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THE CODE OF GOOD PRACTICE IN ELECTORAL MATTERS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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by M. Vincent BERGER*

INTRODUCTION

European electoral litigation

1. European electoral litigation is not the most abundant, and in fact electoral cases only began to emerge fairly recently. In connection with the "right to free elections" as secured under Article 3 of Protocol No. 1, the European Commission of Human Rights ("the Commission") systematically declared such cases inadmissible until 1975. There was very little movement until the eastward enlargement of the Council of Europe, after which litigation on political rights considerably increased.
The European Court of Human Rights ("the Court") attaches great importance to such litigation. It considers it a "characteristic principle" of "an effective political democracy"[1], or a fundamental right which is "crucial (to) (…) democracy governed by the rule of law"[2]. It is no wonder, therefore, that this type of litigation, which is particularly sensitive – in that it affects political rights – has produced a proportionally large number of Grand Chamber judgments.

2. What we might refer to as "European electoral case-law" mainly concerns Article 3 of Protocol No. 1, sometimes in conjunction with Article 13 of the European Convention on Human Rights ("the Convention") (right to an effective remedy) or Article 14 (prohibition of discrimination), and occasionally also with Article 11 (freedom of assembly and association) or Article 10 (freedom of expression).

3. Article 3 of Protocol No. 1 reads as follows: "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". While this rule appears only to be targeted at States, the Commission[3] inferred "subjective rights of participation" from it, as confirmed by the Court in the seminal judgment *Mathieu-Mohin and Clerfayt v. Belgium* of 1987. In this way, European case-law derives from the obligation to organise free elections the right to vote and the right to stand for election[4], which implies the right to exercise one's mandate[5].

A common vision of the European electoral heritage

4. In accordance with the guidelines of the Code of Good Practice in electoral matters ("the Code"), "(i)n the framework of the European electoral heritage, suffrage is governed by five principles: it must be universal, equal, free, secret and direct". The Court's case-law shares this vision and highlights the same general principles, although their content can vary considerably. For instance, in its Grand Chamber judgment *Yumak and Sadak v. Turkey* of 2008[6], it quotes

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[1] *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A, No. 113.
[2] *Hirst v. United Kingdom, (No. 2)*, No. 74025/01, 6 October 2005, § 58.
[3] Commission (decision), *W, X, Y and Z v. Belgium*, Nos. 6745/74 and 6746/74, 30 May 1975.
[4] *Ibid*.
[5] Commission (decision), *M. v. United Kingdom,* No. 10316/83, 7 March 1984; *Selim Sadak and al. v. Turkey*, No. 25144/94, 11 June 2002, § 33.
[6] *Yumak and Sadak v. Turkey*, No.10226/03, 8 July 2008, § 54.

the Code, which "forcefully recalls that the 'five principles of the European electoral heritage are universal, equal, free, secret and direct suffrage'".

5. Article 3 of Protocol No. 1 refers to the principle of free and secret suffrage. The need for secret polling was affirmed by the Commission in 1976[7], because secrecy helps shield voters from pressure to vote for a specific party or candidate. Broadly speaking, this safeguard does not raise any particular difficulties. It is, nevertheless, one possible reason for Switzerland's failure to ratify the Additional Protocol (some cantons still practice public voting by a show of hands). The issue of voting by automatic or electronic means or by correspondence can also lead to problems of confidentiality.

6. The principle of universal suffrage was discarded during the drafting of Article 3 (under pressure from the UK representative), but this omission has subsequently been made good by European case-law. Article 3 is considered to imply universal suffrage, the only type of suffrage which is deemed genuinely democratic. This principle was recognised by the Commission in 1967[8] and has been confirmed on many occasions by both the Commission[9] and the Court, starting with the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 1987 (§ 51). Other landmark judgments have also reaffirmed it more recently, and the Court has ruled that any derogation from the principle constitutes "a risk of undermining the democratic validity of the legislature as so elected and the laws which it promulgates"[10].

