Strasbourg, 30 October 2008 **CDL-UD(2008)005**

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
THE CONSTITUTIONAL COURT OF MALTA
AND THE MINISTRY OF JUSTICE AND HOME AFFAIRS

UNIDEM SEMINAR

"CANCELLATION OF ELECTION RESULTS"

Mediterranean Conference Centre, Valetta, Malta

14 – 15 November 2008

JUSTICE COMING FACE TO FACE WITH ELECTORAL NORMS

by
Mr Slobodan MILACIC (France)
Professor Emeritus at Montesquieu University – Bordeaux IV
Centre d'Etudes et de Recherches sur les Balkans

Process precedes rights

Allow me to begin by explaining my choice of "viewpoint" for this paper.

The idea is to **situate electoral norms among the other constituent norms of a law-governed state and the justice system in relation to the other branches of government in a democratic state, that is to say, a political state,** since, by definition, the pluralist democracy which we claim to be is either political or is not.

Such an approach, which ranges from the general to the particular[1], seeks to understand the issues in themselves, but also in the context in which they arise. It **provides insights into electoral disputes through the general "laws" that govern our system; the system and "the spirit of the law", i.e. systemic laws. The system, however, is complex and ambivalent, for it incorporates both the legal and the political; the – democratic - law-governed state and the – democratic - political state.** As in the case of constitutional proceedings involving political elections, where formal legal rules concerning the run-up to and the conduct of elections and the publication of the results must be considered in conjunction with the substance, not to say the political nature, of the complaint and where there is bound, at some point, to be a degree of interaction between the two. Thus, what is essentially a legal – or even jurisdictional – authority can, on occasion and to some extent, involve or "encroach" on matters political, in the same way as political authorities interpret legal rules, if only by applying them. **Historically speaking, our system of constitutional democracy has developed in a largely empirical manner, shifting to accommodate the pragmatic necessities that arise, often in contradiction with notions of legal or political "purity".** This relative flexibility has been one of the factors in the enduring nature of democracy, and in its "moderation" (Montesquieu), largely synonymous with rationality, which has itself now come to be associated with what is reasonable or indeed realistic.

That is why we felt it was best to take a theorising approach, **seeking to situate disputes relating to political elections** (parliamentary, presidential and referenda, in France) **in and through state systems of law and politics, in all their breadth and complexity,** in the hope of gaining a more thorough understanding of their "meaning and scope"[2].

Practitioners of the law and those who deal with disputes in particular will hardly need reminding that the two types of approaches, or even cultures, involved here, although very different, are, at bottom, mutually complementary. Theoreticians systematically look to what is happening "on the ground" to provide them with fresh ideas while practitioners must refer to conceptual categories to guide them in their pragmatic and casuistic approach.

---

[1] And what scholars refer to as "hypothetico-deducive" methods.

[2] Theory is not like life, capable of being observed directly; nor is it the sum of the cases observed in a particular field over a particular period. Rather, it is the interpretation of observed phenomena, which calls for an extrapolative approach: selecting, filtering and subjecting to analysis in order to single out only that which is most typical, illuminating or comprehensive.

Theory, then, is first and foremost about providing an overview or, in today's vernacular, a global perspective. "There is no theory other than that of the general," as the ancients put it, for the whole helps us to better understand the parts, and vice versa.

It operates through ideas, that is to say, abstractions, or concepts: definitions that have been codified to a greater or lesser degree by the discipline in question.

Elevation to the rank of theory is thus accomplished through the linkage of interdependent, major concepts, within a whole which, although complex, is coherent as an issue, which then becomes the new, rather more modest, name for theory, whose genius lies more in the questions it poses than in the answers it offers.

These preliminary remarks having been made, we will look firstly at the system of the democratic, law-governed state, and the special place occupied there by legal norms and the courts, alongside the ballot box and majorities as a sort of "electoral sanction" if not an arbiter of political power. We will then endeavour to sketch out this oversight, up to and including the annulment of political elections by France's Constitutional Council, since that is the central theme of this seminar.

