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European Standards of Electoral Law in Contemporary Constitutionalism

UniDem Seminar organised in Sofia on 28-29 May 2004 in co-operation with the Constitutional Court of the Republic of Bulgaria

TABLE OF CONTENTS

This publication contains the reports presented at the UniDem Seminar organised in Sofia on 28-29 May 2004 by the European Commission for Democracy through Law in co-operation with the Constitutional Court of the Republic of Bulgaria.

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

INTRODUCTORY ADDRESS

Mr Gianni BUQUICCHIO
Secretary of the Venice Commission

Mr Chairman, ladies and gentlemen,

I am delighted to have the opportunity to speak at this seminar on European standards of electoral law and contemporary constitutionalism. To begin with, I should like to thank the Constitutional Court of Bulgaria, which has taken the initiative of organising this forum and receiving us in Sofia today.

Since the fall of the Berlin Wall, Bulgaria has entered upon a course of integration with European structures and has proclaimed and given proof of its attachment to democratic values such as the rule of law, the protection of human rights, and the participation of all citizens in public life through free elections. Fifteen years later an enormous amount has been achieved but, as in any country, democracy does not stand still: new challenges arise, new tasks emerge and the work of "constitution building" continues.

Bulgaria has now become a member of Nato and is preparing to join the European Union. This is a further step towards the country's integration in Europe, opening up new horizons in the social, legal, economic, political and other fields. It is true that, to this end, further systems of cooperation will be established. However, this cannot lessen the importance of cooperation with other European institutions such as the Council of Europe and the OSCE – of which Bulgaria currently holds the chairmanship – and with other organisations.

As you know, I represent an institution which has longstanding relations with the Republic of Bulgaria and especially its Constitutional Court. Our co-operation dates back to 1991, when the Constitution of the Republic of Bulgaria was being drafted.[1] Other Commission opinions prepared at the request of the Bulgarian authorities have concerned, amongst other things, the Popular Consultation Bill (1996),[2] the Administrative Court Act (1996),[3] and more recently the reform of the judicial system (2003).[4] The Constitutional Court of Bulgaria is actively involved in the work of the Joint Council on Constitutional Justice and the *Bulletin of Constitutional Case-Law*. The Venice Commission hopes that this cooperation will become deeper and more extensive in the future.

Ladies and gentlemen, friends, the subject that brings us together round this table today is of cardinal importance for every democratic European state and in the context of extending the European Union to the whole of our continent. Elections reflect the degree of democratic maturity because they affect all citizens. Nowadays it is clearly asserted in all European constitutions that the only legitimate source of power is universal suffrage, inasmuch as sovereignty – that is, the power to determine freely the rules of social existence – belongs neither to one man nor to one party but resides in the people. The five key principles of electoral law − universal, equal, free, direct and secret suffrage − are firmly established in Europe's constitutional heritage. They are at the root of democracy, which itself is one of the three pillars of the legal culture enshrined in the Statute of the Council of Europe. However, the existence of shared fundamental values does not preclude practical differences in the ways in which they are expressed; national electoral systems vary greatly, and each country chooses the voting system that suits it best. At the same time this diversity must not prevent us from losing sight of the most important thing, as enshrined by the organs of the European Convention on Human Rights and developed by national constitutions: the establishment and protection of democratic institutions founded on popular sovereignty.

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1 See the Venice Commission document : *Draft Constitution of the Republic of Bulgaria* (CDL(1991)014).

2 *Opinion on the Bulgarian draft law on popular consultation* by Mr Ergun Özbudun, Turkey (CDL(1996)002) and by Mr Jacques Robert, France (CDL(1996)004).

3 *Opinion on the Bulgarian law on the Administrative Court* by Mr Klaus Berchtold, Austria (CDL(1996)008) and by Mr Anti Suviranta, Finland (CDL(1996)010).

4 *Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria adopted by the Venice Commission at its 56th Plenary Session (Venice, 17-18 October 2003)* (CDL-AD(2003)016).

The Venice Commission attaches particular importance to European electoral law. In 2002, in cooperation with the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, it set up the Council for Democratic Elections, whose main task is precisely cooperation in the electoral field. One of the first documents to be drawn up by this council was the Code of Good Practice in Electoral Matters, which brings together and codifies the basic European principles for organising free and democratic elections.[5] These norms of European electoral heritage are in the first place the standard constitutional principles of electoral law: universal, equal, free, secret and direct suffrage, together with elections at regular intervals. Stated thus, these principles are largely uncontroversial; this not the case, however, when it is a matter of specifically defining their substance. For example, free suffrage comprises two different aspects: voters' freedom to form an opinion and their freedom to express their wishes. The former aspect, the freedom of voters to form an opinion, is often neglected but requires the neutrality of the public media, for example, which is still far from the case in general. As for the second aspect, the freedom of voters to express their wishes, it requires scrutiny of voting procedures that must be more than just superficial: under which circumstances is postal, proxy and electronic voting allowed? I shall not go into further detail here; I simply wanted to show how something that may seem basic at first sight is often more complicated than we think. Observance of the above-mentioned principles (universal, equal, free, secret and direct suffrage, and regular elections) is necessary for properly conducted elections but not in itself enough: certain basic conditions must be met. One of these is the organisation of elections by an impartial body – i.e. by independent, impartial electoral commissions, except where the administrative authorities have a long-standing tradition of independence from the political authorities. In particular, there must be a certain party-political balance within electoral commissions. An effective system of appeal is also essential, since any rule that cannot be sanctioned by an authority is only *lex imperfecta*, and electoral law is no exception. Another basic condition is respect for human rights, and in particular freedom of expression and freedom of assembly and association for political purposes.

The Code of Good Practice in Electoral Matters was approved in 2003 by the Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of the Council of Europe. In 2004 the Committee of Ministers expressed support for it in a declaration. This endorsement by the statutory bodies of the Council of Europe gives it a very important place in the list of European documents of reference.

Everybody is aware of the essential role played by the judiciary and, in particular, the constitutional courts in guaranteeing free elections. The case-law of national courts is rich and varied and not only serves to develop the constitutional heritage of a particular state but continues constantly to enrich European constitutional heritage as a whole. The Venice Commission enjoys the privilege of following this process through the Codices database and its programmes of cooperation with the constitutional courts.

Since its inception the Venice Commission has earned a solid reputation as a capable and reliable partner in the fields of both constitutional justice and electoral law. However, this is the first time that it has helped to organise a forum bringing together representatives of

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5 *Code of Good Practice in Electoral Matters*, Science and Technique of Democracy, No. 34, European Commission for Democracy through Law, Council of Europe, Strasbourg.

constitutional courts and specialists in electoral law to discuss the subject of the European electoral heritage.

This seminar thus sees a convergence of two of the Venice Commission's main fields of activity: constitutional justice and electoral law, which in the broad sense both come under constitutional law, for which the Commission is responsible. It should be emphasised that this is the first time since 1995 that a seminar has been devoted to a juxtaposition of these two topics; moreover, the seminar held at that time in Strasbourg did not concern constitutional courts directly but related to democracy by referendum. To all intents and purposes, this is the first time that we have addressed this question which is so basic to democracy.

It is not by chance that this work is occurring in 2004. Current discussions concerning the European Constitution and the enlargement of the European Union betoken the start of a new chapter in European history. This development draws its strength from the shared constitutional heritage that we are all called upon to promote, and there is no doubt that the legitimacy of the representative bodies of this new Europe will be firmly grounded in our common electoral heritage. It is essential to exchange experience in this field in order to be able to work together coherently for this new European future.

Mr Chairman, ladies and gentlemen, I am delighted to see in this room many friends with whom we have already worked on a number of occasions, and I am sure that our exchange of knowledge and experience during this seminar will be very fruitful and that many of us will be able to use the results in our future work. I wish you the best of luck in your work today and tomorrow, and I thank you for your attention.

INTERNATIONAL AND EUROPEAN LEGAL STANDARDS CONCERNING PRINCIPLES OF DEMOCRATIC ELECTIONS

Professor Evgeni TANCHEV
Judge, Constitutional Court of the Republic of Bulgaria

I. Introduction

Contemporary representative government evolved from three ideas and social processes – limitation of absolutism, legitimation of government by popular sovereignty and delegation of power for a limited period of time by the people to legislative assemblies to be checked by regular, free, fair and democratic elections.

Today not a single politician or scholar would contest that any democratic representative government should be founded on elections.[6] The triumph of democracy made elected representation as undeniable and irreversible a constellation as the axiom that there can be no

[1] "It is often assumed, either through bad faith or inattention, that only a mandatory can be a representative. This is an error. Children, fools and absentees are represented every day in the courts by men who hold their mandate from the law only, moreover the people eminently combine these three characteristics, for they are always childish, always foolish, and always absent. So why should their tutors not dispense with their mandates?", J. De Maistre, *Considerations on France*, Montreal, 1974, p. 70.

taxation without representation which laid the foundations of parliaments and imposed limits on monarchical sovereignty and raison d'état during the Middle Ages.

It took centuries of human civilisation to arrive at these axiomatic constitutional principles and to fill them with democratic content to transform elections into the cornerstone of the procedural legitimation of democratic government.

Democracy, human rights and the rule of law[7] have been treated as the three main pillars of European constitutional heritage.[8]

The introduction of international standards in elections is an important democratic safeguard aimed at preserving the genuine democratic character of representative government. Enforcing standards will rule out partisan temptation to distort the popular vote, which has been present from the earliest and most primitive forms of franchise and electoral procedures.

Ever since antiquity rulers have been tempted to take advantage through electoral abuse to distort the true reflection of voter preferences in order to ascend to or to prolong their stay in government.[9] Although deformations have gone hand in hand with even the most primitive modes of magistrate selection, the rules that determine the vote cannot in principle wholly determine the outcome of the election and should not be exaggerated. Moreover, the adequate reflection of popular will in the outcome of elections, exclusion of subversion of majority preferences to minority of representation in the composition of parliament or in presidential elections should become an exponent in the history of governmental institutions museum.

Elections have been treated as an instrument to constitute political institutions, particularly parliaments and presidencies when they are elected by the people and/or through the direct participation of the people in government. If the first, instrumental meaning is overexposed the elections are interpreted in a purely technical manner.[10] The principal merit of this approach is

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2 For the difference between the principles of the rule of law and rechtsstaat see F. Neuman, The Rule of Law, Berg, 1986, pp. 179-187; F. Neuman, *Democratic and Authoritarian State*, 1957, Free Press, pp. 43-47; *The Rule of Law*, eds. A. Hutchinson, P. Monahan, Toronto, 1987; E-W. Bockenforde, State, *Society and Liberty*, Oxford, 1991, pp. 47-70; For international standards of the rule of law see *The Rule of Law and Human Rights, Principles and Definitions, International Commission of Jurists*, Geneva, 1966; R. Grote, *Rule of Law, Rechtsstaat and Etat de Droit, in Constitutionalism, Universalism and Democracy*, ed. C. Staarck, Nomos, Baden-Baden, 1999, pp. 269-365; For the different approach of Scandinavian jurisprudence see K. Olivecrona, *Law as a Fact*, Oxford, 1939, pp. 28-49.

3 See Explanatory Report, adopted by the Venice Commission at its 52nd Plenary Session, Venice, pp. 18-19 October 2002, I, 3 and 4, in *Code of Good Practice in Electoral Matters*, Science and Technique of Democracy, No. 34, the European Commission for Democracy through Law, Council of Europe, Strasbourg, 2003, p. 19; See also D. Rousseau, The Concept of European Constitutional Heritage, in *The Constitutional Heritage of Europe*, Science and Technique of Democracy No. 8, European Commission for Democracy through Law, Council of Europe, Strasbourg, 1997, pp. 16-35, pp. 21-24.

4 The more primitive the electoral system, the more primitive the distortions were. Maybe the most amusing story from antiquity of the election malpractice is described by Herodotus when the Persian king was to be selected from among seven members of the nobility. They decided to ride on their horses through the city and to consider elected the rider of the horse that neighed after dawn when reaching a certain place. Darius' groom was a cunning person. He hid Darius' favourite mare near the place where the contest was to be decided. The only horse that neighed when the seven nobles were passing the place was Darius'. Herodotus, The Histories, New York, 1977, Book III, pp. 240-241.

5 Elections are but another technique, like an appointment, drawing a lot, competition, etc., and apply to democratic constitutional systems as usurpation, heredity or inheritance of power apply to despotic regimes. If

the emphasis of the linkage between the nature of elections and the essence of the institutions brought into existence by the elections. The composition of representative assemblies has depended to some extent on the type of the electoral system. Political parties in power have been tempted to adopt electoral systems that might increase their representation in political institutions. However, one should not rely on the electoral system to shape electoral preferences and translate them into parliamentary seats. For the mechanism of the elections might distort the measurement of public preferences and bring a partisan bias to the allocation of parliamentary seats, but no electoral law based on democratic principles can make a party running low in the public opinion polls the winner of the elections.

The casting of ballots or standing for election have been treated as modes of direct participation in government through the people's voting rights. Free, democratic, pluralistic and competitive elections are the foundation of the modern constitutional regime whereby government is legitimated by the consent of the majority of the governed. In this line of thinking elections channel people's preferences like the other modes of direct democracy – imperative referendum, consultative referendum, popular initiative, plebiscite, recall, popular veto or ratificatory referendum.
Under the instrumental approach voting rights have been labelled as a public function or a duty performed by the voters in order to establish the representative government. Within the context of the second approach voters are holders of their sovereign rights in the elections and they are free in the way they might exercise or abstain from exercising them.

In political theory and legislative practice active voting (casting of a ballot) and passive franchise (standing for election) have been interpreted as:

- a fundamental political right, channelling citizens' direct participation in government;

- a public function, being a mode of constituting representative government for the public good, and a duty citizens should not refrain from;

- a *sui generis* political right combining the freedom to take part in government and the obligation to form representative institutions.[11]

II. The essence and meaning of international and European standards in the area of elections

International democratic standards in the area of human rights and institution building are indispensable safeguards of sustainable democratic political and legal systems in post-second world war constitutional development. In the era of globalisation contemporary nation states are recognised by the international community as democracies if they implement and respect these standards.

The term "standard" has been understood as a guide for behaviour and for judging behaviour. Standards have been established by authority or have gradually evolved by custom or

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we start speculating on a value-neutral ground all these methods of forming institutions have something in common and differentia specifica as well. Using one of them one could reformulate the others by the chosen one using it as a matrix and adding differentia specifica.

[6] S. Balamezov, *Constitutional law*, Sofia, 1940, т.II, pp. 86-90; E. Drumeva, Constitutional law, Sofia, 1998, pp. 219-221.

consensus. The concept of international standards connotes some universally, generally accepted canons of behaviour for states, corporations and individuals.[12]

However paradoxical it might seem at first glance, the genesis of international standards is to be found in the constitutional values and principles of the democratic nation state. All of the standards have roots in democratic constitutional development and European standards emanate from the common European heritage. By consenting to the values and principles that have evolved in the old western democracies they have become elements of international treaty law. By applying the *pacta sunt servanda* rule the emerging democracies in the member states of the Council of Europe transplant these standards into their national constitutional orders and accelerate national democratic institution building and development.

Sometimes the process of implementing international standards under national constitutional systems might experience difficulties due to the controversies and different binding force of standards proposed by the increasing number of actors in international lawmaking, since the realm of supranational regulatory systems is no longer solely determined by states but is also influenced by intergovernmental universal or regional organisations, non-governmental organisations, professional associations and transnational corporations. While in the past legal science had to promote the need of establishing international standards, today it is challenged by the need to cope with proliferation of standards and provide unification and convergence of standards.

The impact of international and European legal standards has been approached from many points of view. According to the intensity of obligation and binding force of the international and European legal standards one can trace at least three ways of influencing national constitutional development through implementation and enforcement of standards.

International standards belong to the area and can be found in the soft law or non-treaty agreements. In this case they have been characterised as non-binding commitments which are instrumental on the way to "hardening" international law or precursors of international treaties to full-fledged legalisation.[13] The legal instruments can be classified according to their legal binding or non-binding effect on one hand, and according to their normative or inspirational effect on the other, when law and non-law are regarded as opposing ends of the commitment continuum.[14] It is generally agreed that in spite of the opinion that treaties are classic binding international law instruments, legal standards and soft law might have certain advantages and is to be preferred in some areas and in certain moments to hard law.

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7 H. Morais, Symposium: Globalisation and Sovereignty*: The Quest for International Standards: Global Governance vs. Sovereignty*, 50 Kansas Law Review 2002, pp. 779-780.

8 D. Shelton, *Commitment and Compliance: What Role for International Soft Law?* www.ceip.org/programs/global/semshelton.htm; H. Hillgenberg, A Fresh Look at Soft Law, European Journal of International Law, 1999, vol. 10 N. 3, pp. 499-515; Soft law might be treated as a product of changing patterns of globalisation which transform the state pushing towards emergence of regulatory standards that go beyond national boundaries, see K. Jayasuriya, Globalization, International standards and the Rule of Law: A New Symbolic Politics, WP N 24, March 2002, p. 5.

9 See D. Shelton, matrix of legally binding and non-legally binding instruments where law is defined as a binding legal act and in non-compliance legal action will take place, hortatory – law with normative elements but very weak obligations, commitment being a political or moral obligation that is not legally binding and freedom of action where no commitment is present, ibid., p. 2.

Among the merits of soft law one certainly should not fail to mention:

- effectiveness in dealing with new legal standards or norms;

- the need to stimulate consensus building and content of the international standards which are still in flux;

- making of preliminary flexible regimes for still developing standards and norms;

- efforts to co-ordinate and unify the standards created by different international actors proposing different systems of international standards;

- simplification of procedures to facilitate rapid finalisation;

- avoidance of cumbersome domestic procedures for treaty approving and implementation of international standards and norms in national legislation and maintaining low costs of their implementation in municipal law;

- easing inclusion by securing openness to non-state partners to join the non-treaty agreement or parties which are not recognised by the original parties establishing the non-treaty agreement.[15]

The most typical method of tackling the issue of international legal standards is by approaching them from international and comparative law perspectives. Fourth generation national constitutions[16] have been drafted in a globalised world in which the primacy of international law has become an element of the rule of law. The constitutions of the emerging democracies adopted after the fall of the Berlin wall reflect international standards and include special provisions on the supremacy of international law. If these international standards, especially in the area of elections, are integral parts of the treaties they are transplanted into the national legal order after states adhere to the treaties.

The systems of implementing the treaty obligations, however, are different due to the choice of monistic or dualistic systems in the national constitutions.[17] Incorporation of the treaty provisions and international standards provided in the treaties follows two types of procedures.[18]

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[10] See H. Hillgenberg, *A Fresh Look at Soft Law*, European Journal of International Law, 1999, vol. 10 No. 3, pp. 499-515, Articles 501-502.

[11] See S. E. Finer, Notes *Towards a History of Constitutions*, in Constitutions in Democratic Politics, ed. V. Bogdanor, Aldershot, 1988, pp. 17-32; also *Constitutions and Constitutional Trends Since World War II*, ed. A. Zurcher, Greenwood Press, 1955.

[12] See for different legal orders in dualistic system and integrating both legal orders in monism M. Kumm, Towards a Constitutional Theory of the Relationship between National and International Law Parts I and II, National Courts and the Arguments from Democracy, pp. 1-2, www.law.nyu.edu/clppt/program2003/readings/kumm1and2.pdf; L. Wildhaber, *Treaty-Making Power and the Constitution*, Bazel, 1971, pp. 152-153.

[13] P. van Dijk, GJ.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Boston, 1990, pp. 11-12; A. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford, 1985, pp. 33-35.

According to the monistic system, dominant in Europe, the international treaty becomes an integral part of national law after being ratified. When a country has adopted dualism implementation of treaty obligations can take place not by ratification but by drafting a special law or including a provision in the existing national legislation.

Comparative analysis of European systems demonstrates another type of difference due to the position of the international treaties in the national legal order. In some countries like Belgium, Luxembourg and the Netherlands the international treaty provisions have supranational effect and are placed above the legal system, superseding the authority of constitutional norms.

According to the constitutional practice of other countries like Austria, Italy and Finland the treaties, having been ratified with a parliamentary supermajority, have the same legal binding effect as constitutional provisions.

The third type of implementation of treaty obligations, under the monistic system in Europe, places them above ordinary parliamentary legislation but under the national constitutions according to their legally binding effect. This is the current practice in Bulgaria, Germany, France, Greece, Cyprus, Portugal, Spain and others.

In the Czech Republic, Lichtenstein, Romania, the Russian Federation and the Slovak Republic only the treaties relating to human rights are placed above ordinary legislation.[19]

The primacy of international law standards should always be regarded as a minimum, and if in the area of human rights and electoral law national constitutions establish more democratic standards the national provisions should be preferred and would not be considered a breach of the treaty in question.

The Bulgarian Constitution of 1991 proclaims the primacy of international law treaties which have legally binding force and supersede contradicting provisions of the national legislation. Under the monistic approach international treaties, constitutionally ratified, promulgated, and having come into force for the Republic of Bulgaria, are a part of the domestic law of the country. They take precedence over any conflicting laws under domestic legislation.

The Constitutional Court of the Republic of Bulgaria, in an interpretative ruling, has extended the validity of this constitutional provision, that is Article 5, paragraph 4, to include all the treaties which were signed before the entry in force of the constitution if they fulfil the requirements of Article 5, paragraph 4.[20]

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[14] C. Economides, *The Elaboration of Model Clauses on the Relationship between International and Domestic Law*, The European Commission for Democracy Through Law, Council of Europe, 1994, pp. 91-113, pp. 101-102; L. Erades, *Interactions between International and Municipal Law*, T.M.C. Asser Institute – The Hague, 1993; The French Legal System: An Introduction, 1992, 45; Вж Й. Фровайн, Европейската конвенция за правата на човека като обществен ред в Европа,София, 1994, 32; Вж също така Л. Кулишев, Прилагането на Европейската конвенция за правата на човека в българския правен ред, сп.Закон, бр. 2, 1994, pp. 3-25.

[15] The Constitutional Court of Bulgaria ruled that the legal effect of treaties signed and ratified before the 1991 Bulgarian Constitution entered in force is determined by the regime that was in effect at that time and especially according to the requirement for their publication. The treaties are part of the Bulgarian legal system if they are published or if there was no requirement to be published. If they are not published they do not have primacy to the contravening provisions of the national legislation. They might acquire the superseding effect

Interpretation of Article 85, paragraph 3 and Article 149, paragraph1.4 in connection with Article 5, paragraph 4 makes it clear that the 1991 Constitution of Bulgaria has situated treaties only second to itself but above all national legislation.[21] In this way the primacy of international law has complied with the requirements of Article 2 of the UN Charter respecting the nation state's sovereignty. Of course, the supranational, direct, immediate and horizontal effect of EU law will require the introduction of an EU clause in the Bulgarian Constitution providing for transfer of sovereign powers to the EU and its institutions.

The process of implementing a treaty establishing international standards in the national legal system is different from the interaction between the EU legal order and EU member state legal orders. If a European standard is provided by the EU constitution or primary law, due to the transfer of sovereignty it prevails over the national constitutional norms and has legal binding effect after the EU member states have been notified. That is why the implementation of international legal standards bears no similarity to the obligation to comply with *acquis communautaire* in adapting national constitutions and approximation of legislation in order to provide supranational direct immediate and horizontal effect of primary and institutional EU law. This follows from EU law's supranational, direct, immediate and universal effect on all national legal subjects within the territory of European Union member states.[22]

Last but not least, the establishment of international standards might be approached within the context of emerging global and societal constitutionalism. In order to estimate the significance of international legal standards in the area of human rights and particularly in the electoral law within the context of global and societal constitutionalism, the essence of these new phenomena should be clarified in advance.

The term global constitutionalism has received a wide range of connotations.

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over the contravening norms of Bulgarian legislation from the moment of their official publication. вж. Мотиви на Решение N 7 от 1992 г. по к.д. N 6 1992, ДВ, N 56, от 1992 г.

16 Article 85. (1) The National Assembly ratifies or denounces with a law international treaties that: 1. Are of a political or military nature; 2. Concern the participation of the Republic of Bulgaria in international organisations; 3. Call for corrections to the borders of the Republic of Bulgaria; 4. Contain financial commitments by the state; 5. Stipulate the participation of the state in any arbitration or court settlement of international disputes; 6. Concern basic human rights; 7. Affect the action of a law or require new legislation for their implementation; 8. Specifically require ratification. (2) Treaties ratified by the National Assembly may be amended or denounced only in accordance with the procedures stipulated in the treaties themselves or in accordance with the universally accepted provisions of international law. (3) The signing of international treaties that require constitutional amendments must be preceded by the passage of such amendments.

Article 149. (1) The Constitutional Court: 4. Rules on the consistency between the international treaties signed by the Republic of Bulgaria and the Constitution, prior to their ratification, as well as on the consistency between the laws and the universally accepted standards of international law and the international treaties to which Bulgaria is a signatory.

17 These undoubted characteristics of European law were formulated by the Court as early as the beginning of the 1960s, N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos, v. Netherlands Fiscal Administration; Case 26/62; Costa v. Enel; Case 6/64. See in detail E. Stein, Lawyers, Judges and the Making of a Transnational Constitution, American Journal of International Law, vol. 75, January 1975, No. 1, pp. 1-27; P. Pescatore, The Doctrine of Direct Effect, European Law Review, 8, 1983, pp. 155-157; J. Weiler, The Community System: the Dual Character of Supranationalism, Yearbook of European Law 1, 1981; A. Easson, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI, Florence, 1994-1995.

It has been approached from the comparativist perspective as an instrument of analysis of constitutionalism within the different national models of constitutional government in the world and within the symbiosis of the constitutionalisation of power relationships in contemporary globalisation processes.[23]

Globalisation of constitutionalism and adopting a constitution for a non-state entity has been treated in the context of unwritten constitutions within the founding treaties and in the context of the written constitution drafted by the EU convention. Another glimpse at the standards of elections concerns the relationship between the EU constitution and adapting the national constitutions of EU member states, i.e. the constitutional *acquis*.

In the last decade scholars have made attempts to describe a new phenomenon or a new stage in the development of constitutionalism emerging on a global level.[24] They have treated the global as but another form of governance where power, in order to meet benchmarks of democracy, has to be framed by constitutional restraints.[25] Supremacy of international law, the increasing role of many international organisations like the WTO, and the development of human rights legal instruments at a supranational level might be considered as different streams forming the fabric of global constitutional beginnings posing limitations on the actors of the emerging global governance. However, it would be exaggeration and oversimplification to look for supremacy of the global rule of law for an emerging unwritten constitution. International legal standards are within this context a linkage between national and global constitutionalism. They provide compliance of different legal orders of contemporary constitutional pluralism. The intensity of legal binding is strongest within national constitutionalism, it is present in the federalist context and it has been in the process of affirming the relationship between the EU constitution and the constitutions of the member states. In the global constitutionalism there is some compatibility of democratic standards but not a hierarchy of constitutional orders. Globalisation is still looking for its own constitutional order and the rule of law and global standards interaction with national constitutional orders has still to rely on the *pacta sunt servanda* principle. Due to this fact the significance of international legal standards increases since they are compensation for the weaker binding legal force of emerging supranational constitutionalism at a global level.

Following M. Maduro's recent piece where he offers a three-pillar construct of constitutions in a national and global context we can look at the international standards as a fourth pillar through which the emerging global restraints on governance are transposed to national constitutionalism as a universal criteria for constitutional governance.[26]

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[18] See for the best papers in this field with analysis of post-Second World War trends T. Fleiner, *Five Decades of Constitutionalism*, in Publications de l'Institut de Fédéralisme, Fribourg, Suisse vol. 5, 1999, pp. 315-344; also his Ageing Constitution, paper to the conference *The Australian Constitution in Retrospect and Prospect*, Perth, 21-23 September 2001; B. Ackerman's seminal article *The Rise of World Constitutionalism*, Virginia Law Review, May 1977, No. 83, pp. 771-798.

[19] Л. Ферайоли, Отвъд суверенитета и гражданството. За един световен конституционализъм, Съвременно право, 1995, кн. 4, pp. 70-78.

[20] One of the best liberal definitions of constitutionalism emphasising the constitution's role as a frame of government was offered in the second half of the nineteenth century in the US by John Potter Stockton: "The constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy", J.E. Finn, *Constitutions in Crisis*, 1991, p. 5.

[21] Maduro's three pillars in which national constitutions are affected by the emerging global constitutionalism are challenging the role of nation state constitutions as the utmost expression of sovereignty and as criterion of ultimate validity of the legal system; national constitutional self-determination in the idea of

It is well known that in the past any attempt to propose international standards, especially in the area of elections, would have met the counterargument of being an intrusion to state and national sovereignty, which comprise the heart of state power and citizen rights attributed to nationals: such changes are to be arranged only through national constitutions and legislation.

There are at least two dominant approaches to societal constitutionalism. One of them relates societal constitutionalism to broadening the scope of regulation, which has been one of the main trends in the fourth constitutional generation. However, societal constitutionalism concerns the increasing number of actors participating in the political decision-making process and imposing limits to their actions.[27]

The democratic principles of elections, proposed in the instruments created by supranational, universal, regional or non-governmental organisations, are not abstract formulae to which the participating countries have merely consented but are based on the constitutional evolution of nation states and which result from common European heritage. Therefore any robust discussion on harmonisation of the content of international standards electoral principles has to begin from the national context.

III. Evolution of the constitutional principles of electoral law within the nation state

Contemporary constitutional principles of elections in the modern democratic nation state are the outcome of the gradual expansion of benchmarks of freedom and democracy and the elimination of disqualifying provisions.

Although various scholars and currents of thought have formulated different numbers of principles of the electoral law and electoral system, five seem to be universally accepted.[28] It took centuries for these electoral principles to evolve within the historical development of the state. In fact, like Aristotle, when defining the pure forms of government, one can trace their evolution from these principles' antipodes or opposites. In other words contemporary principles emerged by evolution through centuries, starting from their opposites.

1. From limited franchise to universal suffrage

The contemporary meaning of universal franchise has been achieved after considerable evolution. All electoral systems from ancient times until the end of the second world war were

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self-government, the form of participation, power distribution and representation is also influenced by global governance, see M. Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, Lead Paper to the workshop Changing Patterns of Rights Politics: A Challenge to a Stateness? Hamnse Institute for Advanced Studies, Delmenhorst, Germany, June 2003, pp. 9-12.

22 See G. Teubner, *Societal Constitutionalism: Alternatives to State-centered Constitutional Theory*, Stores Lectures 2003/2004, http://www.jura.uni-frankfurt.de/teubner/.pdf.

23 Often justice in the techniques of seat distribution, majority, regularity of elections and rotation in office are considered by some members of academic world among the principles of electoral law. I. Meny, Government and Politics in Western Europe, Oxford, 1993, pp. 158-172; In the OSCE instruction on monitoring of elections two other principles of franchise have been mentioned – openness and responsibility in elections, see *Guidelines on Election Observation*, OSCE/ODIHR, 1997, pp. 4-5.

founded on a limited franchise. In all of the nation states the initial principle was that of limited franchise.

When the thirteen colonies in North America declared their independence from the British Crown they had a wider franchise than the most developed countries in Europe such as Britain and France. In Great Britain, for example, only 3% of the adult male population or one of every thirty men had the right to vote. In the United States 120 000 out of a free population of three million enjoyed voting rights.

By a series of reforms the voter's qualifications were removed and enfranchisement brought about an increase of the electorate size.[29] The first qualifications to be removed were income and pecuniary requirements such as real property or property in movables, sometimes linked to tax qualifications interpreted as contributions to the common welfare.[30] Over the past three centuries limited franchise has been rigorously vindicated in political thought. When the French Constitution of 1794 declared universal suffrage it was but another form of limited franchise since only the property qualifications were abolished. In fact this was universal male suffrage. Next to be removed were gender, race, excessive age restrictions and literacy tests.

When women in Wyoming (USA) started voting in the state and local elections in the second half of the nineteenth century, respected French constitutionalists such as A. Esmein affirmed that women, as keepers of the hearth, should not be overburdened by voting, and enfranchising them would ruin the family by transferring the party struggle to the home. Women's voting rights were compared to the military conscription of women. Scholars developed a special concept of family voting whereby the head of the household (*paterfamilias*) had a plural vote depending on the number of people in his household. This was recommended as a great achievement and was tried unsuccessfully in one of the reforms during the Third French Republic.

It is worth remembering that national legislation on elections sometimes provided strange limitations. One of the electoral laws of apartheid South Africa specified that educated whites who had not committed any crimes were entitled to vote.

However, today, universal suffrage is not absolute for it includes rational limitations based on:

- nationality, with the exception of voting and standing in municipal and EU Parliament elections;

- age, when maturity has been reached;[31]

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[24] For a detailed overview on the electoral reforms in the nineteenth century see Г. Мейеръ, Избирательное право, Москва, 1906, кн. 2, pp. 1-74

[25] T. Paine's donkey anecdote deserves mention. The famous author of "Common sense" used to joke that a donkey owner is entitled to voting rights but if his donkey dies before election day he will not be able to cast his ballot. Then, asks Paine, who has the voting right – the man or the donkey?

[26] Decreasing the voting age to lower than 18 years for active and passive voting rights should not be exaggerated as a democratic achievement in itself. Acquiring the right to cast ballots at the age of 15 for Iranian citizens and at 16 in Cuba does make either Iran or Cuba a champion of democracy. If it concerns one party or one candidate in non-competitive elections even children could be enfranchised since they might be able to walk to the ballot box.

- residency requirements;

- mental health;

- serving an imprisonment for serious offences which leads to temporary deprivation of voting rights.

These limitations are reasonable and do not affect the universality of voting rights, since they safeguard genuine and authentic participation in the political life of citizens.

2. From inequality in elections to equal suffrage

At its starting point and through centuries in the history of constitutionalism electoral laws introduced inequality in voting rights and inequality was considered to be the norm in elections.

Various forms of inequality in elections consisted in:

- dividing the electoral body into special classes of unequal numbers but electing an equal number of representatives: Theseus in ancient Greece, Prussia and the Austro-Hungarian Empire in the nineteenth century;

- the plural vote in Britain, which survived until 1948. For a century until 1921, Belgian men over 25 years of age had 1 vote, those over 35 and paying high taxes had 2 votes and top civil servants had 3 votes. Cumulative voting was considered normal during the nineteenth century in some states;

- election geometry by gerrymandering, malapportionment or protracted time periods for revision of the distribution of seats and constituencies;

- partisanly drawn plurality or majoritarian electoral systems;

- excessive electoral thresholds reaching over 10% of the electoral vote;

- inequality in the financing of the electoral campaigns when the laws on elections and financing elections did not introduce limits and transparency of money resources in elections.[32]

Democratisation of electoral legislation led to the gradual removal of these marks of inequality in elections.

Contemporary equal suffrage has been apprehended as:

- equality in counting of votes;

- equal weight of votes;

- equality of party and territorial representation;

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[27] Caesar has been often cited in political writing for saying "We'll buy people with money and these people will bring more money".

- equal chances of party and independent candidates;

- safeguarding minority representation through affirmative regulation.[33]

3. From non-free elections to free suffrage

Modern free suffrage is a result of the gradual introduction and safeguarding of human rights, a necessary precondition to the holding of free and democratic elections. Like all political liberties voting rights function in a political context where human rights and a democratic constitutional framework form the essential background. Due to the difference in content of this background franchise can acquire various meanings, starting from an instrument legitimating arbitrary power to a channel for the direct participation of people when the composition of the representative institutions mirrors the free choice of voters' preferences.

Contemporary free franchise was affirmed by development and the removal of prior censorship and restrictions on the modes of freedom of expression. Dissemination of information and transparency in government has been essential to the expression of the voters' will and their preferences.

The development of political pluralism founded on freedom of association, political tolerance, peaceful competition for power and the democratic alternation of political parties in government and in opposition has been essential to free franchise. Non-competitive one party and one candidate elections as benchmarks of dictatorship have transformed the free choice of the voter into that of the plebiscite for the ruling party. In one party regimes the only option of the citizen is to vote or to refrain from casting ballots.

The modern meaning of the principle of free franchise has three different connotations:

- free will formation;

- free expression of the will of the electors;

- the voter's freedom to choose one from several candidates standing for elections.[34]

However, there is the controversial issue of freedom of voting including absenteeism, as compulsory voting does not leave the voter the option of refraining from casting a ballot even if he or she cannot identify their political will with a party list or politician standing for parliamentary election. One can also argue that the proportional system party list does not leave open to the voters the choice of candidates within one party list.

4. From indirect elections to direct vote

Indirect voting existed long before direct voting. As a general rule the upper chambers of parliament, if not hereditary, were constituted by indirect elections. The first institution of the elected head of state – the US presidency, founded in 1787, is still elected by an electoral college.

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28 See P. Garrone, *The Constitutional Principles of Electoral Law, in New Trends in Electoral Law in a Pan-European Context*, European Commission for Democracy through Law, Science and Technique of Democracy, No. 25, Council of Europe, Strasbourg, 1998, pp. 11-34.

29 Ibid., pp. 23-27.

A draft of the Philadelphia Convention, by Alexander Hamilton, contained the proposal for the president to be elected for a life term and by two electoral colleges filtering the popular vote through decisions of two intermediate bodies. Under the 1958 French Constitution the President of the Fifth French Republic (until 1962) and the French Senate are to be elected by a special body consisting of mayors and their deputies. Elections of presidents by legislative assemblies in pure parliamentary systems of government, which is the predominant model of post-second world war Europe, are also a mode of indirect voting.

In his time Alexis de Tocqueville praised indirect elections for bringing wisdom, integrity and temper to the senates and upper chambers of representative assemblies while Lord Bryce and Moisei Ostrogorski bitterly criticised his view.[35] In the Philadelphia Convention and in the Federalist Papers the election of the presidents by the legislature was strongly refuted by the experience of states where governors to be elected by chambers had to take part in intrigues and enter into deals conducted in secret from the popular electorate.

The implications of indirect voting to the outcome of elections and the composition of the institutions were:

- distancing the voter from the outcome of the elections through intermediate electoral bodies;

- elector votes potentially distorting the popular vote;

- elector votes potentially creating a superficial majority.

The evolution of the principles of democracy and the rule of law has affirmed direct elections as a possible mode for composing the lower chambers of the legislature. In general all nation states have opted in their constitutions for popularly elected lower chambers of parliament, which has legitimated parliaments as the reflection of the will of the people and provided a genuine foundation for democratic and responsible government.

5. From open voting to secret ballot in the elections

Nowadays almost everywhere the secret vote functions as a means to shield voters from pressures on choosing candidates. The secret casting of ballots is the only rational mode of conducting universal and equal elections. The obligation to keep the secrecy of the vote rules out the abuse of the disclosure of individual preference, which might influence in turn the will of other citizens. Accordingly, Criminalcodes criminalise activities disclosing the voter's ballot.

