters and opponents. In addition, it must be understood in the light of the Interpretive Declaration on the Stability of the Electoral Law adopted by the Venice Commission in 2005:[17] in particular, the stability of referendum law cannot be invoked to maintain a situation contrary to the norms of Europe's electoral heritage in the area of

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[16] CDL-AD(2002)023rev, II.2.a.

[17] CDL-AD(2005)043.

direct democracy or to prevent the implementation of recommendations by international organisations. Furthermore, given that it is unusual for the date of a referendum to be known a year or more in advance (whereas elections normally take place at set intervals), it is a matter not so much of prohibiting legislative amendments during the year preceding the vote as of prohibiting the application of such amendments during the year following their enactment, in case there are suspicions of manipulation (point II.2.b).

3. Procedural guarantees

3.1 Organisation of the referendum by an impartial body

21. Once again, the fact that referendums do not necessarily entail a divide along party lines but may involve other political players means a choice must be offered, as regards the membership of electoral commissions, between balanced representation of the parties and balanced representation of the proposal's supporters and opponents (point II.3.1.e).

3.2 An effective system of appeal

22. The appeal body's minimum powers are specified, insofar as respect for free suffrage and the results of the ballot are expressly mentioned. Other aspects specific to referendums and popular initiatives should be subject to judicial review, at least in the last instance: the completion of popular initiatives and requests for referendums from a section of the electorate, along with the procedural and, where applicable, substantive validity of texts submitted to a referendum. The review of validity, whether obligatory or optional, should take place before the text is put to the vote: this will avoid the people having to express their views – in vain – on a text that is subsequently ruled invalid because it is contrary to superior law (substantive invalidity) or the content of which breaches the requirements for procedural validity (point II.3.3.d, cf. points III.2-3).

23. Unlike elections, which take place in a number of constituencies, referendums involve a whole territory. Consequently, where partial annulment of the results does not affect the overall result, it must not give rise to a repeat ballot in the area in which the vote was annulled, since this would not lead to a different result. Unless the entire referendum is repeated, however, it must be possible to call a new partial referendum in part of the territory if the overall result is in question; careful consideration must be given to calling a new partial ballot rather than an entire new referendum, however, so as to avoid the massive concentration of campaign resources in a limited area (point II.3.3.e).

3.3. Funding

24. National rules on both public and private funding of political parties and election campaigns must be applicable to referendum campaigns (point II.3.4.a). As in the case of elections, funding must be transparent, particularly when it comes to campaign accounts. In the event of a failure to abide by the statutory requirements, for instance if the cap on spending is exceeded by a significant margin, the vote must be annulled[18]. It should be pointed out that the principle of equality of opportunity applies to public funding; equality should be ensured between a proposal's supporters and opponents (point I.2.2.d).

25. There must be no use of public funds by the authorities for campaigning purposes, in order to guarantee equality of opportunity and the freedom of voters to form an opinion (point II.3.4.b, cf. point I.3.1.b).

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[18] Cf . CDL-AD(2002)023rev, par. 107 ff.

III. Specific rules

1. The rule of law

26. The principle of the rule of law, which is one of the three pillars of the Council of Europe along with democracy and human rights[19], applies to referendums just as it does to every other area. The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. The use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed. On the other hand, referendums must be organised where the legal system provides for them (point I.3.2.b.i).

2. The procedural validity of texts submitted to a referendum

27. Procedural validity comprises three aspects: unity of form, unity of content and unity of hierarchical level.

28. The text submitted to referendum may be presented in various *forms*:

- a *specifically-worded draft* of a constitutional amendment, legislative enactment or other measure
- *repeal* of an existing provision
- a *question of principle* (for example: "Are you in favour of amending the Constitution to introduce a presidential system of government?") or
- a *concrete proposal*, not presented in the form of a specific provision and known as a *"generally-worded proposal"* (for example: "Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?").[20]

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[19] See the Preamble to the Statute of the Council of Europe (ETS 001).

[20] CDL-AD(2005)034, par. 64.

29. A "yes" vote on a specifically-worded draft – at least in the case of a legally binding referendum – means a statute is enacted and the procedure comes to an end, subject to procedural aspects such as publication and promulgation. On the other hand, a "yes" vote on a question of principle or a generally-worded proposal is simply a stage, which will be followed by the drafting and subsequent enactment of a statute. Combining a specifically-worded draft with a generally-worded proposal or a question of principle would create confusion, preventing electors from being informed of the import of their votes and thereby prejudicing their free suffrage.

