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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ELECTORAL LAW

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Le droit électoral
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Contents

General introduction

Part 1 – Elections

Code of good practice in electoral matters – Guidelines and explanatory report

Introduction

Guidelines on elections

- I. Principles of Europe's electoral heritage
 1. Universal suffrage
 2. Equal suffrage
 3. Free suffrage
 4. Secret suffrage
 5. Direct suffrage
 6. Frequency of elections
- II. Conditions for implementing these principles
 1. Respect for fundamental rights
 2. Regulatory levels and stability of electoral law
 3. Procedural guarantees
 4. Electoral system

Explanatory report

- I. The underlying principles of Europe's electoral heritage
 1. Universal suffrage
 2. Equal suffrage
 3. Free suffrage
 4. Secret suffrage
 5. Direct suffrage
 6. Frequency of elections
- II. Conditions for implementing these principles
 1. Respect for fundamental rights
 2. Regulatory levels and stability of electoral law
 3. Procedural guarantees

Conclusion

Interpretative Declaration on the Stability of the Electoral Law

Declaration on Women's Participation in Elections

Study on electoral law and national minorities

Introduction

- I. Rules specifically providing for representation of minorities
 - A. Representation of minorities as such

- B. Rules facilitating the representation of minorities
 - C. The system
 - II. The influence of electoral systems on the representation of political groups – what kind of general rules?
 - III. The effects of electoral systems on the representation of minorities
 - A. Political parties of national minorities – a factor in the representation of such minorities
 - B. The situation when there are no parties of minorities
 - IV. Constituencies and the representation of minorities
 - V. Debate on the electoral system and national minorities
- Conclusion
- Questionnaire on participation of members of minorities in public life
- Synopsis of replies to the questionnaire on participation of members of minorities in public life

Report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries

- Introduction
- I. Affirmative action
- II. Affirmative action and electoral rules
- Conclusion
- Appendix: Electoral law and national minorities

Report on electoral law and electoral administration in Europe – Synthesis study on recurrent challenges and problematic issues

- I. Introduction
- II. General remarks
- III. The electoral administration structure
- IV. The right to vote, and voter registration
- V. The right to stand for election, and the registration of election subjects
- VI. Election campaign
- VII. The role of the media in election campaigns
- VIII. Election observation
- IX. Election day – the polling stations
- X. Voter identification, and voting procedures
- XI. Vote count and the announcement of provisional results
- XII. Election appeals and accountability for electoral violations
- XIII. Final results, and the electoral system
- XIV. Conclusions
- Appendix I: Opinions and recommendations of the Venice Commission
- Appendix II: Reports and other documents of the Venice Commission
- Appendix III: Reports of the Congress of Local and Regional Authorities of the Council of Europe
- Appendix IV: Documents of the Parliamentary Assembly of the Council of Europe
- Appendix V: Reports by the OSCE/ODIHR
- Appendix VI: Further publications

Report on electoral systems – Overview of available solutions and selection criteria

Introduction

Part One – Electoral systems on offer

1. Guiding principles and procedures governing the casting of votes
2. Counting votes and distributing the seats
3. Recall

Part Two – Criteria for selecting a particular election system and the implications of that choice

1. The three major functions of an electoral system
2. The three historical models for the functionality of electoral systems
3. Advantages and drawbacks of hybrid systems
4. Some considerations on the specific situation of the emerging democracies

Conclusion

Table summarising the three historical models

Part 2 – Referendums

Code of good practice on referendums

Introduction

Guidelines on the holding of referendums

- I. Referendums and Europe's electoral heritage
 1. Universal suffrage
 2. Equal suffrage
 3. Free suffrage
 4. Secret suffrage
- II. Conditions for implementing these principles
 1. Respect for fundamental rights
 2. Regulatory levels and stability of referendum law
 3. Procedural guarantees
- III. Specific rules
 1. The rule of law
 2. The procedural validity of texts submitted to a referendum
 3. The substantive validity of texts submitted to a referendum
 4. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution)
 5. Parallelism in procedures and rules governing the referendum
 6. Opinion of Parliament
 7. Quorum
 8. Effects of referendums

Explanatory memorandum

General remarks

- I. Referendums and Europe's electoral heritage
 1. Universal suffrage
 2. Equal suffrage
 3. Free suffrage
- II. Conditions for implementing these principles
 1. Regulatory levels and stability of referendum law
 2. Procedural guarantees
- III. Specific rules
 1. The rule of law
 2. The procedural validity of texts submitted to a referendum
 3. The substantive validity of texts submitted to a referendum
 4. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution)
 5. Parallelism in procedures and rules governing the referendum
 6. Opinion of Parliament
 7. Quorum
 8. Effects of referendums

Referendums in Europe – an analysis of the legal rules in European states

Introduction

General comments

- I. National referendums
 - A. Legal basis of the referendum
 - B. Types of referendum – bodies competent to call referendums
 - C. Content
 - D. Form of the text submitted to referendum (formal validity)
 - E. Substantive limits on referendums (substantive validity)
 - F. Campaigning, funding and voting
 - G. Effects of referendums
 - H. Parallelism in procedures and rules governing the referendum
 - I. Specific rules on popular initiatives and ordinary optional referendums
 - J. Judicial review
 - K. Experiences of referendums
- II. Local and regional referendums
 - A. Legal basis of the referendum
 - B. Types of referendum – bodies competent to call referendums
 - C. Content
 - D. Form of the text submitted to referendum (formal validity)
 - E. Substantive limits on referendums (substantive validity)
 - F. Campaigning, funding and voting
 - G. Effects of referendums
 - H. Parallelism in procedures and rules governing the referendum
 - I. Specific rules on popular initiatives and ordinary optional referendums
 - J. Judicial review
 - K. Experiences of referendums
- III. The future of referendums

Conclusion

General introduction

In the context of its task of promoting democracy through law, the European Commission for Democracy through Law (Venice Commission) has, since it was first set up, been confronted with the most important democratic issue of all, the holding of free and fair elections.

As a body with expertise in constitutional matters, it has therefore studied the electoral legislation of numerous states, intervening where possible at the drafting stage so as to make it easier for account to be taken of its recommendations.

The Venice Commission's opinions are based on the European electoral heritage, in other words the standards recognised in our continent. Its task is to draft guidelines and prepare studies¹ and it has, accordingly, defined the European electoral heritage increasingly precisely and made a comparative study of topical, and sometimes burning, electoral law issues in the various countries.

This publication makes the Venice Commission's main guidelines and studies concerning electoral matters more accessible by combining them in a single volume.

The reference instrument is the code of good practice in electoral matters, which sets out the fundamental standards of the European electoral heritage, as approved not only by the Venice Commission but also, more particularly, by the Parliamentary Assembly, the Congress, and the Committee of Ministers of the Council of Europe in a solemn declaration adopted at ministerial level. The code clearly defines the classic constitutional principles of electoral law: universal, equal, free, secret and direct suffrage, as well as the frequency of elections, but also framework conditions necessary for the organisation of proper elections, for example respect for human rights, the stability of electoral law and procedural safeguards such as the organisation of elections by an impartial body and an effective appeal and observation system. It is accompanied by two interpretative declarations on points that have been the subject of heated discussion (the stability of electoral law and women's participation in elections).

One of the most topical constitutional issues in Europe today is the protection of minorities. It is also a matter with which the Venice Commission has been concerned from the outset. The question of the participation of members of national minorities in elections has been referred to it on several occasions. It carried out a broad review of the matter in its study on electoral law and national minorities, which is designed to show all the solutions adopted in this respect, most of which are not the result of rules specific to minorities. By contrast, in its report on electoral rules and affirmative action for national minorities' participation in the decision-making process, the Venice Commission concentrated on specific rules.

1. Article 3, paragraph 1, of the revised Statute of the Commission.

The conformity of an electoral process with the principles of the European electoral heritage cannot be judged on the basis of legislation alone. It is the way in which the rules are implemented that makes it possible to determine whether elections are free and fair. Some practical problems do, however, stem from the way in which the law is drafted, even though the legislation may not seem problematic on the face of it. The “Report on electoral law and electoral administration in Europe – Synthesis study on recurrent challenges and problematic issues” identified recurring problems resulting from both legislation and practice across Europe and put forward recommendations for addressing them.

The choice of electoral system does not, in principle, raise a problem of conformity with the European electoral heritage, and yet it is a question of great political and practical importance that is often broached when the Venice Commission is involved in discussions on national legislation. The Venice Commission has therefore prepared a report on electoral systems in order both to describe the various voting methods systematically and to explain the criteria for choosing a particular election system and the implications of that choice.

Democracy and indeed voting are not confined to elections. In many states, use is made of referendums, more or less frequently. These may be even more crucial than elections in terms of their impact on institutions and citizens’ daily lives. For this reason, it is essential to establish clear European standards. The Venice Commission has done this by drafting a code of good practice on referendums, which is, *mutatis mutandis*, the counterpart of the code of good practice in electoral matters, but concentrates on specific rules concerning referendums.

The concept of referendum refers to situations that are very different in practice, in terms not only of frequency but also of content, effects and the party deciding to hold a referendum. Indeed, there is little in common between an appeal to the nation by a head of state and a vote on a proposal that is the result of a public initiative, submitted by a group that is part of civil society. The comparative study of referendums in Europe highlights the fundamental features of referendums as practised in European countries, and the similarities and divergences of national traditions.

Part 1 – Elections

Code of good practice in electoral matters – Guidelines and explanatory report²

Introduction

On 8 November 2001 the Standing Committee of the Parliamentary Assembly, acting on behalf of the Assembly, adopted Resolution 1264 (2001) inviting the European Commission for Democracy through Law (Venice Commission):³

- i. to set up a working group, comprising representatives of the Parliamentary Assembly, the then Congress of Local and Regional Authorities of Europe (CLRAE – since 14 October 2003, the Congress of Local and Regional Authorities of the Council of Europe, referred to as “the Congress”) and possibly other organisations with experience in the matter, with the aim of discussing electoral issues on a regular basis;
- ii. to devise a code of practice in electoral matters which might draw, inter alia, on the guidelines set out in the appendix to the explanatory memorandum of the report on which this resolution is based (Doc. 9267), on the understanding that this code should include rules both on the run-up to the election, the elections themselves and on the period immediately following the vote;
- iii. as far as its resources allow, to 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.

The following guidelines are a concrete response to the three aspects of this resolution. They were adopted by the Council for Democratic Elections – the joint working group provided for by the Parliamentary Assembly resolution – at its second meeting (3 July 2002) and subsequently by the Venice Commission at its 51st session (5-6 July 2002); they are based on the underlying principles of Europe’s electoral heritage; lastly and above all, they constitute the core of a code of good practice in electoral matters.

The explanatory report explains the principles set forth in the guidelines, defining and clarifying them and, where necessary, including recommendations on points of detail. The report was adopted by the Council for Democratic Elections at its third meeting (16 October 2002), and subsequently by the Venice Commission at its 52nd session (18-19 October 2002).

The code of good practice in electoral matters was approved by the Parliamentary Assembly of the Council of Europe at its 2003 first part-session – and by the CLRAE at its spring session 2003.

2. Opinion No. 190/2002, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002); CDL-AD (2002) 23 rev.

3. Item 6; see Document 9267, Report by the Political Affairs Committee; Rapporteur: Mr Clerfayt.

As requested in the Parliamentary Assembly's resolution, this document is based on the guidelines appended to the explanatory memorandum to the report on which the Assembly resolution was based (Doc. 9267). It is also based on the work of the Venice Commission in the electoral field, as summarised in Document CDL (2002) 7.

Guidelines on elections⁴

I. Principles of Europe's electoral heritage

The five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals.

1. Universal suffrage

1.1. Rule and exceptions

Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions:

- a. age:
 - i. the right to vote and to be elected must be subject to a minimum age;
 - ii. the right to vote must be acquired, at the latest, at the age of majority;
 - iii. the right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25, except where there are specific qualifying ages for certain offices (for example, member of the upper house of parliament, head of state).
- b. nationality:
 - i. a nationality requirement may apply;
 - ii. however, it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence.
- c. residence:
 - i. a residence requirement may be imposed;
 - ii. residence in this case means habitual residence;
 - iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;
 - iv. the requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities;
 - v. the right to vote and to be elected may be accorded to citizens residing abroad.

4. Adopted by the Venice Commission at its 51st plenary session (Venice, 5-6 July 2002).

- d. deprivation of the right to vote and to be elected:
 - i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:
 - it must be provided for by law;
 - the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
 - the deprivation must be based on mental incapacity or a criminal conviction for a serious offence.
 - ii. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

1.2. Electoral registers

Fulfilment of the following criteria is essential if electoral registers are to be reliable:

- i. electoral registers must be permanent;
- ii. there must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period;
- iii. electoral registers must be published;
- iv. there should be an administrative procedure – subject to judicial control – or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place at the polling station on election day;
- v. a similar procedure should allow voters to have incorrect inscriptions amended;
- vi. a supplementary register may be a means of giving the vote to persons who have moved or reached statutory voting age since final publication of the register.

1.3. Submission of candidatures

- i. The presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures.
- ii. The law should not require collection of the signatures of more than 1% of voters in the constituency concerned.
- iii. Checking of signatures must be governed by clear rules, particularly concerning deadlines.
- iv. The checking process must in principle cover all signatures; however, once it has been established beyond doubt that the requisite number of signatures has been collected, the remaining signatures need not be checked.
- v. Validation of signatures must be completed by the start of the election campaign.
- vi. If a deposit is required, it must be refundable should the candidate or party exceed a certain score; the sum and the score requested should not be excessive.

2. Equal suffrage

This entails:

2.1. Equal voting rights

Each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes.

2.2. Equal voting power

Seats must be evenly distributed between the constituencies.

- i. This must at least apply to elections to lower houses of parliament and regional and local elections.
- ii. It entails a clear and balanced distribution of seats among constituencies on the basis of one of the following allocation criteria: population, number of resident nationals (including minors), number of registered voters, and possibly the number of people actually voting. An appropriate combination of these criteria may be envisaged.
- iii. The geographical criterion and administrative, or possibly even historical, boundaries may be taken into consideration.
- iv. The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity).
- v. In order to guarantee equal voting power, the distribution of seats must be reviewed at least every ten years, preferably outside election periods.
- vi. With multi-member constituencies, seats should preferably be redistributed without redefining constituency boundaries, which should, where possible, coincide with administrative boundaries.
- vii. When constituency boundaries are redefined – which they must be in a single-member system – it must be done:
 - impartially;
 - without detriment to national minorities;
 - taking account of the opinion of a committee, the majority of whose members are independent; this committee should preferably include a geographer, a sociologist and a balanced representation of the parties and, if necessary, representatives of national minorities.

2.3. Equal opportunity

- a. Equal opportunities must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to:
 - i. the election campaign;
 - ii. coverage by the media, in particular by the publicly owned media;
 - iii. public funding of parties and campaigns.
- b. Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time, public funds and other forms of backing.

- c. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.
- d. Political party, candidates and election campaign funding must be transparent.
- e. The principle of equality of opportunity can, in certain cases, lead to a limitation of political party spending, especially on advertising.

2.4. Equality and national minorities

- a. Parties representing national minorities must be permitted.
- b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
- c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.

2.5. Equality and parity of the sexes

Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis.

3. Free suffrage

3.1. Freedom of voters to form an opinion

- a. State authorities must observe their duty of neutrality. In particular, this concerns:
 - i. media;
 - ii. billposting;
 - iii. the right to demonstrate;
 - iv. funding of parties and candidates.
- b. The public authorities have a number of positive obligations; inter alia, they must:
 - i. submit the candidatures received to the electorate;
 - ii. enable voters to know the lists and candidates standing for election, for example through appropriate posting;
 - iii. ensure the above information is also available in the languages of the national minorities.
- c. Sanctions must be imposed in the case of breaches of duty of neutrality and voters' freedom to form an opinion.

3.2. Freedom of voters to express their wishes and action to combat electoral fraud

- i. Voting procedures must be simple.
- ii. Voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions.
- iii. Postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible.
- iv. Electronic voting should be used only if it is safe and reliable; in particular, voters should be able to obtain a confirmation of their votes and to correct them, if necessary, respecting secret suffrage; the system must be transparent.
- v. Very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited.
- vi. Mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud.
- vii. At least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box.
- viii. Voting slips must not be tampered with or marked in any way by polling station officials.
- ix. Unused voting slips must never leave the polling station.
- x. Polling stations must include representatives of a number of parties, and the presence of observers appointed by the candidates must be permitted during voting and counting.
- xi. Military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station.
- xii. Counting should preferably take place in polling stations.
- xiii. Counting must be transparent. Observers, candidates' representatives and the media must be allowed to be present. These persons must also have access to the records.
- xiv. Results must be transmitted to the higher level in an open manner.
- xv. The state must punish any kind of electoral fraud.

4. Secret suffrage

- a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.
- b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.
- c. The list of persons actually voting should not be published.
- d. The violation of secret suffrage should be sanctioned.

5. Direct suffrage

The following must be elected by direct suffrage:

- i. at least one chamber of the national parliament;
- ii. sub-national legislative bodies;
- iii. local councils.

6. Frequency of elections

Elections must be held at regular intervals; a legislative assembly's term of office must not exceed five years.

II. Conditions for implementing these principles

1. Respect for fundamental rights

- a. Democratic elections are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties.
- b. Restrictions of these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.

2. Regulatory levels and stability of electoral law

- a. Apart from rules on technical matters and detail – which may be included in regulations of the executive – rules of electoral law must have at least the rank of a statute.
- b. The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law.

3. Procedural guarantees

3.1. Organisation of elections by an impartial body

- a. An impartial body must be in charge of applying electoral law.
- b. Where there is no long-standing tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.
- c. The central electoral commission must be permanent in nature.

- d. It should include:
 - i. at least one member of the judiciary;
 - ii. representatives of parties already in parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.

It may include:

- iii. a representative of the ministry of the interior;
 - iv. representatives of national minorities.
- e. Political parties must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality may be construed strictly or on a proportional basis (see point I.2.3.b).
- f. The bodies appointing members of electoral commissions must not be free to dismiss them at will.
- g. Members of electoral commissions must receive standard training.
- h. It is desirable that electoral commissions take decisions by a qualified majority or by consensus.

3.2. Observation of elections

- a. Both national and international observers should be given the widest possible opportunity to participate in an election observation exercise.
- b. Observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting.
- c. The places where observers are not entitled to be present should be clearly specified by law.
- d. Observation should cover respect by the authorities of their duty of neutrality.

3.3. An effective system of appeal

- a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.
- b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.
- c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of

jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.

d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.

e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h. The applicant's right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

4. Electoral system

Within the respect of the abovementioned principles, any electoral system may be chosen.

Explanatory report⁵

Alongside human rights and the rule of law, democracy is one of the three pillars of the European constitutional heritage, as well as of the Council of Europe. Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status.

These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the “European electoral heritage”. This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second, the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met. The text which follows – like the foregoing guidelines – is therefore in two parts, the first covering the definition and practical implications of the principles of the European electoral heritage, and the second, the conditions necessary for their application.

I. The underlying principles of Europe’s electoral heritage

Introduction: the principles and their legal basis

If elections are to comply with the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, they must observe five fundamental rules: suffrage must be universal, equal, free, secret and direct. Furthermore, elections must be held periodically. All these principles together constitute the European electoral heritage.

Although all these principles are conventional in nature, their implementation raises a number of questions that call for close scrutiny. We would do well to identify the “hard core” of these principles, which must be scrupulously respected by all European states.

The hard core of the European electoral heritage consists mainly of international rules. The relevant universal rule is Article 25 (b) of the International Covenant on Civil and Political Rights, which expressly provides for all of these principles except direct suffrage, although the latter is implied.⁶ The common European rule is Article 3 of the Additional Protocol to the European Convention on Human Rights, which explicitly provides for the right to periodical elections by free and secret suffrage;⁷ the other principles have also been recognised in human rights case law.⁸ The right to

5. Adopted by the Venice Commission at its 52nd plenary session (Venice, 18-19 October 2002).

6. See Article 21 of the Universal Declaration of Human Rights.

7. Article 3, Right to free elections: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

8. Where universality is concerned, see the European Court of Human Rights (the Court) judgment in *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, No. 9267/81, Series A vol. 113, p. 23; judgment in *Gitonas and Others v. Greece*, 1 July 1997, Nos. 18747/91, 19376/92; 19379/92, 28208/95

direct elections has also been admitted by the Strasbourg Court, at least implicitly.⁹ However, the constitutional principles common to the whole continent do not figure only in the international texts: on the contrary, they are often mentioned in more detail in the national constitutions.¹⁰ Where the legislation and practice of different countries converge, the content of the principles can be more accurately pinpointed.

1. Universal suffrage

1.1. Rule and exceptions

Universal suffrage covers both active (the right to vote) and passive electoral rights (the right to stand for election). The right to vote and stand for election may be subject to a number of conditions, all of which are given below. The most usual are age and nationality.

a. There must be a minimum age for the right to vote and the right to stand for election; however, attainment of the age of majority, entailing not only rights but also obligations of a civil nature, must at least confer the right to vote. A higher age may be laid down for the right to stand for election but, save where there are specific qualifying ages for certain offices (senator, head of state), this should not be more than 25.

b. Most countries' legislations lay down a nationality requirement. However, a tendency is emerging to grant local political rights to long-standing foreign residents, in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level.¹¹ It is accordingly recommended that the right to vote in local elections be granted after a certain period of residence. Furthermore, under the European integration process European citizens have been granted the right to vote and stand for election in municipal and European Parliament elections in their EU member state of residence.¹² The nationality criterion can, moreover, sometimes cause problems if a state withholds citizenship from persons who have been settled in its territory for several generations, for instance on linguistic grounds. Furthermore, under the European Convention on Nationality¹³ persons holding dual nationality must have the same electoral rights as other nationals.¹⁴

c. Thirdly, the right to vote and/or the right to stand for election may be subject to residence requirements,¹⁵ residence in this case meaning habitual residence. Where local and regional elections are concerned, the residence requirement is not

and 27755/95, *Reports of Judgments and Decisions* 1997-IV, p. 1233; on equality, see the aforementioned judgment in *Mathieu-Mohin and Clerfayt*, p. 23.

9. The Court's judgment in *Matthews v. the United Kingdom*, 18 February 1999, No. 24833/94, *Reports of Judgments and Decisions* 1999-I, paragraph 64.

10. 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.

11. European Treaty Series (ETS) 144.

12. Article 19 of the Treaty establishing the European Community.

13. ETS 166, Article 17.

14. The Court does not go so far: Eur. Comm. HR decision in *Ganchev v. Bulgaria*, 25 November 1996, No. 28858/95, *Decisions and Reports (DR)* 87, p. 130.

15. See most recently the Court's judgment in *Hilbe v. Liechtenstein*, 7 September 1999, No. 31981/96.

incompatible *a priori* with the principle of universal suffrage, if the residence period specified does not exceed a few months; any longer period is acceptable only to protect national minorities.¹⁶ Conversely, quite a few states grant their nationals living abroad the right to vote, and even to be elected. This practice can lead to abuse in some special cases, for example, where nationality is granted on an ethnic basis. Registration could take place where a voter has his or her secondary residence, if he or she resides there regularly and it appears, for example, on local tax payments; the voter must not then of course be registered where he or she has his or her principal residence.

The freedom of movement of citizens within the country, together with their right to return at any time is one of the fundamental rights necessary for truly democratic elections.¹⁷ If persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence.

d. Lastly, provision may be made for clauses suspending political rights. Such clauses must, however, comply with the usual conditions under which fundamental rights may be restricted; in other words, they must:¹⁸

- be provided for by law;
- observe the principle of proportionality;
- be based on mental incapacity or a criminal conviction for a serious offence.

Furthermore, the withdrawal of political rights may only be imposed by express decision of a court of law. However, in the event of withdrawal on grounds of mental incapacity, such express decision may concern the incapacity and entail *ipso jure* deprivation of civic rights.

The conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them, as the holding of a public office is at stake and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.

1.2. Electoral registers

The proper maintenance of electoral registers is vital in guaranteeing universal suffrage. However, it is acceptable for voters not to be included automatically on the registers, but only at their request. In practice, electoral registers are often discovered to be inaccurate, which leads to disputes. Lack of experience on the part of the authorities, population shifts and the fact that few citizens bother to check the electoral registers when they are presented for inspection make it difficult to compile these registers. A number of conditions must be met if the registers are to be reliable:

16. See Eur. Comm. HR, decision in *Polacco and Garofalo v. Italy* (re. Trentino-Alto Adige), 15 September 1997, No. 23450/94.

17. See Chapter II.1 below.

18. See, for example, the Court's judgment in *Labita v. Italy*, 6 April 2002, No. 26772/95, paragraphs 201 ff.

- i. There must be permanent electoral registers.
- ii. There must be regular updates, at least once a year, so that municipal (local) authorities get into the habit of performing the various tasks involved in updating at the same time every year. Where registration of voters is not automatic, a fairly long time-period must be allowed for such registration.
- iii. The electoral registers must be published. The final update should be sent to a higher authority under the supervision of the impartial body responsible for the application of the electoral law.
- iv. There should be an administrative procedure – subject to judicial control – or a judicial procedure enabling electors not on the register to have their names included. In some countries, the closing date for entry in the supplementary register may be, for example, fifteen days before the election or election day itself. The latter case, whilst admirably broad-minded, relies on decisions made by a court obliged to sit on polling day, and is thus ill-suited to the organisational needs on which democracies are based. In any event polling stations should not be permitted to register voters on election day itself.
- v. Furthermore, inaccuracies in electoral registers stem both from unjustified entries and from the failure to enter certain electors. A procedure of the kind mentioned in the previous paragraph should make it possible for electors to have erroneous entries corrected. The capacity for requesting such corrections may be restricted to electors registered in the same constituency or at the same polling station.
- vi. A supplementary register can enable persons who have changed address or reached the statutory voting age since the final register was published to vote.

1.3. Submission of candidatures

The obligation to collect a specific number of signatures in order to be able to stand is theoretically compatible with the principle of universal suffrage. In practice, only the most marginal parties seem to have any difficulty gathering the requisite number of signatures, provided that the rules on signatures are not used to bar candidates from standing for office. In order to prevent such manipulation, it is preferable for the law to set a maximum 1% signature requirement.¹⁹ The signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample;²⁰ however, once the verification shows beyond doubt that the requisite number of signatures has been obtained, the remaining signatures need not be checked. In all cases candidatures must be validated by the start of the election campaign, because late validation places some parties and candidates at a disadvantage in the campaign.

There is another procedure where candidates or parties must pay a deposit, which is only refunded if the candidate or party concerned goes on to win more than a certain

19. CDL (99) 66, p. 9.

20. CDL-INF (2000) 17, pp. 4-5; CDL (99) 67, pp. 7-8.

percentage of the vote. Such practices appear to be more effective than collecting signatures. However, the amount of the deposit and the number of votes needed for it to be reimbursed should not be excessive.

2. Equal suffrage

Equality in electoral matters comprises a variety of aspects. Some concern equality of suffrage, a value shared by the whole continent, while others go beyond this concept and cannot be deemed to reflect any common standard. The principles to be respected in all cases are numerical vote equality, equality in terms of electoral strength and equality of chances. On the other hand, equality of outcome achieved, for instance, by means of proportional representation of the parties or the sexes, cannot be imposed.

2.1. Equal voting rights

Equality in voting rights requires each voter to be normally entitled to one vote, and to one vote only. Multiple voting, which is still a common irregularity in the new democracies, is obviously prohibited – both if it means a voter votes more than once in the same place and if it enables a voter to vote simultaneously in several different places, such as his or her place of current residence and place of former residence.

In some electoral systems, the elector nonetheless has more than one vote. In, for example, a system that allows split voting (voting for candidates chosen from more than one list), the elector may have one vote per seat to be filled; another possibility is when one vote is cast in a small constituency and another in a larger constituency, as is often the case in systems combining single-member constituencies and proportional representation at the national or regional level.²¹ In this case, equal voting rights mean that all electors should have the same number of votes.

2.2. Equal voting power

Equality in voting power, where the elections are not being held in one single constituency, requires constituency boundaries to be drawn in such a way that seats in the lower chambers representing the people are distributed equally among the constituencies, in accordance with a specific apportionment criterion, for example, the number of residents in the constituency, the number of resident nationals (including minors), the number of registered electors, or possibly the number of people actually voting. An appropriate combination of these criteria is conceivable. The same rules apply to regional and local elections. When this principle is not complied with, we are confronted with what is known as electoral geometry, in the form either of “active electoral geometry”, namely a distribution of seats causing inequalities in representation as soon as it is applied, or of “passive electoral geometry”, arising from protracted retention of an unaltered territorial distribution of seats and constituencies. Furthermore, under systems tending towards a non-proportional result, particularly majority (or plurality) vote systems, gerrymandering may occur, which consists in favouring one party by means of an artificial delimitation of constituencies.

21. See, for example, Article 64 of the Albanian Constitution and Section 1 of the German Federal Elections Act.

Constituency boundaries may also be determined on the basis of geographical criteria and the administrative or indeed historic boundary lines, which often depend on geography.

The maximum admissible departure from the distribution criterion adopted depends on the individual situation, although it should seldom exceed 10% and never 15%, except in really exceptional circumstances (a demographically weak administrative unit of the same importance as others with at least one lower-chamber representative, or concentration of a specific national minority).²²

In order to avoid passive electoral geometry, seats should be redistributed at least every ten years, preferably outside election periods, as this will limit the risks of political manipulation.²³

In multi-member constituencies electoral geometry can easily be avoided by regularly allocating seats to the constituencies in accordance with the distribution criterion adopted. Constituencies ought then to correspond to administrative units, and redistribution is undesirable. Where a uninominal method of voting is used, constituency boundaries need to be redrawn at each redistribution of seats. The political ramifications of (re)drawing electoral boundaries are very considerable, and it is therefore essential that the process should be non-partisan and should not disadvantage national minorities. The long-standing democracies have widely differing approaches to this problem, and operate along very different lines. The new democracies should adopt simple criteria and easy-to-implement procedures. The best solution would be to submit the problem in the first instance to a commission comprising a majority of independent members and, preferably, a geographer, a sociologist, a balanced representation of the parties and, where appropriate, representatives of national minorities. The parliament would then make a decision on the basis of the commission's proposals, with the possibility of a single appeal.

2.3. Equality of opportunity

Equality of opportunity should be ensured between parties and candidates and should prompt the state to be impartial towards them and to apply the same law uniformly to all. In particular, the neutrality requirement applies to the electoral campaign and coverage by the media, especially the publicly owned media, as well as to public funding of parties and campaigns. This means that there are two possible interpretations of equality: either "strict" equality or "proportional" equality. "Strict" equality means that the political parties are treated without regard to their present strength in parliament or among the electorate. It must apply to the use of public facilities for electioneering purposes (for example billposting, postal services and similar, public demonstrations, public meeting rooms). "Proportional" equality implies that the treatment of political parties is in proportion to the number of votes. Equality of opportunity (strict and/or proportional) applies in particular to radio and television airtime, public funds and other forms of backing. Certain forms of backing

22. See CDL (98) 45, p. 3; CDL (99) 51, p. 8; CDL (2000) 2, p. 5; CDL-AD (2002) 9, paragraph 22.

23. CDL-AD (2002) 9, paragraph 23.

may on the one hand be submitted to strict equality and on the other hand to proportional equality.

The basic idea is that the main political forces should be able to voice their opinions in the main organs of the country's media and that all the political forces should be allowed to hold meetings, including on public thoroughfares, distribute literature and exercise their right to post bills. All of these rights must be clearly regulated, with due respect for freedom of expression, and any failure to observe them, either by the authorities or by the campaign participants, should be subject to appropriate sanctions. Quick rights of appeal must be available in order to remedy the situation before the elections. But the fact is that media failure to provide impartial information about the election campaign and candidates is one of the most frequent shortcomings arising during elections. The most important thing is to draw up a list of the media organisations in each country and to make sure that the candidates or parties are accorded sufficiently balanced amounts of airtime or advertising space, including on state radio and television stations.

In conformity with freedom of expression, legal provision should be made to ensure that there is minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.

The question of funding, and in particular of the need for it to be transparent, will be considered later.²⁴ Spending by political parties, particularly on advertising, may likewise be limited in order to guarantee equality of opportunity.

2.4. Equality and national minorities

In accordance with the principles of international law, the electoral law must guarantee equality for persons belonging to national minorities, which includes prohibiting any discrimination against them.²⁵ In particular, the national minorities must be allowed to set up political parties.²⁶ Constituency delimitations and quorum regulations must not be such as to form an obstacle to the presence of persons belonging to minorities in the elected body.

Certain measures taken to ensure minimum representation for minorities either by reserving seats for them²⁷ or by providing for exceptions to the normal rules on seat distribution, for example, by waiving the quorum for the national minorities' parties,²⁸ do not infringe the principle of equality. It may also be foreseen that people belonging to national minorities have the right to vote for both general and national minority lists. However, neither candidates nor electors must be required to indicate their affiliation with any national minority.^{29, 30}

24. See below, Chapter II.3.5.

25. Article 4.1 of the Framework Convention for the Protection of National Minorities (ETS 157).

26. With regard to bans on political parties and similar measures, see CDL-INF (2000) 1.

27. As is the case in Slovenia and Croatia.

28. As is the case in Germany and Poland. Romanian law even provides for representation of minorities' organisations if they have secured a number of votes equivalent to 5% (only) of the average number of validly cast votes required for the election of a deputy to the lower house country-wide.

29. Article 3 of the Framework Convention for the Protection of National Minorities (ETS 157).

30. With regard to electoral law and national minorities, see CDL-INF (2000) 4.

2.5. *Equality and parity of the sexes*

If there is a specific constitutional basis,³¹ rules could be adopted guaranteeing some degree of balance between the two sexes in elected bodies, or even parity. In the absence of such a constitutional basis, such provisions could be considered contrary to the principle of equality and freedom of association.

Moreover, the scope of these rules depends on the electoral system. In a fixed party list system, parity is imposed if the number of men and women who are eligible is the same. However, if preferential voting or cross-voting is possible, voters will not necessarily choose candidates from both sexes, and this may result in an unbalanced composition of the elected body, chosen by voters.

3. **Free suffrage**

Free suffrage comprises two different aspects: free formation of the elector's opinion, and free expression of this opinion, in other words, freedom of voting procedure and accurate assessment of the result.

3.1. *Freedom of voters to form an opinion*

a. Freedom of voters to form an opinion partly overlaps with equality of opportunity. It requires the state – and public authorities generally – to honour their duty of even-handedness, particularly where the use of the mass media, billposting, the right to demonstrate on public thoroughfares and the funding of parties and candidates are concerned.

b. Public authorities also have certain positive obligations. They must submit lawfully presented candidatures to the citizens' votes. The presentation of specific candidatures may be prohibited only in exceptional circumstances, where necessitated by a greater public interest. Public authorities must also give the electorate access to lists and candidates standing for election by means, for instance, of appropriate billposting. The information in question must also be available in the languages of national minorities, at least where they make up a certain percentage of the population.

Voters' freedom to form an opinion may also be infringed by individuals, for example when they attempt to buy votes, a practice which the state is obliged to prevent or punish effectively.

c. In order to ensure that the rules relating to voters' freedom to form an opinion are effective, any violation of the foregoing rules must be punished.

3.2. *Freedom of voters to express their wishes and combating electoral fraud*

31. See Article 3.2 of the French Constitution; see judgment of 18 November 1982, *Recueil des décisions du Conseil constitutionnel*, 1982, pp. 66 ff.

3.2.1. In general

Freedom of voters to express their wishes primarily requires strict observance of the voting procedure. In practice, electors should be able to cast their votes for registered lists or candidates, which means that they must be supplied with ballot papers bearing their names and that they must be able to deposit the ballot papers in a ballot box. The state must make available the necessary premises for electoral operations. Electors must be protected from threats or constraints liable to prevent them from casting their votes or from casting them as they wish, whether such threats come from the authorities or from individuals; the state is obliged to prevent and penalise such practices.

Furthermore, the voter has the right to an accurate assessment of the result of the ballot; the state should punish any election fraud.

3.2.2. Voting procedures

Voting procedures play a vital role in the overall electoral process because it is during voting that election fraud is most likely to occur.

In some countries the implementation of democratic practices requires a radical change of attitudes, which must be actively promoted by the authorities. In this respect some measures have to be taken to control the habits and reflexes which have a negative impact on the elections. Most of these irregularities, such as “family voting”³² occur during the voting procedure.

All these observations lead us to the following conclusion: the voting procedure must be kept simple. Compliance is therefore recommended with the criteria set out in the ensuing paragraphs.

If the polling station officials represent a proper balance of political opinion, fraud will be difficult, and the fairness of the ballot should be judged by two main criteria alone: the number of electors who have cast votes compared with the number of ballot papers in the ballot box. The first measure can be determined by the number of signatures in the electoral register. Human nature being what it is (and quite apart from any intention to defraud), it is difficult to achieve total congruity between the two measures, and any further controls such as numbering the stubs of ballot papers or comparing the total number of ballot papers found in the ballot box plus those cancelled and unused with the number of ballot papers issued to the polling station may give some indication, but one should be under no illusion that the results of these various measures will coincide perfectly. The risk in multiplying the measures used is rather that the differences in the totals, and in the end the real irregularities, will not be taken seriously. It is better to have strict control over two measures than slack – and hence ineffective – control over a larger number of variables.

Any unused ballot papers should remain at the polling station and should not be deposited or stored in different premises. As soon as the station opens, the ballot

32. See I.4 below.

papers awaiting use must be in full view on the table of the senior station official, for instance. There should be no others stored in cupboards or other places.

The signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot.

The voter should collect his or her ballot paper and no one else should touch it from that point on.

It is important that the polling station officials include multi-party representatives and that observers assigned by the candidates be present.

Voters should always have the possibility of voting in a polling station; other means of voting are, however, acceptable on certain conditions, as indicated below.

3.2.2.1. Postal voting or proxy voting in certain circumstances

Postal voting and proxy voting are permitted in countries throughout the western world, but the pattern varies considerably. Postal voting, for instance, may be widespread in one country and prohibited in another owing to the danger of fraud. It should be allowed only if the postal service is secure – in other words, safe from intentional interference – and reliable, in the sense that it functions properly. Proxy voting is permissible only if subject to very strict rules, again in order to prevent fraud; the number of proxies held by any one elector must be limited.

Neither of these practices should be widely encouraged if problems with the postal service are added to other difficulties inherent in this kind of voting, including the heightened risk of “family voting”. Subject to certain precautions, however, postal voting can be used to enable hospital patients, persons in custody, persons with restricted mobility and electors resident abroad to vote, insofar as there is no risk of fraud or intimidation. This would dispense with the need for a mobile ballot box, which often causes problems and risks of fraud. Postal voting would take place under a special procedure a few days before the election.

The use of mobile ballot boxes is undesirable because of the attendant serious risk of fraud. Should they nonetheless be used, strict conditions should be imposed to prevent fraud, including the attendance of several members of the polling station election commission representing different political groupings.

3.2.2.2. Military voting

Where servicemen cannot return home on polling day, they should preferably be registered at polling stations near their barracks. Details of the servicemen concerned are sent by the local command to the municipal authorities who then enter the names in the electoral list. The one exception to this rule is when the barracks are too far from the nearest polling station. Within the military units, special commissions should be set up to supervise the pre-election period, in order to prevent the risk of superior officers’ imposing or ordering certain political choices.

3.2.2.3. Mechanical and electronic voting methods

Several countries are already using, or are preparing to introduce mechanical and electronic voting methods. The advantage of these methods becomes apparent when a number of elections are taking place at the same time, even though certain precautions are needed to minimise the risk of fraud, for example by enabling the voter to check his or her vote immediately after casting it. Clearly, with this kind of voting, it is important to ensure that ballot papers are designed in such a way as to avoid confusion. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. Whatever means used should ensure the confidentiality of voting.

Electronic voting methods must be secure and reliable. They are secure if the system can withstand deliberate attack; they are reliable if they can function on their own, irrespective of any shortcomings in the hardware or software. Furthermore, the elector must be able to obtain confirmation of his or her vote and, if necessary, correct it without the secrecy of the ballot being in any way violated.

Furthermore, the system's transparency must be guaranteed in the sense that it must be possible to check that it is functioning properly.

3.2.2.4. Counting

The votes should preferably be counted at the polling stations themselves, rather than in special centres. The polling station staff are perfectly capable of performing this task, and this arrangement obviates the need to transport the ballot boxes and accompanying documents, thus reducing the risk of substitution.

The vote counting should be conducted in a transparent manner. It is admissible that voters registered in the polling station may attend; the presence of national or international observers should be authorised. These persons must be allowed to be present in all circumstances. There must be enough copies of the record of the proceedings to distribute to ensure that all the aforementioned persons receive one; one copy must be immediately posted on the noticeboard, another kept at the polling station and a third sent to the commission or competent higher authority.

The relevant regulations should stipulate certain practical precautions as regards equipment. For example, the record of the proceedings should be completed in ballpoint pen rather than pencil, as text written in pencil can be erased.

In practice, it appears that the time needed to count the votes depends on the efficiency of the presiding officer of the polling station. These times can vary markedly, which is why a simple tried and tested procedure should be set out in the legislation or permanent regulations which appear in the training manual for polling station officials.

It is best to avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention.

3.2.2.5. Transferring the results

There are two kinds of results: provisional results and final results (before all opportunities for appeal have been exhausted). The media, and indeed the entire nation, are always impatient to hear the initial provisional results. The speed with which these results are relayed will depend on the country's communications system. The polling station's results can be conveyed to the electoral district (for instance) by the presiding officer of the polling station, accompanied by two other members of the polling station staff representing opposing parties, in some cases under the supervision of the security forces, who will carry the records of the proceedings, the ballot box, and so on.

However much care has been taken at the voting and vote-counting stages, transmitting the results is a vital operation whose importance is often overlooked; it must therefore be effected in an open manner. Transmission from the electoral district to the regional authorities and the central electoral commission – or other competent higher authorities – can be made by fax. In that case, the records will be scanned and the results can be displayed as and when they come in. Television can be used to broadcast these results but once again, too much transparency can be a dangerous thing if the public is not ready for this kind of piecemeal reporting. The fact is that the initial results usually come in from the towns and cities, which do not normally or necessarily vote in the same way as rural areas. It is important therefore to make it clear to the public that the final result may be quite different from, or even completely opposite to, the provisional one, without there having been any question of foul play.

4. Secret suffrage

Secrecy of the ballot 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, and non-compliance must be punished by disqualifying any ballot paper whose content has been disclosed.³³

Voting must be individual. Family voting, whereby one member of a given family can supervise the votes cast by the other members, infringes the secrecy of the ballot; it is a common violation of the electoral law. All other forms of control by one voter over the vote of another must also be prohibited. Proxy voting, which is subject to strict conditions, is a separate issue.³⁴

Moreover, since abstention may indicate a political choice, lists of persons voting should not be published.

Violation of the secrecy of the ballot must be punished, just like violations of other aspects of voter freedom.

33. CDL (2000) 2, p. 9.

34. See above, I.3.2.2.1.

5. Direct suffrage

Direct election of one of the chambers of the national parliament by the people is one aspect of Europe's shared constitutional heritage. Subject to such special rules as are applicable to the second chamber, where there is one, other legislative bodies, like the parliaments of federate states,³⁵ should be directly elected, in accordance with Article 3 of the Additional Protocol to the European Convention on Human Rights. Nor can local self-government, which is a vital component of democracy, be conceived of without local elected bodies.³⁶ Here, local assemblies include all infra-national deliberative bodies.³⁷ On the other hand, even though the president of the republic is often directly elected, this is a matter for the constitution of the individual state.

6. Frequency of elections

Both the International Covenant on Civil and Political Rights³⁸ and the Additional Protocol to the European Convention on Human Rights³⁹ provide that elections must be held periodically. General elections are usually held at four- or five-yearly intervals, while longer periods are possible for presidential elections, although the maximum should be seven years.

II. Conditions for implementing these principles

The underlying principles of European electoral systems can only be guaranteed if certain general conditions are fulfilled.

- The first general condition is respect for fundamental human rights, and particularly freedom of expression, assembly and association, without which there can be no true democracy.
- Second, electoral law must enjoy a certain stability, protecting it against party political manipulation.
- Last and above all, a number of procedural guarantees must be provided, especially as regards the organisation of polling.

Furthermore, elections are held not in a vacuum but within the context of a specific electoral system and a given party system. This second section will conclude with a number of comments on this aspect, particularly on the relationship between electoral and party systems.

1. Respect for fundamental rights

35. See the Court's judgment in *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, No. 9267/81, Series A vol. 113, p. 23; Eur. Comm. HR, decision in *Timke v. Germany*, 11 September 1997, No. 27311/95, DR 82, p. 15; decision in *X v. Austria*, 12 July 1976, No. 7008/75, DR 6, p. 120.

36. Article 3 of the European Charter of Local Self-Government (ETS No. 122).

37. Article 13 of the European Charter of Local Self-Government.

38. Article 25b.

39. Article 3.

The holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital, particularly during election campaigns. Restrictions on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest, and respect the principle of proportionality.

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, 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, European standards are violated by an electoral law which prohibits insulting or defamatory references to officials 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. The 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 if electoral commissions are required to take action against illegal or inaccurate publications. This is even more true if the rules prohibiting improper use of the media during electoral campaigns are rather vague.

Another very important fundamental right in a democracy is freedom of movement within the country, together with the right for nationals to return to their country at any time.

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.⁴⁰ Rules which change frequently – and especially rules which are complicated – may confuse voters. 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.

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*, the composition of electoral commissions and the drawing of constituency boundaries. These three elements are often, rightly or wrongly, regarded as decisive factors in the election results, and care must be taken to avoid not only manipulation

40. 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.

to the advantage of the party in power, but even the mere semblance of manipulation.

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 (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests.

One way of avoiding manipulation is to define in the constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.

For the rest, the electoral law should normally have the rank of statute law. Rules on implementation, in particular those on technical questions and matters of detail, can nevertheless be in the form of regulations.

3. Procedural guarantees

3.1. Organisation of elections by an impartial body

Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.

In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures. It is therefore both normal and acceptable for elections to be organised by administrative authorities, and supervised by the ministry of the interior.

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

This is why independent, impartial electoral commissions must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least to remove serious suspicions of irregularity.

According to the reports of the Bureau of the Parliamentary Assembly of the Council of Europe on election observations, the following shortcomings concerning the electoral commissions have been noted in a number of member states: lack of transparency in the activity of the central electoral commission; variations in the interpretation of counting procedure; politically polarised election administration; controversies in appointing members of the central electoral commission; commission members nominated by a state institution; the dominant position of the ruling party in the election administration.

Any central electoral commission must be permanent, as an administrative institution responsible for liaising with local authorities and the other lower-level commissions, for example, as regards compiling and updating the electoral lists.

The composition of a central electoral commission can give rise to debate and become the key political issue in the drafting of an electoral law. Compliance with the following guidelines should facilitate maximum impartiality and competence on the part of the commission.

As a general rule, the commission should consist of:

- a judge or law officer: where a judicial body is responsible for administering the elections, its independence must be ensured through transparent proceedings. Judicial appointees should not come under the authority of those standing for office;
- representatives of parties already represented in parliament or which have won more than a certain percentage of the vote. Political parties should be represented equally in the central electoral commission; “equally” may be interpreted strictly or proportionally, that is to say, taking or not taking account of the parties’ relative electoral strengths.⁴¹ Moreover, party delegates should be qualified in electoral matters and should be prohibited from campaigning.

In addition, the electoral commission may include:

- representatives of national minorities; their presence is desirable if the national minority is of a certain importance in the territory concerned;
- a representative of the ministry of the interior. However, for reasons connected with the history of the country concerned, it may not always be appropriate to have a representative of the ministry of the interior in the commission. During its election observation missions the Parliamentary Assembly has expressed concern on several occasions about transfers of responsibilities from a fully-fledged multi-party electoral commission to an institution subordinate to the executive. Nevertheless, co-operation between the central electoral commission and the ministry of the interior is possible if only for practical reasons, for example, transporting and storing ballot papers and other equipment. For the rest, the executive power should not be able to influence the membership of the electoral commissions.⁴²

Broadly speaking, bodies that appoint members to electoral commissions should not be free to recall them, as it casts doubt on their independence. Discretionary recall is unacceptable, but recall for disciplinary reasons is permissible – provided that the grounds for this are clearly and restrictively specified in law (vague references to “acts discrediting the commission”, for example, are not sufficient).

In the long-standing democracies where there are no electoral commissions but where another impartial body is competent in electoral matters, political parties must be able

41. See above, I.2.3.

42. See CDL-AD (2002) 7, paragraphs 5, 7 ff., 54.

to observe the work of that body.

The composition of the central electoral commission is certainly important, but no more so than its mode of operation. The commission's rules of procedure must be clear, because commission chairpersons have a tendency to let members speak, which the latter are quick to exploit. The rules of procedure should provide for an agenda and a limited amount of speaking time for each member, for example, a quarter of an hour; otherwise endless discussions are liable to obscure the main business of the day.

There are many ways of making decisions. It would make sense for decisions to be taken by a qualified (for example, two thirds) majority, so as to encourage debate between the majority and at least one minority party. Reaching decisions by consensus is preferable.

The meetings of the central electoral commission should be open to everyone, including the media (this is another reason why speaking time should be limited). Any computer rooms, telephone links, faxes, scanners, etc. should be open to inspection.

Other electoral commissions operating at regional or constituency level should have a similar composition to that of the central electoral commission. Constituency commissions play an important role in uninominal voting systems because they determine the winner in general elections. Regional commissions also play a major role in relaying the results to the central electoral commission.

Appropriate staff with specialised skills⁴³ are required to organise elections. Members of central electoral commissions should be legal experts, political scientists, mathematicians or other people with a good understanding of electoral issues.

Members of electoral commissions have to receive standardised training at all levels of the election administration. Such training should also be made available to the members of commissions appointed by political parties. There have been several cases of commissions lacking qualified and trained election staff.

The electoral law should contain an article requiring the authorities (at every level) to meet the demands and needs of the electoral commission. Various ministries and other public administrative bodies, mayors and town hall staff may be directed to support the election administration by carrying out the administrative and logistical operations of preparing for and conducting the elections. They may have responsibility for preparing and distributing the electoral registers, ballot papers, ballot boxes, official stamps and other required material, as well as determining the arrangements for storage, distribution and security.

3.2. Observation of elections

Observation of elections plays an important role as it provides evidence of whether the electoral process has been regular or not.

43. See CDL (98) 10, p. 5.

There are three different types of observer: partisan national observers, non-partisan national observers and international (non-partisan) observers. In practice the distinction between the first two categories is not always obvious. This is why it is best to make the observation procedure as broad as possible at both the national and the international level.

Observation is not confined to the actual polling day but includes ascertaining whether any irregularities have occurred in advance of the elections (for example, by improper maintenance of electoral lists, obstacles to the registration of candidates, restrictions on freedom of expression, and violations of rules on access to the media or on public funding of electoral campaigns), during the elections (for example, through pressure exerted on electors, multiple voting, violation of voting secrecy, etc.) or after polling (especially during the vote counting and announcement of the results). Observation should focus particularly on the authorities' regard for their duty of neutrality.

International observers play a primordial role in states which have no established tradition of impartial verification of the lawfulness of elections.

Generally, international as well as national observers must be in a position to interview anyone present, take notes and report to their organisation, but they should refrain from making comments.

The law must be very clear as to what sites observers are not entitled to visit, so that their activities are not excessively hampered. For example, an act authorising observers to visit only sites where the election (or voting) takes place could be construed by certain polling stations in an unduly narrow manner.⁴⁴

3.3. An effective system of appeal

If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;
- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experienced with regard to electoral issues. As a precautionary

44. With regard to election observation, see *Handbook for Observers of Elections*, Council of Europe, 1996.

measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

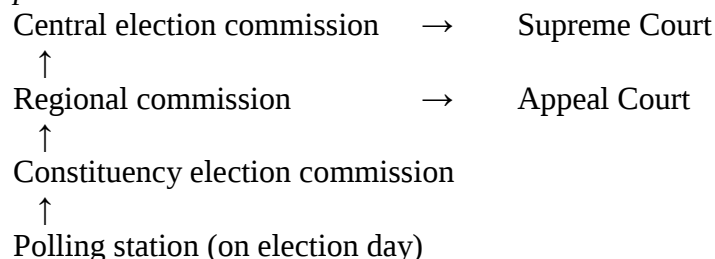
Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

The procedure must also be simple, and providing voters with special appeal forms helps to make it so.⁴⁵ It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different courts – for example, the ordinary courts and the constitutional court – are not clearly differentiated.

Example:



Disputes relating to the electoral registers, which are the responsibility, for example, of the local administration operating under the supervision of, or in co-operation with, the electoral commissions, can be dealt with by courts of first instance.

45. CDL (98) 45, p. 11.

Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.

The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.

The powers of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, that is, affected the distribution of seats. This is the general principle, but it should be open to adjustment, that is, 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.

Where higher-level commissions are appeal bodies, they should be able to rectify or annul *ex officio* the decisions of lower electoral commissions.

Some points deserve to be developed.

3.4. Organisation and operation of polling stations

The quality of the voting and vote-counting systems and proper compliance with the electoral procedures depend on the mode of organisation and operation of the polling stations. The reports of the Bureau of the Assembly on the observation of elections in different countries have revealed a series of logistical irregularities. For example, significant differences between polling stations across different regions of the same state were noted.

Assembly observation missions have also noticed several cases of technical irregularities such as wrongly printed or stamped ballot boxes, overly complex ballot papers, unsealed ballot boxes, inadequate ballot papers or boxes, misuse of ballot boxes, insufficient means of identification of voters and absence of local observers.

All these irregularities and shortcomings, in addition to political party electioneering inside the polling station and police harassment, can seriously vitiate the voting process, or indeed undermine its integrity and validity.

3.5. Funding

Regulating the funding of political parties and electoral campaigns is a further important factor in the regularity of the electoral process.

First of all, funding must be transparent; such transparency is essential whatever the level of political and economic development of the country concerned.

Transparency operates at two levels. The first concerns campaign funds, the details of which must be set out in a special set of carefully maintained accounts. In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled. The second level involves monitoring the financial status of elected representatives before and after their term in office. A commission in charge of financial transparency takes formal note of the elected representatives' statements as to their finances. The latter are confidential, but the records can, if necessary, be forwarded to the public prosecutor's office.

In unitary states, any expenses incurred by local authorities in connection with the running of a national election, the payment of election commission members, the printing of ballot papers, etc, should normally be borne by the central state.

It should be remembered that in the field of public funding of parties or campaigns the principle of equality of opportunity applies ("strict" or "proportional" equality).⁴⁶ All parties represented in parliament must in all cases qualify for public funding. However, in order to ensure equality of opportunity for all the different political forces, public funding might also be extended to political formations that represent a large section of the electorate and put up candidates for election. The funding of political parties from public funds must be accompanied by supervision of the parties' accounts by specific public bodies (for example, the Auditor General's department). States should encourage a policy of financial openness on the part of political parties receiving public funding.⁴⁷

3.6. *Security*

Every electoral law must provide for intervention by the security forces in the event of trouble. In such an event, the presiding officer of the polling station (or his or her representative) must have sole authority to call in the police. It is important to avoid extending this right to all members of the polling station commission, as what is needed in such circumstances is an on-the-spot decision that is not open to discussion.

In some states, having a police presence at polling stations is a national tradition, which, according to observers, does not necessarily trigger unrest or have an intimidating effect on voters. One should note that a police presence at polling stations is still provided for in the electoral laws of certain western states, even though this practice has changed over time.

Conclusion

Compliance with the five underlying principles of the European electoral heritage (universal, equal, free, secret and direct suffrage) is essential for democracy. It enables democracy to be expressed in different ways but within certain limits. These limits stem primarily from the interpretation of the said principles; the present text lays out the minimum rules to be followed in order to ensure compliance. Second, it is insufficient for the electoral law (in the narrow sense) to comprise rules that are in

46. See I.2.3 above.

47. For further details on funding of political parties, see CDL-INF (2001) 8.

keeping with the European electoral principles: the latter must be placed in their context, and the credibility of the electoral process must be guaranteed. First, fundamental rights must be respected; and second, the stability of the rules must be such as to exclude any suspicion of manipulation. Lastly, the procedural framework must allow the rules laid down to be implemented effectively.

Interpretative Declaration on the Stability of the Electoral Law⁴⁸

I. The code of good practice in electoral matters (CDL-AD(2002)023rev, item II.2.B) states :

“The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law.”

II. The Venice Commission interprets this text as follows:

1. The principle according to which the fundamental elements of electoral law should not be open to amendment less than one year prior to an election does not take precedence over the other principles of the code of good practice in electoral matters.

2. It should not be invoked to maintain a situation contrary to the norms of European electoral heritage, or to prevent the implementation of recommendations by international organisations.

3. This principle only concerns the fundamental rules of electoral law, when they appear in ordinary law.

4. In particular, the following are considered fundamental rules:

- the electoral system proper, that is, rules relating to the transformation of votes into seats;
- rules relating to the membership of electoral commissions or another body which organises the ballot;
- the drawing of constituency boundaries and rules relating to the distribution of seats between the constituencies.

5. In general, any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election.

48. Study No. 348/2005, adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005); (Doc. CDL-AD(2005)043).

Declaration on Women's Participation in Elections⁴⁹

Item I.2.5 of the code of good practice in electoral matters provides as follows:

“Legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis”.

The following completes this principle:

- a. Implementation of the parity principle may lead to admit:
 1. Elections by a list system:
 - The obligation to ensure a composition of the candidates' lists alternating men and women;
 - The refusal to register lists which do not respect such an alternating composition;
 2. Elections in single-member constituencies:
 - The obligation to ensure a balanced percentage of women and men amongst candidates of the same party;
 - Dissuasive sanctions in case of non-respect of this obligation.
- b. Suffrage should be individual and secret, which excludes any form of “family voting”, whether committed in the form of group voting (where a [male] family member accompanies one or more [women] relatives into a polling booth), in the form of open voting (when family groups vote together in the open), or in the form of proxy voting (where a [male] family member collects ballot papers belonging to one or more [women] relatives and marks those papers as he sees fit).

49. Study No. 324/2004, adopted by the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006) on the basis of contributions by Mr François Luchaire (Member, Andorra) and Ms Hanna Suchocka (Member, Poland); CDL-AD(2006)020.

Study on electoral law and national minorities⁵⁰

Introduction⁵¹

During the last ten years and the upheavals which have occurred in Europe, the protection of minorities has once again become one of the major preoccupations of European public law specialists. Far from being an academic subject reserved for those specialising in constitutional law and political science, it is central to political debate and to achieving the three fundamental principles of Europe's constitutional heritage on which the Council of Europe is based – democracy, human rights and the rule of law.

The involvement of members of minorities in the various aspects of life in society is an important factor in their integration and in the prevention of conflicts. This applies especially to what is commonly called public life, that is to say participation in state bodies.

The present report covers a central element of public life – participation in a state's elected bodies, especially the national legislature. Such participation is studied through electoral law and the possibilities it gives members of national minorities of being present in elected bodies.

1. Rules of electoral law which provide for special representation of minorities are an exception. They will be briefly considered in the first section of the report.
2. In most cases, the representation of minorities in an elected body is achieved through the application of the ordinary rules of electoral law, which treat people belonging to national minorities and others in the same way.

It is not always easy to identify which of these general rules promote and which hinder representation of minorities. There are various reasons for this.

