Strasbourg, 14 March 2002

CDL (2002) 7 rev.
Or. Fr.

EUROPE'S ELECTORAL HERITAGE

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* *This paper is a slightly amended version of an article by Pierre Garrone, Administrative Officer in the Secretariat of the European Commission for Democracy through Law, which appeared in the Revue du droit public et de la science politique en France et à l'étranger, 2001, pp. 1419-1454.*

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Introduction

For over ten years, the European Commission for Democracy through Law, or Venice Commission, has been playing a key role in the often spectacular constitutional changes which have taken place in Europe. Adopting a comparative approach, it helps to shape the various aspects of Europe's constitutional heritage.

Dynamism is the hallmark of all the Commission's work. Europe's constitutional heritage is not fixed and immutable, but is – like democracy itself - developing and expanding all the time. It is built on international standards, but also on values which, being shoved across Europe, are exprressed transnationally ("trans-constitutionalism").

The Commission's aim in advising countries and helping them to consolidate their democratic systems is to apply Europe's constitutional heritage as part of their constitutions and laws, which then feed into that heritage themselves.

With human rights and the rule of law, democracy is one of the three pillars of Europe's constitutional heritage. And democracy without elections is unthinkable. It is no surprise, therefore, that the Commission should have taken an active interest from the start in electoral matters, and particularly electoral law. In fact, little by little, it defined one specific aspect of Europe's constitutional heritage – its electoral heritage, which this paper discusses.

The text itself is divided into two parts. The first explains the Commission's approach to electoral questions, and details its methods. The second uses the Commission's work to define the various aspects of Europe's electoral heritage.

I. The Venice Commission and electoral law: a pragmatic approach

As in its other areas of work, the Commission's approach to electoral law has two emphases: activities geared to specific countries in specific situations, and general, comparative studies[1].

Its *country-specific activities* are concerned with the *implementation* of Europe's electoral heritage. Like its other activities, they are *pragmatic* – in other words, they do not seek to impose legislative uniformity. On the contrary, with the exception of the basic principles which we shall be considering in detail later, the Commission makes no attempt to insist upon a particular solution, but simply tries to highlight the pros and cons of the various options available. It starts by taking account of the suggestions made by national authorities or other national actors. And it also takes account of national situations, since a solution which works in one country will not necessarily work in another. For example: whereas administrative authorities in established democracies can safely be left to run elections, from registering voters to announcing results, this should be avoided in new democracies, where such bodies are often partisan; complex voting systems, which work well in other countries, may, through their apparent complexity make first-time voter suspicious; a qualifying threshold which seems perfectly reasonable in one country may have to be avoided in another, where it is important to ensure that certain political minorities are represented, and not excluded from parliament; similarly, it may be desirable in one country to use reserved seats to include

[1] *On the Commission's work in general, see CDL-INF (2000) 12.*

national minorities in the political scene, whereas such integration is achieved in a different way in another country.

The Commission's *comparative work* takes the form of general surveys, or of international seminars organised in the framework of UniDem (Universities for Democracy) or in co-operation with constitutional courts. These *general studies and seminars* are *theme-based*, and set out to *define* Europe's shared constitutional heritage – in general or, more often, in relation to a theme – by examining national rules and practices and also international law. This applies both to electoral issues and to constitutional matters in general.

The next few paragraphs use examples to give a clearer picture of these two approaches. The focus then shifts to co-operation with other international organisations, which is particularly important in the electoral sphere. Finally, future prospects for the Commission's work in this field are outlined.

1. Country-specific activities: electoral assistance

Electoral assistance for individual countries has so far been a key focus of the Commission's work on electoral issues. In particular, many new democracies have referred their electoral laws to the Commission very soon after switching to a pluralist system.

As in the other areas of its activity, the Commission prefers to act early and become involved when electoral laws are being drafted, instead of waiting till they are adopted. This method is best, since bills are far more easily amended than laws – especially if they have not yet reached Parliament.

The Commission is often asked to comment on bills. Less frequently, it helps governments to draft them, or even drafts them directly itself. Occasionally, too, it provides *ad hoc* assistance of a more practical or general kind.

Although the Commission most often receives requests for help from governments, co-operation with other international organisations is important too. Indeed, the initiative rests with international bodies when - as in Bosnia and Herzegovina, Kosovo or Albania in 1997 – they are responsible for crisis management. We shall say more about this later.

As a rule, the Commission's opinions cover legislation on elections at the national level, but it has sometimes been asked to consider local elections too, notably in Moldova and Kosovo.

We shall now give examples of the various kinds of electoral assistance it provides.

a. Commenting on draft legislation

It is relatively uncommon for the Commission to comment on a draft electoral law on the basis of the text alone. This did happen in the case of "the former Yugoslav Republic of Macedonia"[2], but requests for comments are usually just one element in a broader process of co-operation.

[2] *See CDL (98) 45.*

Consultation may simply entail contacts with the officials responsible for electoral matters at national level, as in Latvia and Moldova in 1993. But it may also involve long-term co-operation with a particular country. The Commission has, for example, been involved in the field of electoral law in Armenia since 1997; in 1998, it gave its views on two competing bills to amend the Armenian Election Law.[3]

In other cases, and particularly crisis situations, its comments form part of a global programme of international assistance. For example, its comments on the draft electoral law in Belarus[4] are just one element in a process launched by several international organisations aiming to bring that country's electoral law and practice into line with international norms. This applies even more when the international community is actively involved in the legislative process, as it is in Kosovo and Bosnia and Herzegovina. The work on draft regulations on municipal elections in Kosovo, in which the Commission was involded at the end of 1999, was part of a process of close co-operation with other international organisations on the status of Kosovo and the law applying there. In the case of Bosnia and Herzegovina, the Commission first prepared a draft electoral law at the request of the Office of the High Representative (OHR), and then submitted comments on two successive versions of the draft electoral law later prepared by the OSCE[5].

b. Commenting on adopted legislation

It is not unusual for the Commission to comment on laws which have already been passed, even though amendment is harder at this stage than at the drafting stage.

Ex post facto comment by no means implies that the Commission has not been involved beforehand. On the contrary, it may reflect a desire to ascertain to what extent the principles of Europe's electoral heritage, or indeed its own comments on other points, have been incorporated into the final version of a law which it helped to draft or commented on in draft form. This applied in 2000 to Albanian and Armenian legislation[6].

In other cases, a country's laws may be appraised in connection with its *accession* to the Council of Europe. This happened with Azerbaijan[7] and, to a lesser degree, Armenia. Moreover, the accession of both those countries has been followed by a specific monitoring procedure, involving the Commission and focusing *inter alia* on electoral questions. It should be noted that monitoring is not just concerned with laws, but also – if not more so – with practice[8].

When it joined the Council of Europe, Ukraine undertook - like Armenia and Azerbaijan - to make certain changes in its electoral laws. This was why, at the Ukrainian authorities' request, the Commission examined the new law on parliamentary elections[9].

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[3] *CDL (98) 10.*
[4] *CDL (99) 66 and 67.*
[5] *See in particular CDL (99) 40 and 41.*
[6] *CDL (2000) 103 rev.*
[7] *CDL-INF (2000) 17.*
[8] *Cf. CDL (2001) 5 and 6.*
[9] *CDL (99) 51 and CDL (2000) 2.*

Although not strictly part of a monitoring procedure, the Commission's review of Croatian electoral law, carried out in 1998-99 in co-operation with other international organisations, and particularly the OSCE/ODIHR, provided an opportunity to focus on improvements which Croatia needed to make, after joining the Council of Europe, to comply fully with international standards.

c. Assisting in drafting

In addition to commenting on bills and laws, the Commission sometimes plays a more direct part in the drafting of a text. A case in point was Albania, where its experts went twice to Albania to co-operate in the drafting of a new electoral law.

In 1997, when the situation was particularly strained, the Commission gave former Austrian Chancellor Franz Vranitzky its backing in his efforts to mediate and secure a compromise between the different parties in the run-up to the June elections. This involved it in working with OSCE experts on a revised version of the electoral law, the main lines of which were then approved by Parliament.

In 2000, a draft electoral code, prepared by the Government and applying to all elections and referendums, was hotly contested by the opposition. Municipal elections were imminent, and the code was urgently needed. Venice Commission experts joined in inter-party talks organised by the OSCE/ODIHR. Here again, contested or unclear provisions (e.g. on allocation of seats under a proportional system and on disputes) had to be reworded.