I
JUSTICE AND NORMS IN A DEMOCRATIC LAW-GOVERNED STATE

or

the interrelationship between the legal and the political

"Constitutional democracy"[3] was the fashionable term in the 1970s, shortly before the "reinvention" of the "democratic law-governed state". The latter developed **with neo-liberalism,** but fairly soon the adjective "democratic" was dropped, leaving the law-governed state alone to serve as the principal frame of reference for our system of government, or rather our system of political governance. The truncation occurred both at a superficial and at a deeper level; it was both semantic and substantive, where political matters are concerned[4]. It has its roots not simply in the pressure for catchy, simplified language in today's fast-moving world but also in the fact that **political democracy, again essentially state-based, is having trouble finding its niche, eclipsed as it is by the rule of law.** Since then, the word "democratic" has come to be used in legal texts and scholarly writings more as an adjunct to the notion of a law-governed state than as an integral part of it, or else as merely one of several components. National, EU[5] and international positive law make trade-offs between the concepts involved, through juxtaposition or enumeration[6], while legal theorists have difficulty combining them into a whole. To our knowledge, of the major international instruments produced in recent years, only the Council of Europe's rank democracy first in the organisation's trio of core, founding values: democracy, rule of law and human rights.

On closer inspection, however, i.e. from a more theoretical standpoint, these three cornerstones of legal instruments concerned to properly reflect the interplay of cultures, can be seen to boil down to a conceptual dichotomy between the law-governed state and a state based on political democracy, providing, as it were, a pleasing symmetry and complementarity between the two paradigms on which our system rests.

The "rule of law" is a vastly important and long-standing principle of English law but, more specifically, the theory of the law-governed state originated in Germany (*Rechtsstaat)* and was developed in continental Europe. It implies as a basis the rule of law not only in terms of formal references but also, and above all, in terms of the liberal substance of the law, with the primary focus on human rights. The rule of law, furthermore, applies to all of the law that concerns us here, including constitutional, institutional and political law. Today the notion of the law-governed state is becoming "decoupled" from that of the rule of law through a rigorous view of the hierarchy of norms and, above all, through the requirement for judicial review of the constitutionality of laws, with a distinct European preference for the Kelsenian model (a special constitutional court) over the American model (where the ordinary courts also rule on constitutionality).

---

[3] The term coined by the American constitutionalist, Carl Friedrich.

[4] There is as much difference between "government" (in the Anglo-Saxon sense of "system" of government) and "management" (as in the management of public and even private policy).

[5] Such as that on the European constitution, for example.

[6] Through enumeration or juxtaposition of the key references, rather than through an integrated vision of democracy and the law-governed state.

In the end, this last example brings us back to the major conceptual dichotomy of political democracy versus law-governed state.

It is no accident, therefore, that, throughout history, our system of government has needed two frames of reference to define itself: **first the liberal, constitutional and ultimately pluralist democracy and, second, the law-governed state, coupled with political democracy, itself essentially state-based**[7], since the 1970s-80s and the rebirth of postmodern liberalism.

These twin foundations, both liberal and democratic, which give our system its complexity and also its distinctive and profound genius, are evident to a greater or lesser extent, throughout its organisational structure, where they occur in varying proportions. We will come across them again in the context of electoral disputes, where they are more closely interwoven than elsewhere.

Today, the liberal law-governed state and the democratic political state go hand in hand, but it was not always thus. The relationship between the two paradigms is an asymmetrical one: a law-governed state, even a liberal one, can exist without democracy and indeed predates it. Some representative "governments" in the form of monarchies have been very liberal with "civil liberties" in particular individual ones. A pluralist democracy, on the other hand, is conceivable only within the framework of a law-governed state.

A brief – and diagonal – journey back in time[8] will help us to understand the distinction, at least for the purposes of analysis, between what we will call legal liberalism and political democratism.

