



**MINISTERIO DE  
LA PRESIDENCIA**

**CENTRO DE ESTUDIOS  
POLÍTICOS Y CONSTITUCIONALES**



Strasbourg, 16 April 2009

CDL-UD(2009)006  
Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**in co-operation with  
THE POLITICAL AND CONSTITUTIONAL STUDIES CENTRE (CEPC)**

**UNIDEM Seminar**

**"SUPERVISING ELECTORAL PROCESSES"**

**Madrid, Spain, 23 – 25 April 2009**

**ELECTORAL DISPUTES – SUBSTANTIVE ASPECTS**

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## Introduction

As the ancient Romans remarked, laws without judicial sanctions represent declarations of intent rather than legal rules. There can thus be no disputing the importance of electoral disputes. In his report, Mr Darmanovic has described the various bodies responsible for such matters in Europe while other contributors have focused on what happens elsewhere, particularly in Latin America.

The types of electoral dispute heard by constitutional courts and their equivalents in Europe, not to mention those coming before the European Court of Human Rights, vary greatly. This report looks at the content of such disputes. It is based on judgments of European constitutional courts and equivalent bodies concerning elections recorded in the Venice Commission's CODICES data base.<sup>1</sup>

We will briefly summarise the main electoral issues dealt with by the courts and then look in more detail at a number of major topics and judgments, with an emphasis on important areas of common interest.

### The main subjects of electoral disputes: summary

As will become quickly evident, electoral disputes are not confined to voting irregularities.

What is immediately striking is the number of cases concerning referendums. Yet apart from Switzerland, where referendums are frequent, and to a lesser extent Italy, direct democracy plays a much more marginal role than representative democracy in Europe. At first sight, therefore, the frequency of such cases is rather surprising. The explanation may lie partly in the restrictions on the right of referendum, regarding both the substance<sup>2</sup> and the decisions that might be the subject of a referendum.<sup>3</sup>

The remainder of this report looks at elections in the true sense. Such cases might be expected to be mainly concerned with electoral fraud and its consequences. However, this is not the case. Although cases concerning the right to vote and eligibility to be elected appear slightly less frequently in national courts than in the European Court of Human Rights<sup>4</sup> they are still the most common. However, these are rarely the most sensitive cases or the ones with the most serious consequences.

Refusal to grant the right to vote rarely leads to an election being annulled. There have to be extreme irregularities in electoral registers before this occurs, and the cases considered only throw up one such example.<sup>5</sup> Refusal to recognise eligibility to be elected is clearly more problematic, but it ought to be possible to settle the case before the election.

In electoral matters, and unlike in other areas, the cancellation of a mere decision (the validation of the election) may have more serious consequences than that of a law. Inviting the relevant authorities to revise the electoral system to provide more proportionality<sup>6</sup> or avoid so-

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<sup>1</sup> <http://www.codices.coe.int>, which is also available on CD-ROM. The judgments are also published in the Venice Commission's Constitutional Case-Law Bulletin. They are cited here as in that publication.

<sup>2</sup> Examples: HUN-1993-1-001 (judgment of 22 January 1993): parliament cannot be dissolved by popular referendum; UKR-2008-1-007 (judgment of 16 April 2008): the right of popular initiative applies to all areas other than ones excluded by the constitution from the scope of referendums.

<sup>3</sup> Examples: HUN-1993-1-001 previously cited; ITA-2000-3-010 (judgment of 14 November 2000): referendums on the repeal of laws may not affect provisions of the Constitution; SVK-1997-2-005 (judgment of 21 May 1997): the constitution may not be revised directly by referendum.

<sup>4</sup> See Mr Lopez Guerra's report.

<sup>5</sup> ARM-2002-H-001 (judgment of 1 October 2002).

<sup>6</sup> CZE-2001-1-001 (judgment of 14 January 2001).

called natural quorums or thresholds of 10% or more<sup>7</sup> is rather less extreme than overturning the election of a president or an entire parliament. Courts have shown a certain readiness to overturn elections in revolutionary situations but otherwise have been reluctant to do so. So a purely quantitative analysis of types of cases does not necessarily reveal which are the most important ones.