30. An even more stringent requirement of free suffrage is respect for *unity of content*. Electors must not be called to vote simultaneously on several questions without any intrinsic link, given that they may be in favour of one and against another. Where the revision of a text covers several separate aspects, a number of questions must therefore be put to the people. However, total revision of a text, particularly a Constitution, naturally cannot relate solely to aspects that are closely linked. In this case, therefore, the requirement for unity of content does not apply. Substantial revision of a text, involving a number of chapters, may be regarded as being equivalent to total revision; clearly, this does not mean the different chapters cannot be put separately to the popular vote[21].

31. The rule of *unity of hierarchical level* is not as crucial as the previous two rules. It is desirable, however, that the same question should not simultaneously apply to legislation of different hierarchical levels, for example a constitutional revision and the associated implementing Act.

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[21] The option of classifying a revision involving several chapters as a total revision may seem like a means of circumventing the unity of content rule. This overlooks the fact that a total constitutional revision often involves a more complicated process than a partial revision.

3. The substantive validity of texts submitted to a referendum

32. Under the principle of the rule of law, the people are not exempt from compliance with the law. This applies to both procedural aspects and the substance of texts put to the vote, which must comply with all superior law. Legislative referendums must therefore comply with the Constitution; referendums within federated or regional entities must comply with the law of the central State.

33. Irrespective of what national law has to say about the relationship between international and domestic law, texts put to a referendum must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

34. In order to prevent unlawful referendums, texts that are procedurally or substantively invalid must not be put to a referendum.

4. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution)

35. (Optional) referendums held at the request of a section of the electorate and popular initiatives entail the collection of signatures. The guidelines set out a number of rules in this respect, not all of which will be discussed in detail here.

36. Entitlement to collect signatures must not be confined to registered electors, but apply to everyone, including foreigners and minors (particularly in respect of texts concerning their status) (point III.4.c).

37. Authorisation may be required in order to gather signatures on public thoroughfares. As with any restriction of fundamental rights, such authorisation may be refused only where there is a legal basis for doing so and in accordance with the principles of public interest, proportionality and equality (point III.4.d).

38. The collection of signatures should not be remunerated or funded from private sources. Where remuneration is permitted, it must apply only to those who collect signatures, and not to electors who sign a popular initiative or a request for a referendum; it must be regulated, with regard to both the total amount allocated and the amount paid to each person collecting signatures (point III.4.e).

39. It is important that all signatures are checked (point III.4.f). The success or failure of an initiative or a request for a referendum must not be determined on the basis of a sample, which might contain an unusually high number of invalid signatures or, on the contrary, might not contain any while other sheets of signatures might be full of them. At the very most, some signatures need not be checked once it has been established beyond doubt that the number of valid signatures required by law has been collected[22].

40. In addition, a popular initiative – or a request for a referendum – should be declared partially invalid where it is possible to modify the proposed text, without distorting it, so that it complies with the law. An authority must have the power to correct a question that is obscure or misleading or suggests an answer. In the event that the rules on procedural or substantive validity have been violated, it may also declare partial invalidity where the signatories would have approved the remaining part if it had been submitted on its own, or declare the sub-division of a text that is not consistent with unity of content, form or hierarchical level.

5. Parallelism in procedures and rules governing the referendum

41. When the referendum is legally binding, the authorities must respect the people's decision. The guidelines provide, for instance, that for a certain period of time (a few years at the most) a text rejected in a referendum may not be adopted by a procedure without referendum. An optional referendum at the request of a section of the electorate is

[22] In relation to the submission of candidatures for elections, cf. CDL-AD(2002)023rev, I.1.3.iv.

regarded as a referendum procedure: unless such a referendum is requested, a text rejected the first time round may therefore be adopted without a popular vote (points III.5.a.i and v). A similar rule applies to the revision of a provision approved in a referendum (point III.5.a.ii).

42. Two exceptions are provided for:
- where the Constitution provides for a referendum on a total revision of a text (in practice, the Constitution itself) but not on partial revision, a partial revision of that text does not necessarily have to be put to a popular vote (point III.5.a.iii);
- Parliament may revise a rule of law superior to that adopted by the popular vote without a referendum; it is entitled to do so in accordance with the principle of hierarchy of legal rules[23], but this should be avoided for a certain period of time (point III.5.a.iv).