7. European case-law infers equality before electoral law from the right to free elections. According to the Commission, "the only condition laid down [by Article 3] is that elections must guarantee equality of treatment for the citizens", ie, as the Court points out, "equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election"[11]. The electoral law must not be applied in a discriminatory manner, and the Court frequently combines the violation of Article 3 of Protocol No. 1 with violation of Article 14, as in the case of *Aziz v. Cyprus*, in which it condemns the differential treatment between the two communities on the island[12].

On the other hand, the Court does not allow for "equal opportunities", as opposed to one heading in the Code. The Court specifies that "it does not follow (…) that all ballots must have equal weighting in terms of the result, or that all candidates have equal chances of winning"[13]. It thus accepts a number of electoral techniques. Geographical distortions caused by constituency boundaries are therefore possible. The case of *Bompard v. France*[14] is a clear illustration of this.

Where voting systems are concerned, the equality principle does not imply any "obligation to introduce a specific system (…) such as proportional representation or majority voting with one or two ballots"[15]. This is because "the choice of electoral system (…) is a matter in which the State enjoys a wide margin of appreciation"[16].

Furthermore, the Commission[17] and later the Court[18] accept the possibility de making reimbursement of a deposit conditional upon obtaining a minimum number of votes.

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[7] Commission (decision), *X v. United Kingdom*, No. 7140/75, 6 October 1976.
[8] Commission (decision), *X v .FRG*, No. 2728/66, 6 October 1967.
[9] Aforementioned *W, X, Y and Z*; Commission (decision), *X v. United Kingdom,* No. 7566/76, 11 December 1976.
[10] Aforementioned *Hirst (No. 2)*; § 62; *Melnytchenko v. Ukraine*, No. 17707/02, 19 October 2004, § 56; *Yumak and Sadak v. Turkey*, No. 10226/03, 30 January 2007, § 65.
[11] Aforementioned *Mathieu-Mohin and Clerfayt*, § 54.
[12] *Aziz v. Cyprus*, No. 69949/01, 22 June 2004, § 38.
[13] Aforementioned *Mathieu-Mohin and Clerfayt*, § 54.
[14] *Bompard v. France*, No. 44081/02, 4 April 2006.
[15] Aforementioned *Mathieu-Mohin and Clerfayt*, § 54.
[16] *Matthews v.-United Kingdom*, No. 24833/94, 18 February 1999, § 64.
[17] Commission (decision), *Desmeules v. France,* No. 12897/07, 3 December 1990.
[18] *Cheminade v. France* (decision), No. 31599/96, 26 January 1999.

8. The Code addresses many points which have not as yet been dealt with in Strasbourg. This applies to election periodicity and voting procedures, such as voting by correspondence, election result transfer, election observation or the organisation of polling stations. This is probably due to a lack of applications concerning these issues, which is in turn caused by ignorance or discouragement on the part of possible complainants. It is also possible that applications have been declared inadmissible by committees or, since 1 June 2010, by single judges, whose decisions are not published.

9. In the Court's case-law, the Code is quoted in some twenty cases (since the *Hirst (No. 2)* judgment of 2004), which mainly concern alleged infringements of Article 3 of Protocol No. 1 and a wide variety of electoral law issues. They can be split into three groups: the right to vote, the right to stand for election and the right of appeal.

I. THE RIGHT TO VOTE

10. The Court has adjudicated on case of exclusion of the right to vote resulting either from a prohibition to vote or from non-registration on the electoral roll.

A. Prohibition to vote

11. Three very different categories of persons have complained to the Strasbourg Court of being deprived of the right to vote: convicts, persons placed under guardianship and expatriates.

1. Convicts

12. The judgment ***Hirst v. United Kingdom (No.2)***[19] was the first to address the issue of the disenfranchisement of convicted prisoners.
In this judgment, the Grand Chamber quotes, among the relevant international documents, the section of the Code on "exclusion of the right to vote and to stand for election" (guideline I.1.1.d)**:**

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

The Grand Chamber's reasoning comprises similar stages to those of the Code, considering the proportionality and gravity of the measure and the safeguards provided by a court of law, and ends with a finding of violation of the right to free elections.