However, open voting was the initial principle on which elections were founded, from antiquity until the end of the nineteenth century, when it still survived in western Europe. The complexity and disorganisation of voting in open elections has been emphasised ever since Plinius the Younger described the chaos in the election of the Senate of Rome.[36]

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30 The American Senate (until 1913 indirectly elected by the state legislatures, not much different from appointments) was according to him an assemblage of the nation's wisdom. J. Bryce forcefully criticised indirect elections. A. De Tocqueville, *Democracy in America,* New York, 1945, vol. I, p. 212.

31 Письма Плиния Младшего, книги I -X (Plini Secvndi Epistvlarvm, Libri I –X), Москва, 1982, кн. III, 20, p. 58.

During the French Revolution Jean-Jacques Rousseau and Robespierre, and later Bismarck in Germany, asserted that open voting fostered the braveness, integrity and decency of citizens and should be preferred to the secret casting of ballots.[37] During the nineteenth century and until the first world war the open vote was often defended by scholars in Europe who tended to see political virtue when voters stated their preferences, especially when legislation provided for compulsory voting.

IV. Brief survey of the emerging system of supranational and European standards on the principles of democratic elections

The process of evolution and the introduction of common European standards in elections can be observed through the lenses of two opposite trends.

In the international community efforts to propose a coherent system of standards of democratic elections at supranational level began during the second half of the twentieth century. The importance of free, fair and competitive elections to sustainable democratic government and human rights in the world and on the European continent has been firmly acknowledged. However, the process of consensus building on drafting, proposing and implementing instruments on international and European standards in the area of elections has not been fast and easy for they are related to the constitutional framework and institution building traditionally considered to be among the core issues of the nation state's sovereignty.

International and European standards have been drafted by different actors in the international lawmaking arena – universal, regional and non-governmental organisations. Some of their proposals have been adopted as provisions in international treaties or soft law, relating to the supranational standards of elections which are different in scope, parties which are members of the relevant organisation and their legal binding effect.

The short list of international and European acting instruments, draft treaties and soft law containing provisions on supranational standards on the principles of democratic elections belong to several groups according to the legal binding effect they have.[38]

1. Hard core of international rules

The hard core of international rules consists of provisions of international treaties adopted by the UN, the First Protocol to the European Convention on Human Rights and the relevant jurisprudence of the European Court of Human Rights (ECHR).

Universal international standards concerning the principles of democratic elections consist in the UN treaty law provisions:

- Article 21 of the 1948 Universal Declaration of Human Rights;

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32 For a detailed overview on the pros and cons of the secret casting of the votes see С. Стойчев, Избирателни системи и избирателни процедури, София, 2000, pp. 62-64.

33 This division of the survey is built on the conclusion that there is a certain "hard core" of the principles of democratic elections which has been defined in the explanatory report to the Guidelines on Election, see Explanatory Report, adopted by the Venice Commission at its 52nd Plenary Session, Venice, 18-19 October 2002, I, 3 and 4, in *the Code of Good Practice in Electoral Matters*, Science and Technique of Democracy, No. 34, the European Commission for Democracy through Law, Council of Europe, Strasbourg, 2003, pp. 19-20.

- Article 25 (b) of the 1966 International Covenant on Civil and Political Rights;

- Article 1 of the 1952 Convention on the Political Rights of Women;

- Article 5 (c) and (d) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination;

- Article 7 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

2. Hard core of European rules

These consist in:

- European Convention on Human Rights, Protocol 1, Article 3 stating that "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature";

- Convention on the Participation of Foreigners in Public Life at Local Level, Article 6 in relation to the right to vote in municipal elections;

- Jurisprudence of the ECHR on the European Convention on Human Rights, Protocol 1, Article 3.[39]

In December 2002, a draft convention on election standards, electoral rights and freedoms was prepared and submitted by the International Foundation for Election Systems to be debated and adopted by the Council of Europe with the aim to summarise the legally binding international law instrument. The draft convention is based on the experience of legal regulation and administration of democratic elections accumulated by the Council of Europe and member states. The ambition of the drafters was to codify various rules and if adopted to convert European standards into binding hard law for the Members States of the Council of Europe.

3. Soft international law and European rules

Non-binding international and European rules consist in:

- 2002 Guidelines on Elections adopted by the Venice Commission;[40]

- 2003 Existing Commitments for Democratic Elections in OSCE Participating States;[41]

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[34] P. van Dijk, G J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Boston.

[35] *Code of Good Practice in Electoral Matters*, Science and Technique of Democracy, No. 34, the European Commission for Democracy through Law, Council of Europe, Strasbourg, 2003, pp. 7-18.

[36] *Existing Commitments for Democratic Elections in OSCE Participating States*, OSCE, ODIHR, Warsaw, October 2003.

– 1994 Declaration on Criteria for Free and Fair Elections adopted by the Inter-Parliamentary Council at its 154th session (Paris, 26 March 1994).[42]

4. European Union law on elections

Within the EU a body of community law has evolved since the treaty of Maastricht has established citizenship and voting rights of EU citizens in local and EU parliament elections.

Beyond any doubt, implementation of the international and European legal standards in the area of elections bears no similarity with the supranational and, direct, immediate and horizontal effect of community law, with countries like Netherlands that have opted for the pure monistic system of transplanting international provisions into municipal law being an exception. Any comparison between these two phenomena is might relative and may be valid only for the twenty-five EU member states which are all members of the Council of Europe.

The list of EU laws relating to elections consists of primary law – Article 8 b (1) of the Treaty on European Union (TEU),[43] Council Directive 93/109/EC,[44] Council Directive 94/80/EC,[45] Order of the Court of 10 June 1993, the Liberal Democrats v European Parliament,[46] Case C-41/92. These provisions and the relevant amendments in the national constitutions and electoral legislation introduced the rights to vote and stand in municipal elections and in the elections for the European Parliament of EU citizens having a member state of residence different from their home member state. Participation of EU citizens in the local and European Parliament elections in the EU member states of residence has broadened the principles of universal and equal franchise and has been an important step in the process of creating ever closer union among the peoples of Europe. The draft constitution of the EU has reaffirmed the passive and active voting rights of EU citizens in municipal and European Parliament elections when their EU member state of residence is different from their home EU member state.[47]

This brief survey of supranational and European instruments containing international legal standards on elections stimulates several speculations which need further discussion and analysis.

The proliferation of international standards is indicative of the progress of peaceful co-operation, democratisation and rule of law building in the international community. It is

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37 G.S Goodwin-Gill, *Free and Fair Elections*, International Law and Practice, Inter-Parliamentary Union, Geneva, 1994, X-XIV.

38 Official Journal of the European Communities C 325/5, 24 December 2002.

39 Official Journal L 329 , 30/12/1993 pp. 0034-0038.

40 Official Journal L 368 , 31/12/1994, pp. 0038-0047.

41 Actions against Community institutions for failure to act – Act of Parliament – Uniform electoral procedure – No need to give a decision. Case C-41/92, European Court reports, 1993, p. I-03153, Action in respect of failure to act – decision unnecessary, D. Simon: *Journal du droit international*, 1994, pp. 473-477.

42 According to Article 8, 2, 2 of the EU draft constitution citizens of the European Union shall enjoy the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their member state of residence, under the same conditions as nationals of that state, Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome on 18 July 2003 (2003/C 169/01), Official Journal of the European Union (EN 18.7.2003 C 169/3).

instrumental to the harmonisation, unification, convergence and transplantation of the best values, principles, practices and techniques in democratic elections legitimising constitutional government. At the same time the proliferation of international standards on elections has been in compliance with the need to respect national traditions. International treaties and soft law have been carefully creating unity by protecting diversity. Undoubtedly, the process of increasing international standards should be preferred to the lack of international instruments on elections.

However, proliferation of international and European standards on elections has side effects that need to be addressed. Under the assumption that a nation state is simultaneously a member of several international organisations and all of them have adopted different instruments in the area of elections, the issue of compatibility between the provisions of the international organisations, multiple international instruments and domestic legislation arises. The ideal situation is when ambiguities can be resolved through an existing clear hierarchy of sources between and within the standards proposed by the international organisations.

Differences in the scope and detail of standards and of the countries they address are normal and will not create any serious problems during the process of implementation of international obligations. EU law has a stronger binding effect for EU member states. Based on the community method, however, EU law does not have the same binding effect as federal law. The conflicts between some of the treaty and soft law arrangements will not be counterproductive, since hard law always prevails. However, conflicting provisions from one and the same legal order might be an obstacle to the implementation of different standards in the municipal legal system.

Successful resolution of ambiguity between provisions of EU law, hard and soft European law by applying the hierarchy in the area of supranational law to be transplanted into the municipal legal order might be illustrated by the new election act of the Grand Duchy of Luxembourg. Adopted in February 2004, the act entitles non-Luxembourg nationals that have residency in Luxembourg to vote and stand as candidates in the local elections taking place in 2005, regardless of whether they are EU citizens or not, without losing their voting rights in their country of origin.[48] Non-Luxembourg nationals entitled to active and passive voting rights in the local elections must be at least eighteen years old on the date of elections, have their civil rights and must have been resident in the Grand Duchy of Luxembourg for a period of five years when applying to be included on the electoral register. Under Council Directive 93/109/EC the required residence period for local election eligibility for EU citizens in an EU member state different from their home state has not been specified. According to the Convention on the Participation of Foreigners in Public Life at Local Level, Article 6 relating to the right to vote in municipal elections, foreign residents are granted the right to vote and to stand in local authority elections, provided they fulfil the same legal requirements as apply to nationals and furthermore have been lawful and habitual residents in the state for five years preceding the elections. Article 1 on universal suffrage from the Guidelines on Elections points out that exceptions may apply based on nationality requirements, but advises that foreigners be allowed to vote in local elections after a certain period of residence. While not specifying the length of this period for foreigners the guidelines have set the time limit of the residence requirement for nationals not to exceed six months before the local or regional elections take place. Though the Grand Duchy of Luxembourg has not ratified the Convention

[43] Voting rights of non-Luxembourg nationals in local elections held in October 2005, http://www.gouvernement.lu/dossiers/elections/elections_communales_2005/dossier_en.

on the Participation of Foreigners in Public Life at Local Level in order to protect the national's interests in the local elections and to comply with Article 8 b (1) of TEU and the Council Directive 93/109/EC as a EU member state it has opted for a residence requirement of five years for foreigners.

In conclusion, looking at the system of the emerging supranational standards in the area of elections it seems international organisations, the Council of Europe and the European Commission have been concentrating on promoting the macro-conditions as values, principles safeguarding the genuine democratic content of free and fair elections. Only the most fundamental of micro-conditions were treated by European soft law. Detailed regulation of election organisation and choice of electoral systems have been left to the traditional competence of the nation states. Concrete techniques of election monitoring have also been developed and successfully applied within the Organisation for Security and Co-operation in Europe (OSCE).[49] However, adopting the Convention on Election Standards, Electoral Rights and Freedoms by the Council of Europe will convert substantial parts of the soft law in the Guidelines on Elections into treaty hard law and will be an important stage in the harmonisation of European standards in the area of democratic elections.

THE EUROPEAN ELECTORAL HERITAGE AND THE CODE OF GOOD PRACTICE IN ELECTORAL MATTERS

Mr Georges CLERFAYT
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Mr Chairman, at its January 2003 sitting the Parliamentary Assembly of the Council of Europe adopted the Code of Good Practice in Electoral Matters as a reference document[50]. Its aim was to clarify the rules to be followed in electoral matters in order to secure and safeguard democratic elections.

On 9 October 2003 the Committee of Ministers endorsed it as a reference document in its reply to Recommendation 1595, adopted by the Assembly some nine months earlier.

This important document did not come out of the blue. It stemmed from an initiative by the Assembly which, following a report that I presented in 2001, called on the Venice Commission, in Resolution 1264, to set up a working group including delegates from the

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44 Existing Commitments for Democratic Elections in OSCE Participating States, OSCE, ODIHR, Warsaw, October 2003, pp. 24-25; Proceedings of the 2001 Symposium: *International Elections Monitoring: Should Democracy be a Right? Election Monitoring, Technology and the Promotion of Democracy: A Case for International Standards*, 19 Wisconsin International Law Journal, Fall, 2001, pp. 353-367.

50 *Code of Good Practice in Electoral Matters*, Science and Technique of Democracy, No. 34, European Commission for Democracy through Law, Council of Europe, Strasbourg.

Assembly and the CLRAE (Congress of Local and Regional Authorities of Europe) and devise with it a Code of Good Practice in Electoral Matters.

The Venice Commission then set up a tripartite working group which I chaired. At its very first session it decided to call itself the "Council for Democratic Elections". Thanks to documents prepared by Venice Commission experts, and especially Mr Pierre Garrone, whom I should like to thank most particularly, it was able, in two meetings held in the course of 2002, to draw up and approve the guidelines adopted by the Venice Commission at its 51st session on 5 and 6 July 2002 and the explanatory report adopted at its 52nd session on 18 and 19 October 2002[51].

It should be noted that without the Parliamentary Assembly's determination and the Venice Commission's expertise in the rules that should govern electoral matters this document would not have emerged so quickly.

It is thus the fruit of a happy combination of expertise and determination.

And I think I may say that in its content the code reflects "the European electoral heritage", a heritage that the Council of Europe – that guardian of democracy, human rights and the rule of law – has set down as a result of successive joint work by various parts of its internal machinery, namely the Assembly, the European Court of Human Rights, the Venice Commission and the CLRAE – a heritage that it must now protect, enrich and exploit.

Why was such a code drafted recently?

We should instead wonder why we had to wait so long for it.

After the fall of the Berlin Wall and the conversion of East European countries to pluralist democracy, the Council of Europe and the Parliamentary Assembly in particular, together with the Congress of Local and Regional Authorities, were led to observe local and general elections successively in most of these countries. This appeared necessary, for example, as part of the Organisation's membership procedures in order to ascertain whether applicant states had achieved a sufficient degree of democratic development.

These observation missions led the observers to make various more or less critical findings in their reports to the Assembly, and a set of principles thus emerged. But there was no document in which they were brought together in an ordered fashion. Without a reference document to serve as a standard guide, the opinions produced by successive teams of different observers sometimes lacked consistency.

Towards the end of the 1990s a number of parliamentarians – including myself – deplored the absence of a clear document setting out rules and obligations and prohibited practices in this field, so that it could be plainly established whether or not such-and-such an election at such-and-such a time could be deemed to have taken place democratically.

In short, they wanted the criteria for a proper democratic election to be laid down unambiguously.

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51 *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)* (CDL-AD(2002)023rev).

Of course, the decisions of the European Court of Human Rights concerning application of Article 3 of the Additional Protocol to the European Convention on Human Rights already provided certain rules, but, inevitably, not every possible problem had been raised before the Court and therefore gaps remained. It was necessary, without more ado, to try to draw up a complete set of rules covering all electoral matters.

To fill the gaps, it was possible to draw on the precedents provided by good electoral rules in force without challenge in various member states and enshrined in their constitutions, their legislation or the decisions of their courts. This is what may be called the European electoral heritage.

The aim was thus to collect in one official Council of Europe document all the principles to be observed, rules to be followed and, in some cases, practices to be avoided or prohibited concerning everything to do with the holding of elections (and also how to observe them) in order that they might be considered free and fair, and therefore legitimate, with the consequence that their results would be accepted without dispute and with the conclusion that the state in question was operating democratically (or not) with regard to the transfer of political power.

Moreover, for the Council of Europe, acquiring this code of good practice meant at last having the necessary instrument for coordination with other international institutions concerned either with helping states to hold proper elections or observing their conduct. I am thinking of the OSCE and its Office for Democratic Institutions and Human Rights (ODIHR), together with the European Union and various well-known international NGOs, as well as the Association of Central and Eastern European Election Officials (ACEEEO), about whose work I shall say a few words at the end of my paper.

In the near future an attempt will have to be made to harmonise the approaches, positions and requirements of these various organisations which, unfortunately, are not always entirely identical.

For electoral matters, at international level we admittedly have Article 21 of the Universal Declaration of Human Rights ("the will of the people shall be the basis of the authority of government") and Article 25, paragraph (b), of the 1966 International Covenant on Civil and Political Rights, which provide the basic principles. But a Europe that promotes democratic values – and the Council of Europe especially – has a duty to be more precise and demanding in determining the standards to be followed.

In my opinion and, I hope, in the view of any true democrat and thus of the European institutions, democratic elections must be the only legitimate and non-violent means of choosing the political leaders temporarily responsible, until the next election, for governing a state. And therefore such democratic elections are the only means of ensuring the stability of civil society and the sustainable development of a state governed by the rule of law.

There is no proper, legitimate and unchallengeable political power worthy of respect other than that deriving from genuinely free and democratic elections held by secret and universal suffrage at regular intervals according to clear and stable rules and whose results are recognised to be correct by the international community.

Content of the Code of Good Practice in Electoral Matters

The Code consists of two parts:

- The guidelines, and
- The explanatory report.

The principles are laid down in the guidelines. The explanatory report is more specific, providing clarification and qualification.
The five underlying principles are:

- Universal suffrage,
- Equal suffrage,
- Free suffrage,
- Secret suffrage, and
- Direct suffrage.

Universal suffrage means that all human beings have the right to vote and to stand for election.

Having established this principle, the code considers the legitimate conditions to which these principles may be subject: age, nationality, residence, as well as cases in which individuals may be deprived of the right to vote and to stand for election. The explanatory report elucidates the subtler aspects of these various points.

The code then indicates how the lists of voters and candidates can and should be drawn up. Here again, the explanatory report provides essential clarification in order to prevent unfair tactics aimed at distorting the results or interfering with the freedom of the people to express their wishes.

Equal suffrage entails equal voting rights (each voter has only one vote or the same number of votes as anyone else), equal voting power and equality of opportunity.

The section on equal voting power specifies, amongst other things, the rules for correct drawing of constituency boundaries, where it is necessary to avoid both gerrymandering and what is known as "electoral geometry".

As for the principle of equality of opportunity, it must lead the state authorities to remain neutral and guarantee fair rules for the election campaign, media coverage and the public funding of parties and campaigns.

In connection with equal suffrage, principles are also laid down for the delicate matters of equality or parity of the sexes and protection of national minorities.

Once again, I refer you to the explanatory report and its qualifications to flesh out some of the principles listed rather dryly here.

The section on *free suffrage* specifies the basic conditions that the authorities must observe to allow voters freedom to form an opinion. Various obligations on the public authorities are

listed here concerning the election campaign, the practical organisation of the electoral process, and voting procedures on polling day.

We find a whole string of recommendations for avoiding fraud and manipulation. They come from the reported experience of many observers of questionable elections. Thus, detailed rules are given for how to count the votes and transfer the results.

We should further note that the explanatory report offers important observations on proxy and postal voting as well as on electronic voting.
Lastly, *secret suffrage* (individual voting) and *direct suffrage* (for at least one chamber of parliament and for local councils) are also among the conditions laid down for elections to be free and fair.

After this statement of principles, a further section specifies the conditions for implementing them.
In this connection it is recalled that fundamental rights must be respected (freedom of expression and of the press, freedom of movement, freedom of assembly and of association, etc.).

It is further recalled that electoral law cannot be amended too late, that is, too close to elections (less than a year): this is the principle of stability of electoral law.

It is also noted that these rules must be high-ranking – that is, constitutional – or have the status of a special law and therefore cannot be laid down or amended by administrative or ministerial circulars, thus bypassing parliament.

The code also details the rules for fair composition and operation of the body responsible for organising the elections and therefore enforcing electoral law, namely what is called, in some countries, an electoral commission. This point is of paramount importance if we remember Stalin's words: "Regarding elections, the only thing that counts is who declares the results!"

It goes without saying that the ruling majority cannot monopolise power in these electoral commissions, since any monopoly is a source of abuse!

The code further deals briefly with the need to allow observation of elections by both national and international observers. If done seriously, it can provide guarantees of the genuinely democratic nature of the elections.

Lastly, the code stresses the need for an effective system of appeal against any fraud or anomalies found during the various stages of the electoral process. Normally such appeals will be through the courts, but this obviously presupposes that the courts are genuinely independent. So far, no provision has been made for appeals to an international court other than what is possible through the European Court of Human Rights under Article 3 of the Additional Protocol. But this recourse to Strasbourg might be insufficient from a political point of view, especially in the event of large-scale fraud, and this perhaps represents an omission.

Such is the content of the Code of Good Practice in Electoral Matters in summary.

However, I must emphasise that its scope and complexity cannot be properly understood without reading it in conjunction with the explanatory report.

1. At its meetings following the adoption of the code, the Council for Democratic Elections approved the content of a database incorporating the electoral law of Council of Europe member states. It also drew up, with the help of a document prepared by Mr Claude Casagrande, an expert of the Congress of Local and Regional Authorities, an election evaluation guide for the use of observers, together with a questionnaire based on the Code of Good Practice and designed for checking whether all the latter's prescriptions have been complied with.

2. Continuing its work, the Council for Democratic Elections now has to prepare opinions – in coordination with the Assembly and also (by force of circumstance, because of the way it works) with the Venice Commission itself – concerning possible improvements to laws and practices pertaining in specific applicant or member states.

In its resolution of 28 January 2003 endorsing the Code of Good Conduct, the Assembly considered the code to constitute a major step towards harmonising standards for the organisation and observation of elections and in establishing procedures and conditions for the organisation of the electoral process.

It expressed a wish to see member states re-evaluate and/or revise their electoral legislation in the light of the code.

3. Concurrently with this work by the Council of Europe, the Association of Central and Eastern European Electoral Officers (ACEEEO) for its part prepared a Draft Convention on Election Standards, Electoral Rights and Freedoms and sent it to Council of Europe bodies in autumn 2002.

Consequently, when endorsing the Code of Good Practice on 28 January 2003 the Assembly, in its Recommendation 1595 (2003), suggested to the Committee of Ministers that the Code of Good Practice in Electoral Matters should be transformed into a convention, taking into account the work of the OSCE (ODIHR) and the above-mentioned draft from the ACEEEO.

Unfortunately, in its reply to the Parliamentary Assembly adopted on 9 October 2003, the Committee of Ministers felt that it was difficult at that time to draw up a binding legal instrument for such electoral matters and that the drafting and approval of a convention in this field was premature.

It is true, as the Committee of Ministers pointed out, that contemporary technological advances would lead to progress in electronic voting and even its widespread use. It added that, this being the case, we should await this development in order to have a better understanding of the matter before moving to the stage of drafting a convention.

I for my part believe, on the contrary, that it is essential that we should not allow the organisers of electronic voting and the manufacturers of software programs to get into bad habits with regard to the principles laid down in the Code of Good Practice. In the absence of a convention, we must at least stress the need to respect the principles contained in the Code of Good Practice. I know that this idea is fortunately accepted by those currently working in the Multidisciplinary Ad Hoc Group of Specialists on Legal, Operational and Technical

Standards for E-enabled Voting set up by the Committee of Ministers of the Council of Europe as part of "Integrated Project 1". I nevertheless invite democratic jurists to remain vigilant in this field.

4. At all events, it is highly desirable that the Code of Good Practice – possibly supplemented by some additional points from the ACEEEO document – even with its current status, which does not make it a binding legal instrument, should be taken seriously by member states, their governments and their constitutional courts in order to harmonise electoral practices and ensure that elections are democratic.

For let us not forget that elections are a powerful democratic act which lends legitimacy to political leaders. It is therefore important that they should comply with the principles of the European electoral heritage.

In electoral procedures there may admittedly be variations between one state and another for historical reasons and which are therefore acceptable. However, they can concern only minor points and must not in any circumstances deviate from the principles laid down by the Code of Good Practice in Electoral Matters.

In case of doubt, the Council for Democratic Elections, supported by the Venice Commission, should be able to issue an authoritative opinion.

RESIDENCE AND ELECTORAL RIGHTS OF CITIZENS OF THE REPUBLIC OF MACEDONIA

Ms Mirjana LAZAROVA TRAJKOVSKA
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I. Introduction

Free, general, fair and secret elections are a prerequisite of democracy. The right to elect and to be elected are universally recognised political rights in all of the more significant international documents. The Universal Declaration of Human Rights,[52] in Article 21 paragraph 3, determines that the will of the people shall be the basis of the authority of government; the will of the people shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Similarly, pursuant to Article 25 paragraph 2 of the International Covenant on Civil and Political Rights,[53] every citizen has the right and the opportunity, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and without unreasonable restrictions

1 The General Assembly of the United Nations on 10 December 1948 adopted and published the Universal Declaration of Human Rights in Resolution 217 A (III).

2 The International Covenant on Civil and Political Rights was adopted and opened for signatures with the Resolution of the UN General Assembly on 16 December 1966 and entered in force on 23 March 1976.

to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage held by secret ballot, guaranteeing the free expression of the will of the electors. The First Protocol[54] of the European Convention on Human Rights also determines that the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The Guidelines on Elections, adopted by the European Commission for Democracy through Law during the 51st and 52nd sessions held on 5-6 July and 18-19 October 2002 in Venice, are also very important for European election legislation. In this document, the basic principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, universal suffrage also means that all human beings have a right to elect and to be elected, regardless of sex, religion and ethnicity. This right is, nonetheless, connected to certain universal conditions, such as age, citizenship and residence. In this chapter the emphasis is placed on residence as a condition of the right to elect and to be elected. The reasons for this interest are found at international and national level.

At the European level, in particular among the EU member states, there increasingly frequent attempts to make residency a prerequisite for exercising the electoral right to obtain primacy in respect to citizenship. Hence, pursuant to Article 19 paragraph 8b of the EC Treaty (ECT), all citizens in EU member states are entitled to elect and to be elected for the European Parliament as well as for the local elections in the member countries where they reside, regardless of their citizenship, under the same conditions which are stipulated for the citizens in the country where they reside.[55]

At the Macedonian national level the question of residence as a precondition of voting rights is also becoming more relevant, but at the same time remains a politically controversial issue. In what follows the constitutional dimensions of this controversy are described and analysed.

The Constitution of the Republic of Macedonia provides general legal guidelines on exercising the electoral right, as one of the fundamental political rights of citizens.[56] The subject matter of the constitution in the area of elections sets forth fundamental principles on which the electoral legislation is based, while the method, conditions, procedure and relations that derive from the electoral right are stipulated in the separate electoral laws.[57]

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3 The First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms was determined and opened for signatures on 16 September 1963 in Strasbourg.

4 This approach is aimed at improving the integration of the citizens of the European Union into the country where they reside, so for this purpose, Directive 94/80/EU, which addresses the rights related to the local elections, permits all citizens of the European Union to elect and to be elected in the local elections in the member countries where they reside without associating this right with the country of their origin. Directive 93/109/EC lays down arrangements for the exercise of the right of all citizens of the European Union to vote and stand as a candidate in elections to the European Parliament, with an alternative to exercise this right in the country where they reside or in the country of their origin.

5 The Constitution of the Republic of Macedonia (proclaimed with a decision by the Parliament of the Republic of Macedonia on 17 November 1991 and published in the Official Gazette of the Republic of Macedonia No. 52, 22 November 1991). Constitutional Amendments were published in the Official Gazette No. 1/92, 31/98 and 91/2001.

6 The Law on Election of Members of Parliament of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No. 42/2002), Law on Election of the President of the Republic of Macedonia (Official

Pursuant to Article 22 of the Constitution of the Republic, every citizen on reaching eighteen years of age acquires the right to vote. The right to vote and to be voted for is equal, universal and direct and is exercised in free elections by secret ballot. The Constitution of the Republic of Macedonia in principle does not make any distinction between active and passive suffrage. The only exception to these constitutional postulates is the provision of Article 80 which addresses the election of the President of the Republic of Macedonia.[58]

The last exception in the exercise of the electoral rights of citizens of the Republic of Macedonia is the focus of this chapter. Yet before that we will first describe and analyse the well-established practice of imposing residence as a practical condition for exercising active suffrage, besides the clear constitutional provisions.

II. Residence as a condition for exercising the active electoral right in the Republic of Macedonia

In the Republic of Macedonia, the method and procedure of exercising active suffrage is connected with the Voters' List, which is regulated in the Law on Voters' List.[59] The elections for the Members of Parliament of the Republic of Macedonia, for the President of the Republic of Macedonia, local elections and referendum voting on local and national levels are based on the Voters' List. Pursuant to Article 6 of the Law on Voters' List, all citizens who have reached eighteen years of age, have residence on the territory of the Republic of Macedonia and who have a valid personal ID card or passport are registered in the Voters' List.

All citizens of the Republic of Macedonia, who are temporarily working or staying abroad, with a residence on the territory of the Republic of Macedonia and with a valid passport, are also registered in the Voters' List. These persons are registered according to their last place of residence in the Republic of Macedonia, prior to their departure abroad. This clearly indicates the determination of the legislator to use residence as a basis for allocation of the citizens (who have a right to vote) in the Voters' List. Hence, persons who have active suffrage can exercise it if they have or had residence on the territory of the Republic of Macedonia prior to their departure abroad, regardless of their place of residence in the country or abroad.

The method of registration of the new residence and the cancellation of the old residence or temporary residence as well as the registration of the change of address is regulated by the Law on Registration of Residence and Temporary Residence of the Citizens.[60] According to this law, a residence is defined as a place where a citizen settles to live permanently in a

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Gazette of the Republic of Macedonia No. 46/96, 48/96, 56/96, 12/2003), Law on Voters' List (Official Gazette of the Republic of Macedonia No. 42/2002).

7 This article stipulates that the President of the Republic of Macedonia must be a citizen of the Republic of Macedonia and on the day of elections a candidate must be at least 40 years old, and on the day of election must have been a resident of the Republic of Macedonia for at least 10 years out of the last 15 years.

8 The Law on the Voters' List was published in the Official Gazette of the Republic of Macedonia No. 42/2002. According to the data from the State Election Commission, there were 1,339,021 voters in the Voters' List in 1990; 1,360,729 voters in 1994; 1,572,976 voters in 1998; 1,664,296 voters in 2002; and 1,695,103 in 2004.

9 The Law on Notification of Residence and Temporary Residence of the Citizens was published in the Official Gazette of the Republic of Macedonia No. 36/92.

provided dwelling. A citizen has a dwelling, if he or his family can move in, on the basis of ownership or on the basis of a contract for using the dwelling in accordance with the law.

The personal ID card is used as proof of residence, citizenship and the personal identity of the citizens of the Republic of Macedonia. This document is issued in accordance with provisions of the Law on Personal Identification Card and the Ministry of Internal Affairs is authorised to issue it. Since citizens are recorded in the Voters' List according to the municipality where their permanent or last dwelling is located, the Ministry of Internal Affairs is obliged to send the following data to the Ministry of Justice: data on persons who have reached eighteen years of age and who have a valid personal ID card or passport; data on deceased persons; data on persons who have moved from one residence to another and changed address accordingly; data on persons who have changed their name or last name; persons who have been granted citizenship of the Republic of Macedonia or who have lost it; persons who have reached eighteen years of age and live or work abroad temporarily; persons who have emigrated from the Republic of Macedonia with information on the country where they reside.

One question arises from the aforementioned: why did legislators decide to follow the concept which connects active suffrage, i.e. the right of a citizen to vote, with a residence? In the case of Macedonia, the connection between the right to vote and a residence in the Republic of Macedonia derives from the requirement of designing a methodology for developing and processing the data of the Voters' List according to residence as a fundamental condition. This determines the distribution of the polling stations, and accordingly results in the layout of the electoral districts. Due to the lack of legal prerequisites, citizens who are abroad on election day cannot exercise their right to vote unless they return to Macedonia and cast their vote in the polling station located in the municipality where their last residence was before they left the country.

Also deprived of the right to vote is another category of citizens who meet all general conditions for voting, except the one which stipulates that a voter has to have residence or last residence on the territory of the Republic of Macedonia. Although Article 4 of the Law on Election of Members of Parliament of the Republic of Macedonia stipulates that every citizen of the Republic of Macedonia who has reached eighteen years of age and has legal capacity has the right to vote, the Law on Voters' List stipulates that citizens who have a right to vote, but who also have a residency on the territory of the Republic of Macedonia or who work or live abroad temporarily and have a last residence on the territory of the Republic of Macedonia are recorded in the Voters' List. This means that Macedonian citizens over eighteen years of age who were born on the territory of the Republic of Macedonia but were never officially resident there, or Macedonian citizens over eighteen years of age who were born abroad and never lived in the Republic of Macedonia, would not be recorded in the Voters' List and would not be able to exercise their electoral right.[61]

For the next elections, the Republic of Macedonia has to find a formula to encompass this category of voters who reside abroad and want to exercise their right to vote, but cannot come to Macedonia on election day. An additional argument is the fact that the number of citizens

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[10] Not having residence in the country of citizenship, i.e. staying out of the country for a long period of time as a basis for not being able to exercise the right to vote is not unknown in the constitutions and laws of other countries (e.g. Constitution of Iceland from 1944). However, the number of countries which allow their citizens to vote out of their countries is larger (e.g. USA, Canada, UK, and the Netherlands). In the case of the Republic of Macedonia, constitutional prerequisites for this concept also exist.

who are effectively connected to Macedonia, although they do not have a residence in their country of origin, is large. It should be also taken into consideration that neither the Macedonian Constitution, nor the Law on Election of Members of Parliament of the Republic of Macedonia, connects active suffrage with the general condition of residence as a residential prerequisite.

III. Residence as a precondition for exercising the right to vote and to be voted for in the elections for members of parliament

According to the Constitution of the Republic of Macedonia, the Parliament of the Republic of Macedonia is a representative body of the citizens and the holder of the legislative power of the Republic. The method, conditions and procedure for the election of representatives in the Parliament of the Republic of Macedonia are regulated by a law which is passed by the majority of representatives.

The Law on Election of Members of Parliament was passed immediately prior to elections in 2002. This Law stipulates that 120 members of parliament are elected according to a proportional model and parliamentary seats are allocated according to the D'Hondt formula. The right to elect and to be elected as a member of parliament is guaranteed to every citizen of the Republic of Macedonia who has reached eighteen years of age, has legal capacity and is not serving a sentence of imprisonment for a criminal offence.

In a decision,[62] the Constitutional Court of the Republic of Macedonia rejected the initiative for evaluation of the constitutionality and legality of the procedure for the election of a citizen as member of parliament. The initiative stated that the Law on Election of Members of Parliament, which allowed the right to be nominated and elected to a citizen of the Republic of Macedonia who at the moment of elections was not residing in the country, was in contradiction with the Law on Voters' List that deprived the same citizen from the right to vote on the basis of residence in the country.

The Constitutional Court determined the section of the initiative which refers to the nature of the electoral right to be groundless, because the Constitution of the Republic of Macedonia regulates the individual electoral right which is obtained by every citizen who has reached eighteen years of age and the method of exercising this right (free elections and secret ballot). Furthermore, the Constitutional Court determined that the issue of the citizen who was nominated as a member of parliament, without recognising the fact that he did not enjoy active suffrage because he did not have a permanent residence on the territory of the Republic of Macedonia, was not in its jurisdiction and resides in the jurisdiction of the Primary Courts. This case raises many questions for discussion.

According to the present law, the right to be elected as a member of parliament is guaranteed to every citizen of the Republic of Macedonia. It means that although a citizen has to have or have had a residence in the Republic of Macedonia before departing from the country to exercise active suffrage, the legal requirement to have or have had a residency is not stated as one of the general conditions to exercise the right to be elected as a member of parliament as passive suffrage. This provision of the legislation means that every citizen of the Republic of Macedonia who meets the general conditions can run as a candidate for parliament, and does

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[11] Decision of the Constitutional Court of the Republic of Macedonia, U. No. 151/2002 dated 5 March 2003 (Constitutional Court decisions are published on www.usud.gov.mk).

not have to live or have lived in the Republic of Macedonia. The only legal connection with the state that a citizen who wants to run as a candidate has to meet is to have Macedonian citizenship, which can be obtained *ius sanguinis* or *ius soli*, according to the provisions in the Law on Citizenship of the Republic of Macedonia[63] even though he never lived in the Republic of Macedonia. This approach in the Law on Election of Members of Parliament derives from the fact that the Republic of Macedonia is a country with a large population who live abroad but who maintain relations with Macedonia; although the residences of these people are abroad, they can run as members of parliament. Very often these people have dual or multiple citizenship, which is also recognised by the Law on Citizenship of the Republic of Macedonia.

The Law on Election of Members of Parliament does not deal with multiple citizenship or the period between obtaining Macedonian citizenship and running for parliament. This approach in the Law is completely consistent with Article 17, paragraph 1 of the European Convention on Nationality,[64] which stipulates that these citizens enjoy the same rights and duties on the territory of the country where they live as the other citizens in that country. Article 17, "Rights and duties related to multiple nationality", paragraph 1 states the general rule that persons who have multiple citizenship on the territory of the state signatory where they reside, enjoy the same treatment as citizens with single citizenship, for example concerning electoral rights or military duty. However, these rights and duties can be changed with international agreements under certain circumstances.

IV. Residency as a prerequisite for exercising the right to stand as a candidate for election of President of the Republic

In accordance with Article 80 of the Constitution of the Republic of Macedonia, the President of the Republic is elected in general and direct elections, by secret voting, for a period of five years. According to paragraph 5 of Article 80, a person who on election day has not been a resident of the Republic of Macedonia for at least ten years out of the last fifteen cannot be elected as President.[65]

Unlike the constitutional requirement for the election of members of parliament and the local elections to be regulated by law, for the presidential elections the Macedonian Constitution

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12 The Law on Citizenship of the Republic of Macedonia is published in Official Gazette No. 67/92, 3 November 1992 and entered into force on the eight day of its publishing. The Law on Amending and Changing the Law on Citizenship of the Republic of Macedonia is published in Official Gazette No. 08/04, 23 February 2004 and entered into force on the eight day of its publishing.

13 The Republic of Macedonia signed this Convention on 6 November 1997. The Parliament of the Republic of Macedonia passed the Law on Ratification of the European Convention on Nationality on 23 January 2002, which was published in the Official Gazette of the Republic of Macedonia No. 13/02 on 18 February 2002. This Law entered into force on the eight day of its publishing. Instruments for ratification of the Convention were deposited with the Secretary General of the Council of Europe on 3 June 2003 and the Convention entered into force on 1 October 2003. The Republic of Macedonia has put a reserve on Chapter III Article 6, paragraph 3 of the Convention and announced that it will exclude the application of Chapter VII, until harmonisation of the national legislation with the provisions of the Convention, and then, pursuant to Article 25 paragraph 3 of the Convention, the Secretary General of the Council of Europe will be notified on application of the provisions of this chapter.

14 The period of residence in other republics of the Socialist Federal Republic of Yugoslavia is also included in the period defined in paragraph 5 of Article 80. Residency, as a prerequisite for a person to be eligible as a presidential candidate, has also been provided for in the constitutions of Bulgaria and Lithuania.

sets forth an election model and also the general requirements for the candidates. Namely, it is constitutionally determined that the candidate should be a citizen of the Republic of Macedonia and have reached forty years of age by election day, and should meet the residential requirements outlined above (the time of residency in other republics of the Socialist Federal Republic of Yugoslavia is also accounted for).