43. The foregoing does not apply to consultative referendums, which are not legally binding on the authorities. The political wisdom of Parliament going against the wishes of (the majority of) the people is clearly another matter.

44. The adoption of a text at the request of an authority other than Parliament, such as the head of state or government, must not freeze the legal situation indefinitely. Accordingly, the guidelines provide that such a text may be revised either by parliamentary means or at the request of a section of the electorate, where applicable after the expiry of a certain period of time (point III.5.c). When a text is adopted as the result of a popular initiative, it must be possible for the people to pronounce on the issue again at the request of another popular initiative, at least after the expiry, where applicable, of a certain period of time (point III.5.b).

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[23] CDL-INF(2000)013.

45. Constitutional rules relating to referendums should enjoy direct popular legitimacy, ie they should be put to a referendum, compulsorily or at the request of a section of the electorate. In any event, should Parliament wish to introduce a measure limiting popular rights, it should have the power to do so only by means of a measure submitted to one of these forms of referendum (point III.5.d).

6. Opinion of Parliament

46. In the case of popular initiatives, it is important for the people to be informed of Parliament's opinion. Accordingly, the guidelines provide for Parliament to give its opinion. Where Parliament opposes a text but wishes to take a step in a similar direction, it is very helpful if it can put a counter-proposal to the popular vote at the same time[24].

47. Parliament's opinion is all the more necessary when the referendum is requested by the executive. In such cases, it is important to ascertain whether the call to the people is designed to bypass Parliament. Electors must be informed of Parliament's position.

48. Consultation of Parliament must not give rise to delaying tactics. The law must therefore set a deadline for Parliament to give its opinion, and a deadline for the popular vote to take place, where necessary without Parliament's opinion if the latter has not given it in time.

49. In the case of regional or local referendums, the regional or local assembly shall take over the role played by Parliament at the national level.

7. Quorum

50. Based on its experience in the area of referendums, the Venice Commission has decided to recommend that no provision be made for rules on quorums.

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[24] The issue of voting procedures where a popular initiative and a counter-proposal are put to the popular vote is highly specific, which is why the guidelines do not comment on it.

51. A turn-out quorum (minimum percentage) means that it is in the interests of a proposal's opponents to abstain rather than to vote against it. For example, if 48% of electors are in favour of a proposal, 5% are against it and 47% intend to abstain, the 5% of opponents need only desert the ballot box in order to impose their viewpoint, even though they are very much in the minority. In addition, their absence from the campaign is liable to increase the number of abstentions and thus the likelihood that the quorum will not be reached. Encouraging either abstention or the imposition of a minority viewpoint is not healthy for democracy (point III.7.a). Moreover, there is a great temptation to falsify the turn-out rate in the face of weak opposition.

52. An approval quorum (acceptance by a minimum percentage of registered voters) may also be inconclusive. It may be so high as to make change excessively difficult. If a text is approved – even by a substantial margin – by a majority of voters without the quorum being reached, the political situation becomes extremely awkward, as the majority will feel that they have been deprived of victory without an adequate reason; the risk of the turn-out rate being falsified is the same as for a turn-out quorum.

8. Effects of referendums

53. If electors are to cast an informed vote, it is essential for them to be informed of the effects of their votes; it must therefore be clearly specified in the Constitution or by law whether referendums are legally binding or consultative (point III.8.a, cf. point I.3.1.c on free suffrage).

54. Where a legally binding referendum concerns a question of principle or a generally-worded proposal, it is up to Parliament to implement the people's decision. Parliament may be obstructive, particularly where its direct interests are affected (reducing the number of members of Parliament or the allowances paid to them, for example). It is preferable, therefore, for referendums on questions of principle or generally-worded proposals to be consultative. If they are legally binding, the subsequent procedure should be laid down in specific constitutional or legislative rules. It should be possible to appeal before the courts in the event that Parliament fails to act (point III.8.b).

The conference on "Electoral Law and Practice in Council of Europe Member States" was organised by the Venice Commission in co-operation with the Institute of European Law of the State Institute of International Relations (MGIMO University) in Moscow on 28 – 29 April 2008. The reports focused on the comparative analysis of electoral systems in the countries of the Council of Europe and on the Russian political practice in the context of international electoral standards and the judicial protection of the electoral rights. During the discussion the participants had a fruitful exchange of views on a wide range of issues focussing on implementation of international standards in the electoral field in national legislation and practice.

The conference was attended by international experts and approximately 50 participants coming from different Russian public institutions and NGOs, as well as professors of law.