13. the Grand Chamber did, however, qualify its position in the judgment ***Scoppola v. Italy (No. 3)***[20]. It begins by confirming the *Hirst (n° 2)* judgment, stating that general prohibitions of

[19] Aforementioned *Hirst (No.2)*.

the right to vote which automatically affect an undifferentiated group of persons based solely on their prisoner status and irrespective of the length of sentence, the nature or gravity of the offence committed and their personnel situation, are incompatible with Article 3 of Protocol No.1.
The Court once again quotes the Code (§ 44), but nevertheless decides not to apply the last condition which it imposes vis-à-vis the passing of a sentence by a court in a specific decision. It thus varies from *Frodl v. Austria*[21], considering that the aim of minimum individualisation of the sentence can be sufficiently achieved in the absence of a judicial decision. While the intervention of a judge can guarantee the proportionality of the restrictions placed on prisoners' rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in law, making its application conditional on such factors as the nature or the gravity of the offence committed. The Court also notes the lack of a consensus on the need for a judgment under comparative law (§ 99).

2. Persons placed under guardianship

14. The judgment ***Alajos Kiss v. Hungary***[22] follows directly on from *Hirst (No. 2)*, although it targets a very different group.
The Court mentions (§ 16) the Code in connection with exclusion of the right to vote, and declares that it "cannot accept (…) that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation" (§ 42). It "further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification" (§ 44). The Code is once again highlighted by the Court, as is the United Nations Convention on the Rights of Persons with Disabilities, to the extent that these instruments of international law require strict scrutiny of any curtailment of their rights (§ 44). In the light of these considerations, the Court concludes that Article 3 of Protocol No. 1 has been violated. This requirement of individualised judicial assessment is similar to that laid down in the Code.

3. Expatriates

15. In the case of ***Sitaropoulos and others v. Greece***[23], concerning the fact that expatriates cannot vote in their State of residence in parliamentary elections held in their country of origin, the Court first of all decided that there had been a violation of Article 3 of Protocol n° 1. It considered that the failure to enact legislation on voting rights for expatriates as laid down in the Constitution constituted "unfair treatment of Greek citizens living abroad (…) in comparison with those living in Greece, despite the fact that the Council of Europe had urged member States to enable their citizens living abroad to participate to the fullest extent possible in the electoral process". Under the section on international law (§ 18), the Court considered the relevant texts adopted by the competent bodies of the Council of Europe, including the Code, on voting by correspondence and electronic voting.
The Grand Chamber has nevertheless reviewed this position[24]. Like the Venice Commission, it now advocates facilitating the exercise of expatriates' voting rights, although this is not compulsory, but rather a possible option for each individual country. It also notes that in comparative law, some Council of Europe States do not provide for voting by expatriates and that in States which so provide, although they are the majority, the conditions for exercising this right vary considerably and involve wide discretionary powers on the part of the States. Moreover, the Greek Constitution provides for a possibility for voting by expatriates rather than making it mandatory, and the authorities have on many

[20] *Scoppola v. Italy (No. 3),* No. 126/05, 22 May 2012.
[21] *Frodl v. Austria*, No. 20201/04, 8 April 2010.
[22] *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010.
[23] *Sitaropoulos and others v. Greece*, No. 42202/07, 8 July 2010.
[24] *Sitaropoulos and Giakoumopoulos v. Greece*, No. 42202/07, 15 March 2012.

occasions endeavoured – in vain – to legislate on this issue. This new position seems to constitute a more accurate reading of the Code, because the latter only mentions voting by correspondence and e-voting in terms of laying down strict criteria regulating their use, in view of the inherent risks of fraud.

B. Drawing up electoral registers

16. In the case of the ***Georgian Labour Party v. Georgia***[25], the applicant party complained – among other things – about the rules on the drafting of electoral registers.
Among the relevant international documents, the Court extensively cites (§ 47) the Code, particularly in connection with "Regulatory levels and the stability of electoral law" (Guideline II.2.b):

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

However, the Court (§ 89) considers that "in the present case, the electoral authorities had the challenge of remedying manifest shortcomings in the electoral rolls within very tight deadlines, in a "post-revolutionary" political situation (…). Consequently, the Court concludes that the unexpected change in the rules on voter registration one month before the (…) parliamentary election (…) was, in the very specific circumstances of the situation, a solution devoid of criticism under Article 3 of Protocol No. 1". Consequently, the Court is in fact moderating the requirements laid down in the Code following a concrete analysis of the situation, by refraining from adopting the standard set out in the Code.