A. The history of the twin juridico-political concept: liberal democracy

While modernity began with the Age of Enlightenment, in France the main turning point was the French Revolution of 1789 and the rise of liberalism[9], which in turn paved the way for the gradual growth of democracy, throughout the 19th century.

Liberalism establishes freedom as a core principle, both as a founding myth and as an ultimate end to be achieved. Ever since, the intention has been that it should be exercised in a competing manner, i.e. "freely", under the supervision of the courts, as the ultimate guarantors of freedoms and property rights in particular. Freedoms were thus "bestowed" from "above" on individuals by way of "civil liberties" and on towns and citizens via charters.

In these circumstances, the law was the principal logistical force behind liberalism, just as politics would later be for democracy.

Based on promises and revolutionary events, **with egalitarianism as a "founding principle", universal suffrage as a means of securing political legitimacy and the ballot as a sort of electoral sanction or arbiter, political democracy came, as it were, to serve as a backup, if not a bulwark, for legal liberalism,** thanks to the synergy and also the constantly negotiated trade-offs between the two "sub-systems".

As a result, our system has become more complex. **Freedom and equality, norms and elections, the courts and majorities have thus found themselves operating in complementary or even synergistic ways. And in some cases, too, competing or even**

[7] Rather than international or local, two levels to which the term "democratic" or even "political" should never be applied lightly.

[8] With the focus on the French experience, although, in this area, the other European democracies followed the same basic route.

[9] The democratic parameters of the discourse on the power of the people and the participation of the working classes in the key events, including the storming of the Bastille.

conflicting with one another[10]. Both as means of conferring legitimacy and, conversely, as a type of sanction. **This is not the first time here that contradictions have been noted between the rule of law and democracy.**

B. Legal rules and political elections as sources of legitimacy

In the two centuries that followed 1789, **there were three main periods when the two paradigms of our system were somewhat out of balance.**

Early liberalism was built on constitutional or other norms, organising civil liberties and the competition they engendered. Such voting as existed under the representative system of government was confined to the nation's "élites" who were both "electors" and themselves eligible for election. **In disputes, norms were safeguarded by the courts and the political branch of government by extrapolation from the idea of "peer justice",** with the political authority being transformed, for the purposes of the case, into a judicial one. It was a way for the judicial sphere to win ground from the political branch in the days before its historic rise.

With the advent of universal suffrage and the parliamentary Third Republic, in 1875/1877, **legal liberalism gave way to democratic politics,** to summarise rather crudely.

Priority was often given to ballots rather than to norms, which were seen as being the product of, and at the mercy of, the former; this was equally true of statutory or even constitutional norms and even more so of jurisprudence, as a source of law. The principle of legality was, of course, widely proclaimed and endorsed, but not the review of constitutionality. **Certainly the "legal state" possessed elements of the "rule of law" but parliament and the political class did not come under the jurisdiction of the courts.**

The pendulum this time had swung in favour of political democracy.

It was inconceivable back then that the courts (ordinary or special, the constitutional court did not yet exist) might penalise the political class for electoral infringements.

Throughout the near-100-year history (Third and Fourth Republics) of political democracy, electoral disputes were a matter for political, that is, parliamentary bodies and procedures. It is what eventually came to be known as the "verification of mandates procedure", which could be applied either systematically or sporadically. The political parties were then both judge and jury, with the inevitable result that the process became politicised, eventually dying out with the Fifth Republic. Initially de Gaullian, with the decline of parliamentary authority in general, this later evolved into a Gaullist republic with the triumphant return of liberalism, or "neoliberalism", and a new emphasis on legal rules rather than the ballot and on the constitutional court rather than statutory and electoral norms.

Nowadays it is the Constitutional Council, the "French-style" constitutional court, which deals with disputes involving the election of deputies, senators, the President of the Republic and referenda. And in keeping with this process of constitutionalisation, electoral law and electoral disputes, hitherto regarded as something of a backwater, are once again coming to the fore.