As part of the above-mentioned monitoring procedure for Armenia and Azerbaijan, the Commission may also be required to play an active role in drafting legislation.

d. Drafting proper

More rarely, the Commission may be asked to take full responsibility for drafting electoral legislation. In 1997, for example, the Office of the High Representative (OHR) asked it to prepare a new electoral law for Bosnia and Herzegovina, applying to all elections and based on the provisional rules and regulations then in force. A team of Commission experts set to work and produced a text, which subsequently went through various changes and improvements. The OSCE later took over preparation of the law from the OHR, while continuing to base itself on the Commission's work.

e. Other forms of assistance

As we have seen, the Commission's work on electoral questions can take many different forms. Far from confining itself to the tasks described above, it adapts its action to the special circumstances of each situation.

The Commission's co-operation in the electoral field is not always linked to a specific text, but can take the form of more general guidance and assessment, leaving various possibilities open. To take one example, the contacts which it established with the Moldovan authorities as long ago as 1993 covered a variety of electoral reform options. Similarly, in November 1998, it arranged a mission to Belgrade and Pristina, to explore the possibility of organising elections in Kosovo the following year. Its opinion on electoral law reform in the Swiss

canton of Ticino[10] had more precise aims: to suggest ways of changing the law to introduce a switch to majority voting in elections to the State Council, and possibly the Grand Council, and, more specifically, to consider ways of adjusting the electoral system to produce more clear-cut majorities and make it easier for political power to change hands between parties, while emphasising voting for named candidates. It accordingly produced a comparative study of the relationship between electoral systems and political life in various cantons and countries, and an analysis of election results in other cantons[11].

The Commission also sends representatives to seminars on electoral law reform in specific countries, e.g. the IFES (International Foundation for Election Systems) forum on the Armenian electoral law (April 1997), and the International Institute for Democracy seminar on the same theme (Yerevan, January 1998), the Stockholm conference on the electoral law of Bosnia and Herzegovina (January 1996) and the OSCE/OHR seminar on ways of mitigating ethnic confrontation in elections (Sarajevo, March 1998). In Albania, it attended an inter-party meeting as early as 1991, and a seminar on electoral disputes in April 2001.

In other cases, it has helped with the actual election process, working, for example, with the central electoral commissions of Albania and Armenia in 1997 and 1998 respectively.

Finally, in April 2001, Commission experts organised a course on electoral disputes for a number of Albanian judges, who themselves repeated this training for other colleagues. Such training was needed because judges with no experience in this area were finding it hard to enforce and interpret the electoral law.

2. General activities

As in other fields, the Commission's general activities include preparing studies, and organising and participating in seminars.

Its most important *study* in the field of electoral law was devoted to electoral law and national minorities[12]. This formed part of its broader work on minority groups' participation in public life, and particularly access to the civil service[13]. Representation on elected bodies, and especially in parliament, is crucial – and so the Commission focused on this issue. Representation of minorities on elected bodies is rarely regulated *per se*, and other provisions designed to guarantee, strengthen – or, on the contrary, weaken – their representation, are not easily identified. Accordingly, the study did not confine itself to describing electoral law provisions passed to protect minorities, but looked at the nature and impact of electoral systems in general, and then at their application to minorities.

As early as 1992, a shorter expert report considered the general principles and regulatory levels of electoral law. This focused on the rules embodied in Europe's constitutional heritage, and ways of ensuring stability of electoral law by regulating at a high level[14].

The Commission has also organised comparative *seminars* on electoral questions. In 1998, under the UniDem (Universities for Democracy) programme, it invited experts from various

[10] *CDL-INF (2001) 16.*
[11] *See CDL (2000) 71.*
[12] *CDL-INF (2000) 4.*
[13] *See CDL-MIN (98) 1 rev.*
[14] *CDL (92) 1.*

parts of Europe and from South Africa to a meeting in Sarajevo on new trends in electoral law in a pan-European context. The main themes were the constitutional principles of electoral law, changes and continuity in European electoral law, and the effects of electoral systems and electoral law in post-conflict societies, and particularly Bosnia and Herzegovina[15].

In October 1998, the Commission and the Armenian Constitutional Court organised a seminar in Yerevan on electoral disputes before the Constitutional Court, which was attended by representatives of several constitutional courts in Europe and the Commonwealth of Independent States[16].

At its seminars on the constitutional law of specific countries, the Commission may also consider electoral law, as it did at the Trieste seminar on implementation of the Albanian Constitution (December 1999).

It also sends delegates to international comparative seminars, such as the CSCE seminar on democratic institutions (Oslo, 1991), the Friedrich-Naumann-Stiftung's seminar on electoral systems, political stability and viable government in Europe's new democracies (November 1998) and, most recently, the OSCE/ODIHR's "human dimension" seminar on electoral processes (Warsaw, May 2001).

3. Co-operation with other international organisations

Electoral assistance is one of the Commission's main areas of co-operation with other international governmental and non-governmental organisations.

Co-operation with the *OSCE/ODIHR* has gone furthest. As it recently did in the case of Azerbaijan, the Commission consults the OSCE/ODIHR before submitting comments on electoral law. As we have seen, joint documents were prepared on Croatia and Belarus. In the case of Belarus, for example, the European Union (through the European Parliament) and IFES co-operated with the Commission to produce a "benchmark" memorandum in spring 2000 on changes needed in the electoral code to bring electoral procedure into line with democratic norms. The *European Union* has often been represented by the European Commission in activities concerning Albania, Croatia and Kosovo. The *International Institute for Democracy and Electoral Assistance* (IDEA) contributed to the study of electoral law in Croatia and to the revision of Armenia's electoral laws. Similarly, the *Office of the High Representative* instigated the Commission's work on the electoral law of Bosnia and Herzegovina.

As for *non-governmental organisations*, in addition to the International Institute for Democracy and IFES, which contributed to the memorandum on Belarus (see above) and to the revision of Armenian and Albanian electoral law in 1997-1999 and 2000 respectively, the Commission has had contacts with such NGOs as the US National Democratic Institute (NDI) on Albania (1997), and the United Kingdom's Electoral Reform International Services (ERIS) on Armenia and Kosovo.

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[15] *The proceedings of this seminar were published under the title "New trends in electoral law in a pan-European context", Science and Technique of Democracy No. 25, Strasbourg: Council of Europe, 1999.*

[16] *The proceedings of this seminar were published under the title "Electoral disputes before the Constitutional Court" - Collected reports from the third international seminar (Yerevan, 15-16 October 1998), Constitutional Court of Armenia/European Commission for Democracy through Law, Yerevan 1999.*

Co-operation with other international organisations allows the identification of the common principles of the constitutional heritage, for example at seminars like those mentioned above. Above all, however, it ensures that a co-ordinated approach is adopted in specific cases. The work of the various organisations involved is complementary. For instance, the Commission's approach is predominantly legal, while the OSCE/ODIHR emphasises technical aspects.

The US authorities often monitor electoral activities, as they did in Croatia and Kosovo. The Foreign Ministries of countries hosting meetings (e.g. the Stockholm meeting on Bosnia and Herzegovina in 1996, the Oslo meeting on Croatia in 1999) may also become involved in monitoring.

4. Ten years' experience: what of the future?

In general, work on elections has expanded considerably in the last decade. Multi-party elections may not always denote a fully-fledged democracy, but most of the world's countries – and all of Europe's – now have them[17]. The involvement of international organisations has grown particularly fast.

Electoral themes have sparked several projects at the Council of Europe. An integrated project, with input from all Council departments, "Making democratic institutions work", is being launched in 2002, and recognises electoral law as a key issue for the Council.

A longer-term measure is the decision to institutionalise co-operation between the Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe. In a resolution adopted by its Standing Committee on 8 November 2001, the Assembly asked the Commission "to set up a working group, comprising representatives of the Parliamentary Assembly, the CLRAE and possibly other organisations with experience in the matter, with the aim of discussing electoral issues on a regular basis" and, more particularly, "to devise a code of good practice in electoral matters" and "compile a list of the underlying principles of European electoral systems by co-ordinating, standardising and developing current and planned surveys and activities. In the medium term, the data collected on European elections should be entered into a database, and analysed and disseminated by a specialised unit"[18]. This activity will give the Council of Europe and the Commission a bigger role in the electoral field, and is set to begin in 2002.

II. Europe's electoral heritage: a dynamic approach with a traditional base

Europe's electoral heritage is based on five principles: *universal, equal, free, secret and direct suffrage*. These are all familiar concepts, but their practical scope needs to be looked at carefully – and the Commission does this whenever it considers a point of electoral law.

The application of these principles must always be considered in context. The analysis which follows is thus divided into two sections. The first deals briefly with the basis and general conditions needed for implementation of the constitutional principles of electoral law, and the second focuses on those principles themselves.