The Constitutional Court of the Republic of Macedonia rejected the initiative for protecting the passive electoral right of a citizen who intended to be nominated as a presidential candidate.[66] According to the initiative, the decision of the State Election Commission and the decision of the Supreme Court violated an electoral right, contrary to the constitutional provisions and Article 3 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms. Namely, according to the initiator, the State Election Commission and the Supreme Court miscalculated the legal stay of ten years in the last fifteen years, and failed to correctly apply the provisions referred to in Article 132 of the Macedonian Constitution, which are related to the years of residency of the candidate in one of the republics of SFRY. The Constitutional Court rejected the above mentioned initiative, as it assessed that it was not competent to protect the rights and freedoms of the individual and citizen relating to the electoral right.[67]

The Law on Election of President of the Republic of Macedonia[68] stipulates the procedure for the election of a President of the Republic of Macedonia, due to termination of mandate, as well as the protection of the electoral right. According to this law, the procedure for protection of the electoral right is urgent and is a responsibility of the State Election Commission and the Supreme Court of the Republic of Macedonia.

Apart from the prescription of the conditions under which a president of the country may be elected, the Macedonian Constitution also stipulates the election model (majority election model) under which presidential elections may be conducted. The Macedonian Constitution starts from the presumption that the President represents the country abroad and he is the commander-in-chief of the armed forces: therefore, residency as a prerequisite would mean that he is well aware of the circumstances in the country and that he has participated in some areas of life in the country, and thus there is an effective connection and loyalty towards the country.

The implementation of the transitional provision in the Macedonian Constitution, which stipulates that the time referred to in paragraph 5 of Article 80 includes the time of residency in other republics of the Socialist Federal Republic of Yugoslavia, opened numerous disputes among legal experts for the above mentioned case. However, administrative and judicial practice was built at the time when SFRY ceased to exist as a legal entity, or in accordance with opinion numbers 8 and 11 of the Arbitrary Commission for Yugoslavia. More specifically, a presidential candidate who had residence in another republic of the Socialist Federal Republic of Yugoslavia will be considered a resident, and the period of residence will

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15 Idem, Decision U. No.55/2004, dated 31 March 2004.

16 Pursuant to Article 110 line 3 of the Constitution of the Republic of Macedonia, the Constitutional Court of the Republic of Macedonia protects the rights and freedoms of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the grounds of sex, race, religion or national, social or political affiliation.

17 Law on Election of the President of the Republic of Macedonia (Official Gazette of the Republic of Macedonia Nos. 20/94, 48/99 and 11/2004).

be counted in accordance with Article 80 paragraph 5 of the Macedonian Constitution, up to the day when the Republic of Macedonia became independent on 17 November 1991. The date of proclamation of the Constitution of the Republic of Macedonia, as the date when the Republic of Macedonia was considered an independent country, has also been accepted by the Arbitrary Commission (Badenter's Commission). According to some legal theoreticians, the provision of Article 80 paragraph 5 is outdated, because it has been more than ten years since the SFRY ceased to exist.[69]

V. Residency as a condition for exercising the right to be elected in the local elections in the Republic of Macedonia

The Constitution of the Republic of Macedonia guarantees the right to a local self-government to the citizens. Units of local self-government are the municipalities, whereby there is a possibility for establishing forms of community governance. The local elections are conducted according to a mixed model: proportional and majority. The way of organising local elections is determined in the Law on Local Elections. The Law on Local Elections[70] in its basic provisions stipulates that the citizens elect the local authorities in general, direct and free elections, by secret ballot.

Each citizen of the Republic of Macedonia over eighteen years of age and with legal capacity and permanent residence in the municipality where elections are to be held, has the right to elect and be elected as a member of the council. Each citizen of the Republic of Macedonia over eighteen years of age and with permanent residence in the municipality where elections are held, has the right to elect and be elected as a mayor.

The Law on Local Elections also stipulates that the candidate should have permanent residence in the municipality, as one of the general conditions for citizens to exercise their active but also passive electoral right. This approach is quite understandable if we bear in mind the competencies of local self-government. The citizens cannot be represented by a person who is not familiar with the circumstances in the municipality, nor can he stand for resolving certain issues that have significance for the pertinent municipality. Therefore, the Law on Local Elections quite justifiably prescribes permanent residence as an important condition for exercising the electoral right (both active and passive). The local elections are of crucial importance to the citizens who live in a local community, because that is the place where their everyday problems are resolved. Consequently, it is understandable that in many countries even the people who do not have citizenship have a right to vote in local elections, if they were staying in the country for a longer period of time as foreigners (for example, in Switzerland). That is also the tendency in the countries of the European Union. The Directive 94/80/EC for rights related to local elections enables all citizens of the European Union to elect and stand for election in municipal elections in the member states where they reside, without this right being connected to residence in the state of their origin.

The intention of the EU regarding the exercise of the electoral right of the EU citizens is clear, which means that gradually the condition of having citizenship should step down in favour of the condition of residency. This is quite understandable, keeping in mind that due to the free

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18 Svetomir Skaric, "*Comparative Macedonian Constitutional Law*", Matica Makedonska, Skopje 2004, p. 645.

19 Law on Local Elections, Official Gazette of RM No. 6/96.

labour market within the borders of the European Union the citizens of the member states will change residency often in search for new employment or new investments. The idea of enabling each person with an electoral right to exercise within the frames of the community where he lives, and especially for local elections, enables, among other things, the quick integration of the newly arrived members in the local community, and also their involvement in the election of local authorities, since the local authority is also sustained with the tax money of the citizens who live in that community.

VI. Conclusion

Elections mirror the face of democracy. The right to elect and to stand for election is one of the key political rights, one which enables citizens to influence the authorities in the country where they have decided to live. When speaking of local elections (in the case of the member states of the EU and the elections for the European Parliament), in the situation of a dynamic society in which frequent changes of the state of residence do not always result in change of citizenship, it seems that the condition of residence is more relevant than the condition of citizenship. In most European countries residence is accepted as the basis for enabling persons who live on their territory to exercise the right to elect local government and representatives to the European Parliament. The intention of the European Union to enable citizens who come from its member states to exercise the right to vote in the place where they permanently reside has been clearly specified in several directives.

On the other hand, when speaking about the institution of the president of a country, in more than a few countries the passive electoral right is connected to residency in the given country. In other countries, they go as far as to require citizens to have spent a certain period of time as citizens of that country (for example the USA). It is assumed that the president of a country must have an effective legal connection to the state and its citizens.

Parliamentary elections, by their nature, leave space for the electoral right to be exercised regardless of the place of residence, if that has been connected to the state through citizenship. The permanent building of election legislation in the Republic of Macedonia tries to follow the tendency towards creating conditions for a more complete and realistic exercise of the constitutionally given electoral right of citizens.

ELECTORAL SYSTEMS – EUROPEAN STANDARDS: PARTICULAR ASPECTS AND CASE STUDY

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I. Introduction

The Venice Commission for Democracy through Law contributed substantially to setting electoral standards with the Code of Good Practice in Electoral Matters. This summarisation

constituted a clear and incontrovertible set of European standards for the preparation, conduct and reporting the results of elections.

Elections are a major democratic tool of expressing the will of the people relating to political government. Besides, elections are a form of direct democracy, and also a democratic highway to representative government.

The European standards were adopted by the Venice Commission at its 51st session (July 2002) and were summarised, as noted above, in a Code of Good Practice in Electoral Matters (Guidelines and Explanatory Report).[71]

These European standards are formulated in two groups. The first group, principles of Europe's electoral heritage, includes five basic principles:

- universal suffrage;
- equal suffrage;
- free suffrage;
- secret vote; and
- direct elections.

The Venice Commission adds to these five principles the characteristic "periodical elections".[72]

We will also add "definitive elections".

The second group deals with conditions for implementing the principles of the first group. These conditions include:

- respect for fundamental rights;

- high regulatory level and stability of objective electoral law;

- procedural guarantees, including:
- organisation of polling by an independent body;
- observers at elections;
- an effective system of appeal.

Having analysed European electoral practice and synthesised the principles of Europe's electoral heritage, as well as the absolutely necessary conditions for implementing these European principles, the Venice Commission makes the following very important conclusion: "Within the respect of the above-mentioned principles, any electoral system may be chosen."[73]

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1 *Code of Good Practice in Electoral Matters*, the European Commission for Democracy through Law, Science and Technique of Democracy, No. 34, Council of Europe Publishing, Strasbourg, 2003.

2 Ibid., p. 7.

3 Ibid., p. 17.

Systematically, this conclusion of the Venice Commission is placed at the end of the Code of Good Practice in Electoral Matters, immediately after the formulated European standards of elections and the conditions for implementing these standards.

Yet for us this important conclusion of the Venice Commission is a starting point for analysing election systems and fitting these in the general framework of European electoral standards.

Why do actually we address election systems? Why do discussions on choosing one or another election system continue, and why is an adopted election system changed more or less frequently?

Before looking for the answer to these questions and going deep into the essence of election systems, we should make the following clarification: the five principles of Europe's electoral heritage formulated by the Venice Commission enjoy unanimous accord. All modern constitutions positively embed these.

But this is not the case with election systems. Discussions in the field continue. Practice shows that adopting and reaching a consensus on the implementation of the proclaimed five principles of Europe's electoral heritage is not enough to choose a particular election system. Therefore it is especially interesting to closely study the election systems within the European heritage, because the election systems more rarely stand in the focus of attention.

However, we should note that in Article 3 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms there is no attitude concerning matters of election systems.[74]
Later, in another field, the Treaty Establishing the European Community and its Article 8b and the two paragraphs within it,[75] as well as Directives No. 94/80/EC and No. 93/109/EC of the European Council, do not set as a prerequisite the complete harmonisation of the election systems implemented in member states of the European Union.

But discussions on election systems continue. What should be the criteria for preferring one election system to another, given that both contain the five European principles and the necessary conditions for implementing these principles are satisfied? Which election system should be selected as being closer to European standards in terms of heritage as well as in terms of future-oriented effective positive law and practice?

Paradoxically, the details of election systems seldom enjoy wide public interest; they are rarely discussed by the mass media. Many essential particulars, such as converting votes into

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4 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."

5 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the European Union residing in a member state of which they are not nationals. Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament by citizens of the European Union residing in a member state of which they are not nationals.

mandates, generally interest a handful of specialists, almost always outside broad public interest.

This is largely due to the fact that objective electoral law is in immediate proximity to the intensive political process. What is more, the law governing elections regulates this process and submits it to the fundamental effect of law – being an equal measure of human behaviour.

Yet the law and its implementation touch on another ("dark") side of elections, one that smacks of political power and of the efforts of the ruling political elite to make sure they get re-elected. In this light the choice of a particular election system is viewed as part of the repertoire of the political strife involved in ensuring representation, and corresponds most closely to certain expectations and interests; it is regarded as a purely political decision.

As a result, legal science and practice faces the implementation of a responsible task: to focus on legal matters, to be in search of solutions with legal implements so that the choice of a certain type of election system does not slip out towards policy, while retaining legality and fulfilling all the necessary requirements of transparency and control.

On the other hand the variety of systems which specialists offer practitioners is such as to satisfy their wildest dreams. This variety enables, at least theoretically, almost any result to be obtained. Electors have the last word. Nevertheless it is possible for different results to be obtained by applying different election systems to the same facts (electors, number of mandates, etc.).

Despite this proximity and interpenetration between electoral law and political processes, there is an absolute requirement for the constitutional state and the rule of law: law should defend its values and achievements with a view to keeping political strife within the confines of legal regulation, thereby achieving democracy through law.

In our opinion, modern citizens still know undeservedly little about how their votes are converted into another matter – how they become part of the representation of the people and take part in government. Therefore the matter of election systems deserves attention and study despite the indisputable consensus on the principles of Europe's electoral heritage.

This has been stimulated by many years of effort within the framework of the European Union to unify election procedures in particular member states concerning elections for the European Parliament. In this connection, although projected, the following provisions deserve attention – the provision of Article III-232, paragraph 1, of the draft European constitution: "A European law or framework law of the Council of Ministers shall establish the necessary measures for the election of the Members of the European Parliament by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States."[76]

Led by the common European endeavour to retain diversity within the common framework of the European Union[77] and the implementation of European heritage, at the end of this paper

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6 Конституция за Европа, изд. "Св. Климент Охридски", 2004.

7 "United in its diversity" – the motto of the draft constitution for Europe is one of the symbols of the EU (Article IV-1).

we will devote due attention to a case study in an interesting and original legal construction of converting electors' votes into mandates, a system which has been operational in Bulgaria since 1990 (including the last parliamentary elections in 2001).

II. Election systems: essence and purpose

Elections and the functions performed thereby are vital and therefore require systematisation and institutionalisation. This is achieved through the election system.[78]

The election system is a set of legal rules, techniques and frameworks whereby electors express their political will by casting votes for the purpose of constituting the representative government bodies in a state. Constitutional and legal theory contains a wide range of opinions about the essence and the elements of election systems, considering the peculiarities of the legal and representative system in a state or a supranational community.[79] Yet the understanding that the election system is a set of rules governing the expression of electors' will in the preparation and conduct of elections for central and local government bodies and the conversion of the votes cast into representative mandates prevails.[80]

A balanced election system, which contains and implements the principles of universal, equal and direct suffrage with secret voting, is a means of establishing and maintaining democratic government. Human civilisation has not so far created a more efficient and rational technology.

The election system is a strong factor of democratic governance. It puts into motion the principles of election law as a branch of effective objective law.

Assessing and introducing any type of election system always involves two essential questions:

a. from a legal and technological perspective:

- how to find the formulas and legal methods which shall ensure to those who are governed the best representation in public authority bodies, thereby assimilating them with those who govern and achieving the desired identities of those who are governed and those who govern;

- how to achieve optimum proportionality of the votes cast and the mandates they are converted into, having at the same time a stable government.

b. from a political perspective:

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8 We intentionally prefer the term "election system" to "electoral system", which is a legal term. As a matter of fact "election system" is a traditional term for Bulgarian legal theory - КИРОВ, Стефан., Мнозинствена и съразмерна изборна система, сп. Демократически преглед, кн. .VI-VII, 1906 г.

9 This definition marks the "broad notion" – G. Schepis, I sistemi elletoralli, Empoli 1955, p. 21; as far as it concerns the "narrow notion" it is described as "…the procedure, through which the electors votes' send representatives" – N. Diederich, Empirische Wahlforschung", Cologne 1965, p. 3.

10 D. Nohlen, *Die Wahl der Parlamente*, B. I, Berlin 1969, pp. 28-31.

- how to have the election system reflect accurately the separated exercise of power in the state and promote citizens' interests at the same time;

- how to set the election system going as a rich instrument for the development of civil education.

Implementing an election system lies at the heart of democracy, because:

- the will of the sovereign people designates through elections the legitimate representatives, who in turn;

- are responsible before the people and supervise the executive and the judiciary, and;

- are responsible before the electors in periodic and definitive elections.

Election systems are at the very core of democracy because by way of the chosen electoral system and in observation of the European principles mentioned, the electors' votes cast are converted into representative mandates; the multiple individual political will of the sovereign people is transformed and organised by forming legitimate representation of the people distributed in accordance with the expressed will of electors; this representation of the people gives life to and controls state government in democracy and makes itself accountable in the subsequent set of elections.

The core of each election system is the principle by which parliamentary mandates are allocated among the parties and the candidates in accordance with the votes cast for them. Two basic principles, majority/plurality and proportion, and accordingly two basic types of election systems are applied: majority and proportional. Conceptually, the differences between these systems come from the different treatment of the will of the electors.

With a view to making the most of the advantages and to suppress the defects of these two basic types of election system, global and especially European practice achieves a compromise by combining the two principles, developing and applying different variants of a third type of election system – the mixed/hybrid system.

In fact, there is no predefined standardised classification of election systems. Within the frameworks of these three basic types – majority, proportional and mixed, at present legal theory[81] ascertains a huge variety of combinations of particular details.

So that the public is aware of possible modifications to election systems, the general indications of election systems need to be summarised. This is a task of legal science and of election practice, i.e. of democracy through law. These elements are the constructive elements of the taxonomy of election matters. With regard to them legal theory and practice are united about some achieved standards.

Legal theory,[82] as developed within the framework of the Venice Commission, arranges the general indications of election systems into two categories:

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11 D. Nohlen, *Wahlrecht und Parteiensystem*, Opladen, 1989.

12 C. Broquet and A. Lancelot, *Report on Electoral Systems*, Council of Europe, St. Nr. 250/2003.

- the first category includes those factors which concern election organisation, implementation and procedures; these include the constituencies, the form of candidature, the ways of voting, etc;

- the second category consists of the rules, related to the counting of the votes and the distribution of mandates, i.e. the valuation of the given votes.

With regard to the first category, the election systems ought to answer five questions, to which there are different possible answers:

- what sort of electors should be summoned to election ballot-boxes and accordingly, what sort of suffrage should be established? Universal, direct elections or universal, indirect elections, or a combination of both;

- what leading principle should the vote be based on? In conformity with this – majority, proportional or a mixed type of election system?

- how should the electorate be divided into constituencies?

- what form of voting should be selected for the electors? Here a differentiation may be made between methods of "categorical" voting (electors make an absolute choice) as they indicate their preference for a certain party, to the exception of all the others, and methods of "ordinal" voting (whereby electors have the opportunity to qualify their choice);

- how many times should the electors vote? The answer shall determine how many stages the vote should be realised by.

The Code of Good Practice in Electoral Matters has given the answers to these five questions. They contain the conditions formulated for the implementation of the fundamental European standards with regard to elections.[83]

The second category of general indications includes the rules for valuation (counting of the results) of the votes. Four questions are particularly significant:

- the distribution of the mandates between the constituencies;

- the choice of certain methods for allocation of the mandates on different candidate lists;

- taking a decision on whether there should be election barriers and/or bonuses with the aim of facilitating the newly elected parliament in forming a majority for government;

- the allocation of mandates inside of the lists.

This chapter concentrates mainly on the second category, i.e. on the distribution of the mandates, because this category determines the type of election system; and runs over two

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13 *Code of Good Practice in Electoral Matters*, the European Commission for Democracy through Law, Science and Technique of Democracy, No. 34, Council of Europe Publishing, Strasbourg, 2003.

stages. The first stage of this decisive procedure – the distribution of the mandates between the constituencies – is implemented before the voting; in most cases it is the subject of legislation. The second stage is the distribution of the mandates between the participating political parties and independent candidates, if foreseen. The second stage is the decisive one.

III. Types of election systems

1. The majority/plurality system

The name comes from the French word *majorité* (majority). In Bulgaria's parliamentary tradition the system is also called *mnozinstvena* or *visheglasna* (both words meaning majority).[84] Majority is the principle according to which parliamentary mandates are distributed between candidates and parties in accordance with the electors' votes. The candidate who has obtained the majority of the valid votes cast in the corresponding constituency wins the mandate. This type of system is applicable in single-member constituencies.

The system has a centuries-old history. It originated in medieval England as a first-past-the-post system. The oldest known English election law dates back to the mid-fifteenth century. In our times different variants of the majority system are applied in the UK, the USA, India, Syria, Tunisia, France, etc.

In Bulgaria the majority system was introduced immediately after the restoration of the Bulgarian state, as early as the first Election Law (1880). The system was operational until 1910/1912 when it was replaced by a proportional system. The legislation in the period 1938-1944 also envisaged a majority system.

The formation of constituencies is decisive for every majority system – these are the units where the majority deciding the election is formed. Constituencies are single-member and multi-member. In most practiced systems constituencies are single-member – only one deputy is mandated to the parliament; an unlimited number of candidates compete for the mandate.

The single-member constituency corresponds to the British original and to the constitutional principle "one man – one vote".

An elementary requirement of modern electoral law is to have equal single-member constituencies (with minimum admissible deviation). This requirement should guarantee another, more developed principle – "one man – one vote – one weight", i.e. the principle of equal suffrage, which is *conditio sine qua non* for guaranteeing fair and honest elections. But exactly this principle is often violated by so-called "gerrymandering" – redrawing constituencies with a view to guarantee supporting electoral votes in favour of a particular political force.

Majority systems with multi-member constituencies are applied in some countries like Tunisia, Syria, Kuwait and Bulgaria (1880). These constituencies send to parliament two or more deputies. Electors have more than one vote – as many as the mandates elected in the corresponding constituency. In Europe majority systems with multi-member constituencies are practiced only with local elections.

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14 КИРОВ, Стефан, see footnote 8.

Different majorities are applied in deciding the election. There are generally two basic types: relative majority/plurality and absolute majority/majority. Elections within the single-member constituency with relative majority/plurality voting are won by the candidate who has won the highest number of votes compared to any other candidate. This is a plurality. It is always effective. But along with these positive features, it may also have a serious negative result – non-representativeness – as the votes cast for the elected candidate may constitute a minority against the total votes cast for all other candidates in the constituency. These votes cast for all other candidates are lost. That is why the plurality system is often called a "knock-out system".

Absolute majority systems, whereby the winner is the candidate who gets more than 50% of the votes cast, are applied in France, Monaco, etc. Years ago this system was applied as a method of transferring votes into mandates in the election laws of the former socialist countries, where political pluralism and the other absolute attributes of free and democratic elections were in general absent, which made the formal record pointless.

Majority elections are often unproductive – none of the candidates might get more than 50% of the votes. Therefore a secondary procedure is necessary. This is usually a second ballot (second round) organised not earlier than a week after the first. In most cases only the candidates with the highest two results from the first round take part in it; the election is then won by plurality. There are also other known secondary procedures – the so-called Roman system (possible nomination of new candidates in the second round when plurality decides the election), or a wider second round with the participation of the candidates with the highest three results, also then decided by plurality.

To fill a vacated mandate, a runner-up is nominated as early as the nomination of candidates in some countries such as France. But the practice of the so-called partial elections prevails: if a mandate is vacated ahead of term, elections are conducted for this mandate only. Nominating a runner-up as early as the nomination of the candidates for the elections is more conservative because it reflects the status of the community at the time of conducting the elections; yet this way of filling a vacated mandate is much more economical in terms of funds and social energy. Partial elections are doubtless a more democratic method of filling a vacated mandate, but they are more expensive and require more funds and preparation.

Weighing the advantages and the defects of majority systems, personal choice should be pointed out as a major advantage: votes are cast for individual candidates, for personalities. A relationship between electors and elected is in place.

Another undeniable advantage is the simple and easy to understand election contest. It is believed that with majority voting the final decision is clearer and more transparent because there is no uncertainty about the future government; the election turns into a decision of who will be the ruling majority and who the opposition.

Yet these advantages are somewhat offset by the most important defect, which is organically inherent to majority elections, that of non-representativeness: all votes cast for candidates other than the winner are lost and remain unrepresented. Under these circumstances an elector who really wants to contribute with his vote to the formation of the future membership of parliament and government will have to vote for an acceptable candidate who has better

chances of getting a majority. As the famous British election slogan goes: "Make your vote effective!"

Thus the "majority formula" as a decisive principle of the majority system has a concentrating and integrating effect on electors and on society in general. This effect is regarded both as a big plus and a big minus.[85]

Adherents of majority voting point out its integrating effect as an undeniable quality ensuring a working parliament and a stable and in most cases single-party government. Thus the following conclusion can be made: the objective of each majority system is to directly legitimate the government. Majority elections have an inherent protecting effect, putting up barriers against the break up of political parties. There is yet another consideration in favour of majority elections – partial elections are a reliable barometer of electors' attitudes.

But opponents to majority elections regard the so-called integrating effect of the system as a defect which encourages extreme elector behaviour – either apathy and political indifference or violent contest with unforeseeable results. The unfavourable position of small parties as well as the unequal weight of votes, resulting generally from the difference in the size of constituencies, is also regarded as a defect.

2. The proportional system.

Its name is derived from "proportion", i.e. the correlation between two values. In this case the two values are based on electors' votes and the mandates of members of parliament distributed in proportion to these votes. Proportion is the guiding principle for the distribution of seats. A parliament composed under the proportional representation system should present an accurate reflection of political powers in society and provide a snapshot or small-scale image of the nation since it is expected that there will be a correspondence between votes and seats.

The proportional representation system started to establish itself in Europe no earlier than the end of the nineteenth century as an answer to the objective necessity of reflecting the processes of stratification and the growing complexity of public life. As a comprehensive election system, it was first introduced in Belgium in 1893, followed by Denmark in 1906, and Sweden in 1909. After the second world war, proportional representation elections became widespread in Europe: in the Netherlands, Norway, Austria, Spain, Italy, Greece and Turkey; in the last ten years the system spread to South America as well as the Czech Republic, Estonia, Latvia, Slovakia, Slovenia, Romania and Poland.

In Bulgaria the proportional representation system, also known as the "commensurate" system,[86] has had a long tradition. It was introduced gradually: first at the municipal elections of 1910, then at the parliamentary elections in the Turnovo and Plovdiv constituencies in 1911, and in 1912 it was applied throughout the country for both parliamentary and municipal elections.

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85 M. Diverger, *L'influence des systèmes électoraux sur la vie politique*, Paris, 1955, pp. 14-28; K. Loewenstein, *Verfassungslehre*, Tubingen, 1969, p. 279.

86 КИРОВ, Стефан, see footnote 8.

Under the proportional representation system, constituencies are always multi-mandate ones, i.e. each region sends two or more representatives to parliament. Nowadays, electoral regions are defined almost universally in accordance with the existing administrative and territorial divisions. This means that constituencies that vary in population size will be entitled to accordingly different numbers of mandates.

Electors almost always vote for party lists (with the exception of voting for single candidates as is the case of single transferable voting). The logic of elections requires that the lists should contain as many names of candidates as there are mandates in the constituency; there is no obstacle to the lists containing more names than the corresponding mandates. The nature of the lists is defined by the way in which voters express their will when voting. In the case of the so-called "hard lists", the elector cannot change the preliminary ranking of names in the party list.

In the case of the so-called "free" or "independent" lists, electors may express their preferences for candidates on the same list by deleting (pursuant to the Bulgarian Elections Law of 1912), ranking or attributing points (Austria, Italy). Under the so-called "panachage", electors may identify their preferred candidates from different lists (Switzerland, Luxembourg). All these methods of selection are meant to make the proportional choice more personal. However, they are essential only to the inner-party distribution of seats won on the basis of the concrete party list.[87]

Election thresholds and bonuses are formal barriers or bonuses to the winners stipulated by law. They are typical of the proportional representation system.[88] Their aim is to achieve an integration effect: to avoid the fragmentation of voices as an obstacle to arriving at the shared will to govern the country.

Most often, the election barrier amounts to a requirement to receive a certain percentage of the submitted valid votes: it is only the political parties that have gathered the votes corresponding to this percentage threshold that participate in the distribution of seats in accordance with the received votes. In addition to the percentage barrier, some countries (Germany, Austria) impose the requirement of achieving the so-called "basic mandate" which is a mandate dependent on the primary distribution of submitted votes. They are, in some ways, the equivalent of the thresholds used in the first round elections of majority systems.

This restriction on access to distribution generally applies to the award of seats in basic constituencies, but it may also be applied solely to groups of constituencies or to the distribution of remainders. The thresholds, which are generally expressed as a percentage of registered electors or of voters, are a matter for the discretion of the legislature. However, the role played by the thresholds differs depending on how high they have been set and on the party system existing in each country.

The choice of a low threshold eliminates only very small parties, which makes it more difficult to build stable majorities in assemblies. Where there is strong fragmentation of the party system, a high threshold results in the exclusion from representation of a substantial proportion of votes.

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87 For a detailed discussion see C. Broquet and A. Lancelot, *op. cit.*

88 They are very rarely applied in the majority system, in the first round (France, local elections).

Bonuses are mandates granted to the most successful list before the distribution of seats is carried out. They are principally used for local elections.

The most important element in each proportional representation system is the method by which the calculation of votes is performed and their respective reformulation as seats. The applied methods vary; there are also different combinations and variants. Two major methods seem to prevail, however: the electoral quota/number method and the devisor method.

The first method calculates the electoral quota/number. The election quota specifies the number of votes required to win a seat in the constituency, i.e. the "price of the mandate" in the respective constituency. It is calculated by dividing the total number of votes into the number of seats for the constituency; the received value equals the election quota. The number of election quotas within the number of votes for the party list equals the number of seats won in that constituency by the respective party list.

Within this first method doctrine and electoral practice have formed two groups: "fixed" and "variable" electoral quotas.

The "fixed" electoral quota, or uniform number, equals the number of votes predetermined by the legislature and is identical for all constituencies. The use of this quota means that the number of seats in the assembly will not be determined until election night. The number of seats will, moreover, depend on the participation rate. In addition, the adoption of a "fixed" electoral quota tends to preclude the representation of a substantial number of votes, particularly those cast for small parties. Consequently, only the choice of a relatively low electoral quota, coupled with its application in large constituencies, is capable of curbing this tendency. This type of electoral quota has only been used in the Weimar Republic in Germany.

The "variable" electoral quota is determined on election night. It has various forms. The "simple quota" or Hare's quota (after the British mathematician Thomas Hare): this quota (Q) is obtained by dividing in each constituency the total number of votes cast (X) by the number of seats to be filled (Y), $Q = X : Y$.

When 1 is added to the denominator, the quotient is known as the Hagenbach-Bishoff quota ($Q = X: (Y + 1)$). When 1 is added to the Hagenbach-Bishoff quota, the total calculated quota is known as the Droop quota ($Q = X: (Y +1) +1$). Other quotas applied include the Imperial quota as well as the so-called double quota.

When the "election quota" method is applied, there are often seats remaining that have not been distributed. Their distribution follows secondary procedures applied to the respective constituency as well as throughout the territory. Many countries have introduced barriers for both primary and secondary distribution in order to avoid the undesirable fragmentation of the future composition of parliament.

Another method, known as the "denominator method", is always a resultative one: the votes cast for each party list are divided successively by a row of natural numbers (denominators). The value of the quotients received determines the distribution of seats. This method is associated with the name of the Belgian mathematician D'Hondt and is also known as the D'Hondt method.

It should be pointed out that nine of the EU member states (Austria, Belgium, Denmark, Spain, Finland, France, the UK, the Netherlands and Portugal) used this method until May 1, 2004 to calculate the European Parliament election results. The big advantage of this method is that all the seats are distributed in one act.

However, it is well known that this method favours the big parties. To minimise this drawback, various modifications of this method have been elaborated and are in practice:

- the Sainte-Lague method: the votes obtained by each list are divided by a sequence of odd numbers: 1, 3, 5, 7 and so on. Seats are distributed among the lists which obtain the highest averages. The Sainte-Lague method is distinctly more favourable to small parties than the D'Hondt method;

- the modified Sainte-Lague method: it differs from the Saint-Lague method only in that the first divisor is replaced by 1.4. This method is more favourable to small parties than the D'Hondt method but does not favour them overtly. It also affords fairer representation for medium-sized parties. Nowadays it is used for small constituencies in Sweden, Norway and Denmark;

- the so-called "Danish" method: the number of votes obtained by each list is divided by the following numbers: 1, 4, 7, 10, for example. This system is extremely favourable to small parties. In Denmark, this method is used to distribute, among small constituencies, seats attributed to a party at the level of a group of constituencies.

The adoption of different methods or of a combination of separate methods for calculating election results is linked to in-depth analyses of the application of European election principles and of the fair and proportional transformation of votes into seats.

The major advantage of the proportional representation system is in its representative character, i.e. the proportional transformation of electoral votes into seats and the inclusion of smaller parties. The principle of representativeness is linked to the principle of fairness: all votes should possess the same "counting" and "success factor" value. This is the very essence of the philosophy of the proportional representation system.

In addition, the proportional representation system is economical: in the case of an early vacating of a mandate, the seat is taken by the candidate who is next on the list. When the candidates' list has been exhausted, the seat remains vacant. In this way, no efforts or expenses are incurred to conduct partial elections as is the case under the majority system.

The big advantage of this method is that all the seats are distributed in one act. But it is well known that it favours the big parties.

For the European Parliament elections, all fifteen member states (as of May 1, 2004) apply the proportional representation system only; even if the current European legislation (Directive 94/80 EC) as well as the draft EU constitution and its charter of fundamental rights do not state an explicit requirement to that effect.

However, the proportional representation system has its disadvantages as well. The first is that electors vote for parties and their manifestos rather than for personalities. This means that

the proportional representation system presupposes the existence of several parties with well-developed structures and comprehensive programmes for the future government of the country as well as a narrow dependence of future members of parliament on their parties.

The calculation of the results is of a great complexity. It is well known that under a proportional representation system most electors are unaware of the formula for transforming the votes into mandates. Thus, the formula remains "hidden behind curtains" and accessible to experts only.

In addition, it is believed that the proportional representation system has a dividing and "defragmenting" effect on society: the elected parliament will find it hard to form a majority and even harder to form a government. At the same time, it is precisely the formation of capable bodies of government that is the essence and the purpose of an election system. As a rule, applying the proportional representation system leads to coalitions in government. It is for this reason that the opponents of the proportional representation system point out that the value of an election system is not in providing a snap shot of public opinion but in electing – on the basis of the free vote of electors – a parliament and government that functions well.

3. The mixed system

Election law theory has not yet provided a clear answer on a global scale as to which of the two main election systems is better. Majority systems are simple and yield results but they lack representation: all votes for the candidate who does not win remain without their representation and are practically wasted. This unwanted result is not characteristic of proportional representation systems. At the same time, the latter do not include the personality component: electors vote predominantly for the party lists.

While looking for the best election system, a third election system emerged in Europe between the two world wars: the so-called mixed system. Attempts have been made to combine characteristics of both systems in order to avoid their disadvantages. As a result, nowadays various mixed systems are applied in Germany, Mexico, Ireland, Malta, Senegal, Japan, Albania, Lithuania, Russia and others.

The elections for the Grand National Assembly in Bulgaria in 1990 were held under the mixed system as well. What follows is a brief outline of some of the existing mixed systems.

In Germany, the election system is known as a "personalised proportional representation system". This is a combination between the proportional principle and personal choice. However, it is the proportional principle that has a clear prevalence in this combination. The majority component has but a corrective force. The elector's vote is "split": the elector casts a first and a second vote. The first vote goes to individual candidates elected in single-mandate constituencies following the majority principle: the elector votes for personalities. The second vote goes for one of the party lists promoted by the different provinces.

On a national level, the votes for each party under all its lists in the separate provinces are added. The counting follows the Hare-Niemeyer method, which is actually a further development of the Hare method. Again on a national level, all parliamentary seats are distributed in proportion to the votes cast throughout the country. There is also an election barrier: it is only the parties that have gathered no less than 5% of the votes cast throughout the country or no fewer than three majority seats won individually that are entitled to

parliamentary seats. The national mandates won by each party are then distributed on the basis of the lists of the party promoted in the different provinces. The individual majority mandates are subtracted from the national mandates, the leading positions being given to the successful individual candidates promoted by the respective parties.

In this way, the current German election system attaches leading importance to the proportional election based on party lists while majority elections serve to make explicit the leaders in the lists.[89]

The big advantage of this system is in the possible personalisation (through a majority election) of a part of the members of parliament, although in the framework of a proportional election as a whole. The system was has also been used in Estonia (1992) and in New Zealand (1993).

But there are also some drawbacks – its complexity as a construction, and the risk of manipulation. As has been pointed out: "in this two-vote system, there is nothing to prevent a party from not putting forward official candidates in the single member ballot and allowing them to stand as independents (…) In that case, it could, in practice, obtain a substantially higher number of direct seats while benefiting to the maximum from the offsetting mechanism".[90]

In Mexico, electors have two votes as well. The lower chamber of parliament has 500 seats. Electors cast their first vote to elect 300 members of parliament, the relative majority in single-mandate constituencies being of decisive importance. The second vote is cast to select 200 members of parliament under the proportional representation method where the parties participate through their lists in the five multi-mandate constituencies. The threshold in this case is 2%. It is believed that the Mexican system definitely favours the majority principle while the proportional component contributes to achieving the motto of the first Mexican president F. Madero concerning an efficient and definitive election system: "Efficient election law, with no second election".

The election system of Hungary is probably one of the most complicated mixed systems applied so far. It was introduced in 1990 and was used for the second time for the 1994 parliamentary elections. This system comprises three levels. The first one is a majority level: elections are held for 176 seats. At this level the vote goes for individual candidates in single-mandate constituencies. The second level is proportional. Elections are held for 152 seats in multi-mandate constituencies on the basis of party lists. The third level fills in 58 compensation seats under the national party lists. Here, the so-called remaining votes that have not been used at the first two levels are decisive. Importantly, in order to move on to the higher levels under this system one should have achieved certain success at the lower level.

The systems of Australia, Ireland and Malta are closely related to the British legal and political tradition. Their election systems were adopted in order to eliminate the disadvantages of the classic British majority system. What is common to the election systems of Ireland, Australia and Malta is the drive to save the wasted votes; the goal is to make sure that these votes will not be left unrepresented but will rather be used and transferred to the votes cast for

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89 W. Schreiber, Wahlkampf, *Wahlrecht und Wahlverfahren in der BRD*, 1989, pp. 414-419.

90 P. Martin, *Les systèmes électoraux et les modes de scrutins*, 1997, p. 87.

other candidates that are likely to achieve the required majority (Australia) or the necessary election quota (Ireland, Malta). Electors place consecutive numbers before the names of the candidates on the ballot according to preference. The election results are calculated accordingly. In Australia this alternative is based on the majority principle; the system is known as the one of alternative vote. The system applied in Ireland and Malta is based on proportional choice. It is known as the single transferable vote system.

The advantages of hybrid systems are constantly discussed, especially where a reform of the existing electoral system is concerned. Besides, a general tendency to debate the implementation of some type of a hybrid system as a panacea is observed in such cases. The explanation is that hybrid systems have internalised the multi-functionality of electoral systems in general.
Yet by definition a hybrid system brings together conflicting solutions and structures, which is undoubtedly an undesirable effect. Then comes the search for the "happy medium".

To achieve a successful combination of legal figures and solutions, so as not to be exposed to accusations of manipulation, electoral theory in Europe takes on board the conclusion that the hybrid system must be positively based on strong principles, which should be stated and classified by order of importance, since, when applied, they each have the effect of limiting the others.

Unlike pure proportional representation or majority systems, hybrid systems also have the advantage of evening out changes in representation, selection and the capacity for investiture or sanction, thereby achieving good governance in a democratic environment by way of controlling changes (a "well-tempered" electoral system).[91]

Generally, the drawbacks of all hybrid electoral systems can be reduced to their complexity. They often involve procedures that distort the results of the ballot boxes so as either to exclude certain votes from representation (thresholds) or, on the contrary, to increase the weight of other votes (bonuses for the leading party). Then the elector who has difficulty in understanding the complexity of the arithmetic finds it even more difficult to accept the resulting discrepancy compared to the votes cast. Thus the main drawback of hybrid systems lies in the average elector's feeling of alienation vis-à-vis the operation of the electoral system, which he, unable to understand, regards as being "manipulated by politicians".