The disputes that concern us here now need to be seen in the wider context of a system where "liberal" often takes precedence over "democratic". Constitutional norms are frequently accepted in legal and even political practice as the supreme source of legitimacy, without

[10] Like the founding principles which are said to form the core of the common heritage of values and yet which are often a source of conflict between the Left (too much freedom is detrimental to equality) and the Right (too much equality is detrimental to freedom, as equality is apt to lead to egalitarianism).

looking beyond those norms, to the elections that produced them, for example. Alternatively, attention is directed to the universal values provided by natural law, as an expression of the rationality that transcends politics.

It is imperative, however, that this dual structure of our system should not be viewed in dogmatic, still less black and white terms. Freedom and equality as founding principles, legal rules and political ballots, the courts (with the rights of the defence) **and the majority** (with the rights of the opposition) **operate in synergy and complementarity and sometimes, too, in tension and conflict,** the peaceful outcome of which, through political negotiation or legal reform, is always possible and indeed foreseen.

Freedom and equality (among other things, of course), rules and elections, courts and majorities are part of the consensual legacy of values and methods of governance. They are, at any rate, common frames of reference. The two main political currents of liberal democracy[11], however, do not give precisely the same substantive meaning to the principles invoked[12] (freedom and equality) and – in particular – do not rank them in the same way, as, for example, in the case of legal and political methods (disputes and elections).

The general theory of the democratic, law-governed state having thus been, for the most part, expounded, our next task is to situate the constitutional court in relation to electoral disputes, as it appears in France.

II
JUSTICE AND ELECTORAL DISPUTES

or

The justice system as guarantor of freedom and democracy

With the advent of the Fifth Republic, the task of judging elections, that is, "national" or state elections, passed chiefly to the Constitutional Council. Some authors (notably Dominique Rousseau) have lamented the fact that the Council does not have ordinary jurisdiction to rule on elections, a sign, albeit indirect, of the high regard in which the institution is now held, after a slow, gradual process of evolution both as a constitutional court in general, and as a court dealing with elections in particular.

Despite the progress made in this respect, some constitutionalists are disappointed that the Constitutional Council has not gone further in reviewing compliance with the rules of the democratic process, in particular those relating to equality in terms of initial conditions and/or opportunities. Others feel it makes too much of these as it is and accuse it of behaving like a "political court", without being too specific, however, about whether it is the Council's make-up that is the problem (political appointments) or its decisions (described as "partisan").

We therefore propose to examine the principle of judicial review of elections on which the French model is based, before turning our attention to the few advances made by the Constitutional Council's case-law with regard to the implications for freedom (to vote and to stand for election) and equality (in terms of the conditions enjoyed by voters and candidates).

Depending on the different state systems, the interplay between the legal and the political is

[11] In everyday terms, "the – classic – liberal right" and "the – modern – democratic left" as they were known not so long ago, before neoliberalism.
[12] The same applies to dignity, solidarity, etc.

generally organised in two ways[13]:

- the political body (Parliament) reserves this competence for itself as a "sovereign power" or recourse is had to the fiction of the transmutation of political authority into judicial competence, which would then act in that capacity;
- alternatively, electoral disputes are dealt with by the courts (ordinary or specialised, constitutional courts).

For a long time, it was traditional in France for courts to be kept out of the political arena, which had sole power to review political elections. With the advent of representative government, and later parliamentary democracy, the system of "verification of mandates" (whether systematic or sporadic) took hold. The "representatives of the nation" were thus both "judge and jury" up to and including the Fourth Republic. **This was the period in history when the dominant paradigm was political democracy, with all its inherent imbalances and in particular the tendency to substitute "parliamentary sovereignty" for "popular sovereignty".** Various consequent frustrations undermined support for this system of dealing with electoral disputes, however. The withdrawal of seats from 25 of the 53 Poujadist deputies elected in 1956 effectively sounded its death knell, a fact that was acknowledged by the Fifth Republic in 1958 when most of the powers of review which concern us here were transferred to the constitutional judge.