- a. First, the relationship between an electoral system and the composition of elected bodies – other than with regard to its purely mathematical aspects – is one of the most controversial questions in political science. The diversity of situations in the various states makes it impossible to deduce detailed rules which may be applied universally. Furthermore, the significance of international comparisons must be tempered by factors other than the mathematical formula for converting votes into mandates, such as the possibility voters may have of choosing between the candidates

50. Document CDL-INF (2000) 4.

51. This report is based on the replies to the first part of the questionnaire on the participation of members of minorities in public life (CDL-MIN (96) 1, see [p. 61](#)), from the following states: Albania, Argentina, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Georgia, Greece, Hungary, Italy, Japan, Kyrgyzstan, Latvia, Lithuania, Norway, Poland, Portugal, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, and Ukraine (see documents CDL-MIN (97) 1, CDL-MIN (97) 2 and CDL-MIN (99) 2).

on a list or more than one list. The number of seats per constituency, although not part of the electoral system in its strict meaning, is also a decisive factor.

b. Second, in most states which replied to the questionnaire, there are no precise data on the presence of members of minorities in elected bodies. Failing such data, it is very difficult to know whether the electoral system tends to result in under-representation or over-representation of the minority in the elected body.

c. Third, it is often hard to ascertain whether or not the purpose of a rule is to ensure or strengthen the representation of minorities (or, on the contrary, to lessen it). For one thing, such an objective is not necessarily explicit. Also, the representation of national minorities, even if intended, is not necessarily the main objective of legislation, especially in states where there are no sizeable minorities. Thus, in a strongly proportional electoral system, which aims to ensure that small political groups are represented, the representation of national minorities may be an associated aim. And finally, paradoxical as it may seem, when an electoral system ensures that minorities are represented to their satisfaction, the question is not crucial, and thus there is no vital reason for wondering whether the legislation tends to ensure that minorities are represented. As a consequence, no distinction will be made in the present report between those ordinary electoral rules which merely result in the protection of minorities and those whose very purpose is such protection.

d. The rules on the conversion of votes into seats, especially those of a mathematical nature, which are most universal in scope, apply above all to political parties. They never concern a national minority directly. Their significance for the representation of national minorities therefore largely depends on the relationship between national minorities and political parties, or at least political groupings. Such rules concern national minorities when there are parties or other organisations peculiar to such minorities that present their own lists. Obviously, it remains to be seen to what extent the voters belonging to the minority – or indeed the majority – vote for such parties. If there are no such lists, there may be a link between an electoral system and the representation of minorities when membership of a minority is a decisive criterion in voting by citizens.

Consequently, this survey cannot simply present the rules of electoral law in relation to the protection of minorities. It must rather take a general look at electoral systems and their effects, before going on to consider their application to national minorities. Thus, the second section of the report will set out to elicit general rules relating to the influence of electoral systems on the representation of political groups, on the basis of which a third section will deal with the effects of electoral systems on the representation of minorities, distinguishing between situations where minorities have their own parties and those where they do not. Section four will consider the consequences of the distribution of seats between constituencies and the drawing of constituency boundaries. A final section will analyse current discussions on the revision of electoral law and the impact of such discussions on the representation of national minorities.

I. Rules specifically providing for representation of minorities

A. *Representation of minorities as such*

Only three of the states which replied to the questionnaire provide for the election of deputies intended to represent national minorities. They are Croatia, Romania and Slovenia.

1. The most explicit form of specific representation of national minorities is that resulting from the creation of communities (or circles) of persons, where the electorate is made up not of citizens who reside in a particular territory, but of those who belong to an ethnic group.

In the elections to the lower house of the Croatian Parliament, members of national minorities may choose to vote for a general national list (like the members of the majority), but may also vote for specific minority lists (the Hungarian, Serbian and Italian minorities have one seat each, while minorities with small numbers of members are grouped together to elect one deputy between them). In Slovenia, one seat in the National Assembly is reserved for the Italian minority and one seat for the Hungarian minority.

2. The system for local elections in Slovenia is different in that it does not create constituencies based on people, but it nonetheless provides a way of guaranteeing the representation of members of the Italian minority in ethnically mixed areas. The Romanian system ensures minimal representation of legally constituted organisations of citizens belonging to a national minority. If such organisations do not obtain a seat in either house through ordinary electoral procedures, but receive at least 5% of the average number of votes validly cast over the entire country for the election of a member of the Chamber of Deputies, they are entitled to a seat in this house. In 1992, for example, 13 organisations benefited from this clause.

B. Rules facilitating the representation of minorities

Other systems, while not necessarily guaranteeing the presence of members of national minorities in elected bodies, facilitate the representation of minority organisations. In Poland and Germany, for instance, threshold rules do not apply to such organisations.

C. The Belgian system

The Belgian system is specific. The body of institutions is conceived in such a way as to establish a balance between the different linguistic groups (rather than between minorities in the strict sense). Moreover, in certain areas which are mixed from a linguistic point of view, adjustments have been made so that electors from different linguistic communities are represented in the elected body. In this way, a large mixed constituency was created in the centre of the country (Brussels-Hal-Vilvorde constituency). It covers both the bilingual region of Brussels-Capital and two Flemish districts where there are a large number of French speakers. Voters from this constituency can vote, with chances of success, for candidates from Flemish or French-speaking lists for both the Senate and the House of Representatives.

Concerning elections to the Senate, for which voters in the whole country are divided into two electoral colleges, the French electoral college and the Dutch electoral

college, responsible for electing 15 and 25 senators respectively, voters from Brussels-Hal-Vilvorde can vote for a Flemish list or a French-speaking list and thus belong, according to the choice made, to one or other college. Finally, for both Chambers, voters from the two districts with linguistic facilities of Fournon and Comines-Warneton have the right to vote in a district situated on the other side of the linguistic border.

II. The influence of electoral systems on the representation of political groups – what kind of general rules?

In a democracy, it is the choice made by the voters which is the essential factor in determining the result of the election, in terms of seats as well as votes. The electoral system has a lesser part to play. Even so, it does influence the result, directly and indirectly. To begin with, the electoral system is a device for converting votes into seats: it reproduces – faithfully or otherwise – the structure of the electorate in the elected body. Second, it indirectly influences the very behaviour of voters.

The debate on the effects of one voting system as compared with another, which began with the birth of modern democracy, is far from over. It will not be settled by the present report. The purpose of the following paragraphs is simply to show the most generally accepted effects of electoral systems which may be taken into consideration with respect to the representation of minorities.

1. The extent of the impact of an electoral system on the conversion of votes into seats is shown by the difference between the fractionalisation of votes and that of seats. Fractionalisation of votes is defined as the chance that two voters do not choose the same party, whereas fractionalisation of seats is the chance that two seats do not belong to the same party.⁵² When there is no divergence between vote fractionalisation and seat fractionalisation, the electoral system may be described as “neutral”, the distribution of seats being proportional to that of votes. The more a system “defractionalises”, on the other hand, the less proportional is the outcome. Between a perfectly neutral – or fully proportional – system and the most defractionalising, there are a great many intermediate situations, the two extremes being linked by a continuum.

The impact of an electoral system on the conversion of votes into seats depends to a large extent on factors of a mathematical (or mechanical) nature. However, it is impossible to predict scientifically in each individual case what the effect of an electoral system will be, as the factors to be taken into consideration are so complex. At the most, a few general rules may be deduced.

One of the essential rules is that, the more a system defractionalises, the more favourable it is to large groups, in particular the largest, at least at constituency level, and the harder it makes the representation of minority political tendencies. If the entire territory over which an election is held is taken into account, exceptions are found to this rule, when political groups are unevenly represented over the territory.

52. The notion of fractionalisation was developed by Rae, Douglas W., *The political consequences of electoral laws*, second edition, New Haven/London, 1971, p. 53 ff.

Conversely, the more a system is neutral as regards the conversion of votes into seats, the more it allows minority political tendencies to be represented. However, it would be wrong to think that neutral systems encourage small political groups. In actual fact, the representation they give those voting for such groups is equal to, not greater than, that given to other groups.

Obviously, the ultimate distinction between majority and proportional systems of voting has a large part to play in determining the extent to which such systems have a defractionalising effect. However, it allows but an initial differentiation, which needs refining, especially with respect to states using a proportional system.

Most of the states studied use a proportional or predominantly proportional system. This is obviously not to say that the systems are proportional all to the same extent. Without going into a detailed study of the countless variants of electoral systems, it is useful to recall the following: although proportional systems give a more proportional result than majority systems, a proportional system – or, to be more exact, a proportional method of translating votes into mandates – does not in itself guarantee that the composition of the elected body is a true reflection of that of the electorate. The proportionality of the outcome may be limited by several factors:

a. The most visible is the threshold, which excludes from the distribution of seats parties which have not obtained a certain percentage of votes. The significance of the threshold obviously depends on the percentage of votes to which it corresponds. Furthermore, a threshold which applies at national level will exclude more parties than one at constituency level. Turkey is an example of a particularly harsh threshold, as it is set at 10% nationwide, while Poland has a threshold of 7%. In Germany, too, the threshold is set at national level, but is only 5% (or three direct mandates), which allows five parties (or coalitions) to be present in the *Bundestag*, whereas only two would enter the parliament if there were a threshold of 10%. In Denmark, the threshold has hardly any impact, as it is merely 2%. In Armenia, the threshold is, in principle, 5%; however, if one political party manages to get more than 5%, the first two parties which follow (in number of votes) also obtain seats in proportion to their result. It should be pointed out that in Poland, as in Germany, the threshold rules do not apply to minority lists. Thus, the German minority in Silesia is represented in the parliament.

b. The electoral formula itself may have the effect of reducing the proportionality of the result, but to a much smaller extent (for instance, the systems using the largest average formula give a less proportional result than those using the largest remainder method).

c. Also, and above all, the size of constituencies, or, to be more exact, the number of seats they contain, has an essential part to play in the proportionality of the result: the fewer seats there are in a constituency, the higher the electoral quotient is and the harder it is for a party to obtain a seat.

d. Moreover, as well as majority and proportional systems there are mixed systems, which combine aspects of the two major voting systems. This notion covers widely divergent situations. The extent to which the systems are proportional depends

in part upon the criteria mentioned above, but, above all, the extent to which the proportional principle determines the result is variable.

When separate allocations of seats are made under the majority system and the proportional system, the extent to which the result is proportional will depend chiefly on the share of seats kept for the proportional system. In Italy, for example, this share is only 25%. As the minorities are concentrated, they are not harmed by the size of the share of seats filled by the majority system. By contrast, the threshold of 4% at national level which is required in order to win a seat under the proportional system is to their disadvantage. In Albania, the Greek minority, being concentrated, is not disadvantaged by the electoral system, even though only a little over a quarter of the seats are set aside for the proportional system.

In other states there is a balancing-out, insofar as when the seats are allocated under the proportional system, the seats already obtained under the majority system are deducted. Thus, in Germany the result is essentially proportional. There are three stages. First of all, half of the seats are allocated on a majority single-ballot single-member basis. All the mandates are then divided between the parties on a proportional basis and the seats obtained under the majority vote are then deducted. In Hungary, 176 seats are allotted for the majority single-member ballot, 152 for the proportional system with regional constituencies, and 58 on the basis of national party lists, which serve to balance out representation. In these two states, the limited numbers of members of minorities have not led to the creation of minority lists, at least at national level.

2. So far, consideration has been given to the influence an electoral system has on the transformation of votes into seats, that is to say issues of a mathematical nature. However, electoral systems also have an influence on voters' choices. In the first place, their possibilities of choice vary according to the type of system used (a point which will be taken up later)⁵³. Also, and above all, voters who are aware of the way electoral systems work adapt their voting to the electoral system, in particular by casting a "tactical" vote, that is to say avoiding giving votes to a party or a candidate without a chance. This behaviour in turn has an influence on parties and thus on who stands for election. This is a controversial question, which belongs to the realm of political science and will not be gone into further here. It is generally accepted, however, that the behaviour of voters tends to accentuate the effects of an electoral system. Tactical voting increases the chances of the major lists and reduces those of the small lists, thereby accentuating the mechanical effect of the electoral system.

To sum up, except for fully proportional systems, which are neutral but do not exist in a pure state in any of the states studied, all the voting systems are favourable to large political groups and unfavourable to small ones. At constituency level, this results from the automatic application of the system for converting votes into seats and is therefore of universal significance. However, if account is taken of the entire territory over which an election is held, such a rule applies only if the various tendencies are spread relatively uniformly. A majority tendency in a confined geographical area,

53. Point III.B.2.b.

which is not represented in the rest of the territory, may therefore benefit from a highly defractionalised system, despite being in a minority at national level.

III. The effects of electoral systems on the representation of minorities

A. Political parties of national minorities – A factor in the representation of such minorities

The points discussed above apply to the “political parties of national minorities” – that is to say, parties whose purpose is to represent national minorities and defend their interests – as they do to all other parties. How important are the former? The replies to the questionnaire allow the following picture to be drawn of the situation of political parties of national minorities.

a. Only a few of the states which replied to the questionnaire prohibit parties representing minorities. They are Albania, Bulgaria, Georgia and Turkey. On the other hand, the prohibition in the Portuguese Constitution of parties of a regional nature or which have a regional dimension is not directed at minority parties.

b. However, it would appear that in most of the states which prohibit parties representing minorities, such prohibition is ineffective. In Albania, the party called Union for Human Rights includes, above all, the political organisation of the Greek minority, OMONIA. In Bulgaria, the Movement for Rights and Freedoms is the political party from the Turkish ethnic minority. Both these parties have deputies in the respective parliaments. In Turkey, on the other hand, the Constitutional Court has banned several parties pursuant to a statute which notably prohibits parties whose purposes include changing the unitary nature of the state; claiming that there are minorities in Turkey based on differences of national or religious culture, or of religious affiliation, race, or language; or creating minorities in the territory of the Turkish Republic by protecting, developing or disseminating languages and cultures other than the Turkish language and culture. It should be noted, however, that there is a question mark over the compatibility of such statutory provisions with the constitution. Moreover, a political party claiming to represent the Kurdish identity is currently tolerated. It is not represented in the parliament, however, as it fell short of the threshold of 10% of votes nationwide. Regardless of any statutory prohibition, this threshold makes it very difficult for minority lists to be represented in the parliament. Last, the statutory prohibition in Georgia upon associations of citizens aimed at ethnic, religious or national representation is not shown by the questionnaire to have been applied to political parties. Furthermore, there is a large number of associations representing the minorities resident in Georgia.

To sum up, it is highly unusual, in practice, for political parties representing national minorities to be prohibited. As this would be a restriction upon the freedom of association, which is a fundamental part of the common constitutional heritage across the continent, it can be justified only in very special and individual cases, and not in a

general manner. The principle of proportionality must always be fully respected.⁵⁴ It should be noted that the prohibition on using “minority” arguments in an electoral campaign can lead, in fact, to a prohibition on participating in parliamentary life, even if minority parties as such are not formally prohibited.⁵⁵

c. The mere fact that parties representing minorities are permitted obviously does not imply that they exist. They are present in only a certain number of states.

Their absence is often linked to the limited number of people belonging to minorities (Japan), or to their being dispersed (Hungary). In Switzerland, where there are no minority parties strictly speaking, political parties have their roots largely in the cantons, which means that the cantonal sections, at least in the monolingual cantons, are composed of people belonging to the same linguistic group. When concentrated minorities have few members, they sometimes have parties only at regional and local level (Austria; Norway and Sweden for the Samies; Denmark for the German minority). In other cases, even when present in the national legislature, parties from concentrated minorities are naturally situated in the regions where such minorities are in the majority (Italy, Slovakia, Spain), or where they at least have relatively large numbers of members. Indeed, when highly structured, an organisation representing a minority may obtain seats in a national parliament even if the minority is in the majority nowhere, or only in a very confined area. Romania is the country where the largest number of minority parties or organisations (treated as political parties for electoral purposes) have taken part in elections and have deputies and senators in the parliament.⁵⁶ In Slovakia and “the former Yugoslav Republic of Macedonia” there are many minority parties, one of them even being in the government in the latter case, and three of them in Slovakia. The replies from Croatia and Lithuania also mention the existence of parties representing minorities.

Where there are national minority parties, the influence of the electoral system on the representation of the national minorities in the elected bodies is greater. Irrespective of the bearing an electoral system has on the outcome of an election in terms of seats, the deciding factor is always the choice made by the voter. As this choice is made on the basis of the candidates standing for election, the representation of members of national minorities in elected bodies varies according to the number of candidates from such minorities, or at least the number of candidates put forward by organisations which have a chance of winning seats. It is easier for members of minorities to stand for election – and thus to be elected – when there are parties specific to national minorities.

B. The situation when there are no parties of minorities

1. Representation of minorities through the proportionality of the results

54. See document CDL-INF (98) 14, “Prohibition of Political Parties and Analogous Measures”, report adopted by the Commission at its 35th plenary meeting, Venice, 12-13 June 1998.

55. See Eur. Comm. HR opinion in the Ahmet Sadik case, the Court’s judgment in *Ahmed Sadik v. Greece*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V.

56. It will be recalled that there are special statutory provisions in this country encouraging representation of such groupings. See *supra*, point I.A.2.

The general rules concerning the influence of electoral systems on the representation of political groups cannot, just as they are, be transposed to national minorities, for the reasons given hereafter.

a. Political parties from national minorities are not a true reflection of such minorities. Members of national minorities also vote for other parties, especially when the latter's lists include candidates belonging to the minority and openly declaring themselves as such. Also, it is not impossible for a party from a minority to receive votes from outside that minority.

b. Also, and above all, minorities are not generally represented through political parties which are peculiar to them. Although widely permitted, such parties exist only in certain states. In general, when they exist, they are limited to the region where most of the minority resides.

c. Where there are no parties representing a minority, the relationship between the electoral system and the representation of the minority is very difficult to define, even assuming that the way voters cast their votes is determined by whether or not the candidates belong to the minority. Some general trends may nonetheless be identified, as will be seen in the following paragraphs.

It may be that a minority is not in a majority anywhere in the territory. Whether this is because it is dispersed or simply has few members, it has very little chance in such a case of being represented in a defractionalising system, and especially in a majority system. When a minority with a small number of members is concentrated, its interest will be better served by a break-up of national territory into constituencies than by a distribution of seats at national level with a threshold.

The more proportional an electoral system, the more it allows minorities, even dispersed ones, to be represented in the elected body, at least when the number of people belonging to the minority who take part in the election attains the electoral quotient – and, if such be the case, the threshold – in the constituency in question. The minority is then in a position to present its own list, but also to forgo such a list if it arranges with the traditional political parties for them to include its candidates. Thus, the proportional system allows the Swedish minority in Finland, which is in the majority only on the Åland Islands, to be represented by its own list in three other constituencies. It has a seat in a fifth constituency through alliances with other parties.

2. *Pluri-nominal ballot and the election of members of minorities*

a. *Generalities*

Constituencies with several seats, even under a majority system, may make it easier for members of minorities to be elected in constituencies where the minority is not in the majority. Indeed, in a district where there is only one seat to be filled, voters from the majority will tend to choose a candidate from the majority, whereas in a multi-member-constituency system, voters will not hesitate to vote for a list which includes candidates from both the majority and the minority. Thus, in Greece, parties include Muslim candidates on their lists and at least two of them are usually elected. The replies from a good many other states which use the proportional system (or, for the

upper chamber, a pluri-nominal [multi-member] system of majority voting, as in Poland and Switzerland) show that parties tend to balance their lists so as to ensure that minorities are fairly represented. This applies both in states where a proportional system with closed lists is used (Bulgaria), even when combined with a single-member-constituency single-ballot majority system (Albania, Azerbaijan, and Italy), and in those which allow preferences between candidates to be expressed (Austria, Finland, Latvia, Poland, and Slovakia) or candidates to be selected from different lists (Switzerland). It should be noted that even in purely single-member-constituency systems (Canada and “the former Yugoslav Republic of Macedonia” until June 1998 – these states include concentrated minorities), parties sometimes balance out the candidates standing for election between the majority and the minority/ies.

b. Voters’ freedom of choice and its impact on the representation of minorities

Electoral systems differ not only in the way votes are converted into seats, but also in the possibilities offered to voters of choosing between the candidates belonging to one list or one party. Broadly speaking, under a pluri-nominal system, four situations may arise:

- The lists are closed. Voters vote merely for a list and the candidates are elected in the order in which they are listed. This system is applied in numerous states, for example, Azerbaijan, Bulgaria, Croatia, Spain, Portugal and Romania; or Germany, Albania, Armenia, and “the former Yugoslav Republic of Macedonia” for the deputies elected using a proportional system.
- There is the possibility of preferential voting within a list, in which case voters may vote not only for a list but also for candidates on that list. The countries where this is found include the Czech Republic and Slovakia (where voters may express a preference for four candidates), Austria, Estonia, Finland, Poland, Slovenia (where each voter has one vote, which counts for a candidate and the list to which the candidate belongs) and Latvia (the elector can support one or more candidates or, on the contrary, cross out their names). When preferential voting is allowed, seats are more often than not allocated to the candidates in a list in decreasing order of votes obtained.
- Voters are entitled to vote for candidates from several lists (*panachage*). This is the system applied in Switzerland at all levels.
- Voters vote only for candidates, whom they put in order of preference, and not for lists. Seats are allocated to candidates according to the principle of proportionality. This method of voting, which is called the single transferable vote, is not used in any of the states which replied to the questionnaire. However, it is to be found in Ireland and Malta, for example.

In states where lists are not closed, it is easier for voters to take account of membership of a national minority when casting their votes. It is not possible to

ascertain whether, as a general rule, such freedom of choice helps or hinders the election of candidates from minorities. Going by what was said earlier about the effects of the various electoral systems, when seats are allocated to the candidates with most votes on a list – that is to say when a majority system is applied within a list – this should be favourable to minorities which are in the majority in the constituency, and rather unfavourable to the others. The single transferable vote and any other system of proportional allocation of seats to candidates belonging to the same party should ensure that minorities which comprise a proportion of the electorate greater than the electoral quotient are represented.

IV. Constituencies and the representation of minorities

The distribution of seats between constituencies and the drawing of constituency boundaries are an important part of electoral law. They may indeed have a strong impact on the overall result of an election.

1. The principle of equality of electoral force requires that seats be distributed evenly between constituencies, in accordance with a given allocation formula (number of inhabitants, nationals – including minors, registered electors, or voters). When this principle is not respected, it is a matter of manipulation of electorates. Such manipulation is active when the distribution of seats leads to unequal representation from the first time it is applied. It is passive when it results from maintaining the distribution of seats across the territory unchanged for a long time. Regular redistribution of seats between constituencies, or the regular re-drawing of constituency boundaries – which is necessary in a single-member-constituency system – allows passive manipulation to be avoided.

Equality of electoral force is essential for lower houses, but not in the upper ones, where it is replaced by equality between federated states, or even between territorial authorities in non-federal states.

2. When there is unequal representation, this may have an effect on the representation of concentrated minorities when the territory where they are in the majority is over-represented or under-represented in the elected body. Some unequal representation in lower houses has been noted in the replies to the questionnaire. Also, especially in federal systems, seats in upper houses are in most cases not allocated on the basis of population alone (for example, in Switzerland, each canton is entitled to two seats in the Council of States, irrespective of the number of inhabitants; and the Spanish Senate comprises four senators per province, except for island provinces). However, on the basis of the replies to the questionnaire, unequal representation or the representation of territorial entities in upper houses do not appear to have an impact, whether positive or negative, on the participation of minorities in elected bodies.

3. a. When a minority is in the majority over a given part of a territory, a very effective way of ensuring that it is represented in the elected bodies is to make the territory into an electoral constituency or divide it into several constituencies. On the other hand, the drawing of constituency boundaries in such a way that a minority is

nowhere in the majority would be detrimental to its achieving representation, especially under a majority system.

No such manoeuvrings, known as gerrymandering, are revealed by the replies to the questionnaire. However, this kind of territorial representation of minorities exists in all states where there are concentrated minorities of some size. In some, it results from the effects of an electoral system which in theory is not designed to ensure specific representation of minorities. In others, by contrast, it is explicitly sought. As the distinction between the two situations is often difficult to draw, the report will refer to examples of territorial representation of minorities without ascertaining whether or not it was sought by the drafters of the electoral legislation.

b. It should be noted that a concentrated minority will be very well represented in constituencies where it is in the majority, if a majority electoral system is applied, especially in single-member constituencies. Indeed, in this case, the chances of a member of such a minority being elected are very high – whether he or she is a member of a party belonging to the minority or another party. This is so in most of the states which replied to the questionnaire where a single-member-constituency majority system is applied, or a mixed system including single-member constituencies, where concentrated minorities are in the majority in some of the constituencies. This is the case, for example, in Albania, with the Greek minority in the south of the country, in Canada, with the French-speaking population of Quebec and the autochthonous population in the north, and in Italy, with the French-speaking minority in the Valle d'Aosta and the German-speaking minority in the province of Bolzano.

Where there are sub-minorities (majority groups at national level but minorities at local level), the interests of such concentrated minorities will be served by a defractionalising system, that is to say, in concrete terms, a majority system, and especially one with single-member constituencies (in such a system, as each party presents a single candidate, who will more often than not be from the minority, whereas in a multi-member-constituency system candidates from the sub-minority will probably be added so as to attract a maximum number of voters). A proportional system, on the other hand, may reduce the representation of such minorities by allowing a sub-minority to obtain seats in territories where this would be impossible under a single-member-constituency system.

Such a system, applied in constituencies where a concentrated minority is in the majority, allows such a minority to be well represented, without being as favourable to it, however, as the uninominal majority system. The mere existence of a specific constituency ensures that the minority is represented. This is the case in Denmark, where the people of the Faroe Islands and Greenland, who are minorities at national level, are in the majority in the constituencies of the Faroe Islands and Greenland, which each elect two deputies, who thus represent the minority. It is also the case in Switzerland in four of the six cantons where the French-speaking minority is in the majority and in the canton where the Italian-speaking minority is in the majority. On the other hand, in the two cantons which are mainly French-speaking but where there is a sizeable German-speaking sub-minority, the latter is traditionally well represented in the two houses in the parliament (the National Council, which is elected under a

proportional system, and the Council of States, which is elected using a majority system with two seats per constituency).

In Spain (where the constituencies correspond to the provinces), in certain areas of those Autonomous Communities where there is a particularly strong nationalistic awareness, the parties belonging to the minorities are in the majority. In Romania, the Hungarian minority is in the majority in two constituencies (departments). In both cases, despite the fact that a proportional system is applied and the presence of sub-minorities, the minorities, and even their parties, are well represented.

The drawing of constituency boundaries and the distribution of seats between constituencies may therefore have an important part to play in the representation of concentrated minorities. It is in majority systems that the effects of boundary drawing are most noticeable, but in proportional systems they become less and less negligible the more such systems depart from full proportionality. In general, the replies to the questionnaire do not show the rules on the drawing of constituency boundaries to have a favourable or unfavourable effect on the representation of minorities. However, the Finnish constitution provides that constituencies should be monolingual where possible, or that their linguistic minorities should at least be as small as possible. In addition, the Swedish-speaking Åland Islands form a constituency under an enactment which has constitutional status. In Italy, the drawing of constituency boundaries for the election of deputies must comply with the principle of concentration and thus group together homogeneous minorities.

4. The questionnaire asked about the body responsible for deciding how boundaries are drawn and seats distributed between constituencies and whether or not this may be subject to judicial review. The involvement of a judicial body or, at first instance, an electoral board made up without bias should make it possible to avoid drawing boundaries in a politically-oriented way. There are fewer guarantees, however, if the decision is taken solely by a political body. However, only half of the states which answered this question provide for judicial review in this area (for example, Austria, Azerbaijan, Italy, Slovenia – Constitutional Court, Japan – ordinary courts, Lithuania – Vilnius district court), and in many cases the decision is taken by the parliament (for example, Georgia, Norway, Poland, Romania, Sweden) or the president of the republic (Albania, Bulgaria) alone. However, from the replies it does not appear that this causes problems for the representation of the minorities.

V. Debate on the electoral system and national minorities

In every state the electoral system is a subject of more or less recurrent discussion. Although sometimes the matter is of interest only to a limited circle of politicians or specialists, the question whether or not there is a debate on the electoral system aimed at a wider public elicited more positive than negative replies.

The debate more often than not focuses on the extent to which the voting system is a proportional (or a majority) one. Although the choice between a purely proportional and a purely majority system does not seem to be a current issue in the states in question, the discussion may, for example, in mixed systems, cover the significance of the majority and the proportional parts of the voting system in relation to each other

(Albania, Armenia), or the changeover from a predominantly majority mixed system to a purely majority system (Italy). In systems approximating proportional representation, proposals for change may concern greater proportionality (Portugal, Spain, Turkey), or, on the other hand, in order to make the parliament less splintered, a reduction in the proportionality of the result by setting a higher threshold than before (Romania).

Sometimes, what is sought is greater freedom of choice for voters, through the elimination of the closed lists system (Spain), or an increase in their possibilities of choice in a system where voters may express only one preference (Sweden).

There is apparently only one country amongst those which replied to the questionnaire, Hungary, in which a debate arose on creating representation for national or ethnic minorities in parliament. The law on the rights of national and ethnic minorities refers to a separate act to be adopted on the representation of national and ethnic minorities in parliament. The debate that has arisen from this provision is based on the fact that no party based on belonging to a national or ethnic minority could reach the 5% limit necessary for becoming a parliamentary party. This means that representatives of national and ethnic minorities as such could only have seats in parliament if different rules applied to their election, that is, if fewer votes sufficed for a representative of a national or ethnic minority to become an MP. A proposal to this end, however, raised the difficult question as to whether such a regulation would not be contrary to the equality of the right to vote as enshrined in Article 71 (1) of the constitution.

Although the degree of proportionality is a cause of concern chiefly to minority political parties, especially when their electorate is dispersed, it does not necessarily have an impact on the representation of minorities. For one thing, it may be that there are no significant minorities (Portugal). The minorities may be sufficiently concentrated not to be sensitive to a change in the proportionality of the results (Spain). Also, the proposed changes may be sufficiently limited not to have any impact on the representation of minorities. Thus, in Finland, were a majority system to be applied, this would be to the disadvantage of the Swedish minority and its party, which are nowhere in the majority except on the Åland Islands. On the other hand, greater proportionality through an increase in the size of the constituencies would have hardly any impact on the representation of this minority, because it is concentrated.

Consequently, reforming the electoral system in the strict sense, and especially increasing its proportionality, does not necessarily appear to be the best way of achieving greater participation of members of minorities in elected bodies. It is often the case that under-represented minorities or those not represented at all have the smallest numbers of members (for example, in Poland or “the former Yugoslav Republic of Macedonia”) and could not be guaranteed seats, no matter what electoral system were applied.

To sum up, at the present time, no direct link may be made between the debate on electoral reform and the representation of minorities in the states which replied to the questionnaire, except in Hungary.

Conclusion

The wide variety of electoral systems has been grist to generations of legal specialists, political analysts and mathematicians and will continue to be so. It is true that they do not all, without exception, guarantee that national minorities are fairly represented, but the main conclusion which may be drawn from the foregoing analysis is that there is no absolute rule in this field. Indeed, the electoral system is but one of the factors conditioning the presence of members of minorities in an elected body. Other elements also have a bearing, such as the choice of candidates by the political parties and, obviously, voters' choices, which are only partly dependent on the electoral system. The concentrated or dispersed nature of the minority may also have a part to play, as may the extent to which it is integrated into society, and, above all, its numerical size.

Nevertheless, the electoral system is not irrelevant to the participation of members of minorities in public life. On the one hand, certain states – but they are few in number – have specific rules designed to ensure such participation. 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 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.

Questionnaire on participation of members of minorities in public life⁵⁷

I. Electoral systems

A. Electoral systems in general

1. What is the electoral system in general, simple plurality, absolute majority/double ballot, proportional representation, mixed system?

B. Constituencies

2.
 - a. Are there concentrated minorities which are in a majority in a part of the territory?
 - b. If yes, is this part of the territory represented as such in a representative body?
3.
 - a. Are there several levels of constituencies (e.g. local and regional)?
 - b. What is the average size of the constituencies (i.e., the number of deputies to be elected in each constituency)?
4.
 - a. To what extent is the “one man-one vote” principle implemented? Or are there elements of *malapportionment* (i.e. over-representation of certain constituencies and under-representation of others); if so, in favour of what kind of constituencies?
 - b. Is such a *malapportionment* favourable/unfavourable to minorities or has it been criticised as such?
 - c. Is there a system allocating seats without taking (completely) into account the population of the constituency (e.g. in federal states)?
 - d. If yes, is it considered as favourable/unfavourable to minorities?
5.
 - a. Are there rules concerning the drawing of constituency boundaries in a manner favourable or unfavourable to the representation of concentrated minorities?
 - b. Who has the final power in drawing the constituency boundaries?
 - c. Is there any judicial review of such decisions?
 - d. Has the drawing of boundaries been criticised as favourable/unfavourable to the representation of concentrated minorities?

C. Allocation of seats

6.
 - a. If the system is one of proportional representation, what is the “electoral formula” used in transforming votes into seats (i.e. largest remainder,

57. By Mr Ergun Özbudun (Turkey).

D'Hondt, Sainte-Laguë, Imperiali, Hare, etc.)? Please provide an explanation of how this formula works.

- b. If there is a plurality or majority system, how are the seats allocated?
7. If the system is one of proportional representation, are there mechanisms for regional or national redistribution of seats (regional or national remainder system)?
8. In multi-member constituencies:
 - a. Is preferential voting permitted, or are there other mechanisms (like the Irish single transferable vote) to allow voters to express their preferences for individual candidates rather than voting for the straight party ticket?
 - b. If yes, are the seats allocated to individuals on a proportional basis?
 - c. Is it possible to cumulate several votes for a candidate by a single vote (cumulative vote)?
9. Is the electoral system for local and regional governments different from that for national legislature? If so, what are the basic differences? Are they more or less favourable to the representation of the minorities?

D. Others

10.
 - a. Are parties representing minorities prohibited as such?
 - b. If not, do such parties exist?
11. Are there specific rules guaranteeing minimum representation of minorities in elected bodies (vote in separate electoral colleges by persons belonging to national minorities, obligation to present a certain number of minority candidates in electoral lists, etc.)?
12. Even if there is no such legal obligation, do political parties in general attempt to balance their lists by including a number of minority candidates?
13. Are statistical data available on over-representation or under-representation of minorities?
14. Are there concerns over the under-representation/over-representation of minorities?
15. Is there an ongoing public debate on the electoral system?
16.
 - a. In general, to what extent does the electoral system guarantee representation of minority political tendencies?
 - b. Are there concerns about the under-representation of such political tendencies?

Synopsis of replies to the questionnaire on participation of members of minorities in public life

Part I: Electoral systems

The table summarises the replies to the first part of the questionnaire on the participation of members of minorities in public life (CDL-MIN (96) 1), apart from question 13 regarding statistical data on over- and under-representation of minorities, for which insufficient data are available. The questions are covered as follows:

Column in the table	Question
A	1
B	6
C	3 + 7
D	4 + 5a + 5d
E	5b
F	5c
G	8
H	2a
I	2b + 11
J	10
K	12
L	14
M	16
N	15
O	9

Glossary

The following glossary briefly explains the least common expressions in the table.

Nationwide constituency: a constituency in which the representative body is elected in full or in part without subdividing the territory or the people.

Cumulative vote: casting of several votes for the same candidate.

Latoisage: deletion of a candidate from a list.

Panachage: putting candidates from more than one list on a voting paper.

System:

- **of division by a succession of numbers:** seats are allocated in decreasing order of the numbers obtained by dividing the number of votes for each list by:
 - **(d'Hondt system):** 1, 2, 3, 4, etc.
 - **(pure Lague system):** 1, 3, 5, 7, etc.
 - **(modified Lague system):** 1.4, 3, 5, 7, etc.

Largest remainders: after the number of votes for each list has been divided by the electoral quotient, the remaining seats are allocated to the lists with the largest numbers of remaining votes (or the largest shares).

Hagenbach-Bischoff: d'Hondt system presented in a different way.

Vote:

- **preferential:** a vote cast for a specific candidate on a list;
- **limited:** multi-member system of majority voting in which the number of votes a voter has is less than the number of seats to be filled;
- **single non-transferable:** multi-member system of majority voting in which a voter can vote for only one candidate (extreme variant of the limited vote);
- **single transferable:** a proportional system in which a voter votes not for lists but for candidates, in order of preference; the first-choice votes in excess of the electoral quotient which are cast for elected candidates, and the votes cast for the worst placed candidates, are transferred to the second-choice candidates, and so on.

	A	B	C	D	E
	Electoral system: principle (parliamentary elections)	Electoral system: details	Constituencies	Drawing of boundaries and distribution of seats: special features	Person/body responsible for drawing of boundaries and distribution of seats
Albania	Mixed	115 seats absolute majority; 40 proportional (largest remainders; 2% threshold)	Majority: single member; Proportional: nationwide	None	President of the Republic
Argentina	Proportional (Chamber of Deputies) of Mixed (Senate)	D'Hondt (Chamber of Deputies); Two representatives of the first party and two of the second (Senate)	Provinces	None	Parliament
Armenia	Mixed	75 seats relative majority; 56 proportional (strongest remain; threshold 5%)	Majority: single-member; Proportional: nationwide	None (the difference in the number of inhabitants per constituency may not exceed 15%; a given constituency may not include geographical areas which do not border one another)	Central electoral committee
Austria	Proportional	D'Hondt, 4% threshold, seats assigned at regional and national levels for remaining votes	Three levels: district, region and nationwide	None (apart from regional elections in Burgenland and Kärnten)	Parliament (statute)
Azerbaijan	Mixed (absolute majority/ Proportional)	100 seats majority double ballot, 50% of votes + 50% turn-out in first ballot. 25 seats proportional (largest remainders)	Majority: single-member; Proportional: nationwide	None	Central electoral committee
Belarus	Absolute majority	As a rule, two ballots, more if turn-out < 50%	Single-member	None	Central electoral committee

	A	B	C	D	E
	Electoral system: principle (parliamentary elections)	Electoral system: details	Constituencies	Drawing of boundaries and distribution of seats: special features	Person/body responsible for drawing of boundaries and distribution of seats
Belgium	Proportional	D'Hondt	House of Representatives: 20 constituencies; distribution of seats at a higher level (in principle provincial) in case of grouping of electoral lists; Senate (for directly elected senators): three constituencies	No	Parliament (law)
Bulgaria	Proportional	D'Hondt, 5% threshold; redistribution at regional level	Subdivisions of regions (between four and 13 seats)	None	President of the Republic
Canada	Plurality		Single-member	None	Provincial electoral commissions plus parliamentary review
Croatia	Proportional	D'Hondt, with 5% threshold, at constituency level	House of Representatives: 10 constituencies with 14 seats plus one constituency for Croatians abroad; five seats for the representatives of minorities; House of Counties: three seats per county (constituency)	None	Parliament (statute)
Czech Republic	Proportional (Chamber of Deputies); Absolute majority (Senate)	Chamber of deputies: 5% threshold; Allocation of remainders according to the results at national level	Chamber of Deputies: seven constituencies – from 10 to 40 deputies; Senate: single-member	None	Parliament (statute)

	A	B	C	D	E
	Electoral system: principle (parliamentary elections)	Electoral system: details	Constituencies	Drawing of boundaries and distribution of seats: special features	Person/body responsible for drawing boundaries and distribution of seats
Denmark	Proportional	Modified Lague (local level); Allocation of remainders at national level: largest remainders	Local: between two and six seats nationwide	Over-representation of sparsely populated constituencies – no effect on minorities	Parliament (statute)
Estonia	Proportional	Modified d'Hondt, 5% threshold	Eleven constituencies	None	Parliament (statute)
Finland	Proportional	D'Hondt	Regional: from two to 16 deputies	The constitution provides for monolingual constituencies, or constituencies in which minorities are as small as possible	Parliament (statute). Details: government
Germany	Mixed (proportional/plurality)	50% of seats under plurality system (direct mandates); Allocation of all seats at national level using proportional system (largest remainders, 5% threshold or three direct mandates) and subtraction of seats obtained under the plurality system	Single-member (majority); Nationwide (proportional)	None	Parliament (statute), on the basis of a proposal by a permanent commission named by the Federal President
Georgia	Mixed (proportional/absolute majority)	150 seats: proportional, 5% threshold. 85 seats: majority, double ballot	Majority: single-member; Proportional: nationwide	Criticism of the drawing of constituency boundaries does not relate to the representation of minorities	Parliament (statute)

	A	B	C	D	E
	Electoral system: principle (parliamentary elections)	Electoral system: details	Constituencies	Drawing of boundaries and distribution of seats: special features	Person/body responsible for drawing of boundaries and distribution of seats
Greece	Proportional		Varying number of deputies	None	
Hungary	Mixed (proportional and absolute majority)	176 seats: majority. 210 seats: proportional (d'Hondt) (152 in constituencies and 58 at national level for balancing out)	Majority: single-member; Proportional: nationwide plus departments/capital	None	Parliament (statute)
Italy	Mixed (plurality and proportional)	75% of seats: plurality; 25% balancing-out mandates (nationwide with 4% threshold at national level for Chamber of Deputies, and regional for Senate)	Majority: single-member; Proportional: nationwide (allocation of seats to candidates at local level) (Chamber of Deputies); regional (Senate)	The drawing of constituency boundaries should allow concentrated minorities to be represented	Government
Japan	Mixed (plurality and proportional)	House of Representatives: 300 seats – plurality; 200 seats – proportional (d'Hondt); House of Councillors: 152 seats – single non-transferable; 100 seats – proportional (d'Hondt)	Majority: single-member (House of Representatives); prefectures (from two to eight seats) (House of Councillors); Proportional: 11 constituencies (from seven to 33 seats) (House of Representatives); nationwide (House of Councillors)	House of Representatives: the number of voters per representative may vary by a rate of between one and two; House of Councillors: represent prefectures, disparities in representation allowed	Parliament
Kyrgyzstan	Absolute majority		Single-member	None	Electoral committee

	A	B	C	D	E
	Electoral system: principle (parliamentary elections)	Electoral system: details	Constituencies	Drawing of boundaries and distribution of seats: special features	Person/body responsible for drawing of boundaries and distribution of seats
Latvia	Proportional	Laguë	Five constituencies	None	Central electoral commission
Lithuania	Mixed (absolute majority and proportional)	71 seats: majority/double ballot (second ballot: the two candidates with most votes in the first ballot); more ballots if turn-out < 40%. 70 seats: proportional (largest remainders)	Majority: single-member; Proportional: nationwide	Representatives of minorities suggest that “purely national” constituencies be formed	Central electoral committee
Norway	Proportional	Modified Laguë	Between four and 15 deputies (plus eight deputies at national level)	Some over-representation of rural areas	Parliament
Poland	Proportional (<i>Sejm</i>). Plurality (Senate)	<i>Sejm</i> : d’Hondt, 391 seats at constituency level and 69 seats at national level (lists > 7%)	<i>Wojewodztwo</i> - <i>Sejm</i> : between three and 17 seats; Senate: two or three seats	Senate: all constituencies except two have same number of seats	Parliamentary statute (constituencies coincide with <i>województwos</i>)
Portugal	Proportional	D’Hondt	Districts: Between three and 50 seats	None	Constituencies coincide with districts (parliamentary statute); Distribution of seats by a national electoral committee
Romania	Proportional	D’Hondt, 3% threshold, seats assigned at national level for remaining votes	Departments: from four to 29 seats (Chamber of Deputies); from two to 13 seats (Senate); plus nationwide	None	Parliament (statute)

	A	B	C	D	E
	Electoral system: principle (parliamentary elections)	Electoral system: details	Constituencies	Drawing of boundaries and distribution of seats: special features	Person/body responsible for drawing of boundaries and distribution of seats
Slovak Republic	Proportional	Hagenbach-Bischoff, threshold (in principle 5, 7 or 10% according to the number of parties in the list)	One constituency (nationwide)	None	Parliament (statute)
Slovenia	Proportional	Simple quotient, seats assigned at national level for remaining votes (threshold of approximately 3%)	Eight constituencies plus nationwide	Specific representation of minorities	Parliament (statute)
Spain	Proportional (Congress of Deputies) Plurality (Senate)	D'Hondt (Congress of Deputies); Limited vote (Senate)	Provinces; Congress of Deputies: two seats per province, then distribution of remaining seats in proportion to population Senate: four senators per province (Differences in Ceuta, Melilla and the islands)	None	Constitution
Sweden	Proportional	Modified Lagüe, 310 seats constituency-based, and 39 seats on a national basis; 4% threshold	29 constituencies with between two and 33 seats; Nationwide	None	Parliament (statute)
Switzerland	Proportional (National Council); Majority (Council of States, except for one canton)	<i>Hagenbach-Bischoff</i> (National Council); Cantonal law (Council of States), usually absolute majority	Cantons Between one and 35 deputies (National Council) two deputies (20 cantons), one deputy (six former half-cantons) (Council of States)	Concentrated minorities have something of an advantage	Constitution
“The former Yugoslav Republic of Macedonia”	Mixed (absolute majority and proportional)	Majority: 85 seats, double ballot; proportional: 35 seats, D'Hondt, 5% threshold	Majority: single-member; proportional: nationwide	None	Parliament (statute)

	A	B	C	D	E
	Electoral system: principle (parliamentary elections)	Electoral system: details	Constituencies	Drawing of boundaries and distribution of seats: special features	Person/body responsible for drawing of boundaries and distribution of seats
Turkey	Proportional	D'Hondt, 10% national threshold	Provinces or subdivisions thereof: between two and 18 deputies	Each province assigned one basic deputy at the outset	Supreme Board of Elections (a judicial body)
Ukraine	Mixed (majority proportional)	450 seats: majority – 225 seats (elected in single-member constituencies on the basis of a relative majority); proportional – 225 seats (nationwide with 4% threshold for parties and blocs of parties on the basis of proportional representation)	Majority: single-member; Proportional: nationwide	Account taken of the administrative and territorial structure of Ukraine and the concentration of minorities in the drawing of constituency boundaries	Central electoral commission is responsible for drawing up boundaries, taking into account proposals of the <i>Verkhovna Rada</i> of the Autonomous Republic of Crimea and regional, Kiev and Sevastopol city local self-government councils; Central electoral commission is responsible for distribution of seats

	F	G	H	I	J
	Drawing of constituency boundaries and distribution of seats: judicial review	Preferential vote	Concentrated minorities in the majority in part of the territory	Minorities: special representation	Parties representing minorities
Albania	No	No	Yes	Yes (as territory)	Prohibited, but there is in fact a party representing above all the Greek minority
Argentina	Yes (federal electoral justice)	No	No	No	Permitted
Armenia	No	No	No	No	Permitted. A political party representing the <i>yézidi</i> minority has existed since 1997
Austria	Yes (Constitutional Court)	Yes (one preference)	In a single district in Kärnten	No	Permitted. A few groups for regional and district elections
Azerbaijan	Yes (Constitutional Court)	No	Yes	Question pending of (problem of Nagorno-Karabakh)	Permitted
Belarus	Yes	Not relevant	Yes	No	Permitted
Belgium	Yes (Court of Arbitration)	Yes (vote for a list or for a candidate)	Yes	Yes (territorial; personal: possible in two districts on the linguistic border, and, for the Senate, for voters in the constituency of Brussels-Hal-Vilvorde)	Permitted

	F	G	H	I	J
	Drawing of constituency boundaries and distribution of seats: judicial review	Preferential vote	Concentrated minorities in the majority in part of the territory	Minorities: special representation	Parties representing minorities
Bulgaria	No	No	Yes	No	Prohibited under the Constitution, but not in practice – party representing Turkish community
Canada	No	Not relevant	Yes	Yes (as territory)	Permitted
Croatia	Yes	No	Italians and Hungarians up to a certain extent, Serbs too (above all before the armed conflict), others rather dispersed	Yes (as people; as territory currently suspended)	Permitted. Two Serbian parties
Czech Republic	Yes	Yes (four preferences)	No	No	Permitted
Denmark	Yes	Yes (one preference)	Yes	Yes (as territory – Faroe Islands and Greenland)	Permitted – parties representing the German minority (at local level); parties specific to Greenland and Faroe Islands
Estonia	Yes	Yes (one preference)	Yes	No	Permitted. Three Russian parties
Finland	No, apart from minor details (Council of State)	Yes (one preference)	Yes	Yes (as territory – Åland Islands)	Permitted – Swedish People's Party

	F	G	H	I	J
	Drawing of constituency boundaries and distribution of seats: judicial review	Preferential vote	Concentrated minorities in the majority in part of the territory	Minorities: special representation	Parties representing minorities
Germany	Yes (Constitutional Court)	No	No	No, but rules relating to threshold do not apply	Permitted
Georgia	No		Yes	Yes (as territory)	Prohibited
Greece			Yes, at town and village level	No	Permitted. There have recently been such parties
Hungary	Yes, (Constitutional Court)	No	No	No	Permitted
Italy	Yes	No	Yes	Yes (as territory)	Permitted – exist in the three regions where there are linguistic minorities
Japan	Yes, in connection with review of the validity of election results	No, apart from single non-transferable vote	No	No	Permitted

	F	G	H	I	J
	Drawing of constituency boundaries and distribution of seats: judicial review	Preferential vote	Concentrated minorities in the majority in part of the territory	Minorities: special representation	Parties representing minorities
Kyrgyzstan	No	Not relevant	Yes	No	Permitted
Latvia	Yes	Yes – preferential vote and <i>latoisage</i>	No	No	Permitted. There is a party for the Russian minority
Lithuania	Yes (Vilnius district court)	Yes, unless parties request otherwise beforehand	Yes	No	Permitted. There are three parties representing minorities
Norway	No	Yes – <i>latoisage</i> and cumulative vote	Yes, at municipal level	No	Permitted exist at local level
Poland	No	Yes (one preference)	No	<i>De jure</i> no, but <i>de facto</i> yes, through rules regarding threshold not being applied	Permitted. Associations representing minorities take part in elections
Portugal	Yes (by Constitutional Court, of decisions by the national electoral commission)	No	No	No	Regional parties prohibited
Romania	No	No	Yes	Yes (as territory and as people)	Permitted associations representing minorities are treated as political parties for electoral purposes

	F	G	H	I	J
	Drawing of constituency boundaries and distribution of seats: judicial review	Preferential vote	Concentrated minorities in the majority in part of the territory	Minorities: special representation	Parties representing minorities
Slovak Republic	Yes (Constitutional Court)	Yes (four preferences)	Yes	No	Permitted. Parties representing the Hungarian (four), Rom (five) and Ruthenian-Ukrainian (one) minorities
Slovenia	Yes (Constitutional Court)	No	No	Yes (as people)	Permitted
Spain	No	No for Congress of Deputies; <i>Panachage</i> for Senate	Yes	Yes (as territory)	Permitted. There are “nationalist” parties (Basque, Catalan)
Sweden	No	Yes (one preference)	No	No	Permitted. A party exists at local level
Switzerland	No	Yes – <i>panachage</i> , cumulative vote for National Council	Yes	Yes (as territory)	Permitted. Political parties have their roots in the cantons
“The former Yugoslav Republic of Macedonia”	Yes (Constitutional Court)	No	Yes	Yes (as territory)	Permitted. Numerous parties representing minorities
Turkey	No, but see column E	No	Yes	Yes (as territory)	Prohibited. However, there is at present a Kurdish party

	F	G	H	I	J
	Drawing of constituency boundaries and distribution of seats: judicial review	Preferential vote	Concentrated minorities in the majority in part of the territory	Minorities: special representation	Parties representing minorities
Ukraine	Yes (Supreme Court)	No	Yes	Yes (as territory)	Permitted

	K	L	M	N	O
	Tendency for parties to balance their lists	Concerns about the representation of minorities	Debate on the representation of minority political tendencies	Debate on the electoral system	Electoral system for local and regional elections
Albania	Yes	No	No	Yes	Proportional for councils; majority for executive
Argentina	Not relevant (no minorities)	No	No	Yes (above all at local level)	Provincial law
Armenia	No	No	No	Yes	Majority
Austria	Yes	No	No	No	See the national elections (regional parliaments are responsible for the drawing of electoral boundaries for regional elections)
Azerbaijan	Yes	No	No	No	Majority
Belarus	No	No	Yes	No	See the national elections
Belgium	Yes (the question relates above all to the German-speaking minority)	No	No	Yes	D'Hondt system, see the national elections

	K	L	M	N	O
	Tendency for parties to balance their lists	Concerns about the representation of minorities	Debate on the representation of minority political tendencies	Debate on the electoral system	Electoral system for local and regional elections
Bulgaria	Yes	No	No	No	Akin to system for national elections
Canada	Yes	Yes, hence tendency to increase the number of candidates from minorities	Under-representation due to plurality system	No	See the national elections
Croatia	Yes (some parties)	Yes (in both directions)	Yes, in some political circles	Yes (especially at local level)	See the national elections
Czech Republic	No	No	No	No	Municipality is constituency at local level
Denmark	No	No	No	No	Proportional – d’Hondt, single constituencies covering the entire locality
Estonia	No	No	No	Yes	See the national elections
Finland	Yes	No	Yes (for small constituencies)	No	See the national elections

	K	L	M	N	O
	Tendency for parties to balance their lists	Concerns about the representation of minorities	Debate on the representation of minority political tendencies	Debate on the electoral system	Electoral system for local and regional elections
Germany	Partially	Yes	Yes	Yes, sometimes	Proportional (according to the law of Land)
Georgia	Yes	No			
Greece	Yes				
Hungary	No	No	Yes	Yes	Plurality, mixed or proportional (depending on population)
Italy	Yes, especially in Friuli-Venezia Giulia	No	Yes	Yes	In general, mixed systems (regions: plurality premium)
Japan	No	No	No	Yes	Plurality for executive. Single non-transferable vote for councils
Kyrgyzstan		Yes			

	K	L	M	N	O
	Tendency for parties to balance their lists	Concerns about the representation of minorities	Debate on the representation of minority political tendencies	Debate on the electoral system	Electoral system for local and regional elections
Latvia	Yes	No	No	No	Proportional
Lithuania	Yes	Parties and political organisations representing minorities wish to increase their representation	No	Yes	Proportional
Norway	Yes, at local level	No	No	No	
Poland	Yes	Yes (except for the German minority)	No	No	See the elections to the <i>Sejm</i>
Portugal	No – no significant minorities	No	Yes	Yes	See the national elections
Romania	No	No	No	Yes	See the national elections (councils); majority, double ballot (mayors)
Slovak Republic	Yes	No	No (except for parties representing the Hungarian minority)	Yes (especially at municipal level)	Plurality

	K	L	M	N	O
	Tendency for parties to balance their lists	Concerns about the representation of minorities	Debate on the representation of minority political tendencies	Debate on the electoral system	Electoral system for local and regional elections
Slovenia	No, as there are special rules on the representation of minorities	There is over-representation owing to the special rules on the representation of minorities. There are objections to the right of minority representatives to take part in parliamentary debates which do not concern the rights of minorities	No (apart from the powers of deputies representing national minorities)	Yes	Plurality, or d'Hondt system with preferential vote
Spain	No	Yes, hence fair representation of minorities	Yes	Yes	See the Congress of Deputies
Sweden	No	No	No	Yes	See the national elections, but 3% threshold for regional elections and no threshold for local elections
Switzerland	Yes	No	No	No	Cantonal law – in general, proportional for legislative bodies and majority for executive
“The former Yugoslav Republic of Macedonia”	Yes	Yes (especially for small minorities)	Yes	Yes	Councils: proportional; mayors: majority
Turkey	Yes	Yes (notably on account of the 10% threshold)	Yes	Yes	See the national elections (but mayors: plurality)

	K	L	M	N	O
	Tendency for parties to balance their lists	Concerns about the representation of minorities	Debate on the representation of minority political tendencies	Debate on the electoral system	Electoral system for local and regional elections
Ukraine	No	The draft law on the status of the Crimean Tatar people provides for the guaranteed representation of Crimean Tatars in the <i>Verkhovna Rada</i> of Ukraine, the <i>Verkhovna Rada</i> of the Autonomous Republic of Crimea and local self-government bodies of Crimea	Yes (at the <i>Mejlis</i> of Crimean Tatar People)	Yes (at the <i>Mejlis</i> of Crimean Tatar People)	Local and regional elections: majority system <i>Verkhovna Rada</i> of the Autonomous Republic of Crimea: majority system

Report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries⁵⁸

Introduction

1. A motion for a resolution on “Electoral rules and affirmative action for national minorities' participation to the decision-making process in the European countries” was submitted to the Parliamentary Assembly of the Council of Europe by Mr Frunda and others on 23 June 2004. It deems, in particular, that the well-known expertise of the European Commission for Democracy through Law (Venice Commission) would be valuable in order to draft a comprehensive analysis and recommendation in this regard.⁵⁹ On 25 June, the Bureau of the Assembly sent this motion to the Venice Commission for consultation. A formal request was sent to the Venice Commission on 22 September 2004. The Venice Commission then decided to do a comparative study on this question first, on the basis of the practice of the member states of the Council of Europe.

2. The aim of this report is to review the electoral rules on affirmative action in the European countries. The members of the Venice Commission provided information about provisions in this field in the following countries: Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Germany, Italy, Hungary, Poland, Romania, the Russian Federation, Slovenia, Switzerland and “The former Yugoslav Republic of Macedonia”. Electoral legislation, in general, is very dynamic and it will continue to adapt to the new challenges of policies and practices of the affirmative action.

3. The material that was reviewed is presented country by country followed by general conclusions. The analysis of the accessible national electoral rules is based on the conceptual and classificatory frameworks developed in social science during the last decades, presented briefly in the following sections. The report also refers to studies, documents and recommendations of the Council of Europe, OSCE, UN and other international organisations relevant in the field of interest. Yet, we need to be aware that the issue of affirmative action is controversial in science and law as well as in politics and policy. From this perspective the definitions accepted need to be taken only as working tools.

4. This report was adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd Plenary Session (Venice, 11-12 March 2005).

I. Affirmative action

58. Study No. 307/2004, adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd plenary session (Venice, 11-12 March 2005) on the basis of comments by Mrs Mirjana Lazarova Trajkovska (Member, “The former Yugoslav Republic of Macedonia”); CDL-AD(2005)009.

59. Document 10227 revised.

5. The idea of affirmative action is a very controversial one. In politics, but also in social science, contested concepts and definitions are in use. Even the terminology is not universally and unanimously accepted. There is a number of competing terms denoting this idea. Our term used here, “affirmative action”, is sometimes equivalent to and sometimes different from the terms of “positive action”, “preferential treatment”, “positive discrimination” and sometimes even “reverse discrimination”. Affirmative action is sometimes considered as transitional in nature. In connection to this, it needs to be emphasised that the concept accepted here encompasses also the notion of protection measures for minorities in the field of electoral rules, which are permanent and lasting in nature.

6. With this controversy in mind, the Venice Commission favours a broader concept of affirmative action. It is based on two general presumptions:

a. in the everyday functioning of the social systems (economy, education, legislation, culture, etc.) there are different historical and structural inequalities and stereotypes;

b. affirmative action is a mechanism for overcoming these inequalities by creating equal opportunities with the historically privileged groups.

7. On the basis of these presumptions, affirmative action is defined as a set of “policies and practices which favour groups (mainly ethnic groups and women) who have historically experienced disadvantages”.⁶⁰ This definition does not neglect the relevance of the function and, in particular, of the practical aim of policies and practices implied. The emphasis is rather on the political and the legal grounds on which the policies are developed and justified. On these grounds, the definition overrides the distinction between the narrow concept of “affirmative action” *stricto sensu*, and the concept of “special measures”.⁶¹

8. Somehow traditional arenas of the policies and practices of affirmative action have been education and employment. Yet in the last two decades, affirmative action has been introduced in the field of conflict management and prevention, and particularly in the area of protection and development of national minorities. Among the groundbreaking efforts in this area, the opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities in connection with Article 15 of the convention are to be recognised. Here we would also mention Recommendation 1623 (2003) of the Parliamentary Assembly of the Council of

60. The abovementioned elements of the definition of affirmative action are taken from the *Oxford Dictionary of Sociology*, by Gordon Marshall. Oxford University Press, 1998. The definition accepted here is also common to many other social scientists (Richard F. Tomasson, Faye J. Crosby and Sharon D. Hersberger, *Affirmative Action: The Pros and Cons*, American University Press, 1996; John D. Skrentny, *The Ironies of Affirmative Action*, The University of Chicago Press, 1996).

61. The first implies policies and practices that are temporary and transitional in nature while the second implies measures that are more continuous and long lasting. With this conceptual clarification it can be accepted that the measures taken or contemplated by this report, due to their predominantly continuous (not temporary or transitional) nature fall under the category of special measures. This position on the report was expressed in the opinion given by the Office of the OSCE High Commissioner on National Minorities (HCNM).

Europe. The Assembly recommends to the “...state parties to pay particular attention ... to ensure parliamentary representation of minorities”.⁶²

9. In this regard our report is focused on the achievements of one of the latest developments of affirmative action in the sphere of electoral rules as a mechanism for participation of national minorities in the decision-making processes. The participation in the decision-making process of members of national minorities relates not only to the exercise of general human rights, but also to the exercise of special minority rights. That means that members of national minorities, when they appear in the politics as nationals of the state, are at the same time as nationals with special minority needs.⁶³

10. Affirmative action in connection with the national minorities can be defined as conferring special benefits upon individuals by virtue of their membership in a certain minority group. Viewed from the individual or from the group standpoint, this principle seems of essential importance for the establishment of *de facto* not only *de jure* equality.

11. Yet, the principle of affirmative action is very often subjected to criticism. Usually the arguments are that measures, which are taken as an affirmative action, lead to the discrimination of the majority. This is the reason why the action taken must be proportional to the real needs of the minority group in question and directed to providing means for achieving equal opportunities. Affirmative action must be seen as a mechanism which does not establish privileges for the minorities but effective rights that members of the majority already enjoy.