The general rule is that an election will be declared invalid if an irregularity could have influenced the outcome.<sup>8</sup>

Based on the principles governing European elections as laid down in the Venice Commission's Code of Good Practice in Electoral Matters,<sup>9</sup> the Council of Europe reference document on the subject, the following types of judgment can be identified:

- Universal suffrage is undoubtedly the most frequent subject at issue, but infringements of this principle are generally limited in scope, involving the right to vote or eligibility of an individual or restricted group of individuals.
- The question of equal suffrage takes a variety of forms, ranging from dual voting for members of national minorities, which raises the problem of equal voting rights, to the allocation of seats between constituencies (equal voting power), equal opportunities during election campaigns and gender equality.
- Issues relating to voters' freedom to vote or to express their wishes, and related problems of fraud, do not come up very often, and voters' freedom to form their opinion even less frequently. This is not surprising though since until recently there has been much more emphasis on the lawful conduct of elections themselves than there was in the past. Moreover, voters' freedom to form an opinion is also dealt with from the standpoint of equal opportunities.

Other issues arise more sporadically, such as problems relating to secret voting or direct suffrage, or challenges to aspects of the electoral system, particularly quorum requirements, which may in any case be linked to the equality principle.

The courts have also been called on to consider what are referred to in Part II of the Code of Good Practice in Electoral Matters as the "conditions for implementing the principles" of the European electoral heritage, such as respect for fundamental rights, and restrictions on these rights, the organisation of elections by an impartial body, election observation and the financing of election campaigns.

In considering the main features of electoral disputes we will follow the order of the Code of Good Practice.

## **I. THE PRINCIPLES OF EUROPE'S ELECTORAL HERITAGE**

### **I.1 Universal suffrage**

Disputes about electoral registers are usually fairly minor and generally only concern a limited number of voters. As such they do not feature in the major annals of case-law. The only exception is when there are massive irregularities, which in extreme cases may lead to

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<sup>7</sup> SUI-2004-M-001 (judgment of 27 October 2004).

<sup>8</sup> CDL-AD(2002)023rev (Code of Good Practice in Electoral Matters), II.3.3.d; see, for example, CZE-2006-3-013 (judgment of 12 December 2006); FRA-1959-S-001 (judgment of 5 January 1959). For a more general discussion, see the proceedings of the UniDem seminar in Malta organised by the Venice Commission in November 2008, *The Cancellation of Election Results*, Science and Technique of Democracy No. 46, Strasbourg: Council of Europe Publishing, 2009 (forthcoming).

<sup>9</sup> CDL-AD(2002)023rev.

elections being declared invalid.<sup>10</sup> The cases concerned vary widely, particularly as the state of electoral registers in many countries leaves much – sometimes very much – to be desired, yet with no resulting electoral sanctions.

Otherwise, the courts have sometimes removed certain obstacles to universal suffrage, but have also on occasions maintained them.

Examples of the former include the recognition of the right of refugees permanently resident in the country to vote in local elections<sup>11</sup> or the requirement that citizens resident in the country but out of it on election day, and vice versa, should be entitled to vote.<sup>12</sup> Courts have also overturned conditions of at least twelve months on the register in order to vote or stand for election<sup>13</sup> and at least one year's residence in the municipality for candidates for member of parliament or mayor.<sup>14</sup> The residence condition as such has been deemed to be unconstitutional, even for local elections.<sup>15</sup>

A number of grounds of ineligibility have been declared unconstitutional, which is consistent with the liberal approach recommended by international organisations, and in particular the Code of Good Practice in Electoral Matters. Examples include the ineligibility of members of the armed forces, uniformed police officers and authorised officers of the interior ministry and intelligence agency for the posts of municipal councillor and mayor.<sup>16</sup>

Other restrictions on the submission of candidatures have also been ruled inadmissible. For example, the Estonian supreme court has found that confining the right to submit lists at municipal elections to political parties, which must have at least one thousand members, is unconstitutional since it makes it almost impossible to submit local lists. Allowing individual independent candidates to stand does not make the legislation constitutional.<sup>17</sup> In Russia, a provision in the electoral law stating that withdrawal from the list by a candidate holding one of the first three places in the electoral association's federal list will result in a refusal to register that list has been declared unconstitutional.<sup>18</sup> An alternative approach would have allowed all sorts of pressures to be exerted on candidates. The same reasoning underlay the decision to validate a ban on withdrawing candidatures.<sup>19</sup> However, a deposit of less than one month's salary has been found to be acceptable.<sup>20</sup>