A. Judicial review of political elections

There is no question that reviewing political elections is a "patently judicial" function. The Constitutional Council is the "electoral court" and as such has "full jurisdiction", i.e. it can examine any question and exception raised in the application.

Substantively speaking, however, this is an eminently political matter. Political democracies are first and foremost electoral in nature. Granted, we are no longer in the inter-war period and **nowadays the notion of a pluralist democracy is about more than simply elections** or even voting in general. **Political elections, however, remain central to the democratic system.**

The court in these circumstances is expected to provide external or formal legal oversight of procedural acts and decisions, whether they relate to the run-up to elections, the actual ballot itself or publication of the results.

This contentious jurisdiction in electoral matters is exercised by the Constitutional Council in a cautious and highly inflected manner.

Where an application is manifestly inadmissible, the Council will dismiss it without giving judgment[14]. It does not wish to be inundated with groundless, frivolous or perverse complaints nor does it want to see elections needlessly tainted by the doubts that can occur when there is a large number of challenges, even unfounded ones.

At the other extreme, it draws the line at judging the sincerity of candidates' commitment to the ideas they profess **or interfering in parties' internal affairs** by checking to ensure that party appointments have been made in the proper manner[15] or examining

[13] Not forgetting the system of electoral commissions, which are often "backed up" by the court as an appeals body.

[14] It dismisses without any preliminary inquiry complaints that have been filed too early or too late, complaints the purpose of which is unconnected with the proceedings and, generally speaking, any complaints where it is clear that the alleged infringements could have had no bearing on the outcome of the ballot: closure of a polling station a few minutes before the allotted time, candidate subjected to insults by voters, lengthy wait in order to vote, etc.

[15] 25-XI-2004, S., Yonne.

matters relating to parties' internal operation[16].

Operating between these two poles, the Constitutional Council generally exercises its supervision with a fair degree of caution. It is, as you might say, "prudent" in its juris-"prudence"!

Initially more modest or less "interventionist", its primary concern was to preserve voters' freedom of choice, while at the same time striving for "effectiveness". It thus has no hesitation in dismissing "lesser" complaints: minor overspends on elections; limited-scale distribution of leaflets to which the person in question has had time to respond, or as a reciprocal measure; unlawful or unwarranted pressure that cannot reasonably be said to have reached a dangerous level, actually interfering with freedom of choice.

In all these cases and more, the court will refrain from declaring an election void.

Some legal theorists have criticised the Constitutional Council for being too timid in this respect. Such **self-restraint, however, dates from a time when the Council was still building its legitimacy, on rather fragile constitutional foundations,** and was anxious not to encroach too much on the other branches of government which had to "suffer" the gradual widening of its scope and the increasing intensity of its activity[17]. In these circumstances, **it was particularly afraid of being seen as a "political court"** vis-à-vis the other two political authorities, with whom it had no wish to enter into open rivalry.

As the system of the Fifth Republic has developed, however, the Constitutional Council has come to assume a greater role, as will become apparent in the context of electoral disputes.

B. Towards the court as guarantor of freedoms and democratic rules, up to and including cancellation

With the rise of "**neo-constitutionalism" as an expression of "neo-liberalism" under France's Fifth Republic, legal norms have acquired greater prominence and hence, too, legitimacy, eclipsing political ballots.** The new imbalance between the two founding paradigms, which has already been highlighted, seems also to have manifested itself in the sphere of electoral disputes, enabling the constitutional court to venture rather more boldly into the territory of substantive rather than merely formal review of electoral irregularities. In so doing, it may have been encouraged (although not enough, according to some writers) by the fact that its legitimacy is no longer grounded solely in its more or less direct link with universal suffrage. To a large extent, then, the French constitutional court appears to have secured the legitimacy which it was initially said to lack, so much so, indeed, that some writers consider it to be a "representative of the people" in a constitutional and judicial capacity. It makes its rulings, if you recall, "in the name of the French people" but, most importantly, its ground-breaking case-law has introduced French law to new values and ideas, which are then taken up by the legislator.