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[17] *See, for example, López Pintor Rafael, Electoral Management Bodies as Institutions of Governance, New York: UNDP, 2000, pp. 15ff.*

[18] *Resolution 1264 (2001); see also document 9267.*

A. Basis and implementation

1. Introduction

a. Legal basis

National law provides the fullest guarantee of the constitutional principles of electoral law. Constitutions often guarantee them explicitly[19], and electoral laws, and even regulations, spell out details of their application.

At the same time, national law is not solely responsible for the fact that these basic principles are common throughout Europe. International guarantees are important too. The constitutional principles of electoral law are explicitly affirmed in the International Covenant on Civil and Political Rights – with the exception of direct suffrage, which is implied[20]. In Europe, the common standard is Article 3 of the first Protocol to the European Convention on Human Rights, which expressly endorses the right to free elections by secret ballot, and the case-law recognises that the other principles derive from this clause[21]. In the electoral field as in others, international human rights protection guarantees minimum standards; national law is free to go further and guarantee more extensive political rights[22].

b. Guaranteeing the constitutional principles of electoral law: general conditions

Proclaiming the principles of Europe's electoral heritage, and even spelling them out in detailed regulations, is not enough to guarantee their implementation. Three *general conditions* must also be fulfilled:

- first, electoral law must have a certain stability, protecting it against party political manipulation;
- second, there must be procedural guarantees to ensure that the principles are impartially applied;
- third, there can be no true democracy unless fundamental rights – and particularly freedom of expression, assembly and association – are respected.

These general conditions are developed below.

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[19] See, for example, Article 38.1 of the German Constitution, Articles 68.1 and 69.2 of the Spanish Constitution and Article 59.1 of the Romanian Constitution.

[20] Article 25b; see also Article 21 of the Universal Declaration of Human Rights.

[21] See, for example, Pierre Garrone, "The constitutional principles of electoral law", in "New trends in electoral law in a pan-European context" (note 15), pp. 11-34, 28-33; Pierre Garrone, "The constitutional principles of electoral law", in Electoral Systems, Political Stability and Viable Government in Europe's New Democracies – Achievements, Failures and Unresolved Issues: Proceedings of a seminar at the Council of Europe/Friedrich-Naumann-Stiftung, edited by Wolfgang Heinz and Harald Klein, Sankt Augustin: Comdok, 1999, pp. 15-31 and references.

[22] See Article 53 ECHR.

2. Regulatory levels and stability of electoral law

Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy[23]. Rules which change frequently – and especially rules which are complicated – may confuse voters and leave them nonplussed. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections.

As we have seen, the constitutional principles of electoral law derive from international agreements. To that extent, they are immutable. But it is highly desirable that they should have constitutional force as well[24], and many countries have given them this.

In practice, however, it is not so much stability of the basic principles which needs protecting (they are not likely to be seriously challenged) as stability of some of the more specific rules of electoral law, especially those covering the electoral system *per se* and the composition of electoral commissions. This makes it necessary to decide on what level these questions should be regulated. Regulations embodied in the Constitution are obviously harder to change than others[25].

The Commission's work offers no conclusive arguments either for or against "constitutionalisation" of these regulations. Not all countries choose to regulate *electoral systems* in their constitutions, but many constitutions do provide for a proportional system[26], and the Portuguese Constitution even makes this an inalterable principle[27]. Such inflexibility should perhaps be avoided, but making basic changes to the voting system subject to the cumbersome procedure of constitutional revision does guarantee a certain permanence, and is compatible with European norms[28]. Some constitutions are even more specific: the Irish Constitution provides for a single transferable vote, while the Portuguese Constitution stipulates the d'Hondt method and prohibits the statutory imposition of national thresholds[29].

The Albanian Constitution provides for a mixed election system and regulates it in detail. Specifically, it stipulates that one hundred deputies are to be elected by majority vote in single-candidate constituencies, and that forty "equalising" seats are to be allocated at national level, in order to optimise proportionality; it also specifies a 2.5% threshold for single parties and a 4% threshold for coalitions[30]. The Commission, which was involved in drafting the Constitution, felt that these details should be included, to ensure that the electoral law would not be changed before every election. This solution reflected Albania's special circumstances, but other countries may think it unnecessary to specify the actual electoral system in their constitutions.

It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before elections. Even when no

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[23] *On the importance of credibility of the electoral process, see for example CDL (99) 67, p. 11; on the need for stability of the law, see CDL (99) 41, p. 1.*
[24] *See CDL (92) 1, p. 5.*
[25] *See CDL (92) 1, p. 11.*
[26] *See, for example, Article 96.2 of the Polish Constitution, Article 68.2 of the Spanish Constitution and Article 149.2 of the Constitution of Switzerland.*
[27] *Article 288 h.*
[28] *See, for example, CDL (2000) 77, p. 3.*
[29] *Articles 149.1 and 152.*
[30] *Article 64.*

manipulation is intended, changes will seem to be dictated by immediate party political interests and may cast doubt on the legitimacy of the democratic process itself[31]. Last-minute changes should be envisaged only if the applicable law is incompatible with the principles of Europe's electoral heritage - and even then it should be possible to deal with the problem in good time.

Another way of preventing manipulation, while avoiding the inflexibility of "constitutionalising" the electoral system, is to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election, and the new one will take effect after that[32].

Electoral systems in the narrow sense are not the only area where changes may look like manipulation and must not be either ill-timed or frequent. Another is the composition of the *electoral commissions* which supervise elections. The political debate on electoral law often tends to focus on this question, since electoral commissions are seen as having power to decide the outcome of elections. Guarantees of impartiality – which are discussed below – limit this power to announcing the results. Nonetheless, membership changes, particularly in central electoral commissions, will always raise doubts concerning impartiality - above all if they occur shortly before elections.

The drawing of constituency boundaries is another area where the legislator's power must be restricted, to remove a whole range of opportunities for manipulation by the political majority[33]. In countries with multi-member constituencies, the best answer is to write them into the Constitution[34].

3. Procedural guarantees

Any law, however good, is a mere empty shell unless it is properly enforced, and electoral law is no exception. The substantive principles of Europe's electoral heritage will be respected only if the *formal principles* are respected too, i.e. *elections must be organised by an impartial body,* and there must be *an effective appeal system.*

a. Organisation of elections by an impartial body

In stable democracies, where the civil service applies electoral law without being subjected to political pressures, it is both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior.

However, in new democracies with little experience of organising pluralist elections, there is too great a risk of government's pushing the administrative authorities to do what it wants[35]. This applies both to central and local government - even when the latter is controlled by the national opposition.

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[31] *CDL (99) 51, p. 9, and reference.*
[32] *CDL (92) 1, p. 11. In this connection, see new Article 67.6 of the Turkish Constitution: "Amendments made to electoral laws shall not be applied to elections to be held within one year from the amendments' entry into force".*
[33] *CDL (91) 31, p. 31.*
[34] *See, for example, Articles 68.2 and 69.2-4 of the Spanish Constitution and Article 149.3 of the Swiss Constitution.*
[35] *CDL (99) 51, p. 8.*

This is why *independent, impartial electoral commissions* must be set up on all levels to ensure that elections are properly conducted, or at least remove serious suspicions of irregularity. The members must also have the necessary qualifications and experience[36].

Bodies that appoint members to electoral commissions should not be free to recall them, since this would curb their independence, and might bring the commissions under the control of political parties, the government or various political bodies[37]. Discretionary recall is unacceptable, but recall for disciplinary reasons or incompetence is - provided that the grounds are clearly and restrictively specified in law (vague references to "acts discrediting the commission", for example, are not sufficient).

The independence of electoral commissions can be guaranteed in various ways, and there is no universal formula. The rules can simply say, for example, that commissions are to comprise judges, legal experts or specialists in electoral matters, who must be independent of government and political parties. Often, however, this is not enough, since members may seem independent and still have covert ties with specific political factions, and particularly the governing party.

Impartiality can also be guaranteed by ensuring that the various political groupings are fairly represented on the commissions. The principle of equality is respected both by giving every party one seat and by giving the major parties more. It is also acceptable - for example, on the basis of earlier election results - to exclude the smallest parties and so keep commission size reasonable[38]. Under Armenia's current electoral law, the Central Electoral Commission comprises representatives of parties with seats in the last parliament, which have collected at least 30,000 valid signatures for the proportional round of the upcoming election, and representatives of the five other parties with the most signatures (above 30,000)[39]. Equal representation of majority and opposition may also be stipulated. Albania's 1997 law, for example, gave majority and opposition parity on the Central Electoral Commission, and every party one seat on the subordinate electoral commissions[40]. To ensure that no one faction can impose its views, a qualified majority may be required for decisions to be taken. Azerbaijan's deletion of such a requirement from its electoral law, which deprived the opposition of its veto, was challenged – especially at the international level.