To this difficulty in perceiving and understanding the hybrid system can be added that of the nature of the mix itself. A hybrid system would be blocked and paralysed if the various elements it combined did not involve an appropriate ranking.

And what is the best mix? The legal theory offers neither an answer nor a recipe. The answer is empirical – only experience can help in choosing the correct mix.

This conclusion, widely recognised by theory and practice, fits perfectly in the Code of Good Practice in Electoral Matters, particularly in the last formulated condition for implementing European electoral principles: where the underlying principles of European electoral systems are respected, there is an enormous choice of electoral systems.

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91 C. Broquet and A. Lancelot, *op. cit.*

This brief review of the advantages and drawbacks calls for the conclusion that where a hybrid system is implemented, it should be preceded by a profound and professional development involving government institutions, and, above all – by a wide public debate, which will allow a future transparent and clear hybrid system that can be perceived, understood and thereby legitimised.

IV. Criteria for selecting a particular electoral system

What is the basis of assessing an electoral system? Doubtless, its effect. Indeed, it is in this that the biggest problem lies – how should one make an absolute, error-free choice in favour of any particular electoral system?

The Code of Good Practice leaves the choice of a particular electoral system free, in so far as the European electoral principles are respected.

In an attempt to overcome scepticism that a good electoral system cannot possibly exist ("All stink!") and so as not to get lost in infinite relativism, modern legal theory studying electoral matters has adopted the functional approach: by clarifying and exposing the functions of electoral systems to provide legislators and politicians with rich and reliable material for composing the desired electoral system in accordance with the goals set and the principles of European electoral heritage.[92]

The basic functions of an electoral system are to determine the mode of casting votes, the ways in which electors can express their political preferences, and to provide the methods of converting votes cast into mandates. Thus the electoral system structures the electors' decision and achieves expression of the public will concerning government. This expression of will generates efficient political will as a fundament and motor of the democratic state. Therefore, a "good" electoral system must provide ready regulation (a combination of rules and possible solutions) of the entire electoral process – from casting votes to determining the results.

Legal theory and electoral practice offer various classifications of the functions of an electoral system. The classification[93] of the Venice Commission leads with its in-depth analysis and compact synthesis. It reduces matters to the most essential three functions of an electoral system:

- representation;
- selection; and
- investiture.

The first function – ensuring the representation of the people – is doubtless the leading one; it actually gave its name to the "representative system". Yet without an adequate second function in place – the selection of the people in the state government – representation is meaningless. Further, electors appoint their representatives, thereby making their selection for the future state government, but this government will only be legitimate and able to rule if invested with people's confidence through elections.

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92 D. Rae, *The Political Consequences of Electoral Law*, 1967, p. 14.

93 C. Broquet and A. Lancelot, *op. cit.*

The three basic functions of electoral systems are a powerful constructive factor in the modern democratic constitutional state. Therefore any electoral system which fulfils these three functions and hence the principles of European electoral heritage can be a "good" electoral system.

Conclusion

One can hardly object to the conclusion that there is no electoral system satisfactory from every angle. Each basic type has its advantages and its drawbacks, which vary in magnitude depending on what function fulfilled by the electoral system is considered. The variety is immense – a fact constituting in itself strong proof of the high level of development of the democratic state. It is in this variety that the legitimacy of democratic power is identified and implemented in practice.

As to the problems we are faced with in the selection of a particular system, it is worth remembering the words of the French jurist and politician P.P. Royer-Collard (1763-1845): "Une loi électorale, c'est toute une constitution!"

V. Case study: methods of giving value to the votes cast – Bulgaria, 1990-2004

Why Bulgaria? Its electoral practice contains interesting solutions. Further, the election legislation and practice of Bulgaria from 1990 to this day, apart from the expert study of the Referendum Act 1996, has not been considered in the papers of the Venice Commission.

The modern Bulgarian state was restored in the last decades of the nineteenth century and Bulgaria immediately adopted a majority system with multi-member constituencies (1880). It is worth noting that soon after Bulgaria restored its sovereignty it managed to follow the most progressive world trends of electoral law, after centuries of backwardness. Bulgarian legal theory (after Stefan Kirov, Boris Vazov, etc.) began a lengthy discussion on electoral law and systems on the pages of the Democratic Review Magazine, which was particularly intensive in the 1930s.

As a matter of fact, Bulgaria was among the first countries in the world to introduce proportional representation (during 1910-1912). Following this, different variants of proportional representation systems were a strong factor in Bulgaria's political life until 1934 when the actors of proportional election – the political parties – were banned.

After the second world war the period of free and pluralistic elections in Bulgaria did not last for long. The totalitarian regime established after the Soviet model made political pluralism and electoral systems irrelevant as institutions of democracy. In the late 1940s Bulgaria, like the other Eastern European countries, conducted "elections" with one candidate, results being in the order of 99% in favour of the ruling party.

With the democratic changes in the 1990s and the complex and previously untested transition to democracy and market economy, electoral law and systems were established in Eastern Europe as a powerful factor with legitimising and channelling functions.

Grand National Assembly elections were conducted in Bulgaria in June 1990 according to a hybrid system. Regular parliamentary elections were conducted in October 1991 according to

a proportional representation system with participation of independent candidates. The 1994, 1997 and 2001 parliamentary elections were also conducted according to this system.

The 1990 electoral system, as noted, was a hybrid – 50% majority and 50% proportional representation – new to Bulgaria. How did we arrive at its conceptualisation and transformation into effective law? During long discussions at the National Round Table in the first months of 1990, the two basic types of electoral systems (majority and proportional representation) were advanced. Just as global electoral law and practice is not definitely in favour of any of these two systems, the National Round Table did not manage to agree on one or the other. The solution was found in a mixed system – a hybrid of majority and proportional representation – with parallel independent experimentation with the two systems within the general framework of a hybrid system. In this way an initial identification of the nature and degree of segmentation was procured.

What was it in the hybrid system applied in 1990 that attracted the attention of specialists and observers, although the system undeservedly remained outside the focus of Bulgarian legal science? Its originality and simplicity. The mix of majority and proportional elements was new and original. It was mechanical; the interdependence and merging into one another of the two elements, which is inherent to other known hybrid systems, was absent. The system concept was developed in the Act on the Election of the Grand National Assembly (AEGNA) and can be summarised as follows: the two principles, majority and proportional representation, are equally represented – 200 mandates in the 400-member Grand National Assembly are elected on the majority principle in single member constituencies and 200 on the proportional principle, according to party lists in multi-member constituencies. This means that on one and the same territory, i.e. the national territory, majority elections are conducted for half of the mandates and then proportional elections for the other half. The two elections "overlap" without standing in one another's way.

The question which then arises is why these two elements – the majority and the proportional – belong to one and the same system, given that they run independently? Are there grounds to treat them as a system? The answer is yes. The reasons lie in the following:

- One and the same person may run in a single-member constituency (majority) and on a party list in a multi-member constituency (proportional). No one can be on more than one party list; the party lists include different candidates in all twenty-eight multi-member constituencies. When a person running in a single- as well as in a multi-member constituency is elected in both, he must waive one of them. This situation is not explicitly regulated in the law, but it is implicitly contained in the hybrid system concept, via the representative democracy principle of "one man – one mandate". Logically, the candidate should waive the multi-member constituency, which will allow the party supporting the corresponding list to "move in" the next candidate on the list.

- The constituencies were formed so as to have the small, i.e. single-member constituencies fit exactly alongside the borders of the big, i.e. multi-member constituencies. That made it possible for electors to cast their two votes in one and the same polling station, which should be pointed out as a significant facilitation. The electoral commission at the polling station distributes the majority and proportional ballot papers to the regional electoral commissions of the single- and multi-member constituencies, accordingly. With the 1990 hybrid system there are two types of regional electoral commissions, one for single-member constituencies and another for multi-member constituencies.

- Every elector has two ballot papers, which he should use for his two votes, thereby expressing his political will in two ways: on a majority and proportional basis; thus he can choose among personalities as well as among parties.

In single-member constituencies the candidate for whom more than half of the valid votes are cast is declared elected, i.e. elections are won by absolute majority (more than 50%), provided that more than half of the electors in the constituency have voted. Therefore, two requirements should be cumulatively satisfied in order to have a winner in the majority election: absolute majority of the valid votes cast and a participation quorum of over 50% of the electors having the right to vote in the constituency. If either of the two conditions is not satisfied, a second round of elections is conducted within a week as a corrective. The second round is won by relative majority, i.e. by the higher number of votes cast.

The proportional election was conducted in twenty-eight multi-member constituencies varying in size between four-member constituencies and a twenty-six-member constituency. An electoral threshold of 4% was fixed: only parties and coalitions which collected nationwide votes for their lists representing 4% or more of all valid votes cast in the country were eligible to participate in the distribution of the 200 proportional mandates. This 4% threshold operated like all electoral thresholds: the votes cast for the parties which remained below the 4% threshold were wasted.

The most important question in the proportional election is that of the method of calculating the results and realising the proportion between votes and mandates. However AEGNA does not contain explicit regulation of such a method, instead stating that "any party or coalition gets seats in proportion to the valid votes cast for it, according to a method of calculation approved by the Central Electoral Commission". Thus the Act entrusted the Central Electoral Commission with the task of developing such a method within the constitutional two-month period. This was done. The method was published in the Official Gazette (No. 46/1990). It was employed to calculate the proportional part in the 1990 Grand National Assembly elections; and again, in a more detailed fashion, to calculate the results for the candidates nominated by parties and coalitions in the 1991, 1994, 1997 and 2001 parliamentary elections (OG, No. 82/1991, No. 30/1997 and No. 40/2001).

We shall concentrate on the methods of determining the results of the proportional part of the election system in 1990 and of the whole system applied in 1991, 1994, 1997 and 2001, excluding the votes cast for independent candidates. These methods are an organic element of the effective electoral law and therefore it deserves attention. What is more, they contain original and creative elements which proved their efficiency in the elections that followed, but undeservedly remained "off screen".

The methods, which the Central Electoral Commission was to develop in 1990, had to take into account the three guiding principles of the applied proportional aspect of the hybrid system: a) the distribution at national level (the 4% threshold); b) the preliminary fixed number of mandates due to each constituency; c) registration of party lists at regional and not at national level. It is known from mathematics and from the practice of proportional systems that in larger constituencies the proportion between votes and mandates is more just. In a smaller constituency, i.e. smaller number of mandates, the level of correspondence of the votes and the mandates for individual parties is lower. In practice, where a proportional system is applied in four-, three- or two-member constituencies and many parties participate,

a large number of votes are not turned into account. Thus the proportional system when applied in small constituencies becomes in practice a majority system, i.e. it changes its nature and representative character.

In 1990 a large number of the constituencies formed were four-member ones, i.e. small, leading to an undesirable deviation from the proportional nature of the electoral system. Therefore, considerations of just proportional distribution tipped the balance in favour of the national level. The method provided for distribution of the 200 mandates on a national level based on "total party sums", i.e. according to the valid votes cast for each party within the country.

The national level distribution is a guiding principle of the method adopted. But it also takes account of the legal requirement to have the due mandates for each constituency filled and to have these mandates distributed in accordance with the success of the nominated party lists. The national level distribution usually implies that national party lists are in place. But AEGNA makes no provision for national lists of the individual parties; it requires instead that the parties nominate lists in the constituencies. Under these circumstances, there was a need for secondary distribution where the mandates won by a party within the country had to be distributed within the lists of this party in the individual constituencies, i.e. there was a need for personalisation of the mandates by regions.

Combining these difficult to combine legal provisions and taking into account the fundamental requirements of proportional election, the method envisaged two stages in the distribution of parliamentary mandates:

- distribution of mandates at national level;

- personalisation of the mandates won by each party in the first stage by distribution within the lists of the party nominated in the individual constituencies.

The national as well as the intra-party distribution was calculated after the D'Hondt method. The major advantage of this method is that it is always effective – mandates are distributed all together without remainder. This was widely practiced and applied in Bulgaria's electoral laws in the first half of the twentieth century.

The methods of calculation will be illustrated with the following example:

There are twenty-five mandates for distribution. Five parties participate – A, B, C, D, and E. The country is divided into six constituencies with different numbers of mandates to be elected – C1 (7), C2 (5 m), C3 (4 m), C4 (4 m), C5 (3 m) and C6 (2 m). The parties have lists in all constituencies for which the following votes were cast, as illustrated in Table 1.

Table 1

	A	B	C	D	E	TOTAL
C1 (7 m)	700000	600000	320000	60000	20000	1700000
C2 (5 m)	550000	550000	50000	20000	30000	1200000
C3 (4 m)	400000	450000	105000	20000	25000	1000000
C4 (4 m)	350000	300000	120000	50000	80000	900000
C5 (3 m)	250000	150000	180000	100000	20000	700000

C6 (2 m)	150000	50000	125000	110000	65000	500000
TOTAL (25 m)	2400000	2100000	900000	360000	240000	6000000

Step A: The votes cast for each party in all regions are summed up – a "total party sum" is obtained. These sums are arranged and are subdivided by a sequence of whole numbers 1, 2, etc. until the quotient to which the last (the 25th in this case) mandate is allocated. Quotients are sorted from the bigger to the smaller, as in Table 2.

Table 2

	A		B		C		D		E	
1	2400000	/1/	2100000	/2/	900000	/5/	360000	/14/	240000	/22/
2	1200000	/3/	1050000	/4/	450000	/11/	180000		120000	
3	800000	/6/	700000	/7/	300000	/17/	120000		80000	
4	600000	/8/	525000	/9/	225000	/25/	90000		60000	
5	480000	/10/	420000	/12/	180000		72000		48000	
6	400000	/13/	350000	/15/	150000		60000		40000	
7	342857	/16/	300000	/18/	128571		51429		34286	
8	300000	/19/	262500	/21/	112500		45000		30000	
9	266667	/20/	233333	/24/	100000		40000		26667	
10	240000	/23/	210000		90000		36000		24000	
11	218182		190909		81818		32727		21818	
12	200000		175000		75000		30000		20000	

Mandate 1 is allocated according to the biggest quotient, 2400000; it is in the column of party A. Mandate 2 is allocated to the second biggest quotient, 2100000, which is in the column of party B. The procedure continues until the 25th mandate is allocated.
The end result of the national level distribution is: party A has 10 mandates (Nos. 1, 3, 6, 8, 10, 13, 16, 19, 20, 23); party B has 9 mandates (Nos. 2, 4, 7, 9, 12, 15, 18, 21, 24); party C has 4 mandates (Nos. 5, 11, 17, 25); party D has 1 mandate (No. 14), and party E has one mandate (No. 22). Thereby the decisive distribution among parties at national level is completed.

Step B: The next step is personalisation, i.e. getting mandates back by regions. The mandates won by each party at national level are subject to distribution which is effected among the lists of each party nominated in the individual regions, according to the votes cast for these lists.

The following requirements are observed:

- the party gets back mandates only in constituencies where it has nominated lists;

- mandates equal to the number of mandates determined by CEC minus the independent mandates (if any) won in the constituency are allocated;

- the sum of the party's "get back" mandates must be equal to the number of mandates won by this party at national level.

The sums of the votes for the party in each constituency are arranged and the D'Hondt method is applied again. Division continues until mandate X corresponding to the number of mandates won by the party at national level is reached.

Table 3: Party A

Divisor	Region										
	C1		C2		C3		C4		C5		C6
1	700000	/1/	550000	/2/	400000	/3/	350000	/4/	250000	/7/	150000
2	350000	/5/	275000	/6/	200000	/9/	175000		125000		75000
3	233333	/8/	183333	/10/	133333		116667		83333		50000
4	175000		137500		100000		87500		62500		37500

Party A gets 3 mandates each in constituency 1 and constituency 2, 2 mandates in constituency 3 and 1 mandate each in constituency 4 and constituency 5.

Table 4: Party B

Divisor	Region										
	C1		C2		C3		C4		C5		C6
1	600000	/1/	550000	/2/	450000	/3/	300000	/4/	150000	/7/	50000
2	300000	/5/	275000	/6/	225000	/7/	150000		75000		25000
3	200000	/8/	183333	/9/	150000		100000		50000		16667
4	150000		137000		112500		75000		37500		12500

Where equal figures are obtained as a result of the division, the mandate is allocated to the upper line – example: mandate No. 4 and mandate No. 5.[94] Party B gets 3 mandates each in constituency 1 and constituency 2, 2 mandates in constituency 3 and 1 mandate in constituency 4.

Table 5: Party C

Divisor	Region										
	C1		C2		C3		C4	C5		C6	
1	320000	/1/	50000				105000	180000	/2/	125000	/4/
2	160000	/3/	25000		52500		60000	90000		62500	
3	106667		16667		35000		40000	60000		41667	
4	80000		12500		26250		30000	45000		31250	

Party C gets 2 mandates in constituency 1 and 1 mandate each in constituency 5 and constituency 6.

Table 6: Party D

Divisor	Region										
	C1		C2		C3		C4		C5		C6

[94] This aspect of the methods was developed further in the 1997 and 2001 method updates.

1	60000		20000		20000		50000		100000		110000	/1
2	30000		10000		10000		25000		50000		55000	

Party D gets 1 mandate in constituency 6.

Table 7: Party E

Divisor Region

	C1		C2		C3		C4		C5		C6	
1	20000		30000		25000		80000	/1/	20000		65000	
2	10000		15000		12500		40000		10000		32500	

Party E gets 1 mandate in constituency 4.

The distribution by constituencies is:

Table 8

Constituencies	C1	C2	C3	C4	C5	C6
Mandates by distribution	8	6	4	3	2	2
Mandates by decree	7	5	4	4	3	2
Difference	+1	+1	0	-1	-1	0

An expected phenomenon appears: "overfilling" (C1 and C2), but also "under filling" (C4 and C5), i.e. the parties sent back more, respectively less, mandates in these constituencies. In this aspect the methods contain an interesting and original solution:

- Each unfilled constituency is separately filled. The biggest quotient to which no mandate is assigned in this unfilled constituency is found. Depending on where (in what party's column) this biggest quotient is, the distribution only continues between the lists of that party nominated in the different constituencies.

- An overfilled constituency where this party has a nominated list is found.

- The following transfer is made: the mandate allocated to the smallest quotient in the overfilled constituency is transferred to the under filled constituency, again in favour of the same party.

This is the way the vacant mandates in the individual constituencies are filled – according to clear and fixed criteria. In our example there is one vacant mandate each in C4 and C5.

The biggest quotient to which no mandate is allocated in C4, is 175,000; it is in the column of party A. The distribution continues for filling C4. Mandate 10 of party A is transferred from C2 to C4.

The biggest quotient to which no mandate is allocated in C5 is 150,000 for party B. Mandate 8 of party B is transferred from C1 (the smallest quotient to which a mandate is allocated is 183,333 – mandate 9, but it is in C2, which is not overfilled now) to C5.

Thus all mandates in all constituencies are allocated. The parties get the number of mandates due to them according to the votes and the final distribution is:

By party:

- Party A gets 3 mandates in C2, two mandates each in C2, C3 and C4, 1 mandate in C5, i.e. total 10 mandates;

- Party B gets 3 mandates in C2, two mandates each in C1 and C3 and one mandate each in C4 and C5, i.e. total 9 mandates;

- Party C gets 2 mandates in C1 and 1 mandate each in C5 and C6, i.e. total 4 mandates;

- Party D gets 1 mandate in C6;

- Party E gets 1 mandate in C4.

By constituency: exactly 7 mandates are filled in C1, 5 in C2, 4 in C3, 4 in C4, 3 in C5 and 2 in C6.

This method in respect of the "overfilled" and "under filled" constituencies, as well as the "transfer of mandates" is original and effective, thus representing a contribution to electoral technology as a democratic instrument guaranteeing stability and clarity in determining election results and, it seems, there are sufficient grounds to add to the formula named after the Belgian D'Hondt a Bulgarian name.

The proportional election in the 1990 hybrid system resulted in 100% proportion between votes and mandates, as illustrated in Table 9.

Table 9

Parties	Votes	% Mandate	Difference
BCP	48.40	48.50	+ 0.10
UDF	37.17	37.50	+ 0.33
BAPU	8.24	8.00	- 0.24
MRF	6.18	6.00	- 0.18

The differences were below 0.5% and when referred to 200 mandates they fit within one mandate representing an indivisible whole.

This precise proportion is the target of every proportional election. It is undoubtedly a strong argument for conducting the 1991, 1994, 1997 and 2001 parliamentary elections employing a proportional system, though with participation of independent candidates.[95] But in all those elections the proportion between votes cast and seats remained under the optimum because of different segmentation of the electorate space and other factors.

[95] Concerning the independent candidates, the results are calculated not according to the described methods but according to the Hare quota on the constituency level.

These results, as well as the preceding discussion, demonstrate that there is a constant debate as to which election system is the most suitable and fair for the best reproduction of representative democracy.

THE REFORM OF THE RUSSIAN ELECTORAL SYSTEM AND THE ELECTION COMMISSIONS: NEW TRENDS AND PERSPECTIVE

Mr Vladimir LYSENKO
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I. The Constitution of the Russian Federation and free elections

The current Russian election legislation and electoral system were set out in the new democratic Constitution adopted by a plebiscite on 12 December 1993. The Constitution establishes an essentially new federal system of authorities and local selfgovernment bodies, lays down the basis for free elections and introduces a multiparty system. It stipulates that the ultimate direct expression of the people's power is referenda and free elections. Integral components of free elections are fixed, in particular, as follows:

- the citizens' right to elect and to be elected to public authorities and local self-government;

- general principles of the universal, equal and direct suffrage by secret ballot (though as applied only to elections of the President of the Russian Federation); and

- the establishment of procedures for the election of the President as well as the deputies of the lower chamber of the Federal Parliament by federal laws.

The basic rules for conducting early elections are also fixed in the Constitution. The President ceases to exercise his powers before the end of his mandate in case of his resignation or his inability to perform his duties due to poor health. Early elections should be held not later than three months following the President's cessation of powers (in this case the Prime Minister temporarily executes the presidential duties). In case of the dissolution of the State Duma – the lowest Chamber of the Federal Parliament – the President of the Russian Federation establishes a date for early elections so that a newly elected Duma is operational not later than four months after its dissolution.

Today the experience of free elections as well as the new electoral laws provide for an election process which takes into account the existence of the different political forces running freely in elections. As a result, electoral rights receive greater protection. A substantial increase of voters' participation in preparing and conducting democratic elections, transparency both in the verification of voting returns and election results, use of the new technological achievement and means of voting, and compliance with international electoral standards have also been achieved. Thus there is an inter-relation between free elections and

the building of a democratic state – voters influence the organisation and operation of state authorities and bodies of local self-government and as a consequence, the electorate has more confidence in the entire election process. This is essential since elections cannot be separated from other elements of public life such as, for example, the political system, the media and the Constitution.

1. Prospect for the penitration of the elective basis into the state mechanism

The project for constitutional reform includes proposals aimed at strengthening and extending the sphere of the application of basic election rules to the constitution of a number of state bodies enumerated in the Constitution. Well defined rules are essential to ensure the democratic development of Russia as a federative democratic state. According to the Constitution of the Russian Federation and international electoral standards for free and democratic elections, the State Duma is elected through direct general elections, while the upper Chamber of Parliament – the Council of the Federation - (the Chamber of representation of citizens' interests of the Russian Federation) is formed on the basis of one representative from regional legislative (representative) and one from the executive authorities of each region of the federation. Over the last ten years the mechanism of composing the upper chamber has undergone change three times. From 1993 to 1995 two deputies from each region were elected on the basis of universal, equal and direct suffrage by secret ballot by the voters residing on the territory of the Russian Federation, subsequently from 1995 to 2000 Heads of regional legislative and executive authorities were co-opted and, since 2001, these authorities nominate their representatives. Proposals are now being persistently put forward, including by the Chairman of the Chamber, to elect through direct suffrage the members of the Council while maintaining the regional authorities' right to propose candidates. The Constitution does not entirely exclude returning to the formation of the Council on the basis of direct elections. At the same time only the Constitutional Court of the Russian Federation can definitively determine the constitutionality of such a mixed order – whereby the state bodies propose candidates, and the voters have the right to elect them.

Provisions on the election of the Constitutional Assembly's members are also necessary. This body is vested with the constitutional authority to confirm the provisions of the federal Constitution, or to develop a draft and accept it with a two-thirds majority, or to decide and submit a plebiscite should the chambers of the federal parliament insist on modification and supplementing the appropriate chapters of the Constitution. Proposals on the introduction of a mixed system of selecting participants of the Constitutional Assembly are also being debated, though not especially intensively. It has been suggested that some of its members should be elected through direct elections by voters, and others on the basis of nomination by state authorities, political parties, and other institutions of civil society. According to the Constitution the order of organisation of the Constitutional Assembly should be fixed by the federal constitutional law, but this law has not yet been passed. Moreover, there are proposals to add a special chapter into the Constitution of the Russian Federation on the changes and supplements connected to the regulation of the election process, which will bring essentially a strengthening effect to the constitutional principles of organisation and the conducting of free elections.

2. Guarantees of the election rights of national minorities

The mechanism of ensuring the election rights and freedom of national minorities, including "*small ethnic minorities*", has a direct impact on the democratisation of the election process. Lately the adequate legislation adopted in the Russian Federation provided for a genuine

participation of minorities in the governance of the region and local community, and guaranteed representation of their legal interests in legislative (representative) regional authorities and bodies of a local self-government.

Thus, the Constitution guarantees the rights of minorities according to the generally accepted principles and norms of international law and international treaties ratified by the Russian Federation. In order to define the status of such ethnic groups, the Federal Government established a Uniform list of "*small ethnic minorities*" which includes some forty-five national minorities. The Federal Law "On the Basic Guarantees of the Election Rights and Right on Participation in Referendum of the Citizens of the Russian Federation" provides that the allowable dismissal from the average electoral quota of the voters should not constitute more than 30% in forming election districts on territories of compact residence of the "*small ethnic minorities*". Thus, the Federal Law "On the Guarantees of the Rights of the Native Born Small Ethnic Minorities of the Russian Federation" goes further, providing, in particular, a system of quotas for deputy mandates. So, the regional laws can establish the quotas of representation of the ethnic minorities in regional legislative (representative) bodies and representative bodies of local self–government. On this basis, for example, the Charter of the Khanty-Mancy autonomy district was amended to provide the following system: out of twenty-six deputies of the Duma of this autonomous district, thirteen are elected under party lists, ten – on one-mandated districts and three deputy mandates are selected from the quota for the "*small ethnic minorities*" of the Russian North.

3. Elections and prevention of political and administrative monopoly on authority

The development of the election legislation and connected branches of the legislation is based on the constitutional provisions and decisions of the Constitutional Court of the Russian Federation and any political monopoly on authority by the results of elections (by a proportional part of the election system) is declared as none admissible. In this connection special significance is placed on the term of a commission and the number of terms, on which the deputy or elective official can be elected. The Constitution does not directly fix a maximum number of terms of office for the same person, either a deputy or any elective office (except for the position of President of the Russian Federation which cannot exceed two terms). On this basis, the Federal Law "on General Principles of Organisation Legislative (Representative) and Executive Bodies of State Power of the Subjects of the Russian Federation" has fixed the provision of two terms (consecutive) with reference to the elected top officials as one of the conditions preventing the formation of a political monopoly regime. Thus the Federal Law "on the Basic Guarantees of the Election Rights and Right on Participation in Referendum of the Citizens of the Russian Federation" refers to the question of the term and calculation of a term of power with reference to municipal elections at the discretion of local self–governments. So in the charter of the municipal unit the additional rule which does not allow the same person to hold the position of the head of the municipal unit provides a more established quantity of terms, one after the other.

Therefore, if federal and regional authorities do not allow the election of the same person for more than two consecutive terms, the term of his/her state legislature cannot constitute more than five years; whereas, at a municipal level, the decision on the maximum number of terms of office held by the same person, the mandate of a deputy, or any elective position, (and also the definition of re-occupation or recurrence of terms) is transferred to the exclusive competency of local self-government and should be fixed in the charter of a municipal unit. As a whole, in conditions where the local self-government according to the Constitution is

separated from the system of public authorities, it allows the population of the local community to independently define the mechanism of functioning of municipal authorities.

II. System and status of the election commissions

The following election commissions exist in the Russian Federation:

a. the Central Election Commission of the Russian Federation (the CEC of Russia);

b. the Election Commissions of Subjects of the Russian Federation (regional election commissions);

c. the Municipal Election Commissions;

d. the District (constituency) Election Commissions;

e. the Territorial Commissions (regional, urban and other);

f. the Precinct Election Commissions.

These commissions ensure that citizens are aware of their election rights and that these rights are protected. They also prepare and organise elections, inform voters about the procedure, the campaign as well as candidates, consignments, election blocs, and lists of candidates.

The trend is to increase the accountability of the authorities conducting elections. In the federal election laws the order of formation and functioning of the election administration – election commissions – is essentially up-dated. The main purpose of these changes is to make commissions independent from public authorities and officials and to strengthen the role of the political parties, including parties represented in parliament, in their formation to provide efficient co-ordination of the activities of all commissions when elections are held. Thus it increases simultaneously the responsibility of the commissions and of their members. So it is possible to disband commissions if they fail to comply with judgments, or if decisions of higher commissions are provided. It is important that the measures of the responsibility also concern the CEC of Russia. Thus a member of an election commission who infringes election legislation would be relieved of his/her duties and could not be assigned to an other commission.

No more than one representative from each consignment, other public association, or election bloc can be assigned in a commission. In fact, state and municipal employees cannot constitute more than one-third of a commission's members. The hierarchical rule applies in the system of election commissions – the decisions of a higher commission are obligatory for inferior commissions, and any decision contradicting the laws or accepted in violation of an established competency, may be annuled by a higher commission or a court. Thus a higher commission has the right to either accept the judgment or to direct the appropriate materials for re-examination by a commission, whose decision was cancelled.

The commissions within their competency are independent of public authorities and bodies of local self-government. At the same time, the decisions of commissions accepted within their competency, although not subject to state registration, are obligatory for federal executive bodies, regional executive bodies, official bodies, bodies of local government, candidates,

political parties, election blocs, public associations, officials, voters. The officials of the above-mentioned bodies are obliged to assist commissions in fulfilling their duties, in particular, to provide the necessary presmises free of charge, including premises for storage of elective documentation, to provide protection for these premises and the documentation, as well as to provide transport, communication facilities, and technical equipment free of charge. Thus state and municipal organisations conducting TV and broadcasting, or editors of printed periodicals have an obligation to provide the commissions with free broadcasting time to inform voters as established by law, and also free printed space for publication of their decisions, and the publication of other printed information.

The CEC of Russia is a federal state body organising elections in the Russian Federation. The CEC of Russia acts on a continuous basis and is a legal entity. It consists of fifteen members elected for four years. Five members are nominated by the State Duma from among the candidates proposed by factions, other deputy associations, or deputies of the State Duma. One deputy association can have only one representative. Five members of the Commission are nominated by the Council of the Federation from among the candidates proposed by the regional legislative and executive bodies of power. Five members of the Commission are nominated by the President of the Russian Federation. The CEC members should have a law degree or a scientific law degree. They elect a Chairman from amongst themselves as well as a Vice-Chairman and a Secretary by secret vote.

The regional election commissions, municipal election commissions, district election commissions, territorial, and precinct commissions are formed on the basis of proposals by these political parties and electoral blocs which put forward the lists of candidates, admitted to distribution of the deputy mandates in the State Duma. The representative body of state power of the appropriate subject of the Russian Federation in a representative body of a local self-government, as well as public associations, assemblies of voters at a place of work, study, service and residence also play an important role in the above-mentioned process. The regional election commissions are state bodies of the subjects of the Russian Federation. They act on a continuous basis and have a status of legal entity. The term of their authority is four years and the number of members having a decisive right is established by the regional constitution (statute) and laws. They cannot have less than ten and no more than fourteen members.

The election commission of a municipal unit is responsible for the preparation and the holding of elections to bodies of local self-government. The statute of this commission in the system of local self-government is defined by the regional laws and the charter of a municipal unit, thus the commission can be considered as a legal entity. The term of their authority is four years, and the number of their members with the right to vote is established by law or charter of the municipal unit.

The district election commissions are formed under the terms of the Law for holding elections on one-mandated and (or) multi-mandated constituencies. The term of their authority ends on the day of official publication of the decision regarding the assignment of the following appropriate election. For federal elections, the number of members of the commissions is established by federal laws; for regional and local elections by regional laws.

The place of the territorial election commissions in the system of regional state bodies is defined by regional laws. They act on a continuous basis and their term is four years.

Regional law can accord them the status of a legal entity. The commissions are made up of five to nine members.

The local commissions are formed to ensure the voting process and the tabulation of the votes. Their power ceases 10 days following the date of the official publication of the election results, if a higher commission has not received any petitions protesting about the action (inactivity) of the given commission or resulting in violation of the order of voting and tabulation of the votes, and if on the given facts there was no judicial decision. In case of the appeal against the results of voting returns the power of a commission ceases after a decision of a higher commission or a final judgment by a competent court.

III. Election laws and participation of political parties in the election process

The federal act "on the basic guarantees of election rights and rights on the participation in a referendum of the citizens of the Russian Federation" has essentially reinforced the protection of the constitutional institute of free elections and has provided for a reasonable harmonisation in the regulation of elections in the Russian Federation. These measures are directed at ensuring the equal status of the voters and election participants and organising a democratic elective process. The Federal Constitution stipulates that the election of a federal President is based on universal, equal and direct suffrage. The federal law has extended these constitutional principles to all other types of elections. This interpretation is supported by the Constitutional Court of the Russian Federation. The election legislation based on the provisions of the Federal Law "on Political Parties", has introduced basic changes to the way parties participate in elections. Legislation on elections and on parties is complementary. First of all, this is reflected in the composition of the federal parliament. A number of the federal election laws reflects a general tendency to raise the role of parties in the electoral process, namely:

a. Only parties can participate in federal and regional elections, and not public associations in general, as previously;

b. The registration of candidates, lists of candidates put forward by parties and election coalitions is carried out without the petition of voters and without any monetary deposit with the following condition: on the basis of results from previous elections to the State Duma, parties can distribute the mandates between members on their federal list;

c. The proportional part of the election system for elections to regional assemblies where not less than half the mandates in the whole body or in one of its chambers is distributed between the candidates from the lists put forward by the parties and the election coalitions, is proportional to the number of votes received by each of the candidates' lists. The law can provide for the distribution of mandates among parties whose lists received a minimum number of votes, however, the distribution should include no less than two lists of candidates having received together more than 50% of votes. This provision means that currently at a regional level, the mixed election system is obligatory, whereas it was previously applied facultatively.

One of the new elements of the organisation of the regional electoral process is the strengthening of the role of the voters in choosing the candidates from the party list, and the system of open candidates list. The system is similar to the one applied in Austria, Latvia, Lithuania, Poland, Czech Republic, and in some other countries. One other component of an

open elective process is to further raise the parties' participation in the setting up of electoral commissions. The electoral commissions should include not less than 50% (before it was one-third) of members proposed to the State Duma or to the regional legislative body by parties.

IV. Organisation of elections at reasonable intervals as one of the guarantees of free elections

The mandatory and periodic conducting of free elections at reasonable intervals is one of the public and legislative responsibilities of a democratic state based on the rule of law. The state should guarantee periodic elections, the free expression of citizens during elections and the protection of democratic principles and standards of the electoral rights in inter-relation with the generally accepted principles and norms of international law. Article 3 of Protocol No. 1 of the European Convention on Human Rights Protection and Fundamental Freedoms contains the obligation of states "to conduct free elections at reasonable intervals…" Elections enable voters to influence directly the process of setting elected bodies based on the following constitutional and legal statutes.

Firstly, in the Russian Federation, elections are obligatory, periodic and conducted as established by the Constitution, federal acts, and other laws;

Secondly, federal legislation provides some organisational and legal patterns for holding an election:

a. Elections are called by the State, or an official according to the terms established by the constitution and laws; should the date not be set, elections are called and conducted by the appropriate election commissions in due time as indicated in the appropriate normative legal act;

b. In cases listed in the laws, elections are called by the court. This occurs, when the official authorised body or the appropriate election commission cannot call elections in due time, or there is no appropriate commission for certain type of elections it cannot be created according to the procedure established by the laws (in the case, for example, of early cessation of a body's authority or of a deputy's mandate). In the indicated cases on request by the voters, parties, public authorities, bodies of local self-government, or a public prosecutor, elections are called by the court. In practice calling elections under such terms is rather an exception, however, the indicated power of the court is one of the effective guaranties of the compulsion principle as well as the regular holding of elections, protection of the election rights and freedom of citizens.

Thirdly, the mechanism both of calling and of conducting regional and municipal elections can be launched by the federal state on the basis of the appropriate provisions of the federal electoral laws. This means that if the term of office of a regional or a local body has finished, or if it cannot exercise its powers any more and there is no relevant law or corresponding law which has been declared inapplicable by a court, elections are conducted on the basis of the federal laws or the decrees of the federal President.

V. Nomination and registration of the candidates

The new federal election laws provide a number of provisions concerning the conditions and procedure for the nomination, as well as registration of candidates. The electoral deposit is an

alternative to the petition of the candidate's registration. The candidates are obliged to declare their incomes and assets, contributions in banks, and financial assets. Therefore, as mentioned earlier, there is no possibility of refusing a candidate's registration or the cancellation of his/her registration for submission of doubtful information concerning his/her incomes and assets. This information is available to voters who should ultimately decide if they vote for the candidate (there is also a possibility to vote against all candidates). At the same time refusal to disclose information on a previous conviction, or on citizenship of a foreign state is still considered as a basis for removing a candidate from registration.

The federal laws place additional barriers to possible administrative abuses. It is provided that not only state employees but also officials of a certain level from executive, judicial or municipal bodies (with the exception of the President, the Chairman of Government in the case of temporary execution by him of the President's responsibilities, the deputies of the representative bodies of state power and the representative bodies of local self-government) have to be released from the exercise of their duties if they wish to be registered as candidates. Public and local officials have no right to use their position to influence the process of nomination and election of a candidate or a list of candidates. Thus the candidates, political parties, or the election blocs cannot have officials of state or municipal bodies as their representatives; the latter also do not have the right to conduct their campaign in the mass-media.

In order to raise the legitimacy of elections of the heads of regional executive bodies, a number of the federal law provisions are directed at reforming the regional election system. For example, repeated voting (second round or run-off) of elections of the regional heads of executive bodies (top officials) takes place if the candidates has not collected more than 50% of the votes cast (such a rule did not previously exist). The extremely detailed procedure for cancellation of a candidate's registration is fixed in the Federal Law. Thus the court can accept the appropriate decision not later than five days prior to ballot day. At the same time, the list of reasons for registration or cancellation of a candidate's registration under the decree has been essentially reduced in the new laws.