II. RIGHT TO STAND FOR ELECTION

17. The right to stand for election is central to many "electoral" cases submitted to the Court. Most of the obstacles or hindrances arise prior to the elections, but they also sometimes follow them.

A. Pre-electoral measures

1. Refusal to register candidatures

18. In the case of ***Sukhovetsky v. Ukraine***[26] concerning the deposit required to stand for election, the applicant had contended before the Supreme Court, in vain, that his annual income was insufficient for him to pay this sum
Among the relevant international documents, the Court cites (§ 38) the Code in connection with "submission of candidatures" (Guideline I.1.3.vi)**:**

> "If a deposit is required, it must be refundable should the candidate or party exceed a certain score; the sum and the score requested should not be excessive".

In considering the legitimate aim of this infringement of the right to free elections, the Court (§ 61) refers to this paragraph and a joint report by the Venice Commission and the OSCE which regards the aim of discouraging frivolous candidatures as a legitimate one, provided that serious candidatures are not discouraged. It then notes that the amount of the deposit required under Ukrainian law is one of the lowest in Europe (§ 70). This meets one of the requirements vis-à-vis deposits set out in the Code. Again, "in view of the relatively low

[25] *Georgian Labour Party v. Georgia*, No. 9103/04, 8 July 2008.
[26] *Sukhovetsky v. Ukraine,* No. 13716/02, 28 March 2006.

amount of the sum involved, the electoral campaign services provided by the State (see paragraphs 15-17 above), and the other burdensome costs of organising elections which such deposits may help to allay, the Court does not find the measure arbitrary or falling outside the State's wide margin of appreciation" (§ 72). The Court thus focuses on only one of the criteria set out in the Code, and does not expand on the fact that the deposits were only returned to candidates and parties which obtained at least 4 % of the national vote (§ 14). It therefore does not pronounce on the question whether this 4% figure is excessive. True, the applicant's main contention was that the deposit required exceeded his annual income, with no mention of the 4 % threshold.

2. Failure to reinstate candidatures

19. the case of ***Petkov and others v. Bulgaria***[27] concerned the failure to reinstate candidates on the lists (they had been struck off ("deregistered") following allegations of collaboration with the communist-era secret and security services), despite the annulment of the deregistration decision (four days after the elections in the case of one of them, and two days before in the case of the others).
Under "relevant international documents" the Court quotes the Code at length, particularly the provisions on the "stability of electoral law" (Guideline ii.2.b).
The Court observes in this connection that the difficulties encountered by the electoral authorities vis-à-vis the delays in issuing administrative decisions were attributable to the public authorities because the electoral law "was enacted less than two and half months before the elections (…), at odds with the recommendations of the Council of Europe on the stability of electoral law" and because "the practical arrangements for the application of this rule (on the deregistration of candidatures) were clarified by the Central Electoral Commission just twelve days before the elections". The Court therefore concludes that Article 3 of Protocol No. 1 was violated.

3. Dissolution of political parties

20. In the case of ***Republican Party of Russia v. Russia***[28], the applicant party complained of its dissolution as decided by the Minister of Justice on the grounds that it had a membership of under 50 000 and fewer than 45 regional federations with over 500 members each, contrary to the law on political parties. It relied in particular on Article 11 of the Convention.
Among the relevant international instruments, the Court quotes the Code (§ 61), especially the provisions on the stability of electoral legislation (§§ 63-65).
It notes that "the minimum membership requirement is not unknown among the member States of the Council of Europe", but that "the required minimum membership applied in Russia is quite the highest in Europe" and that "domestic legislation on these requirements has changed frequently over the last few years". It is not convinced by the respondent State's justifications of this legislation, namely that it was aimed at avoiding public expenditure and excessive fragmentation of Parliament, as these aims were achieved by other measures which were already in place. The Court then recalls that "frequent changes to electoral legislation will be perceived, rightly or wrongly, as an attempt to manipulate electoral laws to the advantage of the party in power", an assertion which is very similar to that used in the explanatory report of the Code. The Court concludes as follows: "the applicant's dissolution for failure to comply with the requirements of minimum membership and regional representation was disproportionate to the legitimate aims cited by the Government. There has accordingly been a violation of Article 11 of the Convention".
It should be noted that the Code provides that "democratic elections are not possible without respect for human rights, in particular freedom of expression … freedom of assembly and freedom of association for political purposes, including the creation of political parties", and that