For example, **compliance with rules and procedures as such has become a more powerful factor for legitimacy than in the past**[18]**.** There have been cases of governments

[16] 28-VI-2007, A. N., Bas Rhin, 3e.

[17] Particularly in the electoral field where it has "unlimited jurisdiction", whereas its jurisdiction in ordinary matters is preventive in nature.

[18] In the United States, the home of "constitutional patriotism", playing by the rules has always been of paramount importance. There have been several cases in history, including recent history, where the candidate elected president by the presidential "grand electors" did not win the majority of the popular vote, or even where the elected candidate had fewer popular votes than his defeated rival. In Europe such a situation would be barely conceivable. The United States, however, has come to accept this paradox for, however tough the final outcome might be, the rules are the rules. Such procedural "hitches" are regarded as an unavoidable hazard of the

(L. Jospin's for example) scurrying to the Council in advance for confirmation that their bills are constitutionally sound, so that they can turn round later and claim to be "good constitutionalists"! Similar attitudes and behaviour have been observed in electoral matters. All this has helped **nudge the court towards the realm of substantive and hence political – liberal and democratic – law where it has come into contact with the basic principles and thinking which inform that law; liberally or democratically inspired rules and the spirit behind them.** As an electoral court with "unlimited jurisdiction", the Constitutional Council can rectify material errors, correct the tally of votes[19], amend the list of elected candidates or quite simply declare an election void. Such annulments are always effected on an individual basis, even when there are as many as ten candidates involved, as happened in the case of a proportional representation list[20].

Although annulments remain rare[21], they reflect a growing recognition of the basic conditions required for "freedom of voters to form an opinion": voters must have a "genuine choice" and candidates - equal opportunities. The Council now makes the link between the freedom of voters to form an opinion and the democratic exercise of that freedom: the existence of a genuine choice, and of credible competition.

Generally speaking, the Constitutional Council considers that a substantive irregularity undermines the integrity of electoral operations and, hence, democracy itself. It is all a question of the level of severity.

Elections have accordingly been annulled in the following instances: irregularly constituted polling station[22]; irregularities in the counting of votes[23]; substitute not eligible to stand for election[24]; failure to update the electoral register[25]; irregular registration[26]; spending on elections beyond the maximum limit[27]; lack of financial transparency[28]; undue propaganda to which the rival candidate has no opportunity to respond[29]; mass distribution of leaflets[30]; allegations of a particularly virulent and misleading character[31]; large number of irregularly constituted proxies[32]; temporary disappearance of a list of signatures in an election that was won by a single vote[33]; pressure on voters[34]; voters prevented from moving freely around the counting tables in an unlawfully constituted polling station[35].

In presidential elections and referenda, there have been no annulments but there have been a number of cases where supervision has "encroached" on substantive law. France's Constitutional Council has no jurisdiction to rule on acts passed by referendum which are "the direct expression of national sovereignty" (1962) and while, generally speaking, it cannot

---

electoral process. At the end of the day, as in certain sports such as tennis, the player who wins the most sets wins the match, even if he or she lost the majority of the games. The rules are sacrosanct.

[19] Again out of concern to be effective, the Council may validate certain ballot papers which the electoral commission has deemed void if to do so would enable the political movement in question to secure 5% of the vote and obtain a refund of their campaign expenditure. This case-law stems from a concern to ensure a wide range of political ideas in the interest of freedom of expression and choice.

[20] In Haute Garonne, in 1986.

[21] For further details, see below.

[22] 19-II-1963, A. N., Réunion, 2e.

[23] 12-II-1963, A. N., Gard, 2e.

[24] 5-VII-1973, A. N., Lourdes, 1ère.

[25] 23-XI, 1988, A. N., Wallis et Futuna.