VI. Open vote count procedures and establishment of the election results as a necessary condition for establishing the confidence of the people in true electoral institutions and voting procedures

The modern approach to the organisation of the democratic election process is based on the necessity to expand the voting patterns list, taking into account high technology, and also further perfecting the existing voting systems. In this connection, federal and regional laws provide for a possibility to vote by mail. Thus all votes entered by a commission before the poll is closed should be taken into account. The order of a postal vote conducted at regional and municipal elections, before the settlement of this question by the federal act, is defined by the CEC.

In the Federal Law, the concept of "falsification of voting returns" is clarified, and there are severe penal sanctions. Falsification is understood as:

1. including uncounted votes in the reports on voting;

2. falsifying the list of voters by including persons without election rights, or persons who do not exist;

3. substitution of the valid reports;

4. illegal destruction of the official ballot-papers;

5. incorrect tabulation of the votes;

6. signing by commission members of a protocol of voting returns before tabulation or summarising of returns, incorrect (not appropriate to the valid voting returns) execution of a record concerning voting returns;

7. modification of the protocol of voting returns after its completion.

If falsification of voting returns is established, only the State automatic system "Elections" can be applied. The Federal Law of 10 January 2003 "on the State Automatic System of Russian Federation Elections" has fixed its use as one of the technological guarantees of the realisation of citizens' rights to legally receive authentic, operative and complete information about elections and their outcome. One of the basic provisions is the issue of legal terminology of the documents prepared for use of this system. The possibilities of application on election districts of voting means the tabulation is extended, and the returns, which are received will not require manual recalculation of the reports. On the basis of the data received with application of means, the protocol of a local commission will be drafted and signed in due order so that the commission members and observers can have no doubt about the results. Thus the selective conducting of controlled recalculation of the reports in a part of the election district is possible, however, it should be indicated where this procedure has been applied. The election districts will be defined according to a procedure established by law, and under the control of the CEC. If the data of manual recalculation differs from the results of automatic machine counting, traditional (manually) calculated votes will be accepted as a legal basis. In all other election districts of the given territory manual recalculation will also be carried out. As a result of these and other legislative provisions the election rights of voters will be better protected. Observers have the right to be present in election districts from the moment a local commission begins its work on election day, on the days of early voting and before receiving the message that the protocol of voting returns has been adopted by a higher commission, as well as during the repeated vote tabulation of the voters. Observers can be assigned by the registered candidate, political party, election bloc, and political public association. The election officials, their representatives, judges and procurators cannot be assigned as observers.

VII. Constitution and legal responsibility for infringement of the election laws as one of the new guarantees of efficient functioning of the election mechanism

The constitutional and legal responsibility consists in the application of sanctions to election participants. The constitutional and legal sanctions are defined in the Federal Law "on the Basic Guarantees of the Election Rights and the Right to Participate in Referendum the Citizens of the Russian Federation" and other federal laws, as follows:

- warning;

- refusal to register a candidate (or a list of candidates);

- cancellation of a candidate's registration (or a list of candidates);

- declaration of voting returns or election results as invalid;

- disbandment of the election commission.

The electoral commission can be disbanded by the court in the following cases:

a. Infringement by a commission of the citizens' election rights established by the CEC of Russia; regional commission in the statutory order (including the basis of the court decree); invalid voting returns or election results on a corresponding territory;

b. The non-execution by a commission of a court's decision or the higher commission's decision; the CEC decisions. Thus, election laws and connected branches of law create and develop the necessary framework for the open state and efficient civil society, and reaffirm through political parties and other public associations an adequate democratic mechanism of people's government, and expression and realisation of voters' rights.

VIII. Russian election laws and international electoral standards

The Russian election laws should be in compliance with the generally accepted principles and norms of international law for free and democratic elections, which ensure an interaction of the civil society, in particular the political parties and voters, with the electoral bodies of the state. The federal Constitution provides that the principles and norms of international law and international treaties of the Russian Federation are a constituent part of its legal system and if the international treaty establishes rules, other than statutory, the rules of the international treaty are applied. On this basis, and also with the aim of strengthening and developing different legal mechanisms to ensure the election rights and freedom within the framework of the Commonwealth of Independent States (CIS), on 7 October 2002, the Convention on the Standards of Democratic Elections, the Election Rights and Freedoms in the States-Participants of the Commonwealth of Independent States was signed by the heads of seven states and came into effect in November 2003 after its ratification by three states. This Convention defines the democratic electoral standards, and the election rights and freedoms in the CIS as follows:

a. elections should be democratic, periodic, obligatory, free, genuine, fair, competitive, and open;

b. elections are conducted on the basis of universal, equal and direct suffrage by secret ballot;

c. judicial protection of the election rights and the freedom of all participants has to be guaranteed;

d. accomplishment of public and international supervision of elections, guarantees of their fulfilment.

Thus the mechanisms, including a promotion of a principle of openness and publicity of elections, activity of electoral commissions, raising the level of voters' confidence in voting returns and election results are fixed. An important role is also played by the observers

assigned by the candidates, political parties, election blocs, and public associations. The fact that the Convention is binding for its signatory parties is additional proof of the aspiration of the CIS, including the Russian Federation, to further democratise the election process, to create a system of new international election guarantees for freedom to participate in elections, to promote the new approaches of the development of modern democratic elections on the basis of international electoral standards.

The potential of the international legal norms is used by the Constitutional Court of the Russian Federation (CCRF) for the substantiation of legal items for the development of a wide range of decisions. Thus in December 2003, these items were contained in the reasoning of more than 180 decisions, including the protection of election rights and freedoms, and have affected the conclusions of the CCRF regarding the conformity of the disputed legal acts to the Constitution. Thus the indicated decisions contain more than 200 references of international documents at various levels. Actually each third decision was motivated, with the help of references to international norms as well as to the decisions of the European Court on Human Rights. As the list of the guaranteed election rights and freedoms in Russian legislation and international norms are actually identical, the CCRF protects them, being guided by the constitutional provisions, and also the standards of international norms on free and fair elections.

The development by the CCRF of the international universal and European legal space is perceived and continued in judicial practice by Russian ordinary courts. The acceptance of the superiority of the ratified international treaties over the laws of the Russian Federation becomes a standard of the judicial practice in the country.

Now there is an active process in the further development of the international standards in the field of democratic elections as support for improving the national election legislation. In particular, the efforts of OSCE/ODIHR on the preparation of the draft named "Existing Commitments for Democratic Elections in OSCE Participating States", providing the basis for the further development of the Copenhagen international commitments of 1990 in the framework of the OSCE, testify on the progress in the field of the organisation and conducting of democratic elections.

Taking into account the political changes which have occurred in Europe and the increasing experience of conducting democratic elections worldwide, it is more and more urgent to look into the problem of the international electoral standard codification. A European Convention on this issue could promote, distribute and influence the elective democracy principles, the guarantee of election rights and freedom in all European countries; it would provide protection against ungrounded interference in the internal affairs of the state in the decision of questions kept by the international legal instruments at the discretion of the state and any modelling of such electoral standards with reference to momentary geopolitical interests. The Association of Central and Eastern European Elections Officials (ACEEEO) is dealing with this, initiated at a defining role of the CEC engineering of the draft of the European Convention on the Standards of Democratic Elections (the draft Convention was examined by the Venice Commission). In the same line, the Parliamentary Assembly of the Council of Europe (PACE) recommends the preparation of a European convention on this issue, taking into account the above-mentioned draft Convention, and documents of the Office for Democratic Institutions and Human Rights (ODIHR).

THE POWERS OF THE FRENCH CONSTITUTIONAL COUNCIL IN ELECTORAL MATTERS

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The establishment of the Constitutional Council in 1958 marked a very important step forward in the "judicialisation" of French electoral law, since only local elections had hitherto been subject to judicial review regarding their validity – in this case by the administrative courts (ordinary administrative courts and the Conseil d'Etat).

As for parliamentary elections, under the Third and Fourth Republics review of their legality was a matter for parliament alone through the (questionable) system of validation of results.

With the new Constitution, national elections also are now reviewed by a court: the constitutional court.

In France today all political elections[96] thus have a court: for local elections this is an administrative court (administrative court of first instance and Conseil d'Etat for cantonal and municipal elections; Conseil d'Etat as first and last instance for regional elections) and the constitutional court for national elections (presidential and parliamentary) as well as for national referendums.

As regards the Constitutional Council in particular, its powers in electoral matters may be grouped into four categories: electoral boundaries, organisation of the poll, electoral preparations and monitoring of the conduct of an election.

I. The Constitutional Council's powers with regard to electoral boundaries

The question of electoral boundaries – that is, the method by which the national territory (or part of it) is divided into constituencies to which electors are assigned in order to vote – is, overall, a determining factor in whether an election is a genuine expression of the electorate's wishes.

The democratic stakes in these boundaries are particularly high, for if their purpose is distorted or their drawing manipulated, the unfairly obtained electoral result will be due solely to an artificial grouping of voters. This perversion of democracy is well-known by the name of *gerrymandering*, from the name of the American governor (Gerry) who redrew a constituency in the shape of a salamander to perpetuate his election.

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[96] The Constitutional Council calls "political" all national and local elections involving national sovereignty and citizenship. The term does not therefore apply to administrative or organisational elections or to European elections.

It is therefore necessary, here more than elsewhere, to ensure that arbitrariness is avoided.

This can be achieved, firstly, by giving the power to draw these boundaries to an independent body. Such a system is uncommon, although in some states, such as Germany, an independent commission may be involved in boundary decisions.

In most cases, it is up to the government and parliament to undertake these operations, which by their very nature are highly political.

Thus in the French system the drawing of canton boundaries is done by decree, and the drawing of parliamentary constituencies is done by law.

This involvement of political authority in a process that can determine the character of an election is not intrinsically reprehensible in terms of democracy and the rule of law if it is accompanied by strong safeguards with regard to objectivity.

The solution thus lies in judicial review on the basis of specific, objective and unchanging criteria. In France this is carried out by the Conseil d'Etat for boundaries drawn by decree and by the Constitutional Council for boundaries drawn by law.

The Constitutional Council has thus laid out its position in two important decisions.[97] Basing itself on the principle of equal suffrage, the Council first defines the scope of the principle of population balance, calling it a "basic rule" that must allow equal representation according to population without, however, requiring strict proportionality. Although this population criterion constitutes the principle, differences in representation are admissible in order to take account of specific public-interest requirements such as the need to ensure a close link between elector and elected representative or for the purpose of territorial continuity.

These differences must nevertheless be limited and exceptional.

The second principle advanced is that of political balance. Here it is a matter of ensuring that equality prevails between political forces or candidates in order to avoid any political arbitrariness.

Not only must electoral boundaries be fair but they must also be regularly brought up to date to take account of population changes. For the Constitutional Council, "the respect owed to the principle of equal suffrage means that boundaries of constituencies for electing deputies must be periodically revised in the light of population development..."[98]

Thus in a decision concerning election of the Assembly of French Polynesia, the Constitutional Council noted that Parliament had improved the representative nature of this assembly by taking into account the most recent census of the population of the territory's various archipelagos.[99]

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97 Decision 86-208 DC of 1 and 2 July 1986 and Decision 86-218 DC of 18 November 1986 (electoral boundaries), *Recueil des décisions du Conseil constitutionnel* (Rec.), pp. 78 and 167.

98 Decision 86-208 DC.

99 Decision 2000-438 DC of 10 January 2001, *Institutional Act to improve the fairness of elections to the Assembly of French Polynesia*, Rec., p. 37.

On the other hand, the "shortcomings" of Parliament were pointed out when the latter failed to take account of population development in the territorial units represented by the Senate.[100]

II. The Constitutional Council's powers with regard to organisation of the poll

The Constitutional Council's powers with respect to organisation of the poll are twofold: advisory and decision-making.

1. Advisory powers

The Constitutional Council exercises it advisory powers in connection with presidential elections and national referendums.

a. Presidential elections

The Constitutional Council is consulted by the government on all legislation relating to the electoral process: the election calendar, candidate nomination forms, conduct of the poll, etc. Its opinions are not published.

In addition to this consultation, the Constitutional Council has acquired the habit of issuing opinions on how presidential elections are organised and conducted and of publishing these opinions, which may be called "informal".

Thus, when the results of the 1974 presidential election were declared, the Constitutional Council made a statement[101] (published not in the *Journal officiel* (official gazette) but in the *Recueil des décisions du Conseil constitutionnel* (digest of Constitutional Council decisions)) in which it suggested increasing the number of signatories, a suggestion implemented by the Institutional Act of 18 June 1976.

The Constitutional Council itself also vindicated this technique subsequently, holding that "being responsible, under Article 58 of the Constitution, for ensuring the proper conduct of the election of the President of the Republic, [it] was part of its task to suggest to the authorities any measures calculated to promote better conduct of this election".[102]

It was with this in mind that, in the period between the two rounds of the 2002 presidential election, the President of the Constitutional Council intervened to point out, through instructions that were publicised and widely circulated by the media, the importance of maintaining secrecy of the ballot[103].

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100 Decision of 20 September 2001, *Hauchemaille and Marini*, Rec., p. 121.

101 Decision of 24 May 1974 – Statement of the Constitutional Council upon the occasion of the declaration of the results of the 1974 presidential election, Rec., p. 57.

102 Observations of the Constitutional Council on the 2002 presidential election, 7 November 2002.

103 Instructions to Constitutional Council delegates, "Manifestations extérieures du sens du vote lors du second tour de l'élection présidentielle" ("Outward indications of voting intentions during the second round of the presidential election"), available in French on the Council's website (www.conseil-constitutionnel.fr) in "Dossier de l'élection présidentielle 2002", keyword "Délégués du Conseil" (English text in Appendix 4 below).

b. National referendums

Article 60 of the 1958 Constitution states that "the Constitutional Council shall ensure the proper conduct of referendum operations provided for by Articles 11 and 89[104] and shall declare the results of the referendum".

This provision is supplemented by Article 46 of the Order of 7 November 1958 incorporating an institutional act on the Constitutional Council, which specifies: "The Constitutional Council shall be consulted by the Government on the organisation of referendums. It shall be notified forthwith of all measures taken to that end." The advice thus provided is not made public.

This power to give advisory opinions on referendums covers the related campaigns, since the Constitutional Council may make observations on the list of organisations entitled to use public advertising facilities (Article 47 of the 1958 Order).

2. Decision-making powers

The Constitutional Council's decision-making powers in relation to organising the poll principally concern nomination of candidates for the presidential election and, consequently, the list of candidates. To be a candidate in the presidential election it is necessary, in addition to meeting the usual age, qualification and nationality conditions, to be nominated by at least 500 local or national elected representatives representing 30 different *départements* or mainland or overseas administrative areas.

These nominations must be submitted to the Constitutional Council, which, having checked their validity and authenticity, will draw up a list of candidates.

For the second round, after taking into account any withdrawals, the Constitutional Council will designate in a decision the two candidates entitled to remain in the running.

These decision-making powers also include declaration of the results of referendums and presidential elections.

III. The Constitutional Council's powers with regard to electoral preparations

1. General approach

The question of judicial review of the administrative preparation for elections is particularly delicate and problematic in the French system, where two types of electoral court exist side by side: administrative courts and the constitutional court.

Although in France administrative courts are the courts which would normally judge the lawfulness of administrative acts, can they nevertheless review the lawfulness of preparations for elections over which the Constitutional Council has jurisdiction? If the answer is yes, is there not a risk that they will encroach upon the jurisdiction of the constitutional court? And if the answer is no, is there not a risk of denial of justice? This is the debate which for twenty

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104 Article 11: Legislative referendums; Article 89: Constituent referendums.

years, in the absence of a clear response from Parliament, created a bone of contention between the courts which has finally led to a constructive dialogue.

The dispute started in 1981 in connection with an objection by a former French minister to the writ of election issued following the dissolution of parliament decided on by François Mitterrand, newly elected as President of the Republic.

The applicant took his case first to the Conseil d'Etat[105] – which refused jurisdiction on the ground that the Constitutional Council was the court responsible for the lawfulness of parliamentary elections – and then to the Constitutional Council, which, by default, accepted the principle of its jurisdiction whilst rejecting the appeal.[106]

Twelve years later the Conseil d'Etat appeared anxious to regain an area that it had nevertheless apparently abandoned to the Constitutional Council.[107]
Having arrived at this point, both courts – which seemed for a while to be contending against each other – tried to find the best possible solution for the law and the public and finally succeeded in 2000 when a dispute arose concerning the constituent referendum proposed by the President of the Republic to reduce the presidential term of office.[108]

Since then the two courts – the Conseil d'Etat and the Constitutional Council – have respected the following criteria for apportioning cases:

- Jurisdiction of the Constitutional Council to review the lawfulness of electoral preparations remains the exception, with jurisdiction of the Conseil d'Etat being the rule;

- This exceptional jurisdiction is subject to three conditions which recur like a leitmotiv in every decision relating to this matter: a challenge concerning the effectiveness of supervision of the electoral process, a risk of invalidating the general conduct of the voting, and interference with the normal procedures of the public authorities;

- These very strict conditions therefore exclude regular preparatory measures, subordinate measures and measures relating to parliamentary by-elections;

- The writ of election alone seems to meet these criteria and today appears to be the only preparatory measure that can be reviewed by the Constitutional Council.

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105 Conseil d'Etat, 3 June 1981, *Delmas and Others*, rec. Leb., p. 244.

106 Constitutional Council, decision of 11 June 1981, *Delmas*, Rec., p. 97;

107 Conseil d'Etat, Combined Court, 12 March 1993, *Union nationale écologiste and Parti pour la défense des animaux*, rec. Lebon, p. 67; Conseil d'Etat, Division, 26 March 1993, *Parti des travailleurs*, rec. Lebon, p. 87.

108 Constitutional Council, decision of 25 July 2000, *Hauchemaille I*, Rec., p. 117; "Le contentieux des actes préparatoires à un référendum", *Les Petites Affiches* (LPA), 2 August 2000, No. 153, p. 20, comments by J.-E. Schoettl; Constitutional Council, decisions of 23 August 2000, *Hauchemaille II*, Rec., p. 134, and *Larrouturou*, Rec., p. 137; "Le contentieux des actes préparatoires à un référendum: suite…", LPA, 29 August 2000, No. 172, p. 12, comments by J.-E. Schoettl; Constitutional Council, decisions of 6 September 2000, *Pasqua*, Rec., p. 144, and *Hauchemaille III*, Rec., p. 140; Constitutional Council, decision of 11 September 2000, *Meyet*, Rec., p. 148; "Le contentieux des actes préparatoires à un référendum: fin!", LPA, 21 September 2000, No. 189, p. 20, comments by J.-E. Schoettl; *Revue française de droit administratif* (RFDA), 2000, p. 1004, comments by R. Ghevontian.

2. The special case of review of the list of presidential election candidates

As we have already seen, it falls to the Constitutional Council to draw up the list of candidates for a presidential election. But, and this may seem stranger, the decree implementing the law of 6 November 1962 on election of the President of the Republic by universal suffrage adds that the Constitutional Council also has the power to rule on objections relating to this list.

Any person who has been nominated has the right to object to the list of candidates, whether or not they are on it themselves. The period for entering an appeal is very short − within forty-eight hours of the list being published – and the Constitutional Council must deliver its decision "without delay".

The Constitutional Council's jurisdiction in this respect may seem debatable, starting with the fact that it results from a single decree, which thus not only adds to the Constitution but seems to conflict with it, since Article 62 of the latter provides that "no appeal shall lie from the decisions of the Constitutional Council".

But, above all, such an appeal is hardly in keeping with the established principle that you cannot be judge in your own case...

Aware of this legal "incongruity", the Constitutional Council itself would in due course explain (if not justify) it by the fact that the decree was only implementing a law passed by the French people following a referendum, thus constituting a direct expression of national sovereignty and giving the government the broader powers to take all necessary implementing measures.[109]

So far, none of the objections lodged against the list of candidates has resulted in cancellation.

IV. The Constitutional Council's powers with regard to monitoring of the conduct of elections

We shall here successively consider referral, procedure and scope of review.

1. Referral

a. Presidential elections

For presidential elections, the Constitutional Council can only deal with a case prior to declaration of the result.

The case may first be referred by delegates of the Constitutional Council, who are members of the ordinary or administrative courts chosen to carry out supervision and monitoring in various polling stations on the actual polling day.

A prefect or a candidate's agent may also refer a case within forty-eight hours of close of poll. As for the voters, they can do so only by means of a complaint recorded in the polling station's return.

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[109] Decision of 9 April 1995, Néron, Rec., p. 53.

b. Referendums

As with presidential elections, the Constitutional Council can only deal with a case prior to declaration of the result.[110] Voters may refer cases to it by means of a complaint recorded in the polling station's return.

c. Parliamentary elections

Whether elections are for the National Assembly or the Senate, cases may be referred to the Constitutional Council within ten days of declaration of the results of the ballot by any person entered on the electoral register of the relevant constituency or by any candidate.

Applications must be made in writing and sent to the Secretariat-General of the Constitutional Council, the prefect or the leader of the territory.

Since the entry into force of the law of 15 January 1990, cases must also be referred to the Constitutional Council by the National Campaign Accounts and Political Financing Commission if a campaign account has been disallowed, if it has not been submitted, or if the spending limit has been exceeded.

2. Procedure

a. Presidential elections and referendums

Here the rules of procedure are very simple since, by definition, the Constitutional Council only examines complaints relating to preparation of the declaration decision.

b. Parliamentary elections

To consider appeals the Constitutional Council is formed into three divisions each composed of three of its members selected by the drawing of lots. Separate lots are drawn for members appointed by the President of the Republic, members appointed by the Speaker of the National Assembly and members appointed by the Speaker of the Senate. In the first half of October each year the Constitutional Council draws up a list of ten assistant rapporteurs selected from among legal advisers of the Conseil d'Etat and middle-ranking members of the Auditor-General's Department. Assistant rapporteurs are not entitled to vote in the Constitutional Council. When an application is received, the president instructs one of the divisions to examine it and appoints a rapporteur, who may be one of the assistant rapporteurs. The divisions examine the cases thus referred to them, which are brought before the full Council.

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110 This rule cannot be circumvented by referral to the Constitutional Council after declaration of the result on the basis of Article 61 of the Constitution (review of constitutionality of Acts of Parliament before promulgation), since the Council, following established precedents, will then decline jurisdiction (see Decision 62-20 DC − Law relating to the election of the President of the Republic by direct universal suffrage, adopted by the referendum of 28 October 1962, Rec., p. 27 – and Decision 92-313 DC − law of 23 September 1992 authorising ratification of the Treaty on European Union, Rec., p. 94).

However, the Council may, in a reasoned decision delivered without prior adversarial hearings, dismiss appeals that are inadmissible or contain complaints about matters that are manifestly not such as to influence the outcome of the election.

In accordance with the adversarial principle, the member of parliament whose election is challenged is officially notified of this fact and may inspect the file and make observations in writing. The Council and the divisions may, where appropriate, order an inquiry and require discovery of all documents and reports relating to the election, including the campaign accounts of the candidates concerned.

The rapporteur receives witnesses' statements under oath. The proceedings are recorded by the rapporteur and notified to those concerned, who have three days in which to register their written observations.

As soon as these observations have been received, or upon expiry of the period for their submission, a report on the case is made to the Council, which delivers a reasoned decision. The decision is immediately notified to the relevant house.

The parties may have representation.

The hearings are not public.

3. Scope of review

a. Proper conduct of the poll in general

- Presidential elections

Although official provisions do not specify the scope of a review of proper conduct of presidential elections, it seems obvious that the Constitutional Council has the power to annul voting results. Although, given the election's national impact and the special nature of the office of head of state, total annulment seems unlikely, the same is not true of partial annulments, and the Constitutional Council has had no hesitation on this score, moreover, as evidenced by its various declaration decisions (see Appendix 5).

However, these partial annulments in certain polling stations do not affect the final result.

- Referendums

After the poll, the Constitutional Council directly monitors the official addition of the votes, examines and definitively settles any complaints from voters and may, if it finds serious irregularities, wholly or partly annul the voting in the relevant polling stations. Lastly, it declares the results. It performs its functions with the help of the assistant rapporteurs.

- Parliamentary elections

Article 41 of the above-mentioned Order of 7 November 1958 provides that "where the Council upholds an appeal, it may, as the case requires, annul the election that is being challenged or rescind the decision of the counting commission and itself declare the duly elected candidate".

Similarly to the Conseil d'Etat for local elections, the Constitutional Council therefore has very extensive powers with regard to parliamentary elections.

However, this comment should be qualified somewhat. Confronted with a direct expression of national sovereignty, the electoral court has shown prudence and pragmatism.
Before annulling an election it must ascertain that the reported irregularities (or even fraud) have genuinely affected the result of the poll.

The court here applies the principle of decisive influence: this usually depends on the vote difference, which means in practice that not every irregularity or fraud will of itself entail annulment of the poll.

In fact, the real questions asked by the electoral court are the following: "Has the integrity of the election been affected?" and "Does the declared result reflect the freely expressed will of the voters?"

As for rescinding the decision, this presents an even more complex problem. Here it is a matter not only of annulling the poll but also of substituting another candidate for the candidate declared elected, without returning to the voters. If the fraud has been serious or large-scale there may be a strong temptation to proceed in this way.

In fact, the electoral court faces a serious practical difficulty here: rescinding the decision turns the court into a counting office, and it must therefore be able to provide an accurate result in terms of votes before declaring the new winner. This is very often impossible, since there is no way of quantifying the actual impact of the fraud to the nearest unit. Consequently, the electoral court, sometimes reluctantly, must content itself with simply annulling the result, thus opening up the prospect of another election in which all the candidates can stand, including the perpetrator or beneficiary of the fraud. And electoral sociology shows us clearly that in most cases voters do not really take account of moral considerations when making their choice again. The risk is all the greater because any penalty of ineligibility that might be imposed on the perpetrator or instigator of the fraud could be ordered only by a criminal court, which would only become involved a long time after the election and sometimes even after expiration of the term of office.

All this explains why the Constitutional Council has never rescinded such a decision and why the Conseil d'Etat, over a much longer period and with a much larger volume of cases, has decided to do so only three times.[111]

To sum up, we may say that the electoral court judges the integrity of a poll but not its morality, even if, in the Constitutional Council's recent case-law,[112] a – welcome – change is perceptible.

4. Lawfulness in terms of campaign financing rules

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111 See, for example, Conseil d'Etat, 13 January 1967, Aix-en-Provence municipal elections, Rec., p. 16.

112 See, for example, the decision of 8 May 2002 relating to declaration of the results of the election for President of the Republic, Rec., p. 114 (Appendix 5).

The enactment of the rules on campaign accounts laying down rigorous procedures, strict supervision of the origin of revenues and an expenditure ceiling affects the Constitutional Council's powers with regard to election monitoring for presidential and National Assembly elections, but elections to the Senate do not come under these rules.

- Presidential elections

The Council must then check the campaign accounts submitted by the candidates within two months of the election, verifying compliance with the campaign financing rules and especially the spending limits.
Having heard both sides, the Council approves the candidates' accounts, if necessary after modifications, or disallows them. If an account has not been submitted, the statutory spending limit has been exceeded or the account has been disallowed by the Constitutional Council, the candidate is not declared ineligible but loses the legal right to reimbursement of personally incurred expenses.[113]

- National Assembly elections

If a case is referred to it by the National Campaign Accounts and Political Financing Commission where a campaign account has been disallowed or not submitted, including if the submission formalities have not been complied with or the spending limit exceeded, the Council declares, where appropriate, the candidate's resignation or ineligibility. Complaints concerning failure to comply with the legislation on checking of campaign accounts may also be raised by appeal. The National Campaign Accounts and Political Financing Commission is then informed.

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In conclusion, we must first note that the electoral powers conferred on the Constitutional Council by the 1958 Constitution have tended to advance the rule of law through the "judicialisation" of electoral matters.

Of course, in the absolute, we may regret a certain number of flaws and omissions in the system thus established.

This is the case, first and foremost, for the filing of candidates' nominations for presidential elections. Would it not be preferable to entrust responsibility for this matter to an independent administrative authority whose role would be confined to checking whether the proper nomination procedure had been followed and whether the persons nominated had given their consent, thus giving the Constitutional Council jurisdiction solely over review?

It may also be regretted that the review of whether voting has been properly conducted in these same presidential elections is unavailable to voters and, given the fact that it takes place prior to declaration of the results, somewhat virtual… But could it be otherwise in view of the urgent need to guarantee the elected president total stability of office both domestically and internationally?

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113 In 2002 the Constitutional Council thus disallowed Mr Megret's campaign account: Constitutional Council decision of 26 September 2002 concerning the campaign account of Mr Bruno Megret, candidate in the election for President of the Republic on 21 April and 5 May 2002, Rec., p. 221.

Lastly, we may find it surprising that, for review of elections to the National Assembly (and even the Senate), applicants cannot have access to hearings. On this point a change to the procedure might remedy this defect.

But, going beyond these somewhat negative considerations, should we not be turning to what is most important?

In electoral matters, surely the most important thing in a democratic society is to entrust the courts with enforcing the rules and principles guaranteeing implementation of a genuine democracy?

Surely the electoral courts are in the best position, given their rules of neutrality, objectivity and impartiality, to implement such important principles as voters' freedom to choose, equality of voters and of candidates, secrecy of the ballot and integrity of the ballot?

It is only in the hands of the courts that the "European electoral heritage", to use Pierre Garrone's fine phrase, will be able to flourish and bear fruit.

Appendix 1

Constitution of 4 October 1958 (excerpts)

Part VII – The Constitutional Council

Article 56

The Constitutional Council shall consist of nine members, whose term of office shall be nine years and shall not be renewable. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the Speaker of the National Assembly and three by the Speaker of the Senate.

In addition to the nine members provided for above, former Presidents of the Republic shall be *ex officio* life members of the Constitutional Council.

The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie.

Article 57

The office of member of the Constitutional Council shall be incompatible with that of minister or Member of parliament. Other incompatibilities shall be determined by an institutional Act.

Article 58

The Constitutional Council shall ensure the proper conduct of the election of the President of the Republic.

It shall examine complaints and shall declare the results of the vote.

Article 59

The Constitutional Council shall rule on the proper conduct of the election of deputies and senators in disputed cases.

Article 60

The Constitutional Council shall ensure the proper conduct of referendum operations provided for by Articles 11 and 89 and shall declare the results of the referendum.

Article 61

Institutional Acts before their promulgation, and the rules of procedure of the parliamentary assemblies before their entry into force, must be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.

To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the Speaker of the National Assembly, the Speaker of the Senate, sixty deputies or sixty senators.

In the cases provided for in the two preceding paragraphs, the Constitutional Council must rule within one month. However, at the Government's request, this period shall be reduced to eight days if the matter is urgent.

In these same cases, referral to the Constitutional Council shall suspend the time-limit for promulgation.

Article 62

A provision declared unconstitutional shall be neither promulgated nor implemented.

No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.

Article 63

An institutional Act shall determine the rules of organisation and operation of the Constitutional Council, the procedure to be followed before it and, in particular, the time-limits allowed for referring disputes to it.

Appendix 2

Order of 7 November 1958 enacting the Institutional Act on the Constitutional Council (excerpts)

Chapter V – Exercise of powers of the Constitutional Council in relation to the election of the President of the Republic

Article 30

The powers of the Constitutional Council in relation to the election of the President of the Republic shall be determined by the institutional Act governing such elections.

Article 31

Where an application is made to the Constitutional Council by the Government under Article 7 of the Constitution for a declaration that the President of the Republic is unable to exercise his functions, the Constitutional Council shall decide by an absolute majority of its members.

Chapter VI − Disputes relating to the election of deputies and senators

Article 32

The Minister of the Interior and the Minister responsible for the Overseas Territories shall immediately notify the Assembly of the names of the persons declared elected.

The returns drawn up by the counting commissions, to which the prefect or the leader of the territory shall append the certified copy of the birth certificate and Sheet No. 2 of the police record of the persons declared elected and their substitutes, shall be made available for a period of ten days to persons entered on the electoral register and persons having stood for election.

Thereafter, the returns and the documents appended to them shall be filed in the archives of the *département* or the territory. They may be made available only to the Constitutional Council, if it so requests.

Article 33

The election of a deputy or a senator may be challenged before the Constitutional Council within the ten days following declaration of the results of the ballot.

The right to challenge an election belongs to any person entered on the electoral register for the constituency in which the election was held and to any persons having stood for election.

Article 34

The application to the Constitutional Council shall be made in writing, addressed to the Secretariat-General of the Constitutional Council, the prefect or the leader of the territory.

The prefect or the leader of the territory shall forthwith notify the Secretariat-General by telegram and pass on the applications received by them.

The Council's Secretary-General shall immediately notify the relevant house of the applications received or announced.

Article 35

Applications shall contain the name, forename(s) and position of the applicant, the name of the successful candidates whose election is being challenged and the grounds on which annulment is sought. The applicant shall append to the application all documents produced in support of these grounds. The Council may in special circumstances allow additional time for production of some of these documents.

The application shall have no suspensive effect. No stamp duties or registration fees shall be payable.

Article 36

The Constitutional Council shall establish three divisions each composed of three of its members selected by drawing of lots. Separate lots shall be drawn for members appointed by the President of the Republic, members appointed by the Speaker of the National Assembly and members appointed by the Speaker of the Senate.

In the first half of October each year the Constitutional Council shall draw up a list of ten assistant rapporteurs selected from among legal advisers of the Conseil d'Etat and middle-ranking members of the Auditor-General's Department. Assistant rapporteurs shall not be entitled to vote in the Constitutional Council.

Article 37

As soon as an application is received, the President shall instruct one of the divisions to examine it and shall designate a rapporteur, who may be one of the assistant rapporteurs.

Article 38

The divisions shall examine cases thus referred to them, which shall be brought before the full Council.

However, the Council may, in a reasoned decision delivered without prior adversarial hearings, dismiss applications that are inadmissible or contain complaints about matters that are manifestly not such as to influence the outcome of the election. The decision shall be communicated immediately to the relevant house.

Article 39

In all other cases, the member of parliament whose election is challenged shall be notified, as shall his substitute, if any. The division shall set a period of time in which they may inspect the application and the documents submitted to the Council's Secretariat and produce their written observations.

Article 40

As soon as these observations have been received or the period for producing them has expired, a report on the case shall be made to the Council, which shall issue a reasoned decision. The decision shall be communicated immediately to the relevant house.

Article 41

Where the Council upholds an appeal, it may, as the case requires, annul the election that is being challenged or rescind the decision of the counting commission and itself declare the duly elected candidate.

Article 41.1

Where the Council's examination of a case reveals that a candidate is in one of the situations referred to in the second paragraph of Article LO 128 of the Electoral Code, it shall declare him ineligible as provided by that article and, if he has been declared elected, annul his election.

Article 42

The Council and the divisions may, where appropriate, order an inquiry and require discovery of all documents and reports relating to the election, including the campaign accounts of the candidates concerned, together with any documents, reports and decisions gathered or prepared by the commission established by Article L. 52-14 of the Electoral Code.

The rapporteur shall receive witnesses' statements under oath. The proceedings shall be recorded by the rapporteur and notified to those concerned, who shall have three days in which to register their written observations.

Article 43

The Council and its divisions may appoint one or more of their members or an assistant rapporteur to take other procedural measures on the spot.

Article 44

When giving judgment in a case, the Constitutional Council shall have jurisdiction to hear and determine all related questions and objections arising at the time of the application. In such cases its decision shall have legal effect only in relation to the election to which it refers.

Article 45

The Constitutional Council shall rule on the lawfulness of the election of both the principal candidate and his substitute, except where it is subsequently ascertained that one or other is ineligible.

Chapter VII − Monitoring referendums and declaring results

Article 46

The Constitutional Council shall be consulted by the Government on the organisation of referendums. It shall be notified forthwith of all measures taken to that end.

Article 47

The Constitutional Council may make observations on the list of organisations entitled to use public campaign facilities.

Article 48

The Constitutional Council may appoint one or more delegates selected, in agreement with the relevant ministers, from among members of the administrative and ordinary courts to monitor the conduct of a referendum on the spot.

Article 49

The Constitutional Council shall itself monitor the official addition of the votes.

Article 50

The Constitutional Council shall examine and definitively settle all complaints.

Where the Council finds an irregularity in the conduct of the referendum, it shall decide whether, having regard to the nature and seriousness thereof, the referendum should be confirmed or whether it should be wholly or partly annulled.

Article 51

The Constitutional Council shall declare the results of the referendum. Its declaration shall be cited in the decree promulgating the Act enacted by the people.

Appendix 3

Decree No. 2001-213 of 8 March 2001 implementing Law No. 62-1292 of 6 November 1962 concerning the election of the President of the Republic by universal suffrage, as amended by Decree No. 2002-243 of 21 February 2002 (excerpts)

Article 1

All French nationals entered on one of the electoral registers for mainland France, the overseas *départements*, French Polynesia, the Wallis and Futuna Islands, New Caledonia, Mayotte or Saint-Pierre-et-Miquelon may take part in the election of the President of the Republic.

Part I – Nominations and declarations

Article 2

Nominations of candidates for election as President of the Republic shall be addressed to the Constitutional Council following publication of the writ of election and must reach it no later than midnight on the nineteenth day preceding the first ballot.

However, nominations may be submitted within the same time-limit:

1. In the overseas *départements*, French Polynesia, the Wallis and Futuna Islands, New Caledonia, Mayotte and Saint-Pierre-et-Miquelon to the representative of the state;

2. By elected members of the Council for French Expatriates to the head of the diplomatic or consular representation responsible for the consular district in which the nominator resides.

The representative of the state or the head of the diplomatic or consular representation, after issuing a receipt for the nomination, shall ensure that the Constitutional Council is notified of it by the swiftest means.

Article 3

Nominations shall be made on forms printed by the administration in accordance with the model adopted by the Constitutional Council.

When the election takes place in the manner provided for in the third paragraph of Article 7 of the Constitution, forms shall be sent by the administrative authority to the citizens entitled by law to nominate a candidate from a date set by decree, which must be at least fifteen days before publication of the writ of election.

If the office of President of the Republic is declared vacant by the Constitutional Council or the President is declared definitively incapable of acting, forms shall be sent by the administrative authority to the citizens entitled by law to nominate a candidate from the date of publication of the declaration by the Constitutional Council that there is a vacancy or that the incapacity is definitive.

Article 4

The nomination shall be written in capital letters and shall bear the nominator's manual signature. It shall specify the elective office to which it refers, pursuant to the second subparagraph of section 3 (I) of the law of 6 November 1962. Where it is made by a mayor or deputy mayor, it must bear the seal of the mayor's office.

Article 5

The Constitutional Council shall carry out such checks as it may consider appropriate.

Article 6

The citizens referred to in the second subparagraph of section 3 (I) of the law of 6 November 1962 may nominate only one candidate.

Under no circumstances may a nomination be withdrawn after it has been sent or filed.

The name and position of citizens nominating candidates entered on the list provided for by Article 7 shall be published in the *Journal Officiel*.