II. Affirmative action and electoral rules

12. As mentioned above, the extension of the interest for the protection of national minorities in the field of their participation in decision making is a relatively late development. But its importance has already attracted the attention of the relevant international organisations and bodies. Among the most prominent ones in this area, the efforts and achievements of the OSCE High Commissioner on National Minorities (HCNM) and Office for Democratic Institutions and Human Rights (ODIHR) need to be mentioned.⁶⁴ The Venice Commission has also accepted the challenge and conducted its study on electoral law and national minorities.⁶⁵

13. Both studies are focused on the more general issue of the “importance of the electoral process for facilitating the participation of minorities in the political sphere”. In this respect, the Lund recommendation on elections, No. 7 appeals that the “States

62. Adopted by the Parliamentary Assembly at its 27th sitting on 29 September 2003.

63. The Framework Convention for the Protection of National Minorities in its Article 15 states that: “Parties shall create the conditions for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.”

64. The OSCE HCNM has generated a number of documents in this field starting from 1998. Guidelines to assist national minority participation in the electoral process were developed by the ODIHR in conjunction with the International Institute for Democracy and Electoral Assistance (International IDEA) and the Office of the HCNM. The draft guidelines were thus largely prepared by international experts.

65. CDL-INF(2000)004.

shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including the rights to vote and stand for office without discrimination.”⁶⁶

14. The study of the Venice Commission on electoral law and national minorities includes important general conclusions which provide a solid starting ground for the future efforts to develop the discussion on affirmative action in the field of electoral rules for national minorities’ participation in decision making. According to these conclusions, the participation of members of national minorities through elected office is more a result of the implementation and adaptation of the general rules of electoral law than of the application of rules peculiar to the minorities. The unabridged text of the conclusions of this study is appended.

15. In the light of this position, the present report intends to take the discussion one step further, by focusing on specific rules applying to national minorities in the electoral field. Following the accepted definition on affirmative action, we could talk about affirmative action electoral rules if they go beyond the principle of non-discrimination. For an electoral rule (constitutional provision or law) to be categorised as an affirmative action electoral rule, it needs to fulfil the following conditions:

- to provide national minorities (individually or collectively) with effective rights already benefiting the members of the majority;
- the preferences established by the electoral rules should only be limited to creating equal opportunities for the participation of the members of national minorities in decision making.

16. In theory, such affirmative action electoral rules can be formulated for the various dimensions of the electoral system and the electoral law. In practice, various measures in the form of electoral rules are also implemented in the different European countries. The most frequently used affirmative action electoral rules are found in the following areas:

- the electoral system in general (proportional or mixed system)
- the voting right (dual voting right and special voters lists)
- the numerical threshold
- the electoral districts (their size, form and magnitude)
- reserved seats
- representation (over-representation)
- use of the national minorities language in the electoral process.

17. The following presents the findings on the presence of the various affirmative action electoral rules at two levels: constitutional law and electoral law. The countries presented have been selected because they have already introduced some affirmative action electoral rules. Some of them are still today treated as such, that is, as

66. Guidelines to assist national minority participation in the electoral process, Warsaw January 2001: 6.

affirmative action measures, *stricto sensu*, while others, or the same measures in other countries, are understood as protection measures for minorities.

18. This study does not aim at providing a definition of national minorities. In fact, its scope is not limited to minorities as recognised in national or international law, but refers more broadly to ethnic, linguistic or religious communities when they benefit from specific rules of electoral law.

1. Belgium

19. The Constitution of Belgium (1970)⁶⁷ does not use the concept of national (ethnic or linguistic) minorities, and therefore, there are no special constitutional provisions regarding electoral participation of such groups. The concept of minority is used only in terms of ideological and philosophical minorities (Article 11). Yet a number of constitutional and legal provisions regulating the complex constitutional relations are interesting from the affirmative action perspective.

20. The constitution stipulates that the establishing of the constituencies or electoral colleges is governed by law, and that the elections are carried out by the system of proportional representation, as determined by the law. Concerning elections to the Senate, for which voters in the whole country are divided into two electoral colleges, the French electoral college and the Flemish electoral college, responsible for electing 15 and 25 senators respectively, voters from the constituency of Brussels-Hal-Vilvorde can vote for a Flemish list or a French-speaking list and thus belong, according to the choice made, to one or the other college. Brussels-Hal-Vilvorde is also a special constituency for the elections to the House of Representatives and to the European Parliament. Every province is a constituency for the House of Representatives, except Flemish Brabant (which includes the district of Hal-Vilvorde); the Belgian Court of Arbitration found this situation discriminatory in principle and asked the legislator to modify it.⁶⁸ Finally, for both chambers, voters from the two districts with linguistic facilities of Fourons and Comines-Warneton have the right to vote in a district situated on the other side of the linguistic border.⁶⁹

21. Among the different linguistic communities of Belgium, the Dutch speaking and the French speaking communities are in a co-dominant position at federal level, even if the French speaking one is numerically in a minority. In order to protect the interest of both groups, the constitution establishes a number of procedures such as laws to be voted with a double majority, that is, a general majority and a majority in each linguistic group, the parity in the Council of Ministers (Article 99), in the judicial bodies as well as in the highest administrations and the so-called “alarm-bell procedure” (Article 54). Both communities are also considered as co-dominant in the region of Brussels-capital, where the Dutch speaking one is in a numerical minority and the executive level is based on quasi-parity. Only the German speaking community is generally recognised as a national minority.

67. Source: <http://www.uni-wuerzburg.de/law/be00000.html>.

68. Decision 73/2003.

69. See Articles 87, 87bis and 89bis of the *Code électoral*, dossier numéro 1928-08-12/30, publication: 19-08-1928 (amended 1991, 1994, 1998).

22. Bearing in mind Articles 87, 87bis and 89bis of the code on elections, it is obvious that electoral rules are establishing legal grounds for citizens who are from different linguistic communities to be represented in the elected bodies (Senate and House of Representatives).

2. *Bosnia and Herzegovina*

23. In Bosnia and Herzegovina, the various affirmative action electoral rules are built at three levels: local, entities and federal elections. Guaranteed seats, proportional model of elections, and a special list of national minority candidates are the chosen mechanisms.

24. The election law of Bosnia and Herzegovina⁷⁰ does not use the term national minority in the context of the election of the deputies to the elected body on any level. In its Article 10.10, the law stipulates that among 58 delegates to the House of Peoples of the Federation of Bosnia and Herzegovina, 17 are from among Bosniacs, 17 from among Serbs, 17 from among Croats and seven delegates are elected from “others”. The term “others” can be considered as referring to those who are members of national minorities. Bearing in mind this presumption we may say that the law does use the mechanism of guaranteed seats for members of “others”.

25. Another mechanism used in this law is proportional representation of the population of the canton as reflected in the last census of each constituent people and group of others to the House of Peoples of the Federation of Bosnia and Herzegovina. In Article 10.12, the law prescribes that the number of delegates from each constituent people and group of others to be elected to the House of Peoples of the federation from the legislature of each canton shall be proportionate to the population of the canton as reflected in the last census. The election commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of others that will be elected from each cantonal legislature.

26. Yet, the term national minority is used in the context of local elections under Chapter 13A, “Participation of Members of National Minorities in the Elections for Municipality Level”. In this part of the law, the affirmative action electoral rules are more obvious. The legislator states that members of all national minorities in Bosnia and Herzegovina shall have the right to elect their representatives in municipal councils/municipal assemblies. To achieve this, in Article 13.14, it is stipulated that members of all national minorities which make up to 3% of the total population of a municipality shall be guaranteed at least one seat in a municipal council/municipal assembly.

27. Members of all national minorities, which make over 3% of the total population of a municipality, shall be guaranteed at least two seats in a municipal council/municipal assembly. This law leaves it to the municipal statute to establish the number of members of national minorities to be elected in a municipal council/municipal assembly. For that purpose the representation of national minorities

70. Election law of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina, No. 23/01.

is established on the basis of the last census conducted by the state of Bosnia and Herzegovina.

28. Another mechanism of affirmative action implemented in this part of the law is the special list of national minority candidates. Political parties, coalitions, lists of independent candidates, independent candidates, national minorities' associations and citizen groups consisting of at least forty citizens who have a general right to vote shall have the right to nominate candidate members of national minorities to municipal councils/municipal assemblies.

3. Croatia

29. Affirmative action electoral rules in Croatia are to be found in the constitution, the Constitutional Act and in the electoral laws.

30. Article 15 of the Constitution of Croatia⁷¹ stipulates that besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law.

31. The Constitutional Act on the Rights of National Minorities from 2002⁷² in its Article 19 stipulates that the Republic of Croatia shall guarantee to the members of national minorities the right of representation in the Croatian Parliament.

32. According to the Act on the Elections of Representatives to the Croatian Parliament⁷³ two different types of electoral systems are provided in parliamentary elections in the Republic of Croatia: the (general) proportional electoral system and the (special) relative-majority electoral system for the election of national minority representatives.

33. The law specifies that out of 140 seats, eight seats are guaranteed in advance for national minority members and they shall be distributed among the minorities: the Serb national minority elect three representatives; the Hungarian national minority elect one representative; the Italian national minority elect one representative; the Czech and Slovak national minorities elect one representative together; the Austrian, Bulgarian, German, Polish, Roma, Romanian, Ruthenian, Russian, Turkish, Ukrainian, Vlach and Jewish national minorities elect one representative together; the Albanian, Bosniac, Montenegrin, Macedonian and Slovenian national minorities elect one representative together.

34. The Constitutional Act on the Rights of National Minorities, in its Articles 20-24, stipulates that the Republic of Croatia shall guarantee to members of national minorities the right to representation in the representative bodies of local self-government units and in the representative bodies of regional self-government units. On the basis of this Act and as a result of the Law on the amendments to the Law on

71. Ustav Republike Hrvatske (Constitution of the Republic of Croatia), *Narodne novine* No. 56/90, 135/97, 113/00, 28/01, 41/01 – consolidated text, 55/01 – correction of consolidated text.

72. Constitutional Act on the Rights of National Minorities, *Narodne novine* No. 155/02.

73. Act on the Elections of Representatives to the Croatian Parliament, *Narodne novine* No. 116/99, 109/00, 53/03, 69/03 – consolidated text.

the Election of Members of Representative bodies of Local and Regional Self-government Units,⁷⁴ a new Chapter (VIIIa – Elections of Members of the Councils of National Minorities in Self-government Units) was introduced.

35. According to the abovementioned legislation, if at least one member of a national minority, which participates in the population of the local self-government unit with more than 5% and less than 15%, is not elected in the representative body of the self-government unit on the basis of universal suffrage, the number of members of the representative body of the self-government unit shall be increased by one member. If a national minority which accounts for at least 15% of the population of a local self-government unit is not represented by a number of members proportional to its share in the population of the local self-government unit, the number of members of the representative body of the self-government unit shall be increased up to the number that is necessary to exercise the representation. Those members of a certain minority, who were not elected, according to the order of proportional success of each slate in the elections, shall be considered elected. The legislator prescribes that in situations when even by adopting such an approach the number of national minority representatives will not be achieved, by-elections shall be called in the self-government unit in compliance with the Constitutional Act and law regulating the election of members of representative bodies of local and regional self-government units. To achieve such results the proportional model will be used. The official census results shall be relevant to the determination of the number of members of a national minority for the implementation of this mechanism.

36. Each minority group that accounts for more than 5% of the regional self-government unit's total population is entitled to proportional representation. If proportional representation was not achieved during the regular elections, the number of representatives in the county government is to be increased by a number necessary to reach this level for each such minority group.

4. Cyprus

37. The members of the Maronite, Armenian and Latin religious groups are entitled to the same political rights as other Cypriot citizens and a Maronite was once elected to the House of Representatives. Furthermore, according to the religious group (representation) laws of 1970 to 1996 (Sections 3 and 4), a representative of each of these religious groups is elected to the House of Representatives with a consultative status. Each representative is entitled to submit the views of his group on any matter relating to such a group or to make necessary representations on such matters relating to his group before any organ or committee of the House of Representatives or any organ or authority of the republic, with regard to the matters which fell within the competence of the Greek communal chamber before this chamber was abolished and its legislative functions were undertaken by the House of Representatives in 1965, by virtue of Law 12 of 1965.⁷⁵

74. Law on the Amendments to the Law on the Election of Members of Representative Bodies of Local and Regional Self-government Units, adopted by the parliament on 11 March 2003, published in *Narodne novine* and entered into force on 21 March 2003.

75. Information provided by Mr Panayotis Kallis, member of the Venice Commission for Cyprus.

5. *Germany*

38. National minorities are those groups of German citizens who are traditional residents of Germany, but who differ from the majority population through their own language, culture and history and who wish to preserve their identity (the Danish minority, the Sorbian people, the Frisians in Germany, and the German Sinti and Roma). Except for the latter, they have their respective traditional settlement areas in some federal states of the Federal Republic of Germany. These are the Land of Schleswig-Holstein, the Free State of Saxony, and Brandenburg and Lower Saxony.⁷⁶

39. As an affirmative action electoral rule, Germany has chosen to implement no limitation of threshold for political parties representing national minorities. While for other political parties the threshold is 5%, political parties representing national minorities are exempted from the 5% threshold established by the electoral act.⁷⁷

40. In practice, minorities are not so important at national level that this exemption from the threshold regulation helped them to obtain seats at federal level. This is different for the election of the parliaments of *Länder* where minorities are also exempted from the 5% threshold (Schleswig-Holstein, Danish minority; Brandenburg, Sorbian minority).

41. In this way, members of national minorities are encouraged to register political parties that will represent their interests and needs. The final participation of national minorities in the elected bodies further depends on the electoral model, and other electoral rules.

6. *Hungary*

42. Hungary implements the affirmative action electoral rules in the electoral laws. Such laws are based on the Constitution of the Republic of Hungary.⁷⁸ Article 68 of the constitution prescribes that the Republic of Hungary shall protect national and ethnic minorities and ensures their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the right to use their names in their native languages. The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country (paragraph 4). Such laws or pieces of legislation were up to now not adopted in order to ensure the representation of minorities in elected bodies. National and ethnic minorities shall have the right to form local and national bodies for self-government (paragraph 4).

76. First report submitted by the Federal Republic of Germany under Article 25, paragraph 1, of the Council of Europe's Framework Convention for the Protection of National Minorities (received on 24 February 2000) – ACFC/SR (99).

77. German Federal Electoral Law (1993, last amended 1999).

See <http://www.lexadin.nl/wlg/legis/nofr/eur/lxwedui.htm>

78. Constitution of the Republic of Hungary (31 December 1990). Sources: CODICES database of the Venice Commission; *The rebirth of democracy: 12 constitutions of central and eastern Europe* (Council of Europe publishing, second edition).

43. On this basis, the Act on Election of Local Municipal Government Representatives and Mayors (1990),⁷⁹ under Chapter XI – “Protection of the Rights of National and Ethnic Minorities”, provides that the provisions of the Minorities Act with the alterations and amendments contained in this part of the law shall be applied for the nomination and election of national and ethnic minority self-government representatives. If no candidate of the same minority receives a mandate as a result of list voting, then the number of votes, which is equal to half of the number of votes that were validly cast on the candidate receiving a mandate by the smallest number of votes, shall be calculated. Every minority candidate who did not receive a mandate shall receive it in the case that the number of votes cast on them shall be greater than the number determined in the above way; should there be more than one such minority candidate, then the one with the greatest number of received votes is elected. If there are two or more such candidates who have an equality of received votes, then the mandate shall be decided according to the drawing of lots specified in paragraph 4 of Article 28 of the same law.

7. Italy

44. Affirmative action in favour of minorities is provided in the Italian Law on the Election of the Italian Representatives to the European Parliament. A list of candidates proposed by parties or political groups of the French-speaking minority of Valle d’Aosta, of the German-speaking minority of the Bolzano province and of the Slovenian-speaking minority of Friuli-Venezia-Giulia is allowed to join another list of candidates of the same constituency with the purpose of sharing the distribution of seats assigned to this second list. Every voter has the right to express three individual preferences – including one for a candidate of the minority list. After the allocation of the seats to the lists, the candidates of a list or of joined lists are elected according to their number of preferences. However, when no candidate of the minority list is elected, the one with most preferences is proclaimed elected instead of a candidate of the other list if he or she obtains at least 50 000 preferences.⁸⁰

8. Poland

45. Affirmative action electoral rules are found in the Parliamentary Election Law in the form of certain threshold “exemptions”. As special rules on elections to the *Sejm*, the Parliamentary Election Law⁸¹ in its Article 134 stipulates that the lists of election committees created by electors associated as registered organisations of national minorities are exempt from the requirement of threshold. In order to benefit from this exemption, electors associated as registered organisations of national minorities are required to submit to the national electoral commission a relevant declaration no later than five days before the poll.

46. Together with the declaration, the committee shall be obliged to submit a document issued by the appropriate statutory body of an organisation of a national

79. Act on Election of Local Municipal Government Representatives and Mayors (1990) (Source: <http://www.legislationline.org/legislation.php?tid=57&lid=1668>).

80. Articles 12, 14 and 22 of Law No.18 of 24/1/1979.

81. Parliamentary Election Law (2001) (Source: <http://www.legislationline.org/legislation.php?tid=57&lid=798&less=false>).

minority in which the creation of the committee by electors – the members of such an organisation – is confirmed.

9. Romania

47. In Romania affirmative action electoral rules are found in the constitution and in the Electoral Law. In both cases the approach adopted is in the form of guaranteed representation.

48. According to Article 62 of the Constitution of Romania,⁸² organisations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in parliament, have the right to one deputy seat each, under the terms of the Electoral Law. Citizens of a national minority are entitled to be represented by one organisation only. The number of deputies and senators shall be established by the Electoral Law, in proportion to the population of Romania.

49. Law No. 68/1992 on the Election to the Chamber of Deputies and the Senate in its Article 4 stipulates that legally constituted organisations of citizens belonging to each national minority, which in the elections has not obtained at least one deputy or senator mandate shall have the right to a deputy mandate, if they have obtained throughout the country at least 5% of the average number of validly expressed votes throughout the country for the election of one deputy. The organisations of citizens belonging to national minorities participating in the elections shall be, as far as electoral operations are concerned, the juridical equivalent to political parties.

50. On these legal grounds, the Romanian system ensures representation of legally constituted organisations of citizens belonging to a national minority. If organisations of a national minority do not obtain a seat in either house through ordinary electoral procedures, but receive at least 5% of the average number of votes validly cast over the entire country for the election of a member of the Chamber of Deputies, one organisation of this minority is entitled to a seat in this house.

51. The Romanian law for the election of local public administration authorities provides that candidatures for local elections may be put forward by the organisations of citizens belonging to national minorities represented in parliament. Candidatures may also be put forward by other lawfully established organisations of citizens belonging to national minorities, if their number of members is not less than 15% of the total number of citizens who, at the latest census, have declared their belonging to that minority. If the number of members needed exceeds 25,000 persons, the members' list shall include at least 25,000 persons residing in at least 15 counties of the country and in the Bucharest municipality, but no less than 300 persons for each of those counties and for the Bucharest municipality. In summary, candidatures from the organisations of citizens belonging to national minorities represented in parliament are rendered easier, but the procedure is rather cumbersome for other such organisations. No special seat is ensured to national minorities at local level.⁸³

82. Constitution of the Republic of Romania (Source: CODICES database of the Venice Commission).

83. For a more detailed analysis of this law, see document CDL-AD(2004)040.

10. Russian Federation

52. The federal legislation provides, as a matter of principle, national minorities with the possibility to realise their electoral rights in elections and referendums.

53. In a more precise manner, provisions of subjects of the Federation help minorities to be represented in the elected bodies through deviations from the rule of equal representation of the population in the legislative bodies. In the Republics of Carelia and of Daghestan, the deviation from the average norm for the representation of deputies in constituencies created in areas of concentrated residence of non-numerous autochthonous people may exceed the normal deviation norm, but not by more than 40%.⁸⁴

11. Slovenia

54. The Slovenian affirmative action electoral rules are elaborated constitutionally as well as in the law. The mechanisms used are various: guaranteed representation and guaranteed seats, dual voting right, special voting list, special district and proportional elections.

55. The Slovenian National Assembly consists of 90 deputies, elected by a proportional electoral system. According to Article 64 of the Constitution of the Republic of Slovenia, the Italian and Hungarian ethnic communities shall be directly represented at the local level and shall also be represented in the National Assembly. This guarantee to the members of the two national minorities is further developed in Article 80 of the constitution which defines that “the Italian and Hungarian ethnic communities shall always be entitled to elect one Deputy each to the National Assembly.” Members of these two national minorities have dual voting rights, so Italian and Hungarian deputies are elected by all members of those national minorities with voting rights but voters from national minorities can vote at the same time for ordinary candidates.

56. According to the National Assembly Elections Act, for the election of deputies of the Italian and Hungarian national communities, electoral commissions for special constituencies shall be nominated.

57. The Law on Local Self-Government, in its Article 39, stipulates that Italian and Hungarian national minorities in ethnically mixed areas inhabited by members of both national minorities shall have at least one representative in the municipal council. The Law on Formation of Municipalities and the Determination of their Territories (from 1994) prescribes in detail the number of members of the Italian, Hungarian and Romany national minorities in the first municipal council. Elections for the municipal council members from among the minorities are conducted according to the majority principle in a special electoral district comprising the territory of the municipality. Candidates for members of the municipal council – representatives of the Italian or Hungarian national minority – are chosen by the

84. Article 9 of the Law on the Election of Deputies to Representative Bodies and Heads of Local Self-Government in the Republic of Carelia, as of 25 December 2003, and Law on the Election of Deputies to the People’s Assembly of the Republic of Daghestan, as of 12 May 2004.

voters members of the ethnic community in the municipality, with the signature of at least 15 voters.

12. *Switzerland*

58. In Switzerland, a number of provisions guarantee a representation of the language groups or regions. At federal level, care must be taken to ensure that the various language regions be adequately represented in the Federal Council (government).⁸⁵ A similar provision applies to the Federal Court.⁸⁶

59. At cantonal level, in the mainly German-speaking canton of Berne, a seat in the seven-member government is reserved to a French-speaking citizen residing in one of the three French-speaking districts (Bernese Jura).⁸⁷ A minimum of 12 seats in the cantonal parliament (out of 160) is guaranteed to the Bernese Jura. An equitable representation has to be secured to the French-speaking minority of the Bienne-Seeland constituency.⁸⁸

13. *“The former Yugoslav Republic of Macedonia”*

60. In “the former Yugoslav Republic of Macedonia”, the affirmative action has traditional as well as constitutional grounds. Yet the laws on elections, as well as other laws, do not contain specific affirmative action mechanisms.

61. The constitutional grounds are established by Amendment 6 of the constitution. This amendment introduced the concept of “appropriate and equitable participation of communities (i.e. national minorities) in the state organs and the public institutions at all levels” as one of the fundamental values of the constitutional order of the Republic.

62. There are a number of political parties established by members of the national minorities, representing them in the parliament and local elections. Together with the introduction of a proportional election system the minorities have the chance to be better represented.

63. Another, rather strong affirmative action mechanism has been implemented in the design of the electoral districts. Some of the electoral districts are so designed to favour the minority representation. This is the case, for example, with the municipality of Suto Orizari, in the capital of Skopje. This district was established “to enable the election of a representative of the Roma community.”⁸⁹

85. Article 175.4 of the Federal Constitution.

86. Article 1.2 of the Federal Judicature Act.

87. Article 84 of the cantonal Constitution.

88. Article 73 of the cantonal Constitution.

89. OSCE ODIHR, “Guidelines to Assist National Minority Participation in the Electoral Process”, Warsaw, January 2001.

64. Preferential use of minority language in the election materials is regulated by the Law on Election of Members of Parliament (Article 71).⁹⁰

Conclusion

65. The country by country reviews show that there are already in existence interesting electoral rules that have affirmative action goals, in the broader meaning of the concept accepted here. These are, of course, not the only rules of electoral law allowing for a representation of minorities (see appendix). In most of the countries, such rules are introduced as isolated elements, while in a few of the countries, they are introduced in a more systematic way. In the first case, the affirmative action electoral rules are introduced directly in the law. In the second case, such rules are deducted from the more general constitutional provisions. The second pattern is more common among the newly democratised countries.

66. In general, the electoral rules that favour affirmative action have limited range. The number of beneficiaries of such electoral rules is clearly and sharply determined either by the constitution or the law or by other accompanying legislative acts. For example, the number of parliamentary seats guaranteed to minorities is almost always lower than the number of minorities present in the country. Affirmative action may apply only at national, regional, local or even European level, and/or only in a part of the country. This means that the original inspiration for such electoral rules is not purely legally based, but probably political. The legislators are forced to use political criteria for classifying and treating a number of national minorities as one group for the purpose of election of a joint representative. The great differences in the number of members of particular minorities reduce the electoral chances of some minorities, because seats go to the candidate of the minority with the largest number of voters. This is a particularly relevant problem of affirmative action having in mind that the definitions of national minorities applied in each country are ad hoc, vague and vary significantly.

67. Another legal as well as political issue for the affirmative action electoral rules is the question of the nature and the meaning of the representation. The mechanism of guaranteed mandates for members of national minorities in parliament or at local or regional level, for example, opens the question of the nature of the representation and of the mandate of those deputies. Is their mandate strictly on matters affecting minorities and minority rights only (imperative mandate) or is it an ordinary (open or political) mandate?

68. The affirmative action in the sphere of electoral rules opens other relevant legal issues. This again proves the controversial nature of affirmative action in general. Yet, its rationale is strong and on the basis of it countries will develop a wide diversity of mechanisms in accordance with their historical and legal traditions, and the political system. In that direction the Venice Commission's code of good practice in electoral matters provides some of the basic principles for developing electoral affirmative

90. Law on Election of the Members of the Parliament, "Official Gazette of the Republic of Macedonia" No. 42/2002 (Source: <http://www.dik.mk>).

action rules in accordance with Europe's electoral heritage. Among them we will emphasise here the following principles:

- a. Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic-based parties.⁹¹
- b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
- c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
- d. Electoral thresholds should not affect the chances of national minorities to be represented.
- e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.

69. Affirmative action electoral rules, as the experience of the OSCE High Commissioner on National Minorities shows, are particularly productive when applied in local elections. Furthermore, in territories where national minorities represent a substantial part of the population, the delimitation of territorial entities (constituencies, municipalities), in such a way as to prevent dispersal of the members of a national minority, may favour the representation of minorities in the elected bodies, as underlined by Recommendation 43 (1998), on Territorial Autonomy and National Minorities, of the then CLRAE.

70. The abovementioned principles can provide a basis for developing common European frameworks, if not yet standards for affirmative action rules, for national minorities' participation in the decision making.

91. The OSCE High Commissioner on National Minorities advocates the approach based on freedom of association, with a recommendation addressed to all the political parties to integrate members of minorities and their specific interests.

Appendix

Electoral law and national minorities (document CDL-INF(2000)004), conclusion

The wide variety of electoral systems have been grist to generations of legal specialists, political analysts and mathematicians and will continue to be so. It is true that they do not all, without exception, guarantee that national minorities are fairly represented, but the main conclusion which may be drawn from the foregoing analysis is that there is no absolute rule in this field. Indeed, the electoral system is but one of the factors conditioning the presence of members of minorities in an elected body. Other elements also have a bearing, such as the choice of candidates by the political parties and, obviously, voters' choices, which are only partly dependent on the electoral system. The concentrated or dispersed nature of the minority may also have a part to play, as may the extent to which it is integrated into society, and, above all, its numerical size.

Nevertheless, the electoral system is not irrelevant to the participation of members of minorities in public life. On the one hand, certain states – but they are few in number – have specific rules designed to ensure such participation. 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 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.

Report on electoral law and electoral administration in Europe⁹²

Synthesis study on recurrent challenges and problematic issues

I. Introduction

1. The main objective of the present study is to identify the recurrent challenges and weak points in the electoral legislation and the electoral administration in Europe against the background of international standards and good practices in electoral matters. The study refers to elections on both the national and the sub-national level. Problems of referendums have, in principle, not been considered.⁹³

2. The focus of the study is on those states in which the Council of Europe has been engaged in making electoral recommendations or observing elections recently. These are the following countries: Albania, Armenia, Azerbaijan, (Belarus), Bosnia and Herzegovina, Croatia, Georgia, “the former Yugoslav Republic of Macedonia”, Moldova, Romania, Serbia and Montenegro (including elections in Serbia, Montenegro and Kosovo), the Russian Federation (including elections in the Chechen Republic), and Ukraine. Experiences from elections in other Council of Europe member states are, however, also taken into account in the analysis.

3. Systematically screening the electoral process, the report tries to identify problems and open challenges of the electoral legislation and administration process, according to electoral experts and international observers. The country examples that are mentioned in this report have a primarily illustrative character.

4. The study is based on:

- the code of good practice in electoral matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002) (CDL-AD (2002)023 rev);
- opinions and recommendations of the Venice Commission (see Appendix I);
- reports and other documents of the Venice Commission (see Appendix II);
- reports of the Congress of Local and Regional Authorities of the Council of Europe (see Appendix III);
- documents of the Parliamentary Assembly of the Council of Europe (see Appendix IV);
- reports by the OSCE/ODIHR (see Appendix V);
- further publications (see Appendix VI).

92. Study No. 352/2005, adopted by the Council for Democratic Elections at its 17th meeting (Venice, 8-9 June 2006) and the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006), on the basis of a contribution by Mr Michael Krennerich (expert, Germany); CDL-AD(2006)018.

93. For a detailed analysis of the legal rules on referendums in Europe see CDL-AD(2005)034. See also Recommendation 1704 (2005) and Opinion CDL-AD(2005)028 on that recommendation.

5. This study was adopted by the Council for Democratic Elections at its 17th meeting (Venice, 8-9 June 2006) and the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006) on the basis of a contribution by Mr Michael Krennerich (Expert, Germany).

II. General remarks

Commitment to international standards

6. At the outset it should be stated that the electoral laws in most Council of Europe member states, in general, provide an adequate basis for conducting democratic elections and referendums. Remarkably, the electoral laws of several new democracies in central and eastern Europe contain quite progressive provisions, for example with regard to formally independent electoral commissions or the political representation of women and minorities, as well as comprehensive safeguards against electoral fraud and manipulation.

7. Improvements to the electoral laws are due to constant national and international efforts to improve electoral legislation in the emerging or new democracies in Europe. Many recommendations of the Council of Europe and the OSCE/ODIHR have been taken into account in amendments to the electoral codes in the region. Electoral reforms and amendments have mostly served to overcome practical problems in conducting democratic elections.

8. Though important improvements have been made, shortcomings remain in the electoral laws, and some provisions are still cause for concern. In various respects, there is still room for improvement or, at least, debate. As to a number of provisions, the electoral laws may benefit from further reconsideration.

9. However, it should be borne in mind that electoral laws alone cannot guarantee democratic elections. The democratic character of elections depends largely on the responsibility of the authorities to properly implement the electoral law, and the commitment of all other election stakeholders (voters, candidates, parties, media, etc.) to conduct democratic elections. Thus, the extent to which possible improvements in the law can have a positive impact on the election process will mainly be determined by both the will and the capacity of the electoral authorities and other election stakeholders to respect and implement the law in an effective and non-partisan manner.

10. In most Council of Europe member states, both national and sub-national elections (and referendums) are conducted satisfactorily and in accordance with the electoral laws and international democratic standards. Only minor, mostly technical problems can be identified there. Nevertheless, in a small number of states recent elections failed to meet key commitments and still fell short of international standards for conducting democratic elections, according to observer reports. Although important improvements have been made, several aspects of the electoral administration give serious cause for concern there.

Harmonising electoral laws

11. The electoral laws are the main regulatory instruments for the conducting of elections. There is a tendency in Europe to incorporate the main aspects of the electoral legislation into one single electoral code.

12. However, there are still a number of states where different electoral laws are applied for different organs to be elected in the same territory. In Ukraine, for instance, there is a multiplicity of laws which regulate separately the presidential elections, the parliamentary elections, the local elections as well as specific aspects of the electoral administration process (for example, central electoral commission; draft law on state register of voters). In order to reduce the number of redundant provisions and enhance the consistency and the public understanding of the electoral legislation, it may be technically preferable to enact a unified electoral code, containing the general aspects of any election, and – in different parts of the law – the particularities of different elections (see also CDL-AD(2006)002, paragraph 11). As such, the adoption of a single Ukrainian electoral code was recommended, “... as it would make it easier for citizens to understand, for political actors to handle, and for electoral commissions and courts to deal with electoral matters” (CDL-AD(2006)003, paragraph 10). Similar recommendations have been made, for example, with regard to “the former Yugoslav Republic of Macedonia” and Slovenia.

13. Furthermore, there are sometimes inconsistencies between the electoral law and election-related provisions of other laws on, for example, political parties, mass media, referendums, local self-government, or civil and penal codes. Thus, a holistic approach seems to be necessary in order to harmonise election and election-related legislation.

Simplifying electoral laws

14. Unified or not, several electoral laws in the meantime seem to be excessively detailed and sometimes even over-regulated. In a number of countries, the electoral laws have been criticised for being exceptionally long, complex and repetitive documents that, occasionally, even contain internal inconsistencies. However, electoral laws should be precise, clear and easily understandable for electoral officials, candidates and voters alike. Taking into account these criticisms, further electoral reforms should be careful not to add more and more detailed provisions to the electoral law. Instead, a review of the election legislation should be undertaken in order to clarify and simplify complex provisions and to remove inconsistencies and unnecessary repetitions. This would enhance public understanding of the electoral legislation. It would also facilitate voter education and the training of election officials. With a growing professionalism of the electoral administration and a decreasing mistrust among election stakeholders, it will be possible to leave some margin for the adaptation and interpretation of the electoral law to independent electoral commissions.

Stabilising electoral laws

15. The code of good practice in electoral matters highlights that the stability of the law is crucial to the credibility of the electoral process (see CDL-AD(2002)023rev, part II.2.d and paragraphs 63-65). Therefore it should be avoided that rules on

politically delicate issues – like the composition of election commissions, the electoral system or the drawing of constituency boundaries – which are regarded as decisive factors in the election results, are changed frequently or just before elections. “In general any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election” (CDL-AD(2005)043, paragraph 5).

16. Whereas in many countries important amendments were adopted well ahead of the next elections, in other states late amendments to the law or last-minute decisions by the electoral commissions made it difficult to apply the electoral legislation properly and uniformly during elections. For example, according to international observers, the late passage of the 2005 amendments to the Election Law in Bulgaria, only 10 weeks prior to election day, combined with the late clarification of some basic issues through instructions by the central election commission, could have caused confusion for voters and polling station members.⁹⁴

17. On the other hand, in a few cases, the deadlines for amending electoral laws seem to be too restrictive. For example, the provision in the Law on Elections of People’s Deputies of the Ukraine that amendments may be made to the Law no later than 240 days before the day of the next parliamentary elections, may seem too long (see CDL-AD(2006)002, paragraph 13). According to the code of good practice in electoral matters, only fundamental elements of the electoral law should not be open to amendments less than one year before the election.

Translating electoral laws

18. In order to make electoral laws and election materials accessible for all citizens it is important that these public documents are published in all officially recognised and protected minority languages.⁹⁵ This has not always been the case.

III. The electoral administration structure

Sovereignty of the electoral administration

19. Given the paramount importance of democratic elections for a nation, usually the electoral process is administered by sovereign national authorities. However, under the unique context of post-conflict situations – like those in Bosnia and Herzegovina or Kosovo – the international community might be involved in organising or supervising the elections. This might be especially helpful for conducting elections in an initial post-conflict period. Nevertheless, the declining role of international representatives, for example, in the electoral commission of Bosnia and Herzegovina, is welcomed in order to establish a sustainable, fully national state institution (see CG/CP (11) 13).

Independent electoral commissions

94. See the international observers’ opinion at <http://www.hri.org/news/balkans/bta/1996/96-10-30.bta.html>.

95. See CDL-AD(2002)023rev, I.3.1.b.

20. In many old and established west European democracies where the administrative authorities have a long-standing tradition of impartiality, elections (and referendums) are organised by a special branch of the executive government, usually vested in the ministry of the interior or the ministry of justice. This is acceptable insofar as in those countries the respective government of the day normally does not intervene in the electoral management process.

21. However, in states with little experience of organising democratic elections, the impartiality of the electoral administration vis-à-vis the executive government cannot be taken for granted.⁹⁶ This is why the code of good practice in electoral matters makes a strong demand for independent electoral commissions in those countries. In fact, autonomous electoral commissions which are independent from other government institutions are increasingly viewed as the basis of impartial electoral management in developing or new democracies throughout the world.

22. Thus, it is a positive development that formally independent electoral commissions are in the meantime common in central and eastern Europe. The establishment of independent electoral commissions can be regarded as an important step towards strengthening the impartiality and neutrality of the electoral administration process. However, it should be clear that legal guarantees of independence are not always fully respected in practice.

23. Furthermore, the independent status is not necessarily accompanied by budgetary independence. Unpredictable ad hoc budgets and a lack of resources may make it quite difficult for electoral administration bodies to work properly. In some countries the administration of previous or recent elections was marked by financial problems. This was, for example, the case in Montenegro's elections of 2003, which were, however, carried out in an independent and largely effective manner.

Permanent electoral commissions

24. Another positive development is that, as a rule, the respective national electoral commissions have been established as permanent acting bodies in central and eastern Europe. Non-permanent acting national election commissions which do not come together until a few months before the elections are nowadays considered inappropriate to manage the complex process of electoral administration, both in developing and established democracies. Therefore, the code of good practice in electoral matters demands that any central electoral commission must be permanent by nature (CDL-AD(2002)023rev, II.3.1c).

25. In some countries where the electoral law originally established a temporary central election commission, the law has been changed and a permanent body has been established. In Croatia, for example, the absence of a permanent election administration has been criticised by electoral observers to the 2003 parliamentary elections and the 2005 presidential elections. A permanent electoral commission has been provided for in the draft law on the state electoral commission of the Republic of

96. See CDL-AD(2002)023rev, II.3.1.b.

Croatia (2005). The planned reform has been welcomed by international experts, since the frequency of elections implies the need for continuous action by the supreme body which participates in the procedure of conducting the election itself (CDL-EL(2005)053).

26. It is, however, open to question whether permanent election commissions are needed on the sub-national level. It could be argued that it is less important for the election commissions on the sub-national level to be permanent, but this will depend on the nature of the responsibilities they are given. On the lowest level (local level), however, permanent structures are usually not necessary.

27. In any case, it makes a lot of sense for the central election commission to be supported by its own secretariat that deals with the bulk of administrative preparations for conducting elections. The importance of such a technical secretariat was positively mentioned by international observers, for example, to the 2004 local elections in Bosnia and Herzegovina (CG/CP (11) 13). In contrast, electoral observers to the 2004 referendum in “the former Yugoslav Republic of Macedonia” criticised the fact that the permanent secretariat, provided for by law, was not yet established.⁹⁷

28. Finally it should be stated that a permanent election administration does not itself guarantee that the elections are professionally administered. As far as professionalism is concerned, there appears to still be room for improvement in a number of countries.

Multi-tier commission structure

29. In most countries the electoral law provides for a three-tier commission structure: a national electoral commission, regional or district electoral commissions and local electoral commissions. Some countries, for example, the Republic of Croatia and the Russian Federation, even have a four-tier commission structure. Three-tier or, if necessary, four-tier structures of election administration seem to be appropriate for effectively administering elections and referendums.

30. Worthy of note are the commission structures in both the Republic of Serbia and the Republic of Montenegro (in Serbia and Montenegro) where only a two-tier structure exists with commissions on both the central and the local (polling board) level. The absence of an intermediate level of election administration may make it more difficult to carry out an election. According to OSCE/ODIHR observers, it created technical and logistical problems in the 2003 parliamentary elections in Serbia. Despite the criticisms, the electoral law has retained the two-tier structure until now (see CDL-AD(2006)013, paragraph 18). As for Montenegro, however, there have not been similar criticisms by international observers.

31. It is very important that the duties and responsibilities of each body are clearly determined by the electoral law. Sometimes, however, provisions regarding responsibilities of election commissions are vague, and the relationship between the

97. See the report of the international observation mission at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019016.pdf>.

different levels of electoral commissions is not sufficiently specified. An example is the 2004 Law on Local Elections in “the former Yugoslav Republic of Macedonia”. Observers from the OSCE/ODIHR and the Congress of Local and Regional Authorities of the Council of Europe recommended strengthening the responsibility of the state election commission over the action of subordinate election bodies there (CG/BUR (11) 122rev, page 14). Similarly, with regard to the 2002 parliamentary elections in Hungary, the national election commission’s lack of binding authority over the decisions and actions of lower level commissions was criticised as possibly leading to inconsistent implementation and abuse.

32. Furthermore, there is a definite need for a continuous flow of information within the electoral administration structure. In practice, instructions and clarifications of legal provisions are not always communicated from higher-level commissions to lower-level commissions clearly, and in a timely manner, which contributes to a lack of uniformity in the electoral procedures that can still be observed in a number of countries during the election process.

Composition of electoral commissions

33. Even with formally independent electoral commissions, the method of the commissions’ composition may strongly favour the government or pro-governmental forces. Not surprisingly the composition of election commissions is one of the most controversial aspects of the legal framework for the election in many emerging or new democracies in the region.

34. Although in many countries the influence of the executive government on the composition of the electoral commissions has, in general, greatly been reduced, in a few states still a significant number of commission members are nominated and appointed by the executive government, for example, the president of the republic or the ministry of the interior or justice. For example, in Georgia, five (out of 15) members of the central electoral commission are appointed by the president, not including those members appointed by the governing parties in parliament. To avoid the risk of governmental interference in the commission’s work, as a rule the number of commission members nominated and appointed by the executive government should, if at all, be very low.

35. Even if institutions other than the executive government nominate and appoint commission members, these institutions may be *de facto* under governmental control. Three possible solutions might be adopted to avoid that risk.

a) It is important that not all commission members are appointed by the same institution. A “mixture” of institutions that are involved in the nomination process of commission members is nowadays the rule in developing or new democracies in Europe.

b) It is regarded as helpful if at least some of the commission members are appointed by non-political institutions that are perceived as being neutral. In several countries specific bodies of the judiciary are regarded as suitable for that task. Significantly, the Venice Commission has encouraged the involvement of the judiciary in the appointment process for electoral commissions, for example, in

Armenia (see CDL-AD(2005)027, paragraph 9). However, we must be aware that the “trust level” for institutions is country specific. Thus, country-specific solutions ought to be found.

c) If some or all commission members are appointed by the parliament or by political parties, an adequate balance between pro-government and opposition parties has to be achieved. In some countries, however, pro-government parties are (still) favoured in the commission’s composition. Among the remaining shortcomings in the election code of Azerbaijan, for example, is the fact that, according to international observers, the method of composition of election commissions continued to strongly favour the government and thus, undermined confidence in the independence of the election administration. In many countries, the challenge remains to find an adequate balance and a politically acceptable formula as to the distribution of commission members between the parties. Finally, with partisan bodies, careful consideration needs to be given to the selection of the chair, vice-chair and secretary, and the role of other members.

36. The provision for regular or expanded membership of electoral commissions to include party representatives is often regarded as an effective system to guarantee checks and balances of the electoral process. The underlying idea is that one party watches the other. Pro-government and opposition parties are represented in the electoral commission and can control each other. Closely related to the nomination of party representatives to electoral commissions, however, is the risk of the over-politicisation of the commission’s work. In such cases, the commission’s members act in the interest of their parties rather than in the interest of the electorate. The consequences can be serious. In some countries the commission’s work was severely hindered by party conflicts and party interference. In such cases the integration of non-partisan members may contribute towards de-politicising the commission and making it work more professionally.

37. The Albanian electoral code of 2003, for example, has been criticised because the electoral law encourages a politicised election administration dominated by the two major political parties which interfere negatively in the election administration process. It was therefore recommended that impartial, independent, professional and non-partisan election commissions be established, with extended membership possibilities for representatives of political parties before an election (see CDL-AD(2004)017, paragraph 14).

38. Another example is “the former Yugoslav Republic of Macedonia”, where the law grants exceptional privileges to the four leading political parties in the appointment of the election administration. It was criticised by Council of Europe and OSCE/ODIHR observers to the 2005 municipal elections that commission members often protected party interests rather than respecting the obligation to secure a correct and lawful election there.⁹⁸

39. In any case, the electoral law should provide for a clear and transparent procedure of nomination and appointment of electoral commissioners. The lack of

98. See, for example, CG/Bur(11)122rev.

transparency of the nomination process has been criticised by Council of Europe electoral observers, for example, with regard to elections in Azerbaijan and “the former Yugoslav Republic of Macedonia” (see CDL-AD(2004)016rev, paragraph 12.ii; CG/BUR (11) 122rev).

40. Moreover, legislation ensuring women’s participation in election commissions should be considered, since women are heavily under-represented in election management bodies in many countries.

41. In order to guarantee the independence of the election commission it is usually preferable to respect common incompatibilities in the commission members. Persons who could be involved in an inherent conflict of interests with the requirement for impartiality should not be allowed to be appointed to electoral commissions. For example, it would be problematic if registered candidates were not explicitly prohibited from being commission members. International observers highlighted this issue, for example, with regard to the 2002 parliamentary election in Montenegro,⁹⁹ or the 2005 municipal elections in “the former Yugoslav Republic of Macedonia”.¹⁰⁰

42. Furthermore, the commission’s independence can be strengthened by appointing commission members for a fixed (and sufficiently long) time period and by prohibiting their dismissal without reasonable grounds. According to the code of good practice in electoral matters, in general, bodies that appoint members to electoral commissions should not be free to recall them, as it could cast doubt on their independence. “Discretionary recall is unacceptable, but recall for disciplinary reasons is permissible – provided that the grounds for this are clearly and restrictively specified in law...” (CDL-AD(2002)023rev, paragraph 77).

43. Whilst in some countries respective provisions have been amended in the electoral law in line with the code of good practice, in a number of states the grounds for dismissing commission members are still vague and can lead to abuse. In several cases the problem has been pointed out by the Venice Commission and OSCE/ODIHR (see, for example, CDL-AD(2004)027, paragraph 41). The issue has to be considered seriously since there have been repeated attempts by state authorities or political parties to remove “their” designated or appointed members from the electoral commission if they do not follow the official or party line.

Mode of operation of electoral commissions

44. There are many aspects of the activities of electoral commissions that have to be regulated, and there are many ways to do so. Apart from all the technical details, there are some underlying principles that have to be respected. The rules of procedure must be clear. Commissions’ activities and decisions must be transparent, inclusive and consensus-oriented, but at the same time the effectiveness of the electoral administration should not be hampered by endless debates or even dead-lock situations. A way has to be found to combine the best possible transparency,

99. See the international observers’ report at http://www.osce.org/documents/odihr/2002/11/1350_en.pdf.

100. See the international observers’ report at http://www.osce.org/documents/odihr/2005/06/15001_en.pdf.

inclusiveness and effectiveness of the electoral administration at the same time. Depending on what the specific problems of a country's electoral management are, recommendations focus on different, sometimes even contradictory, aspects.

45. With regard to the (effectively administered) elections in the Russian Federation, for instance, international electoral observers recommended that the transparency of the commissions' work should be enhanced by extending the guaranteed access of candidates, their financial representatives and proxies, as well as journalists, to even non-formal sessions. Also, in other countries, the lack of transparency of the commission's work has, in fact, caused serious concern.

46. As for the Ukrainian 2005 reform, in contrast, it was pointed out that extending the right to be present at commissions' meeting to many subjects (candidates, representatives of parties and mass media, foreign and international observers), combined with the "excessively high number" of commission members, may make it very difficult to perform their functions, which require continuous debating and decision making (see CDL-AD(2006)002, paragraph 34). Here a solution has to be found to enable as much transparency as possible without making commissions' work too difficult or even impossible.

47. A similar problem exists with regard to the decision-making process. Reasonably, the code of good practice in electoral matters highlights that it would make sense for decisions to be taken by a qualified (for example, two thirds) majority, so as to encourage debate between majority and minority parties. Reaching decisions even by consensus is preferable (CDL-AD(2002)023rev, paragraph 80). On different occasions, the Venice Commission recommended introducing a higher quorum and/or qualified majorities to increase the inclusiveness of the electoral commissions' decisions (see, for example, CDL-AD(2003)021, paragraph 12; CDL-AD(2004)016 rev, paragraph 12).

48. However, qualified voting requirements can also be abused to obstruct the decision-making process, particularly under the condition of a strongly politicised electoral administration. Such obstruction politics have been criticised, for example, in the Albanian case (see CDL-AD(2004)017rev2, paragraph 13). Generally speaking, a balance is necessary between making the decision-making process inclusive and representative on the one hand, and effective on the other. Institutional incentives (like qualified majorities) to ensure general agreement on electoral administration decisions have to be combined with solutions to overcome deadlock situations.

Training of election commissioners

49. It is important that members of election commissions have the necessary skills to administer elections. In order to address this problem, training courses for members of particularly lower level commissions are strongly recommended by the Venice Commission. "Members of electoral commissions have to receive standardised training at all levels of the election administration. Such training should also be made available to the members of commissions appointed by political parties" (CDL-AD(2002)023rev, paragraph 84). This is especially important with new electoral regulations or the introduction of new technologies.

50. Training programmes for electoral officials are, in the meantime, common in emerging or new European democracies. In many cases, substantial international support was given to the organisation, and conducting of training and the preparation of electoral manuals for election officials. However, the programmes vary with regard to intensity, quality, and scope. Though important improvements have been made, international observers still identify the need for more systematic and comprehensive training programmes, especially for local election officials. Frequently it is recommended that the training be intensified and made available to all electoral officials at all levels. There is a broad consensus that early and thorough training will certainly increase the professionalism of and confidence in the election administration. It was even recommended that attendance at election training be made compulsory by law (see, for example, CG/BUR (11) 122rev). Far-reaching proposals demand that only individuals who have been qualified through examination and testing may be considered as commission members.

Voter education

51. Voter education is an integral, albeit sometimes neglected, part of the election process. It refers to basic information on elections (for example, date and type of elections) and explanations of electoral procedures (voter registration, voting system, etc.), and usually also addresses the voters' motivation and preparedness to participate fully in the elections. Voter education is especially important in emerging and new democracies and in situations where new electoral provisions or technologies are being applied for the first time. As far as referendums are concerned, the voters must be objectively and comprehensively informed both about the question submitted to the electorate in the referendum and its consequences.

52. Electoral observer reports, by showing irregularities, indicate the need for improving voter education in a number of countries. Election administration bodies usually play a crucial role in this process. They should provide not only basic voter information, but also comprehensive voter education programmes. This may be done with the help of political parties, non-governmental organisations, and the media. Additional resources might need to be committed to voter education.

53. Special focus should be put on voter education programmes for national minorities. This includes, among others, the use of minority languages. In the case of 2003 parliamentary elections in Estonia, for example, voter information and education was only in Estonian, but not, for example, in Russian, according to international observers.¹⁰¹

IV. The right to vote, and voter registration

General remarks

54. Universal franchise is a key element of modern democracies. It is important that the right to vote and the process of voter registration are not unreasonably restricted on the basis of race, gender, religion, ethnic origin, past or present political affiliation,

101. See CDL-AD(2002)023rev, I.3.1.

language, literacy, property or registration fees. However, the right to vote may be subject to a number of reasonable conditions, the most usual being age, citizenship and residency. Furthermore, there might be provisions for clauses suspending political rights due to lawful detention, criminal convictions or mental incapacity.¹⁰² As for such conditions, in general the constitutions and electoral laws in Europe meet international standards. Nevertheless, there are several aspects that are worth discussing here.

Voting rights for non-citizens in local elections and referendums

55. Whilst a citizenship requirement is common for national elections and referendums, there is a growing tendency to grant (long-term) foreign residents the right to vote in local elections. Under EU law all EU citizens have already been granted the right to vote (and stand for elections) in local and European Parliament elections in their EU member state of residence (Article 17 of the EC Treaty). But also for non-EU citizens or non EU member states the franchise may be expanded to non-citizens in local elections,¹⁰³ in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level.

56. The Venice Commission recommends, in its code of good practice in electoral matters, that the right to vote in local elections be granted to non-citizens after a certain period of residence,¹⁰⁴ and encourages countries like, for example, Romania to do so (see CDL-AD(2004)040, paragraph 9). Analogously, a recommendation of the Parliamentary Assembly refers also to the participation by foreign nationals in local referendums (see Parliamentary Assembly, Recommendation 1704 (2005), paragraph 13.vi.c). However, a number of Council of Europe member states have not yet followed the general recommendation, which, of course, requires additional administration efforts.

Voting rights for citizens abroad

57. External voting rights, for example, granting nationals living abroad the right to vote, are a relatively new phenomenon. Even in long-established democracies, citizens living in foreign countries were not given voting rights until the 1980s (for example, Federal Republic of Germany, United Kingdom) or the 1990s (for example, Canada, Japan). In the meantime, however, many emerging or new democracies in Europe have introduced legal provisions for external voting (out-of-country voting, overseas voting). Although it is not yet common in Europe, the introduction of external voting rights might be considered, if not yet present. However, safeguards must be implemented to ensure the integrity of the vote (see Chapter X).

58. If external voting rights are granted, attention should be paid to ensure the equality of votes. Though it appears to be acceptable to limit external voting rights to

102. See CDL-AD(2002)023rev, I.1.1; CDL-AD(2005)011, 012 and 031. In the *Hirst (2) v. the United Kingdom* judgment of 30 June 2004, the European Court of Human Rights stated that an absolute ban on voting by any serving prisoner in any circumstances was not in conformity with Article 3 of Protocol I to the Convention.

103. ETS 144.

104. See CDL-AD(2002)023rev, I.1.1.b.ii.

certain types of elections, for example, for president or the national parliament, it may be problematic to not let external voters fully participate in those elections. With Armenia's two ballot system for parliamentary elections, for instance, the voting rights for citizens abroad is restricted to the proportional part of the parliamentary election which is conducted in a nationwide "constituency". In order to ensure equal voting rights, it might be considered whether to allow citizens abroad to participate in the majority part of parliamentary elections as well (see CDL-AD(2003)021, paragraph 30). This would, of course, make it necessary to assign external voters to constituencies within the country, as is provided in a different manner, for example, with the – albeit not identical – two ballot papers systems for the German *Bundestag* and, until 2005, the Russian State Duma.

De facto disenfranchisement

59. Though national residents inside the country do, in principle, have the right to vote, the electoral legislation may *de facto* disenfranchise a substantial part of the electorate due to a lack of special voting provisions for voters who are hospitalised, homebound, imprisoned or temporarily away from their homes. While many electoral laws provide for several forms of absentee voting, such voting is not authorised in all countries. In some cases, like Serbia, the lack of respective provisions was criticised by international electoral observers.

60. A similar case is, for instance, Armenia. The 2005 amendments still do not include previous recommendations (CDL-AD(2002)029; CDL-AD(2003)021; etc.) that provision be made for voters who are unable to attend their polling station on election day. (In the case of Armenia, paradoxically, citizens abroad are able to vote but not citizens within the country who are unable to go to their polling station). Such special voting procedures were omitted from electoral legislation when the original election code was adopted in 1999 in an attempt to reduce fraud. However, the Venice Commission clearly states that the argument of "unpreventable fraud" is not sufficient to justify the denial of the voting rights of these citizens (see CDL-AD(2005)027, paragraph 19). The right to vote is such a fundamental right that all possible measures should be taken to uphold this right. However, it must be clear that with absentee voting strict conditions should be imposed to prevent fraud.

61. More important, however, is the fact that insufficient voter registration and inaccurate voter lists can prevent a significant proportion of the electorate from using their right to vote, and, thus, *de facto* disenfranchise them.

Voter registration and its importance for implementing universal suffrage

62. The proper establishment and maintenance of electoral registers is vital in implementing and guaranteeing universal suffrage. In practice, it is a pre-condition for enabling voters to use their right to vote. Voter registration, however, is one of the most complex, controversial and often least successful parts of electoral administration in emerging and new democracies, especially in post-conflict situations with a large number of refugees and internally displaced persons. Though in many countries considerable efforts have been made to establish proper electoral registration, voter lists are definitely an issue to be improved on in many countries. Typical problems are that voter registers are incomplete (that is, do not include all

eligible voters) and inaccurate (that is, they contain false data, names of deceased persons, etc.). Observers express concern over the inaccuracy of voter lists in a significant number of states.

Variety of models for voter registration

63. There are several methods of producing a voter register. Whilst in many European countries voter lists are taken directly from national, regional and/or local population databases that are used for other administrative purposes, it is also acceptable for voters not to be included automatically on the registers, but at their own request (see CDL-AD(2002)023rev, paragraph 7). Adopting a system which requires the active participation of the voters in initiating their own registration would though be an entirely new approach in most European countries (whereas it is more commonly applied in other world regions). The draft law on the state register of voters of the Ukraine appears to follow such a new approach (see CDL-AD(2006)003).

64. In most European states, however, citizens generally do not have to take action to be registered. Instead, voter lists are compiled by state authorities on the basis of official data, often under the supervision or responsibility of electoral administration bodies. This is an appropriate method, given that there are reliable and consistent data about the population that can be used for electoral purposes.

Creating a centralised voter register

65. However, in a number of countries voter lists are drawn up only on a community level, and there is no consolidated, centralised voter register. But without a national voter register it can be difficult to prevent multiple entries of the same voters in the voter lists across community borders. Thus, in several cases – like, for example, Armenia – it was recommended to create a national voter register (see CDL-AD(2003)021, paragraph 34). Also, international observers of the parliamentary and presidential elections of 2003 and 2004 in Serbia repeatedly demanded the creation of a centralised voter register, as foreseen by the electoral law.

Establishing permanent voter registers

66. In any case it is important that electoral registers are permanent by nature, with a system for regular updates. In countries like Ukraine, traditionally voter lists are not permanent and are created for each election according to a particular timeframe and methodology. The draft law on the state register of voters of Ukraine constitutes an attempt to establish a permanent, computerised and constantly updated voter register (see CDL-AD(2006)003). As regards several other countries, international observers recommended updating the voter registers on an ongoing basis to maintain and improve their quality and comprehensiveness. Furthermore, efforts to remove the remaining deficiencies should be made. In particular, control checks for duplicate entries, deceased persons and entries with incomplete or incorrect data should be conducted continually.

Public review of voter register

67. According to the code of good practice in electoral matters the electoral registers must be published and there should be an administrative procedure – subject to judicial control – or a judicial procedure enabling voters to have erroneous entries corrected or, if they are not on the register, to have their names included (see CDL-AD(2002)023rev, I.1.2). In a number of countries amendments to electoral laws have been made or have been demanded to require voter registers to be publicly accessible in advance of elections. This can be regarded as an important step towards enhancing transparency and improving the accuracy of voter lists.

68. It should be noted, however, that there are even established western European democracies, like Denmark, where the electoral register is not published for inspection and is not accessible either to the public in general, or to political parties. This certainly should not be an example for emerging and new democracies in the region. Given the inaccuracy of the voter lists in many countries, public access to the electoral register is crucial for enhancing the quality and legitimacy of the voter registration process there. Interestingly, the report of the Parliamentary Assembly's ad hoc committee for the observation of the 2002 parliamentary elections in Montenegro (Doc. 9037) showed that due to the public inspection of the voter lists the (transparency of the) voter registration was far less an issue of political contention than during previous elections. Furthermore, voters should be given enough time to examine preliminary voter lists. This is not always the case (see, for example, CDL-AD(2004)027, paragraph 18).

69. However, safeguards might be introduced to protect citizens' rights to privacy. In order to protect private data some countries have introduced restrictions concerning public access to voter lists. Following a reform in 2001, for instance, German voters can only check the correctness and completeness of their own personal data in the electoral register of the respective municipality (the inspection of other voters' data must be justified on specific grounds). Before 2001 the whole electoral register was publicly accessible for everyone to inspect. A balance certainly has to be struck between the transparency of voter registration and the protection of citizens' private data here.

70. Quite debatable is the lack of private data protection, for example, in the United Kingdom. By law, local authorities have to make the electoral register available for anyone to look at, even commercial companies. Recent reforms have at least given British voters the possibility to opt for inclusion on a special version of the voter register which cannot be made available for commercial purposes, but is used "only" for elections, law enforcement and checking applications for credit. It would be preferable for electoral registers to be compiled exclusively for electoral purposes.

71. Moreover, security considerations may allow for restrictions to the transparency of voter lists. In several countries (like Germany) provisions are made for the anonymous registration of people for whom the publication of their name and address on the electoral register would pose a threat to their life or health. The Electoral Administration Bill, as brought in the British House of Commons in January 2006, introduced the possibility of such an anonymous registration in the United Kingdom.

