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Constitutional Review of Elections

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There are many types of constitutional courts. In history they have come in conflict with Parliaments that were becoming sovereign as regards the monarchs. For example, in the Dutch (Netherlands) constitution, Constitutional review of acts of parliament is prohibited by Article 120 of the Constitution. Nevertheless, an advisory opinion of the Council of State has to be obtained on bills and draft Royal decrees.

The French control of constitutional matters also has to be placed in its historical framework. The idea of a Constitional court was debated in 1946 but was opposed by parties who either were affraid of having a US type Supreme Court or preferred that the Senate guarantee the constitutionality of laws. With the arrival of the Fifth Republic in 1958 no one thought of giving more power to the Conseil d'Etat (Supreme Administrative Court) which had a say in parliamentary questions under Napoleonic times but there was no doubt that the system of having parliament decide on the legitimacy of its own elections had to be changed. The Constitutional Court became the judge of parliamentary, presidential elections and supervises the way referenda are run. In time it has increased its authority by including areas such as the voter register in the cases where fraud has had an influence on the final result (note that already two courts are involved in voter register disputes, the civil and administrative courts). It also decides on issues that happen before the final results of the two-round majority systems and after the first round if they had an effect on the final results (proclamation, May 11, 1998).

In the elections for which the Constitutional Court is competent it decides as the judge of the election. It is not a constitutional function it decides as a regular civil or administrative judge would do on the interpretation and application of the law.

Some decisions can be criticized. For example, when the President of the Republic made a public statement once the campaign for a parliamentary election had been closed. The Constitutional Court that was competent for that election declared that as the judge of the election it could not decide on constitutional issues. A doubtful answer as the presidential TV intervention could be qualified as "pressure" "manoeuver" and likely to act on the election result.[1]

The French Constitutional Court has a different approach depending on whether it is judging an election or when it is not. As a judge of an election it does not examine the Constitutionality of an act but it can examine a law according to an international treaty. For example, it takes into account the Rome Convention, Protocole N° 1 that states that *" members have to organise at reasonable intervals the expression of the peoples opinion on the choice of the legislative assembly."*[2] This clause is written in very general abstract terms and the present case had to do with a change in the electoral systems which, of course, is not in the spirit of the convention.

The basis of the French Constitutional Court's involvement is its own jurisprudence taking into account proposals of independent committees that have been set up to deal with precise points such as campaign finance, party financing, party campaigning and polls. The Constitutional Court takes into account the findings of these committees but insists that it makes the financial decision itself.[3]

The Constitutional Court makes observations and recommendations to the government. For the June 2002 parliamentary elections the court had received 162 proposals by candidates or voters and 601 by the committee in charge of checking campaign financing. The result of five elections was declared void. The candidates where then reelected through by-elections.[4]

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[1] CC, June 8, 1967.

[2] October 21, 1988.

[3] Decision of July 31, 1991.

[4] Observations du Conseil Constitutionnel relatives aux élections législatives de Juin 2002.

The Georgian case is quite different and the Constitution, the law on the Constitutional Court makes it quite clear: Article 83 states that *"the legal body for constitutional supervision is the Constitutional Court. Justice is performed by courts of general jurisdiction."* This places the Constitutional Court apart from the Judiciary. The Constitutional Court considers *"disputes connected with questions of the constitutionality of referenda and elections"* (article 89d of the Constitution). But the wording of the organic law of the Constitutional Court is slightly different as one can see from article 19d *"Disputes on referendum and the constitutionality of elections"*. A less restrictive interpretation of this article would mean that the Constitutional Court deals with all disputes that have to do with referenda. Is it a question of interpretation as such? did the drafters of the organic law want to reproduce the article of the Constitution but got confused in the wording? Did the drafters of the organic law mean that the complexity of the clauses that forbid holding referenda required the attention of the Constitutional Court ? or is it merely a problem of translation?

Taking into account those laws and for the time being not taking into account the electoral law it would appear that the main field of work for the Constitutional Court is the same as that of the German Federal Constitutional Court. The federal court has jurisdiction over human and democratic rights in the creation of parties (article 89c and 26-1-3 of the Constitution), campaign complaints, freedom of speech (article 19-1 of the Constitution) and changes in any electoral law. Germany as well as Hungary deal with electoral matters similarly. A case referred to the Hungarian Constitutional Court March 1991[5] is an example of the case in point. The Court ruled against the 4% threshold to obtain a seat in the proportional part of the parliamentary elections (1989 XXXIV Law). The Court dismissed the case. February 1990[6] an appeal was lodged Hungarian Constitutional Court also against the 1989 XXXIV Law that obliged a candidate to obtain 750 signatures including name, residence and national register number . The Court dismissed the case.