Article 7

The Constitutional Council shall draw up the list of candidates after checking that the nominations are in order and that the candidates have accepted the nominations.

The list shall be published in the *Journal Officiel* no later than the sixteenth day preceding the first ballot. Notification shall be sent by the swiftest means to the representatives of the state in the *départements*, French Polynesia, the Wallis and Futuna Islands, New Caledonia, Mayotte and Saint-Pierre-et-Miquelon and to the heads of diplomatic and consular representations.

Article 8

Any person who has been nominated shall have the right to object to the list of candidates drawn up.

Objections must reach the Constitutional Council before the end of the day following that on which the list of candidates was published in the *Journal Officiel*.

The Constitutional Council shall take a decision without delay.

Article 9

Where no candidate obtains an absolute majority of the votes cast at the first ballot, any withdrawals shall be notified to the Constitutional Council by the candidates no later than midnight on the Thursday following the first ballot. The Government shall be informed by the Constitutional Council of the names of the two candidates alone entitled to stand at the second ballot; they shall be published immediately in the *Journal Officiel*. Notification shall also be sent by the swiftest means to the representatives of the state in the *départements*, French Polynesia, the Wallis and Futuna Islands, New Caledonia, Mayotte and Saint-Pierre-et-Miquelon and to the heads of diplomatic and consular representations.

Part III − Electoral process

Article 29

The official addition of the votes shall be conducted under the supervision of the Constitutional Council at its headquarters and an official return recorded.

If no absolute majority is attained at the first ballot, the Constitutional Council shall announce the number of votes obtained by each candidate no later than 8 p.m. on the Wednesday.

The Constitutional Council shall declare the results of the whole election within ten days of the ballot in which one of the candidates attains an absolute majority of the votes cast.

Part IV − Disputes

Article 30

Any voter may challenge the lawfulness of the electoral process by having his complaint recorded in the official return of process.

The representatives of the state in the *départements*, French Polynesia, the Wallis and Futuna Islands, New Caledonia, Mayotte and Saint-Pierre-et-Miquelon shall, within forty-eight hours of the close of poll, refer directly to the Constitutional Council any part of the process in a

constituency in which the statutory or regulatory conditions and procedures have not been observed.

Any candidate may also, within the same forty-eight hour period, refer the entire electoral process directly to the Constitutional Council.

Article 31

Decisions of the Constitutional Council ruling definitively on candidates' campaign accounts shall be published in the *Journal officiel* and notified to the Minister of the Interior.

Appendix 4

Instructions to Constitutional Council delegates for the 2002 presidential election

Outward indications of voting intentions during the second round of the presidential election

Some voters have apparently expressed the intention of showing how they have voted in the second round of the presidential election through ostentatious, or even offensive, dress.

Without in any way prejudicing any decisions regarding such behaviour that it might have to take as an electoral court, the Constitutional Council must ensure that the election is properly conducted. To this end, delegates should note the following information.

1. Such behaviour would breach the secrecy of the ballot, a principle laid down in Article 3 of the Constitution and reiterated in Article L 59 of the Electoral Code. Article L 113 of the same code renders any person who has violated or attempted to violate the secrecy of the ballot by deliberately failing to comply with the law liable to penalties: either a fine of 15 000 euros and a one-year prison sentence or only one of these penalties.

Under Article L 113: *"... Whosoever, in an administrative or municipal commission, in a polling station or in the offices of local authorities, prefectures or sub-prefectures, before, during or after the poll, has, through deliberate non-compliance with the law or the prefect's orders [...] violated or attempted to violate the secrecy of the ballot, undermined or attempted to undermine its integrity, obstructed or attempted to obstruct the electoral process, or altered or attempted to alter the result, will be punished by a fine of 15 000 euros and a one-year prison sentence or by only one of those two penalties.*

If the offender is a member of the ordinary or administrative courts, a government official or a member of a government department, a representative of a public ministry or a returning officer, the sentence shall be doubled."

What is more, the attitudes in question would undermine the dignity of the poll and might lead to disturbances in polling stations or their vicinity.

Furthermore, time-honoured precedents of the Conseil d'Etat consider a "prior understanding" between voters to make their voting intentions public in a polling station to be intimidation or a practice that may affect the integrity of the poll (16 November 1888, Montferrier; 18 March 1893, Etain). The precedents of the Constitutional Council are similar (for example, with

regard to the wearing of jerseys revealing voting intentions: 12 July 1978, A.N., Guadeloupe, second district, Rec., p. 203; 9 October 1981, A.N., Wallis and Futuna, Rec., p. 176).

Lastly, if this prior understanding was aired in front of television cameras, its being broadcast before the end of polling might be interpreted as an electioneering message and would be in breach of Article L 49 of the Electoral Code. Such a breach is subject to a penalty under Article L 89, without prejudicing the disciplinary authority of the Audiovisual Council (CSA) over audiovisual communication services.

2. The returning officer is not only obliged to remain neutral during the poll (see Conseil d'Etat, 8 March 2002, municipal elections of the Vairo associated commune) but must also ensure that the voting takes place in a calm and orderly manner. He may therefore have removed from the polling room any voter who disrupts the proper conduct of the election. He may call upon the police for assistance to this end under Article R 49 of the Electoral Code.

It should be noted, moreover, that insulting behaviour by a voter in a polling station or towards a polling-station official is subject to the penalties laid down in Article L 102 of the Electoral Code. The same applies to assaults that delay or obstruct the voting.

3. Constitutional Council delegates must draw these facts to the attention of returning officers where appropriate. If no action follows, they should report this to the Constitutional Council, either by entering a comment in the polling-station return or through the *département* counting commission, or, for the most serious occurrences, directly to the Council.

Appendix 5

Decision concerning declaration of the results of the presidential election 8 May 2002

The Constitutional Council,

[…] Having dismissed as inadmissible objections from voters addressed directly to the Constitutional Council in disregard of the first paragraph of Article 30 of the above-mentioned decree of 8 March 2001;

Having considered, amongst the objections entered by voters in the return of poll, those implicating the electoral process as a whole, and having concluded that the facts there stated, assuming that they were proven, were not such as to interfere with either the proper conduct or the integrity of the poll;

Having ruled on the other objections entered in the returns of poll;

Having rectified various clerical errors and undertaken the adjustments it deemed necessary, together with the annulments listed below;

Concerning conduct of the election

1. Whereas in the immediate neighbourhood of the polling station in the commune of Villemagne (Aude), in which 157 votes were cast, the mayor of the commune on the one hand made a symbolic "decontamination" facility available to voters and, on the other, organised a

mock poll inviting voters to choose a candidate who was not standing in the second ballot; whereas such acts, advertised and directed by the very authority in charge of the electoral process in the commune were not consistent with the dignity of the poll and were likely to undermine the secrecy of the ballot and voters' freedom; whereas, in these circumstances, it is necessary to cancel all votes cast in this commune;

2. Whereas in Polling Station No. 1 in the commune of Furiani and Polling Station No. 15 in the commune of Bastia (Haute-Corse), in which 957 and 279 votes respectively were cast, the *département* counting commission found serious and unjustified discrepancies between, on the one hand, the number of ballot papers declared blank or spoilt in the polling returns and, on the other, the blank and spoilt ballot papers attached to these returns; whereas, furthermore, the grounds for the cancellation of twenty-two ballot papers in Polling Station No. 1 in the commune of Furiani and nineteen ballot papers in Polling Station No. 15 in the commune of Bastia remain unexplained; whereas, lastly, it has been established by the investigation that the conditions under which these blank and spoilt ballot papers were attached to the returns failed to comply with the provisions of Article L 66 of the Electoral Code; whereas, in these circumstances, the Constitutional Council is unable to review the legality of the polling process; whereas it is necessary to cancel all votes cast in the above-mentioned polling stations;

3. Whereas in the polling station of the commune of Mettray (Indre-et-Loire), in which 1 230 votes were cast, the votes were not counted in accordance with the procedure laid down in Article L 65 of the Electoral Code; whereas in this case the irregularity was likely to result in errors and could encourage fraud; whereas, in view of this deliberate disregard of the provisions intended to guarantee the integrity of the poll, it is necessary to cancel all votes cast in this commune;

4. Whereas in Polling Stations Nos. 3 and 4 of the commune of Mazingarbe (Pas-de-Calais), in which 817 votes were cast, the identity of voters was not checked, in breach of Articles L 62 and R 60 of the Electoral Code; whereas this irregularity continued despite the observations made on this subject by the delegate from the Constitutional Council; whereas, in view of this deliberate and persistent disregard of provisions intended to guarantee the proper conduct and integrity of the poll, it is necessary to cancel all votes cast in these polling stations;

5. Whereas in Polling Station No. 1 of the commune of Erstein (Bas-Rhin), in which 1 457 votes were cast, numerous voters were allowed to vote without going into the polling booth, in breach of Article L 60 of the Electoral Code; whereas, furthermore, the identity of all voters was not checked – contrary to the requirements of Article R 60 of the Code for communes with over 5000 inhabitants, despite the observations of the delegate from the Constitutional Council; whereas, in view of this deliberate and persistent disregard of provisions intended to guarantee the proper conduct and integrity of the poll, it is necessary to cancel all votes cast in this polling station;

Concerning the overall result of the poll

Whereas the results of the second ballot are as follows:

Registered electors	41 191 169
Voters	32 832 295

Votes cast	31 062 988
Absolute majority	15 531 495
Votes obtained by:	
Mr Jacques Chirac:	25 537 956
Mr Jean-Marie Le Pen:	5 525 032

Whereas, Mr Jacques Chirac has received the absolute majority of votes cast required in order to be declared elected;

Therefore,

Declares

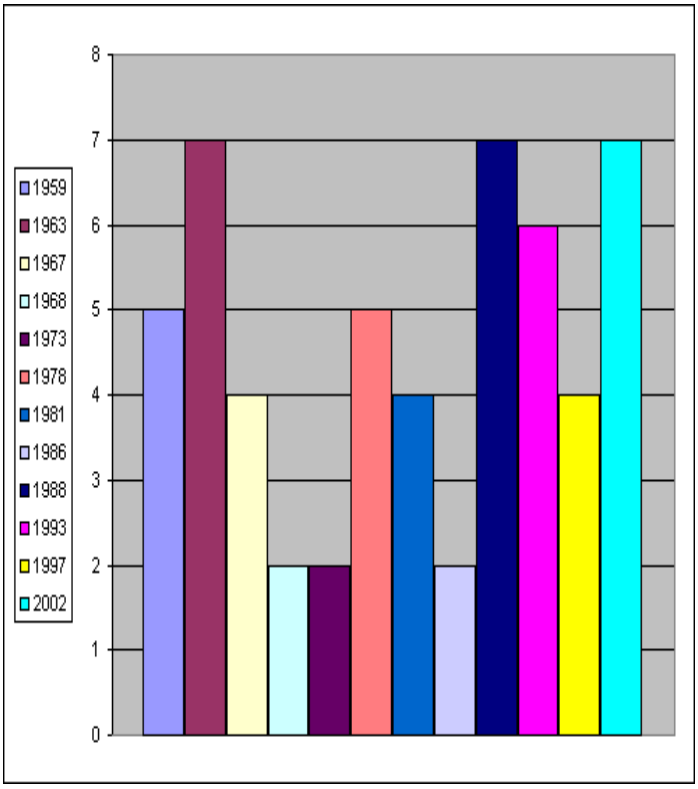
Mr Jacques Chirac President of the French Republic from 17 May 2002.

Appendix 6

Statistics

Annulment of national assembly elections (excluding by-elections)

Year	Number of annulments
1959	5
1963	7
1967	4
1968	2
1973	2
1978	5
1981	4
1986	2
1988	7
1993	6
1997	4
2002	7



Source: Constitutional Council

THE SPANISH SYSTEM OF PROPORTIONAL REPRESENTATION AND ITS LIMITS, ACCORDING TO THE CONSTITUTIONAL COURT

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I. Introduction: elections, politics and law

One of the clearest trends in contemporary constitutionalism is the progressive extension of the Rule of Law. The idea of Government through law is reaching spheres where politics ruled peacefully up to recent times. The idea of Politics caught up by the Law (La politique saisie par le droit) has quite recently arrived in the realm of electoral systems, usually considered as a purely political decision, basically conditioned by historical and traditional data.

Constitutional Law is the sphere where Politics and Law find each other. Both stake a claim for their own autonomy and rules. But sometimes they must agree. And this must happen very particularly in the sphere of electoral law.

In any democratic context, elections are the basic instrument for the political system to be legitimate and accepted by the citizens. However under the rule of law, all power must be submitted to constitutional or legal rules. Even the power to choose those who govern. Elections are an essentially political process. But they have to be held under juridical (constitutional and/or legal) conditions.

In that framework, constitutional and legal norms have adopted the commonly accepted standards of electoral law in democratic countries; standards which refer to essential constitutional principles such as freedom (free elections and secret vote) or equality (universal suffrage, equal vote and equal opportunities). These principles have of course to be respected by electoral rules, which, in many cases, are founded in national traditions, cultures and experience. Sometimes both spheres conflict.

II. Majority and Proportional electoral systems

The conflict between political traditions and basic constitutional principles is quite clearly evident when considering the problems faced by the majority electoral systems, which are funding increasing and important theoretical difficulties to defend themselves. Majority systems usually have a traditional origin. Historically, the first democratic electoral systems were based on majority rules (Great Britain, United States, France…). Nonetheless, in the XXth Century, the extension of democratic principles and the strength of the principle of equality have given place to the rise of proportional representation (PR) systems.

In very general terms, it is commonly accepted that majority systems favour the formation of clear parliamentary majorities, but at a high cost in terms of a proportional - fair - representation of political parties. On the contrary, proportional systems usually guarantee a high level of "justice" or fair representation, because the political composition of Parliament more or less reflects the political distribution of the voters. But this "justice" usually has a certain cost in terms of difficulties for forming clear majorities, which may assure stable governments.

In short the conflict between "majority" and "proportional" systems may be presented as a conflict between stable government and fair representation, between efficiency and justice or equality. As Tocqueville foresaw almost two hundred years ago, this is the time of equality. And, in the electoral context, equality usually means proportionality.

This notion is quite clear in the European Union framework. Despite their different political cultures and institutional arrangements, all the 15 members of the EU used PR systems in the latest 1999 elections to the European Parliament. Even Great Britain left its traditional, majority, "first-past-the-post" system, as France had also done previously, although they both keep their respective majority systems for legislative, national elections. The Italian case is remarkable because it is a "new" majority system, the only proportional country which has adopted an essentially majoritarian model for legislative elections. But it has conserved the proportional system for European elections. With these antecedents, it is not strange that the Council of the EU decided, in May 2002, to reform the 1976 rules for the election of the European Parliament, establishing in the new article 1 that the EP members will be elected according to proportional rules.

This tendency towards proportionality seems thus to be clear. The purpose of this paper is to show, firstly, how the Spanish electoral system, based on proportional principles, has nonetheless taken into account different factors which reduce proportionality and favour the formation of parliamentary majorities; and, secondly, how the Constitutional Court has had to define the constitutional principle of proportionality and its possible limits.

III. The Spanish electoral system: proportional… but not too much

1. The constitutional and legal framework

The Spanish political transition from the authoritarian Francoism to Democracy finished with the enactment of the 1978 Constitution (hereinafter, C.), which set up a democratic, parliamentary regime similar to others in Western Europe. The Spanish Parliament, the Cortes Generales, is composed of two Chambers: the Congress of Deputies and the Senate. The Senate is conceived, as in many other countries, as "the House of territorial representation", and is formed basically of four senators elected in any of the 50 Spanish provinces, and around 50 elected by the Legislative Chambers of the 17 Autonomous Communities (one Senator for any Community, and another for every million inhabitants in any of them).

In any case, the most important Chamber is the Congress of Deputies. As usual, this Lower Chamber votes the Prime Minister and can censure him, thus provoking the fall of the Government. It consists of a minimum of 300 and a maximum of 400 members elected "on the basis of proportional representation", in provincial constituencies (article 68 C.). Constitutional rules are, of course, developed by the Organic Law 5/1985, on the General

Electoral Regime (LOREG), which opts for the D'Hondt formula, applied in 50 provincial constituencies, to elect 350 deputies.

The constitutional principle for the election of the Congress of Deputies is, then, that of Proportional representation. A principle linked, as we have already pointed out, with the values of equality and justice, considered as "highest values" of the Spanish legal system (article 1.1 C.), and which have a particular meaning in the field of political representation, as article 23 C. makes clear: "1. Citizens have the right to participate in public affairs, directly or through their representatives, freely elected in periodic elections by universal franchise. 2. They likewise have the right to access on equal terms to public office, in accordance with the requirements laid down by the law".

Nevertheless, all the elections held in Spain have shown that the electoral rules do not assure strictly proportional results. In fact, the Spanish electoral system produces a relatively important deviation from strict proportional results.

2. The results

Some examples can make it clear. Table 1 shows the results of the last Spanish general elections, held on 14 March, 2004, in terms of votes and seats:

Table 1

1. Parties	2. % of votes (Number of votes)	3. % of seats (Number of seats)	4. Difference 3-2 (% seats % votes)
1. Socialist Party (PSOE)	42,64 % (10.909.687)	46,85 % (164)	+ 4,2
2. People's Party (PP)	37,64 % (9.630.512)	42,28 % (148)	+ 4,6
3. United Left (IU)	4,96 % (1.269.532)	1,42 % (5)	- 3,5
4. CiU (Convergence and Union, catalonian nationalists)	3,24 % (829.046)	2,85 % (10)	- 0,4
5. ERC (Republican Left of Catalonia, catalonian nationalists)	2,54 % (649.999)	2,28 % (8)	- 0,26
6. PNV (Basque Nationalist Party)	1,63 % (417.154)	2 % (7)	+ 0,37
7. CC (Canarian Coalition, regionalists)	0,86 (221.034)	0,85 % (3)	=

8. Other nationalist parties (BNG, CHA, EA, Na-Bai)	1,73 % (440.736)	1,42 % (5)	- 0,3
9. Others (Non parliamentary parties)	Circa 4,75 %	0,00 (0)	- 4,75

Data: Spanish Ministry of Interior (www.elecciones.mir.es/elecmar2004/congreso)

The distribution of seats enables us to draw some conclusions in terms of proportionality. In particular, that the (two) major parties are over-represented, whilst the third and minor parties are under-represented.

That is especially true in the national sphere: the two greater parties, PSOE and PP, do usually have a greater percentage of seats than of votes. This is because, as we will see, they are the two leading parties in most of the Spanish constituencies. On the contrary, United Left (IU), is the third party in the majority of the Spanish constituencies, which do not have nationalist parties; and the fourth (in Galice, Canary Islands or Navarre) or even the fifth (in Catalonia or the Basque Country, among others) where (usually, leftist) nationalists or regionalists are strong. The result is an important loss in terms of proportional representation in the Chamber.

The same result can be observed at regional level, where there are many parties which do not win seats (most of them, little regionalist parties, which have more incidence in local and regional elections), and whose votes are also "lost" in terms of representation.

3. The causes of disproportionality

Technically speaking, the "problem" (in terms of proportionality) is due to the small size of Spanish constituencies. 350 deputies for 50 (in fact, 52) constituencies implies an average size of 7 deputies elected in any constituency. The Spanish Electoral Law sets up an electoral threshold of 3% of the votes for any party to participate in the allocation of seats. But this is not 3% at national level. In fact, as shown in Figure 1, only 4 out of 11 parliamentary parties obtained more than 3% of the valid votes throughout Spain. Nor even at a regional level: the threshold only acts at constituency level. But, speaking once again in purely technical terms, this 3% threshold is useless in almost all constituencies. Because if they have only 7 seats to allocate, the electoral quota, and therefore the average threshold, is well over 10% (100/7).

In addition, there are in fact many constituencies (more than half) which only elect 3, 4 or 5 deputies. If there are only 3 or 4 seats to allocate, it is very difficult to obtain any of them with less than 20% of the votes. In most of these constituencies, all the seats are allocated to the two major parties, so that minor parties, which have 5, 10 or 15 % of the votes, can only gain seats in greater constituencies, such as Madrid (35 seats), Barcelona (31) or Valencia (16), where the "technical" threshold may be close to 3 to 5%. In other words, most of the Spanish constituencies work as majoritarian.

Therefore, the first and second parties in most constituencies (PSOE and PP throughout Spain; and PNV in the Basque Country) are over-represented (have a higher percentage of seats than of votes). On the contrary, parties which almost always are third or even lower, such as IU, are strongly under-represented.

These results have been produced in all nine general democratic elections since the Spanish political transition.[114] The only difference is in the name and the number of the parties. From 1977 to 1982, the two great national parties were the PSOE and the centrist UCD, since then, it is PSOE and the centre-right PP (with different names between 1982 and 1989). But, in all cases, they both had higher percentages of seats than of votes. When looking closely at the data, it is also evident that the winning party always gets maximum benefit:

Table 2

Election	Winner Party	Votes (%)	Seats (%)	Diff.	Second Party	Votes (%)	Seats (%)	Diff.
2000	PP	44,52	183 (52,3)	+7,8	PSOE	34,16	125 (35,7)	+1,5
1996	PP	38,79	156 (44,6)	+5,8	PSOE	37,63	141 (40,3)	+2,7
1993	PSOE	38,78	159 (45,4)	+6,64	PP	34,76	141 (40,3)	+5,5
1989	PSOE	39,60	175 (50,0)	+10,4	PP	25,79	107 (30,6)	+4,8
1986	PSOE	44,06	184 (52,6)	+8,5	PP	25,97	105 (30,0)	+4,0

Data: Spanish Ministry of Interior (www.elecciones.mir.es/MIR/jsp/resultados)

With reference to the number of national relevant parties, between 1977 and 1989 there are four: besides the "two majors", at the beginning, the Communist Party, PCE, and the conservative AP; afterwards, the PCE and a centrist party UCD-CDS; since 1986, IU and CDS. A fourth national party which, of course, was also under-represented.

Table 3

Election	Third Party*	Votes (%)	Seats (%)	Diff.	Fourth Party*	Votes (%)	Seats (%)	Diff.
2000	IU	5,45	8 (2,28)	-3,17	GIL	0,31	0 (0)	-0,31
1996	IU	10,54	21 (6,0)	-4,54	LVE	0,25	0 (0)	-0,25
1993	IU	9,55	18 (5,14)	-4,41	CDS	1,76	0 (0)	-1,76
1989	IU	9,07	17 (4,85)	-4,22	CDS	7,89	14 (4,0)	-3,89
1986	CDS	9,22	19 (5,42)	-3,8	IU	4,63	7 (2,0)	-2,63

Data: Spanish Ministry of Interior (www.elecciones.mir.es/MIR/jsp/resultados)

*The third and fourth parties considered are only those of national scope (i.e., excluding nationalists parties)

In conclusion, and even when other factors are evidently relevant (in particular, the distance between the first and the second party: the greater the distance, the greater the benefit for the

[114] 1977, 1979, 1982, 1986, 1989, 1993, 1996, 2000 and 2004.

first), the basic cause of disproportionality is the small size of constituencies, which makes it very difficult to apply the principle of proportional allocation of the seats.

4. The criticism of political scientists

The consequence is that the Spanish electoral system has been often criticised as non-proportional, and since 1978 there have been voices demanding its reform in a "proportional" way.

In fact, political scientists have often considered that in general, the Spanish electoral system is closer to majority than to proportional systems. Therefore, it should be defined as majoritarian (even attenuated) rather than as proportional (even if it is qualified as imperfect). It has even been said that considering the Spanish electoral system as proportional can only be understood as the result of a non critical, pseudo-constitutionalist or simply nominalist perspective, based on the inertia caused by the constitutional wording.[115]

Douglas W. Rae, one of the leading experts in electoral systems, distinguishes two different "families" of proportional systems: those "highly" proportional and those which are "slightly" proportional. The latter are those which are proportional, but accept the fact that "elections must decide on decision-making… An election is less a question of drawing a portrait than of taking a decision, less a question of reproducing differences than of directing… a country, less a question of resembling than of making". With reference to the Spanish system (which, of course, "will not be qualified for the Olimpics of proportionalism, which is not, in my view, any disgrace"), he considers that it "is a kind of proportionalism which leads to a decision: the system does not intend taking a photograph of the electorate and to put it in the Chambers".[116]

And it is in fact clear that the system has worked in such a way to make possible some results quite similar to those of the majority systems. For instance, since 1977, the party that has won the elections has had an amplified (see data above) parliamentary majority, and has been able to form one-party Governments. There has been no Government coalitions (even when there have been some "parliamentary agreements", when the majority was not an absolute majority), and the instability derived of "alternative majorities" has been almost non-existent.

IV. The constitutional perspective: proportionality and its limits

1. From Politics to Constitution

Up to now, the question of the proportionality of the Spanish electoral system has been summarised in purely political terms. But, as has been pointed out, it is also a juridical and constitutional problem. If the Spanish 1978 Constitution requires the electoral system to be proportional, and the results are closer to majority than to proportional systems, the question

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115 See José Ramón Montero and Richard Gunther, *"Sistemas cerrados y listas abiertas: sobre algunas propuestas de reforma electoral en España"*, in VV. AA., *La reforma del régimen electora*l, Centro de Estudios Constitucionales, 1994; and José Ramón Montero and Josép María Vallés, "*El debate sobre la fórmula electoral*", in Claves, núm. 22 (1992).

116 "*Análisis del sistema electoral español en el marco de la Representación Proporcional"*, in D. Rae y V. Ramírez, El sistema electoral español, McGraw-Hill, Madrid, 1993, pages 9, 19, 27 and 35.

is obvious. Is the Spanish electoral system contrary to the Constitution? What should be then, and what has the role of the Constitutional Court been?

Some authors, following the previously exposed point of view of Political Science, have affirmed without any doubt that the Constitution, which states that the electoral system must be proportional, is not being fulfilled. The argument is basically clear:

a. The Constitution requires a proportional system;

b. The Organic Law sets up so many limits to proportionality, that the results are disproportional;

c. The Law is, then, non-constitutional.

As has been summarised, the Spanish system is proportional in theory, and majority in practice, which is the worst possible option,[117] not only because of the disproportionate results, in general; but also because disproportion means inequality. In fact, due to the reasons already mentioned, that is, the different size of the (provincial) constituencies, the ratio between seats and votes is very different in the different provinces. Once more, the data is expressive enough.

Table 4

Constituency (Province)	Deputies Elected (2000)	2004	Number of electors (2000)	2004	Ratio Electors/Deputies (2000)	2004
Soria	(3)	3	(79.525)	78.531	(26.508)	26.177
Teruel	(3)	3	(118.390)	116.141	(39.463)	38.714
Segovia	(3)	3	(126.484)	124.638	(42.161)	41.546
Huesca	(3)	3	(178.786)	176.971	(59.595)	58.990
Valencia	(16)	16	(1.873.447)	1.884.604	(117.090)	117.788
Barcelona	(31)	31	(4.033.017)	4.007.330	(130.097)	129.269
Madrid	(34)	35 (+1)	(4.317.146)	4.458.540	(126.975)	127.387

Data: Boletín Oficial del Estado (BOE), 4 April 2000, and 5 May 2004.
If Tables 1 to 3 made clear that the election results were not exactly proportional, over-representing some parties and under-representing others (so that it may be argued that there is not an equal "right to access to public office"), table 4 shows even more clearly that the principle of equality is not fulfilled. It is evident that some Spanish citizens are over-represented, and others are under-represented. In other words, some votes have "more value" than others.

Does this situation mean than the Spanish electoral system, set up by the 1985 Organic Law, does not fulfil constitutional requirements? What is the opinion of the Constitutional Court?

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[117] See the intervention of the Professor of Constitutional Law (and Deputy of IU at that moment), Diego López Garrido in AAVV, *La reforma del régimen electoral* (op. cit., p. 158).

2. The principle of proportionality in Spanish Constitution, and its limits, according to the Constitutional Court

The Court has had to give its opinion on some decisions, with reference to different problems. In general, they answered individual appeals for the protection of fundamental rights (recursos de amparo), based on article 23. Not surprisingly, it has accepted the Spanish electoral system, as defined by the Law, as constitutionally acceptable.

In fact, following the Court decision it is clear that the difficulties are not in the Law, but in the Constitution itself. The problem arises when a mathematical principle, that of proportionality, is exported to the realm of political representation, in its constitutional translation in the Spanish system. Because, in fact, the 1978 Constitution admits the principle of proportionality, but at the same time draws such important limits, that proportionality may lose its deepest sense.

As the Constitutional Court put it in its first decision on this issue (S. 40/1981), "proportional representation searches to allocate to each party or group of opinion a number of seats related to its numerical strength. Whatever its concrete varieties may be, its fundamental idea is to guarantee to each party or group of opinion a representation, if not mathematical, at least adjusted to its real importance". A definition which - not by chance, for sure - follows almost word by word the formula used by one of the most classical books on electoral systems.[118]

This concept of proportionality is ultimately used in other decisions, such as S. 75/1985. In this case, the appeal was provoked by the threshold of 3 percent of the valid votes, which the Catalonian Statute of Autonomy declared in force also for the Catalonian regional elections. Two different parties considered that the threshold, which prevented them from getting any seat in the 1984 elections, was not compatible with the principle of proportionality.[119]

In that context, the Constitutional Court declared that the principle of proportionality expresses the will to guarantee a certain relation between votes and seats. It implies then a remarkable sphere of uncertainty, which has to be filled by the legislator. In sum, proportionality is a criterion of tendency, which is always, when put in practice, corrected by different elements of the electoral system. It is even possible to say that any normative development of this principle, necessary to put it into practice, implies a certain deviation of the proportionality, in abstract.

Within that sphere of uncertainty derived from the need to transform the abstract principle in precise legal rules, the legislator has different options. And there are also other constitutional interests which may be relevant. For instance, the Spanish Constitution opted for a system of "rationalised parliamentarism", and in that sense it tries to avoid political and parliamentary fragmentation or atomisation, strengthening solid parties. Thus, among the various formulae for the allocation of seats which follow proportional criteria, the Spanish legislator has opted

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118 See Jean Marie Cotteret and Claude Emeri, *Los sistemas electorales*, Barcelona, Oikos-Tau, 1973, p. 78.

119 In the province of Barcelona, which elects 85 regional deputies, the Party of Communists of Catalonia (PCC) had 60,900 votes (2.76%), whilst other leftist coalition (EEC) got 24,702 (1.12%). The technical threshold was, then, much lower than 3 percent and, in a strictly proportional system, the PCC list would have won 2 seats, and the EEC, one. The 3% threshold kept these two lists out of the Catalonian Parliament. That is why they could appeal to Constitutional Court, claiming that their "right to access on equal terms to public office" has not been respected.

for the D'Hondt formula, which gives certain advantages to the lists with a higher number of votes.

These interests, constitutionally relevant, give constitutional support to clauses setting up limits to the proportional allocation of seats. In that sense, the Constitutional Court has declared, quite logically, that "the 3 percent threshold… susbstantially respects the criterion of proportionality, because it… does not impede that the allocation of seats follows that criterion with respect to the vast majority of the votes cast in the constituency".[120] The conclusion is, then, that the rules of the Constitution (and, for this given case, of the Catalonian Statute) establishing a system of proportional representation have not been violated.

But other constitutionally relevant interests can justify the exceptions to the - also constitutional - principle of proportionality. In fact, it is not the most important one. Because, as I have already pointed out, the main disproportion in the Spanish electoral system results from the allocation of seats on a provincial basis. And that was also a fundamental political decision, taken during the Spanish political transition, and accepted by the Constitution itself.

In fact, the Spanish electoral system is basically prior to the 1978 Constitution. Its basic features were defined before the first democratic elections, in 1977. But the Parliament then elected, the "Cortes", kept those features and put them into the constitutional text, thus giving them particular relevance, and making them much more difficult to change. It is another example of the well-known law of inertia, which is said to be the most usual and enduring electoral law.

In addition the Constitution fixes some rules which necessarily limit the extent of the principle of proportionality. Apart from the already mentioned threshold, the option for a Chamber not too big (between 300 and 400 members), combined with the provincial constituency and the requirement for a "minimum initial representation" for any province imply constitutional limits to the proportional principle.

In fact, the proportional allocation of hundreds of seats allows very different possibilities. However the Constitution itself establishes that "the election in each constituency shall be conducted on the basis of proportional representation" (article 68.3 C.). So that, although the Chambers represent the Spanish people as a whole, the election takes place not at a national level, but at a provincial level. In fact, there are 50 elections (52, when considering "the cities of Ceuta and Melilla", which "shall each be represented by one member", article 68.2) - 50 proportional elections - and it is commonly accepted that proportionality only works on a given threshold.

It is true that the Organic Law develops these constitutional principles in a way that could be "more proportionalist". For instance, since 1977 the Spanish Congress has been composed of 350 members. And since 1977, too, the "minimum initial representation" alloted to each province/constituency is fixed at 2 deputies. That means that, out of the 350 Spanish Deputies, 102 (50 provinces x 2, and 2 more for Ceuta y Melilla) are allocated ope lege, without reference to any criterion of population. Only the remainder 248 Deputies are, thus, "distributed in proportion to the population" (article 68.2 C.) among the 50 constituencies.

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120 In this case, 82 seats were allocated in a perfectly proportional way. Only 3 seats would have changed if the 3% threshold did not exist.

The Organic Law determines, in its article 162, the procedure to allocate those 248 seats: first, establishing the "electoral quota" (total of Spanish population divided by 248); second, giving to each province the entire number of seats which results from dividing its population by the electoral quota; and, third, giving the non-allocated seats to the provinces with higher remainders. Therefore the minimum size of a constituency is 3 Deputies (two for the "minimal initial representation" required by the Constitution, and a third as the minimal result of proportional distribution), and the maximum is, as has already been shown, 35 (Madrid).[121]

In that framework, the principle of proportionality would work better if the number of seats was greater (for instance, the maximum foreseen by the Constitution, 400), and the "minimum initial representation" was lower (for instance, one Deputy for each constituency). These two measures would imply that the number of Deputies distributed in proportion to the population would be 348, thus allowing a much greater range of sizes. But they belong to the sphere of political options, open to the majoritarian will of the Parliament. And the Constitutional Court cannot easily censure the legislator when it is the Constitution itself which gives him the power to decide.

Therefore, the Constitutional Court is limited in its control if Parliament goes further than it can. But, within the constitutional framework, Parliament can freely decide. Even when the final result may not be as proportional as it could have been if the Law had opted for different rules.

In sum, following decision 4/1992, the proportionality, or better to say, the deviations from proportionality which [the Court] may judge cannot be understood in a strictly mathematic way. They have to be linked to situations of remarkable disadvantage, and to the lack of any objective justifying principle. In other words, the deviations of proportionality which may violate article 23.2 C [the right to access on equal terms to public office] must have a clear relevance, and at the same time must lack an objective and reasonable criterion which can justify them.

V. Conclusion

After all that has been said, it seems evident than the initial (political and constitutional) qualification of the Spanish electoral system as proportional finds different limits which may even question that qualification. From a political point of view, many authors analyze the electoral results, underlining the resemblance of the Spanish system to majority models. But from a juridical, constitutional perspective, the principle of proportionality is also a norm, which must be respected by the rest of the legal system. In other words, if the Constitution sets up a proportional electoral system, a non-proportional system would be unconstitutional.

It may be stated that the political perspective does not take into account other constitutional data. Particularly, the fact that the Constitution also establishes some other principles which may act as limits to proportionality; principles such as that of rationalised parliamentarism, or that of the guarantee of a minimum representation of territorial diversity; principles which may reduce the scope of the principle of proportionality, but principles that have to be considered, firstly, by the Parliament in its legislative function; and, secondly, if necessary, by

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[121] Given the demographic changes, there are some variations in the different elections. So, from 1977 to 1986, Madrid elected 32 deputies and Barcelona, 33. But in 2004, Madrid elected 35 Deputies (34 in the previous election, in 2000), and Barcelona, 31 (as in 2000).

the Constitutional Court in its function of judicial review of legislation, even through indirect means (for instance, through individual appeals against alleged violation of rights, which may in the last instance be driven to the legislative framework).

In sum, the constitutional affirmation of proportional representation has to be carefully interpreted. As a Spanish Professor put it, the Constitution speaks of proportional system, of criteria of proportional representation; but, of course, those criteria have to be understood in terms of the Constitution itself, and not with reference to a model existing out of the Constitution".[122]

THE ELECTORAL SYSTEM AND ELECTORAL DISPUTES IN SWITZERLAND

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I. Introduction

Since this is a dual subject, it is natural that this survey should be divided into two parts. However, it is first necessary to highlight some distinctive features of Swiss institutions. On the one hand, because the country is a federal state, elections take place at several levels – federal and cantonal – and the same levels recur in electoral disputes. On the other hand, Switzerland's political system is what is known as a "semi-direct" democracy, in which the population is called upon to take a large number of decisions itself in referendums combined with elections.

In such a system, elections and appeals procedures are extremely diverse. Moreover, the elections have a special character, since they make it possible to choose a government which, once in office, does not have the freedom of manoeuvre that it would enjoy in a purely representative democracy. Deputies and members of the executive are at all times subject to the people, who automatically have the last word: they have the right to request a referendum, that is, the right to be consulted on important matters and to exercise final authority; they also have the right to initiate legislation, which allows them to propose innovations. This being so, elections are just one episode in civic life. They do not provide an opportunity to make genuine "social choices" and arouse only moderate interest. They principally consist in measuring the political balance of power and selecting candidates whose programmes scarcely differ on the main points.

It therefore follows that elections do not revolve around individual candidates. Usually more than one member is returned for each constituency, either through proportional distribution or a two-round majority system. The first-past-the-post system, so widespread in countries influenced by the British tradition, is virtually unknown in Switzerland. This means that the conduct of elections there is often more complicated than elsewhere, from the presentation of the lists of candidates to the voting itself and the declaration of the results.

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[122] Intervention of Professor Juan J. Solozábal, in AAVV, *La reforma del régimen electoral* (op. cit., p. 166).

Thus grounds for challenges are not lacking. Yet electoral disputes play a fairly secondary role for two very different reasons. Firstly, ideological causes and individual passions are largely foreign to the debate. Secondly, it is up to the authorities to ensure of their own motion that an election is properly conducted; it is basically their responsibility to make sure that the Constitution and the law are respected. Of course, citizens may also raise individual claims: they may demand that their right to vote be recognised, that the ballot take place according to the rules, or that the results should not be distorted by any procedural defects or errors of calculation. They thus have the option of an appeal, which they sometimes take up. But this right is only subsidiary to the investigations that take place as a matter of course: the electoral register must be kept constantly up to date, lists of candidates must be checked and if necessary purged, polling stations fitted out properly, and ballot papers counted and recounted until all doubt has been banished.