Supplementary voter lists

72. Supplementary voter lists can enable persons who have changed their address or reached the statutory voting age since the final register was published (CDL-AD(2002)023rev, I.1.2.vi). However, in a number of emerging and new democracies supplementary lists are extensively used for compensating for the inaccuracy of regular voter registration. Voters who do not find their names on the voter list on election day can, under certain conditions, be entered onto a supplementary voter list, for example in Moldova. There, the number of voters entered onto supplementary lists increased from 6% in 1998 to 10% in 2001 and 12.3% in 2003, according to the OSCE/ODIHR. In order to avoid extensive use of supplementary lists, the procedure for compiling and scrutinising regular voter lists has to be improved. As long as the accuracy of regular voter lists cannot be assured, however, supplementary lists seem to be necessary to enable voters to use their right to vote.

73. Nevertheless, it has to be noted that the use of supplementary lists increases the risk of multiple voting and the risk of voters voting in the wrong municipality. One of the major problems of the elections in Moldova was in fact that the number of people added to the supplementary voter lists increased the potential for multiple voting and for voting in incorrect districts. Thus, the Venice Commission's experts pointed out that if a mechanism for supplementary voter lists is still needed, it should be only tolerated if mechanisms for checking multiple voting are improved (CDL-AD(2004)027, paragraph 17). As a general rule, election day registration should be avoided, if possible, and at any rate should not take place at the polling station.¹⁰⁵

V. The right to stand for election, and the registration of election subjects

General remarks

74. As with the right to vote, the right to stand for elections is universal, and cannot be limited for reasons of, for example, race, gender, language, religion, ethnic origin, political affiliation, or economic status. Internationally accepted restrictions may include a minimum age that is higher than the voting age, citizenship and a residency requirement for a certain period of time before elections. Furthermore, the obligations to collect a specific number of signatures or to pay a small deposit are considered as being generally compatible with the universal right to stand for elections. There might also be provisions for clauses suspending political rights (lawful detention, mental incapacity, etc.). In general, the electoral laws of Council of Europe member states are in line with these standards. Nevertheless, some restriction details are worth discussing.

75. Before doing that, however, it should be noted that the registration and de-registration of candidates can be politically manipulated and provoke "absurd legal battles", as happened, for example, in the 2004 mayoral election held in the town of Mukachevo (Ukraine) (CG/Bur (10) 125). Generally speaking, restrictive or restrictively implemented registration requirements for candidates and parties may *de facto* prevent a significant number of electors from using their right to stand for election. The electoral legislation should limit and clarify the reasons for refusing candidates for elections. Justified decisions have to be provided so that aggrieved

105. See CDL-AD(2002)023rev, I.1.2.iv.

persons can bring complaints in the courts. In several countries there is still room for improvement with regard to this point.

Granting non-citizens the right to stand for local elections

76. Following the same arguments as for granting non-citizens the right to vote in local elections, it is recommended accordingly that the right to stand for local election shall be granted to long-standing foreign residents, if possible.

Residency requirements

77. While residency requirements are not incompatible *a priori* with the principle of universal suffrage,¹⁰⁶ it is not acceptable to limit the right to be elected to only those citizens who have resided in a country, region or constituency for an extensively long period of time. As for Georgia and Ukraine, for instance, the required residency period was criticised as being too long (see CDL-AD(2005)042; CDL-AD(2006)002). On the other hand, the lack of any residence requirement for the right to be elected was also criticised by the Venice Commission's expert, for example, with regard to the draft law on the elections to the parliament of the Chechen Republic. Such a requirement existed there only for active suffrage, but not for the passive voting rights (CDL(2003)021fin).¹⁰⁷

Suspension of the right to stand for elections due to criminal conviction

78. It is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms. With regard to the Law on Elections of People's Deputies of Ukraine, for instance, the Venice Commission recommended that the law should provide greater protection for candidate rights, including removing the blanket and indiscriminate prohibition on candidacy for persons who have a criminal conviction (see CDL-AD(2006)002, paragraphs 16 and 100). The OSCE/ODIHR recommendation that the right to be a candidate should be restored to those persons who were convicted and subsequently pardoned after the 2003 post-election disturbances in Azerbaijan goes in the same direction.

79. On the other hand, it might be inappropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all. For instance, the delegation of the Congress of Local and Regional Affairs of the Council of Europe was most concerned at the issue of the validity of the candidatures that were put forward in the 2005 local elections in "the former Yugoslav Republic of Macedonia". An elected mayor was able to run for mayor there despite having being sentenced to four years imprisonment for large-scale theft by the court (see CG/BUR (11) 122 rev).

106. See CDL-AD(2002)023rev, I.1.1.b.

107. The Initiative and Referendum Institute Europe (IRI Europe) defines passive voting right as the "eligibility to be elected".

Submission of signatures

80. The obligation to collect a specific number of signatures is not uncommon by international standards. However, it is generally agreed that signature requirements should not be too high. In order to prevent manipulation, the code of good practice in electoral matters stipulates a maximum 1% signature requirement in relation to the electorate of the national or constituency level where elections are held should not be exceeded. However, adhering to the upper boundary is not an obligation. In several elections the required number of signatures was quite high, sometimes even surpassing the 1% principle. This was the case, for example, for the 2003 parliamentary elections in Armenia (see CDL-AD(2003)021, paragraph 20). In the meantime, the 2005 amendments to the electoral code of the Republic of Armenia completely eliminated the requirement of collecting signatures supporting a candidate's nomination, while maintaining deposits requirements (see CDL-AD(2005)027, paragraph 17). In contrast, similar recommendations to reduce signature requirements have not been implemented, for example, in Azerbaijan and Georgia.

81. In some cases, there is a controversial debate as to whether voters should be allowed to sign the nomination papers of more than one candidate. As supporting a candidate's right to stand for election, however, is not the same as voting for the candidate, international observers recommended removing the provision restricting citizens to being able to sign the nomination papers of only one candidate, for example in the 2003 presidential elections in Montenegro. Similarly, the Venice Commission and the OSCE/ODIHR jointly recommended that the election code of Azerbaijan should allow voters to sign petitions on behalf of more than one candidate in presidential elections, as is already the case in parliamentary elections there (CDL-AD(2004)016rev, paragraph 13). However, allowing multiple signing may lead to abuses when used on purpose in order to confuse the voters.

82. With signature requirements, the checking of signatures is necessary. The process is not only time consuming, but also open to abuse. This is especially true if, by law, only a sample of the signatures is checked at random and in an inconsistent manner (like, for example, in Georgia and the Russian Federation). If a certain percentage of the sample is deemed null and void, the entire list will be invalidated and the registration application will be dismissed there and then. The verification procedure in Georgia was explicitly criticised for being inappropriate (CDL-AD(2004)005, paragraph 30). According to the code of good practice in electoral matters, in principle all signatures should be checked – at least until the required minimum number has been reached.¹⁰⁸ However, the provision has not yet been removed from the Georgian election code (see the law, CDL-EL(2006)009, Article 42).

83. Furthermore, it is important that minor formal errors do not automatically result in the signature lists being declared invalid. Provisions should be made to allow for the correction of any formal or minor errors in the nomination and registration process. This was, for instance, one of the recommendations of international observers

108. See CDL-AD(2002)023rev, I.1.3.iv.

to the Russian presidential elections in 2004. At the same time, however, the falsification of signatures in candidates' petitions should be treated as a criminal offence, which is not always the case.

84. Finally, restrictive requirements for party registrations may have limiting effects on the right to stand for election. For example, the need for parties to be registered one year before the elections if they want to present candidates in Ukraine appears to be a shortcoming of the electoral legislation (CDL-AD(2006)002). In Moldova also restrictive registration requirements for parties exist. The registration of parties to run in elections is dependent on annual membership lists. Moreover, the requirement of membership across the country discriminates regionally based parties there (CDL-AD(2004)027, paragraphs 20-21, 48-56). In order to "organise" party competition, restrictive registration requirements are also applied in some other countries like, for example, the Russian Federation.

Deposits

85. Alternatively there are procedures whereby candidates or parties are obliged to pay a deposit which is only refunded if the respective candidate or party wins a minimum percentage of the votes. According to the code of good practice in electoral matters such practices appear to be more effective than collecting signatures.¹⁰⁹ In fact, deposit systems avoid several disadvantages of signature systems (that is, the time-consuming process of signature collection, the non-secrecy of signatures and the need to check them). However, there is one important drawback of deposit systems. Compared to signature systems, they make the qualification to stand for elections dependent on money, rather than on political support.

86. Where deposit requirements are applied, the amount of the deposit and the number of votes needed for reimbursement should not be excessive (CDL-AD(2002)023rev, paragraph 9). In general, the existing provisions in Europe seem to be considered as being reasonable (see, for example, CDL-AD(2005)027, paragraph 17).

De-registration of candidates

87. De-registration of candidates is a particular problem. While the initial registration of candidates may be positively assessed, the electoral commission is often allowed to de-register candidates before the election, for example, if they seriously violate the electoral law. However, inconsistent and inappropriate last minute de-registration of candidates, often on minor technical grounds, should be avoided. Care should be taken that provisions allowing for the de-registration of candidates are not abused for political purposes.

88. Such provisions can in fact be applied in an arbitrary fashion. As for the non-democratic 2004 parliamentary elections in Belarus, for example, a significant number of prospective candidates were disqualified on the grounds of too many

109. See I.1.3.iv of the code of good practice in electoral matters and paragraph 9 of the explanatory report.

invalid signatures or incorrect income and property declarations. Furthermore, a number of “primary organisations” (for example, party offices in the respective constituency) were deregistered, which were necessary for the nomination of a candidate in that constituency. What is more, a number of registered candidates were deregistered on the grounds of alleged violations of the campaign rules and of bribery of voters shortly before the election day, according to the OSCE/ODIHR.

Withdrawal from candidacies

89. In a number of countries there are problems with the last minute withdrawal of candidates or parties from the election. The mere possibility to withdraw candidacies should be excluded in order to prevent pressures. Where such withdrawals are possible, it is recommended for them to be submitted to strict conditions. In some countries, no realistic deadlines are set, and no (clear) criteria are defined for the withdrawal of candidates. This can cause serious confusion amongst the voters, especially if the ballot papers are already printed. Furthermore, it is not always clear under which conditions political parties or electoral blocs may remove candidates from the lists after they have been registered.

VI. Election campaign

General remarks

90. As for the pre-election period, the basic idea is that the political parties and candidates should act on a “level playing field”. According to the code of good practice in electoral matters, equality of opportunities should be ensured between different parties and candidates, at least as far as possible. It should prompt the state to be impartial towards parties and candidates and to uniformly apply the same law to all. This neutrality requirement applies to the electoral campaign and coverage by the media, especially the state media, as well as to public funding of parties and campaigns where relevant. Furthermore, it is important that political campaigning is conducted in an environment that assures freedom of movement, expression, association, and assembly. These freedoms must be safeguarded to allow political organising and campaigning, and to inform citizens about the parties, candidates and issues. The parties and candidates must have the freedom to convey their programmes and political positions to the voters throughout the country.

91. Thanks to national and international efforts, in a number of countries electoral law amendments have made significant improvements with regard to provisions that aim at guaranteeing equal campaign conditions for election contestants. However, in several cases, there are still some legislative loopholes in this regard. Even more important are problems of implementation.

Restrictions to political rights

92. In most European states freedom of expression, association and assembly is respected on the whole. However, there are exceptions to the rule. Within Europe fundamental freedoms are most seriously challenged in Belarus which is, though, not a member state of the Council of Europe. The authoritarian regime in Belarus has not yet been willing to respect the concept of free and fair political competition, and to

create conditions to ensure that the will of the people serves as the basis for the legitimacy of the government. Not surprisingly the last parliamentary elections (2004), just as the preceding ones, fell significantly short of international standards, according to the OSCE/ODIHR. In the run-up to the 2006 presidential election, the Parliamentary Assembly called on the present regime to refrain from obstructing the free and fair running of the electoral campaign (Resolution 1482 (2006)).

93. But also in some Council of Europe member states, that is, the Russian Federation and the Caucasus' states, political rights have not always been respected before and after recent elections. In Azerbaijan, for example, there were widespread intimidations in the pre-election period, and severe restrictions of opposition candidates' ability to convey their messages effectively. It was recommended, among other things, that the electoral law be amended to curtail the unlimited powers given to the local authorities to restrict political gatherings, and to ensure that political freedoms are respected during election periods (see, for example, CDL-AD(2004)016rev; CG/BUR (11) 95). Still in the 2005 elections, serious interferences with opposition campaigns and violations of political rights occurred, overshadowing the measures the government had taken to improve the election environment.

94. A special situation refers to the 2005 elections in the Chechen Republic (part of the Russian Federation) which took place in an overall political context where fundamental freedoms were undermined by a climate of fear and ongoing serious human rights violations. (With regard to the human rights situation, see Parliamentary Assembly of the Council of Europe, Resolution 1479 (2006)).

Government interferences in the electoral campaign

95. A more common problem is, however, that government officials exert undue influence on the campaign. In a number of recent elections the line between state activities and political campaigning was blurred with government facilities and resources misused for campaign purposes. Widespread abuse of power by authorities during the election campaign was, to mention an example, a cause for serious concern in the 2003 local elections of Moldova. There were also credible reports of coercion and pressure on public employees to support the incumbents, as well as instances of misuse of public resources for campaign purposes in the Moldova parliamentary elections of 2005.

96. Even if, like in Georgia, the election code explicitly prohibits the use of official positions during election agitation and campaigns (CDL-EL(2005)033, Articles 73 and 76), it is not uncommon for even high-ranking state officials to be actively engaged in electoral campaigns, according to international observers. In a number of countries, like the Russian Federation, the misuse of state positions and resources for election campaigns still presents a major problem that must be addressed urgently. And, of course, it is quite unacceptable that officials exert pressure on government employees to attend meetings of and to vote for the ruling party, as routinely happens, for example in Azerbaijan.

97. Referendums represent a special situation. While there is common agreement that the authorities should provide objective voter information on the referendum, there is no consensus on whether the government should be prevented from

campaigning. In some countries (for example, Portugal, the Russian Federation, Armenia) authorities and officials are explicitly prohibited from campaigning; in other states (for example, Austria, Hungary) they are allowed to be involved in the campaign (see CDL-AD(2005)034, paragraphs 85-92, 219-222).

Campaign finances

98. It is commonly accepted that an effective election campaign needs sufficient resources. Parties and candidates would not be able to convey their programmes to the electorate without financial resources. Therefore political funding is considered a necessary condition for elections in modern democracies. Nevertheless, it should be clear that money may lead to corruption and to unfair political competition in the electoral process. Thus, it is important that election (and party) legislation contains clear and comprehensive regulations on party and campaign finances. In Serbia, for example, the Law on Financing of Political Parties has set up a comprehensive and stringent framework for campaign funds (though its effective implementation is a source of controversy). In contrast, in some other countries election and party laws fail to provide for such a coherent framework.

99. Admittedly regulating party and campaign finances is a difficult task. There is a wide variety of regulations in operation throughout Europe and other world regions. Regulations may refer to party funding as a whole (including “routine activities”) or only to electoral campaigns. Some countries apply direct public financing, others allow only private financing. There are systems with contribution and expenditure limits, and others without them. There may be bans on certain types of contributions, as well as on certain types of expenditure. Moreover, electoral and party laws differ considerably with regard to the disclosure of party and campaign funds as well as with regard to public access to the disclosed information. The variety of regulations makes it difficult to set common standards.

100. Nevertheless, the code of good practice in electoral matters places a strong emphasis on the transparency of the funding of political parties and electoral campaigns (CDL-AD(2002)023rev, paragraphs 108-109). Correspondingly, many recommendations by electoral experts and international observers aim to improve accountability and transparency of public and even private funding. In Ukraine, for example, it was pointed out that the law should require full disclosure, before and after elections, of sources, and amounts of financial contributions and the types and amounts of campaign expenditure, in order to provide timely and relevant campaign finance information to the public (Ukraine, CDL-AD(2006)002). Often reporting and enforcement mechanisms for campaign finances are considered to be too weak. With regard to the 2003 elections in Montenegro, for instance, there were strong demands for an independent, transparent and accountable office that should be charged with controlling and auditing campaign accounts and that should have the power to sanction violations.

101. While enhancing transparency is a primary aim of many reforms and reform proposals, it should be noted that there can be specific circumstances under which disclosure of contributions to parties may have unintended side-effects. In the context of prevailing political intolerance, full disclosure may inhibit contributions to opposition parties, and, at the same time may favour the pro-government forces.

Interestingly, it has been recommended that a provision of the Moldovan law that permits the central election commission to know types of financial supports that a candidate receives before election day be deleted. According to the Venice Commission, this could lead to potential donors being dissuaded and pressured in the Moldovan context (CDL-AD(2004)027, paragraphs 71-72). In order to strike a balance between the need for transparency and the protection of individual privacy only large donations are disclosed in a number of countries.

102. Furthermore, care should be taken to ensure that election financing provisions are not so complex that they require much expertise and manpower and impose a cumbersome burden on candidates and (smaller) parties (as in Azerbaijan: CDL-AD(2003)015, paragraph 18; CDL-AD(2004)016rev, paragraphs 15, 19; in the Chechen Republic: CDL(2003)021fin.

103. As far as public funding is concerned, the principle of equal opportunities is of utmost importance. In general, there is a consensus on this principle of equal opportunities. Since money is involved, however, there are sometimes political conflicts about the interpretation of the principle. It may be applied in either a strict sense (equal treatment) or in a proportional sense (according to the strength in parliament or among the electorate). Thus, it is quite a challenge to find a generally accepted formula in the respective country. Relevant rules should be included in the law.

Selected aspects of election campaigning

104. Campaigning for non-participation: In some cases (for example, the Russian Federation), there were legal and political controversies about the legality and legitimacy of campaigns for non-participation. Although a democratic election is based on the voters' participation, it should be clear that campaigning in favour of non-participation in the elections is consistent with the right to freedom of expression. This is particularly important in countries where a minimum voter participation is required for elections or referendums to be valid (see Chapter XIII).

105. "Unethical campaigning": While "dirty campaigns" are, of course, not desirable, it is quite problematic to prohibit them by law. Reference to ethical rules is usually not precise enough and could lead to abuse. The prohibition of "unethical campaigning", for instance, in the Moldovan election code was criticised for being too broad. It could be applied in a manner that would violate a person's right to free speech and expression (CDL-AD(2004)027, paragraph 80). The same refers, for instance, to the prohibition of "casting aspersion" on a candidate in the Ukraine. "In the context of a political campaign in which candidates make a conscious decision to enter the public sphere to compete for public office, a law for the protection of the reputation or rights of others cannot be applied to limit, diminish, or suppress a person's right to free political expression and speech" (CDL-AD(2006)002, paragraph 60). Though there are limits to the freedom of expression, as defined by international and constitutional law, it seems inappropriate to prohibit vaguely unethical campaigning or infringing the honour of a candidate in the electoral legislation. However, there may be some political and moral values in so-called codes of conduct for political contestants (and other election stakeholders).

106. Campaign activities of non-citizens and minors: In some countries, foreign nationals and/or minors are, by law, prohibited from engaging in campaign activities. This limitation might be contrary to international instruments and domestic constitutional law (see, for example, CDL-AD(2004)027, paragraphs 78, 80; CDL-AD(2006)002, paragraph 59).

VII. The role of the media in election campaigns

General remarks

107. Broadcasting and print media are generally the most important way that citizens find out about elections and electoral choices. Thus, the mass media play an important role in the pre-election period. This role is two-fold. Firstly, the media (should) inform the electorate by covering candidates, parties, and political issues relevant to elections in news and special information programmes. This might include even voter education tools. Secondly, they (should) grant candidates and parties direct access to the electorate by allowing political advertisement.

108. In a number of countries the provisions of the electoral law concerning media during election campaigns are rather brief. Detailed provisions on that subject, though, are often found in media laws or in rules given by election administration or media supervisory bodies. Thus, a comprehensive analysis of the media's role in elections should not only refer to electoral laws, but also to other relevant regulations. In some countries, like Estonia, the system is largely self-regulated, but appears to function well, according to international observers.

Coverage of election campaign

109. Free media are a *conditio sine qua non* for providing voters with diverse information concerning elections and referendums. Thus, it is important that freedom of the press is constitutionally and legally guaranteed and not undermined in practice. In most Council of Europe member states the media landscape is pluralistic, and the media act freely.

110. However, there are a few states in which the main mass media are under state control, and the media's ability to operate freely is seriously restricted. Due to administrative restrictions and obstructions, strong and independent media providing unbiased coverage of campaigns were lacking, for example, in Russian elections, according to OSCE/ODIHR and Council of Europe observers. This made it difficult for voters to make a well-informed choice. In Azerbaijan, the difficult situation of the media was further exacerbated by systematic harassment and intimidation of journalists during the past years (see, for example, CG/BUR (11) 95). It should be noted that the government has the obligation not only to respect the freedom of the press, but also to protect the media. The legal system should effectively protect journalists from censorship, intimidation or arbitrary arrest.

111. Even in countries where the media work without undue restrictions, an unbiased coverage of election campaigns is not automatically guaranteed. Democratic elections depend largely on the ability and the willingness of the media to work in an impartial and professional manner during election campaigns. The failure of the media to

provide impartial information about the election campaign and the candidates is one of the most frequent shortcomings arising during elections (CDL-AD(2002)023rev, paragraph 19). In a number of Council of Europe member states, contrary to the law and other regulations, the media provide neither quantitatively nor qualitatively for a balanced coverage of parties and candidates. In some instances, the degree of imbalance in broadcast coverage appears to be aimed at unduly influencing or even manipulating the voters' electoral decision.

Equal access to the media

112. In modern-day democracies, it is also important to ensure that the candidates or parties are accorded sufficiently balanced amounts of airtime and space for political advertising (CDL-AD(2003)023rev, I.2.3). Equal access to the public media should also be given to the supporters and opponents of the proposal in referendums (CDL-INF(2001)010; CDL-AD(2005)028). The electoral and media legislation in Europe generally provides for such conditions. However, in some cases the legal provisions are vague or even missing. For example, unlike in parliamentary elections, the legislative framework for referendums in Armenia does not explicitly ensure access of political parties to free campaign time in public media, according to the OSCE/ODIHR Needs Assessment Mission Report (2005).

113. Furthermore, the regulations concerning equal access to public media differ with regard to, among other things, the types of media and media access, the amounts of time and space, the format and the timing of broadcasting as well as the whole complex of financing political advertising. Due to the wide variety of provisions, it is difficult to discuss the subject on a general level. As for many details, however, there is room for country-specific discussion, for example with regard to criteria for allocating free time. In any case, it is necessary to draw a distinction between public and privately owned media, which is sometimes not done. Private media are usually less regulated.

114. As for the private media, one issue should be singled out here. While it is commonly agreed that parties and candidates should have direct access to state-owned media, there is, for example, some debate as to whether private media can also be obliged to include political advertisements of all electoral contestants. The code of good practice in electoral matters emphasises that, in conformity with freedom of expression, legal provision should be made to ensure that there is minimum access to privately owned audiovisual media with regard to the election campaign and to advertising for all participants in elections.¹¹⁰

115. Accordingly, for instance, the "Rules of Procedure for Electronic Media with National Concession in the Republic of Croatia during the Election Campaign" stipulated that national electronic media, both public and private, should provide contestants free time to present their platforms in the 2003 parliamentary elections. In addition, contestants had the right to use paid advertisements. In some other countries, private media are not obliged to offer free time, but only paid time to parties and candidates.

110. See I.2.3.c of the code of good practice in electoral matters.

116. There are also countries (like the United Kingdom) where the privately-owned media are not obliged to broadcast political advertisements at all. There might also be factual conditions which could justify denying political groups' participation in political campaigning, for example when their ideology opposes that of the media (see CDL-AD(2006)002, paragraph 63). However, if the media, voluntarily or not, provide candidates with free-of-charge time or paid time for political advertisement, they should do that with equal conditions for all contestants. And, of course, the right of private TV and radio stations to accord air time should not depend on the date of their establishment (as for the Chechen Republic, CDL(2003)021fin, comments on Article 52).

117. Irrespective of the details of regulation, in quite a substantial number of countries, public and private media were found to have breached the rules on equal access, according to observer reports. Moreover, even a fixed amount of free television and radio airtime for contestants might not be sufficient to address strongly unbalanced campaign coverage in regular news programmes. Therefore, media behaviour should be carefully monitored and, if breaches of the law occur, be adequately sanctioned.¹¹¹

Supervisory body

118. The establishment of a neutral supervisory body to monitor and regulate the media and to deal with complaints about media behaviour during the campaign can be an important step in implementing the law and promoting free, equal, and fair access to broadcasting. Such a body might be a media monitoring unit within the election administration or a parliamentary commission, a multi-party board, a commission of selected persons or a self-regulatory body of the media. Electoral experts from the OSCE/ODIHR and the Venice Commission have demanded the establishment of such an independent mass media supervision body on different occasions, not always successfully, as the Ukrainian case shows (CDL-AD(2006)002, paragraph 61).

119. However, in practice, the effectiveness of such bodies differs considerably between countries. Concerning the 2004 presidential elections in Serbia, for instance, the Republican Broadcasting Agency did not demonstrate an ability to regulate the media effectively, and a parliamentary supervisory board, as foreseen by law, had not been created at that time. The Parliament of Montenegro, in contrast, established a Board for Mass Media Supervising before recent and preceding elections to monitor compliance by state and private media with the rules on coverage of election campaigns. The board provides an accessible forum for addressing complaints, according to international observers. However, it had no authority to impose sanctions.

120. In several cases, electoral observers recommended defining sufficient and detailed provisions regarding the penalties for broadcasters in the case of misconduct. It is important that in such a case graduated penalties would be available for minor violations of electoral rules by the media. It does not seem to be appropriate, for

111. For a thorough analysis of the issue of media and elections, see CDL-AD(2005)032.

example, to suspend temporarily broadcasting activities due to minor violations, as it seems to be possible in some countries.

Publication of opinion polls

121. Since election-related opinion polls may have an effect on the vote itself, the publication and broadcasting coverage of opinion polls results should be regulated, providing, for example, that the source and other relevant information are included. Usually it is also forbidden to publish the results of opinion polls and projections immediately before and on election day (before the closure of the polling stations). If not already provided for, the introduction of such a deadline is generally welcomed (as for Georgia, see, CDL-AD(2005)005, paragraph 43). However, in some cases – like Moldova (10 days) and Ukraine (15 days) – the time restrictions are excessive. It was recommended that the period be reduced to a more reasonable duration there (CDL-AD(2004)027, paragraph 32; CDL-AD(2006)002, paragraph 68).

VII. Election observation

122. Electoral observation plays an important role in insuring transparency in elections, particularly in emerging and new democracies. The guarantee of domestic and international observers' rights in the electoral law has been repeatedly demanded in cases where they are missing. (Such provisions might also be adopted in many established west European democracies, like France or Spain, which do not have any regulation on non-partisan domestic and international observers at all.) Especially the rights of domestic non-partisan observers need to be enhanced in a number of cases. Even if observer rights are guaranteed in the law, sometimes there is a lack of clarity of rules, resulting in widely differing interpretations of the regulations.

123. According to the code of good practice in electoral matters, it is best to make the observation process as broad as possible, including party observers, non-partisan observers, and international (non-partisan) observers (CDL-AD(2002)023rev, paragraph 87). However, sometimes electoral commissions approve only a limited list of observers prior to the election, leading to an exclusion of other observers. In Ukraine, for example, the electoral law stipulates that a public organisation may only observe elections if it was registered at least two years prior to election day and if election observation is one of their charter tasks. As the 2005 amendments provide the first opportunity for non-partisan domestic observation, these rules would create undue obstacles for the 2006 elections (see CDL-AD(2006)002, paragraph 73).

124. In the 2003 and 2004 elections in Azerbaijan, to mention another example, domestic non-governmental organisations enjoying more than 30% of foreign funding were prohibited from observing the elections (see CDL(2003)054, paragraph 39; CDL-AD(2004)016rev, paragraph 22; CDL-AD(2005)029, paragraph 23). As a result, a number of domestic NGOs were barred from electoral observation. This ban was allegedly temporarily lifted for (only) the local 2004 elections, a last-minute decision that was generally unknown. The absence of domestic observers, along with the fact that the number of international observers was very low, clearly facilitated fraudulent behaviour (CG/BUR (11) 95). In contrast, a high level of domestic observation was welcomed, for example, by the Parliamentary Assembly's Ad hoc Committee for the

Observation for the 2002 parliamentary elections in Montenegro (Doc. 9621, Addendum IV).

125. Obviously, it might be helpful if observers are formally accredited and the accreditation criteria stipulated clearly. Cumbersome and complex registration procedures for observers should be avoided. Unfortunately, an overly bureaucratic approach to the accreditation of observers can be observed in a number of countries. In Ukraine, for instance, there are extremely detailed provisions for nominating observers, including the requirement of authenticated signatures, notarised copies of the organisation's statutes, etc. If formal accrediting for election day observation is not required, observers should have the necessary documents with them to identify themselves at the polling station.

126. Both national and international observers should be given the widest possible opportunity to observe the elections. Observation cannot be confined to election day itself, but must include the whole electoral process, from the registration of candidates (and, if necessary, voters) to the post-election period. However, the observers' right to attend all election commission meetings, observe the election activities at all times, and obtain copies of protocols, tabulations, minutes, and other documents at all levels is not always guaranteed by law or in practice.

127. While awareness that the pre-election period should be comprehensively observed is increasing, the post-election process is frequently neglected. International observers, for example, often depart from a country shortly after election day and long before the declaration of final results. However, it is important that some observer presence remains until the verification and announcement of the final results. Correspondingly, the electoral rules should specify that observers have a role and a right to observe the post-election period and have a right of access to electoral commissions until all the electoral tasks are completed (as for Azerbaijan, CDL-AD(2004)016rev; CDL-AD(2005)029).

IX. Election day – the polling stations

Location, size and layout of polling stations

128. Evidently, there should be enough polling stations throughout the country. They should be easy to find and accessible to all voters. They are preferably located in prominent and suitable locations (like schools or other public buildings). Many electoral observers highlight the paramount importance of the appropriateness and the accessibility of voting stations. In several countries there are still too many polling stations of unacceptable size in relation to the number of voters. Polling stations are sometimes over-crowded, according to observer reports. Furthermore, they do not always offer unimpeded access to elderly and disabled persons. In general, it can be said that more thought should be given to polling station selection and arrangements, particularly in some emerging and new democracies in the region.

129. The same refers to the polling station layout – that is, the positioning of tables for polling station procedures, barriers for voter queues, voting booths, ballot boxes, etc. – which should ensure the effective flow of voters through the polling station and the secrecy of the vote. It is very important that polling station members (as well as

the observers) have an effective overview of all staff and voter activity. For example, it is quite problematic if voting booths cannot be supervised by polling station members because they are completely out of sight or even placed in different rooms. Exactly this was criticised, for instance, by observers in the 2004 local elections in Azerbaijan.

Persons present in the polling station

130. The electoral laws or instructions given by electoral administration bodies should clarify which persons are authorised to be in the polling stations. Besides the voters and the polling station officials, authorised persons are usually representatives (agents, proxies) of candidates or political parties/alliances, domestic and, if invited, international observers, and the media. However, there is always the risk that unauthorised persons are present inside the polling station, too. In a number of elections, observers reported the presence of unauthorised persons due to unclear instructions given to electoral officials or failures to implement respective rules.

131. As has already been mentioned, the presence of electoral observers is of paramount importance for the integrity of the electoral process. While the free access of proxies and observers to polling stations is generally respected in almost all European countries (Belarus being an exception until recently), on several occasions proxies and observers had problems to enter the polling stations or move freely inside. The small size and the over-crowding of polling stations has often been used as a justification for restricting the movement of proxies and observers. It should be clear, however, that the inappropriateness of the polling station cannot be used as an excuse for restricting the observers' free movement. Instead, it is the obligation of the electoral authorities to select and prepare polling stations in such a manner that an effective observation is possible without hindering the polling station activities.

132. Furthermore, it is commonly agreed that police and security forces should not routinely be inside (or even outside) the polling station, as this may have an intimidating effect on voters, especially in countries with a rather poor democratic tradition or in (post-)conflict situations. As a rule, the police should only be allowed to enter the polling station when asked by the chairman of the respective electoral commission to secure order. Of course, they should only be called when the situation could otherwise get out of control. During 2004 municipal elections in Moldova, for example, the provision that the police may be called by the chairman of the polling station to restore legal order, was misinterpreted in such a way as to ensure police presence even when there was no unrest (see CDL-AD(2004)027, paragraph 94). In a number of cases, the electoral legislation or the instructions given by the central election commission might establish greater clarity in the regulations for the presence of police officers in polling stations and their role on election day. Police training on rights and obligations during the elections should, if necessary, be intensified.

X. Voter identification, and voting procedures

Voter identification

133. The process of voter identification is of paramount importance for the overall integrity of the electoral process. Before voting, voters are required to prove their

identity, usually through presentation of identity documents. It is important that the election law or instructions by the electoral administration body clearly specify what kind of identity document is valid for the purpose of voter identification. In some countries, the legal situation is complex and not very clear. International observers criticised, for example, the case of the 2003 parliamentary elections in Croatia. Special care should be taken with regard to groups that may lack necessary identity documents, like, for example, refugees, internally displaced persons or specific minority groups (for example, Roma). Especially in those countries where “multiple voting” is a well-known problem, not effectively verifying voters’ identities is considered to be a severe problem.

134. Following confirmation of the voter’s identity, the next step is usually to check whether the voter has the right to vote at that particular polling station. Such a check is normally done by the voter list. However, the problem of voters coming to polling stations without their names being on the voter register, either because they went to the wrong polling station or because the voter lists were in a sorry state, was reported in several countries. Given the poor quality of regular voter lists in some countries, supplementary lists might be necessary, but this is far from being ideal (see Chapter IV).

135. Alternatively, voters may cast a so-called conditional ballot (in other countries and world regions known as provisional or tendered ballots). In Kosovo’s 2004 elections, for example, voters who did not find their names on the voter list in the polling station in question were redirected to an alternative polling station, physically situated in the same polling centre, where the voters could cast their votes according to a special procedure that enabled a later check of their eligibility, that is, conditional ballot voting. This was a change from earlier elections in which such voters could be put on a supplementary list on-the-spot, with the provision of adequate proof of identity and residence. The reform’s purpose was to give additional safeguards, as supplementary on-the-spot lists were not without risk of fraud. Despite misgivings from the delegation about extensive use of conditional voting, the system seemed to work well (see CG/BUR (11) 74).

136. In any case, however, there is still an urgent need to improve regular voter lists in order to reduce voting by supplementary lists or conditional ballots (see Chapter IV).

Safeguards against “multiple voting”

137. Furthermore, polling station officials must check whether the voter has already voted in the election. Unfortunately, “multiple voting” is still a common problem in a number of states in the region. In principle, it can be avoided if the voters are properly identified and registered, and the voter lists are signed by the voter (or marked by the election officials) when voters receive the ballot papers. However, in practice, there are many instances in which voter lists were not signed by voters, or in which multiple similar signatures with the same handwriting were found on the voter lists (see, for example, CG/BUR (11) 95; CG/BUR (11) 122rev). The latter may indicate either “multiple voting” or “family voting”.

138. An additional method to diminish the risk of “multiple voting” is to mark the voter’s finger with indelible (visible or invisible) ink to indicate that he or she has voted. Though inking of voters’ finger is uncommon in western Europe, it is widely used in other regions of the world and repeatedly recommended for emerging and new democracies. As the Armenian case shows, however, such recommendations are not always implemented. Despite the fact that inking was recommended by Venice Commission and OSCE/ODIHR experts and was included in previous draft amendments to the election code, the recently adopted amendment does not provide for this procedure in Armenia (see CDL-AD(2003)021; CDL-AD(2005)019; CDL-AD(2004)049; CDL-AD(2005)027; CDL-EL(2006)020). In contrast, the inking of voters’ fingers was introduced, for example, shortly before the 2005 parliamentary elections in Azerbaijan, thus implementing a long-standing recommendation by international experts. If “inking” is provided for, however, it is necessary that the procedures of applying ink and checking ink marking are properly followed. This is not always the case, as, for instance, the 2005 municipal elections in “the former Yugoslav Republic of Macedonia” show, according to international observers.

Ballot papers

139. Following the determination that a voter is entitled to vote at the polling station, the ballot papers should, as a rule, be immediately issued to the voter. Of course, it is strictly forbidden by law that voters receive more ballot papers than they are entitled to have. Not acceptable is the practice, still observed in some regions, that extra ballot papers are given to citizens after showing identity documents of their non-present relatives. Totally unusual – and not recommendable for emerging and new democracies in Europe – is the Spanish model. There, political parties may produce their own ballot papers according to an approved model and can freely distribute them prior to and on election day.

140. It is common practice in Europe to use single integral ballot papers which contain the names of all parties and/or candidates and have to be marked by the voters. This is normally preferable to systems in which voters choose from different (coloured) party ballots and seal the ballot of their choice in an envelope before placing it in the ballot box. The latter system was used in Bulgaria until the 2005 amendments to the electoral law.

141. In order to safeguard the ballot, in many countries ballot papers bear an official stamp specific to the polling station and/or the signature of authorised polling station officials. Some electoral laws contain clear and detailed provisions on that subject. According to the code of good practice in electoral matters, the signing and stamping of ballot papers should not take place at the point at which the ballot is presented to the voter because, theoretically, the stamp or the signature might mark the ballot in such a way that the voter could be identified later during the count (CDL-AD(2002)023rev, paragraph 34). Even more important is that the ballots are not stamped by a member of the polling station commission after the voter has made his/her choice. In Moldova, for instance, this procedure was criticised for violating the secrecy of the vote, especially since it was possible to see the marked ballot during the stamping of the rear side of the ballot before entering it into the box (CDL-AD(2004)027, paragraph 25). In order to ensure the secrecy of the vote, the code of good practice in electoral matters clearly points out that the voter should collect his or

her ballot paper and no one else touch it from that point on (CDL-AD(2002)023rev, paragraph 35).

142. Still unusual for established west European democracies is the possibility of casting a negative vote (“against all”). The negative vote system stems from the communist tradition of non-competitive elections and is still used in a number of Council of Europe member states. It gives voters the possibility of expressing their annoyance with the candidates and parties/blocs on the ballot paper. In this way, however, political and party apathy in the population can be strengthened if the voters are able to simply reject candidates and parties instead of making the (often not easy) decision as to who is better (or best of the worst) candidate or party. As a matter of principle, voters should be encouraged to vote for their preferred candidate or party and thereby take the responsibility for the body that is being elected (see, for example, CDL-AD(2003)021, paragraph 31; CDL-AD(2005)027, paragraph 23; CDL-AD(2006)002rev, paragraph 78).

Voting procedures – irregularities

143. After being issued a ballot paper, voters usually are directed to a vacant voting booth in order to mark the ballot. Naturally, it is quite helpful if voters are familiarised with voting procedures. Voter education programmes and clear voting instructions in the polling stations are necessary, particularly if ballot structures and voting systems are complicated. Such programmes are common throughout Europe. In some cases, the ballot paper itself contains instructions for voters on how to fill out the ballot. According to the election law of the Chechen Republic, for example, such instructions are printed on the ballot in Russian and Chechen. Nevertheless, voters may make mistakes in filling out the ballot paper. In such cases, the election legislation or election commission instructions should provide for the possibility of voters who have made a mistake to void their ballot and be provided with a second ballot paper, as was recommended, for example, by observers to the 2005 municipal elections in “the former Yugoslav Republic of Macedonia”.

144. Although the voting processes were considered to be professionally and efficiently administered in most Council of Europe member states, there are still some irregularities observed in several cases. Multiple voting (see above) and open and family voting are among such irregularities. Democratic elections require that ballots be completed by the voters in secret. The secrecy of the vote is not only a fundamental right, but also an obligation. Thus, any voting outside the voting booths is usually forbidden. In practice, however, there are a number of examples in which open voting has been tolerated by electoral officials. In the Russian presidential elections of 2004 open voting was even actively encouraged by the respective election commission in a high proportion of the polling stations. However, it should be clear that polling station officials should be obliged to stop voters from deliberately showing their marked ballot.

145. In order to secure the voter’s secrecy, the voter should generally be alone in the voting booth. Only in special cases, for example, blind voters, are exceptions to be allowed. The conditions for giving assistance to voters should, if necessary, be formalised in the electoral law or electoral commission instructions. In any case, it is

unacceptable that “interpreters” accompany voters to the voting booth and indicate the name of the candidate for whom the voter wants to vote. This is what happened, for example, with illiterate Roma voters during the rigged mayoral election held in the town of Mukachevo (Ukraine) in 2004 (see CG/BUR (10) 125).

146. Though prohibited by law, in practice, so-called family voting or group voting is still tolerated in a number of countries. Electoral observers witnessed widespread family and group voting, to mention a few examples, in Azerbaijan, “the former Yugoslav Republic of Macedonia”, Moldova, Serbia and Montenegro and the Russian Federation. Even in countries like Bosnia and Herzegovina, where the polling conduct was assessed as “excellent” in recent municipal elections (2004), there were many cases of family members, and especially elderly married couples, voting together, according to international observers.

147. Obviously, family and group voting is by no means acceptable. It tends to deprive women, and sometimes young people, of their individual voting rights and as such amounts to a form of electoral fraud (see, for example, CG/BUR (11) 95). The Congress Recommendation 111 (2002) emphasised the paramount importance of women’s right to an individual, free, and secret vote and underlined that the problem of family voting is unacceptable from the standpoint of women’s fundamental rights (CG/BUR (11) 122 rev). It should be clear, however, that preventing effectively family and group voting requires a radical change of attitudes, which must be actively promoted by the authorities (CDL-AD(2002)023rev, paragraph 30).

148. Strictly forbidden by law, but rather difficult to prove, is vote buying, that is, the distribution of goods or money to people combined with the request to vote for a particular candidate or party. This is allegedly common practice in the pre-election period and on election day in some countries, according to international observers. In order to reduce the risk of vote buying on election day, it is important to guarantee the secrecy of the vote. It should also be ensured (and observed) that voters do not leave the polling station without depositing their ballots in the ballot boxes because some voters may try to take blank ballots outside the polling station and give or sell them to other people. As a rule, any unused ballot paper should remain at the polling station. However, in several cases, there were confirmed instances of stamped and signed ballots circulating outside polling stations on election day.

149. In a number of countries, transparent ballot boxes are used in order to prevent ballot box stuffing before or during the voting. In principle, this makes sense, as ballot box stuffing still remains a problem in singular cases. However, transparent ballot boxes may also raise concern with regard to the secrecy of the vote if ballot papers are not properly folded.

Special voting procedures

150. As mentioned, the lack of special voting procedures, that is, absentee voting, may disenfranchise a substantial part of the voters who are not able to vote in their respective polling station on election day (see above, Chapter IV). With absentee voting, voters are able to vote at a place other than the polling station at which they are included on the voter list. There is a wide variety of absentee voting procedures in operation throughout Europe. Some countries allow voting in advance of election day

(early voting), others do not. Regulations differ, furthermore, with regard to the place where absentee voting is conducted (special or regular polling stations; only in the voter's district or in any district; inside and/or outside the country) and the way it is done (by attending a polling station or by mail, proxies or mobile boxes).

151. Unfortunately, serious irregularities occur with absentee voting in several countries. Thus, where absentee voting procedures are provided for, special care must be taken to ensure the secrecy of the vote and to prevent fraud. International observers have recommended introducing more safeguards in a number of cases. In the 2005 presidential election in Croatia, for example, the loose control of out-of-country voting, especially in Bosnia and Herzegovina, was a matter of serious concern. Particular attention should also be paid to early voting by military personnel, prisoners, persons in custody, and displaced persons. This is not always conducted satisfactorily. Strict safeguards should also be applied to the use of mobile ballot boxes, including pre-election application for mobile voting and attendance of several members of the polling station commission from different political groupings. In a number of countries, the organisation of mobile voting was rated as weak.

152. Postal voting is permitted in several established democracies in western Europe, for example, Germany, Ireland, Spain, Switzerland and, for voters abroad, the Netherlands, Norway, and Sweden (CDL-AD(2004)012, Chapter III). It was also used, for example, in Bosnia and Herzegovina and Kosovo in order to ensure maximum inclusiveness of the election process (CG/BUR (11) 74). However, it should be allowed only if the postal service is secure and reliable. Each individual case must be assessed as to whether fraud and manipulation are likely to occur with postal voting.¹¹²

153. In any case, absentee voting procedures require additional, and in many cases improved, efforts to prevent fraud, special voter education programmes, and extra training for members of election commissions. Special attention should be paid to guaranteeing the secrecy of the vote when introducing new voting technologies.

XI. Vote count and the announcement of provisional results

Vote counting

154. According to the code of good practice in electoral matters, the votes should preferably be counted at the polling station immediately after poll close, rather than in special counting centres (CDL-AD (2002)023rev, paragraph 45). This has the advantage of providing quick results for the polling station. Further, counting away from the polling station may raise security problems, since the transport of ballot boxes and accompanying documents is always a security risk. However, in some elections (for example, Albania 2005) ballot boxes were transferred to counting centres where the votes were counted. In such cases, great care has to be taken to assure the transparency and security of the ballot box and ballot paper transport from the polling stations to the counting centres. It should be noted, however, that security

112. See I.3.2.2.1 of the explanatory report to the code of good practice in electoral matters.

problems can also arise on the polling station level (see, for example, CG/BUR (10) 125).

155. For the counting process to be open and transparent, it has to be carried out in the presence of observers and representatives of candidates, parties, and electoral alliances. (In some countries, like France and Spain, the vote count is completely open to the public.) Authorised persons should be able to witness all aspects of the count. However, in some cases electoral observers reported that the distance they were required to remain from the counting tables lessened their ability to observe the process effectively. There were also singular incidents in which observers or proxies were completely denied access to the place of counting. Contrarily, in other cases, non-authorised persons were present during the count. Both should be avoided.

156. It is of paramount importance that the vote count is conducted correctly. The correctness of the count depends on clear procedures, adequate staff training and their commitment to the process. The correctness of the results does not only refer to the vote share of each candidate, party or electoral alliance. It refers also to the accuracy of the whole electoral data, including, for instance, the number of votes cast (which is especially important in those countries where a minimum turnout is needed for elections or referendums to be valid). Great care must be taken to ensure that all figures are accurately recorded in election protocols.

157. Though the overall process of the vote counting is reasonably organised in most Council of Europe member states, there are still technical and political problems. International observers were concerned about serious irregularities of the vote counting in a number of countries in the past years. Among them are Albania, Armenia, Azerbaijan, “the former Yugoslav Republic of Macedonia”, and the Russian Federation. In some cases, the deficiencies appeared to result from poor administration rather than attempts at manipulation. This underlines the importance of polling station members being well trained. Furthermore, election manuals might be helpful as a reference guide in doubtful cases and should be provided for if still missing. Sometimes though there were also clear attempts at fraud, including ballot box stuffing and the falsification of results and protocols.

158. In several cases, the number of votes in the ballot boxes is higher than the number of voters indicated on the voter lists who were delivered ballot papers. This typical ballot stuffing situation is not easy to resolve. As recommended, for example, for Moldovan elections, there must be clear rules to deal with such a problem, for example, a recount, an entry in the protocol and even the possibility to declare the election invalid in the respective polling station. However, the situation international observers reported at one polling station in the 2003 parliamentary elections in Croatia, that the whole polling station results were annulled based on a single extra ballot seems exaggerated. There, the electoral law provided the mandatory annulment of results and conduct of repeat elections in polling stations where the number of ballots in the box exceeds in any way the number that should have been cast according to the records of the polling. Instead, the criteria for annulling the election should be based on whether extra ballots influence the voting results, that is, the allocation of mandates (see Chapter XIII).

159. Quite uncommon, and not acceptable by international standards, is the fact that in Spain all counted ballot papers are destroyed by polling station members immediately after the count. Thus, no recount is possible. OSCE/ODIHR observers to the Spanish elections recommended adopting legal provisions to safeguard the counted ballots at least until all appeal processes have been completed and the final results have been announced.

Election results protocols

160. Close attention has to be paid to ensure that results protocols are correctly completed and signed by all authorised persons, according to the law. It goes without saying that the protocols have to be signed after the count has finished, rather than beforehand, as is sometimes the case. Properly completing election protocols is no easy task. In order to ensure the safety and uniformity of the process, the laws of many emerging or new democracies in Europe provide for a quite complex procedure with many items on the protocols. Recent amendments to the electoral law of Ukraine, for example, have significantly increased the information required on the polling station protocols, thus making additional training of election commission members necessary. However, care should be taken not to make the procedure too complex. In some cases like, for example, Azerbaijan or the Russian Federation, international experts suggested considering the simplification of the (overly) complex provisions for filling out the protocols. In any case, enhancing training sessions on how to correctly fill out election result protocols was recommended.

161. In accordance with the code of good practice in electoral matters, distributing results protocols to observers and proxies and publicly posting the results outside the polling station are recommended. Until recently, not all electoral laws included respective provisions. Even if provided by law, observers and proxies sometimes have problems to obtain copies of the elections protocols in practice. In some elections, like the 2004 municipal elections in Bosnia and Herzegovina, international observers reported a widespread failure of polling station commissions to publicly post the results.

Transmission and announcement of provisional results

162. The transmission of the results by telephone, fax or electronically and the personal transfer of copies of election protocols to a higher level electoral commission are vital operations, the importance of which is often overlooked (see also CDL-AD(2002)023rev, paragraph 51). Although these processes deserve closer attention, they seldom attract the observers' interest. It should be noted, however, that the transmission of election results and the transfer of election documents from lower to higher electoral commissions can be a source of error and manipulation. Special safeguards should be considered (security codes for transmitting; accompanied and observed transport; re-check of results based on original copies of election protocols; etc.).

163. Provisional election results can be published in different ways. In some countries, the incoming results from lower level to higher electoral commission are publicly displayed as and when they come in. With this system of "piecemeal reporting", first results can be quickly provided, but the initial results may be different

from the final outcome, as the results come in from different areas. Alternatively, provisional results may not be announced until all results, or a representative portion of them, have been reported from lower level to higher level electoral commissions. In such cases, the first published provisional results are close to the final outcome. Under this system, however, taking too much time to publish the first provisional results might be problematic.

164. Thus, both the inaccuracy and the delay of provisional results might negatively affect the level of confidence in the elections and can meet with opposition. Depending on the electoral system and the political context, a balance has to be found between the need for an early announcement and the need for a reliable consolidation of provisional results. Not acceptable, however, are delays which are attributable to the fact that lower level electoral commissions do not work properly and fail to provide the central election commission with preliminary results, as was observed, for instance, in the 2005 parliamentary elections in Albania.

165. In any case, it is highly desirable that the central electoral commission publishes (reliable) provisional results not only as fast as possible, but also in as much detail as possible. Breaking down the results by polling station and making this tabulation available to the voters could considerably contribute to the transparency of elections. An important element of transparency is the voters' and party representatives' ability to check results protocols issued at polling station level in comparison with the results published by higher level electoral commissions. In the meantime, many central election commissions publish election results broken down by polling station results on their website, a practice which is generally welcomed.

XII. Election appeals and accountability for electoral violations

166. The management of complaints and appeals is an essential part of democratic elections. The code of good practice in electoral matters underlines that irregularities in the election process must be open to challenge before an appeal body. Generally speaking, complaints and appeals may result in the partial or full invalidation of election results. They also may aim to correct problems and decisions even before the elections, especially in connection with the right to vote and voter registration, the right to stand for elections, the validity of candidatures, compliance with the rules governing the electoral campaign, access to the media, and party funding (CDL-AD(2002)023rev, paragraph 92).

167. Complaint and appeals procedures must be open at least to each voter, candidate, and party. A reasonable quorum may, however, be imposed for appeals by voters on the results of election (CDL-AD(2002)023rev, paragraph 99). In order to comply with international standards, the complaint and appeals procedures should clearly provide the following rights for voters, candidates, and political parties: the rights to file a complaint, to present evidence in support of the complaint, to a public and fair hearing on the complaint, to impartial and transparent proceedings on the complaint, to an effective and speedy remedy, as well as to appeal an appellate court if a remedy is denied (see, for example, CDL-AD(2004)027, paragraph 111). In practice, however, these rights are not always respected. At times, even credible complaints are left without any legal redress.

168. Due to different legal and political traditions, a variety of procedures are used in the resolution of election disputes. In many established democracies in western Europe (like France, Germany, Italy, or the United Kingdom) election appeals are heard by ordinary administrative and judicial bodies operating under special procedures. In contrast, in most emerging and new democracies in central and eastern Europe (and in other regions of the world), the responsibility for deciding on election complaints and appeals is shared between independent electoral commissions and ordinary courts. In several countries, mostly outside Europe, special electoral courts are responsible for resolving election disputes. Although there is no single “best” method suitable for all countries, several issues are open to debate.

169. It is of paramount importance that appeal procedures should be clear, transparent, and easily understandable.¹¹³ However, in a number of cases, the procedures for dealing with complaints and appeals are not clearly defined and are very complicated. International observers’ reports repeatedly characterise complaint and appeals procedures as complex, ambiguous, and confusing, leading to an inconsistent interpretation and application of the electoral law. The rules and procedures are often not well understood by electoral subjects. Furthermore, members of relevant bodies are not always sufficiently trained on election complaints and appeals rules.

170. Especially with dual complaint and appeal procedures, which involve electoral commissions and ordinary courts, the electoral law should clearly regulate the respective powers and responsibilities so that a conflict of jurisdiction can be avoided. Neither the appellants nor the authorities should be able to choose the appeal body (see CDL-AD(2002)023rev, II.3.3.c. and paragraph 97). Thus, the possibility of concurrent complaints procedures is avoided. Furthermore, it should be clear which bodies act as first instance fact-finding bodies and which bodies act as appellate review bodies. Nevertheless, in a number of elections, inappropriate provisions have generated confusion over the jurisdiction of electoral commissions and courts to deal with election complaints and appeals. In the 2004 municipal elections in Bosnia and Herzegovina, for instance, it was quite unclear to which instance violations should be appealed. The OSCE/ODIHR observer report noted many cases of simultaneous filing of complaints there. Also, with regard, for example, to Moldova and Ukraine, the option of making challenges in different forums, possibly leading to “forum shopping” and inconsistency in decisions, was criticised (see CDL-AD(2004)027, CDL-AD(2006)002).

171. Moreover, the electoral law should provide that the appeals review by the election commissions follow a single hierarchical line, from lower to higher level commissions. With regard to the 2005 municipal elections in “the former Yugoslav Republic of Macedonia”, however, the state election commission did not have any role in the complaints and appeals process. The municipal electoral commissions (MECs) served as the first avenue for lodging complaints and appeals. Appeals against the MEC decisions were filed to the courts. In order to enhance the uniformity of decision making on appeals, it was recommended that the state election

113. See CDL-AD(2002)023rev, II.3.3.

commission be made the second instance for all complaints and appeals, even in local elections, before appealing to the court.

172. Appeal bodies should have the authority to annul elections.¹¹⁴ There is consensus that the annulment should not necessarily affect the entire election. Instead, partial invalidation should be possible if irregularities affect a small area only. The central criterion for (partly or completely) annulling elections is, or should be, the question of whether irregularities may have affected the outcome, that is, may have affected the allocation of mandates. In some countries (like Azerbaijan and Ukraine), however, the electoral law establishes a tolerance level for fraud (based on certain percentages of irregular votes), a practice which does not meet international standards (see, for example, CDL-AD(2005)029, paragraphs 42–43; CDL-AD(2006)002, paragraph 84).

173. As a matter of principle, electoral violations should be investigated and electoral violators should be held accountable by law. Thus, election (and party) legislation and/or framework legislation such as civil and penal codes should specify election-related offences (which can be committed by voters, candidates, parties, media, electoral and public officials, etc.) and the legal sanctions for such offences (for example, forfeiture of contributions or public funding, suspension or disqualification for a candidate, fines or imprisonment).

174. Though widespread electoral violations were acknowledged to have taken place, there was a general failure to enforce the law in a number of elections. In some countries, there is still a “culture of impunity” for election-related offences. Of particular concern is the fact that election officials are seldom held legally or administratively accountable for electoral violations. Electoral observers have frequently demanded that election officials found guilty of irregularities should be held accountable and not be reappointed for future elections. The relevant authorities’ general failure to take measures against election violations undermined the credibility of, and public confidence in, elections of several countries. Prompt and radical measures by the authorities are needed to curtail any tolerance for election-related offences as well as to fully restore the rule of law and confidence in the election process.

175. In sum, there is still a lot to do in order to improve election complaints and appeals procedures and to reverse the culture of impunity for election-related offences. The OSCE/ODIHR guidelines, “Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System” offer valuable clues to improvements.

XIII. Final results, and the electoral system

Announcement of final results

114. See II.3.3.e of the code of good practice in electoral matters and paragraph 101 of the explanatory report.

176. Final results cannot be announced until the electoral authorities have received the decisions on any complaints and appeals that might have a bearing on the outcome of the elections. Partial or full recounts of votes and annulments of elections might be required by complaints and court decisions. Some legislation calls for automatic recounts if the resulting differences of candidates/parties are within a certain margin. In some cases, the extremely long delay of the announcement of final results was a source of conflict. Moreover, it was criticised that international observers were not allowed to monitor the post-election activities at the central election commission in the crucial days before the announcement of the final results in some elections, for instance, in the 2003 presidential elections in Azerbaijan.

General remarks on the electoral system

177. The conversion of votes to political mandates depends largely upon the electoral system. The code of good practice in electoral matters is quite indifferent about the electoral system, as long as these systems are democratic in nature.¹¹⁵ With respect to democratic principles, thus, any electoral system may be chosen, regardless of whether it is a plurality or majority system, a proportional system or a combined system. It should be underlined that there is no such thing as the “best” electoral system that could be exported to all countries in the world.

178. Apart from the fact that the effects of one particular electoral system can be different from country to country, we must appreciate that electoral systems can pursue different, sometimes even antagonistic, political aims. One electoral system might concentrate more on a fair representation of the parties in parliament, while another one might aim to avoid a fragmentation of the party system and encourage the formation of a governing majority of one party in Parliament. One electoral system encourages a close relationship between voters and “their” constituency representatives, while another makes it easy for the parties to specifically introduce women, minorities or specialists into parliament by way of closed party lists. In some countries, complicated electoral systems are accepted in order to combine several political aims. In other countries, it is seen as a priority that the electoral system be not too difficult for the electorate and the administration to understand and operate. The appropriateness of an electoral system is determined according to whether it will do justice, bearing in mind the local conditions and problems. In particular, transparency of the elaboration of the list should be ensured. Thus, the electoral system and proposals to reform should be assessed in each individual case.¹¹⁶

Electoral systems and women’s representation

179. There is broad agreement that women’s representation should be increased in democratic institutions. The electoral system may affect the structure of opportunities for women’s representation. There is some empirical evidence, for example, that women are generally better represented under proportional representation list systems than, for example, in plurality or majority systems in single-member constituencies. Usually closed lists are preferable to open list voting systems. In the municipal

115. See CDL-AD(2002)023rev, II.4.

116. For a more detailed study on electoral systems, see CDL-AD(2004)003.

elections in Bosnia and Herzegovina, for instance, preferential voting reduced the percentage of women elected (see CG/CP (11) 13). Depending on the political culture, however, the effects of such provisions can differ in individual cases.

180. Furthermore, there might be gender quotas for the composition of or the candidacies for parliament. According to the code of good practice in electoral matters, legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered as contrary to the principle of equal suffrage (CDL-AD(2002)023rev, I.2.5). In a number of Council of Europe member states, such a minimum percentage of women on the list of candidates is required by law. In the 2004 municipal elections in Kosovo, for example, a third of the candidates had to be women, otherwise political entities would have been disqualified (see CG/BUR (11) 74). In Armenia, the required minimum percentage of women on a list of candidates has recently been increased from 5% to 15% (CDL-AD(2005)027, paragraph 16). In addition to a minimum gender balance, the election law may also stipulate a detailed order to ensure balance throughout the list (as for Bosnia and Herzegovina, see CG/CP (11) 13). A composition of the candidates' lists with alternating men and women might be considered. Even with elections in single-member constituencies, a minimal percentage of members of each gender among candidates might be possible (see CDL-EL(2005)031).

181. However, it should be clear that the electoral system itself is neither a necessary nor a sufficient condition to ensure women's representation. Additional measures are needed to encourage the increase in women's representation. Some measures have been included in the Council of Europe Parliamentary Assembly Recommendation 1676 (2004), adopted on 5 October 2004.