As far as the German Federal Constitional Court is concerned, it is competent to decide cases regarding the prohibition of pollitical parties (article 21 (2)) . The order to dissolve a party includes the prohibition of a "*substitute organization*". The property of the dissolved party can be confiscated for public benefit. In 1956 the Communist Party KPD was declared unconstitutional but in 1967 the substitute organization DKP was not prohibited as circumstances had changed and what would not have been admitted in the early days of democracy was accepted later. Sometimes this is without consequences but at other times could lead to difficulties. The Communist Party as well as the neo nazi party NPD were not considered as a danger to German democracy in the early sixties so they were not dissolved. The latter attained 2.1% of the votes in the 1965 elections and no direct plurality seat. This was considered as being a definite victory over the Nazi party. In time though the electoral system produced a stalemate between parties where no government coalition was made possible (between one large party and the Liberals, a small party). The only solution was to form a large coalition government (an "elephant" government) that included the two main parties – Christian Democrats and Socialists. This changed what we call the "welcome structure" for the opposition leaving it to the NPD and the liberals which meant that the NPD gained votes alarmingly at first in the regional elections:

[5] 3/1991 (11-7) AB.

[6] 2/1990 (11-18) AB.

Hambourg	March 1966	3.9%
Hesse	November 1966	7.9%
Bavaria	April 1968	7.4%
Bade Wurtenberg	April 1968	9.8%

The Germans became worried that the NPD would be elected into the Bundestag and there was a proposal to eliminate the proportional part of the election or at least doing away with the compensation mechanism between the two votes but in the 1969 legislative elections they only reached 4.6% of the votes while the threshold was at 5% and no direct seat. The restrictive formal approach of the German Constitutional Court in 1956 had become liberal in the sixties and brought back unwelcomed memories.

Another case (2003) that involved the prohibition of a political party concerned once again the NPD. It failed when the court discovered that the party structure was infiltrated by secret service officers. On an other issue, the Court rejected a CDU/CSU proposal to circumvent the 5% threshold to obtain proportional seats in order for a party to obtain 5 majority mandates instead of 3 as it is until today.

On the one hand, the Court decided on October 27, 2004 that new regulations that limit party financing to smaller parties infringed the Constitution. On the other, the same court decided April 10, 1997 that "overhang mandates" are constitutional. These mandates occur when a party wins more direct majority votes than it would have received following the distribution of list mandates according to their percentage of the votes. In 13 elections this has only happened on 9 occasions.

The last decision gave rise to debate as the Court admitted a manouever that was undoubtedly not in the mind of the framers of the Constitutions. The Court admitted the chancellor's call to his party members in the Bundestag to abstain in voting on July 1, 2005 as being in line with the Constitution. The German Constitution allows holding early elections only in the case of a parliamentary vote of no confidence which was not the case.

Great Britain might not have a Constitution but has been a working democracy since the XIII century. This means that this country cannot be left out of our research. In Great Britain a petition under the Representation of the People Act is heard by a special electoral court. Elections can be invalidated thus. A deciding judge reminds us that *"most election petitions undergo a 'Scrutiny' prior to the substantive petition being heard. An officer of the court ... examines the original election documents with a view to finding the factual framework surrounding the petition. The parties to the petition and their lawyers are entitled to attend the Scrutiny and to make representations. The Scrutiny rearely lasts for more than a few hours."* The main findings were that a *"large number of completed declarations of identity which accompanied the completed ballot"*...seemed "*to have been completed by a small number of people" .."identical handwriting"* and they all favoured the Labour Party. In the conclusions the deciding judge notes that as "*there is one year time limit for most electoral offences"* and the Commissioner was *"under time constraints having regard to the need to resove an election Petition promptly."*.[7]

Election results can be questioned by the presentation of a petition under the Representation of the People Act which is then heard by an electoral court. There have been 17 such occasions in the 20th century.[8] We have two examples one in 1961 where the case involved

[7] The Queen on Appeal on the application of Muhammad Afzal, Appellant, and Election Courts & Ors Respondents. Appeal of judgment by Mr. Mawrey QC regarding Petition of 4 electors of Aston Ward of Birmigham City Council. http://www.bailii.org/

[8] BBC News, http://newsvote.bbc.co.uk/

Tony Benn and the issue was his eligibility to sit in the House of Commons *"having inherited a peerage, winning the subsequent by-election and yet still being judged unable to sit in the Commons"*. The other case was that of Garry Malone in 1997 where the High Court declared the election result void on October 6, 1997. Mr. Malone had lodged an appeal in the High Court after loosing the seat to a Liberal Democrat by two votes. The predominant fact of the case was the existence of *"55 ballot papers"* being *"..rejected by the Returning Officer as they had not been stamped properly by polling station staff"*. The deciding judge ruled that these ballots invalidated the result. (The petition did not help Mr. Malone as the Democrat Liberal remained MP until the re-run election, at which Mr. Malone lost again).