There is no reason why electoral commissions should not include government appointees, provided their weight is not decisive. This is the case in Armenia, where three members of the Central Electoral Commission are government-appointed[41]. In fact, governments are involved, in one way or another, in the electoral process (e.g. through civil status registers or the logistics of setting up polling stations), and their participation in electoral commissions may therefore be useful. Lithuania's regional electoral commissions comprise two representatives of each political party, two legal experts appointed by the Ministry of Justice, and two appointed by the Lithuanian Law Society. This arrangement is considered balanced[42]. On the other hand, government appointment of all the members of an electoral

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[36] *See, for example, CDL (98) 10, pp. 4-5.*
[37] *On this subject, in relation to Armenia, see CDL (2000) 103 rev, pp. 3-4; it was later pointed out that the possibility of recall needed to be rescinded.*
[38] *See, for example, CDL (98) 10, p. 4.*
[39] *Article 35 of the 1999 Electoral Code.*
[40] *Sections 35a, 37 and 39 of the 1997 Elections Act.*
[41] *Article 35 of the 1999 Electoral Code.*
[42] *CDL (94) 42, p. 4.*

commission (even if these are not civil servants) is highly suspect[43]. This is the case in Belarus, where the President's role in appointing half the members of the Central Electoral Commission is also deemed excessive.

Central electoral commissions – and, if possible, the commissions immediately below them - should be *permanent*, since this guarantees their independence and the continuity of their work[44].

The *qualifications and experience* required of people serving on central and local commissions, and even at polling stations, naturally varies with the body concerned. Members of central commissions should be legal experts, political scientists, statisticians or other people with a good understanding of electoral issues[45,46].

b. An effective appeal system

The proper conduct of the entire electoral process must be open to challenge before an appeal body. There are three possible approaches here:

- Parliament decides whether its members have been validly elected, with or without the possibility of judicial appeal;
- appeals are heard by the ordinary courts, a special court or the constitutional court;
- authority rests with the electoral commissions, usually with the possibility of subsequent appeal to a court[47].

Appeal to Parliament itself may be a safe solution in some well-established democracies, but should be avoided in new ones, where Parliament's impartiality is far from self-evident – and where appeal to a court should at least be possible[48].

As a rule, judicial appeal is thus the best answer; final appeal to an independent and impartial electoral commission may also be acceptable[49].

It is also vital that the appeal procedure, and especially the powers of the various bodies involved in it, should be clearly regulated. Otherwise, the risk that successive bodies will refuse to give a decision (on the ground that they lack jurisdiction) is seriously increased, particularly where appeal is theoretically possible to either the courts or an electoral commission, or where the powers of different courts – e.g. the ordinary courts and the

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[43] *CDL (99) 67, pp. 6-7.*
[44] *CDL (98) 45, p. 3; CDL (2000) 2, p. 4.*
[45] *Cf. CDL (98) 10, p. 5.*
[46] *For general information on the composition of electoral commissions in central and eastern Europe, see György Csalótzky's article on electoral corporative bodies (commissions, committees, boards) and preparation of voter's registers promoting free and fair democratic elections, in "New trends in electoral law in a pan-European context" (note 15), pp. 35-49, 38 ff; see also Pierre Garrone on options for electoral legislation, in "L'attuazione della Costituzione albanese – Atti del seminario di Trieste, 13-14 dicembre 1999", Quaderni del Dipartimento di Scienze Giuridiche, Trieste: Edizioni Università di Trieste 2000, pp. 95-133, 121-122.*
[47] *Bernard Owen, "Le contentieux électoral: étude comparative", in Le contentieux électoral devant la Cour constitutionnelle (note 16), pp. 54-70, especially p. 54. This work looks in detail at electoral disputes in Armenia, France, Germany, Russia, Switzerland and Tajikistan. A number of constitutions provide for judicial appeal – see, for example, Article 55.2 of the Ukrainian Constitution and Bulletin (note 47), UKR-1998-1-003.*
[48] *See, for example, CDL (91) 31, pp. 28-31.*
[49] *Cf. CDL (99) 67, p. 9; CDL (99) 40, p. 3.*

constitutional court – are not clearly differentiated. This problem has arisen in several CIS countries, such as Armenia[50], Azerbaijan[51] and Belarus.

When appeal does not take the form of a complaint to a higher authority, but is lodged with an independent body, then it must be open to voters, but not to observers[52].

The procedure must be simple, and providing voters with special appeal forms can help to make it so[53]. The training sessions on application of Albania's electoral law by the courts (April 2001) stressed the need to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

The *powers* of appeals bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated[54].

4. Respect for fundamental rights: a necessary condition

a. Respect for fundamental rights generally

Democracy is unthinkable in practice, unless the two other pillars of the Council of Europe - human rights and the rule of law – are also respected.

We shall simply mention the *rule of law* in passing. In particular, democracy requires that the *rules of electoral law* be respected, that elected bodies discharge the functions entrusted to them, and that *laws* democratically passed be *enforced in practice*.

Democracy is equally hollow if *human rights* are not respected. This is especially true of free speech and freedom of the press, and of freedom of assembly and association for political purposes, especially during election campaign periods[55].

The fact is that many countries have legal limitations on *free speech*, which, if restrictively interpreted, may just be acceptable - but may generate abuses in countries with no liberal,

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[50] CDL (2000) 103 rev, pp. 12-13, 15-16.
[51] CDL-INF (2000) 17, pp. 6-7.
[52] CDL (99) 40, p. 10; (2000) 103 rev, pp. 10-11.
[53] CDL (98) 45, p. 11.
[54] There was a problem here with the November 2000 elections in Azerbaijan. Under Section 3.1 of the Law on elections to the Milli Majlis, 100 seats are allocated on a single-round, single-candidate, majority vote, and 25 under a proportional system. Both the majority and the proportional segments were annulled in eleven constituencies, but only the majority vote was repeated, and the votes cast there under the proportional system were simply ignored when the seats concerned were allocated. This was because, under Sections 73.8.2 and 76.1 of the Law on elections to the Milli Majlis, the proportional segment of an election can be repeated only in its entirety, and then only if the results have been annulled in 25% of polling stations (or constituencies?).
[55] On these questions, see Pierre Garrone, "The constitutional principles of electoral law" (seminar at the Council of Europe) (see above, note 21), pp. 15-16; see also CDL-INF (2000) 17, p. 2.

democratic tradition. In theory, they are intended to prevent "abuses" of free speech by ensuring, for example, that candidates and public authorities are not vilified, and even protecting the constitutional system. In practice, however, they may lead to the censoring of any statements which are critical of government or call for constitutional change, although this is the very essence of democratic debate. For example, several international organisations agree that European standards are violated by the electoral law of Belarus, which prohibits "insulting or defamatory references to officials of the Republic of Belarus or other candidates" in campaign documents, makes it an offence to circulate libellous information on candidates, and makes candidates themselves liable for certain offences committed by their supporters[56]. Similarly, in Azerbaijan, the law's insistence that materials intended for use in election campaigns must be submitted to electoral commissions, indicating the organisation which ordered and produced them, the number of copies and the date of publication, constitutes an unacceptable form of censorship, particularly since electoral commissions are required to take action against illegal or inaccurate publications. Furthermore, the rules prohibiting improper use of the media during electoral campaigns are rather vague[57].

When it comes to media access, the constitutional principles of electoral law go beyond the requirements of free speech, especially during election campaigns. We shall return to this later[58].

b. Protection of minorities

In recent years, the protection of minorities has (again) become one of the main focuses of European public law. Since its inception, the Commission has made this one of its priorities, and its proposal for a European convention on the subject[59] led to the Framework Convention for the Protection of National Minorities[60]. It later made a detailed assessment of the protection of minorities in national law, and of the specific solutions adopted in federal and region-based states[61]. The protection of minorities is now part of Europe's constitutional heritage[62], and electoral law is far from irrelevant here. On the contrary, representation of minorities in elected assemblies, and especially national parliaments, holds the key to their participation in public life, and the Commission has accordingly looked at it closely and made it the subject of a special study[63].

This study finds that electoral laws contain a wide range of provisions which are either expressly designed to ensure minority participation in elected assemblies, or do so in practice. It concludes that:

- Some countries – though not many - have *specific rules* to ensure such participation.

- Some rules are designed to ensure that *minorities as such* are represented.