[27] *Petkov and others v. Bulgaria*, No. 77568/01, etc, 11 June 2009.
[28] *Republican Party of Russia v. Russia*, No. 12976/07, 12 April 2011.

"restrictions of these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality". These arguments are similar to those used by the Court.

4. Television coverage of election campaigns

21. This issue emerged for the first time in the case of ***Russian Communist Party and others v. Russia***[29]. The applicants were two political parties which had stood for the 2003 parliamentary elections and six individuals who had voted for these parties. The elections had been covered by the main national broadcasting corporations operating, three of which were directly controlled by the State and two indirectly attached to the State. The applicants contended that the TV coverage had been generally hostile to the opposition parties and candidates and that the United Russia Party, which represented the pro-Government forces, had exerted influence on the television companies to secure favourable reporting, with the result that the elections had not been free.
The Court draws on several international documents and, obviously, refers to the explanatory report of the Code, which stresses equal opportunities and in particular the neutrality requirement for the public media (§ 2.3).
In its (non-final) judgment, the Court basically seconds the findings of the Supreme Court, which had examined an application to cancel the election results. The applicants produced no direct evidence that the Government had abused its dominant position in the television companies. The TV journalists themselves did not complain of any undue pressure from the Government or their superiors during the election campaign. Drawing on the opinion of the OSCE, the Court agrees that the media coverage was not favourable to the opposition, but it considers that it is very difficult, indeed impossible, to draw a causal link between "excessive" political publicity and the number of votes obtained by a party or candidate. It concludes that Article 3 of Protocol No. 1 was not violated.

B. Post-electoral measures

1. Cancellation of elections

22. The problem of the cancellation of an election – an extremely serious measure – arose for the first time in the case of ***Georgian Labour Party v. Georgia***[30]. The applicant party complained of the cancellation of elections in two constituencies, depriving 60 000 voters of their right to vote and preventing the said party from achieving the 7 % threshold required for a seat in Parliament.
Among the relevant international documents, the Court refers (§ 47) extensively to the Code, particularly in connection with "the organisation of elections by an impartial body" (Guideline II.32.1).
It considers that the authorities did not validly justify their decision or surround it with guaranties capable of preventing abuse of power. Noting that the Central Electoral Commission, instead of organising fresh elections in the two districts in question, hastily decided to close the national election without any valid justification, the Court holds that the applicant party's right to stand in an election was flouted in breach of Article 3 of Protocol No. 1.

2. Inability to exercise an elective mandate

23. Can someone have a right to stand for election and be elected, and then be required immediately to renounce his mandate? This seems difficult to imagine at first sight, but this is no academic question, as witness the case of ***Tanase v. Moldova***[31], which concerned a legal prohibition on Moldovan nationals holding a second nationality from sitting in Parliament after

[29] *Communist Party of Russia and others v. Russia*, No. 29400/05, 19 June 2012.
[30] Aforementioned *Georgian Labour Party*.
[31] *Tanase v. Moldova*, No. 7/08, 27 April 2010.