II. The electoral system in Switzerland

It would undoubtedly be more accurate to speak of electoral systems in the plural, since there are a large number as the Confederation and each canton all have their own special features. In short, without going into detail, it is worth studying six points:

Section 3.01 − A. Purpose of elections

This is defined very broadly at all levels. A firmly established tradition means that no constituted authority can be appointed. This is why not only the parliament and the executive but also judges are always elected, usually directly and more rarely through indirect election. In the communes it is not uncommon for the people also to elect officials or even teachers and ministers of religion. One of the original features of Swiss law is undoubtedly the fact that ministers and judges are not actually appointed but are elected.

Section 3.02 − B. Direct election and indirect election

An important distinction must be made here. At federal level, the two chambers of parliament (the National Council with 200 members and the Council of States consisting of two members per canton) are elected by direct universal suffrage; they then meet in the Federal Assembly to elect members of the executive (known as the Federal Council) and the judiciary (federal courts). At cantonal level the parliament and members of the executive are elected by direct vote; however, this method is seldom used in the case of judges.

Section 3.03 − C. Role of political parties

Whether we like it or not, the parties play a vital and indispensable role in the functioning of representative democracy. Long disregarded by constitutional and statute law, they have now been acknowledged as partners, since pluralist democracy entails contested elections fought between individuals and between political parties. Thus the new Federal Constitution of 18 April 1999 accepts that "political parties shall contribute to the forming of the opinion and the will of the people" (Article 137).

The role of the parties nevertheless varies greatly and depends both on the electoral system and on the social structure of the various parties. Since the introduction of proportional representation for electing the National Council in 1918, Switzerland has had four main

parties, although their relative strengths and memberships have changed considerably over the past few years. At present there are two parties that easily exceed 20 per cent of the vote (Swiss People's Party and Social Democratic Party), while two others obtain between 15 and 20 per cent (Free Democratic Party and Christian Democratic People's Party). Mention should also be made of smaller parties such as the Greens and the Liberals. All these parties are usually present in every canton, apart from the Liberal Party, which, as yet, is only really present in French-speaking Switzerland.

Swiss law does not contain any express and specific provisions regarding political parties, for example their financing or methods of operating. This is because, up to now, the need has not been felt. The absence of blocks and, consequently, changeover of political power between the parties doubtless explains this phenomenon, together with the smallness of the country and the constant supervision that the large parties are able to exercise over each other.

Section 3.04 − D. Plurality/majority systems

As everyone knows, plurality/majority elections can be single-member or multi-member with one round or two. Swiss institutions have all these systems, although multi-member two-round elections clearly predominate.

Single-member elections are virtually unknown, other, of course, than when it is a matter of choosing a single person (for example, one member of the National Council or one member of the Council of States in cantons with only one seat); moreover, when the Federal Assembly – the two chambers together – elects the seven members of the Federal Council, it makes its choice through separate elections for each seat, which really amounts to seven single-winner elections. Apart from these cases, which may be termed exceptional, elections are multi-member, especially for electing members of executives in cantons and communes. Although the plurality/majority system is virtually unknown in Switzerland for parliaments – other than in Graubünden – it is common for governments, on the other hand.

Elections almost never take place in one round, the exception being election of a member of the National Council in a canton with only one seat. Everywhere else, plurality/majority voting takes place in two rounds, an absolute majority being required in the first round and a relative majority in the second round. In practice, if the multi-member plurality/majority election is for cantonal and communal executives, the two-round system leads to a sort of proportional representation, since the main parties are generally certain to have one or more representatives in the government. This is also the case for the composition of the Federal Council, elected by indirect ballot by both chambers of the federal parliament.

Section 3.05 − E. Proportional representation systems

As everyone knows, proportional representation systems vary greatly and depend mainly on three variables.

In the first place, the system may be either full proportional representation or semi-proportional, depending on whether the constituency forms a single unit or, on the contrary, is divided into a number of districts. In Switzerland the latter method is much more frequent than the former. At federal level, election of the National Council admittedly takes place using a system of proportional representation, but the territory is divided into twenty-six constituencies corresponding to the twenty-six cantons that make up the federal state. It

follows that in reality there are twenty-six distinct proportional elections which take place on the same day but which provide separate results. This partitioning of the electorate has been deemed essential to protect political life in the cantons, together with their diversity. Division into districts is also the rule in elections for cantonal parliaments, allowing for exceptions such as Geneva, a densely populated but small canton, which constitutes a single constituency for its parliament's hundred members.

In a proportional representation system, the law may require entirely separate lists or, on the contrary, allow presentation of lists that are indeed distinct but which are joint or allied lists, which improves their chance of obtaining seats when the method of calculation favours the large parties. Federal law provides for the possibility of combined lists in elections to the National Council, and most cantonal laws make similar provision, although they are not obliged to.[123]

Proportional representation is not a mathematical principle but a legal rule applied by means of an arithmetical method. The latter is determined by parliament, which has a choice between countless methods of calculating seats and allocating them to the different political parties. As a general rule, federal and cantonal laws have opted for the "highest quotient", or "d'Hondt", method.

Section 3.06 − F. Removal of elected authorities

Seven cantons have an unusual institution: the right to remove elected authorities. This power allows a certain number of citizens to prompt a vote on the question of dissolving either the cantonal parliament or the government during the period for which it has been elected. In reality, however, this option plays a negligible role, probably owing to the supervision exercised over state bodies through referendums. At most we may cite a petition for removal of the cantonal executive in Schaffhausen, which was dismissed on 12 March 2000; this vote gave rise to a challenge and an appeal to the Federal Supreme Court, which rejected it.[124]

III. Electoral disputes

Legal procedures differ according to whether the elections are federal or cantonal, the former being much simpler than the latter.[125]

1. In federal cases

The only federal election in Switzerland is for the National Council, that is, the lower house of parliament. This is supposed to represent the "Swiss people" as a whole[126], while the other

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123 Federal judgment of 26 February 2002, RDAF, 2003, p. 373.

124 Judgment of 5 May 2000, Zentralblatt, 2001, p. 148.

125 Pierre Garrone, *"L'élection populaire en Suisse: étude des systèmes électoraux et de leur mise en œuvre sur le plan fédéral et dans les cantons"*, dissertation, Geneva, 1990; Etienne Grisel, *Commentaire de la Constitution fédérale*, Article 73, Basle/Zurich/Bern, 1987-1996; Christoph Hiller, *"Die Stimmrechtsbeschwerde"*, dissertation, Zurich, 1990; Tomas Poledna, "*Wahlrechtsgrundsätze und kantonale Parlamentswahlen"*, dissertation, Zurich, 1988; Stephan Widmer, *"Wahl - und Abstimmungsfreiheit"*, dissertation, Zurich, 1989; these works contain extensive bibliographies.

126 Federal Constitution of 29 May 1874, Article 72, paragraph 1.

house consists of representatives of the cantons, chosen by each of the latter in a purely cantonal election.[127]

Elections for the National Council, governed by the principle of proportional representation, are held in twenty-six separate constituencies, however, with each canton or half-canton "forming one electoral district".[128] The electoral process is thus hybrid by nature, which no doubt explains the twofold remedy provided for by the law.[129]

Section 5.01 − A. Appeals to the cantonal government

In the first instance, challenges relating to the right to vote or the election of the National Council must be heard by the government of the canton in which the problem has occurred. It may seem odd that the appeals procedure should thus begin before a cantonal executive. The resulting drawbacks are obvious: not only may disparate precedents emerge but, above all, the authority dealing with the case is often the authority that took the impugned decision and does not, moreover, provide the safeguards of an independent court; lastly, it has only limited power, since in any case it is up to the National Council itself to validate the election.[130] However, there are practical reasons for instituting a cantonal appeals procedure enabling the facts to be established quickly and sometimes allowing the reported irregularities to be corrected without delay on condition that it is up to the National Council − or the Federal Supreme Court − to take the final decision.

Appeals may concern matters covering either the right to vote or the preparation for and conduct of elections.[131] They will not necessarily relate to a formal decision, sometimes challenging a failure to act (refusal to issue a voting card), a physical act by an authority (error of calculation) or even illegal acts by private individuals (unlawful electioneering; misappropriation or forgery of ballot papers).

The grounds for appeal may arise from a mistaken assessment of the material facts or a misinterpretation of the relevant rules, which cover both the general principles concerning freedom to vote and the specific rules laid down in the Political Rights Act[132] and the Criminal Code.[133]

Anyone who is an active (ie voting and tax-paying) citizen - or claims to be - is entitled to take legal action. Political parties and organisations may also appeal. This is therefore a sort of *actio popularis*, unusual in Swiss law but justified by the mandatory nature of electoral law.

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127 See Footnote 17 below.

128 Federal Constitution of 29 May 1874, Article 73, paragraph 1.

129 Federal Act on Political Rights (Loi fédérale sur les droits politiques - LDP) of 17 December 1976, RS 161.1.

130 See Footnote 14 below.

131 LDP, section 77, subsection 1.

132 LDP, sections 21 et seq.

133 Articles 279 et seq., Swiss Criminal Code of 21 December 1937, RS 311.0.

The time-limit for entering an appeal is exceptionally short: it expires within three days of the "grounds for appeal being ascertained" and no later than the third day following publication of the election results in the official cantonal gazette.[134]

The cantonal government must issue a decision within ten days of receipt of the appeal petition. This is therefore a simple and prompt written procedure. The executive has the power to investigate freely, which it exercises of its own motion, both to ascertain the facts and to hear and determine the case. But its role is limited by force of circumstances: if it rejects the appeal, the case will almost always be referred to a higher authority; if it allows the appeal, it will rectify the established error whenever possible and, failing this, it will simply deliver a declaratory judgment, since the National Council alone has the power to validate - or invalidate - the election of its members.[135]

Section 5.02 − B. Appeals to the federal authority

There are two sorts of appeal to a federal authority, depending on the matter raised: if it relates to the right to vote it will be an administrative-law appeal to the Federal Supreme Court; if it concerns the preparation for or conduct of an election, the objection must be made to the National Council.

a. Appeals relating to the right to vote

The Federal Supreme Court is Switzerland's supreme court. Consisting of thirty judges, it has five divisions, which usually deal with appeals against decisions by the authorities beneath it. Its jurisdiction covers cases entailing the application of federal law. Consequently, whenever a cantonal government rules on the existence – or the exercise – of a right to vote in federal matters, its decision is open to challenge before the Federal Supreme Court, which will review the problem in the light of the Constitution (especially Articles 43 and 74) and the legislation (especially sections 1 to 9 of the Political Rights Act).

An appeal is open to any individual entitled to take legal action before the cantonal government and who has referred the case to it without success. It must be lodged within thirty days of notification of the impugned decision.[136]

The Federal Supreme Court has the power to investigate freely. It delivers a declaratory judgment, recording that such-and-such a person does or does not have the right to vote, or that such-and-such a procedural rule has been infringed or observed. This judgment thus has no direct impact on the validity − or result − of the electoral process. But it might, in extreme circumstances, have indirect repercussions if the National Council has to rule on the election of its members.

b. Appeals relating to elections

According to a conception of the separation of powers that is doubtless too rigid and rather outdated, Parliament itself validates its own election. This is referred to as "verification of

134 LDP, section 77, subsection 2.

135 LDP, section 53.

136 LDP, section 80, subsection 1, amended by the law of 18 March 1994.

credentials", a power which is thus entirely outside the courts. Under section 53 of the Political Rights Act, soon after the election the National Council must hold a "constituent sitting", whose primary task is precisely the validation of the election results. It follows that appeals "related to elections" must also be referred to the National Council.[137] However, following a reform of the Constitution in 2000, the law might in future give this jurisdiction to the Federal Supreme Court (Constitution, Article 189, paragraph *f*, which is not yet in force).

Any individual entitled to refer the case to the cantonal government and who lost at this stage may refer the case to the National Council within five days of notification of the decision.[138] The law enjoins the lower house to deal with objections at the same time as the validation itself, the procedure being laid down in the rules of procedure.[139] Members who have appropriate certificates from their cantonal governments are entitled to take their seats; they can take part in discussions and votes, apart from those concerning their own election,[140] since any member whose election is challenged must withdraw during consideration of the appeal.

The actual validation occurs as a matter of course and does not usually occasion any discussion. As for appeals, they are so rare that they have not given rise to a case-law worthy of the name. However, following the 1995, 1999 and 2003 elections various appeals were referred to the National Council from four cantons; they were all rejected, some because they were inadmissible (out of time or irrelevant) and others on their merits (the reported irregularities turned out to be minor and not such as to affect the result of the election).[141]

2. In cantonal cases

Elections in the cantons are many and frequent: besides the lower house of parliament, citizens directly elect members of the government, sometimes judges or prefects, and members of the Council of States, the upper house of the federal parliament. All the cantons are divided into communes, whose authorities are also chosen by voting, almost always directly.

Cantonal and communal elections are open to two sorts of appeal: firstly to a cantonal authority and then to the Federal Supreme Court. A case cannot be referred to the latter until all available cantonal remedies have been exhausted..[142] It is therefore not a political authority that has the last word but a court, which encourages the development of a genuine body of case-law.

Section 6.01 − A. Appeals to the cantonal authority

It is necessary to simplify to some extent in order to convey the variety of the twenty-six sets of cantonal legislation without going into tedious detail[143]. Following a well-established

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137 LDP, section 77, subsection 1, paragraph *c*.

138 LDP, section 82.

139 Rule 1 et seq., National Council Rules of Procedure of 22 June 1990, RS 171.13.

140 LDP, section 53, subsection 2.

141 *Bulletin officiel de l'Assemblée fédérale*, National Council, 1995, 4 December 1995 sitting, pp. 2343-2346; 1999, pp. 2370-2374; 2003, pp. 1175-1176.

142 See Footnote 29 below.

143 A precise account is given by Hiller, *op. cit.*, pp. 55ff.

tradition, most cantons entrust all their electoral disputes to a political body: the parliament, at least for matters concerning its own election, and the government in other cases; thus electoral cases are outside the jurisdiction of the courts in fifteen or so cantons, including the most densely populated such as Zurich, Bern and Vaud. However, approximately a third of the cantons refer certain cases to a court or provide for legal appeal against decisions of political bodies. Lastly, two cantons have given the courts sole jurisdiction (Geneva with its Administrative Court[144] and Jura with its Constitutional Court).[145]

The subject of the appeal is defined broadly. It can cover any matter relating to voting and the right to vote, preparation for elections, lawfulness of electioneering, the validity of the casting and recording of votes, and the accuracy of the results.

The right to take legal action is granted to any person having an interest protected by the Constitution and the law: active citizens, political parties and sometimes even the communal authorities involved.

Time-limits are usually short: depending on the canton they range from three days (Bern) to twenty days (Zurich), starting either from the discovery of the grounds for the appeal or from the publication of the election result in the official gazette.

The written procedure, usually free of charge, is simple and prompt. It is directed by the courts, with certain exceptions. If proceedings take place before a political authority, they come under administrative law; otherwise, they come under judicial law. The appellant's petition must clearly indicate the act being challenged and must specifically state the charges; the law sometimes requires it to demonstrate a causal relationship between the reported irregularity and the outcome of the vote.

The effect of the judgment varies according to whether it is delivered before or after the election. In the first case it will usually be possible to rectify the defect through appropriate injunctions. In the second case the only option is annulment of the election, but this will only be ordered if, in view of the circumstances, it is plausible that the result itself may have been distorted by the acts held to be unlawful.

Section 6.02 − B. Appeals to the Federal Supreme Court

Appeals relating to "votes and elections" are based on section 85, paragraph *a*, of the Federal Administration of Justice Act[146]. Unlike other appeals to the Federal Supreme Court, they are not based on specific provisions of the Federal Constitution. But they have an implied basis in Article 5 of the 1874 Constitution, which enjoins the Confederation to guarantee the "rights of the people" as well as cantonal constitutions. Consequently, central government is responsible for enforcing popular sovereignty and the principles following from it, including free and properly conducted elections. The latter are, however, affected by the cantonal element, as the cantons have certain room for manoeuvre in this respect. This means that the powers of the federal court are necessarily limited: on the one hand it must ensure adherence to the basic

144 LDP, section 180, subsection 1, RS A 5 05.

145 LDP, section 108, subsection 1, RS 161.1.

146 Law of 16 December 1943, RS 173.110.

precepts of democracy, but, on the other, it must grant the cantons the latitude implied by federalism.

Appeals may have many different subjects. Firstly, citizens are entitled to challenge the actual content of cantonal rules, for example regarding restrictions on the right to vote,[147] conflict-of-interest rules,[148] apportionment of seats among constituencies[149] or the calculation system used for proportional representation.[150] Secondly, appellants may criticise the application of cantonal law by the executive authority: for instance, they may object to the effect of an unpublished declaration of alliance,[151] an appeal on points of law will be admissible even if it challenges the lawfulness of a failure to act by claiming that the cantonal authority was required to take action,[152] when the Geneva Grand Council, for example, appointed sixteen judges to the Insurance Court when they should have been elected by the people, the Federal Supreme Court set aside their appointments.[153] Lastly, appeal is possible if the impugned acts are attributable not to the public authorities but to private individuals,[154] since the latter may sometimes manage to affect the freedom of voters to express their wishes by engaging in unlawful electioneering, obtaining votes by illegal means or manipulating proxy votes.[155]

Entitlement to take legal action is determined in the same way as before the cantonal authority.[156] It is recognised for natural persons who are − or claim to be − citizens in the canton (or commune) to which the appeal relates; they do not need to prove that they are defending a personal, substantive, current or legally protected interest, for it is accepted that every interested party has an equal claim to reliable enforcement of democratic rights and proper conduct of elections; in this field an action brought by a member of the public is justified because the appellant, by definition, is performing a public function as much as exercising an individual right and is defending general interests rather than his or her own situation. As for legal entities, they may appeal provided that they are political in nature: they must either be formally organised in political parties or else they must have presented a list of candidates.[157]

The time-limit for entering an appeal is thirty days. It is therefore no different from the time-limits for ordinary appeals to the Federal Supreme Court in civil, criminal and constitutional cases. It could of course be shortened, given the particular circumstances of electoral disputes, but a reduction would only really make sense if the appeal had a suspensive effect and the Federal Supreme Court was able to rule promptly; however, these two elements are generally lacking, so that a month seems a reasonable lapse of time. As for the start of this period, it is

147 Official Collection of Decisions of the Swiss Federal Supreme Court (ATF), 116 Ia 359.

148 ATF 114 Ia 395, 399-401.

149 ATF 99 Ia 658, 661.

150 Schweizerisches Zentralblatt für Staats- und Gemeindeverwaltung (1987) (ZBl), p. 367 et seq.

151 ATF 102 Ia 264.

152 ATF 108 Ia 165.

153 Decision of 27 January 2004, unpublished.

154 Etienne Grisel, *Initiative et référendum populaires*, 2nd edition, p. 334; cf. Berne, 1997, p. 141.

155 ATF 103 Ia 564; 97 I 659.

156 See Footnote 21 above.

157 ATF 112 Ia 208, 211; 111 Ia 191.

necessary to distinguish between two situations: if the appeal concerns the actual right to vote, the period runs from notification of the decision taken by the cantonal authority of last instance; a person challenging an irregularity in the preparation for the election, on the other hand, must appeal within thirty days of the defect having been ascertained – for reasons connected with good faith and certainty of law, a citizen cannot therefore await the result of the election.[158] If, lastly, the appellant challenges the conduct or outcome of an election, that person must take legal action in the month following publication of the results in the official cantonal gazette.

These rules must nevertheless be qualified, since appeal to the Federal Supreme Court is possible only when cantonal remedies have been exhausted. In the few cantons which have introduced legal remedies against decisions by political authorities it is therefore necessary to begin by using this procedure, and the time-limit for entering an appeal will run from notification of the cantonal decision.

The appeal must take the form of a detailed statement of grounds that sets out the facts of the case and develops a legal argument. The grounds cited must be based above all on the Constitution and cantonal law, which describe in detail the procedures to be followed. But they may also be drawn from the Federal Constitution's provisions concerning equality (Article 4) and the right to vote (Article 43) or from general principles (voter freedom, lawful electioneering). The Federal Supreme Court will consider only expressly raised and firmly supported grounds; the maxim *jura novit curia* does not apply here, since the constitutional court is not primarily responsible for the lawfulness of local elections.

The Federal Supreme Court has the power to investigate freely in all matters concerning the application of constitutional and statutory provisions bearing closely the right to vote and the elections themselves. Exceptions to this are complaints not directly connected with the substance of political rights and also matters relating to the principle of equality; thus the Federal Supreme Court has voluntarily reduced its jurisdiction over the allocation of parliamentary seats between constituencies; this self-restraint was admittedly explained by considerations of federalism, but it has been criticised, not without reason, as it could be argued that the "one man, one vote" principle should prevail over the cantons' autonomy and ought to be strictly enforced by the courts.[159]

The judgment is neither declaratory nor *in rem*. It therefore has the effect, in principle, of setting aside the decision. If it bears on the right to vote, it voids the impugned decision.[160] If it relates to an election, the latter may be rendered null and void, but only if the reported irregularity has in all likelihood had a decisive influence on the actual result; an election may be partially annulled, with voting having to be repeated for certain seats or in a given constituency.[161] At all events, if an appeal is accepted the case is referred back to the competent cantonal authority in order that it may take a new decision in line with the federal judgment.

IV. Conclusions

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158 ATF 113 Ia 46; 111 Ia 191; 108 Ia 1; see ZBl 1997, p. 254.

159 See Pierre Garrone, *op. cit.*, p. 57.

160 Exception: ATF 116 Ia 359.

161 ATF 104 Ia 360, 366; 97 I 659, 668.

An outline study of electoral systems in Switzerland reveals the clear preponderance of proportional representation. Not only are almost all parliaments elected by this method, but the result of two-round multi-member majority elections usually reflects the political parties' respective strengths. This preference for proportional representation is explained by the country's cultural, geographical and linguistic diversity, its taste for stability and perhaps above all the existence of direct democracy, which could not function without ensuring that all parties and major strands of opinion in the population participate in political responsibility.

Although a small country, Switzerland has extremely complex institutions, as is apparent, for example, from electoral disputes. It would therefore be rather pointless to talk about the jurisdiction of the constitutional court without mentioning the role of the other bodies called upon to rule on the right to vote and the validity of elections. The full picture shows that in this respect power is shared between the political and judicial authorities. This means that the Swiss Federal Supreme Court, which is nevertheless the supreme court in constitutional matters, has a limited jurisdiction which, in particular, does not extend to national elections; however, a reform of the Constitution accepted in 2000 allows parliament to extend the Federal Supreme Court's jurisdiction to all political rights, including at federal level – that is, to the election of the National Council, for example.

It must once again be stressed that challenges are infrequent. Thus the case-law is only sketchy. Essentially, it confines itself to laying down a few principles which are not in the least original, moreover, and the enforcement of which has not met with any particular problems. Whatever the system, an election is only meaningful if its result unquestionably reflects the actual wishes of the people. Two maxims follow from this truism: voter freedom on the one hand and vote security on the other. Special requirements apply for different types of election process. A quick survey of recent practice will illustrate these ideas.

Freedom to vote means that citizens must be able to form their own opinions shielded from any government influence. It follows that official bodies do not, as such, have the right to intervene in an election campaign,[162] there may sometimes be exceptions to this rule – for example in judicial elections[163] or school elections[164] – but the authority is always required to provide objective information that is not calculated to mislead its recipients. Moreover, an authority is certainly not prohibited from assisting political parties by paying their costs for printing and dispatching their lists of candidates.[165] This financing may be restricted to parties reaching a minimum threshold of votes, but equal treatment must prevail, and a refund cannot be refused to a party which has obtained 1.92% of the votes.[166]

The security of an election may be jeopardised by proxy voting[167] or postal voting?[168] secrecy should, of course, be preserved, but the procedure must also enable voters to be identified so

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162 ATF 118 Ia 261; 117 Ia 452, 457; 114 Ia 433; 113 Ia 296; ZBl 1998, pp. 85, 89; 1996, p. 222; 1993, p. 161.

163 ATF 117 Ia 452.

164 ZBl 1996, p. 222.

165 ATF 113 Ia 297.

166 ATF 124 I 55.

167 ATF 97 I 659.

168 ATF 121 I 187; ZBl 1997, p. 351.

that effective monitoring remains possible, since it is advisable to avoid a situation in which the same person can cast more than one ballot or can vote without having the right to vote.

When citizens have a general assembly *(Landsgemeinde)*, it must be ensured that there is free access at all times[169] and that the declared result corresponds to the actual wishes of the majority[170]. If an election takes place on the basis of proportional representation, equal treatment must prevail, not only through rules on cumulating and splitting votes,[171] but also regarding constituency boundaries,[172] the consequences of combined lists,[173] and by-elections.[174]

In Switzerland elections are many and frequent, since the federal state has twenty-six cantons divided into several thousand communes, and all these bodies are administered by directly elected authorities. But challenges are so rare that on average the Federal Supreme Court publishes no more than one decision a year on the subject, and this is of more interest to scholars than to the public.

CONSTITUTIONAL CONTROL OF EUROPEAN ELECTIONS: THE SCOPE OF JUDICIAL REVIEW

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The subject of this paper is judicial review of elections at the European level – judicial review of elections to the European Parliament. I will focus in particular on the division of jurisdiction between the European Court of Justice on the one hand and the European Court of Human Rights on the other. Since the organisation and conduct of those elections falls partly within the competence of the member states and partly within the competence of the Community institutions, the subject provides a good illustration of the emerging system of constitutional review in Europe and of the respective functions within that system of the European Court of Justice and the European Court of Human Rights.

More generally, the judicial review of elections at the European level – as at the national level – can be seen as having a vital constitutional function, namely to ensure that elections conform to proper democratic standards and that the system gives adequate expression to the

169 ZBl 1997, p. 252.

170 ATF 99 Ia 52; ZBl 1997, p. 252; 1992, p. 169; 1981, p. 321.

171 ATF 118 Ia 415.

172 ZBl 1994, p. 479.

173 ZBl 1994, p. 526.

174 ZBl 1996, p. 134.

175 This is a revised version of my contribution to the conference organised by the Venice Commission in Sofia (28-29 May 2004). It has been updated to take account of the text of the Treaty establishing a Constitution for Europe.

wishes of the electorate. The subject is of course a particularly appropriate one for the Venice Commission (the European Commission for Democracy through Law), since the concern of the subject is precisely "democracy through law".

1. I will first outline the role of the European Court of Justice in the European Union. In the broadest terms, the Court's role includes, on the one hand, ruling on the interpretation of the Treaties and of Community legislation at the request of the courts of the member states – and the Court's rulings on such references from national courts have sometimes had a constitutional aspect, as when it has ruled on the direct effect and the primacy of Community law – and on the other hand review of the legality of measures of the institutions of the European Union, and of member states where they act within the field of EU law. The European Court of Justice is not a specialised constitutional court; and the European Union has as yet no written constitution; the Treaty establishing a Constitution for Europe agreed at the European Summit on 18 June 2004 must be ratified by all member states before it enters into force. However the Court itself has described the EC Treaty (first in 1986 in its judgment in Les Verts[176] below) as the Community's constitutional charter; and certainly some aspects of its jurisdiction, both over member states and over Community institutions are, in substance, constitutional in character.

Thus to take first the review by the Court of Community measures: the EC Treaty has always given the Court power to review the compatibility of Community legislation with the EC Treaty, a power which can be compared with review of the constitutionality of legislation – the essence of constitutional jurisdiction.

In the exercise of this jurisdiction, the Court may also be called upon to decide whether the measure is within the competence of the Community, or of the member states. Such jurisdiction is necessary because the European Union is a divided power system, with legislative and executive competences divided between the European Union and the member states. The nature of the system imposes the need for adjudication on the limits of competence of the European Union and the member states respectively – a further archetype of constitutional jurisdiction, familiar in federal systems.

A further dimension is the division of powers within the EU's own institutional structure among the political institutions – especially the European Parliament, the Council of the European Union and the Commission. This structure requires the Court to adjudicate on the respective competences of those institutions, again a form of constitutional adjudication.

Turning now to the jurisdiction of the European Court of Justice over the member states, we find that some aspects of the jurisdiction are also of a constitutional character. Broadly speaking, where matters fall within the competence of the European Union, they are within the jurisdiction of the European Court of Justice; where matters fall within the competence of the member states, they are outside the jurisdiction of the European Court of Justice. However the dividing line between the competence of the European Union and that of the member states has to be drawn by the European Court of Justice. Often, matters are partly regulated by EU law and partly by the national law of member states. The law governing elections illustrates this point. While elections to national parliaments and local elections are largely matters for national law, some aspects of local elections are governed by EU law. For instance, every citizen of the European Union residing in a member state of which he is not a

176 Case 294/83, Parti écologiste «Les Verts» v. European Parliament [1986] ECR I-1339.

national has the right, under Article 19(1) of the Treaty, to vote and to stand as a candidate at municipal elections in the member state in which he resides, under the same conditions as nationals of that state. The interpretation of that provision – one of some political and also symbolic significance – falls within the jurisdiction of the European Court of Justice.

Moreover in the exercise of their competence, member states may not act contrary to EC law. Outside the field of electoral law, taxation provides a good example. While some aspects of indirect taxation are within the Community's competence, direct taxation remains within the competence of the member states. But the exercise of that competence remains subject to the constraints of Community law. For example, in exercising their competence in matters of direct taxation, member states may not impair freedom of movement, or the right of establishment for companies. And interpreting those limits on member states' competence is, necessarily, a matter for the European Court of Justice.

2. The division of competence between the Community and the member states can be found in European electoral law, and in particular in the law governing elections to the European Parliament. The original EEC Treaty provided that the European Parliament (or "Assembly" as it was then called) should consist of delegates designated by the respective national parliaments from among their members in accordance with the procedure laid down by each member state. However the original EC Treaty also envisaged that the European Parliament should subsequently be directly elected, and it provided that the Assembly was to draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all member states. The Council of the European Union, acting unanimously, was then to lay down the appropriate provisions, which it was to recommend to member states for adoption in accordance with their respective constitutional requirements.

Although agreement could not be reached on a uniform procedure, direct elections were introduced by a decision of the Council of the European Union in 1976, to which was annexed the Act of 20 September 1976 concerning direct elections – an act of an unusual, perhaps unique character. While it took the form of an Act annexed to a Decision of the Council, the nature of the Act was not clear from the Act itself or from the classification in the Treaty of Community measures; moreover it has the appearance of a hybrid or mixed act, since although annexed to a Decision of the Council, it carries the signatures also of representatives of the member states.[177]

Elections to the European Parliament were first held, pursuant to the 1976 Act, in 1979; since then, elections have been held at five-year intervals, most recently in June 2004. But even now such elections are, broadly, organised by the member states, and largely in accordance with national rules. Both the existing Treaty, and the draft constitution, envisage that a European law should lay down uniform procedures, but this is still only an aspiration.

Since 1982, the European Parliament has drafted four reports in attempts to establish uniform procedures, of which three have been considered by the Council. Only the most recent was approved by the Council. That report, adopted by the Parliament in 1998, contained a draft act in which election of members by a list system of proportional representation was a central proposal.[178]

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3 See J. Forman, *Direct elections to the European Parliament*, European Law Review 1977, 35.

4 See Corbett, Jacobs and Shackleton, *The European Parliament*, 2003, pp. 23-24.

A Council decision of 25 June and 23 September 2002 accepted certain common principles which it recommended to member states, in application of Article 190(4) of the EC Treaty, for adoption in accordance with their respective constitutional requirements.

The main aspects of the decision are as follows:

- proportional-type ballot with some room for manoeuvre for the member states which may allow balloting for a preferential list;

- choice of the type of constituency by the member state without adversely affecting the proportional nature of the vote;

- series of incompatibilities with the other institutions and bodies of the European Union and with national parliaments;

- constraints as regards the timetable for elections, while complying with traditions concerning the day of the week and the publication of the results of the elections.

Otherwise, a few measures governing elections to the European Parliament have, however, been passed. The right of citizens of the European Union to stand for election in their country of residence under the same conditions as citizens of that country has been the subject of a Council Directive.[179] Treaty amendments have also provided for an increase in the number of members.[180]

3. The constitutional jurisdiction of the European Court of Justice in this area is well illustrated by its ruling in Les Verts[181] in 1986 on the admissibility and on the substance of the case. Here a political group, Les Verts, challenged a financing scheme set up by the European Parliament in connection with the 1984 elections.

A fundamental issue was that of the admissibility of the action. The Treaty did not at that time give the Court jurisdiction over measures of the European Parliament, which had then no law-making powers: Article 173 (now 230) provided for judicial review of acts only of the Council and Commission. The Parliament had, however, acquired very significant budgetary powers the exercise of which was also being challenged in separate cases brought both by the Council and by the United Kingdom.[182]

The background to the Les Verts case was that the Parliament had allocated funds from its own budget to the political parties for an "information campaign" leading up to the direct elections to the Parliament to be held in 1984. The new French environmentalist or "green"

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5 Council Directive 93/109/EC of 6 December 1993.

6 See also amendments to the 1976 Act made by, for example, Council Decision 93/81/Euratom, ECSC, EEC, OJ 1993 L 33/15.

7 See Note 2 above.

8 Case 34/86 Council of the European Communities v. European Parliament [1986] ECR 2155. Case 23/86 United Kingdom v. European Parliament was withdrawn after judgment was given against the Parliament in Case 34/86, but not before the United Kingdom had obtained an interim Order from the President of the Court partially suspending the exercise by the Parliament of its budgetary powers: Case 23/86 R [1986] ECR 1085.

party complained that by reserving only a limited proportion of funds to parties putting up candidates for the first time in 1984 the Parliament was discriminating in favour of parties already represented within it.
The Court held, in a judgment of great constitutional significance, and in which it may also have had the budget cases in mind, that proceedings could be brought against the Parliament under Article 173. It emphasised that "the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[183] This was a very explicit assertion of the Court's constitutional jurisdiction. Although Article 173 as originally worded referred only to acts of the Council and the Commission, the "general scheme" of the Treaty was to make a direct action available against "all measures adopted by the institutions … which are intended to have legal effects".[184] The Parliament was not expressly mentioned, according to the Court , because, in its original version, the Treaty merely granted it powers of consultation and political control rather than the power to adopt measures intended to have legal effect vis-à-vis third parties. An interpretation of Article 173 which excluded measures adopted by the Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 (now Article 220) and to its system.

As the Court put it:

"Measures adopted by the European Parliament in the context of the EEC Treaty could encroach on the powers of the Member States or of the other institutions, or exceed the limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court. It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects vis-à-vis third parties."[185]

Having accepted the application as admissible,[186] the Court held on the substance that the scheme set up by the European Parliament to finance an information campaign was tantamount to a scheme for reimbursing election campaign expenses, a matter which at that time, under the 1976 Act, remained within the competence of the member states.[187] Accordingly the measures were annulled.

Two subsequent legislative developments should be mentioned here. First, the Treaty was amended, by the Maastricht Treaty, to bring it into line with the Court's case-law, and indeed following the exact language of that case-law. Article 173 as amended gave the Court jurisdiction to review acts of the European Parliament intended to produce legal effects vis-à-vis third parties. Secondly, and far more significantly in constitutional terms, the Maastricht Treaty gave the European Parliament significant legislative powers: in many important

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9 Les Verts, at paragraph 23 of the judgment.

10 Case 22/70 Commission v. Council (ERTA) [1971] ECR 263, in paragraph 42 of the judgment.

11 Case 294/83, Les Verts, in paragraph 25 of the judgment.

12 A further problem on admissibility, overcome by the Court, but not pursued here, was whether the applicant satisfied the requirement of "individual concern" laid down by Article 173 of the Treaty.

13 The second paragraph of Article 191 of the Treaty (added by the Treaty of Nice) currently provides that the Council shall lay down the regulations governing political parties at European level and in particular the rules regarding their funding.

sectors, legislation was no longer to be adopted by the Council after consulting the Parliament, or in co-operation with the Parliament, but instead to be enacted jointly by the European Parliament and the Council. Article 173 accordingly gave the Court, in addition, jurisdiction to review the legality of such acts – i.e. a constitutional jurisdiction to review the legality of legislation in which the European Parliament had acted as co-legislator.

Since Les Verts, the Court has rarely considered cases concerning elections to the Parliament, and where it has the limits to its jurisdiction in this area have not been further clarified. An application from a party in the European Parliament, the Group of the European Right, seeking, by way of interim measures pending final judgment, the suspension of a similar financing scheme in the 1986 elections held in Spain and Portugal after their accession to the Community was admitted by the Court but was dismissed on the grounds that the threat of serious and irreparable damage to the applicant was not proved.[188] In Liberal Democrats v Parliament,[189] the Court found no need to decide an action for a declaration of failure to act, based on the Parliament's failure to draw up proposals for a uniform electoral procedure. Since the start of the proceedings, the proposals required under the Treaty had been produced. The Court was therefore not required to consider whether or not the action for failure to act was admissible.[190]

4. Next must be considered the jurisdiction of the European Court of Human Rights, and in particular the nature and extent of its jurisdiction over EU measures or measures adopted by member states within the framework of EU law. Since the topic currently under discussion is constitutional jurisdiction, two reservations should be made. First, formally the jurisdiction of the European Court of Human Rights is not a constitutional jurisdiction: it does not annul legislation but tests it for compliance with the European Convention on Human Rights. Secondly, the European Court of Human Rights has no jurisdiction yet over the European Community or the European Union, but only over its member states. To that extent, there is a gap in the system of judicial protection.

However, that gap has been partly filled, and in two ways.

In the first place, the European Court of Justice has developed its own fundamental rights jurisprudence. According to the case-law of the European Court of Justice, it must apply fundamental rights as general principles of law, and the European Convention on Human Rights has a special importance here. Subsequently that principle was incorporated in the Treaty (in the Maastricht Treaty, and then further strengthened in the Treaty of Amsterdam). Article 6(2) of the Treaty on European Union now specifies that the European Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the member states, as general principles of Community law. Thus the European Union is not formally bound by the Convention, but in practice the result is the same. And the European Court of Justice regularly cites, and follows, the case-law of the European Court of Human Rights.

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14 Case 221/86 R Group of the European Right and National Front Party v European Parliament [1986] ECR I-2969.

15 Case C-41/92 [1993] ECR I-3153.

16 See paragraph 4 of the Order.

But the European Union is not at present a party to the Convention or subject to the jurisdiction of the European Court of Human Rights. The question therefore arises to what extent EU measures can be challenged there indirectly. The question whether proceedings could be brought against the member states collectively was raised in *Senator Lines*, but the case was ultimately withdrawn.