[26] 12-VII-1978, A. N., Paris, 16e.

[27] 24-XI-1993, A. N., Paris, 19e.

[28] 16-XI-1993, A. N., Loir et Cher, 1ère.

[29] 7-VI-1978, A. N., Seine Saint-Denis, 9e.

[30] 3-XII-1981, K. N., Paris, 2e.

[31] 7-VII-1993, A. N., Loire Atlantique, 8e.

[32] 25-XI-1988, A. N., Bouches du Rhône, 6e.

[33] 3-V-1996, S., Vaucluse.

[34] 23-X-1997, A. N., Haut-Rhin, 6e.

[35] 21-X-1988, A. N., Meurthe et Moselle, 19e.

prevent a referendum that is actually a plebiscite in disguise, **it considers itself competent to rule on the constitutionality of the referendum operation and requires that the question put to the electorate be "clear and fair"**, failing which it could condemn the question as "equivocal". The Council could also bring a measure of influence to bear by refraining from giving the government its opinion, a move which would certainly cast doubt on the referendum. Last but not least, it can make comments and suggestions about the list of bodies entitled to use official means of propaganda (any opinions given in this connection must be given confidentially, however).

This tribunary or pedagogical advisory function is even more wide-ranging in parliamentary elections where it extends to the use of opinion polls, financial transparency and transparency in the lists of "sponsors".

Despite the few inroads made into substantive law, the Council has set itself boundaries, of both a quantitative and qualitative nature. **It requires that any irregularity attain a certain level of severity and has ordered few annulments overall.**

Since the beginning of the Fifth Republic, it has annulled the election of 57 deputies and 9 senators, **which makes 66 cancellations in all,** there having been no annulments in presidential elections or referenda.

If we consider that up until 2002, there had been 12 general elections in 500 constituencies, on average, **that is a relatively small number.** Especially given the very pronounced tendency of voters to re-elect the person whose mandate was declared invalid!

Also worth noting is the fact that, out of concern for effectiveness, **the Council will refrain from annulling an election that was irregular if correcting the difference in the number of votes will not change the final result. Some writers** have expressed indignation that quantity should be the determining factor in the decision whether or not to cancel, even going so far as to describe the practice as "**amoral**" and **conducive to a "culture of impunity**".

When the Council conducts reviews and imposes penalties that might seem overly selective, however, it is merely acting in keeping with **the spirit of the system which marries a concern for "representativeness" through genuine freedom[36] of will and choice with a concern for "good governance", and the proper functioning of democracy[37], through its insistence on political competition.**

For a long time, electoral disputes were kept in the shade, regarded as being of lesser importance and as such a matter for the ordinary courts or special electoral commissions. **With the advent of neo-constitutionalism and its emphasis on the rule of law and legal norms,** however, things have begun to change. **Compliance with legal rules is becoming an increasingly effective test of legitimacy.** The more so since with the general trend towards the blurring of distinctions between political philosophies, we are gradually moving towards a system of government or governance based on consensus. As a result, the focus of legitimacy has shifted to election processes and procedures as safeguards for the free formation of political opinion and equality of opportunity, or "proper competition" between candidates.

France's constitutional court could afford to address certain political, i.e. democratic aspects of elections, rather more boldly and with greater transparency. In 1791, Mirabeau, addressing the National Assembly, **said that electoral disputes were one of the most important political issues with which we had ever had to contend.** And the experience of Germany's Constitutional Court shows that numerous political issues can be

[36] On the part of voters, in particular, as regards the freedom to form and express opinions.
[37] Equal opportunities, i.e. competition between candidates.

translated into constitutional terms in order to find a solution to them, or at least a legal formulation. **Electoral democracy could benefit even more from the logistics of the rule of law.**

France's Constitutional Council has sometimes been criticised for being a "political court", specifically in the context of electoral disputes. Such charges, however, are too ambiguous to be convincing, if all they rely on is slogan or cliché, without any further critical analysis to support them.