having been elected, subject to undergoing a procedure to renounce the said different nationality.
In its judgment, the Grand Chamber stresses the fact that the international reports, especially those of the Venice Commission, have voiced unanimous concerns and criticisms vis-à-vis the discriminatory effect of the Moldovan law.
Moreover, among the "relevant instruments adopted in the context of the Council of Europe", the Court mentions (§ 86) the Code, and more specifically two passages from its explanatory report, on equal rights for dual nationality holders and the stability of the electoral law (§§ 6 b. and 63-65).
In an attempt to ascertain whether the measure at issue really had the legitimate aim of guaranteeing loyalty to the State (§ 168), the Court notes that the overall electoral reforms have had a disproportionate negative effect on the opposition, that some dual nationality holders are not affected by the law and that the amendments were adopted less than one year before the parliamentary elections: "the Court refers to the Venice Commission Code of Practice, which warns of the risk that frequent changes to electoral legislation or changes introduced just before elections will be perceived, rightly or wrongly, as an attempt to manipulate electoral laws to the advantage of the party in power."
So the Court is clearly using the Code, especially since the terms used are very similar to those of the explanatory report (§ 63: "voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful"). Furthermore, the reference to "one year before the elections" may be seen as a further reference to the Code (Guideline II.2.b: "The fundamental elements of electoral law (…) should not be open to amendment less than one year before an election (…) ").

III. RIGHT OF APPEAL

24. In a number of States Parties to the Convention, electoral litigation commonly comes under the jurisdiction of electoral commissions and then the ordinary courts.

A. Electoral commissions

25. In the judgment ***Georgian Labour Party v. Georgia***[32], the applicant party complained about the composition of the electoral commissions. For instance, most members of the Central Electoral Commission were representatives of the political forces in power. Furthermore, this Commission had reached its decisions on a majority basis, which enabled it to ignore the applicant party's many complaints about the irregularities which it had noted.
Among the relevant international legal texts, the Court refers (§ 47) extensively to the Code, particular in connection with "the organisation of elections by an impartial body" (Guideline II.3.1). It also quotes its explanatory report*:* "(i)n states where the administrative authorities have a long-standing tradition of independence from the political authorities (…) (i)t is (…) acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior" (§ 69). On the other hand, in countries with little experience of organising pluralist elections, independent, impartial electoral commissions in order to ensure that elections are properly conducted (explanatory report, §§ 70-71).
In this case, however, the Court does not go into all the criteria laid down in the Code on the composition of these commissions. Given the applicant party's criticism of the lack of independence vis-à-vis the political authorities, it concentrates on this criterion. While an OSCE report regretted the lack of political balance in the electoral commissions and noted a few cases of dysfunctions in these bodies, the Court notes that there is no evidence that the rights and interests of the applicant party were directly restricted by the action or inaction of the electoral commissions. Moreover, "(t)he Court cannot find a violation of Article 3 of Protocol No. 1 solely on the basis of the allegation, no matter how plausible it is, that the system created possibilities for electoral fraud; instead, the applicant party should have submitted evidence of specific

[32] Aforementioned *Georgian Labour Party*.

incidents of alleged violations" (§ 109). Here again the Court avoids abstract considerations, rejecting the allegation of partiality on the basis of appearances.

B. The ordinary courts

26. Ineligibility of individuals based on their activities within political parties which have been declared illegal and dissolved was central to the cases of ***Etxeberria and others v. Spain*** **and** ***Herritarren Zerrenda v. Spain***[33].
Among the relevant instances of international law and practice, the Court refers to the Code (§ 37) in respect of an "effective appeal system" (Guideline II.3.3).
It notes that *the time allowed to the groupings in question to submit their appeals, viz two days, were short*, and then recalls that *the standards established by the Venice Commission in the "Code of Good Conduct in Electoral Matters" recommend a time-limit of three to five days at first instance***.** It therefore seems to be taking the recommendations of the Code seriously. However, after its analysis *in concreto*, it decided to qualify these abstract principles, to the effect that it had not been demonstrated that two days were too short to allow the applicants to appeal and appropriately defend their interests. The Court therefore concluded that Article 13 had not been violated.