Electoral systems and minority representation

182. Sometimes there are also strong demands for a better representation of national minorities in parliament. In such cases, the electoral systems may facilitate the minority representation, for example, by the use of proportional representation systems in nationwide or in large multi-member constituencies (without a high threshold of representation). But also proportional representation list systems in small multi-member districts or even plurality/majority systems in single-member constituencies may ensure minority representation if the minorities are territorially concentrated. Also, the candidacy and voting form, among other things, may have an influence on minority representation. In some countries (for example, Poland and Germany), there are "threshold exemptions" for candidates lists or parties presenting national minorities (see CDL-AD(2005)009, paragraphs 35, 49).

183. Alternatively, or additionally, there are sometimes provisions for reserved seats that are separately allocated to national minorities (for example, in Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, Slovenia, Romania). However, the notion of setting aside seats reserved for minorities is debatable (CG/BUR (11) 74). While reserved seats might be a short-term mechanism to secure the representation of minorities in a transitional period, in the long term the interest of the minorities and the country itself might be better served by representation through the "ordinary" electoral system (see, for discussion, the Parliamentary Assembly's report on the 2002 parliamentary elections in Montenegro; Doc 9621, Addendum IV). Furthermore, with

reserved seats, there is always the problem of deciding which minorities should be entitled to have such seats and who legitimately represents the respective minority in national or local parliaments (see, for example, CDL-AD(2004)040).

Further issues to discuss in regard to the electoral system and referendums

184. Without entering into a discussion on the “best” electoral system, a few general issues related to the electoral systems in the region might be reconsidered, as they seem to be inconsistent with international standards. For example, in a number of countries the required vote share for candidates or parties to win the elections or gain political mandates is not calculated on the basis of the valid votes cast, but rather on the total votes cast, including invalid votes. This is quite uncommon and seems inappropriate. This problem is acute with regard to some absolute majority systems (two round systems) applied in the region. Usually, with this system the winning candidate is required to get the absolute majority of valid votes (50% plus 1) to win the mandate in the first round. However, in several Council of Europe member states, the electoral law provides for the majority of the total votes cast.

185. The same problem occurs in regard to the calculation of election thresholds in a few countries. It seems to be inappropriate that, for example, a 5% threshold for gaining parliamentary representation is calculated on the basis of the total votes cast or even the total number of voters, as in the 2004 parliamentary elections in Serbia. There, the electoral law stipulated that seats should be allocated to “candidates’ lists that have won at least 5 per cent of the voters who have voted”. In an official interpretation of this provision by the election commission, it was specified that the threshold is calculated on the number of voters who go to the polls by counting the number of signatures on the extract of the voter register in each polling station. In some other countries, like Georgia and Ukraine, the electoral law still provides for calculating the threshold on the basis of the votes cast. Even if such provisions are applied differently in practice, the electoral law should be changed to be consistent with international standards.

186. A quite specific problem was observed in the 2003 parliamentary elections in Serbia. The electoral legislation did not oblige political parties and electoral alliances to determine the order of candidates on their lists beforehand. Instead, parties and electoral alliances were allowed to arbitrarily choose which candidates from their lists become members of parliament after election day, thus limiting the transparency of the vote. It should be clear that under PR list systems, the order on the list usually determines the allocation of mandates if voters are obliged to vote for the party list and not, by preferential votes, for individual candidates on the list.

187. In a number of countries, the election code still contains a requirement for a minimum turnout for the election to be valid. Since turnout rates remain arbitrary without the existence of accurate voter registration, such a requirement might be problematic. Furthermore, the requirement might provoke attempts to fraudulently inflate turnout rates (see, for example, CDL-AD(2004)005, paragraph 49). It is a question of whether there should be a turnout requirement at all for elections. Such criteria may end up in a stalemate. In fact, several presidential elections held during 2002 and 2003 in Serbia failed because voter turnout fell below the requirement

minimum of 50%. For this reason, the 2004 amendments to the presidential election law abolished the voter turnout requirement.

188. In a number of states in which referendums are held on a national and/or sub-national level (for example, Bulgaria, Croatia, Italy, Malta, Lithuania, the Russian Federation, Slovenia, “the former Yugoslav Republic of Macedonia”), a minimum turnout (quorum of participation) is required for the referendum to be valid. Usually, a turnout of 50% of the registered voters is needed (the exception being Azerbaijan with 25%). However, as long as voter registration is not accurate, the appropriateness of turnout requirements might be questioned in some countries. Furthermore, there is a serious problem with a quorum of participation: “The opponents of the draft proposal submitted to referendum, as several examples have shown, appeal to people to abstain even if they are very much in the minority among the voters concerned by the issue” (CDL-AD(2005)034, paragraph 111). It should be noted, however, that the Venice Commission opposed proposals to abandon the quorum of participation for the planned referendum on independence in Montenegro at the present stage. It considers a minimum turnout of 50% of the registered voters as appropriate for a referendum on the change of state status (CDL-AD(2005)041, paragraphs 23-26).

189. Alternatively, or additionally, a quorum of approvals might be applied. Such a quorum makes the validity of the results dependent on the approval (or rejection) of a certain percentage of the electorate (which also makes accurate voter registration necessary) or the valid votes. Quorums of approval are often considered as preferable to requiring a minimum turnout (CDL-INF(2001)010, item II.O; CDL-AD(2005)034, paragraph 111). However, the required rates for approval differ considerably throughout Europe. As for the planned referendum on the independence in Montenegro, the approval rate was debated controversially (CDL-AD(2005)041, paragraphs 29-37).

Withdrawal of elected representatives

190. Another, common problem was visible in the 2003 parliamentary elections in Serbia. According to the Serbian electoral law, parties and coalitions were allowed to terminate mandates of representatives who lost party membership, regardless of whether it was voluntary or followed expulsion. Such a provision is not consistent with international standards nor, according to the Serbian Constitutional Court, the Serbian Constitution. Although political parties might try to recall members of parliaments after they have been elected and duly installed in office, it is commonly agreed that the individual members of parliament, and not the parties or alliances, should have legal ownership over the mandates. This is the essence of the principle of “free mandate” (which should only be lifted in exceptional, clearly specified cases).

191. Very exceptional, and problematic by democratic standards, is the fact that in the unique context of the post-war arrangements in Bosnia and Herzegovina, many elected officials have been removed in the years since the Peace Agreement by international authorities without due process protections. While such actions by international community representatives are in line with their mandates to promote peace in compliance with UN Security Council resolutions, they are at least irregular, and even undemocratic, by international election standards, according to the report on the 2004 municipal elections by the Congress of Local and Regional Authorities.

Surely, “(i)t is regrettable that the situation in BIH remains at a point where such measures are still deemed necessary” (CG/CP (11) 13, p. 4).

XIV. Conclusions

192. The electoral laws in most Council of Europe member states provide an adequate basis for democratic elections, and in most cases elections and referendums are conducted satisfactorily and in accordance with international standards. However, there are a number of countries in which the electoral legislation and the electoral administration face serious problems. In some cases recent elections even fell short of democratic standards.

193. Since the quality of the elections differs considerably among Council of Europe member states, it is difficult to make general statements on the recurrent problems of elections in Europe. This report’s considerations focus mainly on those countries in which the elections are still characterised by serious shortcomings according to international observers and the Venice Commission’s experts.

194. Although much progress has already been made, there is still room for improvement in regard to both the electoral legislation and administration in a number of countries. The most important areas for such improvements are the following:

- Enhancing the independence, professionalism, and legitimacy of the electoral administration: In a number of countries, efforts should be made to improve the electoral administration bodies’ independence vis-à-vis both the government and political party interests. Measures might also be taken to enhance the transparency and effectiveness of electoral management and to install confidence in the electoral administration process among political contestants and voters. Especially the commissions’ composition is an extremely controversial issue in emerging and new democracies.
- Ensuring fair and equal conditions for the political contestants in the pre-election period: Although fundamental political rights are openly violated in the forefront to elections in only a few states, the misuse of state positions and resources for election campaigns as well as unbalanced campaign coverage in the media are common shortcomings in a larger number of countries. Among the issues that have to be considered more thoroughly is the question of whether (and how far) not only public, but also private, media should be regulated during the election campaign. The funding of political parties and electoral campaigns is also being controversially debated.
- Improving voter registration and the voting procedures: The poor quality of the voters’ lists is a matter of serious concern in several countries. In several cases special care has to be taken to guarantee the integrity of the vote and to effectively prevent “multiple voting” or family and group voting. While special voting procedures (absentee voting, etc.) are considered appropriate to enhance elections’ inclusiveness, they require additional efforts to avoid malpractice and prevent fraud. In a few cases, there are still incidents of vote buying, ballot box stuffing, and falsification of election protocols.

- Paying more attention to the post-election period: Whereas awareness about the importance of the pre-election period for democratic elections is increasing, the post-election period is often neglected. However, there is still a lot to do in order to improve election complaints and appeals procedures and to reverse the culture of impunity for election-related offences. Not only electoral authorities, but also electoral observation missions, should pay more attention to the time period between the end of the count and the announcement of the final results.
- Protecting women's and minorities' rights: Despite some progress, further legal and practical measures can be taken to effectively protect the rights of women and national minorities and to improve their participation in the election process. Such measures may refer, for example, to the composition of election commissions, the translation of electoral documents, voter education programmes, special requirements for candidacies and party lists, the practice of voting, and the inclusiveness of the electoral system.

195. However, further electoral reforms should be careful not to add increasingly detailed provisions to the electoral law. While it may be necessary to fill loopholes in the law, a review of the election legislation should be undertaken with the aim to clarify and simplify complex provisions as well as to remove inconsistencies and unnecessary repetitions. Furthermore, serious effort should be made to harmonise electoral and election-related legislation.

196. Of course, it depends on the will and the commitment of the electoral authorities and other election stakeholders as to whether the electoral law is properly implemented and the elections conducted in accordance with international democratic standards. Here, much remains to be done in order to build a culture of respect for the law and democratic procedures in some countries. Intensified training for election officials at all levels and comprehensive voter education programmes can be helpful tools to improve the commitment to democratic elections.

197. In view of the insufficient implementation of and respect for the electoral law and the severe problems in regard to the election administration process in several countries, it might be appropriate to oblige the respective election authority to provide a post-election report following each election and referendum. Such a report might indicate problems in applying the law and in administering the elections or referendums and it might suggest measures to overcome these problems. It might also include an analysis of electoral violations and of measures taken against violators.

Appendix I: Opinions and recommendations of the Venice Commission

CDL(2003)021fin. Comments on the Draft Law of the Chechen Republic on Elections to the Parliament of the Chechen Republic as submitted to Referendum on 23 March 2003.

CDL(2003)054 Joint Final Assessment of the Electoral Code of the Republic of Azerbaijan by the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE and the European Commission for Democracy through Law (Venice Commission, Council of Europe).

CDL-AD(2002)023rev Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002).

CDL-AD(2003)021 Joint Recommendations on the Electoral Law and the Electoral Administration in Armenia by the Venice Commission and the OSCE/ODIHR.

CDL-AD(2004)001 Opinion on the Draft Law on Election of People's Deputies of Ukraine adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003).

CDL-AD(2004)002 Opinion on the Draft Law on Election of People's Deputies of Ukraine – Adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003).

CDL-AD(2004)005 Opinion on the Unified Election Code of Georgia as amended on 14 August 2003.

CDL-AD(2004)010 Opinion on the draft ACEEEEO Convention on Election Standards, Electoral Rights and Freedoms – Adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004).

CDL-AD(2004)016rev Joint Recommendations on the Electoral Law and the Electoral Administration in Azerbaijan by the Venice Commission and the OSCE/ODIHR adopted at the 8th meeting of the Council for Democratic Elections and endorsed by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004).

CDL-AD(2004)017 Joint Recommendations on the Electoral Law and the Electoral Administration in Albania by the Venice Commission and the OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 9th meeting (Venice, 17 June 2004) and endorsed by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004).

CDL-AD(2004)027 Joint Recommendations on the Electoral Law and the Electoral Administration in Moldova of the European Commission for Democracy through Law (Venice Commission, Council of Europe) and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE – Adopted by the Council for Democratic

Elections at its 9th meeting (Venice, 17 June 2004) and the Venice Commission at its 59th plenary session (Venice, 18-19 June 2004).

CDL-AD(2004)029 Opinion on the Referendum of 17 October 2004 in Belarus – Adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004).

CDL-AD(2004)040 Opinion on the Law for the Election of Local Public Administration Authorities in Romania – Adopted by the Council for Democratic Elections at its 11th meeting (Venice, 2 December 2004) and the Venice Commission at its 61st plenary session (Venice, 3-4 December 2004).

CDL-AD(2004)042 Opinion on the Draft Federal Law amending the Federal Law “On General Principles governing the Organisation of Legislative (Representative) and Executive State Authorities of Constituent Entities of the Russian Federation” and the Federal Law “On Fundamental Guarantees of Russian Federation Citizens’ Electoral Rights and Right to Participate in a Referendum” – Adopted by the Commission at its 61st Plenary session (Venice, 3-4 December 2004).

CDL-AD(2004)049 Joint Opinion on the Draft Amendments to the Electoral Code of Armenia by the Venice Commission and OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 10th meeting (Venice, 9 October 2004) and the Venice Commission at its 61st plenary session (Venice, 3-4 December 2004).

CDL-AD(2005)008 Preliminary Joint Opinion on the Revised Draft Amendments to the Electoral Code of Armenia by the Venice Commission and OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd plenary session (Venice, 11-12 March 2005).

CDL-AD(2005)018 Interim Opinion on proposed amendments to the Election Code of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR endorsed by the Council for Democratic Elections at its 13th meeting (Venice, 9 June 2005) and by the Venice Commission at its 63rd plenary session (Venice, 10-11 June 2005).

CDL-AD(2005)019 Interim Joint Opinion on the Draft Amendments to the Electoral Code of Armenia version of 19 April 2005 by the Venice Commission and OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 13th meeting (Venice, 9 June 2005) and the Venice Commission at its 63th plenary session (Venice, 10-11 June 2005).

CDL-AD(2005)027 Final Opinion on the Amendments to the Electoral Code of the Republic of Armenia by the Venice Commission and OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

CDL-AD(2005)028 Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums: Towards Good Practices in Europe – Adopted by the Council

for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th Plenary Session (Venice, 21-22 October 2005).

CDL-AD(2005)029 Final Opinion on the Amendments to the Election Code of the Republic of Azerbaijan by the Venice Commission and OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

CDL-AD(2005)041 Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with applicable International Standards – Adopted by the Venice Commission at its 65th Plenary Session (Venice, 16-17 December 2005).

CDL-AD(2005)042 Opinion on the Draft Organic Law on “Making Amendments and Additions into the Organic Law – Election Code of Georgia” – Adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005).

CDL-AD(2006)002 Opinion on the Law on Elections of People’s Deputies of Ukraine by the Venice Commission and OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005).

CDL-AD(2006)003 Joint Opinion on the Draft Law on the State Register of Voters of Ukraine by the Venice Commission and OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005).

Appendix II: Reports and other documents of the Venice Commission

CDL(2005)076 Law on Referendum of the Republic of Montenegro (Serbia and Montenegro) of 19 February 2001 (OSCE-ODIHR Unofficial translation).

CDL-AD(2004)003 Report on Electoral Systems – Overview of available solutions and selection criteria – Adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003).

CDL-AD(2004)012 Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe – Adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004).

CDL-AD(2004)047 Report on Media Monitoring during Election Observation Missions – Adopted by the Council for Democratic Elections at its 10th meeting (Venice, 9 October 2004) and the Venice Commission at its 61st plenary session (Venice, 3-4 December 2004).

CDL-AD(2005)009 Report on Electoral Rules and Affirmative Action for National Minorities' Participation in Decision-Making Process in European Countries – Adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd Plenary Session (Venice, 11-12 March 2005).

CDL-AD(2005)032 Guidelines on media analysis during election observation missions – Prepared in co-operation between the OSCE's Office for Democratic Institutions and Human Rights, the Council of Europe's Venice Commission and Directorate General of Human Rights, and the European Commission – Adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

CDL-AD(2005)034 Referendums in Europe – An Analysis of the Legal Rules in European States. Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

CDL-AD(2005)036 Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers and Pledge to Accompany the Code of Conduct for International Election Observer prepared by The United Nations Electoral Assistance Division (UNEAD), The National Democratic Institute for International Affairs (NDI), and The Carter Center (TCC) (7 July 2005) endorsed by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

CDL-AD(2005)043 Interpretative Declaration on the Stability of the Electoral Law – Adopted by the Council for Democratic Elections at its 15th meeting (Venice, 15 December 2005) and the Venice Commission at its 65th plenary session (Venice, 16-17 December 2005).

CDL-EL(2005)023rev Electoral Code of Moldova of 21 November 1997 – (Law No. 1381-XIII) including the amendments passed on 22 July and 4 November 2005.

CDL-EL(2005)024 Law of the Republic of Armenia on Amendments and Additions to the Electoral Code of the Republic of Armenia (Adopted on 17 May 2005 by the National Assembly of Armenia).

CDL-EL(2005)025 Law on electing the President of the Republic of Serbia (1990 as amended 1992, 2002, 2003, and February 2004).

CDL-EL(2005)026 Law on the elections of representatives of the Republic of Serbia (update May 2004).

CDL-EL(2005)031 Draft Declaration on Women’s Participation in Elections.

CDL-EL(2005)033 Election Code of Georgia.

CDL-EL(2005)050 3rd Conference of Global Electoral Organisations organised by ACEEEO (Association of Central and Eastern European Election Officials) on “Legal Remedies in the Electoral Processes – Standards of Electronic Voting” (Siofok, Hungary, 14-17 September 2005). Report “Legal remedies in the electoral processes in the Republic of Macedonia”.

CDL-EL (2005)053 Draft Law on the State Electoral Commission of the Republic of Croatia.

CDL-INF(2001)010 Guidelines for Constitutional Referendums at National Level: adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001).

Appendix III: Reports of the Congress of Local and Regional Authorities of the Council of Europe

CG (12) 16 Part II: Twelfth session (Strasbourg, 31 May-2 June 2005): Local and regional democracy in Netherlands. Explanatory memorandum.

CG/BUR (9) 17 Report on local elections in Georgia (2 June 2002). Document adopted by the CLRAE Bureau on 5 July 2002.

CG/BUR 10 (125) Report on the mayoral election held in the town of Mukachevo (Ukraine) on 18 April 2004. Document adopted by the Bureau of the Congress on 4 May 2004.

CG/BUR 11 (25) Report on the observation of local and regional elections in Romania (6 June 2004). Document adopted by the Bureau of the Congress on 12 July 2004.

CG/BUR (11) 40 Report on the regional elections in Adjara (Georgia) on 20 June 2004). Document adopted by the Bureau of the Congress on 17 September 2004.

CG/BUR (11) 74 Report on the elections of the Kosovo Assembly on 23 October 2004. Document adopted by the Bureau of the Congress on 10 December 2004.

CG/BUR (11) 75 Report on the referendum in “the former Yugoslav Republic of Macedonia” (7 November 2004). Document adopted by the Bureau of the Congress on 10 December 2004.

CG/BUR (11) 95 Report on local elections in Azerbaijan on 17 December 2004. Document adopted by the Bureau of the Congress on 23 February 2005.

CG/BUR (11) 122rev. Report on the observation of the local elections in “the former Yugoslav Republic of Macedonia” held on 13, 27 March and 10 April 2005. Document adopted by the Bureau of the Congress on 29 April 2005.

CG/CP (11) 13 Report on the municipal elections in Bosnia and Herzegovina (2 October 2004). Document adopted by the Standing Committee on 5 November 2004.

CG/CP (12) 13 Report on the local elections in Armenia observed on 25 September and 16 October 2005. Document adopted by the Standing Committee of the Congress on 9 November 2005.

Appendix IV: Documents of the Parliamentary Assembly of the Council of Europe

Parliamentary Assembly, Ad hoc Committee on the Observation of the Parliamentary Elections in the Republic of Moldova (22–26 February 2001), Doc. 9037, 23 April 2001.

Parliamentary Assembly, Report of the Ad hoc Committee for the Observation of the Parliamentary Elections in the Republic of Montenegro (20 October 2002), Doc. 9621, Addendum IV, 8 November 2002.

Parliamentary Assembly, Report of the Ad hoc Committee for the Observation of the Parliamentary Elections in Kosovo (26 October 2002), Doc. 9621, Addendum V, 8 November 2002.

Parliamentary Assembly, Report of the Ad hoc Committee for the Observation of the Parliamentary Elections in Armenia First Round (19 February 2003), Doc. 9742, 18 March 2003.

Parliamentary Assembly, Report of the Ad hoc Committee for the Observation of the Parliamentary Elections in Armenia (25 May 2003), Doc. 9836, 23 June 2003.

Parliamentary Assembly, Ad hoc Committee to Observe the Presidential Election in Azerbaijan (15 October 2003), Doc. 10003, 27 November 2003.

Parliamentary Assembly, Ad hoc Committee to Observe the Parliamentary Elections in Georgia (2 November 2003), Doc 10004, 27 November 2003.

Parliamentary Assembly, Report of the Ad hoc Committee to Observe the Parliamentary Elections in the Russian Federation (7 December 2003), Doc. 10032, 22 January 2004.

Parliamentary Assembly, Ad hoc Committee on the Observation of Parliamentary Elections in Serbia and Montenegro (28 December 2003), Doc. 10045, 26 January 2004.

Parliamentary Assembly, Ad hoc Committee to Observe the Extraordinary Presidential Elections in Georgia (4 January 2004), Doc. 10046, 26 January 2004.

Parliamentary Assembly, Report of the Ad hoc Committee to Observe the Presidential Election in the Russian Federation (14 March 2004), Doc. 10150, 26 April 2004.

Parliamentary Assembly, Ad hoc Committee to Observe the Repeat Parliamentary Elections in Georgia (28 March 2004), Doc. 10151, 26 April 2004.

Parliamentary Assembly, Observation of the presidential election in Ukraine (31 October 2004), Doc. 10369, 7 December 2004.

Parliamentary Assembly, Observation of the presidential election in Ukraine – Re-run second round of the election (26 December 2004), Doc. 10394, 13 January 2005.

Parliamentary Assembly, Observation of the parliamentary elections in Moldova (6 March 2005), Doc. 10480, 29 March 2005.

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OSCE/ODIHR: Republic of Moldova. Local elections 25 May and 8 June 2003. OSCE/ODIHR Election observation mission report, Warsaw, 14 August 2003.

OSCE/ODIHR: Republic of Azerbaijan. Presidential election, 15 October 2003. OSCE/ ODIHR election observation mission report, Warsaw, 12 November 2003.

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OSCE/ODIHR: The Slovak Republic. Presidential election 2004. OSCE/ODIHR election assessment report, Warsaw, 9 June 2004.

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Report on electoral systems

Overview of available solutions and selection criteria¹¹⁷

Introduction

1. In any political society whose size necessitates a certain “division of labour” between those who are governed and those who govern, the system of representation lies at the very heart of the democratic system. The electoral system is at the very core because its task is to translate the will of the sovereign people in designating their legitimate representatives who are responsible, on their behalf, for supervising executive and legislative acts and, while not having a binding mandate, make themselves accountable in the next set of elections.

2. Stated in such broad terms, these basic principles of democratic representation enjoy unanimous accord. But that accord will always show cracks or even completely disintegrate once it is attempted to define procedures for implementation. Is there just one “sovereign people” or several? Does the people’s ethno-cultural make-up (national minorities) or at least its variable presence on the territory (division into constituencies) require special consideration? Must representation be purely political in nature (party- or ideology-based) or must it take cultural and social factors (religion, sex, social category, etc.) into account? Must the need to arrive at a governing majority be catered for prior to the election, by tolerating “distortions” of plurality or majority voting, or afterwards, by allowing free representatives to form coalitions in the light of the challenges and the balance of power? Since parliamentary elections do not have the same scope from one political system to another (parliamentary, presidential or semi-presidential) and are not the sole elections held in most democracies (there being infra-national and sometimes supranational elections), should they not be regarded as part of a broader “electoral system”, in which several patterns of representation may coexist and, accordingly, several voting methods, with each offsetting the effects of the others? All these issues should be focal points for specialists and politicians.

3. However, somewhat paradoxically, the issue of electoral systems, which should attract the attention of all election analysts, generally interests only a handful of specialists, albeit very intensely, if not obsessively, so that they rapidly become fervent advocates or relentless adversaries of proportional representation, leaving the rest totally indifferent or perhaps somewhat contemptuous.

4. This paradox is doubtless largely due to the necessarily amoral, and for some people immoral, side of electoral systems which smacks of “political jiggery-pokery” and unfortunately detracts from the purity of the immortal principles of the sovereignty of the people, the expression of the general will and the legitimacy of the elective authorities. But politics, even democratic politics, is not just about principles. It is also the arena of combat between all those who dream of conquering legitimate power. Law and philosophy weigh in less heavily here than history and sociology,

117. Study No. 250/2003, adopted by the Venice Commission at its 57th plenary session (Venice, 12-13 December 2003) on the basis of comments by Mr Christophe Broquet (expert, France) and Mr Alain Lancelot (substitute member, France); CDL-AD(2004)003.

which prompts us to agree with Mosca that when we say that the electorate elects its representatives, we have got things out of perspective: “the truth is that the elected representatives do all they can to be elected by their electorate”. And the choice of a particular electoral system is clearly part of the armoury of any political undertaking wishing to “have its representatives elected” in order that the elected assembly should correspond most closely to its own expectations and interests.

5. It must be acknowledged that the variety of systems which specialists offer practitioners is such as to satisfy their wildest dreams. The variety of systems on offer is not only so varied as to be bewildering, it enables almost any result to be obtained, as if the electors’ vote was ultimately less important than the sophistication of those responsible for drawing up electoral legislation. Alain Lancelot has shown this (Commentary, No 73, 1996) using simulations carried out on the basis of the results of a French region and applying 41 differing electoral systems. Depending on the system chosen, with 57 seats to be filled, the moderate right obtained between 18 and 57 seats and the socialists between 4 and 30!

6. The fact that there is such a “predictive” factor for election results means that attention ought to be paid to it. This is the aim of this introductory report. The first part, written by Christophe Broquet, seeks to bring some order into the plethora of electoral systems available, and the second part, drawn up by Alain Lancelot, sets out to identify the main criteria for choosing between the various systems in the light of the few fundamental interests which each system takes into account in its own particular way.

Part One – Electoral systems on offer

7. There is no predetermined uniform classification of electoral systems. In general, electoral systems are divided into three main types: majority or plurality/first-past-the-post, proportional representation and hybrid. Yet within these major types, there is a virtually unlimited number of voting methods. Just to take plurality and majority systems, Frédéric Bon¹¹⁸ calculated that there were no fewer than 80 on the basis of general criteria alone (number of rounds, counting methods, types of constituency/electoral district). Consequently, in order to give the best possible account of the various different forms which electoral systems may take, this report will concentrate on identifying their main features.

8. The definition of electoral systems as “the set of procedural rules governing the expression of votes cast in a given election and their conversion into seats”,¹¹⁹ enables us in the first place to classify those features in two main categories: the first consists of all those factors relating to the organisation, the conduct and the process of the

118. Bon, Frédéric, *Les élections en France. Histoire et sociologie*, Paris, Seuil, 1978, pp. 88-90.

119. Garrone, Pierre, *L’élection populaire en Suisse. Etude des systèmes électoraux et de leur mise en œuvre sur le plan fédéral et dans les cantons*, Faculté de Droit de Genève, 1991, Basle – Frankfurt am Main, Helbing & Lichtenhahn, Collection genevoise, p. 11.

election; the second consists of the rules relating to the counting of votes and the distribution of seats.

9. The first category covers the rules governing how the elector exercises his or her right to vote. As far as this area is concerned, electoral systems have to provide a response to five questions, and several responses are possible:

- What electors do you want to call to the ballot box and hence what sort of suffrage is to be applied: direct universal suffrage, indirect universal suffrage or multi-tiered elections?
- What guiding principle should the vote be based upon? Is the intention to give preference to the majority principle, proportional representation or “hybrid” systems?
- How is the electorate to be divided up between constituencies/electoral districts?
- What method of voting is to be available to electors? Here we can distinguish between “categorical” voting methods (electors are asked to make an absolute choice by indicating their preference for one party or one political movement to the exclusion of all others) and “ordinal” ones (under which electors may qualify their choice).
- How many times must electors vote? This is a question of deciding how many rounds the vote should be spread over.

10. The second category of rules deals with how votes are counted and how seats are distributed. In this context, four factors have to be taken into consideration:

- the distribution of seats among constituencies/electoral districts;
- the choice of method for allocating seats between the various lists;
- the determination of thresholds for election and of bonuses designed to ensure that assemblies elected by proportional representation obtain government majorities; and
- the distribution of seats within lists.

1. Guiding principles and procedures governing the casting of votes

1.1. Direct and indirect universal suffrage, multi-tiered elections

11. Before considering the different features of the various electoral systems, it is necessary to define what type of suffrage is being sought to adopt. Three types of suffrage are available in democratic systems: direct universal suffrage, indirect universal suffrage and multi-tiered elections.

- direct universal suffrage: namely “where every citizen, except those who are excluded by law, can directly participate in the vote”¹²⁰ and elect his or her representatives without the involvement of intermediaries. This type of vote is employed in practically all democracies for the purposes of electing representatives to lower chambers.
- indirect universal suffrage: elected representatives are chosen by leading citizens, who may themselves be elected representatives. However, unlike electoral colleges, the leading citizens in question are not chosen for that purpose.
- Multi-tiered elections: representatives are chosen by electoral colleges chosen for that purpose. Nowadays this type of suffrage is no longer used to elect representatives to lower chambers, but the president of the United States is elected by a system of electoral colleges.

1.2. *Plurality/majority, proportional representation and “hybrid” systems*

12. Every electoral system works according to a guiding principle. It varies between two extremes: the plurality/majority systems and proportional representation. Hybrid or intermediate electoral systems fall between the two.

a. *The plurality and majority systems*

13. In the plurality and majority systems, the candidate or list of candidates that obtained the most votes in the conclusive round of voting is declared elected. This system is the one most consonant with European cultural traditions. It is also the only system possible where there is only one vacant seat per constituency. One of the effects of the first-past-the-post system is that it enables clear government majorities to be formed.

14. The plurality and majority systems may take many forms according to how one defines “the most votes”. There are three possibilities:

- Relative (or simple) majority (plurality system/first-past-the-post in English): the candidate obtaining the most votes in the conclusive round (the one on which the election depends) is declared to have been elected.
- Absolute majority: defined as half plus one of the votes cast.
- Qualified (or reinforced) majority: this corresponds to a greater majority than half plus one of the votes cast (majority equivalent to, for example, two thirds or three fifths of the votes cast). This type of majority is little used in elections based on direct universal suffrage.

15. Systems requiring a relative majority are more likely to result in a two-party race or at least a concentration of seats in the hands of the leading two parties,

120. *Interparliamentary Union*, “Electoral systems, a world-wide comparative study”. Geneva, 1993, p. 3.

whereas systems requiring an absolute majority (in the first round) are more open to multi-party coalitions.

b. Proportional representation

16. Proportional representation may be defined in terms of its objective, which is to seek to achieve “a proportional transposition of votes into mandates”.¹²¹ To date, three countries have opted for full proportional representation: Israel, the Netherlands and Paraguay.

17. Proportional representation is generally regarded as being the “fairest system” on the grounds that it tends towards a more faithful representation of the various political forces. However, the drawback with this system is that it favours a fragmentation of those seeking to be elected and consequently makes it more difficult to form stable majorities in the assemblies. This was shown by the Polish legislative elections of June 1993: 29 parties were represented in the lower house (460 members in all), but no party obtained more than 12.3% of the seats.

18. Lastly, it should be noted that a proportional representation system is not automatically synonymous with a list system. The proportional system may be effectively used, albeit very rarely, in combination with individual candidatures.

c. Hybrid systems

19. Hybrid or combined systems is the term generally used to describe systems presenting a combination of the first-past-the-post/majority and proportional systems (Italy, Japan), and also systems in which proportional representation is applied but the actual distribution of seats does not exactly match the proportions identified (Greece, Portugal, Spain). Their aim is to arrive at governmental majorities, secure optimum representation for the different political tendencies and preserve the link between the electorate and elected representatives, which is not always possible with the rigid application of first-past-the-post/majority or proportional systems. While such electoral systems were long regarded as “institutional anomalies symptomatic of an inferior political civilisation”,¹²² they are now being taken on board by more and more countries, particularly those having undergone sweeping political changes.

20. The main combinations proposed are the following:¹²³

- Application of plurality/majority system in some constituencies and proportional representation in the others.

121. Nohlen, Dieter (dir.), *Die Wahl der Parlament und anderer Staatsorgane: ein Handbuch. Band I: Europa*, Berlin, 1969, p. 33.

122. “La règle électorale”, speech by Thanassis Diamantopoulos at the 7th Congress of the Association française de science politique.

123. For the sake of clarity, we have also indicated those combinations which take account of variables connected with the distribution of seats.

- Use of the plurality/majority systems for candidates or lists having obtained the absolute (or qualified) majority and the distribution of the remaining seats on the basis of proportional representation.
- In a given constituency, application of the plurality/majority system for a predetermined number of seats and use of proportional representation for the remainder.
- Application either of the plurality/majority system or the proportional representation system depending on the size of the constituency.
- Use of proportional representation in order to offset the effects brought about by plurality/majority voting. Amongst those systems, mention may be made of “personalised representation” in Germany and the 1994 Electoral Act in Italy.

1.3. Constituencies/electoral districts

21. A third variable characterising electoral systems is “the units within which voting returns are translated into distributions of parliamentary seats”,¹²⁴ namely the constituency or electoral district. The constituency may have a social (“personal circles”)¹²⁵ or a territorial (territorial constituencies) basis.

a. Personal circles

22. Whereas elections organised on the basis of personal circles were frequently encountered in the past, few countries still apply such a breakdown of electors. Several criteria have been employed, such as social class, income, occupation or membership of an ethnic group. Some commentators have also proposed other distinctions: formation of opinion groups or age groups or the possibility for electors themselves to determine the personal circle to which they wish to belong.

b. Territorial constituencies

23. Territorial constituencies constitute the principal way of dividing up electors. They may be based on pre-existing administrative divisions (member states of federal states, provinces, departments) or have been created *ex nihilo* by the legislature for a given election (legislative and interregional constituencies in France, for example).

24. Territorial constituencies may be broken down into two types:

- Single-member constituencies (one seat in contention per constituency) are the most widespread today, in particular in the common-law countries. It is possible to make use of such constituencies for elections based on the plurality/majority principle. In contrast, they are inconceivable for elections based on pure proportional representation.

124. Rae, Douglas, *The Political Consequences of Electoral Laws*, New Haven (Conn.), Yale University Press, 1967, p. 19.

125. Garrone, Pierre, *L'élection populaire en Suisse. Etude des systèmes électoraux et de leur mise en œuvre sur le plan fédéral et dans les cantons*, p. 124.

- Multi-member constituencies (several seats in contention per constituency) are compatible both with plurality/majority systems and proportional representation. As far as plurality/majority voting is concerned, they are used in practice in Europe virtually only for local elections. Outside continental Europe, multi-member constituencies are frequently used for the election of national parliaments.

25. Determining the constituency boundaries is an important step in the electoral process, since they can give rise to marked “structural”¹²⁶ inequalities in representation. Three factors may be behind such disparities: demographic change, gerrymandering and “natural gerrymandering”.

- The varying demographic trends experienced by different territories make regular redrawing of constituency boundaries necessary. A failure to redraw constituencies has an adverse effect on the most demographically dynamic constituencies (urban areas) as compared with those constituencies with a low population growth (rural areas).
- Gerrymandering consists in skilfully redrawing constituencies on the basis of previous electoral results with a view to boosting the representation of the party in power. In such a case, two specific examples may arise: either the minority is voluntarily brought together in a few constituencies where it has a strong majority, whilst the majority has only a slight edge over it in a higher number of constituencies; or the redrawing is carried out in such a way that the minority cannot obtain a majority in any constituency. In order to avoid this, it is absolutely necessary that the redrawing of constituency boundaries be carried out by an independent and politically neutral body.
- Lastly, there is what Maurice Duverger terms as “natural gerrymandering”. Unlike gerrymandering proper, it does not result from a deliberately biased redrawing of boundaries. It may be that one category of the population is strongly concentrated in a small number of electoral constituencies, whilst another has a very small majority in a large number of constituencies.¹²⁷

c. The existence of several levels of constituencies/electoral districts

26. During an election, there may be several levels of constituencies coexisting alongside one another. The method of casting votes or the guiding principle may therefore vary depending on constituency size. For elections to the US House of Representatives, use has sometimes been made of single-member majority voting in small constituencies and a multi-member majority system in bigger constituencies. When the number of seats allocated to each state increased, these different

126. Duverger, Maurice, “Esquisse d’une théorie générale des inégalités de représentation” in Cotteret, Emeri, Lalumière, *Lois électorales et inégalités de représentation en France : 1936-1960*, p. VI.

127. For further rules on division into constituencies, see the code of good practice in electoral matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002) (CDL-AD (2002) 23 rev), I.2.2.

constituency levels were used to designate additional elected representatives and no fresh divisions of single-member constituencies were made. A number of constituencies may also be superimposed over each other. In hybrid systems, representatives are sometimes elected at two levels of constituencies. In Mexico, for example, of the 500 representatives making up the Chamber of Deputies, 300 are elected by a single-member, one-round first-past-the-post system and 200 by means of a system of regional proportional representation using closed lists in multi-member constituencies. In South Korea, half the deputies are appointed by single-member constituencies, with the other half being elected by proportional representation in a national constituency. The joint use of personal circles and territorial constituencies is also possible. It enables specific majorities to be represented, as in the case of the election of the House of Representatives in New Zealand (61 territorial constituencies, 6 constituencies reserved for the Maori minority and 53 seats for list MPs).

1.4. *Methods of voting*

27. When voting, each elector is called on to make a choice and one of the functions of the electoral system adopted is to govern how that choice is expressed. On the basis of the choice which the elector is asked to make, a distinction can be made between “categorical” voting methods which require the voter to make an absolute choice and “ordinal” voting methods under which the voter may qualify his or her choice. It should be made clear immediately that this analysis variable has no direct impact on the fragmentation of the party system and elected assemblies.¹²⁸

a. “Categorical” voting methods

28. “Categorical” voting methods oblige the voter to indicate a preference for a party, a list or a candidate to the exception of all others. They are used both in plurality/majority systems and in elections run under proportional representation. The following types exist.

29. Single-member ballot

This is where there is just one seat to be filled per constituency and each elector has only one vote. It is therefore applicable only in plurality/majority or hybrid systems.

30. The single non-transferable vote¹²⁹

Irrespective of the number of seats to be filled, each elector has only one vote. Candidates receiving the most votes are elected in proportion to the number of seats to be filled. This system is regarded as being the “fairest” of the non-proportional methods, since it enables a high degree of proportionality to be achieved between the votes cast and the number of seats.

31. The closed list

128. See Rae, Douglas, *The Political Consequences of Electoral Laws*, New Haven (Conn.), Yale University Press, 1967, pp. 126-129.

129. This system is in fact a particular type of limited vote (see paragraphs 41-43, below). It was proposed for the first time in 1793 by Condorcet for the election of juries.

Under this system the elector has to choose a list in its entirety. It is generally used in proportional representation systems; but it can also be used in plurality/majority and hybrid systems. Under proportional representation, candidates on closed lists are elected in the order in which they appear on the list.

b. “Ordinal” voting methods

32. “Ordinal” voting methods enable electors to express a more complex choice. For example, they can class parties by order of preference or choose between the lists or candidates presented to them. Whereas they are chiefly used in proportional representation systems, “ordinal” voting methods are sometimes used in plurality/majority systems. In all, there are nine types of “ordinal” voting systems:

33. *The preferential vote*

This type of vote is possible only for list-based proportional systems. It enables the elector to mark a preference for one or more candidates appearing on the competing lists. However, it is not a question of classifying candidates within lists but only a way of expressing a preference for a specific candidate or candidates.¹³⁰ The number of preferential votes which an elector may cast is limited.

34. “*Latoisage*”¹³¹ or “*negative vote*”¹³²

This is the converse of the preferential vote in that the elector can strike one or more candidates from the list, so as to show which candidate he or she does not wish to vote for. The “negative vote” differs from *panachage* (or vote-splitting) as the elector does not indicate the name(s) of other candidate(s) to replace the candidate(s) struck out.

35. *Cumulative vote*

Electors may give two or more votes to a given candidate. In practice therefore, each elector has a stock of votes equal to the number of seats to be filled which he or she can use to mark his or her preference. The leading candidates are elected in proportion to the number of seats to be filled. When used in the plurality/majority systems,¹³³ the cumulative vote tends to accentuate artificially the representation of significant minorities. The drawback with this system is that it may result in a defeat for the majority if there is an excessively large number of votes for one of its candidates. Lastly, it should be noted that the cumulative vote may be combined with the limited vote.

36. *Graduated or rank-ordered vote*

130. For the counting of preferential votes and their role in attributing seats, see paragraphs 78 ff. below.

131. Battelli, Maurice, “Les systèmes électoraux”, in *Les doctrines politiques et le système électoral en Suisse*, Geneva, 1950, p. 111.

132. Schepis, Giovanni, *I sistemi elettorali. Teoria-tecnica-legislazioni positive*, Empoli, 1955, p. 187.

133. Use of this voting method under proportional representation, although it occurs less frequently, is authorised in Switzerland and in Luxembourg.

This allows electors to classify candidates in order of preference. To this end, electors have a number of votes which they distribute between the various candidates for whom they wish to vote. Each position corresponds to a number of votes determined by the legislature. It is in this respect that this method differs from the cumulative vote. It should be added that the number of candidates for whom an elector may express a preference may be limited.

37. The aforementioned ordinal voting methods do not cater for the possibility of voting for candidates from several lists. That is possible, however, with the following variants, which are designed to enable voters to vote simultaneously for candidates from different lists.

38. *Panachage or vote-splitting*: the elector can modify a party list and include on it candidates from other lists. *Panachage* is rarely authorised in proportional representation systems.

39. *The blank list*

The elector draws up his or her list of candidates that he or she would like to see elected, but the candidates' names must already appear on other lists.

40. *The totally open list*

Electors draw up their lists themselves. They can include persons of their choice, whether or not they are standing for election. The persons obtaining the most votes are declared elected. Multi-member plurality/majority ballots belong in this category. The candidates stand independently and electors indicate the names of those they would like to see elected.

41. *The limited vote*

The elector has fewer votes than there are seats to be filled and he or she is not allowed to cast more than one vote for a given candidate. The candidates with the most votes are elected in proportion to the number of seats to be filled.

42. The use of the limited vote in a list-based proportional representation system is extremely rare. There is only one recorded occurrence: Finland between 1906 and 1935. In contrast it is used somewhat more frequently in plurality/majority systems. For example, it is used to elect the Spanish Senate.

43. This type of ballot has the advantage of securing a measure of representation for minorities in plurality/majority systems. The reason for this is that the party likely to obtain the majority has no interest in putting up a number of candidates equal to the number of seats to be filled because, if it did so, it would no longer be sure of obtaining a majority as a result of the dispersion of votes. Strategically, therefore, it is compelled to present a number of candidates equal to the number of votes available to each elector in order to optimise its chances of obtaining a majority. This therefore enables minority parties to be represented.

44. *Contingency vote system*

The elector has only one vote under this voting system. On his ballot paper, he is asked to classify all the candidates standing in his constituency in order of

preference. In the count, his vote will initially go to his or her first-preference candidate. Subsequently, that vote may be transferred to the second, third, etc. preferred candidate. The aim of this voting method is to enable electors to qualify their choice, while avoiding the wastage of votes granted to candidates who would not be elected or who already have a sufficient number of votes to be declared elected. In practice, this type of voting method has invariably been used where there are individual candidatures. However, it could theoretically be applied to list-based ballots provided that the lists are closed. It should also be noted that contingency vote systems are only used for single-round ballots.

45. In general, a distinction can be made between two types of contingency votes which depend on the guiding principle used for the election. Where the majority system is used, the contingency vote is known as the alternative vote. In the case of proportional representation, it is known as the single transferable vote. The difference between the two systems applies solely to the distribution of seats and has no effect on the manner in which the elector may vote.¹³⁴

1.5. Number of rounds of voting

46. A further variable affecting the make-up of electoral systems is the number of rounds of voting. Most ballots consist of one or two rounds but there are also systems with n rounds.

a. Single-round ballots

These can be used not only in proportional representation systems but also in first-past-the-post systems. This type of ballot generally leads to a bipolarisation of political life (Duverger's Law) or at least to the conclusion of pre-electoral agreements between large and small parties. Moreover, opting for a single-round ballot magnifies, virtually systematically, the dominance of the majority party in terms of votes and under-representation of other parties in the assemblies. This trend is even more marked where there is a multi-member ballot.

Moreover, where there is a single-member first-past-the-post system in which two parties are virtually of equal strength (two-party system), the distribution of seats approximates to a cubic relationship (Law of Cubic Proportions):¹³⁵

$$\frac{S1}{S2} = \left(\frac{V1}{V2} \right)^3$$

in which S1 = number of seats obtained by party 1, S2 = number of seats obtained by party 2

V1 = number of votes obtained by party 1, and V2 = number of votes obtained by party 2.

134. Consequently, the two systems (alternative vote and single transferable vote) will be analysed separately in the second section of this part.

135. Duverger, Maurice (dir.), "L'influence des systèmes électoraux sur la vie politique", *Cahier de la FNSP*, No. 16, Paris, 1950; M. G. Kendall, A. Stuart, "The law of cubic proportions in election results", *British Journal of Sociology*, 1, 1950, pp. 183-197.

It should be noted, however, that there are numerous exceptions to this rule. Two conditions have to be fulfilled in order for this law to apply: all the constituencies must be substantially equal and the difference between the votes cast for the majority and the minority has to be virtually identical in all constituencies. As a result, the Law of Cubic Proportions can provide only an imperfect indication as to the possible make-up of assemblies.

b. Two-round ballots

A second round of voting is habitually used where the leading candidate or list failed to obtain an absolute majority¹³⁶ in the first round and this type of majority is necessary in order to be declared elected in the first round. It is therefore closely linked to the majority system.

47. In order to guarantee a measure of representativeness of elected persons, a quorum is often necessary in order to validate an election in the first or, indeed, the second round. The quorum can take two forms: a minimum score in terms of the registered electorate for the leading candidate or the attainment of a certain participation rate. In France, for the election of members of the National Assembly, for example, a candidate cannot be declared elected in the first round unless he or she obtained the votes of at least 25% of the electors on the register. In Lithuania, a 40% participation rate is necessary in order to validate a parliamentary election. On top of this there are frequently conditions designed to restrict the number of candidates standing in the second round. Accordingly, thresholds may be introduced so as to authorise only candidates or lists which have obtained a minimum score to participate. In the case of parliamentary and regional elections in France, the respective thresholds are 12.5% of electors on the register and 10% of the votes cast. Participation in the second round may also be restricted to the two candidates or the two lists which came out on top in the first. This restriction to two candidates for the second round is still used in France, Portugal, Austria, Poland, Brazil and Peru for the election of the president of the republic and in Ukraine for the election of members of parliament. It was formerly used for the election of the Reichstag in Imperial Germany and in Austria and Italy before 1918.

48. In the second round of voting, only a relative majority is needed for a given candidate or list to be declared elected.

49. In single-member ballots, opting for a two-round election has the main effect of encouraging coalitions between parties: “The influence of the two-round, single-member ballot on the strategies of political parties may depend as much on alliances as on the number of votes obtained”.¹³⁷ The logic behind this type of ballot is that in the first round, each party should quantify the strength of the other parties. In the

136. There are, however, a few systems in which a relative majority is sufficient to be elected in the first round provided that a specific quorum has been obtained. This is the case in the canton of Geneva for elections to the Council of State or the Council of States, where a candidate can be declared elected on the basis of a relative majority provided that he or she has obtained one third of the votes cast.

137. Martin, Pierre, *Les systèmes électoraux et les modes de scrutin*, Montchrestien CLEFS Politique, 1997, p. 125.

second round, these parties support those candidates best placed to win and promote their ideas. More often than not, this support is expressed by withdrawal. In multi-member systems, support may take tangible form in the merging of lists (if authorised and subject to the reaching of certain applicable thresholds). It should be noted that where alliances are possible only in a single camp – owing in particular to the influence of extreme parties or parties excluded from alliances with government parties – the inequalities in terms of representation may prove to be particularly marked.

50. *Ballots consisting of n rounds*

Little used nowadays, this type of ballot can be contemplated only where there is a requirement for an absolute majority. The principle underlying this system is simple: since an absolute majority is required in each round, as many rounds of voting are held as are necessary in order to be able to declare one of the candidates or one of the lists elected; on the other hand, in a two-round system, an absolute majority is required only in the first round. Sometimes, the candidates who do the least well are excluded between the various rounds but this does not happen systematically. Votes consisting of n rounds appear to be largely incompatible with elections by secret ballot. For practical reasons, it is hard to contemplate calling all electors to the ballot box more than two or three times. Consequently, this system is used only for votes carried out by assemblies of limited size.

2. **Counting votes and distributing the seats**

2.1. *Distributing the seats among constituencies*

51. Before considering the allocation of seats among the various political formations, it is worth dwelling briefly on the distribution of seats among constituencies. The number of seats must be approximately proportional to the population of the constituency, either the number of nationals – including minors –, the number of electors, or the number of actual voters. In the last case, the seats can only be allocated on the evening of the election. There are, however, examples of “non-proportional” distribution. Examples are the US Senate and the Swiss Council of States, where all the states or cantons (except the former half-cantons) have two representatives, irrespective of their population size. In these cases, preference is given to equality between states or cantons over equality between citizens.

52. There are often other rules in addition to this requirement for proportionality. For example, there are five rules governing the election of the House of Representatives in the United States: 1) the number of representatives of a given state cannot decrease where the total number of representatives increases (Alabama paradox); 2) only the quota determines the number of seats to be allocated (rounded up or down to the nearest whole number); 3) all the states are subject to the same method of allocation; 4) the method used must not excessively favour small states over large states, and vice versa; 5) each state must receive at least one representative. Similarly when the 1958 electoral map was drawn up in France, the principle of proportionality was supplemented by the obligation to give each *département* at least two deputies.

53. It is for this reason that a number of methods have been drawn up in order to take account of all of these rules. The most frequently used ones are as follows:

- *The Jefferson method*
It is used today for the purposes of distributing seats under the name of the “highest average method” although it was originally invented for the purposes of allocating seats among constituencies.¹³⁸
- *The Webster method*
Corresponds to the Sainte-Laguë method.
- *The Hamilton method*
This is a method of the largest remainders. The snag with this mode of distribution is that it does not preclude the effects of the Alabama paradox.
- *The Huntington method*
The votes cast for each list are divided by the following series of numbers: $\sqrt{0 * 1}$, $\sqrt{1 * 2}$, $\sqrt{2 * 3}$, ..., $\sqrt{(n - 1) * n}$. The seats are allocated in the same way as in the divisor method.¹³⁹ This system yields arbitrarily at least one seat per constituency, as the first divisor is 0. This system has been adopted in the United States for the House of Representatives. It may be used for the purposes of allocating seats between parties, provided that the first division is not carried out. It is not possible to grant one seat to all the competing lists without exception.

2.2. Distributing the seats between political formations

54. Counting votes and distributing seats amongst the various candidates (or amongst political tendencies) depends essentially on the guiding principle adopted. We shall therefore distinguish between the plurality/majority systems and proportional representation.¹⁴⁰

a. Distribution of seats in plurality and majority systems

55. As mentioned earlier, where the guiding principle is majoritarian, the candidate or list which obtains the requisite majority¹⁴¹ in the conclusive round of voting obtains all the seats in a constituency. In single-round ballots, a relative majority is generally required. In systems where an absolute or qualified majority is required, there are generally two rounds of voting.

56. However, there is a single-round voting method which enables representatives to be elected by an absolute majority. This is the alternative vote, a system whose

138. The following three distribution methods will be described in more detail in the sequel to this report.

139. See paragraphs 60-61 below.

140. Hybrid systems merely take their method for the distribution of seats from those two systems. They will consequently not be considered separately in this part.

141. That majority may be relative, absolute or qualified depending on what the legislature has previously decided.

method for counting votes warrants our full attention, since it differs significantly from that of the other majority (or plurality) systems. In order to explain this method of counting votes, we shall draw a distinction between its application in single-member constituencies (only one seat to be filled) and multi-member constituencies (several seats to be filled).

i) *The single-member alternative vote*

The number of first preferences obtained by each of the candidates is counted.¹⁴² If one of them obtains an absolute majority, he or she is elected. If this is not the case, the candidate who obtained the fewest first preferences is eliminated. The second preferences recorded on the ballot papers of the candidate who has been eliminated are then considered. Those second preferences then become first preferences. The total number of first preferences is recalculated to see if one of the candidates obtains an absolute majority. If that is not the case, the candidate with the fewest votes is eliminated and his or her votes are carried forward as described above. The operation is repeated as many times as is necessary for one candidate to obtain the absolute majority of the votes cast.

The advantage of this manner of counting votes is that it avoids any candidate being elected by chance owing to the dispersion of his or her competitors. It also affords a higher degree of representativeness of the person elected in his constituency, since votes cast for small candidates will be taken into account by the carry-over system. This method of voting is used in Australia for elections to the House of Representatives and Assemblies of States, with the exception of Tasmania.

ii) *Multi-member alternative vote*

The first seat is allocated using the same method as in single-member constituencies. For the purposes of allocating the second seat, the second preferences on the ballot papers of the candidate elected become first preferences. The first preferences are then recalculated. The second elected representative is then appointed using the same procedure as in the case of the single-member alternative vote. All these operations are repeated until all the seats are filled.

57. The votes of electors who gave their first preference to an elected candidate are taken into consideration several times. This has the effect of enabling the majority party to obtain almost all the seats. Thus in 1925 the Labour Party obtained 45% of the votes cast in the election for the Australian Senate¹⁴³ yet obtained no seats.

58. With alternative votes, a vacancy in a seat usually results in the holding of a by-election.

b. *Distribution of seats in proportional representation systems*

142. See the manner of voting offered to electors as discussed in paragraph 44 above.

143. The multi-member alternative vote was used to elect the Australian Senate between 1919 and 1946.

59. The allocation of seats in proportional representation systems generally requires two operations to be carried out. The first allocation is effected using an electoral quota. However, use of such a quota does not enable all the seats to be allocated and all the votes cast to be dealt with. It is therefore necessary to have a second stage designed to convert the remaining votes into seats.

First stage of the distribution: the electoral quota or quotient

60. An electoral quota or electoral number is a divisor which helps determine the number of seats to be allocated to each of the lists. During this first stage of the distribution, a list therefore obtains a number of seats (S) equal to the quota – rounded up to the next whole number – of the total number of votes obtained by the list (V) divided by the number of votes needed in order to obtain a seat (the electoral quota, EQ).

$$S = \frac{V}{EQ}$$

61. There are two major classes of electoral quotas: “fixed” electoral quotas and “variable” electoral quotas.

i) The “fixed” electoral quota or uniform number: this is a number of votes predetermined by the legislature and identical for all constituencies. Use of this quota means that the number of seats in the assembly will not be determined until election night. The number of seats will, moreover, depend on the participation rate. Moreover, adoption of a “fixed” electoral quota tends to preclude the representation of a substantial number of votes, particularly those cast for small parties. Consequently, only the choice of a relatively low electoral quota, coupled with its application in large constituencies, is capable of curbing this tendency. This type of electoral quota has only been used in the Weimar Republic in Germany.

ii) The “variable” electoral quota is determined on election night. There are various forms:

- *The simple or Hare quota*: this quota is obtained by dividing, in each constituency, the total number of votes cast (V) by the number of seats to be filled (S).

$$\text{Hare quota} = \frac{V}{S}$$

In practice, the Hare quota corresponds to the maximum number of votes which a candidate requires in order to be elected. The drawback with this system therefore is that it means that only a small number of seats can be allocated during the first distribution. It is, moreover, for this reason that other quotas have been formulated so as to allow the maximum possible number of seats to be allocated during the first stage of distribution.

- *The Hagenbach-Bischoff quota*: this quota is obtained by dividing, in each constituency, the total number of votes cast (V) by the number of seats (S) plus one.

$$\text{Hagenbach-Bischoff quota} = \frac{V}{(S + 1)}$$

- *The Droop quota*: this quota is calculated in the same way as the Hagenbach-Bischoff quota, but one is added.

$$\text{Droop Quota} = \frac{V}{(S + 1)} + 1$$

- *The Imperiali quota*: this quota is calculated in the same way as the Hagenbach-Bischoff quota but two is added to the divisor instead of one.

$$\text{Imperiali Quota} = \frac{V}{(S + 2)}$$

- *The double quota*: this is, in a manner of speaking, a combination of the “fixed” electoral quota and the Hare quota. In the first instance, an initial electoral quota is fixed corresponding to the minimum number of votes needed to participate in the distribution of seats. A second electoral quota is then calculated which takes account only of the votes obtained by the lists which were successful in the first stage.

The double quota must not be confused with a qualifying threshold for participating in the distribution of seats. First, the quota is expressed as a number of votes. Second, it is identical regardless of the constituency. The double quota is used chiefly in Latin America (Bolivia, Costa Rica, Ecuador).¹⁴⁴

Second stage: distribution of the remaining seats and votes cast

62. It is rarely possible to distribute all the seats using quota methods. At the end of the first distribution, there very often remain unrepresented votes and seats to be allocated. Accordingly, a second distribution has to be carried out using one of the following methods:

- *The largest remainder method*: using this system, the list with the highest number of unrepresented votes at the end of the first distribution obtains one seat. The operation is repeated until all the seats unfilled at the end of the first distribution have been allocated.

This method is by far one of the most favourable for small lists, thereby tending to encourage a proliferation of small parties. Moreover, the lower the number of available seats, the more this system favours small political groupings. The largest remainder method also suffers from the disadvantage that it does not take account of the relative strengths of the parties, that is to say the number of seats

144. Interparliamentary Union, *Electoral systems, a world-wide comparative study*. Geneva, 1993, p. 9.

obtained during the first distribution. On top of this, a number of paradoxes, such as the “Alabama paradox”,¹⁴⁵ are associated with this method.

- *The strongest lists method*: this system provides for those seats which remained unfilled at the end of the first distribution to be allocated to the lists or list obtaining the greatest number of votes cast. This system markedly favours the large parties. This method, which was only infrequently used in the past, is no longer used today.
- *The highest average method*: this is the system in most widespread use internationally. Under this method, the number of votes cast for each of the lists (V1) is divided by the number of seats which the list in question obtained during the first distribution (S1), to which a fictitious seat is added. The list which has the highest average per seat is then allocated the seat at stake. This operation is repeated as many times as necessary until all the vacant seats have been allocated. During the first distribution of seats, either the simple quota or the Hagenbach-Bischoff quota may be used.

$$\text{Average votes per seat} = \frac{V1}{(S1 + 1 \text{ fictitious seat})}$$

This system tends to put large parties at an advantage and to exclude small parties from the distribution of seats. It also guarantees that coalitions will obtain at least as many seats as they would have obtained if the parties belonging to them had stood as single parties.

Lastly, mention should be made of a variant of the highest average method, the Balinski-Young method. First, an initial distribution of seats is carried out using the Hare quota. Next, the highest average method is used as described above with one variant. The division is carried out once only and the seats go to the lists with the highest average. Consequently, no party obtains more than one of the remaining seats; this has the effect of reducing the over-representation of large parties.

63. Lastly, it should be noted that the distribution of seats remaining vacant may be carried out at the level of the basic constituency, at the level of groups of constituencies or even at the national level. The choice of a second level of constituencies for the purposes of allocating the remaining seats makes for greater proportionality between seats and votes cast, since as D. W. Rae¹⁴⁶ has observed, that factor depends on constituency size.

Allocating the seats in one operation: the divisor methods

64. Some allocation methods have, however, been introduced so as to enable all the seats to be allocated in a single operation. These methods are all based on the following general principle: the number of votes cast in favour of each of the lists is divided by sequential numbers. The seats are allocated to the lists which obtain the

145. For an explanation of this paradox, see paragraph 52 above.

146. Rae, Douglas, *The political consequences of electoral laws*, pp. 114 ff.

highest quotas during this operation. We have set out below the main divisor methods which have been applied in practice.