A limited number of judgments have accepted restrictions on the right to vote. One of the most interesting cases concerns a judgment of the constitutional court of Bosnia and Herzegovina.<sup>21</sup> This clearly takes account of the country's post-conflict situation by preventing persons unlawfully occupying property belonging to someone else from voting in their place of residence. This restriction on the right to vote was only geographical and was simply intended to ensure that the beneficiaries of ethnic cleansing were unable to exercise their "democratic" powers at the expense of those whose property they had taken. Moreover, the provision only concerned persons who had been issued with an enforceable restitution order. Certain restrictions that have been found to be lawful are more open to discussion. Examples are the ineligibility of ministers of religion for municipal elections,<sup>22</sup> and restrictions on eligibility for the

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<sup>10</sup> As noted, only one such case emerged: ARM-2002-H-001 (judgment of 1 October 2002).

<sup>11</sup> ARM-1999-3-003 (judgment of 16 December 1999).

<sup>12</sup> HUN-2008-1-002 (judgment of 24 April 2008).

<sup>13</sup> POL-2006-1-005 (judgment of 20 February 2006).

<sup>14</sup> SVK-1998-3-010 (judgment of 15 October 1998).

<sup>15</sup> UKR-2003-3-017 (judgment of 23 October 2003).

<sup>16</sup> MKD-1997-1-002 (judgment of 12 March 1997).

<sup>17</sup> EST-2005-3-001 (judgment of 19 April 2005).

<sup>18</sup> RUS-2000-1-006 (judgment of 25 April 2000).

<sup>19</sup> MKD-1996-3-008 (judgment of 23 October 1996).

<sup>20</sup> EST-2003-2-001 (judgment of 27 January 2003).

<sup>21</sup> BIH-2004-1-002 (judgment of 30 January 2004).

<sup>22</sup> GRE-1995-2-002 (judgment of 29 June 1995).

country's presidency based on obligations to other states (in this case derived from an explicit constitutional provision)<sup>23</sup> or dual nationality.<sup>24</sup>

## I.2 Equal suffrage

### I.2.1 Equal voting rights

The one person – one vote principle in the narrow sense is rarely at issue. The main subject that can arise is that of dual voting for members of national minorities. This has been found to be compatible with the Slovenian constitution.<sup>25</sup>

### I.2.2 Equal voting power

The almost universally acknowledged rule is that the first or single chamber must be elected on the basis of demographic principles.<sup>26</sup> Once this rule has been established, it needs to be applied in detail. Firstly, a basis must be determined for the allocation of seats, be this the number of inhabitants, citizens (including children), registered voters or votes cast. In Albania, it is the number of registered voters rather than votes cast,<sup>27</sup> in Romania, the number of inhabitants not voters.<sup>28</sup> Finally, there is a substantial body of case-law on possible inequalities of representation. In France, for example, a minimum of two deputies (members of parliament) per *département* was found to be admissible in 1986, but the Constitutional Council modified its case-law in 2009.<sup>29</sup> Similarly, in Belgium, the over-representation of Dutch speakers in the Brussels-Capital Region Parliament has been ruled to be compatible with the Constitution.<sup>30</sup>

It then has to be determined whether the results have to be proportional, and if so to what extent. Equal suffrage does not, as such, imply an absolutely proportional system, with every vote having the same impact on the results. In other words, equality of results is not a requirement.<sup>31</sup> However, this changes when the constitution stipulates a proportional system. Disputes in such cases mainly concern electoral thresholds, or quorums. In general, constitutional courts and equivalent bodies are reluctant to declare quorums unconstitutional.<sup>32</sup> Thresholds of 5% have been ruled lawful in the Czech Republic and Slovakia, as well as higher figures for coalitions, with the figures rising to, respectively, 20% and 10%, depending on the number of parties concerned.<sup>33</sup> Interestingly, in the latter case, the persons bringing the case considered that a 10% threshold for coalitions of four or more parties discriminated in their favour rather than against them. A quorum of 6% has been found acceptable in Moldova.<sup>34</sup> However, the German constitutional court has ruled that a 5% quorum can only be justified by the impairment to the viability of the local representative bodies that can be reasonably anticipated.<sup>35</sup> A recent exception to judgments in support of quorums concerns the Swiss canton of Aargau, but only for certain constituencies. The Federal Court has even suggested the abolition of natural

<sup>23</sup> AZE-2003-2-004 (judgment of 1 August 2003).