[56] *Articles 47, 49 and 75 of the Electoral Code; see also CDL (99) 66, pp. 7-8.*
[57] *For further information, see CDL-INF (2000) 17, pp. 2-3, and Articles 56 and 57 of the Law on elections to the Milli Majlis.*
[58] *See below, section II.B.2.a.cc.*
[59] *See "The protection of minorities", Science and Technique of Democracy No. 9, Strasbourg: Council of Europe, 1994, pp. 10ff.*
[60] *ETS 157.*
[61] *"The protection of minorities", Science and Technique of Democracy No. 9, pp. 44ff.*
[62] *See the Framework Convention mentioned above.*
[63] *CDL-INF (2000) 4; for non-electoral themes, see CDL-MIN (98) 1 rev.*

-- The most explicit arrangement for the representation of national minorities is the *personal constituency*, where the voters are people who belong to a certain ethnic group, not people who live in a certain area. Slovenia, for example reserves one seat in Parliament for the Italian minority, and another for the Hungarian minority[64]. In Croatia, members of national minorities may choose, in elections to the Croatian Parliament, to vote for a general national list – like members of the majority – but, under Article 15.3 of the Constitution, they may also vote for specific minority lists. This system is not entirely satisfactory, however, chiefly because it obliges candidates (*de jure*) and voters (*de facto*) to reveal their ethnic origin, even when they do not intend to stand - or vote – for minority-reserved seats. Moreover, the drop in the number of deputies from the Serb minority raises questions. In addition to its specific activities on behalf of minorities in Croatia, the Commission has joined other international organisations in trying to find a better answer to this problem[65].

-- Romania's system for elections to the lower house of Parliament guarantees lawfully constituted organisations of members of national minorities a *minimum level of representation*. If they get at least 5% (only) of the average number of validly cast votes required for election to the lower house country-wide, and the normal election process still leaves them with no seats in either house, then they are entitled to one seat in the lower house.

- Other rules are simply designed to *facilitate minority representation* in elected bodies, without necessarily guaranteeing it. In Poland[66] and Germany[67], for example, the threshold rules do not apply to minority organisations. In Ukraine, under the 1998 election law, the areas where national minorities are concentrated must form separate constituencies. If a minority has more members than a normal constituency has voters, then at least one constituency must be drawn to give that minority strong representation in it[68].

- *Belgium* has a special system. All its institutions are planned to strike a balance between language groups (rather than minorities proper). In some linguistically mixed areas, adjustments have also been made to ensure that voters from the various linguistic communities are represented on elected bodies[69].

- On the other hand, it may be that neutral rules - for example, those relating to the drawing of constituency boundaries - are applied with the intention of making it easier for minorities to be represented. More often than not, however, the representation of minorities is not a deciding factor in the choices made when an electoral system is adopted or even put into practice. However, as regards the presence of members of minorities in elected bodies, the following general remarks may be made.

  - The impact of an electoral system on the representation of minorities is felt most clearly when national minorities have their own parties.

  - It is uncommon for political parties representing national minorities to be prohibited by law and highly unusual for this in fact to happen. Only in very rare cases does this

[64] *Article 80.3 of the Constitution.*
[65] *On this subject, see above all the annual activity report for 2000, pp. 10-11.*
[66] *Cf. Bulletin (note 47), POL-1997-1-009.*
[67] *Section 6.4 of the Federal Electoral Act.*
[68] *Section 7.2 of the Law on the election of people's deputies; see CDL (2000) 2, p. 5.*
[69] *For more information, see CDL-INF (2000) 4, p. 4.*

constitute a restriction upon the freedom of association, which nonetheless respects the principle of proportionality, and is consistent with the European constitutional heritage.

- Although parties representing national minorities are very widely permitted, their existence is neither the rule nor indispensable to the presence of persons belonging to minorities in elected bodies.

- The more an electoral system is proportional, the greater the chances dispersed minorities or those with few members have of being represented in the elected body. The number of seats per constituency is a decisive factor in the proportionality of the system.

- When lists are not closed, a voter's choice may take account of whether or not the candidates belong to national minorities. Whether or not such freedom of choice is favourable or unfavourable to minorities depends on many factors, including the numerical size of the minorities.

- Unequal representation may have an influence (positive or negative) on the representation of concentrated minorities, but the replies to the questionnaire do not indicate any concrete instances.

- When a territory where a minority is in the majority is recognised as a constituency, this helps the minority to be represented in the elected bodies, especially if a majority system is applied.

To *sum up*, the participation of members of national minorities in public life through elected office results not so much from the application of rules peculiar to the minorities, as from the implementation of general rules of electoral law, adjusted, if need be, to increase the chances "of success of the candidates from such minorities".[70]

B. The constitutional principles of electoral law[71]

The hard core of Europe's electoral heritage comprises the five constitutional principles of electoral law which have already been mentioned: universal, equal, free, secret and direct suffrage. The following sections will explain the content of these principles, giving practical examples of their application.

1. Universal suffrage

Taken literally, universal suffrage means giving everyone the basic political rights: the right to vote (active electoral rights) and the right to stand for election (passive electoral rights). However, electoral rights are always subject to conditions of age and nationality, and usually residence also. Moreover, certain persons may lawfully be deprived of their electoral rights in specific cases[72].

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[70] *CDL-INF (2000) 4, pp. 13-14.*

[71] *On these questions, see in general Garrone, P., The constitutional principles of electoral law, in "New trends in electoral law in a pan-European context" (note 21) ; The constitutional principles of electoral law (seminar at the Council of Europe) (note 21).*

[72] *On this question, see Garrone, P. : The constitutional principles of electoral law, in New trends in electoral law in a pan-European context" (note 21), pp. 12 ff.; The constitutional principles of electoral law, seminar at the Council of Europe (see above, note 21), pp. 17ff.*

a. First of all, the right to vote and stand for election is subject to *age* conditions: the minimum voting and standing age may well vary from country to country and election to election, but electoral rights are always withheld from minors. There are certain functions for which the qualifying age is relatively high[73]. Far more rarely, there is an upper age limit – the standard retirement age or above – for passive electoral rights[74]. This age limit is on a par with the regulations obliging civil servants to retire at a specified age. However, depriving old people of active electoral rights would violate the principle of universal suffrage.

b. Most states also make political rights dependent on *nationality*. Exceptions, at least in national elections, are extremely rare; the Irish Constitution, for example, gives the law the possibility of conferring the right to vote in national elections[75]; in the United Kingdom, Irish and Commonwealth nationals are allowed to vote in all elections[76]. More states allow non-nationals to vote in local elections, even if only five – Denmark, Finland, the Netherlands, Norway and Sweden – have so far ratified the Council of Europe Convention on the participation of foreigners in local public life[77] without excluding the section on voting rights in local elections. The right of EU nationals to vote and stand in local elections and elections to the European Parliament in their countries of residence[78] is one aspect of the European integration process.

Under the European Convention on Nationality, people with dual nationality must have the same rights as other nationals[79]. Requiring elected candidates to renounce their second nationality may prove detrimental to national minorities[80]. The break-up of the Soviet Union and Yugoslavia has given this question a special significance. The European Convention on Human Rights does not require, however, that holders of dual nationality be allowed to stand for election[81].

c. Third, conditions of residence may apply to both the right to vote and the right to stand for election[82]; in local elections, requiring a certain period of residence would not seem incompatible with the principle of universal suffrage, if that period is just a few months; a longer period would be justified only in special circumstances[83].

Conversely, a fair number of states give nationals residing abroad the right to vote and even stand for election. This raises no problems in most cases, but might prove delicate in post-

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[73] For example, in Italy, forty for election to the Senate (Art. 59.2 of the Constitution), and fifty for the Presidency (Art. 84.2 of the Constitution).

[74] This applies to a limited number of cantonal elections in Switzerland.

[75] Art. 16.1 2 ii).

[76] On this question, see the Report of the Steering Committee on local and Regional Authorities (CDLR) on electoral systems and polling methods at local level, prepared in consultation with Professor Dieter Nohlen and adopted by the CDLR at its 22nd meeting (1-4 December 1998), p. 13; The participation of foreigners in local public life – Explanatory report on the convention opened for signing on 5 February 1992, Strasbourg, Council of Europe 1993, para. 36.

[77] ETS 144.

[78] Art. 19 of the Treaty establishing the European Community.

[79] Art. 17 of the European Convention on Nationality (ETS 166).

[80] CDL-INF(2000)17.

[81] Bieliunas Egidijus, Le contentieux électoral devant les organes de la Convention européenne des droits de l'homme, in «Le contentieux électoral devant la Cour constitutionnelle» (note 16), pp. 87-98, 95-96, and European Commission of Human Rights. No. 28858/95, dec. 25.11.96, Gantchev v. Bulgaria, D.R. 87, p. 130.

[82] See, most recently, European Court of Human Rights, No. 31981/95, dec. 7.9.99, Hilbe v. Liechtenstein.