- *The D'Hondt method*: the votes obtained by each list are divided by a sequence of whole numbers: 1, 2, 3, 4, 5... The seats are allocated to the lists obtaining the highest quotas. This method tends to favour the majority party.
- *The Sainte-Laguë method*: the votes obtained by each list are divided by a sequence of odd numbers: 1, 3, 5, 7... The seats are distributed among the lists which obtain the highest averages. The Sainte-Laguë method is distinctly more favourable to small parties than the D'Hondt method.
- *The modified Sainte-Laguë method*: this differs from the Sainte-Laguë method only in that the first divisor is replaced by 1.4. This method is more favourable to small parties than the D'Hondt method, but does not overly advantage them. It also affords fairer representation for medium-sized parties. It is used today in Sweden, in Norway and also in Denmark for small constituencies.
- *The so-called "Danish" method*: the number of votes obtained by each list is divided by the following numbers: 1, 4, 7, 10... This system is extremely favourable for small parties. In Denmark, this method is used to distribute, among small constituencies, seats attributed to a party at the level of a group of constituencies.

c. *Some specific methods for counting votes and distributing seats*

65. In the following section, we propose to examine two specific methods for accounting for votes (the single transferable vote and the "apparentement" – or alliance – system) before discussing the distribution of seats in "personalised proportional representation systems".

i) *The single transferable vote*

66. The contingency vote applied in the context of a proportional representation ballot is known as the single transferable vote. It is used principally in Ireland and in Australia for elections to the Upper House. As in the case of the alternative vote, vote counting is a relatively complex operation. This is how it works. First, a count is made of the number of first preferences obtained by the competing candidates. Any candidate obtaining the electoral quota¹⁴⁷ is declared elected. If no candidate satisfies this condition, the one who obtained the fewest first preferences is eliminated. The second preferences on the ballot papers are then taken into consideration. A new total is worked out to see whether one or more candidates has obtained the electoral quota. Once a candidate has been elected, his or her name is deleted from all the ballot papers.

147. In both Ireland and Australia, the Droop electoral quota is used. It is possible, however, to opt for another quota.

67. The question which then arises is how to carry forward votes which have not been used directly to elect a candidate. There are two possible solutions. The first is to transfer the votes appearing on the ballot papers which were sorted after the electoral quota was reached. The final outcome of the election will therefore depend on the order in which the ballot papers were sorted. The second solution, adopted in Ireland, eliminates this random factor. All the preferences marked on the ballot papers on which the elected candidate received first preference are counted. These are then weighted by a quota equal to the surplus votes of the elected candidate divided by the number of transferable votes. Unlike the alternative vote in multi-member constituencies, the votes are therefore taken into account only once. The preferences weighted as described above are added to the first preferences of the respective candidates. If one of the candidates attains the electoral quota, he or she is elected. If not, the worst-placed candidate is eliminated and the preferences indicated on the ballot papers where that candidate had a first preference vote go up one place in the hierarchy. A candidate is elected when he or she attains the electoral quota. When at least one of the competing candidates is declared elected, the operation is repeated from the beginning by striking out the name of the candidate elected and then taking account of all the preferences on the ballot papers on which the elected candidate had a first preference vote and so on.

68. Should a seat fall vacant, the procedure for designating a new elected representative varies according to the country or assembly concerned. In the Irish House of Representatives for example, a by-election is held, as in the Indian Council of States and the Maltese House of Representatives. In the Australian Senate, on the other hand, the incumbent is replaced by a member of the same party elected by the chambers of the state or territory concerned. For vacant seats in the Irish Senate, the prime minister may appoint a replacement in some cases.

ii) *The “apparentement” or alliance system*

69. The “apparentement” or alliance system can be summarised as follows: “Several lists of different parties which are entirely separate, each having its own programmes may declare by mutual agreement that they intend to link up, in other words this means that when the seats are allocated, the votes which they have obtained separately must be added together”.¹⁴⁸ It is used today in Finland, the Netherlands, Spain and, above all, Switzerland.

70. “Apparentement” declarations generally have to be made before the election, but it is possibly conceivable to have a system in which such declarations are not disclosed until after the election. In systems involving two rounds of voting, “apparentements” may be authorised only for the second round so as to allow electors to express their choices. “Apparentement” is often subject to conditions. For example, in France, under the 1951 Electoral Act for the election of the National Assembly, “apparentement” was permitted only between lists of national parties or groupings, that is to say parties or groupings putting forward candidates in at least 30 *départements*. It should be added that “apparentements” are sometimes operative only

148. Cotteret, Emeri, Lalumiere, *Lois électorales et inégalités de représentation en France: 1936-1960*, p. 298.

for the allocation of remainders in the basic constituency or in groups of constituencies.

71. In comparison with union lists, the “*apparentement*” system enables a more proportional distribution to be achieved between the various linked parties. It is more favourable than the higher average system to small parties. This system benefits only parties which are able to form alliances.

iii) “*Personalised proportional representation*”

72. The idea behind “personalised proportional representation” is to offset the effects of first-past-the-post (or majority) voting during the distribution of seats. Its best-known application is that of the election of the *Bundestag* in Germany, which we shall use as a guide in explaining this system. It has, however, been used in Estonia since 1992 and in New Zealand since the 1993 referendum.

73. Under this system, each elector has two votes. The first vote is designed to elect half the representatives of the *Bundestag* in single-member constituencies. The second enables the total number of mandates attributed to the various parties to be determined on a proportional basis at national level. Those mandates are then distributed between the various *Länder* in proportion to the votes obtained by the lists in those *Länder*. The number of seats attributed as a result of the first votes is subtracted from the total number of seats allocated to each party in the *Länder*. If a party obtains more seats with the first votes than it obtains in the proportional vote, the seats gained in this way are kept. As can be seen, such a system may resemble a preferential vote within a party. The advantage of this method of distribution is that it enables members to be designated directly while ensuring proportional representation in the assemblies. However, there are risks of manipulation as Pierre Martin points out: “in this two-vote system, there is nothing to prevent a party from not putting forward official candidates in the single member ballot and allowing them to stand as independents (...) In that case, it could, in practice, obtain a substantially higher number of direct seats while benefiting to the maximum from the offsetting mechanism”.¹⁴⁹

d. *Thresholds and bonuses*

74. In order to ensure that there are stable majorities in assemblies elected by proportional representation, the legislature very often has recourse to thresholds entitling access to the distribution of seats and to bonuses for the most successful list.

75. Thresholds have “fixed or variable limits, established using the election result, which determine whether a given list or a given candidate takes part in the distribution of seats”.¹⁵⁰ They are in some way the equivalent of the thresholds used in the first round election in the majority system. This restriction on access to distribution generally applies to the award of seats in basic constituencies, but it may also be

149. Martin, Pierre, *Les systèmes électoraux et les modes de scrutins*, Montchrestien, CLEFS Politique, 1997, p. 87.

150. Polenda, Tomas, “Wahlrechtsgrundsätze und kantonale Parlamentswahlen”, *Zürcher Studien zum öffentlichen Recht* 79, Thesis Zurich, p.110, quoted in Garrone, Pierre, *L'élection populaire en Suisse. Etude des systèmes électoraux et de leur mise en œuvre sur le plan fédéral et dans les cantons*, p. 231.

applied solely to groups of constituencies or to the distribution of remainders. For example, in Austria, only those lists obtaining the simple quota in the basic constituencies are admitted to the distribution of seats at the level of groups of constituencies. In Greece, there are three rounds of distribution of seats. During the first two rounds the seats are distributed between all parties according to the votes they have acquired, excluding those parties which have not reached the threshold of 3% of the votes. In the third round the remaining seats are usually allocated to the party having acquired the majority of the votes. In any case it has to be made certain that the representation of all parties is equal to at least 70% of their proportional share of votes.

76. The thresholds, which are generally expressed as a percentage of registered electors or of voters, are a matter for the discretion of the legislature. However, the role played by the thresholds differs depending on how high they have been set and on the party system existing in each country. The choice of a low threshold eliminates only very small parties, which makes it more difficult to build stable majorities in assemblies. Where there is strong fragmentation of the party system, a high threshold results in the exclusion from representation of a substantial proportion of votes.

Examples of thresholds adopted for the election of lower houses

- Netherlands: obtaining 0.67% of the votes cast at national level.
- Israel: obtaining 1% of the votes cast at national level.
- Bulgaria: obtaining 4% of the votes cast at national level.
- Liechtenstein: obtaining 8% of the votes cast at national level.
- Denmark: obtaining 2% of the votes cast at national level or obtaining a specific number of votes in two of the three geographical areas of the country.
- Germany: obtaining 5% of the votes cast at national level or obtaining three direct mandates.
- Sweden: obtaining 4% of the votes cast at national level or 12% of the votes cast in the basic constituency in which the seat is awarded.

77. Bonuses are mandates granted to the most successful list before the distribution of seats strictly speaking is carried out. They are principally used for local elections. In the French regional elections, a bonus equivalent to one quarter of the seats is given to the list which ends up in the lead in the conclusive round. For elections to the Corsican Assembly, three bonus seats are granted. Likewise, half the seats are granted directly to the leading list in the case of municipal elections in municipalities of more than 3,500 inhabitants. Bonuses can sometimes exist in other forms. For instance, the 1953 Italian Act provided that linked lists obtaining more than 50% of the votes were to receive 64.5% of the seats. Consequently, these bonuses enable government majorities to be conferred on assemblies and hence avoid the necessity of bargaining with extremely minority parties.

2.3. Allocation of seats within lists

78. Once the seats have been distributed among the political parties, the question arises as to how to distribute them within the lists in the case of elections under a system of proportional representation. That distribution can be done in many ways,

but we will confine ourselves here essentially to presenting procedures which have already been used.

a. Modes of expression and distribution

79. In the simplest case, that of closed lists, candidates are elected in the order in which they appear on the lists. In this case, the political parties have very substantial power, since they determine the order in which candidates appear. In the case of preferential, cumulated and rank-ordered voting on the other side, the electors determine the position of each candidate on the list which they compose.

80. In practice, preferential votes do not always influence the distribution of mandates within lists. Although the electors can indicate their preferences, a number of conditions have to be fulfilled almost systematically before they can be taken into account. In Belgium, for example, in the case of both chambers, the votes of electors who have not cast a preferential vote are automatically considered to be preferential votes in favour of the candidates at the top of the lists. Once a sufficient number of votes has been obtained in order to declare the candidate at the head of the list elected, non-preferential votes are counted as being votes in favour of the candidate in second place and so on. For the election of the Austrian National Council, there is a threshold for taking preferential votes into account. The threshold is fixed at a level equivalent to the number of voters in the basic constituency divided by the number of seats to be filled. This generally results in a *de facto* closed list situation.

81. Lastly, the single transferable vote, *panachage*, and open or blank lists, when applied to the letter, inherently incorporate a system for allocating seats within lists.

b. Subdivided constituencies

82. Some electoral systems provide for subdivided constituencies. These are subdivisions of the constituencies used as the basis for the election and in which the candidates stand. When the seats are distributed, the mandates are attributed between the various lists at the level of the basic constituencies.¹⁵¹ Once this operation has been carried out, the seats obtained by each list are then distributed among the various subdivided constituencies, generally in proportion to the votes obtained in each of those constituencies. Within those constituencies themselves, candidates are then elected in the order in which they appear on the lists.

83. The total number of representatives in subdivided constituencies is not known in advance. It depends on the level of participation. The higher the turnout in a subdivided constituency, the higher its number of seats will be. In addition, the most populated subdivided constituencies are placed at an advantage. They generally obtain more seats than less populated constituencies simply as a result of the pro rata distribution of the votes obtained.

84. Today, the Netherlands and Denmark apply this distribution system for elections to the lower chamber. In Germany, the *Länder* act as subdivided constituencies for the

151. In this case, they are sometimes called "attribution constituencies".

election of the *Bundestag*. Recently, subdivided constituencies have been introduced for French regional elections (departmental sections).

2.4. Examples of past or present electoral systems

*Estonia – Electoral Act of 7 June 1994, last amended: December 1994*¹⁵²

Chamber (monocameral system):	<i>Riigikogu</i>
Number of seats:	101 seats
Constituencies:	11 multi-member constituencies (8 to 11 deputies per constituency)
Guiding principle:	Proportional and proportional by compensation
Distribution of seats:	Triple proportional allocation of seats using the Hare quota in each of the 11 multi-member constituencies. The seats remaining to be allocated (“compensatory” seats) are distributed at national level between the parties and coalitions which obtained over 5% of the votes cast.

France – 1951 Electoral Act, in force for the 1951 and 1956 elections

Lower chamber:	<i>Assemblée nationale</i>
	Deputies of metropolitan France
Constituencies:	Each <i>département</i> constitutes a constituency with the exception of the <i>départements</i> of Bouches-du-Rhône, Pas-de-Calais, Rhône, Seine, Seine-et-Oise, Seine Inférieure and Gironde, which are divided into several constituencies
Guiding principle:	Hybrid: use of the majority system for candidates or lists that have attained a majority and distribution of the remaining seats on the basis of proportional representation
Manner of voting:	Single-round list-based ballot with “apparentement” of lists, <i>panachage</i> and preferential votes
Counting of votes and distribution of seats:	“Apparentements” authorised at constituency level between lists of national parties and groupings or between lists composed solely of candidates belonging to national parties or groupings provided this “apparentement” is accepted by all candidates subject thereto. The list or the group of linked lists which obtains the absolute majority obtains all the seats. Seats are distributed between linked lists according to the rule of the highest average, account being taken of preferential votes and <i>panachage</i>. If no list satisfies these

152. Unless stated otherwise, the electoral act cited is still in force today.

conditions, the seats are distributed on the basis of proportional representation in accordance with the rule of the highest average (largest remainders in Seine and Seine-et-Oise). Distribution within lists is carried out on the basis of the highest average. No seat is awarded to lists obtaining less than 5% of the votes cast.

France – 1985 Electoral Act

Election:	Municipal elections
Constituencies:	Municipalities with more than 3,500 inhabitants (except Paris, Lyon, Marseille)
Guiding principle:	Hybrid, the ultimate aim being to achieve a majority
Manner of voting:	Two-round ballot. Closed lists. Only lists which obtained 10% of the votes cast may go through to the second round. Lists obtaining 5% may merge and can go through to the second round.
Distribution of seats:	Bonus equivalent to half the seats for the leading list in the conclusive round. The remaining seats are distributed on the basis of proportional representation between lists which obtained 5% of the votes cast including the leading list.

Germany – 1993 Electoral Act

Lower chamber:	<i>Bundestag</i>
Number of seats:	656 members (500 as from 2002)
Constituency:	328 constituencies plus one subdivided national constituency (the <i>Länder</i>)
Manner of voting:	Each elector has two votes – one vote for the single-member one-round ballot – one vote for a list under a proportional representation system
Distribution of seats:	– 328 members designated by the single-member one-round ballot by the first vote – 328 seats allocated by proportional representation at national level. In order to participate in the distribution of seats, a list must obtain 5% of the votes cast or have obtained three seats in the single-member ballot. This threshold does not apply to parties representing national minorities. The seats are then distributed between the <i>Länder</i> in proportion to the votes obtained in the <i>Länder</i> themselves. The number of seats obtained on the basis of the first vote is subtracted from the total number of those seats. If a party obtains more seats in the single-member ballot than it is allowed according to the proportional representation vote, it keeps those seats.

Ireland – Electoral Act of 5 November 1992, last amendment: March 1998

Lower chamber:	<i>Dáil Eireann</i> – House of Representatives
Number of seats:	166 seats
Constituencies:	42 multi-member constituencies (three to five seats).
Guiding principle:	Proportional representation
Manner of voting:	Single transferable vote
Distribution of seats:	Included in the single transferable vote.

Italy – Electoral Act of 6 February 1948, last amendment: August 1993

Upper chamber:	<i>Senato della Repubblica</i>
Number of seats:	315 seats
Constituencies:	– 232 single-member constituencies – 20 multi-member constituencies
Guiding principle:	Hybrid combining a single-member ballot and proportional representation by a system of offsetting
Method of voting:	– plurality vote in the 232 single-member constituencies – distribution of the 83 remaining seats by proportional representation on the basis of regional results and in accordance with the d'Hondt method. These are “compensatory” seats and accordingly, before a distribution on the basis of proportional representation is carried out, the votes given to the candidates elected are subtracted from the total votes for the list to which they belong.

Italy – Electoral Act of 6 February 1948, last amendment: 4 August 1993

Lower chamber:	<i>Camera dei deputati</i>
Number of seats:	630 seats
Constituencies:	475 single-member constituencies 155 seats elected by proportional representation in 26 constituencies
Guiding principle:	Hybrid combining a single-member ballot and proportional representation by a system of offsetting
Method of voting:	Each elector has two votes
Distribution of seats:	– First-past-the-post in the single-member constituencies, with candidates belonging to lists – The lists have to pay a “levy” (<i>scorporo</i>) for each candidate in the quota elected under the first-past-the-post system. Distribution takes place at national level on the basis of the total obtained in the constituency. Initially, only lists which obtained 4% of the votes cast take part in this stage. The 155 seats are allocated among the lists by means of the method of whole quotas and largest remainders. Distribution at the level of the lists must fulfil two conditions. Firstly, each list is allocated seats in the constituencies where, proportionally, it gained the highest number of votes. Then, the total number of deputies elected in a

constituency (the sum for all lists) may not exceed the number of seats allocated to that constituency for the proportional part of the vote.

Japan – Electoral Act of 1 January 1900, last amendment: May 1998

Upper chamber:	<i>Sangiin</i>
Constituencies:	– 47 multi-member constituencies, metropolitan or prefectural – One national constituency for the remainder of the seats
Guiding principle:	Hybrid: first-past-the-post for a predetermined number of seats and proportional representation for the remainder.
Method of voting:	– 146 representatives elected by first-past-the post in geographical constituencies. Candidates obtaining a number of votes equal to or greater than one sixth of the electoral quota (total number of votes divided by the number of seats to be filled in the constituency) are declared elected in an order reflecting the amount of valid votes received. – 96 representatives elected at national level by a proportional list system in accordance with the d'Hondt method.

Lithuania – Electoral Act of 9 July 1992, last amendment: April 2003

Chamber (monocameral system):	<i>Seimas</i>
Number of seats:	141 seats
Constituencies:	– 71 single-member constituencies – one multi-member constituency (70 seats)
Guiding principle:	Hybrid: parallel application of first-past-the-post (in single-member constituencies) and proportional (in one multi-member constituency) systems.
Distribution of seats:	– first-past-the-post system in 71 single-member constituencies. A candidate shall be considered elected when that candidate receives the majority of the votes cast. A turn-out of 40% is required for the election to be valid. – proportional voting for one nationwide multi-member constituency. The list of candidates of the party may receive mandates only if not less than 5% of the voters participating in the elections voted for it. The threshold for joint lists of candidates is 7%. If less than 60% of the voters have voted for the lists that have received more than 5% of the votes cast, the lists that have not taken part in the distribution up till then may acquire the right to take part in the distribution of mandates. The lists that have not taken part in the distribution are added one at a time,

starting with the one that received the highest percentage of votes cast until the lists taking part in the distribution of mandates make up a total of at least 60% of the votes cast. The distribution of mandates is done on the basis of Hare's quota. The mandates still to be distributed after the first distribution are distributed according to the highest remainders. A 25% turn-out is required for the election to be valid.

Luxembourg – Electoral Act of 31 July 1924, last amendment: February 2003

Chamber	
(monocameral system):	<i>Chambre des Députés</i>
Number of seats:	60 seats
Constituencies:	four electoral constituencies: South (23 deputies), Centre (21 deputies), North (nine deputies) and East (seven deputies)
Guiding principle:	Proportional representation
Method of voting:	Preferential vote or <i>panachage</i>
Distribution of seats:	Hagenbach-Bischoff method Remaining seats distributed in accordance with the highest average.

Malta – Electoral Act of 27 September 1991, last amendment: 2002

Chamber	
(monocameral system):	<i>Il-Kamra Tad-Deputati</i>
Number of seats:	65 seats
Constituencies:	13 multi-member constituencies (five seats per constituency)
Distribution of seats:	Application of the single transferable vote, the quotient used is the Hagenbach-Bischoff quotient. If a party obtains the majority of first preferences, it is granted a “bonus” supplement of seats if needed, to ensure that it has a majority in the chamber.

Netherlands – Electoral Act of 28 September 1989

Lower chamber:	<i>Tweede Kamer der Staten-Generaal</i>
Number of seats:	150 seats
Constituencies:	18 subdivided constituencies
Guiding principle:	Full proportional representation
Method of voting:	Preferential vote
Distribution of seats:	The seats are distributed at national level in accordance with the d'Hondt method. A threshold of 0.67% of the votes cast at national level is required in order to take part in the distribution.

Norway – Electoral Act of 7 September 1984

Chamber (monocameral system):	<i>Stortinget</i>
Constituencies:	19 multi-member electoral constituencies (from four to 15 deputies) corresponding to the 19 provinces
Guiding principle:	Proportional representation
Method of voting:	Lists
Distribution of seats:	Modified Sainte-Laguë method

Poland – Electoral Act of 12 April 2001

Lower chamber:	<i>Sejm</i>
Number of seats:	460 seats
Constituencies:	41 provincial multi-member constituencies (between seven and 19 seats per constituency)
Guiding principle:	Proportional
Distribution of seats:	– 391 deputies are elected from local lists in multiple-seat constituencies. Seats are divided between the parties using the d'Hondt method and then allocated to the candidates who individually obtained the highest number of votes. In order to be eligible for seat allocation, a party must obtain 5% of votes cast at national level and a coalition of 8% of votes. These thresholds do not apply to the national minority lists. – 69 deputies are elected from national lists. Seats are divided between the lists using the d'Hondt method and then allocated in the order in which the candidates appear on those lists. Seats are allocated only to those parties and coalitions which obtained 7% of votes cast at national level.

Spain – 1985 Electoral Act, last amendment: March 1995

Lower chamber:	<i>Congreso de los Diputados</i>
Constituencies:	– 50 multi-member constituencies (two seats at least per province, the remainder being distributed on the basis of population size) corresponding to the provinces – two single-member constituencies (the North African enclaves of Ceuta and Melilla)
Guiding principle:	Proportional, except for the constituencies of Ceuta and Melilla where the first-past-the-post principle is applied. However, the small number of seats per constituency does not allow the guiding principle to come fully into play. The voting method is closer <i>de facto</i> to the first-past-the-post method.
Manner of voting:	Closed lists or single candidate depending on the constituency
Distribution of seats:	– multi-member constituencies: closed lists with seats being distributed proportionately in accordance with the d'Hondt method; each elector chooses a list from

- among those made available in the constituency (province)
- single-member constituencies: plurality system.

Sweden – Electoral Act of 1 June 1997

Chamber	
(monocameral system):	<i>Riksdagen</i>
Constituencies:	– 29 multi-member constituencies (two to 34 seats) for 310 members – one other multi-member constituency for 39 compensatory seats
Guiding principle:	Hybrid: offsetting system
Method of voting:	List system with preferential votes
Distribution of seats:	– proportional distribution in accordance with the modified Sainte-Laguë method in the 29 multi-member constituencies. In order to obtain a seat, a party has to obtain either at least 4% of the votes cast at national level or 12% of the votes cast in a basic constituency. – the 39 remaining (“compensatory”) seats are awarded by full proportional representation on the basis of the votes obtained at national level. Nevertheless, the seats are distributed between the constituencies. Parties which obtain seats only by virtue of the rule of 12% of the votes cast in a basic constituency are disqualified from taking part in this distribution. The minimum required to be elected on the basis of the preferential vote is 8% of the total votes cast for the candidate’s party in the constituency concerned.

Ukraine – Electoral Act of 22 October 1997

Chamber	
(monocameral system):	<i>Verkhovna Rada</i>
Number of seats:	450 seats
Constituencies:	– 225 multi-member constituencies – one national constituency governed by the proportional system (225 seats)
Guiding principle:	Hybrid: parallel application of first-past-the-post and proportional systems
Method of voting:	closed lists for election by proportional representation
Distribution of seats:	– single-round first-past-the-post ballot in the 225 multi-member constituencies – proportional ballot of lists for the other 225 seats. Seats are allocated only to those parties and coalitions exceeding the threshold of 4% of votes cast.

3. Recall

85. Recall is a semi-direct democratic procedure whereby a public office holder who no longer gives satisfaction to the electorate may be dismissed.¹⁵³ This procedure is similar, therefore, to the instigation of a binding mandate. Recall may apply to a single elected representative or an entire assembly, since in certain Swiss cantons the cantonal assembly may be dismissed in this manner (*Abberufungsrecht*).

86. There are generally two grounds for recall. The first is to control the functioning of institutions. In order to limit the use of the presidential right of dissolution, the Lithuanian Constitution of 1991 authorises the *Seimas* to decide on the holding of early presidential elections, for example. However, that decision must be adopted by a three-fifths majority within thirty days following the first sitting of parliament. The second reason is to give the electorate a means of controlling its elected representatives. In some American states recall has been introduced for that purpose. It takes the form of a petition which, if signed by a sufficient number of voters, enables them to decide on whether the elected representatives should remain in office or a new candidate should be elected.¹⁵⁴ If the number of signatures falls short, the office holder remains in place.¹⁵⁵ It should be noted that the procedure is a rarity in this day and age, since the regular holding of elections ensures greater effective control over elected representatives.

153. Bidégaray, Christian, article entitled “Recall” for P. Perrineau, D. Reynié, *Dictionnaire du vote*, PUF, 2001, pp. 787-788.

154. The most recent example was the election of A. Schwarzenegger to the post of governor of California, following the recall procedure initiated against Governor Gray Davis (2002). The signatures of 12% of the previous election’s voters are required for the holding of a new ballot.

155. A recall procedure was also initiated against Senator McCarthy, but did not succeed since some of the signatures were declared invalid (2003).

Part Two – Criteria for selecting a particular electoral system and the implications of that choice

87. Given the account set out in the first part of this paper of the incredible diversity of electoral systems available, it is difficult not to succumb to a degree of scepticism or at least admit to the fact that relativism is inevitable. The only obvious thing emerging from this survey is that there is no evidence leading one to make an absolute choice in favour of any particular electoral system. Or, more precisely, no electoral system can be the best or the worst, or perhaps even intrinsically good or bad. In order to assess its quality, it is necessary to know precisely what is expected of it – what is first expected of it – by assessing the way in which it fulfils its different, sometimes conflicting functions, namely those of the electoral system in the context of the democratic political system. We have used this functional approach in order to illuminate the criteria in choosing an electoral system and the implications of that choice. We will then examine in succession the three major functions of an electoral system, the three major models which have been successively applied in order to fulfil those functions in Western democracies, the advantages and drawbacks of hybrid systems and a number of problems specific to the emerging democracies.

1. The three major functions of an electoral system

88. Reducing matters to their most essential, there are three main functions of an electoral system: representation, selection and investiture.

1.1. Representation

89. Representation is the most obvious function. Did it not give its name to the representative system? But it is as complex as it is vital because it covers the various fundamental and conflicting issues at stake.

a. The most traditional and doubtless the most investigated contradiction is that between representation as mandate, which confines the role of the person represented to designating his or her agent, and representation as a reflection which further requires that the agent is as similar as possible to the person represented in order to prevent the latter's sovereignty from being excessively altered, not to say betrayed or substantially alienated, by the machinery of representation. Adherents of the theory – encouraged by law and philosophy – that the electorate determines the office uphold or upheld the first hypothesis, whereas those more sensitive to sociology – considering that the electorate confers the right – uphold the second.

But this contradiction does not say everything about the complexity of the function of representation. What in fact does it mean to serve the function of representation in an election? At least three answers can be given to this question.

b. The first relates to the representation of political opinions and hence of the movements and forces giving form to them. It is axiomatic that representation itself raises numerous problems. Is it necessary to represent all tendencies, including the most minority ones? Should existing tendencies be favoured to the detriment of emerging parties or should emerging tendencies be encouraged in order to make it easier to adapt what is on offer politically to suit new issues? Should the spirit of

compromise be fostered by making the formation of coalitions possible through mechanisms such as the second round or “apparentement”? Most of the answers given to each of these questions dictate the choice of the electoral system or of one or more of its refinements.

c. The second meaning attached to representation relates to the representation of territories. Here too the range of options available is to a large degree open. The first choice concerns the very existence of such representation: should the emphasis be given to the overall representation of the electoral population – as is the case in certain democracies with a relatively small population but also in larger states in the case of certain elections (the European elections in France up until a recent reform) – or should representation be broken down to the level of smaller entities? The second choice has to do with the nature of those entities: should a territory be divided into ad hoc electoral constituencies or should administrative divisions simply be adopted? The third choice relates to the demographic and perhaps spatial dimension of the entities decided upon: should the constituencies be large enough to guarantee a measure of heterogeneity of the electorate or smaller in order to guarantee that the electorate is homogenous?

d. This consideration cuts across the third meaning of representation, which relates to the representation of specific categories of the electorate. Some of those categories may be represented through geographical representation if where they are to be found coincides with one or more electoral constituencies. This may be the case with ethnic and cultural categories, which are often referred to as national minorities in multi-cultural states. But, because of their nature or the fact that they are more widely dispersed, other categories do not coincide with particular areas. Is it necessary to provide in the electoral system for specific representation and, if so, what form should that representation take? Some systems make use of quotas, occasionally coupled with financial penalties in the event of non-compliance, as in the case of France and the application of equality between men and women in elections. This example is very interesting since it marks a conclusive break with the traditionally abstract and formally egalitarian conception of citizenship under the French model. According to that tradition, the citizen (and hence the elector) is a reasonable being who allows the public interest to transcend the specific interests of his or her gender, age, occupation, ethnic and cultural origin and religious belief. Insofar as it introduces positive discrimination in favour of classes which are equal under the law but de facto disadvantaged vis-à-vis the dominant classes, the electoral system fulfils a new function. It does not merely distribute seats in accordance with votes, but seeks to influence a change in social relationships and becomes an overt instrument for redistributing political power between categories of the electorate.

1.2. Selection

90. Something which is less obvious when considering electoral systems is that selection of the people in the governing class is as important a function as representation. Moreover, the two functions merge when it comes to the representation of specific categories, one of the potential forms taken by the “pre-selection” of representatives.

91. Essentially, what is at stake in the democratic selection of persons to govern through elections can be assessed in three respects: that of the independence of candidates – and hence of future elected representatives – vis-à-vis the political machine, social fairness in recruitment and the renewal of the elite in power.

a. The extent to which candidates and elected representatives are dependent on the party machine relates directly to the electoral system. The latter can influence matters in this area in two ways. The first is whether candidatures are for single-member or multi-member constituencies. A ballot for a single member, which brings personalities into play, naturally favours the candidate with the greatest “personal assets”. The qualities of the candidates, which have to do with their character, talents, training, or experience are as important as – or perhaps more important than – their membership of a party when it comes to determining whether they are to be candidates and whether they are elected. They owe the fact of their election first and foremost to themselves. This is not the case in a multi-member constituency where the most important thing is first of all to get a place on the list of candidates. Indeed, whether one appears on the list depends almost invariably on the wishes of the local and/or national party authorities. Moreover, the more a candidate wishes to be on an electable position on the list, the more closely he or she is dependent on those authorities.

The second influence concerns whether the electoral system is plurality/majority or proportional. This is because the dependence of elected representatives on parties is greatest in a proportional representation system. In most cases, the head of the list or the two or three candidates heading the list of the large parties have every chance of being elected in a large constituency, since it is only from the third or fourth seat to be filled that the real competition begins. In such a case, the fact that the party places a candidate in an electable position is tantamount to guaranteeing his or her election. It is the party and not the elector which selects the elected representative. How can the elected representative not be indebted to the kingmaker?

b. The problem as to the degree of social fairness in the selection of elective elites is less directly dependent on the choice of electoral system, even though it can reasonably be argued that a single-member ballot favours those who already have certain cultural and social assets whereas a list ballot enables less privileged persons to stand. This is naturally facilitated still further by the introduction of “positive discrimination” procedures as shown above (see paragraph 1.1). It tends to be through the related systems of the electoral system and the representative system that social fairness in the recruitment of candidates can be best assured. As regards the former, particular mention may be made of public funding for electoral campaigns and as regards the latter, of remuneration for elected office and provisions fostering the re-employment of elected representatives at the end of their term of office. As far as the latter aspect is concerned, public office holders, who are often guaranteed to return to their job at the end of their term of office, are markedly more advantaged than their opposite numbers from the private sector.

c. The extent to which elective elites are replaced by new blood is another major feature of selection. It depends first and foremost on the constitutional provisions relating to assemblies (duration of terms of office, whether or not there is a limit to the number of successive mandates allowed, whether local and national mandates may be combined, etc.). But it also depends on provisions concerning who may be elected:

the minimum age required to stand as a candidate, whether foreign residents may stand (citizens of other member states of the European Union, for example) or the provisions on equality between men and women referred to above. The latter provisions, adopted when the French Constitution was revised in 1999, are potentially the most important for the renewal of elective elites. Their effect has so far been more potential than actual because the parties – or rather the men leading them – have taken advantage of the difficulties entailed by the single-member ballot so as to delay their application even if it means paying the penalties provided for by the law.

1.3. Investiture

92. Elections are not merely the time when electors are given the chance to express their party preferences officially and secretly; they are also the means of putting into office, more or less directly, the party or coalition of parties which will govern the country until the next election (or the first crisis). This function is crucial under the parliamentary system or the semi-presidential system of the French type, as experiences with “cohabitation” have shown, and it remains very important under the presidential system where, by definition, the presidential election fulfils this function, but where the essential role played by the legislature in the political process invariably results in the parliamentary elections having a clear impact in terms of investiture or censure, especially when they take place between two presidential elections, as in the case of the US mid-term elections.

a. This function is naturally particularly significant and the most strongly felt in countries relying on the plurality and majority systems for their elections, especially in its most extreme form of the single-round plurality ballot, which is notorious for fostering the development of a functional two-party system involving two potentially majority organisations which assume in turn, with swings in one or the other direction, the functions of government and counter-government (which means the official opposition whose aim is to become the governing party). In democracies of this type, electors in voting have the direct, clear potential to put their government into office. It is therefore possible to speak in this connection of a “governing democracy”.

b. This is not necessarily the case with democracies whose electoral culture is that of proportional representation, unless there are sociological (exceptionally clear social divisions reflecting religious and cultural splits, for example) or historical (memories of a trauma associated with the absence of a government majority) factors which come into play. This is because the logic of proportional representation is naturally to give preference to the function of representation over the function of investiture. The more this logic is adhered to (constituencies having numerous seats, rule of the highest average, no threshold and no second round or majority correcting factor), the more the election becomes a mere poll of all the existing political tendencies. Pure proportional representation favours a multi-party system and the jealously guarded independence of parties. It deprives the elector of the possibility to have a direct influence in the formation of the government, which is invariably the outcome of bargaining between the parties represented in parliament, more often than not after rather than before the elections. Hence the expression “governed democracy” that is used for these types of systems in which the conclusive choice of the government majority is monopolised by the political class, thereby depriving the sovereign people

of the full exercise of their sovereignty: “democracy without the people”, to borrow the title of a work by Maurice Duverger on the French tradition of the Parliamentary Republic before 1958.

c. The example of France also shows that proportional representation is not the only system being questioned. Doubtless this form of electoral system may be introduced to respond to exacerbated criticism to the effect that in the long run a majority system causes small and medium-sized parties to be excluded from the distribution of seats and that the smallest parties even find it difficult to survive as independent parties in their own right. But it can also “record” a fundamental political split that the majority system – especially in a less effective form than the first-past-the-post – cannot eradicate owing to cultural factors or historical events resulting in irreconcilable differences (war, revolution, economic crisis, etc.). This was the case in France between the two world wars when the continuance of a revolutionary movement in the working class awakened by the Soviet revolution had created an irreconcilable cleft between the communists and the socialists and the continuing cleft between conservative Catholicism and anti-clerical radicalism had prevented the right from regrouping even before the extreme fascist right burst on to the scene. In such a socio-political setting, two-round majority voting was considered above all from the point of view of the results of the first round – which enabled each political family to count its electors – rather than the second, which, admittedly, eradicated “in functional terms” the divisions within the two major tendencies by presenting a façade of a right/left split, but the latter did not take long to shatter in the Assembly when major problems facing the country had to be dealt with. The lack of interest in the second round is so manifest and seems so natural that second-round results were virtually never quoted before the 1970s in the historical and political-science literature dealing with the period. So much so that a man with a mind as keen as Maurice Duverger claimed to study the “inequalities of representation” under the Third Republic by relating the distribution of seats following the second round to the distribution of votes in the first, without paying the slightest attention to the transfers of votes between the first and second rounds and without this legerdemain seeming to pose any problem to him.

93. The latter considerations show how complex it is to undertake a functional interpretation of electoral systems. The truth is that for every major stage in the development of democracy there is a corresponding “ideal/typical” electoral system which carries out in a particular way the three functions described above. This specific combination may be appraised in the three successive forms which they took in the course of the last one hundred and fifty years.

2. The three historical models for the functionality of electoral systems

94. If we consider the development of elective democracy in very broad terms, we can see three major stages, corresponding to three socio-political models for the electoral system: the elitist model, the mass organisations model and the consumerist individuation model.

2.1. *The elitist model*

95. This model corresponds to the running-in period of universal suffrage. The three major functions of the electoral system are fulfilled in such a way that it could almost be categorised as being pre-democratic. Whether regarding representation, selection or investiture, each is stamped by the moral, cultural and political power of the elite vis-à-vis the great mass of the electorate granted voting rights.

a. Accordingly, the logic of representation is geared to obtaining votes. Prominent persons of all opinions canvassing for electors' votes appeal to their immediate clientele, namely the section of the population that knows them directly and naturally has confidence in them in order to defend their material and spiritual interests much better than they could do themselves. The population divides according to each individual's relationship with the immediate clientele of given prominent persons.

b. The logic of selection is a reverse selection. It is not so much the elector who chooses the elected representative than the would-be elected person who gathers together his potential electors. The personalities are pre-selected in one camp or another and are candidates only because they have all the tangible or intangible attributes of distinguished figures. This goes without saying in the conservative camp because they defend the "natural right" of the traditional governing classes to govern, although this may also be found in the liberal camp in the form of what Maurice Agulhon described as "democratic patronage", that is to say, the political commitment of the new governing strata who feel that they have been invested with a duty to speak in the name of the people in order to defend their interests of which they may be unaware.

c. The logic of investiture is *carte blanche*. Each of the clients mobilised by the competing notables delegates to them all of his powers – without having any idea of how it will affect him personally – in order that they should pursue in parliament or, perhaps, in government the policy which seems to them to be the best and, which therefore cannot but be the best.

d. The most functional electoral system for such a model is the single-member, one-round ballot. First-past-the-post with one round of voting is the simplest system to understand and agree upon in an inegalitarian, uneducated society. The single-member system is adopted because it is most commensurate with the logic of the model, based as it is on notables.

2.2. *Mass democracy model*

96. This model corresponds to the exploitation of the political potential of universal suffrage through mass organisations having the aim of mobilising electors. It was established during the stage of the emergence and development of employees' trade unions and of mass parties associated with them which gradually become generalised by a process of emulation to the whole of the political field, as shaped by the major socioeconomic divisions of industrial society. Three conditions have to be satisfied in order to move from the first to the second model. The first is that the electors should be in some way masters of their own votes and capable of joining a party while moving on from the logic of clan-like affiliation of clients: it may then be considered that the electorate has attained the threshold of individualisation. The

former model was vertical, whereas this one is horizontal. Individuals come together because they resemble each other, not because they depend on the same boss. The second condition is that the electors back their party because they share a similar ideology, not because of their personal short-term interest. It is possible to speak in this connection of a threshold of politicisation. The third condition is that electors of all constituencies vote more or less in accordance with the same socio-political logic and not for reasons differing radically from one region to another. It is then possible to speak of the threshold of nationalisation.

a. Under this system, the logic of representation is socio-cultural. Parties form in line with the major social divisions (mainly the split between the self-employed and employees) and the major cultural divisions, which are generally based on religious affiliation (Catholic/secular or between various Christian churches). They appeal to social groups – often consolidated by associations or trade unions – wanting these groups to be represented as such in the assemblies.

b. The logic of the selection is party-political. It is essentially the outcome of militancy. Candidature as such, and then the candidate's position in the list, are stages in the militant's progress. The electors ratify this choice insofar as they put in place those whom they regard as most representative of their background and therefore, from this point of view, the best of them.

c. The logic of investiture is not directly present in electors' minds, whether in the form of the great myths, such as preparation for proletarian revolution, on the one hand, or restoration of the natural order of society, on the other. In the shorter term, the important thing is to do whatever one can to prevent trouble-makers or reactionary forces from unilaterally calling into question the implied socio-political pact. As a result, the logic of "two opposing fronts" often put forward by both sides in the 1930s is redolent rather of trench warfare than warfare on a moving front. It is a question of prevention rather than of investiture.

d. The most functional electoral system for this model is clearly the list system with proportional representation. But it may be able to cope with a plurality or majority list system if each camp exhibits the potential to gather electors together and it is therefore possible to give some strength to a coalition government outside the usual compromises of the "blocked society".

2.3. *The consumerist individuation model*

97. This model, which is tending to replace the preceding one in the advanced democracies, is less perfected and less widespread to date. But its most significant features are beginning to emerge in most western countries which have shared the same experience of prosperity, peace, openness to the world and liberalisation of morals over recent decades. Those transformations of living conditions have fostered the emergence of a culture described by Ron Inglehart as post-materialist, a culture whose features he has described and whose consequences on electors' attitudes and political behaviour he has assessed.

a. The logic of representation has clearly abandoned the principles of loyalty under the system of faithful patronage and affiliation to a particular socio-cultural category.

It has come closer to the logic of the market. From the supply constituted by the available parties and candidates, the elector makes a choice which best – or least badly – matches his or her present demands. Those demands are ranked by each person in the light of the priorities which he or she gives to the issues at stake (security, employment, environment protection, moral liberation, taxation, globalisation, etc.). As a result, the system no longer represents social groups but the aggregation of individual priorities assigned to the various public policies.

b. The logic of the selection is therefore eminently political: the electors choose the people who seem to them to be the most capable of understanding their dominant demands and of supplying them with answers or, if you like, the “political enterprises” best satisfying the “call for tenders” that elections now represent for the electorate.

c. The logic of the investiture is very much present: what is involved is a contract concluded between the “consumer” of public policies and the “entrepreneur” whom the consumer instructs to resolve his or her problems. But the contract is a precarious one. It clearly constitutes a fixed-term contract for the achievement of a priority objective. So much so that the vote is as much concerned with sanctions as it is with investiture. The consumer may try out a new product, but he or she may reject it with a clear conscience if he or she does not find it entirely satisfactory. Electoral behaviour was so stable in the past that people did not shrink from likening it to geology. It is so volatile nowadays that it may be more appropriate to liken it to the dramatic changes more familiar to the field of meteorology.

d. The most functional voting method in a model of this kind is certainly first-past-the-post or majority, which clearly invests and sanctions and favours alternating between political parties in power. But such a system may suffer from the drawback that it does not leave enough room for emerging movements susceptible of capturing new demands. As a result, in this new culture there is a blossoming of proposals for, or attempts at, implementing hybrid systems, predominantly first-past-the-post (or majoritarian) for the purpose of having alternating parties in power, but embodying a corrective feature of proportional representation in order to allow for innovation.

98. The table, at the end of this report, recapitulates the chief characteristics of the three models described above. It must not be forgotten that what we are dealing with here are “ideal/typical” models. Instances of them in history are often more complex and the developments less clear-cut. This is because the models described as being successive are still in part concurrent and sometimes intermeshed. The elitist model of top-down democracy based on patronage has not completely disappeared and here and there residual pockets may still be observed and there may even be episodic reversions in the behaviour of present-day electors. This is still more often the case for the great dominant model of the 20th century – mass democracy. A social movement inspired by active minorities and orchestrated in street demonstrations is enough to make the public – which had voted for an enterprise dedicated to resolving a major problem – realign itself behind the spokesman of the categories to which it belongs. What was formerly called the gross variables of electoral behaviour (objective social class, subjective social class and religious affiliation, in particular) are doubtless no longer as healthy as they used to be, but strong traces of them linger on and re-emerge to interrupt the regular decline in their explanatory power. The fact

is that voting has never been and doubtless will never be one-dimensional, a feature which it shares with all human behaviour. Moreover, it is this which adds to the interest taken by many players and observers in hybrid systems.

3. Advantages and drawbacks of hybrid systems

99. Reformers are increasingly tending to regard hybrid systems as a panacea. This is partly because they have internalised the multi-functionality of electoral systems, which may lead to conflicting provisions.

3.1. *The search for the happy medium*

100. Hybrid systems have the main advantage of combining logics which would be incompatible if an attempt were made to implement them without placing them in a ranking order. This is true mainly of the majority principle – which is essential for the investiture function – and of the proportional representation system – which is the most favourable for the representation function. This may also be true of single-member or multi-member constituencies – which favour personal selection – and the closed list – which favours discipline and hence the cohesion of parliamentary groups and parties – or the territorial approach – which favours geographical representation – and the national approach – which favours political/ideological representation. A concrete example of seeking the happy medium by means of combining and prioritising may be found in a proposal made by Alain Lancelot in 1993 to the Association Nationale des Élus Régionaux at the request of its chair, Valéry Giscard d’Estaing, for a possible reform of the method of electing French regional councils. The proposal, drawn up by Jean-Claude Casanova and Alain Lancelot, was summarised in our report as follows: “So as not to be exposed to accusations of manipulation, the choice of voting method should be based on a number of strong principles, which should be stated and classified by order of importance, since they each have the effect of limiting the others.

- The regional government must be founded, within the Council, on a stable and clear majority.
- The identity of the regions must be affirmed through the choice of a regional constituency.
- Representation of minorities must be ensured.
- Representation of the various *départements* likewise.

The third principle corrects the first and the last corrects the second. If these objectives are accepted, one is led to propose a reform of the electoral system along the lines of a majority system and adoption of the region as the electoral constituency in place of the *départements*, whilst limiting the effects of the majority system through the representation of minorities and ensuring that the *départements* are fairly represented.”

Hybrid systems also have the advantage of evening out changes in representation, selection and the capacity for investiture or sanction. These changes tend, in the long

run, to be virtually paralysed by the application of the systems which most favour representation, such as pure proportional representation, and conversely run the risk of becoming somewhat chaotic when first-past-the-post (or majority) systems are implemented in their most radical form, owing to repeatedly alternating victors. Between *sehr langsam* and *allegro vivace*, if not *furioso*, the happy-medium tempo *bien tempéré* attracts those who believe that controlled change lies at the heart of good democratic governance.

3.2. Drawbacks and difficulties

101. Notwithstanding this analysis, the main drawback of hybrid systems lies in their complexity. Doubtless, some “simple” systems, such as proportional representation, are in themselves very complicated when it comes to the way in which seats are distributed, especially in the use of remainders, for an elector who is not arithmetically minded. But at least their underlying principle is unambiguous and everybody can grasp it straight away. That is not the case with hybrid systems, which often involve procedures that distort the results of the ballot boxes so as either to exclude certain votes from representation (through the operation of thresholds) or, on the contrary, to increase the weight of other votes (the majority bonus, for example, for the leading party). The elector who has difficulty in understanding the complexity of the arithmetic will find it even more difficult to accept the resulting discrepancy compared with the votes cast. This may lead sometimes, or even often, to a feeling of alienation vis-à-vis the operation of the electoral system, which is “manipulated by politicians”.

To this difficulty can be added that of the nature of the “mix” itself. A hybrid system would be paralysed or simply random if the various logics it combined did not involve an appropriate ranking. But only experience can help in choosing the correct mix. If the secondary logic is instilled too weakly, it will scarcely have any corrective effect on the result of the election. If, conversely, it is too strong, the main logic system will be diluted to an excessive extent. The problem is particularly acute when a quantitative correction factor has to be introduced in order, for example, to set the level of a majority bonus or the threshold required to be surpassed in order to be represented.

In order to overcome these kinds of difficulties, the Committee for the Reform of the Voting Method, set up in France in 1992 by Prime Minister Pierre Bérégovoy, on which Alain Lancelot sat under the presidency of Professor Vedel, proposed maintaining the majority system with two rounds of voting for most of the seats in the *Assemblée nationale* and adding, “for a non-negligible part” of those seats, the election by proportional representation of national lists. The representatives of the left-wing majority and the right-wing opposition sitting alongside the experts on that committee finally agreed that 10% of the total number should constitute the “non-negligible part” of national seats to be filled by proportional representation, but only after bitterly debating the very principle of a hybrid system, since they were concerned that it would look like a return to “rule by political parties”. The argument that finally won them over was our proposal that each elector should be given two votes: the first to elect one of the candidates in the single-member majority ballot, and the second so as to choose one of the lists of candidates by proportional representation at the national level. The originality of this hybrid system lay in its transparency, since

having a double vote would definitively preclude any accusation of inequality and any suspicion of distorting the will of the electorate. But the idea ultimately ran aground owing to the practical difficulty in finding 50 seats to be filled by proportional representation, either by increasing the total number of seats, which, in the eyes of the parliamentarians on our committee, ran the risk of worsening anti-parliamentary feeling, or else by reducing by the same amount the number of constituency seats, which would be very unpopular in the *départements* whose representation would be reduced. And the reform was not taken on board by the government. In France, we like to say that “the devil is to be found hiding in the details” and hybrid systems, alas, do not lack detail.

4. Some considerations on the specific situation of the emerging democracies

102. The emerging democracies tend legitimately to skip stages of political, economic and social development in order to take short cuts to catch up with the developed states which took decades and sometimes centuries to mature. It would be pointless and unjust to preach patience to them. That said, it is wise to help them to make at the start of their democratisation process the fundamental choices that are going to shape how they develop, in full knowledge of the facts. From the point of view of electoral systems which is our subject here, this preliminary phase, should, at the “constitutive moment” cover three aspects: initial identification of the nature and degree of segmentation, the choice of a model of citizenship, and finally, the choice of giving electoral democracy greater or lesser influence over governance.

4.1. *Initial identification of the nature and degree of segmentation*

103. Identifying the nature and degree of political stratification and its socio-cultural foundation is a necessary first step. It is on this segmentation that the choice of models to be created will depend for the purposes of defining citizenship and for the investiture of those who are to govern.

104. In order to carry out this identification, it seems to us that there needs to be a first general election – for a constituent assembly, for example – under proportional representation. This is the formula best suited to measuring the initial degree of fragmentation of the political forces and to pinpointing the nature of the allegiances (political, religious, ethnic/cultural, etc.) which bind each of them together.

105. Some might fear that such an overt initial phase would not merely make an initial finding, but would firmly establish the differences by making them visible; this would, consequently, have a heavy influence on subsequent choices. That objection is not a negligible one. But experience shows that this is not necessarily the case. Setting forth the divisions may well trigger a desire to reduce them and, in any event, all the effects – particularly the harmful ones – of an electoral system are not really experienced until it is applied for a second time, that is to say after two consecutive elections.

4.2. *Choice of a model of citizenship*

106. By using the results of an initial consultation under proportional representation, it is possible to distinguish the main fault lines in the electorate, to assess their

independence or any possible overlap and to evaluate their respective importance. If fragmentation is marked and based essentially on qualitative factors (ethnic/cultural or religious, for example), the crucial choice lies between (i) a universalist conception of citizenship which transcends de facto differences and boosts de jure equality so as to define a general higher interest, and (ii) a pluralist conception, that of a mosaic that recognises, protects and promotes the specific rights of the various communities. These two conceptions are equally valid, whatever followers of Jean-Jacques Rousseau may think. And to impose an abstractly egalitarian conception of citizenship on a very heterogeneous society constitutes a very weak protection against the risks of actual discrimination or even genocide. If the divisions run deep, it is better to recognise them officially and to try to compel the communities to recognise their respective rights as constituting reciprocal duties.

107. The choice of one or other of these models entails consequences for the lasting choice of electoral system after the initial stage of proportional representation. The universalist model calls for constituencies to be drawn up along politico-administrative lines and a first-past-the-post or majority voting system. The pluralist model calls for constituencies that follow the spatial distribution of communities as much as possible and a hybrid electoral system or proportional representation, depending on how deep the divisions go and whether the intention is to limit their effects or to accept that they will become more rigid.

4.3. Choice of a system of democratic governance

108. The choice extends and reinforces that of the model of citizenship. It includes the choice between a unitary system and a federal system and the choice between a parliamentary system, a presidential system and, possibly, a semi-presidential system.

109. From the point of view of electoral systems, the choice of the unitary or federal form of state organisation is not very important. It may be noted, however, that the federal form could permit different electoral systems to be used for elections at federal level and for elections at the level of the federated states. One could readily imagine, for example, a first-past-the-post or even a hybrid system with first-past-the-post dominating at the level of the federal parliament, whose attributions relate more to supra-community (or “universal”) issues such as defence, foreign affairs, human rights or economic and social bargaining for the whole of the federation, and a system using proportional representation to a greater or lesser extent for all or some of the parliaments of the federated states.

110. As regards “governing democracy” as discussed above which is a characteristic feature of societies whose citizens have a real power to elect their government, the type of political regime and electoral system which may be associated with it introduces a very significant difference. It is clear that the presidential system, which is intrinsically a majority system, is the most capable of simplifying the political choice of the nation and forcing the nation to come together. And this is all the more so if it is supported by a first-past-the-post (majority) ballot in parliamentary elections, especially if parliamentary elections occur in the immediate wake of a presidential election. The French elections of 2002 clearly showed the beneficial effect of this, from the point of view of the investiture of a majority, of inverting the

electoral calendar that had initially scheduled the presidential election to take place after the parliamentary elections.

111. The presidential regime may, however, impose too harsh a choice on a pluralist society and may run the risk of turning into a movement towards personal power in a society whose democratic culture is too recent. If so, it may then be appropriate to introduce a hybrid system which gives a proportionalist outlet to minority forces and guarantees them a role as a democratic counter-power.

112. The same arguments apply to the parliamentary system, which, since it is intrinsically a majority system, must rely on the electoral system to identify a governing majority on the basis of the ballot box, whilst respecting the rights of minorities and the possibility of alternating the parties in government. Even if they are difficult to understand – although we have seen above that this difficulty may be reduced – hybrid systems with plurality/majority dominating seem to be the most functional for an emerging democracy, both from the point of view of governing democracy and that of respecting community pluralism.

113. Be that as it may, it seems dangerous to state, in the name of some sort of theory of legal evolution, that proportional representation is the supreme stage or as far as one can go in democratic elections. This is obviously not true of the old advanced democracies and it is not at all certain that it has to be true of all emerging democracies.

Conclusion

114. The closing remark in the last section enables us to turn full circle from where we began in the general introduction to this report: despite the preference for proportional representation, often expressed by supporters of a “politically correct” view of the “democratic kit” or the equally peremptory assertion that outside a pure first-past-the-post system there can be no “governing democracy”, there is no electoral system which is good from every angle. Each has its advantages and its drawbacks, which vary in magnitude depending on what function fulfilled by the electoral system is considered.

115. The stakes are high since it is a question of identifying and implementing in practice the legitimacy of democratic power and ensuring that it is effective. Doubtless, this should bring forth some modesty on our part. It is not so much a question of choosing between ideal types as identifying – from minute examination of the socio-cultural realities, local legal traditions and the prevailing circumstances – what constitutes the best possible mix of conflicting solutions. There must be no hesitation in rectifying a system that is starting to produce perverse effects, since it is as easy to get into bad habits as good, and bad habits become difficult to eradicate when they turn into a cultural tradition. This is a sadly relativist conclusion for a lawyer who believes in the strength of principles. But, under cover of legal principles and mathematics, the question of electoral systems has to do with the art of politics, which, in order to reconcile conflicting interests peaceably, requires everyone to compromise without compromising themselves.

Table summarising the three historical models

Elitist model

Period of dominance:	beginnings of universal suffrage to the start of the 20th century
Logic of representation:	patronage
Logic of selection:	notability and democratic patronage
Logic of investiture:	carte blanche for the representative
Ideal/typical system:	one-round, one-member first-past-the-post/majority

Mass democracy model

Period of dominance:	first three quarters of the 20th century
Logic of representation:	identification with a socio-cultural category
Logic of selection:	militancy
Logic of investiture:	indirect <i>ex post</i>
Ideal/typical system:	proportional representation

Consumerist individuation model

Period of dominance:	last decades of the 20th century
Logic of representation:	demand for priority public policies
Logic of selection:	most credible offer
Logic of investiture:	contract with a limited objective and for a specified duration
Ideal/typical system:	hybrid system predominantly based on the first-past-the-post or majority system

Part 2 – Referendums

Code of good practice on referendums¹⁵⁶

Introduction

1. In response to a request from the Parliamentary Assembly, the Council for Democratic Elections and subsequently the Venice Commission adopted the code of good practice in electoral matters in 2002.¹⁵⁷
2. This document was approved by the Parliamentary Assembly at its 2003 session (first part) and by the CLRAE at its Spring 2003 session.
3. In a solemn declaration dated 13 May 2004,¹⁵⁸ the Committee of Ministers recognised “the importance of the code of good practice in electoral matters, which reflects the principles of Europe’s electoral heritage, as a reference document for the Council of Europe in this area, and as a basis for possible further development of the legal framework of democratic elections in European countries”.
4. As democracy spreads through Europe, both pluralist elections and the use of referendums has become increasingly common.
5. Accordingly, for several years the Parliamentary Assembly has taken an interest in the issue of referendums and good practice in this area. Its work led, on 29 April 2005, to the adoption of Recommendation 1704 (2005) on “Referendums: towards good practices in Europe”.¹⁵⁹ The Assembly worked in co-operation with the Venice Commission in this connection; the latter submitted comments on the aforementioned recommendation at the Committee of Ministers’ request¹⁶⁰ and drew up a summary report based on replies to a questionnaire sent to its members on the issue of referendums. This report is entitled: “Referendums in Europe – An analysis of the legal rules in European States”.¹⁶¹
6. It was decided that a Council of Europe background paper on referendums should be drafted to accompany the code of good practice in electoral matters. The Council for Democratic Elections took on this task, on the basis of contributions by

156. Study No. 371 / 2006, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007) on the basis of contributions by Mr Pieter van Dijk (member, the Netherlands), Mr François Luchaire (member, Andorra), Mr Giorgio Malinverni (member, Switzerland); CDL-AD(2007)008.

157. CDL-AD(2002)023rev.

158. CM(2004)83 final.

159. See also document 10498, containing the Political Affairs Committee’s report (Rapporteur: Mr Mikko Elo, Finland, Socialist Group), to which is appended a working paper prepared by the Research and Documentation Centre on Direct Democracy of the Geneva Law Faculty.

160. CDL-AD(2005)028.

161. CDL-AD(2005)034; see also the questionnaire, CDL(2004)031, the replies, CDL-EL(2004)011, and the tables summarising the replies to the questionnaire, CDL-AD(2005)034add and CDL-AD(2005)034add2.

three members of the Venice Commission, Mr Pieter van Dijk (Netherlands), Mr François Luchaire (Andorra) and Mr Giorgio Malinverni (Switzerland).

7. The guidelines on the organisation of referendums were adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and by the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006).

8. These guidelines are accompanied by an explanatory memorandum, which was adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007).

Guidelines on the holding of referendums¹⁶²

I. Referendums and Europe's electoral heritage

1. Universal suffrage

1.1. Rule and exceptions

Universal suffrage means in principle that all human beings have the right to vote. This right may, however, and indeed should, be subject to certain conditions:

- a. *Age:*
the right to vote must be subject to a minimum age but must be acquired, at the latest, at the age of majority;
- b. *Nationality:*
 - i. a nationality requirement may apply;
 - ii. however, it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence.
- c. *Residence:*
 - i. a residence requirement may be imposed;
 - ii. residence in this case means habitual residence;
 - iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;
 - iv. the requisite period of residence should be reasonable and, as a rule, should not exceed six months;
 - v. it is desirable that the right to vote be accorded to citizens residing abroad.
- d. *Deprivation of the right to vote:*
 - i. provision may be made for depriving individuals of their right to vote, but only subject to the following cumulative conditions:
 - ii. it must be provided for by law;
 - iii. the proportionality principle must be observed;
 - iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
 - v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

1.2. Electoral registers

Fulfilment of the following criteria is essential if electoral registers are to be reliable:

162. Adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006).

- i. electoral registers must be permanent or refer to a register that is constantly updated (population register or register of births, marriages and deaths);
- ii. there must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period;
- iii. electoral registers must be public;
- iv. there should be an administrative procedure – subject to judicial control – or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place as a result of a decision taken by the polling station on election day;
- v. a similar procedure should allow voters to have incorrect inscriptions amended within a reasonable time;
- vi. provision may be made for a supplementary register as a means of giving the vote to persons who have moved or reached statutory voting age since final publication of the register.