<sup>24</sup> LTU-1999-1-002 (judgment of 11 November 1998). See, however, the subsequent European Court of Human Rights *Tănase and Chirtoacă v. Moldova* judgment of 18 November 2008, whereby such a restriction no longer appears to be acceptable.

<sup>25</sup> SLO-1998-S-003 (judgment of 12 February 1998). On the subject of dual voting for members of national minorities see the Venice Commission report (CDL-AD(2008)013).

<sup>26</sup> FRA-1986-S-002 (judgment of 1 July 1986).

<sup>27</sup> ALB-2005-1-001 (judgment of 7 January 2005).

<sup>28</sup> ROM-2008-1-001 (judgment of 12 March 2008).

<sup>29</sup> FRA-1986-S-002; the change in the case-law results from decision 2008-573 DC of 8 January 2009.

<sup>30</sup> BEL-2003-1-003 (judgment of 25 March 2003).

<sup>31</sup> SLO-2000-1-001 (judgment of 9 March 2000).

<sup>32</sup> See Kieran Williams, *Judicial Review of Electoral Thresholds in Germany, Russia, and the Czech Republic*, *Election Law Journal*, Volume 4, Number 3, 2005, pp. 191-206, 191.

<sup>33</sup> CZE-2001-1-001 (judgment of 14 January 2001); CZE-1997-1-002 (judgment of 2 April 1997); SVK-2001-1-001 (judgment of 11 January 2001).

<sup>34</sup> MDA-2000-3-008 (judgment of 10 October 2000).

<sup>35</sup> GER-2008-1-003 (judgment of 13 February 2008).

quorums, that is the restrictions on access to parliament in the case of small constituencies, when these quorums exceed 10%. It was ruling on the basis of a cantonal constitutional requirement for electoral districts to be amalgamated when this was necessary to avoid high quorums that were contrary to the rules of proportional representation.<sup>36</sup> Similarly, although the Czech Republic's constitutional court ruled the national 5% quorum admissible, it found that, combined with relatively small constituencies, the modified d'Hondt method, with an initial electoral divisor of 1.42 rather than 1, resulted in an excessive natural quorum of more than 14% on average, which was incompatible with the principle of proportional representation.<sup>37</sup>

### 1.2.3 Equality of opportunity

Equality of opportunity, particularly regarding access to the media, is often breached, while too often only lip service is paid to the neutrality of the media, as provided for in the Code of Good Practice in Electoral Matters<sup>38</sup> and in a specific Committee of Ministers recommendation.<sup>39</sup> Legislation designed to secure equal coverage is often understood to be confined to specially designed broadcasts. Unfortunately, the constitutional case-law consulted does not seem to have done much to remedy the situation. For example, the Russian constitutional court has ruled that unless the courts have decided explicitly that the clear intention was to make propaganda, the actions of the media cannot be regarded as constituting propaganda or as a violation of a corresponding prohibition.<sup>40</sup> It is extremely difficult to establish that breaches are sufficiently serious to warrant the overturning of an election. Thus the Slovakian constitutional court has ruled that only serious and recurrent infringements of the law provide legal grounds for this sanction.<sup>41</sup> It is easier to establish a violation when the inequalities have a basis in law, such as a ban on parties that are members of a coalition from exercising their right to media coverage separately.<sup>42</sup>

There is slightly more case-law on other forms of abuse during election campaigns. One of the French constitutional council's first decisions was to set aside an election because of unlawful propaganda, particularly emanating from certain public bodies.<sup>43</sup> The Ukrainian constitutional court has criticised one of the most frequent abuses, sometimes known as "abuse of administrative resources". It stated that officials of executive bodies are prohibited from participating in electoral campaigns at any time, work or leisure.<sup>44</sup> Similarly, in France local government staff may not take part in election campaigns during working hours.<sup>45</sup>