The fact is that the political sphere, as a subject, constitutes the principal part of constitutional law. More specifically, democracy as a legal "regime" and political "system" is set within the framework of the rule of law. It could even be argued, from the point of view that concerns us here, that **democracy exists and is realised only through the collective uses made of the rights and freedoms affirmed and guaranteed by a liberal, law-governed state *stricto sensu.* By intervening more boldly in electoral disputes, the court does not necessarily become "political". It does not presume to give opinions on political discourse (of candidates or parties) or public policy (by examining the balance between ends and means or promises and results) but merely verifies that the rules of politics, in the sense of majority or opposition "party politics", are observed in a fair and transparent manner. One does not become a "political judge" by being a judge of politics, and of the system through its rules, which are necessarily a reflection of its ideas and core values, or, as Montesquieu would say, its "spirit".**

To sum up the French experience

To sum up and comment on the basis of France's experience of judicial review of political elections, let us look again at the oft-repeated claim that the Constitutional Council monitors little and badly. To a large extent, the two criticisms overlap, since the implication is that to monitor "little" is in and of itself a bad thing!

Depending on whom you read, the Council cancels "little", "very little" or even "too little", doubtless for fear of being seen as a "political court", which is one of the charges frequently levelled at it. We have already tried to rebut this argument with our suggestion that being a judge of political matters is not the same as being a "political judge", either statutorily, in law and in fact, or functionally, through "tendentious", "partial", "politicised" or "partisan" decisions. By the same token, when a court rules on legislative matters, that does not make it a legislator.

This criticism that the Constitutional Council cancels "too little" proceeds from a concern for democracy and democratic ethics in particular. Some critics have described as "amoral" the general tendency to adopt a strictly mathematical approach when deciding whether to punish certain irregularities. In cases involving electoral fraud, the Council will not act if the number of votes liable to be annulled is too small to affect the end result. Yet surely, goes the argument, this creates a sort of incentive to commit fraud, since a candidate will in that case have every reason to commit fraud extensively in order to widen the gap with his rival! And by extension, where serious irregularities are committed by both candidates, the Council will be apt to conclude that since the breaches are of equal "weight" in terms of their severity, they cancel each other out[38]. It could even be said that the Constitutional Council, unintentionally of course, pushes candidates into a sort of "tacit agreement to defraud" or, for that matter, to "out-fraud" each other because, ultimately, if the winner has significantly more votes than his rival, his election will not be annulled and neither will the other candidate's (also voidable).

[38] Constitutional Council decision of 11 May 1989, where Mr Tapie exceeded the maximum permitted expenditure, as did his rival, Mr Teissier, whose expenditure was of "a similar type and volume". In the circumstances, it was held that "their mutual disregard for the law did not have the effect of undermining voters' freedom of choice or the integrity of the ballot".

The reasons for this reluctance to annul can be traced back to the judicial institution itself. From the general spirit of the Council's case-law in electoral disputes, it will be observed that the court's stance has always been one of self-restraint when presented face to face with the sovereign electorate[39], with whom, as has already been pointed out, it is disinclined to meddle.

It strikes us, however, that in principle, there is no reason for the Council to be more restrained, timid even, when dealing with the body of voters in electoral disputes than when dealing with the "body" of constitutional law, which is, even more so than ordinary law, the direct expression of the constitution-making sovereign.

Particularly as unlike referenda, where the sovereign votes in a blanket fashion, parliamentary elections are annulled in an individual (based on the candidate concerned) and partial manner (based on the constituency). It is not as though every - fraudulently – elected candidate across the country is going to have his or her mandate declared invalid, thereby producing a new, overall winner. And yet, legally speaking, that is the only circumstance in which the sovereign could properly be said to be directly involved.

[39] Of particular note was the 1962 Constitutional Council decision in which it refused to review legislation passed by referendum, deeming it to be a "direct expression" of the sovereign.