2. Equal suffrage

2.1. Equal voting rights

Each voter has in principle one vote; where the electoral system provides voters with more than one vote (for example, where there are alternatives), each voter has the same number of votes.¹⁶³

2.2. Equality of opportunity

- a. Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This entails a neutral attitude by administrative authorities, in particular with regard to:
 - i. the referendum campaign;
 - ii. coverage by the media, in particular by the publicly owned media;
 - iii. public funding of campaign and its actors;
 - iv. billposting and advertising;
 - v. the right to demonstrate on public thoroughfares.
- b. In public radio and television broadcasts on the referendum campaign, it is advisable that equality be ensured between the proposal's supporters and opponents.
- c. Balanced coverage must be guaranteed to the proposal's supporters and opponents in other public mass media broadcasts, especially news broadcasts. Account may be taken of the number of political parties supporting each option or their election results.
- d. Equality must be ensured in terms of public subsidies and other forms of backing. It is advisable that equality be ensured between the proposal's supporters and opponents. Such backing may, however, be restricted to

163. See, however, I.2.3.

supporters and opponents of the proposal who account for a minimum percentage of the electorate. If equality is ensured between political parties, it may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections.

- e. Financial or other conditions for radio and television advertising must be the same for the proposal's supporters and opponents.
- f. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the referendum campaign and to advertising, for all participants in the referendum.
- g. Political party and referendum campaign funding must be transparent.
- h. The principle of equality of opportunity can, in certain cases, lead to a limitation of spending by political parties and other parties involved in the referendum debate, especially on advertising.
- i. Sanctions must be imposed in the case of breaches of the duty of neutrality.

2.3. Equality and national minorities

- a. Special rules providing for an exception to the normal vote-counting rules, in a proportional way, in the case of a referendum concerning the situation of national minorities do not, in principle, run counter to equal suffrage.
- b. Voters must not find themselves obliged to reveal their membership of a national minority.

3. Free suffrage

3.1. Freedom of voters to form an opinion

- a. Administrative authorities must observe their duty of neutrality (see 1.2.2.a. above), which is one of the means of ensuring that voters can form an opinion freely.
- b. Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes must be prohibited.
- c. The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum;

voters must be able to answer the questions asked solely by yes, no or a blank vote.

- d. The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report or balanced campaign material from the proposal's supporters and opponents should be made available to electors sufficiently in advance, as follows:
 - i. they must be published in the official gazette sufficiently far in advance of the vote;
 - ii. they must be sent directly to citizens and be received sufficiently far in advance of the vote;
 - iii. the explanatory report must give a balanced presentation not only of the viewpoint of the executive and legislative authorities or persons sharing their viewpoint but also of the opposing one.
- e. The above information must be available in all the official languages and in the languages of the national minorities.
- f. Sanctions must be imposed in the case of breaches of the duty of neutrality and of voters' freedom to form an opinion.

3.2. Freedom of voters to express their wishes and action to combat fraud

a. Voting procedure

- i. voting procedures must be readily understandable by citizens;
- ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:
- iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;
- iv. electronic voting should be in conformity with Committee of Ministers' Recommendation Rec(2004)11 on Legal, operational and technical standards for e-voting. In particular, it should be used only if it is safe, reliable, efficient, technically robust, open to independent verification and easily accessible to voters; the system must be transparent; unless channels of remote electronic voting are universally accessible, they shall be only an additional and optional means of voting;
- v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;
- vi. mobile ballot boxes should only be allowed under strict conditions that avoid all risks of fraud;
- vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;
- viii. voting slips must not be tampered with or marked in any way by polling station officials;
- ix. unused and invalid voting slips must never leave the polling station;

- x. polling stations must include representatives of a number of parties, and the presence of observers appointed by the latter or by other groups that have taken a stand on the issue put to the vote must be permitted during voting and counting;
 - xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;
 - xii. counting should preferably take place in polling stations;
 - xiii. counting must be transparent. Observers, representatives of the proposal's supporters and opponents and the media must be allowed to be present. These persons must also have access to the records;
 - xiv. results must be transmitted to the higher level in an open manner;
 - xv. the state must punish any kind of electoral fraud.
- b. *Freedom of voters to express their wishes also implies:*
- i. that the executive must organise referendums provided for by the legislative system; this is particularly important when it is not subject to the executive's initiative;
 - ii. compliance with the procedural rules; in particular, referendums must be held within the time-limit prescribed by law;
 - iii. the right to accurate establishment of the result by the body responsible for organising the referendum, in a transparent manner, and formal publication in the official gazette.

4. Secret suffrage

- a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.
- b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.
- c. The list of persons actually voting should not be published.
- d. The violation of secret suffrage should be sanctioned.

II. Conditions for implementing these principles

1. Respect for fundamental rights

- a. Democratic referendums are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the

country, freedom of assembly and freedom of association for political purposes, including freedom to set up political parties.¹⁶⁴

b. Restrictions on these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.

2. Regulatory levels and stability of referendum law

a. Apart from rules on technical matters and detail (which may be included in regulations of the executive), rules of referendum law should have at least the rank of a statute.

b. The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law.

c. Fundamental rules include, in particular, those concerning:

- the composition of electoral commissions or any other body responsible for organising the referendum;
- the franchise and electoral registers;
- the procedural and substantive validity of the text put to a referendum;¹⁶⁵
- the effects of the referendum (with the exception of rules concerning matters of detail);
- the participation of the proposal's supporters and opponents to broadcasts of public media.

3. Procedural guarantees

3.1. Organisation of the referendum by an impartial body

a. An impartial body must be in charge of organising the referendum.

b. Where there is no longstanding tradition of administrative authorities' impartiality in electoral matters, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c. The central commission must be permanent in nature.

d. It should include:

- i. at least one member of the judiciary or other independent legal expert;
- ii. representatives of parties already in Parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.

164. In particular, street demonstrations to support or oppose the text submitted to a referendum may be subject to authorisation: such authorisation may be refused only on the basis of overriding public interest, in accordance with the general rules applicable to public demonstrations.

165. See III.2 and III.3.

It may include:

- iii. a representative of the Ministry of the Interior;
 - iv. representatives of national minorities.
- e. Political parties or supporters and opponents of the proposal put to the vote must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality between political parties may be construed strictly or on a proportional basis (see I.2.2.d.).
- f. The bodies appointing members of commissions must not be free to dismiss them at will.
- g. Members of commissions must receive standard training.
- h. It is desirable that commissions take decisions by a qualified majority or by consensus.

3.2. Observation of the referendum

- a. Both national and international observers should be given the widest possible opportunity to participate in a referendum observation exercise.
- b. Observation must not be confined to election day itself, but must include the referendum campaign and, where appropriate, the voter registration period and the signature collection period. It must make it possible to determine whether irregularities occurred before, during or after the vote. It must always be possible during vote counting.
- c. Observers should be able to go everywhere where operations connected with the referendum are taking place (for example, vote counting and verification). The places where observers are not entitled to be present should be clearly specified by law, with the reasons for their being banned.
- d. Observation should cover respect by the authorities of their duty of neutrality.

3.3. An effective system of appeal

- a. The appeal body in referendum matters should be either an electoral commission or a court. In any case, final appeal to a court must be possible.
- b. The procedure must be simple and devoid of formalism, in particular where the admissibility of appeals is concerned.
- c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). The law must specifically designate the competent body in each case.
- d. The appeal body must be competent to deal with the sphere covered by these guidelines, in particular with:

- the franchise and electoral registers;
 - the completion of popular initiatives and requests for referendums from a section of the electorate;
 - the procedural and, where applicable, substantive validity of texts submitted to a referendum: the review of the validity of texts should take place before the vote; domestic law determines whether such review is obligatory or optional;
 - respect for free suffrage;
 - the results of the ballot.
- e. The appeal body must have authority to annul the referendum where irregularities may have affected the outcome. It must be possible to annul the entire referendum or merely the results for one polling station or constituency. In the event of annulment of the global result, a new referendum must be called.
- f. All voters must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters against the results of a referendum.
- g. Time-limits for lodging and deciding appeals must be short.
- h. The applicant's right to a hearing involving both parties must be protected.
- i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

3.4. Funding

- a. The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding.
- b. The use of public funds by the authorities for campaigning purposes must be prohibited.¹⁶⁶

166. See point I.3.1.b. above.

III. Specific rules

1. The rule of law

The use of referendums must comply with the legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction.

2. The procedural validity of texts submitted to a referendum

Questions submitted to a referendum must respect:

- unity of form: the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle;
- unity of content: except in the case of total revision of a text (Constitution, law), there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link; the revision of several chapters of a text at the same time is equivalent to a total revision;
- unity of hierarchical level: it is desirable that the same question should not simultaneously apply to legislation of different hierarchical levels.

3. The substantive validity of texts submitted to a referendum

Texts submitted to a referendum must comply with all superior law (principle of the hierarchy of norms).

They must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

Texts that contradict the requirements mentioned under III.2 and III.3 may not be put to the popular vote.

4. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution)

- a. Everyone enjoying political rights is entitled to sign a popular initiative or request for a referendum.
- b. The time-limit for collecting signatures (particularly the day on which the time-limit starts to run and the last day of the time-limit) must be clearly specified, as well as the number of signatures to be collected.
- c. Everyone (regardless of whether he or she enjoys political rights) must be entitled to collect signatures.

- d. If authorisation is required in order to gather signatures for popular initiatives or requests for a referendum on public thoroughfares, such authorisation may be refused only in specific cases provided for by law, on the basis of overriding public interest and in accordance with the principle of equality.
- e. Payment from private sources for the collection of signatures for popular initiatives and requests for referendums should, as a rule, be prohibited. If permitted, it must be regulated, with regard to both the total amount allocated and the amount paid to each person.
- f. All signatures must be checked. In order to facilitate checking, lists of signatures should preferably contain the names of electors registered in the same municipality.
- g. In order to avoid having to declare a vote totally invalid, an authority must have the power, prior to the vote, to correct faulty drafting, for example:
 - i. when the question is obscure, misleading or suggestive;
 - ii. when rules on procedural or substantive validity have been violated; in this event, partial invalidity may be declared if the remaining text is coherent; sub-division may be envisaged to correct a lack of substantive unity.

5. Parallelism in procedures and rules governing the referendum

- a. When the referendum is legally binding:
 - i. For a certain period of time, a text that has been rejected in a referendum may not be adopted by a procedure without referendum.
 - ii. During the same period of time, a provision that has been accepted in a referendum may not be revised by another method.
 - iii. The above does not apply in the case of a referendum on partial revision of a text, where the previous referendum concerned a total revision.
 - iv. The revision of a rule of superior law that is contrary to the popular vote is not legally unacceptable but should be avoided during the above-mentioned period.
 - v. In the event of rejection of a text adopted by Parliament and put to the popular vote at the request of a section of the electorate, a similar new text must not be put to the vote unless a referendum is requested.
- b. When a text is adopted by referendum at the request of a section of the electorate, it should be possible to organise a further referendum on the same issue at the request of a section of the electorate, after the expiry, where applicable, of a reasonable period of time.
- c. When a text is adopted by referendum at the request of an authority other than Parliament, it should be possible to revise it either by parliamentary means or by referendum, at the request of Parliament or a section of the electorate, after the expiry, where applicable, of the same period of time.

- d. It is advisable for constitutional rules relating to referendums to be put to a referendum, compulsorily or at the request of a section of the electorate.

6. Opinion of Parliament

When a text is put to the vote at the request of a section of the electorate or an authority other than Parliament, Parliament must be able to give a non-binding opinion on the text put to the vote. In the case of the popular initiatives, it may be entitled to put forward a counter-proposal to the proposed text, which will be put to the popular vote at the same time. A deadline must be set for Parliament to give its opinion: if this deadline is not met, the text will be put to the popular vote without Parliament's opinion.

7. Quorum

It is advisable not to provide for:

- a. a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no;
- b. an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.

8. Effects of referendums

- a. The effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law.
- b. Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.

Explanatory memorandum

General remarks

1. This explanatory memorandum is intended to elaborate on those aspects of the above guidelines that are specific to referendums. Accordingly, it does not comment on the principles and general rules applicable to both elections and referendums. The explanatory memorandum to the code of good practice in electoral matters¹⁶⁷ may be referred to in this connection. As far as possible, the guidelines on the holding of referendums echo the code of good practice in electoral matters. Not every aspect of the guidelines will be discussed in detail.
2. A number of textual adjustments were necessary, such as replacing the word “election” with “referendum”. Others, resulting from the specific nature of referendums, will not be further discussed. For instance, no reference is made to the right to stand for election (see point I.1.1.a, for example), the submission of candidatures¹⁶⁸ or the distribution of seats between the constituencies (equal voting power);¹⁶⁹ the possibility of electors casting more than one vote relates to alternatives rather than preference vote or cross-voting (point I.2.1); election (or rather referendum) observation must be extended to the signature collection period (point II.3.2.b).
3. In addition, the code of good practice in electoral matters has been clarified in response to questions raised in connection with its application. For instance, the requirement for permanent electoral rolls is satisfied if they refer to a register that is constantly updated (population register or register of births, marriages and deaths) (point I.1.2.i); it is expressly stated that observers must be able to go wherever referendum-related operations are taking place (point II.3.2.c).
4. Other points take into account the adoption of new texts by the Venice Commission¹⁷⁰ or by Council of Europe organs.¹⁷¹
5. It should be made clear that the guidelines apply to all referendums – national, regional and local – regardless of the nature of the question they concern (constitutional, legislative or other). Each reference to Parliament also applies to regional or local assemblies.

167. CDL-AD(2002)023rev, pp. 19 ff.

168. See CDL-AD(2002)023rev, I.1.3.

169. See CDL-AD(2002)023rev, I.2.2.

170. CDL-AD(2005)043, Interpretive Declaration on the Stability of the Electoral Law.

171. Recommendation Rec(2004)11 of the Committee of Ministers on legal, operational and technical standards for e-voting.

I. Referendums and Europe's electoral heritage

1. Universal suffrage

1.1. Rule and exceptions

6. The conditions for according the right to vote are normally the same for both referendums and elections. In particular, a period of residence requirement may be imposed on nationals solely for local and regional referendums, and should not exceed six months other than in exceptional circumstances (point I.1.1.c.iii-iv).

7. It is desirable that the right to vote be accorded to citizens residing abroad, at least for national referendums. It is important to ensure that this does not lead to fraud, however. Accordingly, it is preferable not to record such people on the same register as residents, but to allow them to vote abroad or from abroad; in addition, this will help ensure that they exercise their right to vote, which is unlikely if they have to return to their home country for the sole purpose of voting (point I.1.1.c.v).

2. Equal suffrage

2.2. Equality of opportunity

8. Respect for equality of opportunity is crucial for both referendums and elections. While in elections equality must be ensured between parties and between candidates, simply replicating this principle in the case of referendums may lead to an unsatisfactory situation. In countries with popular initiatives or optional referendums, these are often not instigated by a political party, and may even propose an option that is rejected by the largest parties – such as reducing the number of members of Parliament or public funding of parties. Accordingly, the guidelines emphasise equality between the supporters and opponents of the proposal being voted on notably as concerns the coverage by the media, in particular in news broadcasts, as well as public subsidies and other forms of backing; in this framework, account may be taken of the number of political parties supporting each option or their election results (points I.2.2.a-e).

9. It would be unrealistic to require a perfect balance between a text's supporters and opponents in all cases. It may be that a degree of consensus emerges in one direction or the other – particularly in the case of a mandatory referendum on a proposal having required a qualified parliamentary majority. Supporters and opponents must always be guaranteed access to the public media, however. As long as this requirement is satisfied, account may be taken of the number of political parties supporting each option or of their election results, especially in news broadcasts (point I.2.2.c).

10. Similarly, it is advisable to ensure equality between the proposal's supporters and opponents in terms of public subsidies and other forms of backing. Such backing may be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate, provided that the support received by each side is balanced. If equality is ensured between political parties, it may be proportional,

taking account of their election results. Allocating funds to the parties alone is not the ideal solution, however, as explained above (point I.2.2.d).

2.3. Equality and national minorities

11. As in the case of elections, there may sometimes be grounds for taking into account the specific circumstances of national minorities. In particular, this would apply to a referendum on self-government for a territory with a relatively high concentration of a minority population: a double majority of electors within that territory and throughout the country may be required.

3. Free suffrage

3.1. Freedom of voters to form an opinion¹⁷²

12. In the case of elections, intervention by the authorities in support of a list or a candidate is unacceptable: their duty of neutrality is absolute. An authority must not use its position, or public funds, to stay in power; nor must it do so on behalf of its supporters in another organ.

13. The situation is different in the case of referendums, since it is legitimate for the different organs of government to convey their viewpoint in the debate for or against the text put to the vote. They must not abuse their position, however. In any event, the use of public funds for campaigning purposes must be prohibited in order to guarantee equality of opportunity and the freedom of voters to form an opinion. In addition, the public authorities at every level (national, regional or local), must not engage in excessive, one-sided campaigning, but show neutrality. Clearly, this does not mean they will not take a stand, but they must provide a certain amount of necessary information in order to enable voters to arrive at an informed opinion. Voters must be able to acquaint themselves, sufficiently in advance, with both the text put to the vote and, above all, a detailed explanation (point I.3.1.d):

- the best solution is for the authorities to provide voters with an explanatory report setting out not only their viewpoint or that of persons sharing it, but also the opposing viewpoint, in a balanced way;
- another possibility would be for the authorities to send voters balanced campaign material from the proposal's supporters and opponents – corresponding, *mutatis mutandis*, to candidates' election addresses made available to citizens prior to some elections.

14. Both the text and the explanatory report or balanced campaign material must be sent directly to citizens sufficiently in advance of the vote (at least two weeks beforehand).

15. The clarity of the question is a crucial aspect of voters' freedom to form an opinion. The question must not be misleading; it must not suggest an answer,

172. The term "voter" is used here in the broad sense: it refers to citizens (who may be foreign nationals) entitled to participate in a referendum.

particularly by mentioning the presumed consequences of approving or rejecting the proposal; voters must be able to answer the questions asked solely by yes, no or a blank vote; and it must not ask an open question necessitating a more detailed answer. Lastly, electors must be informed of the impact of their votes, and thus of the effects of the referendum (is it legally binding or consultative? does a positive outcome lead to the adoption or repeal of a measure, or is it just one stage in a longer procedure?) (point I.3.1.c).

3.2. Freedom of voters to express their wishes

16. The paragraph on electronic voting has been brought into line with the new standards introduced by the Council of Europe through the adoption of Recommendation Rec(2004)11 of the Committee of Ministers on legal, operational and technical standards for e-voting (point I.3.2.a.iv).

17. Given the distinctive nature of referendums, in that they divide not only parties but also other groupings not seeking representation within elected organs, representatives of the proposal's supporters and opponents – including representatives independent of the parties – and observers appointed by both sides should have access to polling stations during both the voting itself and counting (points I.3.2.a.x and xiii).

18. The guidelines also emphasise another aspect of voters' freedom to express their wishes, which is also necessary in elections but is more likely to be violated in the case of referendums: voters must be allowed to express their wishes in accordance with rules prescribed by law, and have the right to accurate establishment of the result (see point I.3.2.b). In particular, the time-limit prescribed by law must be observed. In the case of a referendum or a popular initiative requested by a section of the electorate, the authorities may actually be tempted to draw the process out until the question is no longer relevant.

II. Conditions for implementing these principles

1. Regulatory levels and stability of referendum law

19. The wording of the guidelines is slightly less restrictive than the code of good practice in electoral matters¹⁷³ as regards the requirement that all rules of referendum law – apart from rules on technical matters and detail – should have the rank of a statute, using the term “should” rather than “must”. Where a referendum is requested by the executive, it is conceivable that the latter could set the rules for it. Such a situation is not entirely satisfactory, however, and the requirement for a procedural statute is the norm (point II.2.a).

20. The list of fundamental aspects of referendum law, which should not be open to amendment less than one year before a referendum, at least if they are set out in ordinary legislation, takes into account the specific nature of referendums by including rules on the procedural and substantive validity of texts put to a referendum and the effects of referendums. It also emphasises the need for rules on the franchise and electoral registers, and access to the public media for the proposal’s supporters and opponents. In addition, it must be understood in the light of the Interpretive Declaration on the Stability of the Electoral Law adopted by the Venice Commission in 2005:¹⁷⁴ in particular, the stability of referendum law cannot be invoked to maintain a situation contrary to the norms of Europe’s electoral heritage in the area of direct democracy or to prevent the implementation of recommendations by international organisations. Furthermore, given that it is unusual for the date of a referendum to be known a year or more in advance (whereas elections normally take place at set intervals), it is a matter not so much of prohibiting legislative amendments during the year preceding the vote as of prohibiting the application of such amendments during the year following their enactment, in case there are suspicions of manipulation (point II.2.b).

2. Procedural guarantees

2.1. Organisation of the referendum by an impartial body

21. Once again, the fact that referendums do not necessarily entail a divide along party lines but may involve other political players means a choice must be offered, as regards the membership of electoral commissions, between balanced representation of the parties and balanced representation of the proposal’s supporters and opponents (point II.3.1.e).

2.2. An effective system of appeal

22. The appeal body’s minimum powers are specified, insofar as respect for free suffrage and the results of the ballot are expressly mentioned. Other aspects specific to referendums and popular initiatives should be subject to judicial review, at least in the last instance: the completion of popular initiatives and requests for referendums

173. CDL-AD(2002)023rev, II.2.a.

174. CDL-AD(2005)043.

from a section of the electorate, along with the procedural and, where applicable, substantive validity of texts submitted to a referendum. The review of validity, whether obligatory or optional, should take place before the text is put to the vote: this will avoid the people having to express their views – in vain – on a text that is subsequently ruled invalid because it is contrary to superior law (substantive invalidity) or the content of which breaches the requirements for procedural validity (point II.3.3.d, see points III.2-3).

23. Unlike elections, which take place in a number of constituencies, referendums involve a whole territory. Consequently, where partial annulment of the results does not affect the overall result, it must not give rise to a repeat ballot in the area in which the vote was annulled, since this would not lead to a different result. Unless the entire referendum is repeated, however, it must be possible to call a new partial referendum in part of the territory if the overall result is in question; careful consideration must be given to calling a new partial ballot rather than an entire new referendum, however, so as to avoid the massive concentration of campaign resources in a limited area (point II.3.3.e).

2.3. Funding

24. National rules on both public and private funding of political parties and election campaigns must be applicable to referendum campaigns (point II.3.4.a). As in the case of elections, funding must be transparent, particularly when it comes to campaign accounts. In the event of a failure to abide by the statutory requirements, for instance if the cap on spending is exceeded by a significant margin, the vote must be annulled.¹⁷⁵ It should be pointed out that the principle of equality of opportunity applies to public funding; equality should be ensured between a proposal's supporters and opponents (point I.2.2.d).

25. There must be no use of public funds by the authorities for campaigning purposes, in order to guarantee equality of opportunity and the freedom of voters to form an opinion (point II.3.4.b, see point I.3.1.b).

175. See CDL-AD(2002)023rev, paragraphs 107 ff.

III. Specific rules

1. The rule of law

26. The principle of the rule of law, which is one of the three pillars of the Council of Europe along with democracy and human rights,¹⁷⁶ applies to referendums just as it does to every other area. The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. The use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed. On the other hand, referendums must be organised where the legal system provides for them (point I.3.2.b.i).

2. The procedural validity of texts submitted to a referendum

27. Procedural validity comprises three aspects: unity of form, unity of content and unity of hierarchical level.

28. The text submitted to referendum may be presented in various forms:

- a specifically-worded draft of a constitutional amendment, legislative enactment or other measure
- repeal of an existing provision
- a question of principle (for example: “Are you in favour of amending the Constitution to introduce a presidential system of government?”) or
- a concrete proposal, not presented in the form of a specific provision and known as a “generally-worded proposal” (for example: “Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?”).¹⁷⁷

29. A “yes” vote on a specifically-worded draft – at least in the case of a legally binding referendum – means a statute is enacted and the procedure comes to an end, subject to procedural aspects such as publication and promulgation. On the other hand, a “yes” vote on a question of principle or a generally-worded proposal is simply a stage, which will be followed by the drafting and subsequent enactment of a statute. Combining a specifically-worded draft with a generally-worded proposal or a question of principle would create confusion, preventing electors from being informed of the import of their votes and thereby prejudicing their free suffrage.

30. An even more stringent requirement of free suffrage is respect for unity of content. Electors must not be called to vote simultaneously on several questions without any intrinsic link, given that they may be in favour of one and against another. Where the revision of a text covers several separate aspects, a number of questions must therefore be put to the people. However, total revision of a text, particularly a Constitution, naturally cannot relate solely to aspects that are closely linked. In this case, therefore, the requirement for unity of content does not apply.

176. See the preamble to the Statute of the Council of Europe (ETS 001).

177. CDL-AD(2005)034, paragraph 64.

Substantial revision of a text, involving a number of chapters, may be regarded as being equivalent to total revision; clearly, this does not mean the different chapters cannot be put separately to the popular vote.¹⁷⁸

31. The rule of unity of hierarchical level is not as crucial as the previous two rules. It is desirable, however, that the same question should not simultaneously apply to legislation of different hierarchical levels, for example a constitutional revision and the associated implementing Act.

3. The substantive validity of texts submitted to a referendum

32. Under the principle of the rule of law, the people are not exempt from compliance with the law. This applies to both procedural aspects and the substance of texts put to the vote, which must comply with all superior law. Legislative referendums must therefore comply with the Constitution; referendums within federated or regional entities must comply with the law of the central state.

33. Irrespective of what national law has to say about the relationship between international and domestic law, texts put to a referendum must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

34. In order to prevent unlawful referendums, texts that are procedurally or substantively invalid must not be put to a referendum.

4. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution)

35. (Optional) referendums held at the request of a section of the electorate and popular initiatives entail the collection of signatures. The guidelines set out a number of rules in this respect, not all of which will be discussed in detail here.

36. Entitlement to collect signatures must not be confined to registered electors, but apply to everyone, including foreigners and minors (particularly in respect of texts concerning their status) (point III.4.c).

37. Authorisation may be required in order to gather signatures on public thoroughfares. As with any restriction of fundamental rights, such authorisation may be refused only where there is a legal basis for doing so and in accordance with the principles of public interest, proportionality and equality (point III.4.d).

38. The collection of signatures should not be remunerated or funded from private sources. Where remuneration is permitted, it must apply only to those who collect signatures, and not to electors who sign a popular initiative or a request for a

178. The option of classifying a revision involving several chapters as a total revision may seem like a means of circumventing the unity of content rule. This overlooks the fact that a total constitutional revision often involves a more complicated process than a partial revision.

referendum; it must be regulated, with regard to both the total amount allocated and the amount paid to each person collecting signatures (point III.4.e).

39. It is important that all signatures are checked (point III.4.f). The success or failure of an initiative or a request for a referendum must not be determined on the basis of a sample, which might contain an unusually high number of invalid signatures or, on the contrary, might not contain any while other sheets of signatures might be full of them. At the very most, some signatures need not be checked once it has been established beyond doubt that the number of valid signatures required by law has been collected.¹⁷⁹

40. In addition, a popular initiative – or a request for a referendum – should be declared partially invalid where it is possible to modify the proposed text, without distorting it, so that it complies with the law. An authority must have the power to correct a question that is obscure or misleading or suggests an answer. In the event that the rules on procedural or substantive validity have been violated, it may also declare partial invalidity where the signatories would have approved the remaining part if it had been submitted on its own, or declare the sub-division of a text that is not consistent with unity of content, form or hierarchical level.

5. Parallelism in procedures and rules governing the referendum

41. When the referendum is legally binding, the authorities must respect the people's decision. The guidelines provide, for instance, that for a certain period of time (a few years at the most) a text rejected in a referendum may not be adopted by a procedure without referendum. An optional referendum at the request of a section of the electorate is regarded as a referendum procedure: unless such a referendum is requested, a text rejected the first time round may therefore be adopted without a popular vote (points III.5.a.i and v). A similar rule applies to the revision of a provision approved in a referendum (point III.5.a.ii).

42. Two exceptions are provided for:

- where the Constitution provides for a referendum on a total revision of a text (in practice, the Constitution itself) but not on partial revision, a partial revision of that text does not necessarily have to be put to a popular vote (point III.5.a.iii);
- Parliament may revise a rule of law superior to that adopted by the popular vote without a referendum; it is entitled to do so in accordance with the principle of hierarchy of legal rules,¹⁸⁰ but this should be avoided for a certain period of time (point III.5.a.iv).

43. The foregoing does not apply to consultative referendums, which are not legally binding on the authorities. The political wisdom of Parliament going against the wishes of (the majority of) the people is clearly another matter.

179. In relation to the submission of candidatures for elections, see CDL-AD(2002)023rev, I.1.3.iv.

180. CDL-INF(2000)013.

44. The adoption of a text at the request of an authority other than Parliament, such as the head of state or government, must not freeze the legal situation indefinitely. Accordingly, the guidelines provide that such a text may be revised either by parliamentary means or at the request of a section of the electorate, where applicable after the expiry of a certain period of time (point III.5.c). When a text is adopted as the result of a popular initiative, it must be possible for the people to pronounce on the issue again at the request of another popular initiative, at least after the expiry, where applicable, of a certain period of time (point III.5.b).

45. Constitutional rules relating to referendums should enjoy direct popular legitimacy, that is, they should be put to a referendum, compulsorily or at the request of a section of the electorate. In any event, should Parliament wish to introduce a measure limiting popular rights, it should have the power to do so only by means of a measure submitted to one of these forms of referendum (point III.5.d).

6. Opinion of Parliament

46. In the case of popular initiatives, it is important for the people to be informed of Parliament's opinion. Accordingly, the guidelines provide for Parliament to give its opinion. Where Parliament opposes a text but wishes to take a step in a similar direction, it is very helpful if it can put a counter-proposal to the popular vote at the same time.¹⁸¹

47. Parliament's opinion is all the more necessary when the referendum is requested by the executive. In such cases, it is important to ascertain whether the call to the people is designed to bypass Parliament. Electors must be informed of Parliament's position.

48. Consultation of Parliament must not give rise to delaying tactics. The law must therefore set a deadline for Parliament to give its opinion, and a deadline for the popular vote to take place, where necessary without Parliament's opinion if the latter has not given it in time.

49. In the case of regional or local referendums, the regional or local assembly shall take over the role played by Parliament at the national level.

7. Quorum

50. Based on its experience in the area of referendums, the Venice Commission has decided to recommend that no provision be made for rules on quorums.

51. A turn-out quorum (minimum percentage) means that it is in the interests of a proposal's opponents to abstain rather than to vote against it. For example, if 48% of electors are in favour of a proposal, 5% are against it and 47% intend to abstain, the 5% of opponents need only desert the ballot box in order to impose their viewpoint, even though they are very much in the minority. In addition, their absence from the

181. The issue of voting procedures where a popular initiative and a counter-proposal are put to the popular vote is highly specific, which is why the guidelines do not comment on it.

campaign is liable to increase the number of abstentions and thus the likelihood that the quorum will not be reached. Encouraging either abstention or the imposition of a minority viewpoint is not healthy for democracy (point III.7.a). Moreover, there is a great temptation to falsify the turn-out rate in the face of weak opposition.

52. An approval quorum (acceptance by a minimum percentage of registered voters) may also be inconclusive. It may be so high as to make change excessively difficult. If a text is approved – even by a substantial margin – by a majority of voters without the quorum being reached, the political situation becomes extremely awkward, as the majority will feel that they have been deprived of victory without an adequate reason; the risk of the turn-out rate being falsified is the same as for a turn-out quorum.

8. Effects of referendums

53. If electors are to cast an informed vote, it is essential for them to be informed of the effects of their votes; it must therefore be clearly specified in the Constitution or by law whether referendums are legally binding or consultative (point III.8.a, see point I.3.1.c on free suffrage).

54. Where a legally binding referendum concerns a question of principle or a generally-worded proposal, it is up to Parliament to implement the people's decision. Parliament may be obstructive, particularly where its direct interests are affected (reducing the number of members of Parliament or the allowances paid to them, for example). It is preferable, therefore, for referendums on questions of principle or generally-worded proposals to be consultative. If they are legally binding, the subsequent procedure should be laid down in specific constitutional or legislative rules. It should be possible to appeal before the courts in the event that Parliament fails to act (point III.8.b).

Referendums in Europe – an analysis of the legal rules in European states¹⁸²

Introduction

1. Since it was established, the Venice Commission has taken an interest in electoral issues, including the use of direct-democracy procedures, such as referendums, which are becoming increasingly common as democracy spreads through Europe.
2. Against this background, the Venice Commission adopted guidelines for constitutional referendums at national level (CDL-INF(2001)010) at its 47th plenary meeting (Venice, 6-7 July 2001).
3. Recent experience in Europe prompted the Council of Europe's Parliamentary Assembly to consider referendums and good practices in this field, in co-operation with the Venice Commission.¹⁸³ Its work led to the adoption, on 29 April 2005, of Assembly Recommendation 1704 (2005) on "Referendums: towards good practices in Europe".¹⁸⁴ At the Committee of Ministers' request, the Venice Commission submitted comments on this recommendation (document CDL-AD(2005)028).
4. At its 8th meeting (Venice, 11 March 2004), the Council for Democratic Elections decided to carry out a new study on referendums and compile a questionnaire on their use. Based on a contribution by Mr François Luchaire (member of the Venice Commission, Andorra) (document CDL(2004)031), this questionnaire was adopted by the Council for Democratic Elections at its ninth meeting (Venice, 17 June 2004), and by the Venice Commission at its 59th plenary session (Venice, 18-19 June 2004) (document CDL(2004)031).
5. Replies to the questionnaire have been submitted by Venice Commission members from thirty-three countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia" and Turkey.

182. Study No. 287/2004. Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005); CDL-AD (2005)034. The tables summarising the replies to the questionnaire on referendums by the Venice Commission appear in documents CDL-AD(2005)034add and CDL-AD(2005)034add2.

183. See Parliamentary Assembly document 9874 of 10 July 2003, motion for a resolution, presented by Mr Gross and others, "Guidelines for good practices in the holding of referenda".

184. See also document 10498, containing the Political Affairs Committee's report (rapporteur: Mr Mikko Elo, Finland, Socialist Group), to which is appended a working paper prepared by the Research and Documentation Centre on Direct Democracy in Geneva.

6. The Venice Commission secretariat has used these replies to prepare this summary report, appending a draft summary table of the replies themselves. Like the questionnaire, the report comprises three parts, covering national referendums, regional and local referendums and the future of referendums.

7. This report was adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and by the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).

8. Following adoption of this report, the Council for Democratic Elections and the Venice Commission may wish to draw up guidelines on referendums in general.

General comments

9. As democracy has spread throughout the European continent, the forms it should take have naturally been discussed, both nationally and internationally. The utility of direct democracy and the limits to its use are a fundamental aspect of this debate.

10. The constitutions and constitutional practice of many of the new democracies give referendums a prominent role – sometimes more so than those of the older democracies.

11. This means that the pros and cons of direct democracy can be gauged with reference to concrete examples. It would, however, be unwise to draw conclusions or make general recommendations on a purely empirical or, conversely, over-theoretical basis.

12. Direct consultation of the people via referendum has long been the subject of heated discussion between legal and political experts, sociologists, politicians, and indeed the general public.

13. This study sets out to identify the fundamental aspects of referendums, as used in European countries, and also points of convergence and divergence between national traditions – in short, to answer the main legal questions raised by direct consultation of the people in European democracies. This will give the basis needed to draw up general guidelines.

I. National referendums

A. Legal basis of the referendum

14. In the vast majority of states that replied to the questionnaire, the constitution provides for the organisation of national referendums. Only four states have no provision for this.

15. In Belgium, there is no constitutional or even legislative basis for a referendum and a decision-making (legally binding) referendum is considered unconstitutional. A consultative referendum – the constitutionality of which has been strongly disputed – was organised in 1950 further to a specific decision of Parliament. The fact that the constitution does not mention referendums could accordingly be regarded as ruling out a referendum.

16. In the Netherlands, no national referendum has been organised to date on the basis of the (temporary) General Law on Referendums. A consultative referendum concerning approval by the Netherlands of the Constitutional Treaty of the European Union (the "European Constitution") was held on 1 June 2005, but that referendum was based upon an ad hoc law. Provision for a referendum was introduced by means of a temporary law that was in force from 2002 to 2004, although it was never applied. It should be stressed that Parliament recently opposed the introduction of the referendum into the constitution. It is because no final decision has yet been taken on the introduction of referendums that there is no provision for them as yet in the constitution.

17. In Norway, as there were no relevant provisions in the constitution, two referendums (both on accession to the European Economic Community and then the European Union) were organised on the basis of specific acts of parliament (in 1972 and 1994). Here, the fact that there is no provision in the constitution on the subject does not rule out a referendum, but the latter is so exceptional that a general provision is not appropriate.

18. In Cyprus, the institution of the referendum is dealt with at legislative level. It has been used only once.

19. To sum up, the general practice in Europe is for a national referendum to be provided for in the constitution. Where there is no such provision, referendums have either not been introduced on a permanent basis or are quite exceptional.

20. Constitutions do not necessarily provide for all forms of referendum, even national ones. In Malta, for example, only the constitutional referendum is dealt with in the constitution.

21. The existence of constitutional rules providing for a referendum clearly does not preclude implementing legislation. On the contrary, it is natural for the constitution to set out the principles and for the other rules to be specified in ordinary legislation. In some states, the constitutional rule is implemented by a legal instrument that ranks higher than the ordinary law (in Andorra this is a "qualified" law, in Spain, Georgia and Portugal an "organic" law or implementing Act). In Russia, whose constitution

contains only a few rules on referendums, the subject is regulated by a constitutional law. The situation is in theory the same in the Czech Republic, although such a constitutional law has not been passed there except with regard to the country's accession to the European Union, and it has accordingly not yet been possible to organise national referendums on other subjects. When the referendum is rarely used, a special law may have to be passed each time one is organised (as in Finland, which has held two referendums).

B. Types of referendum – bodies competent to call referendums

22. The nature of the referendum varies according to whether it is mandatory or optional and depends on the body competent to call it. This will be considered in this section.

1. Mandatory referendum

23. A referendum is mandatory when certain texts are automatically submitted to referendum, perhaps after their adoption by Parliament.

24. A mandatory referendum generally relates to constitutional revisions. In some states, any constitutional revision is submitted to a mandatory referendum, with the result that the people itself becomes the constitution-making body (Andorra, Armenia, Azerbaijan, Ireland, Switzerland – where a majority of the people and of the cantons is required –, Denmark where a precondition for a constitutional revision is the holding of general elections). In other states (Austria, Spain), only total revisions are submitted to a mandatory referendum. A mandatory referendum may also be restricted to changes to certain provisions or rules: basic constitutional provisions (*Estonia* – the chapters of the Constitution on general provisions and the revision of the Constitution as well as the law complementing the Constitution, on accession to the European Union –, *Latvia* – democratic and sovereign nature of the state, territory, official language and flag, election of the Parliament by universal, equal, direct, secret and proportional suffrage, a rule providing for a referendum to be called for the revision of previous provisions –, *Lithuania* – an independent and democratic republic, chapters on the state and revision of the constitution, constitutional law on the country's non-alignment with post-Soviet alliances –); three provisions relating to constitutional revisions and the duration of Parliament (*Malta*).

25. A mandatory referendum may also be conditional on a preliminary procedure, as in the case of France, where it concerns only constitutional revisions initiated by Parliament (there has been no actual case in which it has been used) and Turkey, where it concerns only constitutional amendments adopted by at least three-fifths but less than two-thirds of the members of the Grand National Assembly and not returned to the Assembly by the President of the Republic for reconsideration, although such a case is unlikely. In Russia, the mandatory referendum may be provided for only by an international treaty.

26. Other very important instruments are sometimes submitted to mandatory referendum. Such instruments are, firstly, quasi-constitutional rules, such as, in Switzerland, emergency laws derogating from the Constitution for more than one year and, secondly, instruments that involve a considerable limitation of sovereignty,

especially in the context of European integration, such as accession to the European Union (Latvia), joining collective security organisations or supranational communities (Switzerland), joining international organisations in the case of a transfer of powers (Lithuania), association with other states (Croatia) or joining or leaving a community with other states (“the former Yugoslav Republic of Macedonia”). In Denmark, a referendum must take place when constitutional powers belonging to the national authorities are delegated to international bodies, unless Parliament approves this by a five-sixths majority. Also submitted to mandatory referendum are changes to a country’s territorial integrity, such as a redefinition of borders (Azerbaijan, “the former Yugoslav Republic of Macedonia”). Finally, other states provide for mandatory referendums in specific fields: in Denmark, a change in the voting age; in Portugal, regionalisation.

2. *Referendums at the request of an authority*

27. Referendums at the request of an authority – or extraordinary referendums – exist in quite a number of states. The state body that calls for such a referendum may be the executive (in particular, the President), in which case the citizens’ confidence in this body may be concerned (plebiscitary aspect) or the legislative (or part of it). If the call for a referendum comes from the majority or, indeed, the opposition, it too may have a plebiscitary character, which will not be the case if the legislative takes the decision by common consensus to hold a referendum.

28. The remarks below refer only to referendums at the request of an authority. Most of the states concerned also have provision for mandatory referendums or referendums at the request of part of the electorate.

29. In fact, very few states provide for only the executive to call a referendum. This is the case in *Turkey*, where the President can submit to the people amendments that he or she has sent back to Parliament and have been subsequently adopted by the latter by a two-thirds majority. In *Albania*, on the other hand, the President can call on the people to decide only at the request of 50,000 voters. It has to be emphasised that these two states have a parliamentary system.

30. In *France*, the President can call a referendum on the proposal of the Government or (except for constitutional revisions) a joint proposal by the two assemblies. In the case of a Government proposal, a debate must be held by the two assemblies. In the case of constitutional revisions, Parliament can decide to organise a referendum. It should be noted that the Government’s involvement precludes, in principle, a call for a referendum against the advice of the parliamentary majority. In *Portugal*, there also has to be an agreement between the President and Parliament, or the President and the Government. In *Croatia*, an issue may be put to the vote either by Parliament or the President, but the latter can only call a referendum on the Government’s proposal and with the Prime Minister’s counter-signature.

31. In some cases (such as *Azerbaijan* and *Georgia*), the President or Parliament may each have the general right to call a referendum.

32. In other states, however, the executive and the legislative have to agree before a referendum is called. In *Armenia*, this is the case with the President and the Parliament

(the President can also call a referendum at the Government's request with the consent of Parliament). In Andorra, the Head of Government and the Council General have to agree, and in Cyprus there must be agreement between the Prime Minister and Parliament – which should not pose any problem given the parliamentary nature of the political system. In Ireland, the President calls a legislative referendum on a joint proposal of the Senate majority and at least one-third of the lower house (Dáil).

33. The Polish lower house (Sejm) alone has the power to call a referendum, the President being able to do so only with the consent of the Senate.

34. In many countries, however, Parliament is the only authority able to call a referendum (Estonia, Finland, Latvia – on modifications of the terms of membership of the European Union –, Lithuania, Luxembourg, Malta, Sweden). In Belgium and Norway, where the constitution does not provide for referendums, Parliament has acted on the basis of a decision or specific acts of Parliament. In Austria, the National Council decides whether to hold a legislative or consultative referendum on issues of national importance; one-third of members of Parliament can submit a partial revision of the constitution to a popular vote. In Bulgaria, it is Parliament that decides, but the proposal to call a referendum may come not only from a quarter of members of Parliament but also the Council of Ministers or the President. In Hungary, Parliament decides following a proposal by the President, the Government, one-third of its members or 100,000 voters, while in “the former Yugoslav Republic of Macedonia” it decides in response to a proposal by the Government, a member of Parliament or 10,000 citizens. In Spain, a consultative referendum on an issue of particular importance is called by the King on the proposal of the Prime Minister following the authorisation of the Congress. In Greece, the President formally calls a referendum but the decision must be taken by a majority of members of Parliament on the proposal of the Government (on crucial national issues) or three-fifths of members of Parliament (on laws relating to important social issues).

35. In Russia, if a constituent assembly is convened, it can adopt a new constitution by a majority of two-thirds of its members or submit a proposal to referendum.

36. Sometimes, a minority of parliamentarians can refer partial revisions of the constitution to the people, as in Denmark (one third of members of Parliament) or *Spain* (10% of the members of either chamber).

37. In some states, a referendum can be requested by a number of constituent entities – in Switzerland, eight cantons, or regional entities – in Italy, five regions (by decision of the Regional Council).

38. In very few states, the legislative may call a referendum on the dismissal of the executive or vice versa. Each of these two possible cases appears once in the replies to the questionnaire. In *Austria*, a referendum on the dismissal of the President can be called by a two-thirds majority of the National Council; in Latvia, by contrast, it is the President who can call a referendum on the dissolution of Parliament.

3. *Referendum at the request of part of the electorate*

39. Provision for a referendum at the request of part of the electorate is less common than that for a mandatory referendum or referendum at the request of an authority.

40. Referendums at the request of part of the electorate must be divided into two categories: the ordinary optional referendum and the popular initiative in the narrow sense. Both result in a popular vote without an authority taking a decision in this respect, but the authorities are least involved in the case of the popular initiative. An ordinary optional referendum challenges a text already approved by a state body, while a popular initiative enables part of the electorate to propose a text that has not yet been approved by any authority.

41. It is in Switzerland that the mechanisms of the ordinary optional referendum and the popular initiative are the most highly developed. A referendum can be requested by 50,000 citizens against specific laws (except for emergency laws adopted for less than one year), certain international treaties and certain federal orders – decisions adopted by Parliament. A popular initiative can be presented by 100,000 citizens with the aim of revising the constitution and a general popular initiative, which can also lead to a change in the law, will be introduced shortly. Parliament decides solely on the validity of the popular initiative.

42. A request for an ordinary optional referendum or a popular initiative requires 500,000 signatures in Lithuania and 150,000 in “the former Yugoslav Republic of Macedonia”. In Latvia, 10% of voters can launch a constitutional or legislative popular initiative or request a referendum if the President suspends a law at the request of one-third of Parliament, if the law is not passed again by the latter by a three-quarters majority of its members.

43. Italy has both optional constitutional referendums and abrogative legislative referendums, at the request of part of the electorate (500,000 signatures are necessary). Parliament can, however, rule out a referendum by revising the basic principles and key content of the old law. Albania and Malta also have provision for abrogative legislative referendums. The system in the Russian Federation provides for a referendum at the request of 2,000,000 voters. This is more akin to a popular initiative, even though it may relate to a text already adopted as it is not suspensive.

44. *Croatia* has a popular initiative (at the request of 10% of the voters) but not an ordinary optional referendum. The same applies to Georgia (at the request of 200,000 voters). As we shall see later, in these two countries the referendum cannot relate to the text of a law.

45. Ordinary optional referendums exist in Hungary but not the type of popular initiative described here (200,000 signatures). The temporary law in force in the Netherlands from 2002 to 2004 was along the same lines (600,000 voters, following an introductory request by 40,000 voters).

46. In several states, there is also a limited form of popular initiative, with a number of voters being able to propose that another body call a referendum. This is accordingly an extraordinary referendum organised at the request of part of the electorate. In Poland, 500,000 citizens can ask the Sejm to organise a referendum; in

Portugal, such a request can be submitted to Parliament by 75,000 voters; in Hungary, 100,000 signatures are necessary and in “the former Yugoslav Republic of Macedonia” 10,000 (it should be pointed out that the referendum must take place if there are 200,000 or 150,000 signatures respectively). On the other hand, 50,000 voters can ask the President of Albania to organise a referendum, while 300,000 can do so in Azerbaijan.

47. Otherwise, the role of the authorities, and especially Parliament, is limited in the case of the popular initiative. As pointed out above, the Italian Parliament can rule out an abrogative referendum by revising the basic principles and key content of the old law. Maltese law is similar: the referendum does not take place if Parliament repeals the impugned legislation. The Lithuanian Parliament debates the initiative, but cannot refuse to submit it to the people unless it is unconstitutional. In Switzerland, Parliament examines the validity of the popular initiative and must recommend its acceptance or rejection within 30 months of its being presented. It can make a counter-proposal to the popular initiative aimed at a partial revision of the constitution, which will then be put to the vote at the same time as the initiative. Parliament may also declare the initiative invalid and refuse to submit it to the people’s vote.

C. Content

Constitutional referendums

48. A referendum is often used to amend the constitution. In a number of states, as noted above, this is a mandatory referendum, either for any constitutional provision or only for certain provisions judged particularly important.

49. Optional constitutional referendums, either at the request of an authority or part of the electorate, exist in most states that do not have mandatory constitutional referendums. For example, the French President or Parliament can submit to the people a constitutional amendment approved by the two assemblies. In Azerbaijan and Turkey also, the President or Parliament can call a constitutional referendum, while in Armenia the agreement of the President and Parliament is required. A constitutional referendum can take place on the initiative of Parliament in Estonia, Lithuania and Malta (subject to cases of mandatory referendums in the latter two states) and one third of the members of one of the chambers in Austria. In Russia, it can relate to a new constitution as a whole, on the initiative of the constituent assembly.

50. The optional constitutional referendum at the request of part of the electorate is used in Italy (500,000 signatures are required), Lithuania (300,000 signatures) and Hungary (200,000 signatures; if there are only 100,000, the consent of Parliament is necessary).

51. The constitutional popular initiative is very common in Switzerland (100,000 signatures) and also exists in Lithuania (300,000 signatures) and “the former Yugoslav Republic of Macedonia” (150,000 signatures).

52. By contrast, several states exclude constitutional issues from the scope of the referendum: Bulgaria, Greece, Luxembourg, Netherlands – temporary law applicable up to 2004 –, Portugal.

Legislative referendums

53. Quite a number of states provide for legislative referendums. In most cases, this is an extraordinary referendum held on the initiative of the President (Azerbaijan, France), Parliament (Albania, Austria, Azerbaijan, Lithuania, Luxembourg), a number of members of Parliament (Denmark, Greece) or on the basis of an agreement between the President and Parliament (Armenia, Ireland – where the agreement of a majority of the Senate and one-third of the Dáil is required). In Portugal, the President decides on the basis of a proposal by Parliament or Government.

54. The ordinary legislative referendum is very common in Switzerland (at the request of 50,000 voters). It also exists in Hungary, Lithuania and “the former Yugoslav Republic of Macedonia”. In these states, it is suspensive, which increases its chances of success as voters are always more willing to oppose a legal instrument that is not in force than one they have seen applied.

55. The popular legislative initiative is less common. It exists in Lithuania, Russia and “the former Yugoslav Republic of Macedonia”. Albania, Italy and Malta provide for abrogative legislative referendums, on the initiative of part of the electorate. This type of referendum may however terminate a statute’s validity, not lead to its adoption.

Treaty-related referendums

56. Several states have provision for treaty-related referendums (on international treaties). They are mandatory in some states in the case of accession to the European Union (Latvia) or, more generally, to a supranational community (Switzerland), international organisations in the case of a transfer of powers (Lithuania, Denmark, except when a decision is taken by a five-sixths majority of members of Parliament) or in the case of joining or leaving a community with other states (“the former Yugoslav Republic of Macedonia”) or of an association with other states (Croatia). It should be noted that the accession of Austria to the European Union was considered a total revision of the constitution and was consequently submitted to mandatory referendum. Switzerland also opts for a mandatory referendum in the case of joining collective security organisations.

57. The ordinary optional treaty-related referendum exists in Switzerland – at least for the most important treaties – and in “the former Yugoslav Republic of Macedonia”, and is subject to the same conditions as the ordinary legislative referendum.

58. The treaty-related referendum may also be extraordinary. In France, it is initiated by the President, in Portugal by the President on a proposal by Parliament or the Government, and in Malta by Parliament. This type of referendum is also possible in Azerbaijan and Russia.

59. Certain other instruments may be submitted to referendum, such as Swiss federal orders (without general scope) in the cases provided for in the constitution or the law (ordinary optional referendum). Azerbaijani, Estonian and Maltese law provide for other instruments to be submitted to the people by Parliament (or the President in the case of Azerbaijan).

60. States that do not provide for a referendum on a specifically-worded draft (Croatia, Georgia, Sweden)¹⁸⁵ do not provide for a vote on the actual text of the Constitution (or other texts). However, they do provide for a vote on important issues that may clearly be constitutional in nature or related to laws or treaties. In Croatia, for example, voting can take place on any issue falling within the competence of Parliament or any matter that the President considers important.

Matters to which referendums may relate

61. A number of states limit the matters to which referendums may relate, doing so either by drawing up an exhaustive list or excluding certain areas from the popular vote.

62. An exhaustive list is drawn up in France in the case of legislative or treaty-related referendums, which can relate to the organisation of the public authorities, economic and social policy reforms and the relevant public services and, finally, the ratification of a treaty not contrary to the constitution but liable to influence the operation of the institutions. In practice, this is a very wide area.

63. Apart from elections and questions submitted to the decision of judicial or administrative bodies, which are expressly excluded from referendums by Armenian, Austrian and Azerbaijani law and implicitly excluded by the law of many other countries, the principal matters in respect of which national law rules out a referendum are financial, budgetary and tax issues (Albania, Azerbaijan, Denmark, Estonia, Greece, Hungary, Italy, Malta, Poland on the initiative of the citizens, Portugal, and “the former Yugoslav Republic of Macedonia”), amnesties and pardons (Albania, Azerbaijan, Georgia, Italy, Poland on the initiative of the citizens, and “the former Yugoslav Republic of Macedonia”) and restrictions on fundamental rights (Albania, Armenia, Georgia). It may also relate to territorial integrity (Albania), states of emergency (Albania, Estonia), the powers of Parliament, judicial bodies and the Constitutional Court (Bulgaria), texts concerning the civil service, naturalisation and expropriations (Denmark), the monarchy and the royal family (Netherlands under the temporary law applicable up to 2004, Denmark to a certain extent), legislative acts that are submitted to a special procedure and whose content is imposed by the constitution or acts constitutionally necessary for the operation of the state (Italy, Portugal), and appointments and dismissals (“the former Yugoslav Republic of Macedonia”). The implementation of international treaties cannot be submitted to the decision of the people in Denmark, Hungary, Malta and the Netherlands (temporary law), so as to avoid a breach of international law. Similarly, Swiss law allows for (but

185. See section I.D.

does not make compulsory) an international treaty and its implementing provisions (constitutional or legislative) to be put to a single vote.

D. Form of the text submitted to referendum (formal validity)¹⁸⁶

64. The text submitted to referendum may be presented in various forms:

- a specifically-worded draft of a constitutional amendment, legislative enactment or other measure
- repeal of an existing provision
- a question of principle (for example: “Are you in favour of amending the constitution to introduce a presidential system of government ?”) or
- a concrete proposal, not presented in the form of a specific provision and known as a “generally-worded proposal” (for example: “Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?”).

65. A number of states do not have any rules on the form of texts submitted to referendum (Azerbaijan, Belgium, Cyprus, Finland, Latvia, Luxembourg, Norway, Poland, Russia, “the former Yugoslav Republic of Macedonia”). Moreover, some of these states (Belgium, Finland, Luxembourg, Norway) do not have general rules on referendums or stipulate that the Council of Ministers (cabinet) should determine the form of the text submitted to referendum (Cyprus). In Bulgaria, it must simply be possible to reply yes or no to the question asked.

66. Other states, such as Armenia, Denmark, France, Ireland, the Netherlands (temporary law) and Turkey, only provide for a vote on a specifically-worded draft. There is also provision in Italy for an abrogative referendum, which also relates to a specific legal text.

67. By contrast, Croatian law excludes specifically-worded drafts (and thus takes into consideration questions of principle and generally-worded proposals); the situation is in principle the same in Portugal, where the only specifically-worded text which may be submitted to referendum is a treaty which aims at the construction or the deepening of the European Union. Only questions of principle can be put to the vote in Georgia and Sweden (where a choice between various alternatives is possible).

68. The referendum may also relate to a text that has or has not been specifically worded, depending on its nature or purpose. In Austria (where two alternative drafts may be offered), Andorra, Spain and Lithuania, a decision-making (legally binding) referendum relates to a specifically-worded draft (or the dismissal of the President in the case of Austria) and the consultative referendum to a question of principle.

69. Other states provide both for referendums on specifically worded drafts and questions of principle (Greece, Spain, Albania). Finally, the three possibilities (specifically-worded draft, question of principle, generally-worded proposal) may co-

186. CDL-INF(2001)010, “Guidelines for constitutional referendums at national level”, adopted by the Venice Commission at its 47th plenary meeting (Venice, 6-7 July 2001), paragraph II.C.

exist (Hungary, Switzerland, Malta in the absence of a rule to the contrary). Albania and Malta also have provision for abrogative referendums, which relate to a specifically-worded text.

70. Questions of principle are defined by national law in various ways. In Greece, for example, they are crucial national issues and important social issues, in Spain issues of particular importance, and in Cyprus important issues of public interest; in Switzerland, it is the total revision of the Constitution.

Unity of form

71. The question then arises as to whether the texts submitted to referendum have to comply with the principle of unity of form (the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle).

72. States that do not provide for any rule concerning the form of the texts submitted to referendum logically do not adopt the principle of unity of form either. By contrast, when a single form is prescribed, this principle is imposed by definition. Certain states that provide for several types of referendum adopt the principle of unity of form. This principle is expressly laid down in Switzerland but is implicit to a greater or lesser extent in quite a number of other states (for example, in Albania a vote is held on constitutional provisions, the repeal of legislation or a question of principle). A similar situation may be said to exist in Andorra, Estonia, Greece, Hungary, Lithuania and Spain.

Unity of content

73. The principle of unity of content means that, except in the case of a total revision of the constitution or another piece of legislation, there must be an intrinsic connection between the various parts of each question put to the vote in order to guarantee freedom of suffrage (the voter must not be expected to accept or reject as a whole provisions without an intrinsic link between them).

74. To date, most of the states that have replied to the questionnaire have not adopted any rule imposing compliance with the principle of unity of content. This does apply however in Bulgaria, Italy, Portugal, Switzerland and Hungary, where freedom to vote is considered to have been violated if parts of a question are contradictory, if their relationship with one another is not clear and if they do not flow from one another or are not linked by their content. Less explicitly, this principle is also applied in Armenia, Austria and “the former Yugoslav Republic of Macedonia”. In the Netherlands, this question does not really arise since only an entire law can be put to the popular vote under the temporary law.

Unity of hierarchical level

75. Unity of hierarchical level means that the same question must not relate simultaneously to the constitution and subordinate legislation. It is complied with in the following countries: Andorra, Armenia, Ireland, Italy, Switzerland and, implicitly, Hungary and Lithuania.

76. Unity of hierarchical level is mandatory by definition in states that do not provide for a constitutional referendum (Bulgaria, Greece, Luxembourg, Netherlands, Portugal) or those that, by contrast, provide only for a constitutional referendum (Turkey). It applies solely to specifically-worded drafts; questions of principle and generally-worded proposals have no place in the hierarchy of rules (they are implemented by constitutional and legislative rules).

Other requirements relating to the question asked

i. Clear and non-leading questions

77. Freedom to vote presupposes that “the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum; voters must answer the questions asked by yes, no or a blank vote”.¹⁸⁷ A number of national legal systems explicitly uphold these rules, especially the requirement that the question be clear. In Albania, questions of principle (particularly important questions) submitted to the electorate must be clear, complete and unequivocal; in Armenia, the question must be straightforward; in Hungary, devoid of ambiguity; in Portugal, questions must be formulated in an “objective, clear and precise manner”, and may not contain any suggestion or preliminary considerations; in France three conditions are attached: fairness, clarity and absence of ambiguity. The requirement for clarity relates to the rules providing that the voter should be able to reply yes or no (Austria, Croatia, Greece, Malta, “the former Yugoslav Republic of Macedonia”) or to vote on a specifically-worded text (Ireland). The requirement that the question be clear and non-leading is also upheld in Bulgaria, Italy, Poland, Portugal and Switzerland. Elsewhere it should apply in pursuance of the principle of freedom to vote.

ii. Number of questions

78. In general, the number of questions asked at the same ballot is not limited. However, in Armenia a referendum cannot relate to more than one question and in Portugal no more than three. In some states, alternatives can be proposed (Austria, Russia, Sweden). In Switzerland, Parliament can adopt a counter-proposal to a popular initiative, which is put to the vote at the same time.

E. Substantive limits on referendums (substantive validity)¹⁸⁸

79. The question of substantive limits is most important in the case of constitutional revisions. Most constitutions do not prescribe substantive limits to their revision, but this does not exclude the possibility of such limits existing, whether they be extrinsic (international law or some of its rules) or intrinsic, entailing the precedence of certain constitutional provisions over others. This is not the place to enter into a doctrinal debate but rather to establish to what extent national legal systems recognise such limits to the constitutional referendum.

187. CDL-INF(2001)010, paragraph II.E.2.a.

188. See CDL-INF(2001)010, paragraph II.D.

80. Intrinsic limits to the revision of the constitution are quite rare. In Albania, referendums cannot lead to interference with the country's territorial integrity or with fundamental rights. In Croatia, the only limit is the re-creation of a Yugoslav or Balkan state.