The Russian constitutional court has concluded that the financing of election campaigns is also to some extent an aspect of the equal opportunities principle. It has found that the purpose of the ban on citizens' independently financing propaganda is to ensure the equality of candidates, as well as the transparency of election financing.<sup>46</sup> Without going into the detail of the debate, this approach appears to be completely at variance with that of the United States Supreme Court, which accepts a ceiling on private donations but considers them to be important for freedom of speech and association and prohibits ceilings on expenditure.<sup>47</sup> Purely state funded campaigns might be the impartial ideal in an ideal world where there was complete separation of machinery of state and the governing authorities.

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<sup>36</sup> SUI-2004-M-001(judgment of 21 November 2003).

<sup>37</sup> CZE-2001-1-001, already referred to.

<sup>38</sup> CDL-AD(2002)023rev, I.2.3.a.ii and I.3.1.a.i.

<sup>39</sup> Recommendation R (99) 15 on media coverage of election campaigns.

<sup>40</sup> RUS-2003-3-006 (judgment of 30 October 2003).

<sup>41</sup> SVK-1994-3-006 (judgment of 2 November 1994).

<sup>42</sup> CRO-1999-3-021 (judgment of 17 December 1999).

<sup>43</sup> FRA-1959-S-003 (judgment of 9 July 1959). See also FRA-1959-S-001 (judgment of 5 January 1959).

<sup>44</sup> UKR-2005-1-003 (judgment of 24 March 2005).

<sup>45</sup> FRA-2002-3-007 (judgment of 26 September 2002).

<sup>46</sup> RUS-2006-2-003 (judgment of 16 June 2006).

<sup>47</sup> See in particular *Buckley v. Valeo* of 30 January 1976, 96 *Supreme Court Report* 612 (1976).

The thresholds for securing public funding are generally below those necessary to win seats. The Czech constitutional court has even stated that it must be significantly lower, and below 3%.<sup>48</sup>

#### *1.2.4 Equality and national minorities*

There have been a number of court decisions on rules specially affecting national minorities. Infringements of the equality principle have been invoked by representatives of both minorities and majorities. In the former case, it is general rules that are not formally aimed at minorities that are perceived to be discriminatory. The question has been raised in the Italian constitutional court in connection with the minorities of Trentino-Alto Adige. It thought that the situation at national and at regional levels differed. It refused to declare the national 4% quorum for the proportional part of elections unconstitutional, even though it prevented a party representing the German-speaking minority from obtaining one of the seats allocated proportionally (though not one of the plurality system seats).<sup>49</sup> At provincial level, in the two provinces of Trento and Bolzano, the thresholds, which were set respectively, at 5% of the valid votes and at the "natural threshold", were deemed to be incompatible with the regional statute, which established explicit safeguards for the Ladin community.<sup>50</sup> The question of dual voting for members of national minorities in Slovenia has already been considered.<sup>51</sup>

In Romania, on the other hand, rules to offer parliamentary representation to minorities who have not obtained seats under the normal allocation procedure have been declared constitutional,<sup>52</sup> though admittedly on the basis of a constitutional provision expressly concerned with minority representation.<sup>53</sup>

#### *1.2.5 Equality and parity of the sexes*

Whether or not there is an explicit constitutional provision usually determines the outcome of cases concerning gender parity or quotas. For example such measures were declared unconstitutional in France,<sup>54</sup> until a constitutional amendment was passed to authorise them.<sup>55</sup> In Spain, however, the Constitution<sup>56</sup> provides for material equality in a broad sense in several areas, including political participation. A legal requirement for candidate parity is therefore admissible. Finally, in Switzerland, after weighing up the interests the federal court confirmed the decision that a cantonal referendum requiring absolutely and without further qualification that the ratio of women to men in the parliament, government and cantonal courts should be equivalent to the ratio in the population as a whole was void.<sup>57</sup>

### **I.3 Free suffrage**

#### *1.3.1 Freedom of voters to form an opinion*

As noted in the introduction, voters' freedom to form their opinion has long been neglected. Such case-law on this issue has generally overlapped with that on equal opportunities, which was considered earlier. It is still limited in scope when compared to the problems concerned.