[83] Cf. European Commission of Human Rights. No. 23450/94, dec. 15.9.97, Polacco and Garofalo v. Italy, D.R. 90, p.5 (on Trentino-Alto Adige).

conflict situations. The situation created by giving Croats resident in Bosnia and Herzegovina political rights, and granting nationality on an ethnic basis, was regarded as going far beyond the norm – particularly as those Croats were given a special constituency, while Croatian Serbs resident abroad were *de facto* denied nationality and refused political rights. In a more general sense, deciding which constituency should get the votes of nationals living abroad is a problem; one answer might be to establish a special home constituency for them[84].

d. Universal suffrage is also compatible with withholding civic capacity from certain persons in clearly-defined situations. At the same time, restrictions must "not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness", and must be "imposed in pursuit of a legitimate aim", and "the means employed" must not be "disproportionate"[85]; moreover, the restrictions must have a clear basis in law[86]. Persons liable to be deprived of political capacity include, first and foremost, those deprived of legal capacity (particularly on mental health grounds), as well as those serving criminal sentences, at least certain sentences or for serious crimes[87]. On the other hand, depriving persons held in detention pending trial of their political rights is incompatible with the presumption of innocence[88]. Moreover, "lustration" laws, debarring persons who exercised certain functions under a previous authoritarian regime from public office, must apply only to persons shown to have engaged in criminal activity.

Passive electoral rights may be more extensively withheld than active electoral rights without compromising universal suffrage. Public office is the issue here, and it may well be lawful to debar certain people if an overriding public interest would suffer from their holding it. Obviously, the principle of proportionality must be scrupulously respected[89].

In general, the approach to loss of the right to stand for election and to incompatibility must be restrictive.

e. Making the validity of an election conditional on a certain *minimum turn-out* may violate the principle of universal suffrage if this requirement also applies to a second ballot held because the first one failed to reach the threshold. In such cases, some seats may be left unfilled. The same applies if an absolute majority is required in every ballot. The combination of these two requirements in Ukraine in 1994 left a number of seats unfilled, and this is not acceptable[90].

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[84] *CDL(99)41, p. 5.*

[85] *European Court of Human Rights, Matthews v. United Kingdom, judgment of 18 February 1999, ECHR 1999-I, para. 63; Bulletin (note 47) 1999-ECH-004.*

[86] *See already CDL(92)1, p. 4.*

[87] *Examples: Art. 54(2) of the Netherlands Constitution: loss of voting rights applies only to persons sentenced to at least one year's imprisonment and simultaneously deprived of the right to vote; Art. 34(2) of the Romanian Constitution: here again, deprivation of electoral rights must be expressly ordered in the judgment. In both states, mental illness is the only other ground recognised. On the admissibility of depriving persons serving prison sentences of their civic rights, see, for example, European Commission of Human Rights, No. 24827/94. Holland v. Ireland, dec. 14.4.98.*

[88] *This question recently arose in Belarus; cf. CDL(94)42, p.6.*

[89] *On the question of loss of the right to stand for election, and specifically the Gitonas and others v. Greece judgment of 1 July 1997, Reports of judgments and decisions 1997-IV, p. 1233, see Bieliunas E. (Note 81) pp. 91 ff.*

[90] *CDL(99)51, p. 6 ; CDL(2000)2, p. 10.*

f. The right to vote may be subject to a requirement of *enrolment* on the electoral register, in countries where registration is not automatic on the basis of the population lists. In other countries, people must register before they can vote or stand for election. This requirement[91] must not be seen as a restriction on universal suffrage, but as part of the manner of exercising it. The principle of universal suffrage does oblige states, however, to make it practically possible for people to register, and allow them a reasonable time for doing so[92]. Registration offers opportunities for fraud – hence the need to find ways of identifying voters clearly when they register, and so prevent them from registering twice[93]. Finally, the electoral register must be open to public inspection: the best approach is to post the lists in a public place – this facilitates correction and helps to make them more reliable[94].

g. Requiring potential candidates to collect a certain number of signatures or even lodge a deposit, before they can stand, must also be regarded as part of the manner in which political rights are exercised, as long as this imposes no excessive restrictions. In principle, the number of signatures required should not exceed 1% of the electorate[95]. Requiring parties wishing to present a list of candidates in the single national constituency (where one exists) to collect a certain number of signatures in the various parts of the country is acceptable[96]. There must also be clear rules on verifying signatures, which must apply to all signatures, and not just a sample[97].

2. Equal suffrage

Equal suffrage has several aspects, some forming part of Europe's shared constitutional heritage, which are based on Article 3 of the first Protocol to the European Convention on Human Rights: equal voting rights, equal voting power and equal opportunity. National law alone can, however, ensure equality – or proportionality – of the results. We shall look at these various aspects in turn.

a. Elements forming part of Europe's shared constitutional heritage

aa. Equal voting rights

Equal voting rights are fundamental. Every elector is entitled to one vote – and to one vote only. This rule no longer raises any problems in Europe.

bb. Equal voting power

Except in the case of single-member constituencies, the territory must be divided up in such a way that seats in the *lower houses*, which represent the people, are fairly distributed between the constituencies, using a clear criterion, e.g. the population of each, the number of resident nationals (including minors), the number of registered voters or even the number of people who actually vote.

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[91] *It exists, for example, in France (Art. L9 ff. of the Electoral Code) and in the United States.*
[92] *On the question of electoral lists, see Csalótzky G. (Note 46) pp. 45-47.*
[93] *Cf. Garrone P., Options pour la législation électorale (note 46), p. 102.*
[94] *CDL(98)10, p. 10.*
[95] *CDL(99)66, p. 9; for an example, see Venice Commission, Bulletin (Note 47), SLO-1999-1-002.*
[96] *CDL(99)51, p. 4; CDL(2000)2, p. 6.*
[97] *CDL-INF(2000)17, pp. 4-5 ; CDL(99)67, pp. 7-8.*

Serious failure to match this criterion at once raises a problem of *unequal representation*, also known as *electoral geometry*. With multi-member constituencies, this can be forestalled by allocating seats to constituencies in a manner consistent with the criterion; indeed, seats should be redistributed at regular intervals to ensure that population shifts do not result in unequal representation (passive electoral geometry). The situation is more complicated with single-seat majority systems since, whenever seats are redistributed, constituencies have to be redrawn. In single-menber constituencies, departures from the norm of up to 15% are acceptable, at least when the drawing of constituencies takes account of administrative and geographical boundaries. Whenever possible, however, departures from the norm should not exceed 10%, as experience in Ukraine has shown[98]. Greater discrepancies can, however, be envisaged, to ensure that national minorities are represented.

cc. Equal opportunity

Equal opportunity for parties and candidates means, first of all, that the same rules apply to all candidates, wherever they come from. This principle is violated most flagrantly by banning a party or preventing candidates from standing, in the absence of any compelling public-interest reason for such an exceptional measure[99].

Equal opportunity is not respected when some parties can put candidates forward more easily than others. In Belarus, for example, workers' collectives can nominate candidates by majority vote and without a secret ballot, provided that they have at least 300 members and a majority attend the meeting; in extreme cases, 76 votes are sufficient, whereas candidates nominated by electors require 1000 signatures[100]. Workers' collectives may also be exposed to pressure from management – which is why the power given them to nominate candidates is excessive[101].

- In a more general sense, states must adopt a neutral stance on elections. This applies primarily, of course, to the authorities responsible for organising them, such as electoral commissions[102]. The authorities must also refrain, for example, from openly supporting a particular candidate, or regulating the right to demonstrate, use of posters, media access and the allocation of public funds to parties in an unequal fashion.

Equal opportunity can, however, be understood in two ways. Equality can be "strict" or "proportional". Strict equality means treating all the parties in the same way, regardless of their current parliamentary strength or electoral support. This is essential when use of state property for electioneering purposes is the issue. Proportional equality means taking account of parties' election results (votes or seats) in allocating radio and television air-time or public funds. Albania has found an intermediate solution: air-time allocation on public radio and TV comes close to strict equality: in the first round, all parties represented in parliament are entitled to the same air-time, which may not be less than 15 minutes, while parties with no seats in parliament are entitled to 10 minutes[103]; state funds, on the other hand, are allocated to parties on an essentially proportional basis: 10% is divided equally among the parties

[98] *CDL(98)45, p. 3; CDL(99)51. p. 8; CDL(2000)2, p. 5.*
[99] *See, on this question, Guidelines on prohibition and dissolution of political parties and analogous measures, CDL-INF(2000)001.*
[100] *Arts. 63 and 65 of the Electoral Act.*
[101] *Cf. CDL(99)67, p. 7.*
[102] *See above Ch. II, A.3.a.*
[103] *Art. 103 of the Electoral Code.*

registered for the elections; 30% is divided equally among the parties represented in parliament, or on the municipal councils; finally, 60% is divided in proportion to the number of votes obtained in the previous national or local elections; parties which fail to win 2.5% of the vote must refund the sums advanced to them[104].