27. The judgment ***Grosaru v. Romania***[34] is particularly interesting as regards the parliamentary representation of national minorities. It concerns a refusal by the Central Electoral Office to grant a parliamentary mandate to a representative of the Italian minority of Romania, even though the latter had received the largest number of votes at the national level in the parliamentary elections, and the fact that this mandate was granted instead to a different representative of this minority, who had obtained the largest number of votes in only one constituency.
Among the relevant instances of international law and practice, the Court makes extensive reference (§ 22) to the Code in connection with "an effective appeal system" (Guideline II.3.3).
It goes on to note (§ 55) that "no national court ruled on the interpretation of the legal provision at issue. Thus, the Supreme Court of Justice rejected the applicant's challenge as being inadmissible, considering that the decisions of the central office were final. Subsequently, the Constitutional Court informed the applicant that it had no jurisdiction in electoral matters". The Court recalls that it is important for such allegations to be examined "in the context of judicial proceedings". A further reference is made to the Code (§ 56) : "That approach has, moreover, been confirmed by the Venice Commission in its Code of Good Practice in Electoral Matters, which recommends judicial review of the application of electoral rules, possibly in addition to appeals to the electoral commissions or before parliament." Considering "the lack of clarity of the electoral law as regards national minorities and the lack of sufficient guarantees as to the impartiality of the bodies responsible for examining the applicant's challenges", the Court concludes that Article 3 of Protocol No. 1 was violated, as was Article 13 of the Convention in conjunction with Article 3 of Protocol No. 1.
The Code would seem to have been particularly influential here because the judgment constitutes a reversal of precedent. It was the Court's first ruling that Article 13 had been violated in conjunction with Article 3 of Protocol No. 1, which combination it had previously avoided[35].

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[33] *Etxeberria and others v. Spain*, No. 35579/03, etc, and *Herritarren Zerrenda v. Spain*, No. 43518/04, 30 June 2009.
[34] *Grosaru v. Romania*, No. 78039/01, 2 March 2010.
[35] Commission (decision), *Estrosi v. France*, No. 24359/94, 30 June 1995; *Pierre-Bloch v. France*, No. 24194/94, 21 October 1997**,** § 64; and aforementioned *Bompard*.

28. In the case of ***Namat Aliyev v. Azerbaijan***[36], a candidate for the parliamentary elections complained of irregularities and violations of the electoral law and of the fact that the elections had not been effectively examined by the authorities, primarily the electoral commissions, but also, subsequently, by the appellate court and the Supreme Court. The latter had set out extremely formal grounds in order to avoid examining the substance of the applicant's complaints.
Having extensively cited the Code (Guidelines II.3.1 "The organisation of elections by an impartial body" and II.3.3 "An effective system of appeal"), which cautions against "excessive formalism in examination of election-related appeals", the Court criticises the courts in question. It states that "such a rigid and overly formalistic approach was not justified under the Convention". Since the point at issue was compliance by the State with its obligation to organise free and impartial elections, the domestic courts should have reacted by taking reasonable measures to investigate the alleged irregularities, without imposing excessively strict and unreasonable procedural obstacles on the applicant. The latter relied not on Article 13 but on Article 6, which is not applicable to electoral matters. However, the Court confirmed its wish to sanction the lack of an effective appeal in electoral matters for the first time by imposing on States a procedural obligation based on Article 3 of Protocol No. 1, finding a violation of this provision.

29. Lastly, in its judgment ***Communist Party of Russia and others v. Russia***[37], the Court accepted that although the appeal facilities made available during the election campaign in order to complain of the partiality of television companies might have been insufficient, the applicants had nonetheless been able to request the cancellation of the results by the Supreme Court. The latter had examined the applicants' requests and issued a reasoned judgment, and its independence had at no stage been challenged. The fact that the Supreme Court had only studied some of the recordings of the TV broadcasts produced by the applicants ("sampling method") did not render this appeal ineffective. Furthermore, the Court did not note any procedural defect in the proceedings before the Supreme Court. In short, there was no violation of Article 13.