A form of voting that has been challenged in the High Court is postal voting. A Liberal Democrate candidate in Birmingham (and deputy leader of the Birmingham City Council who had set up an election court to investigate reports of mass electoral fraud with postal ballots) would like to force the Government to make "last-minute" changes to the new postal voting system.[9] He appealed the system on human rights grounds. He claimed that the government had *"failed to provide for free and fair elections, and, second..."* that there was *discrimination between different parts of the UK because the new system"* was not in use in Northern Ireland. He demands that the postal system be changed by an Order in Council so that:

1. "postal votes are counted separately from non-postal votes, to make evidence of fraud more obvious

2. parties are allowed to inspect the application forms for postal voting, to spot any evidence of fraud

3. a list is kept of all hte people who turn up at polling stations unaware that a postal vote has been applied in their name

4. the period in which elction petitions can be filed, querying an election result, is extended from 21 days to two months."

Another case is an appeal to a judgment of an Election Court regarding a Petition where four electors of the Birmingham city council sought to set aside the election on 10 June 2004 of three Labour Party Councillors. One ground relied upon was that one of the councillors (Mr. Afzal) was personally guilty of *"corrupt and illegal practices in relation to the elections."* The corrupt practices were mainly related to the use of postal voting. The election Commissioner had found him guilty so he voided the election one of the consequences being that Mr. Afzal would not be able to vote in any parliamentary election.

At the appeallate stage, the judgment of the Court written by Lord Phillips eliminated ("quashed" being the legal term) the part of the decision that concerned the corruption charges and made an order by which the plaintiff could vote in the general election if he so wished. The decision was based mainly on what the court stated was a lack of a fair trial as the defender was not given a fair opportunity to defend himself.

Our last example is a decision by the House of Lords on appeal of an election to the Northern Ireland Assembly[10] The issue was *"whether the election by the Northern Ireland Assembly of a First Minister and Deputy First Minister on 6 November 2001, more than six weeks after the restoration of the devolved government..." "... on 23 September 2001, was legally valid."* The judges quote a previous decision regarding Inland Revenue (taxes) to base their decision. The two options of that decision are: rigid interpretation versus one flexible that

[9] TIMESONLINE, April 19, 2005, http://www.timesonline.co.uk

[10] Opinions of the Lords of Appeal for Judgment in the Cause Robinson (appellant) v. Secretary of State for Northern Ireland and others (aespondents) (Northern Ireland) 25 July 2002, [2002] UKHL 32. For fifty years Northern Ireland had a government elected on "straightforward majoritarian principles". In 1972 the devolved government was suspendend and under the Northern Ireland Act of 1998 the elections would be uner single transferable vote.

takes into account the intentions of the legislator ("l'esprit de la loi"). The judge of the Lords prefers the second option as it reflects the flexibility of the Northern Ireland Act of 1998.

We have seen that the Constitutional Court[11] of Georgia is an independent court the function of which is guaranteing the supremacy of the Constitution of the Republic while "protecting human rights and freedoms". These words are found in most constitutions but many changes in an electoral law are well beyond human right issues evoked in a constitution. Most changes have political reasons and do not go against the terms such as "will of the people". The fact that one electoral system is chosen rather than another is a political and practical decision that depends ont the degree of political integration or segregation desired.

Nevertheless, an attentive lecture of two Georgian constitutional court decisions show that the definition of article 83 of the Constitution does not hold in practice. Article 77 of the Election Law which deals with the adjudication of elections ends with the following statement *"...if the disputes refers to the Constitutional nature of the elections.."* they can be appealed *"to the Constitutional Court"*. This article opens the door to enlarged jurisdiction of the Constitutional Court. The two cases we considered[12] deal with decrees of the Central Election Commission which are contested as being, amongst other things, unconstitutional. This proved a very liberal interpretation of article 89 of the Constitution and article 19 of the organic law on the Constitutional court because it leads the Court to judge an election that has to do with matters such as disappearing or burning ballots, date of a by-election fighting, facts that would be within the jurisdiction of a Electoral Commission or a Supreme Court. The plaintiff lawyers chose to include constitutional issues in an electoral appeal in order to involve the Constitutional Court. In the two cases we studied the constitutional human rights arguments were not essential when compared to the the electoral rights violated.

In these cases the Constitutional court interpreted and applied laws in relation to facts just as an ordinary court would do. This approach cannot be taken as a strict interpretation of the Constitution or of the spirit in which it was written. The Constitutional Court could of course have refused to take the case. We also have to bear in mind that once laws have been adopted they have to be applied in real life. In the Georgian case the Court has acted on its own initiative the way the French Constitional Court works albeit based on other foundations.

To conclude on Georgia: The interpretation and the way a constitutional law is applied depends on the Constitutional Court. It's decision creates caselaw (article 19.2 of the Constitution) which is binding for other institutional bodies but which can change in time because of circumstances and events. Laws are living documents and as such have to be adapted.

In order to ascertain its authority it is advisable for the Constitutional court to make declarations after each election even if no decision was taken in order to show that it is well aware of events that have occurred and that it can be called upon to deal with all cases regarding the constitution. If decisions were taken it is useful to make a note of them in the declaration without all the legal details of a decision.

[11] Article 1-1 of the Law on the Constitutional Court.

[12] N 13/122, 128 of 13 June 2000 and N6/134 - 139-140 of 30 March 2001.