Equal opportunity means that the media must not only be impartial in election broadcasts, but must also be more generally impartial, particularly during the campaign. In fact, media bias, or at least a tendency to highlight government activities and ignore those of the opposition, is a recurrent problem[105].

- Neutrality is not expected, on the other hand, of *individuals* – although individuals can sometimes interfere with equal opportunity. The state may also regulate the funding of political parties, particularly with a view to limiting private contributions which would give certain parties an advantage[106]. Publishing details of contributions and expenditure helps to prevent unlawful funding, and indeed vote-buying[107]. Conversely, parties should not be financially dependent on public funds, since this allows the authorities to influence the campaign[108].

- *Gerrymandering* – manipulating boundaries to concentrate opposition voters in a few constituencies, and let the majority carry the others – also interferes with equal opportunity. This is difficult to prove, and so prevention is better than cure: in particular, administrative boundaries must be taken into account when constituencies are being drawn[109]; in multi-seat systems, constituencies can even be made to coincide with such sub-state entities as federated states, regions or *départements* – if necessary, by providing for this in the constitution[110]. When constituencies are regularly redrawn (e.g. in single-seat systems), this should at least be done by an independent commission or judicial body, and not left to a parliamentary or government body[111]. Recent examples include the Albanian Electoral Code, under which constituencies are drawn in accordance with the recommendations of a commission comprising the Secretary of the Central Electoral Commission, the Director of the Statistical Institute, the Director of the Land Survey Office, and the Director of the Geographical Studies Centre at the Academy of Sciences[112].

  Gerrymandering to the detriment of national minorities must also be avoided. On the contrary, constituencies should be drawn in a way which helps them to secure a number of seats proportional to their percentage position in the population[113].

- The adoption of *positive measures* to rectify past inequalities, legal or *de facto*, suffered by certain groups, such as women or minorities, is also conceivable, within the limits of the individual state's constitution. The French Constitution, for example, was amended in 1999 to ensure equal representation of both sexes in the various elected bodies[114]. Similarly, some

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[104] *Art. 139 of the Electoral Code.*
[105] *See, for example, CDL(99)51, p. 5; CDL(2000)2, pp. 7-8.*
[106] *See, for example, CDL(2000)2, pp. 8-9.*
[107] *Cf. CDL(99)51, p. 6.*
[108] *See Guidelines and report on the financing of political parties, CDL/INF(2001)008.*
[109] *CDL(2000)2, p. 5.*
[110] *CDL(92)1, pp. 8-9.*
[111] *Cf. CDL(91)31, pp. 33-34.*
[112] *Art. 68; cf. CDL-INF(2000)17, P. 11.*
[113] *CDL-INF(2000)4, p. 14.*
[114] *See Art. 3 of the Constitution.*

states have special regulations to ensure that minorities are represented[115]. So far, however, such positive measures are relatively rare, and cannot be counted among the *acquis* of Europe's electoral heritage.

b. Equality of results and the electoral system in the strict sense

Equality of results is one aspect of electoral equality which is not covered by international law or Europe's constitutional heritage, but which still figures prominently in the law of certain countries.

- Equality of results can be seen in various ways. Most people think of *equality of representation between parties*. The more closely the elected body's composition resembles that of the electorate, the more equality of results becomes a fact. In other words, the systems which yield the most proportional results come closest to achieving this objective.

  There are three factors which play a central part in determining an electoral system's proportionality, i.e. the extent to which the elected body's membership reflects the proportion of the vote secured by each party. The first, of course, is the nature of the system; the second is the threshold; and the third is the number of seats per constituency – the fewer the seats, the more thresholds tend to eliminate small parties[116].

- The Venice Commission, like the bodies responsible for enforcing the European Convention on Human Rights[117], holds that states are free to choose their *electoral system* and free to decide, in particular, how proportional it should be[118]. In some cases, however, a proportional system, or at least a system with some proportional elements, is desirable. In Belarus, for example, the international community considered that, in the political circumstances of the year 2000, a proportional element, and thus a hybrid system, was needed to give the opposition a bigger say in parliament, and so offset a very powerful presidency[119]. Careful thought should be given before introducing in a new democracy a system which has seen little use elsewhere, e.g. the alternative vote proposed for presidential elections in Bosnia and Herzegovina[120].

  It is also best not to be over-strict on turn-out, since this leads systematically to second rounds or repeated ballots; the "Former Yugoslav Republic of Macedonia" went a little far, for example, by requiring (an absolute majority of the votes cast and) the support of one-third of the registered voters for election in the first round[121].

  In general, national electoral systems must be assessed with reference to national circumstances: for example, Ukraine's adoption of a system which allocated half the seats in single-member constituencies on a relative majority, and half on a proportional basis, with a 4% threshold in unitary constituencies and no compensatory mandates, allowed moderates to

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[115] *See above, Ch. II A.4.b.*
[116] *See, for example, CDL(99)41, p. 2.*
[117] *See, for example, European Court of Human Rights, Mathieu-Mohin and Clerfayt v. Belgium, Judgment of 2 March 1997, Series A, No. 113, p. 24; cf. Bieliunas E. (Note 81), pp. 90-91.*
[118] *CDL(2000)77, p. 3.*
[119] *Cf. CDL(99)66, pp. 2-4.*
[120] *Cf. CDL(99)40, p. 7.*
[121] *CDL(98)45, p. 2; see, on excessive turn-out requirements, Ch. II. B.1.e above.*

be elected in single-seat constituencies, and the party system to develop at national level[122]. This would not necessarily have been the case in another country or in other circumstances.

- Another aspect of equality of results is *equal territorial representation* or, rather, equal representation of the inhabitants of various parts of the country. As well as excluding electoral geometry, this means that constituencies must be as small as possible, i.e. that they must, in practice, be single-member.

  Equal representation of lists and equal territorial representation cannot be fully guaranteed at the same time. The systems which come closest to doing this are those which combine straight election in single-member constituencies with proportional election at national level, and particularly the "personalised proportional representation system", which applies in Germany[123] and, imperfectly, Albania[124].

- Finally, positive measures can be taken to guarantee *equal representation of the sexes*[125].

3. Free suffrage

Elections worthy of the name depend even more on suffrage's being free than on its being universal and equal. Free suffrage comprises two elements: the more obvious is free expression of the voters' wishes, i.e. a free voting procedure and accurate recording of the results; before that, voters must have formed their opinions freely. We shall now consider these two aspects separately.

a. Freedom of voters to form an opinion

For voters, freedom to form an opinion is partly a matter of equal opportunity. It requires the *state* to respect its duty of neutrality, particularly in the matter of media access, posters, the right to demonstrate in public, and the funding of parties and candidates. Another requirement is that properly nominated candidates should be allowed to stand for election, and debarred only if pressing public-interest reasons make this necessary[126].

The authorities also have certain positive obligations. In particular, they must make it possible for voters to ascertain the lists and candidates running for election, e.g. by giving them sufficient publicity.

Individuals can also interfere with voters' freedom to form an opinion, particularly by buying votes – a practice which the state must take effective action to prevent and punish. In extreme cases, the dissemination of untruthful electioneering material by private individuals or organisations may compromise voter freedom. However, this applies only in cases where such material cannot be refuted before the election, i.e. rarely when freedom of expression is guaranteed, particularly through press pluralism and equal media access for the various candidates.

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[122] *CDl(99)51, p. 7.*
[123] *Sections 4-6 of the Bundestagwahlgesetz of 1 September 1975.*
[124] *Art. 64 of the Constitution.*
[125] *See Ch. II.B.2.a.cc. above.*
[126] *See Ch. II.B.2.a/cc. above.*

b. Freedom of voters to express their wishes, and action against electoral fraud

aa. For voters to express their wishes freely, the *voting procedure* provided for by law must first be respected. In practice, voters must be able to vote for the registered lists or candidates, and this means, among other things, that they must have ballot papers, on which the names of candidates are marked, and be able to deposit these in ballot boxes. The state must provide the premises needed for the holding of elections. Voters must not be subjected by public authorities or individuals to intimidation or constraints which prevent them from voting, or from voting as they wish; the state has an obligation to prevent and punish such practices.

Voters are also entitled to *accurate recording of the outcome of the ballot*, which means that the state must ensure that votes are counted properly. Finally, the *elected bodies must be constituted and be able to function* in a manner consistent with this outcome. In recent years, this has not always been the case in Bosnia and Herzegovina, owing to restrictions on the freedom of movement of refugees elected in their former places of residence. In states where democracy is not well-established, the possibility of recalling MPs between elections may well jeopardise their independence; nor should they be obliged to stand down if they leave the party for which they were elected[127].

bb. *Fraud* takes countless forms, and we cannot list all the remedies here. At the same time, the Commission's work does point to some of them.