CONCLUSION

Partial consideration of the Code

30. As the Grand Chamber stressed in its judgment *Tanase v. Moldova*[38], the Court is careful to consider the relevant international instruments and reports, in particular those issued by other Council of Europe bodies, in interpreting the guaranties provided under the Convention and determining whether there is any European common standard in the relevant field. The Code figures large among these international instruments, and when it is taken into account it has a varying degree of influence over case-law.
The Court has apparently interpreted the Convention "in the light" of the Code in a number of cases concerning the lack of an effective remedy in electoral matters, and also the issue of ineligibility (for instance, non-reinstatement of candidates on the electoral list despite the cancellation of the deregistration decision or the fact that dual nationality holders are barred from exercising their mandates).
In other cases, the influence of the Code seems weaker, merely reinforcing the Court's arguments. This applies to several cases concerning breaches of the right to stand for election (the dissolution of a party, or a deposit requirement), or limitations on voting rights (vis-à-vis convicted prisoners and persons under guardianship).
Nevertheless, the Court has clearly distanced itself from the recommendations of the Code on several occasions. Each time, the Court seems to consider it with interest but ultimately

[36] *Namat Aliyev v. Azerbaijan*, No. 18705/06, 8 April 2010.
[37] Aforementioned *Communist Party of Russia and others*.
[38] Aforementioned *Tanase*, § 176.

decides to discard it, considering that the case under consideration and a concrete appraisal of the situation call for some qualification. For instance, the "post-revolutionary" situation in Ukraine was regarded as requiring flexibility in analysing the stability of the electoral law. The Grand Chamber has also held that under certain circumstances a law could adequately fulfil the requirements of individualising sentences imposed on prisoners, in connection with deprivation of their voting rights. Moreover, the Court is sometimes rather fastidious about evidence, requiring the applicant to specify the extent to which a given appeal time-limit was too short or to report on incidents showing that the action or inaction of electoral commissions infringed his right of appeal.
In short, the Court uses the Code as a valuable source of inspiration, but does not consider itself bound by its requirements.

31. Beyond any comparisons between the conclusions of the Court and the recommendations of the Code, which in fact reveal more complementarity than divergence, the Code has the advantage of shedding a different light on cases, thus elucidating European standards. This fresh light is especially interesting increasing numbers of cases concerning electoral rights are coming to Strasbourg. The past five years have seen many allegations of violations of the right to free from central and eastern Europe (Azerbaijan, Bosnia and Herzegovina Bulgaria, Georgia, Latvia, Moldova, Romania, Russia and Turkey). Two of these countries – Turkey and Azerbaijan – account for the largest number of cases involving Article 3 of Protocol No. 1.

Random compensation for violations

32. Despite the fair number of findings of violation of the provisions of the Convention and Protocol No. 1, the Court has never invited a State "found against" to organise fresh elections, whether in a single constituency or, *a fortiori*, nationwide. And yet it is clear that in many fields it no longer seems to hesitate in applying Article 46 of the Convention, particularly with regard to judgment enforcement. There are several possible explanations, apart from the politically sensitive nature of the issue. Applicants do not usually demand fresh elections, knowing how difficult the procedure would be, especially as they have since spent some time exhausting domestic remedies and implementing the Strasbourg proceedings. Furthermore, fresh elections, which may be less open to criticism, have in most cases been held in the meantime. In short, *restitutio in integrum* here seems if not impossible then at least extremely difficult. The Court's cautious approach is obviously also adopted by the Committee of Ministers of the Council of Europe.

33. This leaves the possibility of the Court granting the victim of the violation "just satisfaction" under the terms of Article 41 de the Convention. Such compensation does not concern material damage, because the Court refuses to conjecture about a candidate's chances of being elected or the latter's failure to receive the remuneration or allowances payable, for instance, if he or she had been elected to Parliament. On the other hand, the Court may grant a sum of money for the non-material damage caused by the violation. It also sometimes confines itself to declaring that the finding of violation is sufficient.

34. Beyond individual compensation, the question of enforcing the Court's judgments is fairly serious since many of the "electoral" cases submitted to the Court point to underlying structural problems. In this connection, the United Kingdom's persistent refusal to grant voting rights to convicted prisoners is a major cause for concern, especially as, if we set aside such geopolitical problems as Cyprus and Transnistria, it is the first ever case of deliberate non-enforcement of a judgment, issued, moreover, by the Grand Chamber.

35. At all events, democracy is and will remain the only political model envisaged by and compatible with the Convention. And of course genuine democracy is impossible without genuinely free elections.