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<sup>48</sup> CZE-2005-1-001 (judgment of 19 January 2005); CZE-2000-1-002 (judgment of 13 October 1999).

<sup>49</sup> ITA-1993-1-002 (judgment of 16 January 1993). The court declared the application inadmissible in the absence of a constitutionally binding solution, in accordance with its established case-law.

<sup>50</sup> ITA-1998-3-009 (judgment of 21 October 1998).

<sup>51</sup> Paragraph I.2.1.

<sup>52</sup> ROM-2008-1-001 (judgment of 12 March 2008).

<sup>53</sup> Art. 4.2 of the constitution.

<sup>54</sup> FRA-1999-1-001 (judgment of 14 January 1999); FRA-1982-S-004 (judgment of 18 November 1982).

<sup>55</sup> Art. 3.4.

<sup>56</sup> Art. 9.2.

<sup>57</sup> SUI-1997-2-004 (judgment of 19 March 1997).

The Czech supreme and supreme administrative courts are an exception,<sup>58</sup> but the constitutional court did not back them up.

### *1.3.2 Freedom of voters to express their wishes and combating electoral fraud*

We have now reached the most amusing or the saddest part of the report, namely irregularities and even fraud in the very conduct of elections. In this respect, the human imagination knows no limits. A wide range of cases have come before the constitutional courts. For example, the Armenian constitutional court overturned a fairly close election following an accumulation of irregularities, none of which in itself was necessarily serious. An electoral commission had ordered more ballot papers than provided for in the electoral code, one person not authorised to form part of the electoral commission of a polling station had nevertheless done so, and the prosecution service had failed to cast light on two allegations of forged signatures by members of electoral commissions in two polling stations.<sup>59</sup> In another case where the election was overturned, ballot box stuffing seemed more than likely, given the presence of unsigned ballot papers, and the vote counting procedure had not been properly administered.<sup>60</sup> Other suspicious cases have included violations of the secret ballot coupled with failure to check voters' identity, and significant, unexplained discrepancies between figures shown in the official record of results and in the counting sheets,<sup>61</sup> or more whimsically, in one Mediterranean island, the disappearance in one polling station of the record and attendance lists and even, in another, the removal of a ballot box and its casting into the sea.<sup>62</sup> Irregularities in the collection of votes cast in the home by voters unable to travel to the polling station occurred when the chair of the electoral commission visited homes without another member of the commission and was himself a candidate.<sup>63</sup>

Another type of irregularity concerned the omission of the name of the candidate heading a list from the ballot paper,<sup>64</sup> but this was less serious than the omission of a complete list, as occurred in another case.

### *1.4. Secret suffrage*

Finally, the secret of the ballot box<sup>65</sup> may be the only issue at stake. The Austrian constitutional court has held that this is breached if ballot papers are sent to people's homes but are no longer available in polling booths.<sup>66</sup>

### *1.5. Direct suffrage*

The judgments considered have included ones concerning direct suffrage. The constitutional court of Bosnia and Herzegovina has confirmed that Article 3 of the Additional Protocol to the European Convention on Human Rights does not exclude the election of second chambers by indirect suffrage.<sup>67</sup> More originally, the Lithuanian court has declared a ban on independent candidates unconstitutional, admittedly on the basis of freedom of association,<sup>68</sup> while the Slovenian court has ruled that so-called closed lists are compatible with direct suffrage, except in the case of certain seats obtained from national lists because the relevant legislation did not

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<sup>58</sup> See Mr Podhrazky's report.

<sup>59</sup> ARM-2003-2-003 (judgment of 1 July 2003).

<sup>60</sup> ARM-2003-2-002 (judgment of 16 June 2003).

<sup>61</sup> FRA-2002-2-004 (judgment of 24 April 2002).

<sup>62</sup> FRA-1968-S-001 (judgment of 24 January 1968).

<sup>63</sup> SVK-2004-1-002 (judgment of 19 February 2004).

<sup>64</sup> CRO-1997-1-020 (judgment of 20 April 1997).