Secondly, where EU measures are implemented by the member states individually, the member state's measures may be open to challenge before the European Court of Human Rights. To take an example, once again, from outside the field of electoral law, a good illustration is provided by the Bosphorus Airways case.[191] Here an aircraft owned by the Yugoslav national airline was impounded at Dublin airport by the Irish authorities pursuant to United Nations resolutions imposing sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro). The UN Resolutions were implemented within the EU by an EC regulation. Bosphorus Airways, a Turkish company which leased and operated the aircraft, challenged the seizure before the Irish courts. The Irish High Court quashed the decision of the Irish Minister for Transport, Energy and Communications, but on appeal by the Minister the Irish Supreme Court referred to the European Court of Justice issues on the interpretation of the EC regulation. One of the contentions of Bosphorus Airways was that the seizure of the aircraft infringed its fundamental rights, in particular its right to peaceful enjoyment of its property and its freedom to pursue a commercial activity. The European Court of Justice did not accept those arguments, and thus by implication rejected the claim based on, among other things, the European Convention on Human Rights and Article 1 of the First Protocol. Subsequently an application in relation to the seizure of the aircraft by the Irish authorities was brought before the European Court of Human Rights but no ruling has yet been published.

So, as the Bosphorus Airways case demonstrates, decisions and measures of the member states, even within the field of EU law, may be subject to the jurisdiction of the European Court of Human Rights.

5. In the field of elections to the European Parliament, implementation is for the member states; but the measures adopted by member states under EU law may be subject to the jurisdiction of the European Court of Human Rights. The point is illustrated in the context of elections to the European Parliament by the Matthews case.[192] The applicant was a British citizen living in Gibraltar, a dependent territory of the United Kingdom. When the United Kingdom joined the Community in 1973, Gibraltar was included as one of the European territories for whose external relations the United Kingdom was responsible. Thus the EC Treaty applied to Gibraltar, but the operation of parts of the Treaty is excluded. The 1976 Act (a decision of the Council, not a United Kingdom Act) provided for elections to take place in the United Kingdom but not in Gibraltar. Denise Matthews was unable to vote, and took the case to the European Court of Human Rights. The European Court of Human Rights found a violation of Article 3 of the First Protocol. It rejected the United Kingdom's argument that the European Parliament, although it had certain powers within the process of EU legislation, was not a legislature; after analysing the powers of the European Parliament and their impact upon

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17 Case C-84/95 Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General [1996] ECR I-3953.

18 Application No. 24833/94, Matthews v. United Kingdom (1999).

Gibraltar, it concluded that the European Parliament constitutes "part of the legislature of Gibraltar for the purposes of Article 3 of Protocol No. 1".[193]

The United Kingdom sought to comply with the judgment and accordingly made provision for direct elections in the European Parliament Representation Act 2003. But although this is a matter for member states, they must act according to EC law; and the United Kingdom measure has now been challenged in the European Court of Justice by the Kingdom of Spain.[194] Spain contends that the right to vote in elections to the European Parliament cannot be granted to those who are not United Kingdom nationals and therefore not citizens of the European Union.

6. Regarding future developments, reference must now be made to the Treaty establishing a Constitution for Europe, agreed in June 2004. It would be premature to seek to establish the full implications of the draft constitution at this stage, but the following points may be briefly sketched.

First, the draft constitution increases still further the areas in which the European Parliament is co-legislator.

Second, there is little change to the provisions on elections to the European Parliament. The constitution states that the members of the European Parliament shall be elected for a term of five years by direct universal suffrage of the citizens of the European Union (Article I.19(2)) and envisages the enactment (by the Council, on a proposal from the European Parliament) of a European law laying down uniform procedures – as has been seen above, a long-standing aspiration.

Third, Article 39 of the EU Charter of Fundamental Rights, which will become legally binding as Part II of the draft constitution, provides that every citizen of the European Union has the right to vote (and to stand as a candidate) at elections to the European Parliament in the member state in which he resides. It is not clear however whether that provision is intended to go further than the existing rights, already mentioned, under Article 19(2) of the EC Treaty.

Fourth, the provisions on the jurisdiction of the European Court of Justice are significantly amended. While the basic scheme is preserved, the three-pillar scheme of the Maastricht Treaty is abolished and the Court's jurisdiction is extended to cover new fields of EU activities; the standing of individuals to challenge regulatory measures is enlarged; and the Court will have jurisdiction not only over the Community institutions but over all European Union bodies.

Fifth and finally, the draft constitution transforms the relationship between the European Union and the European Convention on Human Rights. Under the existing Treaties the Community was not competent to accede to the Convention:[195] Article I-7(2) of the draft

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19 Ibid., in paragraph 5 of the judgment. It is interesting to note that one year previously the Court had declined to rule whether or not elections to the European Parliament were covered by Article 3 of Protocol No. 1, in the case of Ahmed and Others v. the United Kingdom (No. 65/1997/849/1056), in paragraph 76. In that case, however, it took that position on the basis that no violation had occurred.

20 Case C-145/04 Spain v. the United Kingdom, introduced (in the English language) on 18 March 2004.

21 See Opinion 2/94 [1996] ECR I-1759.

constitution stated that the European Union shall "seek accession" to the European Convention on Human Rights. An amendment accepted at a late stage goes further and says: "The Union shall accede" to the European Convention on Human Rights. Meanwhile the Fourteenth Protocol to the Convention, which provides among other things for accession to the Convention by the European Union, has just been opened for signature within the Council of Europe.

Accession by the European Union to the Convention would subject all EU measures to control by the European Court of Human Rights. Such accession might reinforce compliance of European elections with the European Convention on Human Rights and in particular with Article 3 of the First Protocol. But there is still some way to go before this can be achieved. Not only must the draft constitution first be ratified by all member states. In addition, accession to the European Convention on Human Rights has to be successfully negotiated, and the accession provisions ratified by all (currently 45) member states of the Council of Europe.

In the meantime the European Court of Justice will no doubt continue to derive inspiration from the European Convention on Human Rights and from the case-law of the European Court of Human Rights and continue to develop its own constitutional review of European elections.

FROM THE ELECTORAL SYSTEM REFERENDUM TO CONSTITUTIONAL CHANGES IN SLOVENIA (1996-2000)

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I. Characteristics of the electoral system referendum

A referendum was held at the end of 1996 to decide whether to change the electoral system in Slovenia and replace it with one of the three proposals put forward. It was neither the first nor the last time that the fate of a country's electoral system was being decided at a referendum. Let me mention two examples that I have a special appreciation for. The first was the introduction of a combined double-vote electoral system based on the German system,[196] introduced in New Zealand in a 1993 referendum. The second example is a set of two attempts to repeal the proportional electoral system by means of a single transferable vote in Ireland. Both attempts failed, which is surprising since the single transferable vote system is considered a system in which the division of votes is very difficult to understand; it is

[1] This electoral system is most commonly referred to with the acronym MMP (Mixed Member Proportional). Arguably the best short definition of the system is: "Under MMP the list PR (proportional representation) seats compensate for any disproportionality produced by the district seat results" (*The International Idea Handbook of Electoral System Design*, Stockholm, 1997, p. 147). In other words, based on the second vote the lists get seats in opposite proportion to the success of their candidates in the majority part of the elections (the first vote). This system is justifiably called combined since the majority of deputies are elected based on the first-past-the-post majority system.

appreciated in theory but unpopular with voters. I believe that its success at the Irish referendums – quite tight the first time and convincing the second time[197] – has to do with the fact that the extended use of a system can reduce its shortcomings. Let me explain this statement with the example of Slovenia, where the electoral system is being reproached for deceiving voters: in casting their ballot in one of the electoral districts, voters have the feeling of taking part in majority elections and selecting among individual candidates; yet when they see the effects of their vote, they realise it was a vote for the party's list of candidates according to the proportional electoral system. However, the more experience they have, including negative surprises,[198] and the longer the system is in use (in Slovenia, it has been used a tenth of the time that it has been in use in Ireland), the less likely it is that voters will be misled or fail to grasp what effect their vote has.

Nor is the choice of three proposals and a controversial referendum result characteristic only of Slovenia. For example, Brazil decided on a "trilemma" in 1993 when the voters chose between a presidential system, a parliamentary system and a monarchy. In Italy, meanwhile, the results of a 1993 referendum were exceptionally tight: 90% of the votes were in favour of a change in the electoral system, but it was not enacted as turnout was below the 50% quorum (49.6%). Still, Slovenia's example is unique in many ways: the choice was between four electoral systems; all possible means of calling a referendum were used at the same time; the Constitutional Court reached surprising decisions and engaged in a genuine political war with the majority in parliament regarding the interpretation and implementation of the referendum results; the constitutional system was in jeopardy of coming to a deadlock; a constitutional amendment was passed to overcome it; advocates of the majority system made the dispute international by asking the Venice Commission whether the constitutional changes were in harmony with European democratic principles, etc. Considering its twists and turns, Slovenia's example is unique and even made-up examples from the office of a very resourceful electoral system expert can hardly compare to it.

II. Development of the electoral system up to 1996

After the fall of the Berlin Wall, countries in transition tested an extraordinary array of electoral systems whose practical effects were often far removed from theoretical conclusions and the expectations of their designers. These effects were also related to the degree of political pluralism in the individual countries.[199] Countries in transition have particular

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2 In terms of effect, this system is proportional but takes more from the treasury of the majority system than the proportional system; it is not based on party lists as voters choose between individuals (in multi-member constituencies) whereby voters vote by prioritising (first, second, third preference, etc.) with the help of so-called alternative voting. The voters thereby do what would otherwise happen in the first, second and third round of the election. Ireland has had this system since 1922. In 1959, it barely survived a referendum, 52% to 48% (although the referendum was held at the same time as presidential elections wherein the opponent of this system was elected). The second time it was challenged was nine years later, when a proposal to introduce a majority system was rejected by 61% to 39% (the majority system was to reduce the number of parties and improve the stability of the executive). See R. Sinnott, *The Electoral System*, in Politics in the Republic of Ireland, Galway, 1992, pp. 65-67.

3 Voters as well as candidates are disappointed when they realise that a candidate (of a larger party) was not elected although he or she received most votes in his electoral district (e.g. 30%) while a candidate (of a smaller party) was elected although he or she received only a fraction of the votes (e.g. 10%).

4 See T. Karakamiševa, Development of the Electoral Systems in the Former Socialist States with Special Emphasis on the Republic of Macedonia, doctoral dissertation, Ljubljana, Faculty of Law, September 2002. The author places Slovenia alongside Poland and the former Czechoslovakia among the countries where the processes of gradual political pluralisation and the staging of multiparty elections went hand in hand,

characteristics, so the selection of an electoral system does not affect the workings of the constitutional system as much as it would elsewhere. The first multiparty election in Slovenia provided many interesting topics for electoral system researchers. In the spring of 1990, voters elected representatives to the tricameral parliament based on the then still applicable Yugoslav Constitution. Yet the new Slovenian legislation determined that each of the three chambers would be elected by a different electoral system. The opposition parties united in the Demos coalition won by a landslide in the Municipality Assembly, which was elected by a two-round majority system, but were less convincing in the Socio-political Assembly (55%), which was elected by a proportional system wherein each voter could cast a preferential vote for candidates on different lists; they only won a minority of seats in the United Labour Assembly, where representatives were elected in a first-past-the post majority system (only employees were allowed to vote for this chamber). Such an inconsistent arrangement resulted in formidable problems for the political parties: should they join forces, which was useful for the Municipality Assembly, or should they act independently, which was appropriate for the Socio-political Assembly; should they focus on the party's agenda in the campaign or stress the qualities of individual candidates; should they emphasise local interests (the Municipality Assembly), the interests of employees (the United Labour Assembly) or national interests (the Socio-political Assembly), etc.

From the theoretical point of view, it is more or less indisputable that the majority system rewards the winner and reaffirms the stability of his power, while the proportional system alleviates the problems of the losers and increases their chance of making a comeback in a coalition government (possibly even before the next election). In Slovenia in 1990 the opposition parties (the ultimate winners) advanced the proportional system, and the governing parties (the ultimate losers) advocated the majority system. This should not be attributed to their poor knowledge of the effects of electoral systems. Instead, the opposition did not expect it could win the first election, while the ruling parties did not believe they could lose, having relied heavily on public support won in the struggle with Slobodan Milošević.

Before and after the elections there were intensive debates on what the electoral system should be like in the future. Political parties were tempted to ensure election success by tailoring the electoral system to their needs instead of doing the opposite – adjusting themselves to the system. These options are very limited in Slovenia as electoral system legislation is adopted in a procedure more demanding even than constitutional amendments, which require a two-thirds majority of all legislators. It is therefore logical that the struggle to change the electoral system moved from parliament to referendum (unlike a constitutional referendum, a legislative referendum has no quorum, as the majority of the valid votes decides) and on to the Constitutional Court.

III. Criticism of the pre-referendum electoral system

The 1991 Slovenian Constitution instated the National Assembly and a weak second chamber representing local and professional interests (the National Council), yet it had to leave the electoral system up to legislation due to the political parties' failure to come to agreement. The new electoral system for the National Assembly remained within the boundaries of the proportional system (which until then had applied for the Socio-political Assembly) but it attempted to personalise[200] the election by introducing electoral districts[201] (replacing

simultaneously. In other countries, one or the other process lagged behind.

5 F. Grad, Volitve in volilni sistem (The Elections and Electoral System), Ljubljana, IJU, 1996, pp. 148-

preferential votes).

The quest for a new electoral system started with a strongly exaggerated criticism of the aforementioned system, with fierce criticism coming from all sides. The most widely used reproach was that voters were being deceived. The advocates of the various electoral systems – proportional, combined, majority – reproached the system with labels such as "deceiving", "misleading" voters, "double fraud", "indistinct", "deformed", "unjust", "undemocratic" and the "rule of partitocracy".[202] Such criticism is exaggerated, although the electoral system of the time displayed many shortcomings.

The electoral system placed too much emphasis on encounters between candidates of the same political party (fighting for a nomination in a better district[203] and for a larger share of votes as compared to candidates on the same list in other districts of the same constituency). The threshold was set low (at least three deputies elected, which required just over 3% of the votes) and contributed to a fragmented political scene. The option introduced on the proposal of smaller parties – that a candidate could run in two districts in exceptional cases – was widely abused by larger parties, which resorted to this solution for their cabinet ministers and other better known candidates. Voters were also annoyed by the fact that in practice, political parties engaged in mutual fighting to substantially raise their approval rating but ended up forging coalitions after the election. Yet the system's biggest flaw was that with the help of special national (state-wide) lists, the parties could bring their leading members into parliament regardless of the voters' actual support. The Constitutional Court ruled that this arrangement was not unconstitutional although it led to an unequal representation between candidates and constituencies (at the expense of peripheral regions; politicians from the centre of the country were placed on national lists). The Constitutional Court held that "regarding the question which candidate they want to give their vote to, the voters' will cannot be established" (since each party had only one candidate in an electoral district).[204] For the biggest party in parliament (LDS) the ratio between the actual votes and their seats in parliament was 36.3% to 38.6% in 2000 and 27% to 28.4% in 1996.

IV. Referendum war

In Slovenia, the National Assembly has the power to call a legislative referendum and must do so when requested by the National Council, by one third of the deputies (30) or by 40000 voters. All these options were used simultaneously in 1996. One of the political parties

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6 Interestingly, Slovenia had a very similar system as part of the Kingdom of Yugoslavia. See L. Pitamic, Država (The State), Ljubljana, Družba Sv. Mohorja, 1927, pp. 333-334.

7 See C. Ribičič, Podoba parlamentarnega desetletja (Image of a Parliamentary Decade), Ljubljana, 2000, p. 25.

8 Slovenia is divided into 8 constituencies each of which has 11 electoral districts. 88 deputies are elected this way, while the remaining 2 deputies are elected by the Hungarian and Italian minorities, respectively, from among their ranks in a majority system using alternative voting.

9 Deputies filed the request for a constitutional review with the explanation that it violated the constitutional right to equality of voting rights. The Constitutional Court decided that only the failure to present national lists before the election is unconstitutional (Decision on case No. U-I-106/95, 2 February 1996). In his dissenting opinion, Judge Matevž Krivic assessed that even without the national lists, the electoral system is deformed beyond recognition, incomprehensible, non-transparent and repulsive to such an extent that it is no longer compatible with the principles of democracy.

launched a signature-collecting campaign and gathered over 43000 signatures for a referendum on the introduction of a two-round majority system whereby the two candidates that mustered the most support in the first round in the one-member constituencies would make it to the second round. Meanwhile, on the proposal of the non-governmental organisation the Slovenian Development Council, the National Council proposed a somewhat improved two-vote combined system that was modelled on the German system. Additionally, thirty-five deputies proposed minor improvements to the proportional system and the elimination of national lists. Alongside the three proposals, the existing proportional system with electoral districts was the subject of the referendum. Neither the Slovenian Constitution nor the legislation contain regulations on how to act in the event several proposals on the same subject are to be the subject of voting, as they presuppose that each proposal is decided upon separately (the first proposal filed having the first date).

The referendum war started when the National Council took advantage of the period when signatures for the majority system were still being collected, and filed its proposal for the introduction of a combined system. The National Council approved the referendum request, yet while the National Council President was having lunch, a group of thirty-five deputies signed and (as the President was paying for his lunch and making his way to the Speaker of Parliament to submit the request) filed its own request for a referendum, which consisted of minor improvements to the extant electoral system.[205] The National Assembly called a referendum on the latter proposal, regarding it as the one that had been filed first. Yet the Constitutional Court issued an interpretative decision ruling that all referendums must be called at the same time such that the results be determined for each one separately; the one with the most votes would win. The decision was passed in a 5:4 vote with judges submitting seven separate opinions. Dr. Lojze Ude wrote a dissenting opinion stating that the interpretative decision[206] had "replaced the legislative regulation of referendums, that it replaced a law which is passed by a qualified majority" in "a case where the subject of a referendum decision would be the electoral system, the cornerstone of parliamentary democracy". The Constitutional Court continued passing such tight decisions regarding the calling of the referendum, the required majority to reach a decision and even the deadline for the referendum to be called, while at the same time engaging in mutual reproaches on politically motivated decision-making.[207]

V. Alternative electoral system proposals competing at the referendum

The main advantages of the majority electoral system are its simplicity, transparency, a reasonable degree of personalisation and the resulting stability of the executive branch. Its weaknesses lie in the fact that the executive office can be won with a minority of votes and that it leads to a bipartisan polarisation. The advocates of the majority system in Slovenia

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10 This proposal was withdrawn before the referendum and replaced by a proposal for a proportional system where electoral districts would be eliminated and the preferential vote introduced.

11 Decision of case No. U-I-201/96, 9 May 1996.

12 The Constitutional Court's Decision on case No. U-I-279/96, 10 September 1996, annulled the decree on calling the referendum 90 days after the election, arguing that the date the referendum is held may not be set more than 15 days after the referendum is called. Judge Dr. Peter Jambrek issued a concurring opinion stating that delaying the referendum until after the election is a reflection of the pathology of Slovenia's constitutional system and the authorities' paternalism to the citizens. Judge Dr. Lojze Ude, meanwhile, issued a dissenting opinion arguing that holding the referendum at the same time as the election would jeopardise the election right as set down in the Constitution.

stressed that introducing this system would create a more direct relationship between the voters and the representatives elected in the single-member constituencies.[208] Personalisation was said to be more explicit than in a proportional system, the party leaderships would no longer be able to push through their leading members who did not have significant support among voters, and the government would be made more stable. Opponents claimed that this would lead to excessive two-bloc polarisation (which is already present in Slovenia as it is) and that it would reduce the variety of choice between political agendas. Behind the introduction of a majority system was the hidden agenda to unite right-of-centre parties into a uniform bloc and end the practice where one of them always ended up being part of the government coalition.

The key benefit of the proportional electoral system lies in its very name: it provides for a proportional representation of political parties whose number of seats in parliament corresponds to the share of votes they have won. The downside of this system is that there is a choice between a large number of small parties, not between the candidates' personalities. The proportional system overcomes this shortcoming with levellers such as the threshold, the preferential vote and electoral districts. Just like the advocates of the majority system, the proponents of the proportional system in Slovenia highlighted the flaws of the current system of electoral districts. They stressed, however, that the introduction of a majority system would be like jumping out of the frying pan and into the fire. Compared to a majority system, a proportional system is superior in that it prevents parties which may win a distinct minority of votes from winning a majority of seats in parliament. The imbalance between the actual number of votes and the party's seats in parliament is significant in a first-past-the-post majority system. In the 2001 election in Great Britain, the winning party won 40.7% of the vote and got 62.7% of the seats. Even in a two-round majority system, the imbalance is often considerable. In the last general election in France in 2002, the ruling party got 33.7% of the vote and as much as 61.9% of the seats in parliament. In a parallel system, too, the underlying logic of the majority electoral system prevails, albeit to a somewhat lesser degree: in Russia in 2003, the largest party won 37.6% of the vote and 49.3% of the seats. The deficiencies of a pure proportional system should be alleviated by a decisive preferential vote with which the voters affect the election of individual candidates. The advocates see the benefits of their proposal in that it eases the polarisation of the political scene and gives the voters the chance to select between a larger number of political agendas (a rainbow of diverse political parties and their candidate lists). The opponents of this system, meanwhile, stress that the rule of partitocracy is too strong, personalisation too indistinct and that people prefer selecting candidates to parties.

In the polarised political environment of the 1990s, political parties showed little willingness to reach out for creative compromises that would combine the advantages of both extremes and sidestep their weaknesses. This was on the agenda of the non-governmental Slovenian Development Council, which proposed the introduction of an improved double-vote combined system based on the German model. This system produces relatively proportional results although it slightly favours larger parties and rewards the winning party.[209] In the 2002 election in Germany, the winning party received 38.5% of the vote and won 41.6% of parliamentary seats. The ratio between votes and seats was very similar in New Zealand,

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13 Due to the disharmony with the Constitution, the proposal to introduce the recall and create special seats for Slovenians living abroad was dropped.

14 See The German Electoral System, Bonn: In press, 1998; C. Jeffrey, Electoral System: Learning from Germany, London, F. Ebert Foundation, Working paper no. 2, 1997.

where the ruling party won 41.3% of the vote in the 2002 election and 43.3% of the seats. This proposal consisted of the introduction of a double-vote system whereby additional elements of the majority system would be included (strengthening the role of personalisation by electing candidates from party lists according to the number of votes they won in the majority part of the elections). Voters would support a party list by voting for the candidate that they favoured.[210] Yet in a departure from the German model, which has a (second) vote for the party, less than half the deputies would be elected this way (similar arrangements are in place in New Zealand and Italy). The advocates of this system, including myself,[211] have stressed that it combines the advantages of both extremes, having borrowed proportional representation of political agendas from the proportional system and personalisation from the majority system. Furthermore (and in connection with a higher election threshold) it leads to a more stable government and to a reduction in the number of political parties, which is more acceptable than a bipartisan system. This model is unpopular with party leaderships; unlike the proportional system, it renders it more difficult to elect leading party members. It has therefore been avoided by advocates of the proportional and majority systems alike. The supporters of the majority system were willing to concede to a parallel system,[212] while the champions of the proportional system considered the combined system a lesser evil only as long as there was the threat that the majority system might actually be implemented against their will.

VI. The manner of voting and ways of determining the majority at the referendum

Two opposite camps gradually emerged. The first, made up of right-of-centre opposition parties, was advancing the majority electoral system. Yet smaller parties had second thoughts, fearing that they would lose their independence in a majority system. The opposing camp consisted of left-of-centre coalition parties and promoted the preservation of the extant system or altering it by eliminating electoral districts.

After the Constitutional Court decided that referendums on the same issue must be held at the same time, politicians continued to engage in conflict over the question of the majority necessary to change the electoral system. One of the reasons for the conflicts was that the Slovenian Constitution does not provide for a situation where several competing proposals are decided upon, but only sets forth how to vote for or against a single proposal. The supporters of the majority system favoured a solution where the proposal that won the most votes (a relative majority) would be selected, and said that separate referendums should be held for each of the proposals simultaneously.[213] Meanwhile, the opponents insisted that a majority of all votes cast was necessary for changing the electoral system.[214] The latter underlined that the

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15 Such a system was in place in the Federal Republic of Germany in 1949; it reduces the influence of party leaderships to the election of deputies. See E. Jesse, The West German Electoral System: The Case for Reform, 1949-87, in West European Politics, July 1987, p. 446.

16 Personally, I believe that the combined German system of two votes is not as good as the single transferable vote system in place in Ireland, Malta and Scotland (for the latter only in local elections). Yet considering the complex system of transposing votes into parliamentary seats, it is difficult to push through with this system in Slovenia even in professional and parliamentary debates, let alone in a popular vote.

17 This idea, which leaders of coalition and opposition parties discussed after the referendum, is related to an increase of deputies from 90 to 120 and the elimination of the second chamber (National Council).

18 Since multiple proposals could win in this case, the Constitutional Court stated in the above-quoted decision that the proposal which gets the most votes wins in this case.

19 The author of this paper was in favour of holding the referendum in two stages: the two proposals that

electoral system had been passed by a two-thirds majority of all deputies in the National Assembly, while the former emphasised that a simultaneous vote on a larger number of proposals would disperse the votes and make it impossible to change the system. The ruling coalition failed to take into account the warnings of the Constitutional Court and insisted on the constitutionally set majority, saying that it had to apply to examples where several proposals were being voted on. The act which enabled such a manner of establishing the referendum outcome (the proposal which won the absolute majority of the votes cast), which was in contradiction to the position taken in decisions by the Constitutional Court, was not annulled the second time and the referendum was implemented on its basis.

None of the proposals won the majority required by law. With a turnout of 37.9%, the majority system got 44.5% of the vote, the proportional 26.2% and the combined 14.4%; 4.1% voted against all three proposals and 9.8% of the ballots were invalid.

VII. Diverging interpretations of the referendum outcome

According to legislation in place at the time, none of the proposals won. The proposal on the majority system received a relative majority (44.5% of the votes cast or 16.9% of all registered voters), but failed to receive the prescribed majority, even if all invalid votes had been excluded. The voters could only cross "yes" for one of the proposals and the legislative materials make it clear that the National Assembly only called one referendum where all proposals for changing the electoral system were decided upon at the same time.[215] It is therefore beyond doubt that none of the proposals won the necessary majority in the referendum. Yet two years after the referendum, the Constitutional Court decided (by five votes against three),[216] that the proposal on the majority electoral system had won.

With this decision, the Constitutional Court first "revived" the act that provided for the establishment of the results, since it had expired after the referendum was staged. With the imperative part of the decision, the Court furthermore established that the law was not unconstitutional only if it were interpreted such that all three referendums were held at the same time, with the majority determined for each separately. It also required that the National Assembly enact the proposal that was passed in the referendum and change the legislation accordingly within six months. In a concurring opinion, Dr. Peter Jambrek wrote that the reasoning of the majority which upheld the decision was logically and empirically watertight. He also provided an advance reply to the critics by saying that their views would be "to the benefit of the heirs and successors of the semi-past dictatorship cloaked in a gown of public interest". The judges who voted against the decision listed a series of legal and constitutional arguments that led them to their conclusion. Dr. Dragica Wedam Lukić wrote in a dissenting opinion that the Constitutional Court might have invalidated the referendum, yet it should by no means have decided on an act that had already expired. Furthermore, the interpretative part of the decision went beyond the explanation of the act and conferred on it a content absent from its original form. With its subsequent interpretation, the Court interfered with the principle of trust in the law instead of rejecting the petition because the act had expired. Judge Franc Testen voiced a very similar opinion in his dissenting opinion, warning that it was an interpretation of a "dead" act made after the Report of the Electoral Commission on the

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mustered the most votes in the first round would be voted on in the second round.

20 See C. Ribičič, *Zakonodajalčeva volja* (Legislator's Will), Ljubljana, Pravna praksa, 18 January 1998.

21 Decision in case No. U-I-12/97, 8 November 1998.

Referendum Results became final (the Court had rejected a constitutional complaint against this report as all other legal means had not been exhausted). A subsequent interpretation of a dead act was unacceptable since the Constitutional Court cannot abrogate an act but can only annul it. Moreover, it causes an internal discord in the act by interpreting it in an impossible way. There were not three referendums; according to the law, there was one referendum on all three proposals. According to Judge Testen, this was constitutionally controversial (a dispersion of votes) but it nevertheless did not permit the Court to treat it as three referendums. In his dissenting opinion, Judge Matevž Krivic stated that the decision exceeded all boundaries of allowance and reason, especially as regards the revival of a dead act and its interpretation. This could not benefit the reputation of the Constitutional Court.

The Constitutional Court based its decision on the wrong premise, namely that the National Assembly had not defined what was meant by the wording of the law "of the voters who voted" that is, what exactly constituted the majority that decided the referendum. Critics also find it controversial how the Constitutional Court took it upon itself to determine the result of the referendum voting (the Constitutional Court "establishes that the referendum passed the proposal…"), which is an interference with the jurisdiction of the Electoral Commission. The Constitutional Court has the power to determine how its decision is to be implemented (it names the authority which has to implement it and the manner of implementation), but it cannot assume the jurisdiction of other authorities.

One of the fiercest critics of the decision was Dr. Ivan Kristan, then President of the National Council, who assessed that what the majority of the Constitutional Court judges did was "hocus-pocus". He considered it an unreasonable decision, "just like rules had been changed two years after a football game and the result declared based on the new set of rules".

Naturally, the numerous critiques of the Constitutional Court decision cannot obscure the fact that there was a multitude of violations in the National Assembly's decisions concerning the electoral system referendum requests, whose ultimate goal it was to reduce the chance that the electoral system might actually be changed. This is especially true of the manner of determining the majority, which due to the dispersion of votes greatly reduced the possibility that any of the proposals would succeed.

Notably, the issue was a key systemic question, which in fact should be in the Slovenian Constitution and which the National Assembly determines with a two-thirds majority of all deputies (a majority required for constitutional changes). From this point of view it is interesting to see the warning issued by Dr. Dragica Wedam Lukić in her already quoted dissenting opinion: that the number of votes which could hypothetically decide the referendum is smaller than the number of National Assembly representatives.

The Slovenian political public split into those who demanded the unconditional implementation of the Constitutional Court decision, and others who noted that nobody could order the deputies what to do, least of all if the Constitutional Court had so bluntly exceeded its jurisdiction.[217] There were a few attempts at wholesome assessments that would take into

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22 Jadranka Sovdat has a different opinion. She says that a decision by the Constitutional Court is legally binding for the National Assembly even when it is wrong; the only legitimate means available to the National Assembly to overturn such a decision are constitutional changes ("Sestava in volitve Državnega zbora" (Composition and Elections to the National Assembly), Komentar Ustave Republike Slovenije (Commentary of the Constitution of the Republic of Slovenia), Lovro, Šturm (ed), Ljubljana, FPDEŠ, 2000, p. 775).

account the arguments of both sides. One of them was a speech delivered by Dr. France Bučar at the Constitutional Court on 22 December 1999, at a ceremony marking Constitution Day. He said that the crucial issue was the legal commitment of the parliament to enact decisions of the Constitutional Court, as the lack of observance of these decisions leads to a state of unconstitutionality. Yet on the other hand, "the Constitutional Court must be all the more careful to make all of its decisions – from the value perspective – fully compatible with the ethical standards that are considered untouchable in a democratic society. The Constitutional Court is not without flaw. No court is immune from mistakes, yet it cannot afford the slightest lapse in ethics, especially the Constitutional Court. Any lapse in this field would amount to a self-inflicted dissolution".

VIII. Constitutional changes

The Constitutional Court imposed the implementation of the referendum decision and the introduction of a majority electoral system on the National Assembly. This cast a shadow of doubt on the legitimacy of elections that were held on the basis of the unchanged election regulations. Since the National Assembly failed to vote in favour of the implementation of the majority system over several attempts, an ad hoc coalition for changes to the Slovenian Constitution was formed by the left-of-centre parties and one right-of-centre party (the Slovenian People's Party – SLS). The coalition first offered the champions of the majority system a compromise: the introduction of a combined electoral system which would achieve the majority of goals the latter advocated. When this option was rejected, the Slovenian Constitution was changed.

The Amended Article 80 of the Slovenian Constitution states that deputies are elected according to the principle of proportional representation, "with due consideration that voters have a decisive influence on the allocation of seats to the candidates". The amendment, which was approved by three quarters of all deputies (the constitution requires a two-thirds majority), introduced in July 2000 a higher threshold (4%), increased the importance of the allocation of seats at the regional level (The Droop quota replaced the Hare quota), the allocation of seats was partially corrected to the benefit of larger parties, but most importantly, national lists were eliminated. These are minor changes, but they nevertheless somewhat increase the voters' influence on choosing between candidates, not merely parties. The downside of these changes is that they additionally narrow the probability that independent candidates might get elected. Yet they are important in that they have in effect put an end to political struggles regarding the changes to the electoral system, which resonated through Slovenia for four years and threatened to escalate in a full-blown constitutional crisis and jeopardise the legitimacy of the elections.

I believe the changed Article 80 of the Slovenian Constitution permits various systemic solutions, provided that political agendas are represented proportionately and that voters have a decisive influence on the allocation of seats to the candidates. While the former is certainly guaranteed in the current electoral system, the latter is provided for only partially. Many feel that the voters' influence on the allocation of seats to the candidates should be strengthened by introducing a strong preferential vote in place of the districts (a similar system is in place for elections to the European Parliament). I am confident that such a change would not contribute to the personalisation of elections (perhaps after the elimination of electoral districts, the choice between parties would be even more in the forefront than it is in the existing system) which the voters seem to desire. It would therefore make sense to introduce a

combined electoral system based on the German model,[218] strengthening the role and significance of voters in the selection of deputies. This is a system that ensures a proportional representation in parliament and the personalisation of elections, especially if additional improvements are taken into account (more than half of the deputies elected by majority system, taking into account the votes for individual candidates elected from party lists, etc.).[219]

IX. Opinion of the Venice Commission

The government, which was elected just months before the general election, asked for the opinion of the Council of Europe's Venice Commission.[220] Although it is true that the petition was an attempt to aggravate the political struggles that paralysed the working of the constitutional system,[221] reproaches against it were misplaced. The Venice Commission cannot be regarded as a kind of foreign arbitration since Slovenia is a full member of the Council of Europe and the Venice Commission is as much Slovenia's as it is of other members of the Council of Europe.

The opinion of the Venice Commission – taken before the election and released after it – was convincing. It signalled an end to the escalation of tensions and delays in the proceedings of the Slovenian constitutional system. The Venice Commission wrote: "The Commission finds that the National Assembly's reaction to the risk of a constitutional impasse, i.e. the adoption of amendments to the Slovenian Constitution adopted on 25 July 2000, in strict compliance with the latter's relevant provisions, is not in conflict with European democratic standards." It warned that it was the duty of all state authorities to help solve the crisis that threatened to bring the constitutional system to a halt. The legislative referendum does not prevent the parliament from adopting a constitutional change and providing for the electoral system in a manner different from the referendum result. In other words, even if the Constitutional Court was right and the proposal for a majority system had indeed won, this does not mean that the National Assembly cannot change the Slovenian Constitution and install a proportional system.[222] Provided, of course, it acts in strict accordance with the constitutional provisions on the procedure and majority required to pass a constitutional change.

The opinion of the Venice Commission attests to how someone who has an outside view can see more clearly than someone who fails to see the forest for the trees surrounding him, and

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23 Jadranka Sovdat believes that the amended Article 80 of the Constitution would be "fully complied with through the introduction of the single transferable vote system" (ibid., p. 776).

24 I believe the combined electoral system would have several benefits for Slovenia: it would reduce the number of parliamentary parties yet not lead to a bipartisan polarisation; the government would be more stable but it would still be necessary to form coalitions; it would lead to the greater personalisation of elections without creating the necessity to rule with a minority of votes; there would be fewer possibilities for manipulation in forging post-election coalitions. See C. Ribičič, Podoba parlamentarnega desetletja (Image of the Parliamentary decade), Ljubljana, 2000, p. 28.

25 Opinion on the Constitutional Amendments concerning Legislative Elections in the Republic of Slovenia, Venice Commission, 44th Plenary Meeting, 16 October 2000 (www.venice.coe.int).

26 Three of the five former Constitutional Court judges who voted for the decision on the victory of the majority system in the referendum were ministers in the government that petitioned the Venice Commission.

27 Franc Testen, Constitutional Court President at the time, made a similar assessment in several public appearances: he argued that the National Assembly "overcame" the Constitutional Court by passing a constitutional change.

therefore fails to find a way out. The opinion vindicated the National Assembly, which resolved the dispute in its competency as the legislator[223] by changing the Slovenian Constitution. The Venice Commission furthermore underlined the limited reach of a legislative referendum; it cannot be used to prevent constitutional changes.[224]

It would be wrong to understand the opinion of the Venice Commission as uncritical to those incorrect and legally controversial moves by the government majority in the National Assembly which were used in attempts to prevent changes to the electoral system. The Venice Commission suggested that the general election which was then looming could demonstrate whether the voters believed anyone had acted contrary to their will and democratic traditions. As it turned out, struggles over the electoral system ultimately had no significant effect on the election outcome. No party was punished for opposing the majority system, but neither was SLS awarded for its constructive stance: the party first voted for the introduction of the majority system but later made a significant contribution to the adoption of the constitutional changes and the resolution of the crisis. Interestingly, the advocates of the majority system remained in such a minority after the election that they can be glad their proposal for a majority system was not accepted.

The opinion of the Venice Commission ends with the recommendation that Slovenia should consider which legislative and possibly constitutional amendments are required to avoid the risk that similar situations arise again. Slovenia has not been successful in upgrading the Referendum Act or the Slovenian Constitution to resolve these issues[225] and therefore even now faces similar dilemmas to those that preoccupied it four years ago. There are again heated political debates on what issues can be subject to referendum voting, what its effects are and where the boundaries of the Constitutional Court's jurisdictions are or what the effects of its decisions are.[226] But that is another story altogether.

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28 The Constitutional Court voiced this similarly to the Venice Commission, concluding: "The decision of the Constitutional Court regarding the establishment of the results at the legislative referendum, binds parliament as the legislature but not as the author of changes to the Constitution. As the creator of the Constitution, the National Assembly can change this supreme law of the state as set forth in the Constitution." (Decision on case No. U-I-204/00, 14 September 2000).

29 The proponents took a different stance in separate opinions, claiming on the basis of the German doctrine of the unconstitutional constitutional amendment that the decision of the National Assembly was in disharmony with European democratic traditions. However, the opinion of the Venice Commission is based largely on Italian constitutional practice (Peter Jambrek and Klemen Jaklič).

30 Constitutional law theory has long ago defined what amendments to the Constitution regarding the referendum are necessary, and which restrictions should be built into the constitutional system. Yet the National Assembly has been very reluctant to deal with this issue. See I. Kaučič, Zakonodajni referendum (Legislative Referendum) in Podjetje in delo, No. 7-8/2001, p. 857, and M. Cerar, Razmerje med neposredno in posredno demokracijo v slovenski ustavni ureditvi (Relation between Direct and Indirect Democracy in the Slovenian Constitutional System), Javna uprava No. 2/2002, 246.

31 At the present, these issues are contested in the framework of the debate on whether the so-called "erased people" (people from other republics of the former Yugoslav Federation who opted not to apply for Slovenian citizenship) should have permanent residency rights reinstated which had been revoked over a decade ago, and in the framework of the request for a referendum on the construction of a mosque in Ljubljana, the capital of Slovenia.