Strasbourg, 24 November 2008 **CDL-UD(2008)012**

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

UNIDEM SEMINAR

"CANCELLATION OF ELECTION RESULTS"

Mediterranean Conference Centre, Valletta, Malta

14 – 15 November 2008

REPORT

by
Mr Ugo MIFSUD BONNICI
President Emeritus, Vice-President of the Council for Democratic Elections,
Member of the Venice Commission

1. The participants in the Unidem Seminar on the Cancellation of Election Results held in Malta on the 14/15 November 2008 were examining one of the essential conjunctions of Democracy and the Rule of Law. The exercise of popular sovereignty through the vote, in elections or referendums, is considered a fundamental feature of democracy [in the Welcoming Speech by the **Minister of Justice of Malta** "the cornerstone of democracy"]; but even this primary expression of the people's will is subject to law [in the **Maltese Chief Justice's** Welcoming address seen as an elementary condition for civilised communities], and derives therefore its "legitimacy", used in both of its senses, from conformity to law. **Mr Pierre Garrone**, opening the proceedings on behalf of the Venice Commission reminded the participants that all laws needed to be fortified by sanction, for without it, a law could be a *lex imperfecta.* Cancellation of election results was the ultimate sanction.

2. The paradigm words Liberty and Equality were used by **Professor Slobodan Milacic** of Montesquieu University of Bordeaux, to get to the roots of the justification of this conjunction. Law is the guarantor of Liberty, the equal franchise is the classical exercise of Equality. Law safeguards rights, politics provide the mechanics for legislation and implementation. Moderation of the whole political process can only be made properly through law and its operation. Though Courts may be reticent in entering this field, and the *Conseil d'Etat*, in France, too timid, their role is by no means irrelevant or dispensable. **Jean-Claude Colliard**, President of the *Fondation Santé des Etudiants de France* and member of the Venice Commission, made the point that even the validity of the election which produced the legislative organ has to be decided upon by the Courts, if contested. Earlier some legislatures contended that they could not only confirm the credentials of individual member but also auto-legitimise themselves. The best way is for independent electoral commissions to conduct elections and referenda, and let disputes which might arise, be adjudicated upon by the Courts.

3. **Professor Ian Refalo** of the University of Malta argued the case for certain electoral disputes to be referred to the special competence of Constitutional Courts where these exist, whilst leaving the ordinary courts with the primary general jurisdiction. He compared the position in the case law of the United Kingdom and that of Malta, observing the reluctance to interfere with the result, in both countries, quoting some cases, and went further into the new overall role of the European Court of Human Rights. **Mr Michael O'Boyle,** Deputy Registrar of that Court, reviewed the principal cases decided by that Court and the general trends in its case law. He remarked that whilst the Court had gone a long way to extend the interpretation of Article 3 of Protocol 3 to the European Convention of Human Rights, to include within the meaning of "legislature" all bodies with a rule making competence, it would be impossible to see the protection covering also the right to vote for presidential elections or in a referendum. He also expressed the opinion that present thinking in the Court did not show that the court would be willing, given the text of the Convention and its protocols, to go deeper into the question of the breach of equality in the weighting of the votes through distortions in the electoral systems legislated by the States, though blatant gerrymandering would not be countenanced and would be sanctioned as fraudulent. He also referred to the way that the opinions given by the Venice Commission concerning electoral matters have helped the Court to assess what is the best and standard practice in this field. **Mr André Kvakkestad** from Norway and former member of the Parliamentary Assembly of the Council of Europe, spoke on the great service rendered by Election Observation missions to keep in check abuses and breaches of good practice in the conduct of elections. Cases[1] were quoted which highlighted the difference that organised opposition in a given country can make in the gathering of evidence of these abuses, and in the way that these can be used in internal and international fora. Mr Kvakkestad stated that Observation Missions, though of course, obliged to exercise discretion in disclosing sources of information, are not bound by confidentiality with regard to what their members have observed directly. **Mr Oliver Kask,** Judge of the Court of Appeal of

[1] Georgia, Ukraine, Kazakhstan, Azerbaijan, Moldova, and the question of the barren wastes of northern Norway and their disproportionate, but in some way justified, electoral representation.

Estonia and member of the Venice Commission, pinpointed some distinctions to be made. Regulation by a country's Constitution *vice* regulation by electoral laws; compulsory sanction of cancellation as against discretionary power of cancellation; the ascertainment of the violation and its impact on the result; the acts directly traceable to a candidate and those committed without his/her knowledge or connivance; violations in one particular constituency and those more widely spread.

4. Participants were then asked to react by making comments and referring to occasions, in their countries, when some matter concerning elections was brought before the Courts.

Bulgaria, Bosnia and Herzegovina, Croatia, the Czech Republic, France, Germany, Greece, Latvia, "the former Yugoslav Republic of Macedonia", Malta, Poland, Serbia, Sweden, and the United Kingdom all produced examples of electoral disputes, and with different solutions. Arguments were made with regard to the difficulties attaching to the various electoral systems employed. It was noted that whilst simple majority systems produced unfair results, they were accepted because the possibility of this result was known and taken into account, beforehand. On the other hand even the most proportional of systems, such as that of Germany could produce difficulties in the formation of stable governments.

5. Summing up I reviewed what had been said by the participants in their interventions.

In conclusion

a. it seemed that all our countries could make efforts to further fine tune their electoral systems. It was evident that when the Constitution provided for certain clear indications concerning the running of elections and referenda, and when the electoral laws were specific and precise in the requirements and obligations, less contestations would arise after the result. More legal guidelines or criteria should be specified as to when a violation could be of such import as to be considered determining in the result, and when criminal acts or "corrupt practices" are found to be so widespread as to invalidate the result of a whole countrywide election. The matter of possible alternative sanctions should also be provided for in the legislation. It was also pointed out that in matters of eligibility for voting or standing for elections, stricter rulers as to when and with what knowledge and evidence it could be raised, should be specified in electoral laws. Questions such as who could have the right to contest the validity of an election and within which time limitation, should be further examined and defined. The more provident the laws with regard to the ambit of discretion given to the electoral commissions and to the courts, the easier it would be for these bodies to moderate impartially.

b. It seemed that some further objective and scientific research into the workings of electoral systems, is now warranted. It was surely not merely a matter of the mathematics involved, though, no doubt, numbers are of the essence of democracy and equal weighting of the vote of every single citizen is expected by people in all European countries. Perhaps better methods could be devised to ensure that "free and fair elections" be held in such a way that equality would be attained, without jeopardising the possibility of the formation of proper governing majorities. It was emphasised that the European Convention together with its protocols, does not adequately cover the right to vote for presidential elections and in referenda, and that should there exist a strong political will, some further amendment to strengthen the requirement of substantial equality in the weighting of votes, could also be agreed to between the member of the Council of Europe. It would seem that a consensus could be arrived at, after a fuller and more detailed examination of the possible electoral systems, about the best ways of achieving this *desideratum.*

c. The European Convention of Human Rights, which authorises the European Court of Justice to interfere, should be revisited. It was emphasised that Article 3 of the Protocol of 1952, does not adequately cover the right to vote in referenda, and elections to bodies or public

offices which cannot be said to legislate, and does not fully safeguard the supreme value of substantial equality of voting rights and weighting of votes. Given a strong political will, it should not be impossible to have the member states agree on an amendment to cover both deficiencies.