One of the best ways of making sure that elections are properly conducted is to have them organised by an *impartial body*, and particularly an independent electoral commission[128].

The presence of national or international *observers* can also be useful; they must be able to observe both the voting proper and the counting of the votes, and have access to the records kept on various levels[129].

Transparency helps to prevent fraud by bringing it into the open; specifically, regular publication of the turn-out figures for each polling station, and of the results at the various levels (e.g. polling station, constituency, country) makes it fairly easy to see if figures are being manipulated, at least on any significant scale[130]. Counting should also be continuous, and start as soon as polling stops; the results should be announced and communicated to the next level up as soon as possible.

Experience generally shows that extremely detailed and complicated laws, embodying numerous safeguards, are not effective against fraud. *Impossibili nemo tenetur*: in other words, laws which are hard to keep are nearly always broken and – what is more – people care less when they are. Often, therefore, voting procedures need to be simplified and clarified[131].

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[127] *CDL(99)66, p. 4.*
[128] *See Ch. II.A.3.a above.*
[129] *CDL(99)51, pp. 8-9; CDL(99)67, p. 8; CDL-INF(2000)17, p. 11.*
[130] *CDL(99)41, p. 8.*
[131] *See, for example, CDL(98)10, p. 10; Armenia's electoral law has since been extensively clarified and simplified: CDL(2000)103 rev., pp. 5-6.*

Some voting practices actually encourage fraud. If voting is spread over several days, for example, tampering with the ballot boxes may well become easier. This system should be adopted only when it becomes clear that, in practice, it is hard for all voters to vote on one day[132]. With early voting, the risk is even greater, particularly if it is spread over a long period, and portable ballot boxes are used[133]. Servicemen should not vote on military bases, or voting should at least be organised by civilians; nor should servicemen report to vote under the command of an officer[134]. Postal voting – at home or in hospitals or other institutions – can also give rise to fraud; the reliability of postal staff or other persons responsible for this must be verified in advance[135].

We shall say more later about the *secrecy of voting*, which is one aspect of voter freedom[136].

c. Freedom to choose between candidates

Giving voters no choice between candidates standing for the same party is not inconsistent with Europe's electoral heritage, either in single-member majority systems or, above all, fixed-list systems. This applies, for example, in Spain, Portugal and Romania. Nominating candidates thus remains very much a matter for the parties.

However, some states are more liberal, e.g. the Czech Republic, Slovakia, Poland and Finland, which allow voters to indicate *preferences* for a number of candidates on their chosen list[137].

Others give voters a mixed choice, allowing them to vote for candidates from several lists. This system applies in Luxembourg[138], and at all levels in Switzerland[139], where it may be said to have constitutional value[140].

Ireland has written the single transferable vote – a non-proportional system without lists, in which voters rank candidates in order of preference – into its Constitution[141]. This gives the voter's right to vote for candidates from several parties a clear constitutional basis.

In some cases, the international community has urged the introduction of a preferential vote system, freeing voters in certain countries from following the party leaderships' choice. This is the recommended solution in Bosnia and Herzegovina. Kosovo has (in municipal elections) a single preferential vote.

The preferential vote system may help, in particular, to ensure representation of a minority which constitutes the majority in a specific constituency; in other cases, it is not

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[132] *Cf. CDL(99)41, p. 7.*
[133] *CDL(99)66, p. 7.*
[134] *CDL(99)66, pp. 6-7.*
[135] *CDL(94)42, pp. 9-10.*
[136] *See Ch. II.4 below; see already CDL(92)1, p. 9.*
[137] *For further examples and references, see Garonne P., Les principes constitutionnels du droit électoral (Note 21), pp. 25-26.*
[138] *Martin Pierre, Les systèmes électoraux et les modes de scrutin, Paris, Montchrestien 1994, p. 97.*
[139] *For elections to the National Council, see Art. 21ff. LFDP.*
[140] *CDL-INF(2001)16, p. 10.*
[141] *Art. 16.2.5.*

recommended as a way of ensuring minority representation, since the highest scoring candidates on each list are likelier to be those of the majority[142].

Two specific points deserve to be re-emphasised.

In two-round majority systems, the right to stand in the *second round* is normally restricted to those who stood in the first, if not those who received the most votes: a threshold of 7% of the first-round votes may even be considered low[143].

The possibility of voting against all the candidates is a survival from elections in a non-competitive system. It can be the (undesirable) expression of the voter's disenchantment with (democratic) politics[144]; in practice, however, such votes are rare and closer to blank papers[145] .

4. Secret voting

Although traditionally presented as a separate principle, secrecy is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure – and particularly the casting and counting of votes. Voters are entitled to it, but must also respect it themselves, since failure to do so would make it easier for anyone wishing to exert pressure on them to compel them to disclose how they had voted. In some states, where pluralist democracy is a recent innovation, it is important to emphasise the vital nature of this obligation – and punish non-compliance by disqualifying any ballot paper whose content has been disclosed[146].

Another common problem in new democracies is family voting, i.e. a situation where several members of a family enter the polling booth at the same time. When this happens, one member – no prizes for guessing which in most cases – can tell the others how to vote, and this is not acceptable[147].

Moreover, since abstention can imply a political choice, the list of persons voting should not be published.

5. Direct suffrage

Direct election of the lower house by the people is one aspect of Europe's shared constitutional heritage. It is an expression of the people's sovereignty and, more generally, of democracy. Insofar as Article 3 of the first Protocol to the European Convention on Human Rights applies to other legislative bodies, such as the parliaments of federated states[148] and the European Parliament[149], direct election of those bodies may also be regarded as part of the

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[142] CDL-INF(2000)4, p. 12.
[143] CDL(98)45, p. 2.
[144] CDL(99)51, p. 7; CDL(2000)2, pp. 9-10.
[145] CDL (2000) 103 rév., p. 6.
[146] CDL(2000)2, p. 9.
[147] CDL(2000)2, p. 9.
[148] Cf. European Court of Human Rights, Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A. No. 113, p. 23; European Commission of Human Rights, No. 27311/95, dec. 11.9.97, Timke v. Germany, D.R. 82, p. 15; No. 7008./75, dec. 12.7.76, X. v. Austria, D.R. 6, p. 120.
[149] Cf. European Court of Human Rights, Matthews v. United Kingdom judgment of 18 February 1999, ECHR 1999-I, paras. 36ff.

shared electoral heritage, as may the existence of elected bodies at local level. On the other hand, direct election of the upper house, or indeed the president, is – although common – at each state's constitutional discretion.

Conclusion

Respect for the five principles of Europe's electoral heritage (universal, equal, free, secret and direct suffrage) is vital to democracy. This does not mean that electoral law is necessarily fixed and immutable. On the contrary, within the framework of these principles (and of respect for human rights, without which they cannot be implemented), it is widely open to discussion and to change. Change should always be approached with caution, however – not because electoral laws are already too perfect to be tampered with, but because suspicions of manipulation are easily roused.

This is why, provided that the basic principles are respected, the Venice Commission acknowledges the validity of various electoral systems and various approaches to the organisation of elections. It looks at each situation in its own context, and applies no universal yardsticks.

With over ten years' experience of working on electoral issues in close co-operation with national authorities and other international organisations, the European Commission for Democracy through Law is helping, not only to define, but also to build, Europe's electoral heritage – which is both the basis of democracy and a vital part of Europe's constitutional heritage. In doing this, it is remaining faithful to its primary task – building democracy through law.

Summary

Since it was established in 1990, the European Commission for Democracy through Law (Venice Commission) has been working on electoral law – an area of vital importance for democracy. In doing this, it has helped to define, and even construct, one important aspect of Europe's constitutional heritage. In this, as in other fields of constitutional law, it helps numerous states, particularly in Central and Eastern Europe, by commenting on projected or existing laws, and indeed helping to draft them; it also produces general studies on such themes as electoral law and national minorities, and new trends in electoral law in Greater Europe.

The five basic principles of Europe's electoral heritage are universal, equal, free, secret and direct suffrage. The Commission seeks to refine these classic principles, while bearing in mind that the basic rules – although shared by all the countries of Europe – can be applied in different ways. It emphasises that fundamental rights are a vital condition of real democracy, that procedural guarantees are needed to ensure that electoral law is enforced in practice, and that instability of electoral law can be dangerous.

The Commission's work in the electoral field, where it co-operates closely with other international organisations, keeps it faithful to its prime task of building democracy through law.

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