<sup>65</sup> Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I.2.4.

<sup>66</sup> AUT-2000-3-007 (judgment of 2 December 2000).

<sup>67</sup> BIH-2005-1-001 (judgment of 28 January 2005).

<sup>68</sup> LTU-2007-1-006 (judgment of 9 February 2007).



provide for the mandatory publication of these lists.<sup>69</sup>

## II. CONDITIONS FOR IMPLEMENTING THE PRINCIPLES

Certain key conditions must be met to safeguard Europe's electoral heritage, including respect for fundamental rights and procedural safeguards, in particular the organisation of elections by an impartial body and an effective appeals system. Other requirements concern the stability of electoral law, the observation of elections and campaign financing, which has already been considered above.<sup>70</sup>

Appeals arrangements will not be considered here as they are the subject of the report on the procedural aspects of disputes. Fundamental rights in election periods should not differ fundamentally from those outside them, which is why the requirement for public meetings to be notified in advance also applies to election meetings.<sup>71</sup>

Regrettably, there have been few cases concerning the organisation of elections by an impartial body.<sup>72</sup> One of the major problems in the organisation of elections is often the lack of independence of members of electoral commissions, who are generally answerable to the relevant authorities. In our research we have only identified one such case, where a member of an electoral commission was also a parliamentary candidate on a proportional list, which was unacceptable.<sup>73</sup> The question of objective impartiality may raise other issues, such as whether members of electoral commissions can be removed by the bodies that appointed them.<sup>74</sup> However, we consider it counter-productive to question the principle that such commissions should have partisan membership, since so-called non-partisan members are very often creatures of the governing authorities. There nevertheless remains the question of subjective impartiality.

Several constitutional courts have dealt with the observation of elections.<sup>75</sup> The Lithuanian constitutional court has stressed the importance of publicity and monitoring arrangements in democratic elections,<sup>76</sup> and the Slovakian court has ruled that the right to information includes the right to be present when district electoral commissions are counting the votes at elections.<sup>77</sup> In Croatia, observers must have the same rights as representatives of political parties, which means that non-partisan observers must be granted access to relevant material.<sup>78</sup>

The courts have even considered the often forgotten issue of the stability of electoral law, since it is preferable not to be continually changing the rules of the game.<sup>79</sup> Thus, the Czech constitutional court has argued that electoral rules should not be subject to constant revision and, if possible, should be stabilised by means of a stricter adoption procedure.<sup>80</sup>

## Conclusion

The picture we have painted confirms – and this is almost a truism – that electoral disputes are determined on a case by case basis, even at the level of constitutional courts and equivalent bodies. However, in a more fundamental way the major principles are clearly applied, which is

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<sup>69</sup> SLO-1996-1-002 (judgment of 25 January 1996).

<sup>70</sup> CDL(2002)023 rev (Code of Good Practice in Electoral Matters), part II.

<sup>71</sup> MKD-2000-1-001 (judgment of 16 February 2000).

<sup>72</sup> CDL-AD(2002)023rev, par. II.3.1.

<sup>73</sup> ARM-2007-2-004.

<sup>74</sup> See CDL-AD(2002)023rev, par. II.3.1.f.

<sup>75</sup> CDL-AD(2002)023rev, II.3.3.

<sup>76</sup> LTU-1996-3-013 (judgment of 23 November 1996).

<sup>77</sup> SVK-1999-2-003 (judgment of 16 June 1999).

<sup>78</sup> CRO-1997-1-007 (judgment of 27 March 1997).

<sup>79</sup> CDL-AD(2002)023rev, II.2; CDL-AD(2005)043.

<sup>80</sup> CZE-2005-2-009 (judgment of 22 June 2005).

why we believe that structuring our presentation in this way is not simply one option but clearly the best one.

However, this presentation also highlights the limits of such an exercise. Since anything connected with elections is politically highly sensitive, cases leading to the setting aside of important elections are extremely rare. There are other sensitive issues which do not at first sight appear to be fundamental in determining whether or not an election is democratic, and which are only dealt with rarely and with great circumspection. These include voters' freedom to form their opinion, particularly with the assistance of the media, or the allocation of seats between constituencies. Future debates will show whether this statement remains true.