81. As regards extrinsic limits, Switzerland upholds the mandatory rules of international law (*ius cogens*). In Hungary, it is forbidden to organise a referendum on the obligations resulting from international treaties already in force and on the laws that implement them.

82. Quite a number of states do not provide for any limits (for example, Austria, Azerbaijan, Finland, Latvia, Malta, Turkey, France in practice).

83. On the other hand, when a referendum relates to a legal instrument of lower rank than the constitution, an examination is often conducted before the vote to establish whether it conforms to the constitution (Estonia, Lithuania, Portugal, Russia, Sweden) or with the constitution and international law (Cyprus, Denmark, Greece, Italy, "the former Yugoslav Republic of Macedonia"). In Ireland, the examination is carried out with respect to the constitution and European Union law. The latter requires that, at the very least, no law contrary to it should be in force in any member state. Such an examination can even be conducted in the case of a referendum on a question of principle or a generally-worded proposal when the latter cannot lead to a revision of the constitution (Andorra – the question must also comply with international treaties). In Russia, the question submitted to referendum must not restrict, set aside or reduce universally recognised human and civic rights and freedoms or the constitutional guarantees for exercising them.

84. In Poland, even though there is no explicit limit, the Sejm examines the question of conformity with higher-ranking law before deciding to call a referendum. In addition, the necessity to ensure conformity with higher-ranking law does not prevent the exclusion of preventive checks (Armenia).

F. Campaigning, funding and voting

1. Campaigning¹⁸⁹

a. Information for voters

85. The availability of the text put to the vote is an essential precondition for the electorate to freely develop an informed opinion. Publication in the official gazette is a minimum form of publicity that actually only reaches a limited number of voters. Lithuania and Russia provide for the text to be published in the public media and on their websites. In Ireland, the text must be made available to the public at post offices; in the Netherlands, it must be made available in town halls (under the temporary law applicable up to 2004).

189. See CDL-INF(2001)010, paragraph II.E.2.

86. Some countries have rules stipulating that the authorities must not only put the text at the disposal of citizens, but also provide additional objective information. In the Netherlands, a summary of the text is sent to voters. Other states arrange for an explanatory note or other information to be made available. In Switzerland, the text put to the vote is sent to voters together with an explanatory note from the Federal Council (Government), which must set out the various points of view in a balanced manner. In France, even if this is not prescribed by law, in practice the authorities have to supply objective information, by providing voters with the text and an explanatory note. The draft note is checked by the Constitutional Council, as a matter of course. In Finland, an objective explanatory note was sent to voters for the referendum on the country's accession to the European Union in 1994 (a special law is passed for each referendum). Such a note is drawn up in Ireland if the two houses of Parliament make provision for this and it must be neutral. In Portugal, all the authorities are required to ensure the strictest impartiality, while in Latvia the central electoral commission must provide citizens with neutral information, especially on the draft put to the vote.

87. In Portugal, it is the national electoral commission's task to draw up and provide any objective information on the referendum necessary for voters; in Poland, the state electoral commission is simply authorised to do this.

b. Sources of campaign material

88. An obligation for the authorities to demonstrate absolute impartiality and neutrality is recognised in Portugal and is also very widely established in Switzerland.

89. In Russia, as well as in Portugal, authorities and officials are prohibited from campaigning. Restrictions imposed on the authorities are sometimes more limited. In Armenia, they only apply to the exercise of their functions (for judges, police officers and military personnel, there is an absolute ban on campaigning). In Georgia, the ban on campaigning applies only to members of the electoral commissions.

90. In Austria, the authorities must provide neutral information but they are also allowed to campaign. However, the Constitutional Court has ruled in its case law that they are prohibited from disseminating non-objective or disproportionate mass information.

91. Other states, however, allow the authorities to be involved in the campaign (Hungary).

92. As far as individuals are concerned, most states do not impose any restrictions. However, foreign citizens and organisations are not allowed to campaign, for example, in the following states: Armenia, Azerbaijan, Georgia and Russia. In Russia, religious associations and charities cannot campaign. Special status is granted in Portugal to political parties, coalitions of parties or groups of at least 5,000 voters.

c. Access to the media

i. Public media

93. The majority of states that replied to the questionnaire regulate access to the public media during the referendum campaign. Quite often, equal air time is given to the supporters and opponents of the draft proposal (Albania, Azerbaijan, Bulgaria, Cyprus, Lithuania, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”).

94. In some states, a balance must be ensured between the various groups participating in the campaign rather than between the supporters and the opponents. This is the case in Italy, Malta, Poland, Portugal and Russia.

95. In the Netherlands and Spain, the rules simply state that the political parties represented in Parliament can use the time allocated to them on the radio and television for the referendum campaign. In Spain, this time is allocated in proportion to the parties’ electoral strength.

96. French law requires that the supporters and the opponents of the draft proposal be given “fair” coverage on radio and television. Only the parties represented in Parliament and those whose participation appears justified in view of the nature of the question asked may express their views. There is also a requirement to be fair in Ireland.

97. Other legal systems ensure a balance with regard to the requirements of objectivity, impartiality or neutrality. For example in Austria, the public broadcasting service is generally required to guarantee that the public receives objective and impartial information and to ensure a diversity of opinions.

ii.) Private media

98. Rules concerning the *private media* are less common than those relating to the public media. However, in some states there is a requirement for both the private and the public audiovisual media to be balanced. For example, supporters and opponents have the same air time in the two types of media in Bulgaria and Cyprus. In Austria, the requirement of impartiality and objectivity also applies to private radio and television stations, while in France and Ireland they must provide supporters and opponents of the draft proposal with fair coverage. This was also the case in Finland at the time of the referendum on accession to the European Union.

99. In Portugal,

- the requirement for balance applies to private audiovisual media in the same way as to public media – including the obligation to grant air time;
- the same requirement for balance applies to other private media (the printed media), but only if they wish to insert campaign material;
- the use of media is free (for parties and groups); the state has to compensate publications and channels.

100. Without going as far as this, legislation may provide that unequal financial conditions must not be imposed on referendum campaigning according to its origin (Italy, Russia and Spain, where rates cannot be higher than those for commercial advertising, and Switzerland in principle).

2. *Funding*¹⁹⁰

101. The use of public funds for or against a draft submitted to referendum is prohibited in a number of states: Armenia, Bulgaria, Croatia, Georgia, Ireland, Portugal, Poland, Russia, Spain, Switzerland, and “the former Yugoslav Republic of Macedonia”. This clearly does not exclude the use of public funds for the organisation of the referendum, including the benefits granted both to the supporters and opponents of the text in respect of postage (Spain) or tax exemption for activities connected with the referendum (“the former Yugoslav Republic of Macedonia”).

102. Other countries link the use of public funds to compliance with the requirement of neutrality. Ireland and Malta provide for public funds to serve the purpose of providing information but not for campaigning. In Finland, at the time of the referendum on accession to the European Union, public funds were distributed equally among the supporters and opponents of the proposal.

103. In some countries, the authorities’ ability to use public funds during the campaign is not ruled out but is limited. In Austria, the moderate use of public funds by Parliament and the Government is accepted if it does not constitute disproportionate and non-objective information. In Azerbaijan, the authorities are prohibited from campaigning only in the period immediately preceding the vote.

104. The law of other states that replied to the questionnaire makes no mention of this question.

Payment for the collection of signatures

105. In states in which popular initiatives or optional referendums are held, there is the question of the possibility of remunerating the people who collect signatures. None of the replies to the questionnaire mentions that such payment is prohibited, so the problem does not appear to exist in practice. It goes without saying, only these who collect signatures may be remunerated, not as voters who sign a popular initiative or a request for a referendum stated in Russia’s reply.

3. *Voting*

a. Voting period

106. In most states, the vote takes place over one day in the Czech Republic over two days. Finland schedules two days if the referendum is held at the same time as the national elections. The vote can also take place over one or two days in Poland. By definition, when advance or postal voting is allowed, it takes place before the actual polling day. For example, postal voting takes place over a period of thirty days in Sweden and three weeks before polling day in Switzerland. In Estonia, advance voting may take place at the polling stations from thirteen days before the election (moreover, electronic voting between four and six days before the election will be

190. See CDL-INF(2001)010, paragraph II.F.

allowed from 2005). Advance voting is permitted by Russian law for fifteen days in the case of less accessible localities, boats, polar stations and, more generally, everywhere outside the national territory.

107. If there are different time-zones within a country, is it possible for the results from some polling stations to be known before voting closes in others? This question arises in Russia much more than anywhere else, and the outcome of the vote is announced after the closure of all polling stations and the general counting of the votes. There is a significant time-difference between Metropolitan France and the overseas departments, and up to now the publication of the results has not been prohibited before the last polling stations close.

b. Compulsory voting

108. Compulsory voting is prescribed for referendums only in a very limited number of states: Greece, Luxembourg, Turkey and Belgium (where just one ad hoc referendum has been organised). In Switzerland, it is imposed only in one canton.

c. Quorum

109. Most states do not provide for a quorum to validate the result of a referendum.

110. Where a quorum does exist, it can take two forms: quorum of participation or quorum of approval. The quorum of participation (minimum turnout) means that the vote is valid only if a certain percentage of registered voters take part in the vote. The quorum of approval makes the validity of the results dependent on the approval (or perhaps rejection) of a certain percentage of the electorate.

111. A quorum of approval is considerably preferable to a quorum of participation, which poses a serious problem.¹⁹¹ The opponents of the draft proposal submitted to referendum, as several examples have shown, appeal to people to abstain even if they are very much in the minority among the voters concerned by the issue.

112. A quorum of participation of the majority of the electorate is required in the following states: Bulgaria, Croatia, Italy and Malta (abrogative referendum), Lithuania, Russia and “the former Yugoslav Republic of Macedonia” (decision-making referendum). In Latvia, the quorum is half the voters who participated in the last election of Parliament (except for constitutional revisions, see below), and in Azerbaijan, it is only 25% of the registered voters. In Poland and Portugal, if the turnout is not more than 50%, the referendum is *de facto* consultative and non-binding (in Portugal, the quorum is calculated on the basis of the citizens registered at the census).

113. A quorum of approval of a quarter of the electorate is laid down in Hungary. In Albania and Armenia, the quorum is one third of the electorate. In Denmark, a constitutional amendment must be approved by 40% of the electorate; in other cases,

191. See CDL-INF(2001)010, paragraph II.O.

the text put to the vote is rejected only if not simply the majority of voters vote against it but also 30% of the registered electorate.

114. Moreover, a particularly high quorum is sometimes required for fundamental decisions. In Latvia, when a constitutional amendment is submitted to referendum, it must be approved by more than 50% of the registered voters. In Lithuania, certain particularly important rules relating to sovereignty can only be decided by a majority of three-quarters of the electorate, while others relating to the state and constitutional revisions require a majority of the electorate. In Croatia, a “yes” vote of a majority of the electorate is required in the case of an association with other states.

115. The quorum of participation and quorum of approval may be combined. For example, in Lithuania, in the case of a mandatory referendum, the quorum is a 50% turnout and one-third of the voters must approve the draft proposal. For accession to supranational organisations, only the minimum turnout has to be achieved.

G. Effects of referendums¹⁹²

Decision-making (legally binding) and consultative referendums

116. Most referendums organised in the states that replied to the questionnaire are of a decision-making nature, in other words the result is legally binding, in particular on the authorities.

117. Several states provide only for decision-making referendums: Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Estonia, France, Georgia, Greece, Ireland, Italy, Latvia, Russia, Switzerland, “the former Yugoslav Republic of Macedonia” and Turkey. The only referendum organised in the Czech Republic (on accession to the European Union) was a decision-making one.

118. In other states, such as Denmark, decision-making referendums are the rule but consultative referendums are not excluded.

119. In Hungary, a referendum on a law or following a popular initiative launched by 200,000 citizens is always binding, while in other cases Parliament decides whether the referendum will be binding or consultative.

120. Some states distinguish between decision-making referendums and consultative referendums according to the nature of the text put to the vote. In Andorra, Austria and Spain, a referendum on an important issue is consultative, while a constitutional referendum (and a legislative referendum in Austria) is legally binding. In Lithuania, a referendum is binding if it relates to legislative provisions proposed by a popular initiative and to constitutional provisions submitted to a mandatory referendum. In other cases, it is consultative.

121. In Poland and Portugal, the referendum is binding if the majority of the electorate has voted; otherwise it is *de facto* consultative.

192. See CDL-INF(2001)010, paragraph II.N.

122. Finally, Belgium, Finland, the Netherlands and Norway have had only consultative referendums to date. In Sweden, while a legally binding referendum on a question relating to basic laws is possible, only consultative referendums have been held up to now.

Suspensive and abrogative referendums

123. Leaving out the case of the popular initiative, which leads to the adoption of a new text, a decision-making referendum may also be:

- suspensive: the text may not enter into force unless it has been approved by the voters or unless a request to hold a referendum has not been made within the time-limit established by the Constitution or by law;
- abrogative or resolutive: the text ceases to be in force following a vote against it or failure to secure a “yes” vote within a certain time-limit after its adoption.

124. A suspensive referendum, since it involves voting on a text not yet applied, is more likely to result in rejection of the matter put to the vote. It is always employed when international treaties are put to the vote in order not to incur the international liability of the state, as well as in the following countries: Armenia, Azerbaijan, France, Greece, Hungary, Ireland, Latvia, Lithuania and Turkey. In Denmark and Switzerland, the referendum is suspensive unless it relates to an emergency law (in which case it is resolutive). The only referendum organised in the Czech Republic (on the country’s accession to the European Union) was suspensive. Although it is consultative, a referendum is also suspensive in the Netherlands.

125. A referendum is suspensive only in respect of constitutional issues in Albania, Andorra, Italy and Spain and, when it relates to a specifically-worded draft, (and is accordingly binding) in Austria. In Malta, a referendum is suspensive if it concerns a constitutional revision submitted to a mandatory referendum or a law proposed by Parliament.

126. By contrast, in Russia a referendum is in principle abrogative. Both suspensive and resolutive referendums exist in “the former Yugoslav Republic of Macedonia”. It must be recalled that Denmark and Switzerland, where referendums are in general suspensive, use abrogative referendums for emergency laws. Albania, Italy and Malta have abrogative referendums also in respect of legislative matters.

Decisions to be taken after a referendum

127. When the vote has concerned a question of principle or a generally-worded proposal, Parliament must adopt implementing regulations. This is the case in states where specifically-worded drafts cannot be submitted to referendum, as in Croatia and Georgia. It is also the case with generally-worded texts in Estonia (issue of national interest), Switzerland (generally-worded popular initiative). Bulgaria (when necessary) and “the former Yugoslav Republic of Macedonia” (within 60 days if the referendum is not suspensive) also provide for Parliament to be called upon to pass legislation in accordance with the outcome of the referendum.

128. In Portugal, in the case of a legally-binding referendum with a positive outcome, Parliament or the Government is required to approve an international convention or corresponding legislative act within 90 or 60 days respectively. In Russia, the follow-up decisions necessary must be taken within three months of the vote.

129. In the Netherlands, under the temporary law, although a referendum was suspensive, Parliament had to take a new decision if the outcome of the referendum was negative and decide on the entry into force of the text if the vote was positive.

130. In order to ensure that Parliament does not bypass the popular vote, Croatian law provides that it may not take a decision contrary to the outcome of a referendum until one year has passed. Moreover, another referendum on the same issue may not be organised for six months. These rules do not apply in the case of a popular initiative and a referendum concerning an association with other states.

H. Parallelism in procedures and rules governing the referendum

Parallelism in procedures¹⁹³

131. The scope of a popular vote depends not only on whether it is a binding or consultative one, but also on whether parliament is able to reverse the decision taken by the people. In other words, can a provision approved by referendum be revised without going through the same procedure again? If it has been rejected by the people, can it be adopted without a referendum?

132. There is no clear trend in this respect and the various national laws are divided in their approach. In general terms, the following countries apply parallelism of procedures and consequently require proposed amendments to provisions already approved by referendum to be put to a further referendum (mandatory or consultative): Albania, Andorra, Azerbaijan, Italy, Malta, Switzerland and “the former Yugoslav Republic of Macedonia”. Where the referendum is abrogative (legislative referendum in Albania, Italy and Malta), a parliamentary amendment running counter to the decision taken by referendum can, in theory, enter into force, but this is viewed as a politically unwise move. In Russia, a provision approved by referendum may be annulled or revised only by referendum unless another procedure had been stipulated

193. See CDL-INF(2001)010, paragraph II.L.

in the text submitted in the original referendum. A new referendum cannot take place for two, or even five years.

133. Some countries (Austria, Denmark, Ireland, Latvia) have provision for parallelism of procedures exclusively for matters submitted to mandatory referendum. In Armenia, not only constitutional provisions (submitted to mandatory referendum), but also laws approved by referendum may be amended only by means of a subsequent referendum; however, in theory at least, parallelism of procedures does not apply to texts rejected by referendum, which may be approved by parliament.

134. There is no provision for parallelism of procedures in Portugal, but if a solution has been rejected in a referendum, it cannot be passed by parliament until after the election of a new parliament.

135. In principle, where referendums are consultative, parallelism of procedures is not an issue. This is the case in Belgium, Finland and Norway. Clearly, this does not rule out a consultative referendum on a text amending a text put to referendum, as indicated in the Netherlands reply to the questionnaire.

136. The question is a controversial one in some states, such as Greece. However, in the majority of the other countries that replied to the questionnaire (for example, Bulgaria, Croatia (after one year), Cyprus, Hungary, Lithuania, Poland, Spain, Sweden), it is possible – at least from a legal point of view – for parliament to take action running counter to the result of a referendum.

Arrangements for revising the rules governing referendums¹⁹⁴

137. Can a constitutional or legislative provision allowing for a referendum be amended by a procedure which does not provide for a referendum?

138. The majority of countries that replied to the questionnaire indicated that there was no particular provision relating to the revision of texts setting out the rules for referendums.

139. Accordingly, the situation across the different countries varies considerably. For example, in countries such as Norway, Finland and the Netherlands, which have only consultative referendums, obviously the only type of referendum that could be held in this respect would be a consultative one. In Portugal, where referendums cannot relate to constitutional provisions, no such popular vote could be held, even if the provision in question concerned referendums. In contrast, in Switzerland, where the constitution is subject to mandatory referendum and legislation to optional referendum, any provision relating to referendums (except where it is regulatory) must, under the law, be submitted to referendum. Between these two extremes, every possible situation is to be found. Clearly, in countries where constitutional amendments are subject to mandatory referendum (in addition to Switzerland, this is also the case in Andorra, Armenia, Azerbaijan, Denmark and Ireland), this also applies where such amendments relate to referendums. In Italy, constitutional provisions are submitted to

194. See CDL-INF(2001)010, paragraph II.K.

suspensory referendum and legislation to abrogative referendum at the request of 500,000 voters. In Albania, constitutional provisions relating to referendums (like all other constitutional provisions) may not be amended without a referendum unless they have been approved by a two thirds majority in parliament.

140. However, in some countries, there are specific provisions stipulating that certain regulations relating to referendums must themselves be subject to mandatory referendum. This is the case in Latvia and Malta (in respect of the provision stipulating the constitutional provisions subject to mandatory referendum), in order to ensure that parliament is unable to get round the requirement for a referendum by amending the provision in question. This is also the case more broadly in Estonia and Lithuania for the sections of the constitution relating to constitutional revision, which set forth the cases where a mandatory referendum applies.

I. Specific rules on popular initiatives and ordinary optional referendums¹⁹⁵

141. Where referendums are organised at the request of a part of the electorate, whether this is for an ordinary optional referendum or popular initiative, a number of questions are raised concerning the collection of signatures.

142. The first concerns the time-limit for collecting signatures. Where the referendum is not suspensory, domestic legislation may not stipulate a time-limit, as in Albania, Georgia, Malta, Poland and Portugal.

143. Where a time-limit is stipulated, it varies considerably: just 15 days in Croatia, 45 in Russia, 3 months in Lithuania, 3 months for legislative referendums and 6 months for constitutional referendums in “the former Yugoslav Republic of Macedonia”, 4 months in Hungary, 100 days for ordinary optional referendums and 18 months for popular initiatives in Switzerland. In Italy, the time-limit is 3 months for constitutional referendums while abrogative legislative referendums can be called for between January 1 and September 30. In the Netherlands (according to the temporary law), signatures were not collected as such, and electors signed referendum applications in their town hall; the introductory application (40,000 signatures) must be filed within 3 weeks and the final application (600,000 signatures) within 6 weeks following the date on which the introductory application was declared valid.

144. In most cases, checking of signatures is centralised and carried out by the central electoral commission (Albania, Latvia, Lithuania, Russia – where at least 40% of the required number of signatures are checked) or an equivalent body (Hungary, Malta). In Italy, a special office of the Court of Cassation is responsible for this task; in Switzerland, it is the Federal Chancellery; in “the former Yugoslav Republic of Macedonia”, the department of state administration in the Ministry of Justice. In Poland, the Speaker of the Sejm checks that the required number of signatures has been collected; if this is not the case, a further two weeks are allowed; the list of signatures may be sent to the state electoral board if there is any doubt about the validity of the signatures. In the case of any dispute, the Supreme Court takes the final decision. In Portugal, parliament may request that the competent authorities check the

195. See CDL-INF(2001)010, paragraph II.J.

signatures by sampling. In some countries, signatures may be checked at local level: in Georgia, all signatures must be confirmed by a notary or the local authority (although this does not also rule out checks at national level); in the Netherlands, signatures were checked by the town hall under the temporary law. In Croatia, the referendum committee is responsible for checking the lists of signatures.

145. Only Switzerland provides for rectification of irregularities resulting from the content of the question, which must be carried out before the collection of signatures begins.

J. Judicial review¹⁹⁶

146. Judicial review in the field of referendum applies first *a priori* and addresses the decision to submit a matter to referendum. It may also take place during the procedure, and address procedure itself or the voting rights and, after the vote, the validity of results. Finally, *a posteriori* control of the text adopted by referendum is conceivable.

147. The questionnaire put the main emphasis on the *a priori* scrutiny and the scrutiny of results. However, the answers provided a number of other interesting elements.

148. Many countries provide for judicial review of decisions on whether or not to submit a matter to referendum. Often this relates to whether the questions put to a referendum are in conformity with the constitution: Albania, Armenia, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Italy, Malta, the Netherlands, Poland, Russia, “the former Yugoslav Republic of Macedonia”. In Lithuania, review relates to conformity with legislation in general; in Portugal, to the constitutionality of questions submitted to referendum and the legality of submitting a matter to referendum.

149. In countries which have a Constitutional Court, the latter is generally competent to review (*a priori* or *a posteriori*) the conformity with legislation of the texts submitted to the people. This applies to all the countries cited, with the exception of *Estonia* and the *Netherlands* (where the Council of State is the competent organ).

150. In other countries, judicial review relates not to the decision on holding a referendum but solely to procedure (Austria, France, Greece – special Supreme Court, Ireland, Spain, Sweden, Turkey – Supreme Board of Elections –); it may lead to the invalidation of results. Judicial appeals may also be limited to the respect of the right to vote (Switzerland).

151. As regards competence, it should be noted that the Constitutional Court in many countries is the organ responsible for ruling in general terms on appeals concerning referendums (Croatia, France – Constitutional Council –, Malta, Portugal). In Albania, it rules not only on constitutional matters, but also on the clarity of the question (where people are asked to vote on a generally-worded text) and, with regard

196. See CDL-INF (2001)010, paragraph II.P.

to an abrogative referendum, on the autonomous nature of the law of which part is to be repealed. Portugal's reply states that *a posteriori* judicial control by the Court deals namely with the lawfulness of the campaign and the vote, as well as the sincerity of results.

152. There may also be provision that only the decision on holding a referendum fall under the competence of the Constitutional Court, while another body is responsible for scrutiny of the results. In Bulgaria, disputes over results are dealt with by the Supreme Administrative Court, in Hungary and Italy by the administrative courts, in Latvia by the ordinary courts following a decision by the central electoral commission (only decisions of the President or parliament are subject to the review of the Constitutional Court).

153. In "the former Yugoslav Republic of Macedonia", the Constitutional Court is competent only for non-conformity of the law with the constitution or in cases of a violation of a constitutional right other than the right to vote or eligibility. The ordinary courts are competent to deal with disputes over the right to vote (following submission of the matter to the electoral boards).

Who may lodge an appeal

154. Replies from several countries (Croatia, Greece, Hungary, Ireland, Italy, Malta, Russia, Switzerland and "the former Yugoslav Republic of Macedonia") stated that all electors were able to lodge an appeal. In the Netherlands, any person directly concerned could appeal; in Andorra legitimate interest was necessary; in Denmark and Estonia, a legal interest. In Austria, an appeal has to be submitted by a specific number of electors, varying from 100 to 500 depending on the province in question. Broad capacity to lodge an appeal does not however prevent certain authorities from doing so (the Director of Public Prosecutions in Ireland, the Attorney General in Malta), or the initiators of a referendum from being given special capacity in this respect (Italy).

155. However, in other countries capacity to lodge appeals is not so extensive. In Spain, only interested parties (political parties, institutions) may do so; in Russia, the persons or bodies who took part in the referendum; in Bulgaria, the bodies entitled to propose a referendum. In France, this capacity is granted to the central government representative in each department or equivalent authority, but not to the electorate except in very special cases. In Portugal, in an *a priori* scrutiny, the standing to lodge appeals belongs (compulsorily) to the President of the Republic; in an *a posteriori* scrutiny, it includes every voter (for his or her polling station), but in particular political parties and groupings that took part in the referendum campaign.

156. Lastly, there may be provisions to restrict the capacity to lodge an appeal solely to certain authorities. In Armenia, this is the President of the Republic or a third of the members of parliament; in Georgia, the President of the Republic, a fifth of the members of parliament or the ombudsman; in Lithuania, a fifth of the members of parliament, the government or the courts (to which of course the matter may be referred by individual citizens).

K. Experiences of referendums

157. Countries' experiences of referendums vary considerably. With the exception of Switzerland, where more than 500 matters have since 1848 been put to a referendum, most states make rare use of the possibility. Several countries (Albania, Andorra, Bulgaria, Croatia, the Netherlands (up to 2004), Russia) have never had a referendum, at least under the terms of their current constitution. However, in Albania, Andorra and Russia, the constitution was adopted by referendum and the question of Croatia's independence was also put to referendum.

158. Several countries (Armenia, Azerbaijan, Belgium, Cyprus, Czech Republic, Estonia, Malta, Spain) had experienced only one referendum at the time their replies to the questionnaire were written. Others had held only two (Austria, Finland, Luxembourg – in 1919 and 1937 –, Norway, Poland, Portugal, “the former Yugoslav Republic of Macedonia”, Turkey), three (Latvia), or four (Hungary). Six had taken place in Sweden, Lithuania (since 1992) and Greece (during transition periods) and nine in France (since 1958).

159. Accession to the European Union was the reason for the majority of referendums in countries where they are infrequent. It was the subject of the only referendums held in the Czech Republic and Estonia and the two referendums in Norway (to be more accurate, in 1972 it concerned accession to the European Communities). One of the two to four referendums held in Austria, Hungary, Poland and Latvia, also concerned accession to the Union.

160. Referendums are more frequent in Denmark (14 referendums on 17 matters), Ireland (28 constitutional referendums since 1937) and especially in Italy (53 abrogative referendums and one constitutional referendum since 1948).

161. The body initiating a referendum obviously varies in line with the procedures provided for in domestic law. In Switzerland, it is a percentage of the electorate, except in the case of mandatory referendums; only one referendum out of more than 500 has been at the request of the cantons. In Italy, referendums have generally been initiated by the electorate, and only rarely by regional councils. The two referendums held in “the former Yugoslav Republic of Macedonia” following independence have been at the request of part of the electorate. Two referendums have been held at the request of the electorate in Hungary and two on the initiative of the government. The executive has initiated the referendums held in France, Armenia, Azerbaijan, Cyprus, the Czech Republic, Spain, Turkey and, jointly with parliament, Luxembourg and Malta. In Finland and Norway, special acts of parliament were passed. Parliament has also initiated referendums in Austria, Belgium, Estonia, Lithuania (with the exception of one case of a popular initiative), Sweden, Ireland (by adopting texts submitted to mandatory referendum), Portugal (one mandatory referendum, one parliamentary initiative). In Denmark, referendums have always been organised at the request of the authorities, but on only one occasion (on four matters) was this a request by parliament; all other referendums have been initiated by the government wishing to gain acceptance for a bill that had failed to obtain a sufficient majority in parliament, or have been mandatory referendums. In Latvia, one referendum has been initiated by

parliament, and two following suspension of a law by the President, at the request of one tenth of the electorate.

162. Obviously, the question on a turn-out/approval quorum applies only to those countries where such a quorum is provided for¹⁹⁷. The 50% turn-out threshold was not achieved in 18 out of 53 abrogative referendums in Italy, in two out of six in Lithuania, in one out of two in “the former Yugoslav Republic of Macedonia” and in Portugal. In this latter case, the effect of the referendum was then merely consultative. With regard to approval quorums, the only referendum held in Armenia since the adoption of the current constitution failed as it was not approved by a third of the electorate. Similarly, one referendum (out of the four that have been held) in Hungary was invalidated as none of the alternatives in the question obtained the approval of one quarter of the electorate.

163. The proportion of *yes* and *no* votes in referendums varied considerably among the different countries and it is impossible to draw any general conclusions. Moreover, the raw figures given do not indicate the extent to which citizens voted in line with the wishes of the authorities, at least in countries having popular initiatives or abrogative referendums (in which a *yes* vote implies in principle a vote against the authorities and a *no* vote implies confidence in them). Switzerland, which has held the most number of referendums, has had more *no* votes than *yes* votes, but many of these rejections relate to popular initiatives. In Italy, 19 abrogative referendums have yielded a *yes* vote and 16 a *no* vote. In countries where referendums are held solely on texts submitted by the authorities, there have been 21 *yes* votes and 7 *no* votes in Ireland, 10 *yes* and 2 *no* in France, and 9 *yes* and 7 *no* in Denmark. In the other countries, referendums are too infrequent to be able to making any meaningful comparisons. In any event, there is no significant trend towards either a systematic *yes* or a systematic *no* vote.

164. The questionnaire asked whether factors unrelated to the question asked in the referendum, or the popularity (or lack of it) of an authority may have played a role in the result. A few replies were received that suggested this might have been the case, mentioning the role of the executive (Azerbaijan, France, Malta, Spain), whereas the reply from Switzerland did not rule out such factors (at least in some of the over 500 questions put). However, it is likely that such factors play a role to varying degrees in other countries.

197. See above, point I.F.3.

II. Local and regional referendums

A. Legal basis of the referendum

165. Provision is less common for local or regional than for national referendums. Of the states that replied to the questionnaire, Andorra, Azerbaijan, Cyprus, Georgia, Latvia, Lithuania, Norway and Turkey do not allow such referendums. In Denmark, local consultative referendums can be held only on the basis of specific laws. In Lithuania, municipalities can only conduct surveys.

166. Any provision for local or regional referendums is usually made in central government texts. However, there are fewer constitutional references to such referendums than to national referendums. Provision is made for them, for instance, in the basic law of Albania, Belgium, Bulgaria, France, Hungary, Italy, Luxembourg, Poland, Portugal, Russia and Switzerland. In the Czech Republic, the Charter of Fundamental Rights and Freedoms, which ranks as constitutional law, makes indirect provision for local referendums. In Spain, provision is made in the constitution for referendums on the Statutes of Autonomy and amendments to them, and there is a law providing for municipal referendums.

167. By contrast, provision for local or regional referendums is made solely at the legislative level in the following states: Armenia, Croatia, Estonia, Finland, Ireland, Malta, Russia, Sweden and “the former Yugoslav Republic of Macedonia”. This was also the case under the temporary law applicable in the Netherlands from 2002 to 2004.

168. Even where a constitutional provision allows referendums at a sub-national level, implementing legislation has often also been adopted, as is the case in Albania, Bulgaria, the Czech Republic, France, Hungary, Luxembourg and Poland. In Portugal, the implementing legislation is an “organic” law.

169. In federal and regional states, if national law allows local or regional referendums, the rules governing such referendums are often laid down at the level of the entities. In Austria, this institution is mentioned in the constitutions of the nine Länder; in Russia, many local and regional entities have introduced regulations relating to referendums; in Switzerland, the federal constitution simply makes provision for cantonal constitutional referendums, leaving it up to the cantons to define the institution of the referendum. In Italy, the constitution allows the regions’ Statutes (basic laws) to make provision for referendums on regional legislative acts and administrative decisions; the Statutes also make provision for local referendums. Regional implementing provisions also exist in Spain.

170. Specific rules may also be adopted at local level in unitary states: in Hungary for instance, the law simply lays down the basic framework; the details are dealt with in municipal regulations. Local, provincial or regional authorities in Croatia, Estonia, the Netherlands and “the former Yugoslav Republic of Macedonia” have also adopted provisions on referendums.

A1. Level at which referendums are held

171. Stating that referendums are possible at a sub-national level does not answer the question as to the precise level at which they can be held. Referendums may be solely regional, solely local, or both, not to mention the fact that they can be held at intermediary levels. Firstly, this depends to a large extent on the types of territorial authorities within a state, since provincial referendums, for instance, are only conceivable in those states that have provinces.

172. The replies to the questionnaire are consequently very wide-ranging.

173. In federal and regional states, there is provision for referendums in the federate states, autonomous communities and regions, as well as in the municipalities. This is the case in Austria, Italy, Russia and Switzerland. In Spain, referendums can be held at the level of the autonomous communities, provinces and municipalities.

174. In Belgium, however, there is currently provision for referendums in provinces and municipalities, but they are still in the process of being introduced at regional level.

175. There is provision for referendums at both the local and regional levels in Albania, Bulgaria, Croatia, Hungary and Sweden. In the Netherlands, referendums could be held in provinces and municipalities from 2002 to 2004; in Poland, in regions, districts and municipalities. France provides for local referendums at the regional, department and municipal levels; it also holds institutional referendums within specific territories (overseas territories, Corsica), relating to the status of the territory in question as a unit of government. The Portuguese constitution provides for regional referendums in the Azores and Madeira autonomous regions, but an “organic” law must be passed before such referendums can be held.

176. By contrast, only municipal referendums are held in Armenia, the Czech Republic, Estonia, Finland, Ireland, Luxembourg, Malta, “the former Yugoslav Republic of Macedonia” and Portugal (in municipalities and their constituent districts, until the “organic” law on regional referendums is passed). In *Lithuania*, municipal authorities can conduct surveys.

Role of central government authorities

177. The questionnaire asks whether national or federal authorities can intervene in local and regional referendums.

178. Generally speaking, they cannot, with the exception of judicial reviews of the compliance of referendums and texts adopted by referendum with higher-ranking legislation. The matter may be referred to a court by an executive organ; in *France*, for instance, the central government representative can apply to the Administrative Court for preliminary or ex post facto review. In “the former Yugoslav Republic of Macedonia”, the central government representative can suspend the application of any municipal regulation on grounds of unconstitutionality or illegality, but must then refer the matter to the Constitutional Court. In Estonia, such matters may be referred to a court by district governors; in Malta, by the Attorney-General.

179. In Spain, however, local referendums are subject to the authorisation of the national government.

180. A national electoral commission may also be involved in local and regional referendums, as is the case in Poland.

B. Types of referendum – bodies competent to call referendums

181. At national level, a distinction must be made at local level between mandatory referendums, referendums called by an authority and referendums at the request of part of the electorate.

Mandatory referendums

182. In federal states, revisions of the constitutions of the federate entities are sometimes submitted to mandatory referendum. This is the case in Switzerland and in two Austrian *Länder*. Similarly in Spain, amendments to the Statutes of Autonomy adopted in accordance with a special procedure in the first few years following the constitution's entry into force are submitted to mandatory referendum.

183. One area in which there is generally provision for mandatory referendums is that of geographical boundary changes. In Italy, this applies to changes to regional boundaries and the establishment of new regions. In Albania, a referendum is generally mandatory in the event of geographical boundary changes, although the final decision rests with Parliament, in the form of legislation; the same applies to Hungary, where there is provision for this institution in the event that municipalities are merged or divided up, or that a municipality is transferred from one district to another. In the Czech Republic, mandatory referendums are held only in the event that a municipality is divided up, in the part of the municipality wishing to separate.

184. Swiss cantonal law provides for many other situations in which referendums are mandatory, particularly in relation to legislation. In Hungary, local laws can also provide for other situations in which referendums are mandatory.

Referendums called by an authority

185. National law may provide for regional referendums to be held at the request of regional authorities: in Austria, depending on the Land, a referendum may be called by the Landtag (Parliament) or a specified number of its members.

186. Referendums called by the municipal legislature exist at local level, for example in the following states: Belgium, the Czech Republic, Estonia, Finland, Ireland, Luxembourg, the Netherlands (temporary law) and "the former Yugoslav Republic of Macedonia"; in Hungary, a referendum may be called by the municipal council itself, a quarter of its members or one of its committees. Where the decision to hold a referendum is taken by the assembly, it may be initiated by part of the assembly or by an executive organ: in Bulgaria, for instance, at municipal level, the initiative may come from a quarter of the municipal councillors, the mayor of the municipality or the regional governor; in Portugal, from members of the assembly or the local executive; in both of these states, the assembly takes the final decision as to whether or not to

hold a referendum, which, as will be explained further on, can be requested by a specified number of citizens.

187. In some states, local referendums require the agreement of the municipality's legislative and executive organs. This is the case in Russia, where the agreement of the representative body and that of its head are required, and in Spain, where mayors can hold referendums with the agreement of a majority of the municipal councillors and that of the national government.

188. At both local and regional levels, referendums can also be called by the authorities: in Croatia and Sweden, referendums can be called by municipal, town or regional assemblies; in France and Poland, by the deliberative assembly of each local or regional authority. In Switzerland, a number of cantonal laws provide for such referendums at various levels.

189. Referendums called by lower-ranking territorial authorities exist at regional level in Albania: they are organised at the request of commune or municipal councils representing at least a third of the region's population. A number of Austrian *Länder* also provide for referendums to be held at the request of a specified number of municipalities.

Referendums at the request of part of the electorate

190. Most of the states that have local or regional referendums allow referendums at the request of part of the electorate. Where national law provides that the deliberative body is free to decide whether or not to hold a referendum following such a request, the number of signatures required is generally fairly low: at local level, in Estonia, 1% of the population, but at least 5 signatures; in Finland, 5% of voters. By contrast, where a request for a referendum must be followed by a popular vote, the number of signatures required is often higher: 30% of voters in municipalities with up to 3000 inhabitants in the Czech Republic, 20% in "the former Yugoslav Republic of Macedonia", 10% in Malta and Albania (but no more than 20 000 in the latter), but 5% in Armenia and Russia. In Bulgaria, requests for referendums must be supported by at least a quarter of registered voters, but a municipal council is obliged to hold a ballot only if it is requested by half of the registered voters. In Italy, a regional referendum may be requested by 20% of the region's voters.

191. Owing to the considerable variations in the number of inhabitants in different territorial communities, the percentage of voters necessary in order to request a referendum is often higher in smaller municipalities than in large ones: in Luxembourg, the requirement is a fifth of voters in municipalities with more than 3000 inhabitants, and a quarter in other municipalities; similar rules apply in the Czech Republic.

192. In Belgium and in Portugal, the percentage is calculated according to the population, at both provincial and local levels. As stated above, Albania has an upper limit of 20 000 on the number of signatures. In Hungary, each local or regional authority decides on the necessary percentage of voters, within a range of 10 to 25%.

193. In federal states, the law of the federate entities also governs referendums requested by part of the electorate: this is the case in Switzerland (where referendums and popular initiatives are very frequent), Austria and Russia.

194. As with national referendums, the role of the authorities in triggering the referendum process also varies in respect of local and regional referendums. The question of intervention by national authorities has already been discussed above. In the case of referendums called by the authorities or requested by part of the electorate, subject to an authority's approval, local and regional authorities can decide whether or not to hold a ballot. This is the case in Finland; in Bulgaria, where the request comes from less than 50% of registered voters; in "the former Yugoslav Republic of Macedonia", where it comes from less than 20% of registered voters. In the event of a request from part of the electorate, local or regional authorities in some states can rule on its compliance with higher-ranking legislation (Poland, Switzerland); otherwise, they essentially have the task of organising the ballot. In the Czech Republic however, a municipal council receiving a request for a referendum from part of the electorate can, with the referendum committee's agreement, rule on its substance without holding a referendum.

C. Content

Types of act submitted to referendum

195. Most of the replies to the questionnaire state that, generally speaking, it is not so much the legal nature of the act that determines whether or not it can be submitted to local or regional referendum; rather, the decisive factor is whether or not the act comes within the remit of local or regional authorities. This is the case in the following states: Albania, Armenia, Belgium, Bulgaria, Croatia, Finland, France (in respect of local referendums), Hungary, the Netherlands, Portugal, Russia, Sweden and "the former Yugoslav Republic of Macedonia"). In other words, this means that, in these states, all acts of local or regional authorities can theoretically be submitted to referendum. Denmark, Estonia, Luxembourg and Poland do not have any specific rules, from which it may be inferred that a similar situation exists.

196. Some states impose restrictions, however, as to the legal nature of the acts that may be submitted to referendum. In the Czech Republic, municipal regulations cannot be submitted to referendum; in Malta, on the other hand, they are the only possible subject-matter of a referendum; in Ireland, this instrument is confined to draft financial schemes. In Switzerland, a wide range of acts are submitted to referendum: except for referendums on cantonal constitutions, which are mandatory under the federal constitution, these acts – at both cantonal and local level – are specified by cantonal law; at cantonal level, for instance, there is usually provision for referendums on laws and on certain items of expenditure (financial referendums). In Austria too, the law of the federate entities (*Länder*) specifies the acts that can be submitted to referendum: at the level of the *Länder*, these are usually bills passed by the Landtag (regional Parliament); at local level, municipal council decisions.

Matters to which referendums may relate

197. In many cases, there is no restriction on the list of matters that may be submitted to referendum either (Albania, Croatia, Czech Republic, Estonia, Finland, France, Lithuania – where it is more a question of surveys -, Malta, Poland and “the former Yugoslav Republic of Macedonia”). In Switzerland, cantonal law, which governs this area, generally adopts the same approach.

198. One of the most common subjects of local and regional referendums is that of changes to the boundaries of local and regional authorities, even where the final decision is a matter for national law, as stated, for instance, in the replies from Albania, Croatia, Estonia, Hungary, the Netherlands and Russia; in Austria, municipal boundary changes can be the subject of a referendum in some Länder. In Switzerland, the federal constitution provides for the approval of the electorate concerned in respect of any change to a canton’s geographical boundaries. In Italy, regional boundary changes and the establishment of new regions are submitted to mandatory referendum. In Portugal, local referendum (the only one which exists for the time being) may at best deal with territorial changes of a municipality only in the framework of proceedings for consultation of local bodies, proceedings which the legislature has to follow. By contrast, referendums cannot be held on geographical boundary changes in Belgium.

199. In France, institutional referendums within specific territories (overseas territories, Corsica) relate to the status of the territory in question as a unit of government.

200. However, a number of states exclude certain areas from the scope of referendums, however. Firstly, these may relate to matters for the exclusive jurisdiction of elected bodies (Armenia). In that country, referendums relating to areas delegated by the national authorities, or affecting fundamental rights, are also excluded. In Russia too, referendums cannot lead to restrictions on fundamental rights.

201. Matters excluded from referendum may relate, for instance, to appointments and staffing matters (Armenia, Belgium, Hungary and Russia) or to budgetary, financial and fiscal matters (Armenia, Belgium, Croatia, Italy, Portugal, Russia and Spain).

202. In Ireland, by contrast, local referendums can relate only to draft financial schemes (but none has been held to date).

203. In Bulgaria too, local referendums relate to financial matters: loan contracts with banks or other financial institutions; sales, concessions, leases or rentals of municipal assets of considerable value or of particular importance to the municipality; the construction of buildings, infrastructure works or other facilities to meet the municipality’s needs and investments that cannot be paid for out of the municipality’s ordinary revenue. The Dutch Temporary Law (in force until 2004) also set out a detailed list of subjects on which referendums could or could not be held; provincial and municipal regulations could add other subjects, except, naturally, where the Temporary Law ruled out a referendum.

204. Generally speaking, elections cannot be challenged by a referendum, as is expressly provided in the Czech Republic, Hungary and Russia. In Poland and some

Austrian *Länder*, however, it is possible for an elected body to be dismissed following a referendum at the request of voters (recall).

D. Form of the text submitted to referendum (formal validity)

205. To an even greater extent than for national referendums, the legislation of the various states often has nothing to say about the form (specifically worded draft, question of principle, generally worded proposal) of the acts that may be submitted to local or regional referendum.

206. Armenia, France and Italy allow only specifically worded drafts. In Malta, where only municipal regulations can be submitted to referendum, specifically worded texts are also required. By contrast, the Czech Republic and Portugal provide for referendums only on questions of principle or generally worded proposals, and Belgium restricts them to questions of principle. In Ireland, the subject-matter of local referendums (draft financial schemes) means that they are generally worded texts.

207. In the other states, referendums on questions of principle, generally worded proposals or specifically worded texts may therefore coexist, as is expressly provided in Hungary and Switzerland (under cantonal law). Some legislative systems also provide simply that it must be possible to answer yes or no to the question, which does not rule out any of these forms (Bulgaria, Croatia). In Austria, the approach adopted varies according to the Land.

Unity of form

208. Explicit provision is made for unity of form in Switzerland, and implicit provision in Hungary. Unity of form is also required in those states that submit only specifically worded drafts to referendum (Armenia, France, Italy) or, on the contrary, only questions of principle or generally worded proposals (Belgium, Czech Republic, Portugal).

Unity of content

209. The rule of unity of content is not imposed any more often in respect of local and regional referendums than for national referendums. It applies, for instance, in Armenia, Bulgaria, Italy, Portugal, Switzerland and Hungary, where, as is the case in national referendums, parts of a question must not be contradictory, their relationship with one another must be clear and they must flow from one another or be linked by their content. In *Austria*, the approach adopted depends on the Land.

Unit of hierarchical level

210. Swiss law states that, in the cantons which provide for the so-called “unique” popular initiative – which can be of a constitutional or a legislative nature – the initiators have to determine its hierarchical level and may not provide at the same time a revision of the Constitution and of ordinary law.

Other requirements relating to the question asked

– *Clear and non-leading questions*

211. As already stated in respect of national referendums, freedom to vote presupposes that the question put to the vote must be clear and non-leading, even though not all national legislative systems contain explicit provisions to this effect.

212. Generally speaking, the national rules applicable in this respect are the same as for national referendums.

213. In Albania, the question submitted to the electorate must be clear, complete and unequivocal; in Armenia, the question must be straightforward; in Hungary, devoid of ambiguity; in France, conditions of fairness, clarity and absence of ambiguity are imposed. The requirement for clarity also emerges from the rules providing that voters should be able to answer yes or no (Belgium, Bulgaria, Croatia, Czech Republic, Finland, Malta, “the former Yugoslav Republic of Macedonia”). The requirement that the question be clear and non-leading is also upheld in Italy, Poland and Switzerland.

– *Number of questions*

214. As in national referendums, there is usually no limit on the number of questions asked at the same time. In Armenia there cannot be more than one question per ballot, and in Portugal, no more than three. Alternative replies are also allowed in Russia, as well as in Switzerland and Austria on the basis of the law of the federate entities.

E. Substantive limits on referendums (substantive validity)

215. Substantive limits are inevitably more numerous in the case of local and regional referendums. While there are often doubts as to the existence of legal rules ranking higher than the (national) constitution, the very existence of the state implies that the law of the (federal or unitary) central state prevails over that of the federate entities, regions and other subordinate local authorities.

216. Accordingly, almost all the replies to the questionnaire emphasise the need for texts submitted to referendum to comply with higher-ranking legislation, particularly national or federal law. This requirement may be explicit or implicit. Some replies emphasise the need to respect fundamental rights (Russia) or to keep within the municipality’s remit (Finland, Hungary); once again, this is an expression of the more general principle of the need to comply with higher-ranking legislation.

217. Referendums must also comply with the rules of higher-ranking territorial authorities (for example, regional rules in the case of local referendums), in accordance with the general principle of the hierarchy of rules.

218. The regulations governing purely consultative referendums can be more flexible, since no legal rules are adopted by popular vote, thereby excluding any breach of higher-ranking legislation. However, the principle is that consultation must remain within the remit of the local or regional authority in question, as stated in the

reply from Belgium. In Lithuania, where municipalities conduct surveys instead, the latter must relate to areas within the municipality's remit.

F. Campaigning, funding and voting

1. Campaigning

219. The rules governing election campaigning are often less stringent in respect of local and regional referendums, in view of the more limited stakes of such ballots. However, the replies from the following states indicate that the same rules apply, *mutatis mutandis*, as at national level: Austria, Hungary, Italy, the Netherlands, Portugal, Switzerland, Spain and “the former Yugoslav Republic of Macedonia”.

220. The authorities have an obligation to supply objective information in France, Poland and Switzerland, in particular.

221. As far as sources of campaign material are concerned, prohibitions on campaigning by the authorities, which are in place in Armenia, Portugal and Russia for instance, apply to all referendums. In Austria, this also holds for the principle whereby the authorities, although allowed to campaign, cannot disseminate non-objective or disproportionate mass information; in Hungary, the authorities can be involved in campaigning.

222. In view of the limited stakes, states impose fewer regulations in respect of the media for local and regional ballots than for national ballots. In France, provision is made for campaigning on television channels or radio stations only in the case of institutional referendums, and then only on local public channels and stations; in such cases, as at national level, supporters and opponents of the draft proposal must be given fair coverage. In Portugal, free access to the media is guaranteed. In Spain, free access is confined to those parties represented in the regional or provincial Parliament. In Malta, a balance must be ensured between supporters and opponents in the public media; however, no local referendum has been held to date.

2. Funding

223. Relatively few states regulate the funding of referendum campaigns at local, or even regional, level. Prohibitions on using public funds for campaign purposes are mentioned in the replies from Armenia, Portugal, Russia and Switzerland. In Austria, the moderate use of public funds is accepted, as it is for national referendums; in Malta, public funds can be used for information purposes, but not for campaigning; in Spain, campaign mailings are subject to special, preferential postage rates. In many cases, administrative costs are borne not by the central government, but by the local authority organising the vote, as is the case in Croatia, Poland and “the former Yugoslav Republic of Macedonia”.

224. Payment for the collection of signatures is not prohibited in any of the states that replied to the questionnaire. This consequently does not seem to raise any problems, any more than it does at national level.

3. Voting

Voting period

225. Voting over one day only is the rule in local and regional referendums, even more so than in national referendums. The Czech Republic schedules two days if the vote coincides with local, regional or national elections.

226. As in the case of national referendums, postal voting may also be allowed, for instance over a period of 30 days in Sweden and three weeks in Switzerland. The early voting permitted by Russian law (over a period of 15 days in less accessible locations, on boats, at polar stations and abroad) also applies to federate entities and municipalities.

Compulsory voting

227. Compulsory voting is virtually unheard-of in connection with local and regional referendums. It exists in one Swiss canton.

Quorum

228. Quorum requirements are uncommon in local and regional referendums.

229. A quorum of participation of 50% of voters is required in Bulgaria, Croatia, the Czech Republic, Malta and Russia (but not in Italy, unlike at national level). In Poland, the quorum is 30%, and in Belgium just 10% of inhabitants at provincial level and 10 to 20% at municipal level. In Portugal, referendums are legally binding only if the turnout is more than 50%.

230. Other states provide for a quorum of approval. In Hungary, a referendum is valid if the same answer is given by 25% of registered voters; in Armenia, the approval of a text necessitates a third of registered voters; in Ireland and the Netherlands (according to the temporary law applicable up to 2004), on the other hand, the rejection of a text requires a third or 30%, respectively, of registered voters. Lastly, in the Czech Republic, the separation or merger of municipalities requires the approval of 50% of registered voters.

G. Effects of referendums

Decision-making (legally binding) and consultative referendums

231. Like national referendums, local and regional referendums are usually legally binding. This is always the case in Armenia, Bulgaria, France, Hungary, Poland, Spain and “the former Yugoslav Republic of Macedonia”. In Portugal, referendums are legally binding only if the turnout is more than 50%.

232. Generally speaking, referendums are also legally binding in Austria and Switzerland, but *Länder* or cantonal law, respectively, can provide for consultative referendums.

233. In other states, referendums are legally binding, unless they relate to a question necessitating the passing of a law at national level. In Albania, for instance, referendums relating to geographical boundary changes, which necessitate a national law, are consultative; in Italy, the establishment of new regions and the transfer of an area from one region to another are the subject of consultative referendums; in the Czech Republic, more generally, referendums are consultative when they relate to a question that comes within the municipality's consultative remit. In Malta, a consultative referendum is conceivable.

234. A number of states have only consultative referendums at local level: this is the case in Belgium, Denmark, Estonia, Finland, Ireland, Lithuania (where it is more a question of surveys), Luxembourg, the Netherlands and Sweden.

Suspensive and abrogative referendums

235. Most local or regional referendums are suspensive. This is the case in Armenia, Spain, the Netherlands (temporary law, even though referendums were consultative) and, in almost all cases, Switzerland (nevertheless, cantonal law can provide for an abrogative referendum). In Austria, the effect of a referendum depends on Länder law.

236. Abrogative referendums are less common at local and regional level. They are mentioned explicitly only in the reply from Malta, and no such referendum has been held as yet. In Italy, Austria and Switzerland, provision is made for them in the law of some federate or regional entities.

Decisions to be taken after a referendum

237. National authorities usually have to decide what action to take on a legally binding referendum relating to a question of principle or a generally worded proposal, as the reply from Switzerland explains. In Portugal, in the event that the outcome of a legally binding referendum is positive, and that the answer to the question requires the competent local body to take a decision, the latter must do so within 60 days. In Russia, if a follow-up decision is necessary, it must be taken within three months.

238. In some states that have only consultative referendums, provincial or municipal bodies may nevertheless have to follow a specific procedure after the vote. In Belgium, provincial or municipal councils must give reasons for their decisions in relation to matters that have been the subject of popular consultation; in the Netherlands, according to the temporary law, they had to take a new decision if the outcome of the referendum was negative, and decide on the entry into force of the text if the outcome was positive.

H. Parallelism in procedures and rules governing the referendum

Parallelism in procedures

239. As in the case of national referendums, a number of legislative systems provide that rules adopted by referendum at a lower level can be revised only by referendum,

so as to ensure respect for the popular will. However, such rules are less common than for national ballots.

240. Firstly, the revision of texts submitted to mandatory referendum may be submitted to the same type of referendum, but this is less common than at national level.¹⁹⁸ In Switzerland, any rule submitted to referendum (mandatory or optional) can be revised only by the same procedure. The same applies in Italy and “the former Yugoslav Republic of Macedonia”, which has only optional referendums at local level. In Armenia, texts adopted by referendum can be revised only by the same procedure.

241. The Czech Republic, Russia and Hungary have the most stringent legislation. In the Czech Republic, a decision adopted by referendum can be modified only by another referendum, after a period of 24 months. In Russia, a question submitted to referendum can be reopened only after two or five years, depending on the circumstances, and by referendum; the rule submitted to referendum can, however, provide for a different procedure. In Hungary, if a quarter of voters supported or opposed the proposal, the matter can be addressed only by a new referendum, after a period of one year. In Croatia, on the other hand, the prohibition on reversing a decision taken by referendum without holding a fresh referendum applies for just one year.

242. By contrast, in other states it is permissible – at least from the legal point of view – to address issues that have been the subject of a popular vote without holding a fresh referendum, as is the case in Bulgaria, France, Hungary, Poland and Spain. It remains to be seen whether this is politically feasible. That is also the case in Portugal, but only during a new term of the local body concerned. The same principle applies to a new referendum on the same question (in case the result of the first one was negative). It remains to be seen whether going against the people’s vote is politically feasible.

243. As already stated in respect of national referendums, the question of parallelism of procedures does not normally arise in respect of consultative referendums (Belgium, Denmark, Estonia, Finland, Ireland, Luxembourg and Sweden), even if, as indicated in the reply from the Netherlands, a consultative referendum can be held on the same subject.

Procedure for the revision of rules governing referendums

244. As stated above,¹⁹⁹ where rules governing referendums are submitted to referendum, this is due to their nature (usually constitutional) rather than their substance, except for certain constitutional rules relating to referendums. Few constitutions contain provisions relating to local or regional referendums: it is consequently fairly unusual for them to be submitted to referendum. In Armenia for instance, only the constitutional provision allowing the institution of the referendum

198. For specific examples, see point II.B above.

199. Point I.H.

can be amended solely by referendum, and it does not explicitly mention local referendums.

245. *Switzerland* is an exception, since all federal and cantonal constitutional and legislative texts are submitted to referendum. In Italy, referendums may also be held on a considerable number of rules, at either state or regional level, including – naturally – those relating to referendums.

I. Specific rules on popular initiatives and ordinary optional referendums

246. Where provision is made for referendums to be called at the initiative of part of the electorate (a popular initiative or an ordinary optional referendum), the time-limit for collecting signatures varies, as is the case at national level: thirty days in Armenia, one month in Hungary, forty-five days in Russia, sixty days in Poland, three months in Italy. In Austria and Switzerland, the time-limit depends on the federated entities' law. In the Netherlands, the temporary law established a time-limit of three weeks for the initial motion and six weeks for the final one, as at national level.

247. Here too, some states apply no time-limit for consultative or abrogative referendums. This applies to Albania, Belgium, the Czech Republic, Estonia, Finland, Luxembourg and Malta.

248. In Albania, Malta, Poland and Russia, it is the central election commission which checks signatures.

249. However, in some states checking of signatures is performed at regional or local level. In Hungary, it is the responsibility of the local or district election commission, depending on the level at which the referendum is being held. In Italy the local judicial authorities or special bodies of the regional councils have competence for regional referendums, and special branches of local authorities for local referendums. In the Czech Republic signatures are checked by the municipal council. Lastly, in Austria and Switzerland, the federated entities' legislation determines the competent body.

250. In Armenia and Switzerland, correction of flaws in the question's substance is possible before signature collection begins.

J. Judicial review

251. According to the replies to the questionnaire, the rules governing judicial review are generally not as well-developed in the case of regional or local referendums as they are for national referendums. The lesser importance of the issues at stake helps to limit the number of proceedings.

252. One specific means of exercising oversight regarding use of local referendums is designation of a supervisory authority, which exists for instance in *Belgium*. Automatic prior review of the question put to the vote may also be performed by a judicial authority: in Italy, the special office of the Court of Cassation gives decisions concerning referendums on changes to regional boundaries or the creation of new regions; in Portugal, the Constitutional Court obligatorily rules on the

constitutionality and lawfulness of the question put to the vote, in terms of both form and substance.

253. Centralisation of judicial review is less frequent than for national referendums. That is, however, the case with the Constitutional Court in Malta, which has few local authorities. Otherwise, it may be a matter for the administrative courts (Belgium, Finland, Poland and France, where jurisdiction in proceedings concerning institutional referendums lies with the Conseil d'Etat, the administrative court of last instance) or the ordinary courts (Armenia, Bulgaria, the Czech Republic, Hungary – the local or district court depending on whether the referendum is held at municipal or district level – and Russia, where federal courts have jurisdiction). In Croatia, the competent bodies are the state election commission and the Constitutional Court. In “the former Yugoslav Republic of Macedonia” the ordinary courts or the election commissions are competent for infringements of voting rights, and the Constitutional Court for violations of the Constitution. In Italy, the question's substance and form are a matter for the Constitutional Court, and the administrative courts deal with appeals concerning results.

254. Holding of referendums may be excluded from the courts' jurisdiction, as in Ireland. The central election commission may also give last-instance decisions concerning results, as in Finland.

255. Lastly, in Austria and Switzerland, it is respectively the *Länder* and the cantons which determine the bodies competent for deciding appeals at their level. The Swiss Federal Court rules at last instance on infringements of political rights at cantonal level.

256. Judicial review of the constitutionality or lawfulness of the question put to the vote, once approved, is also, more often than not, possible on appeal to the courts normally competent in such matters, as for any rule-making instrument.

257. Only a few respondents provided information as to who may lodge appeals. As is the case for national referendums, this right may be conferred on any member of the electorate (Czech Republic, Hungary, Malta, Russia, Switzerland), or it may be confined to bodies or groups of voters entitled to propose the holding of a referendum (Bulgaria). In Portugal, in the *a priori* scrutiny, the standing to lodge appeals belongs (compulsorily) to the president of the municipal assembly; in an *a posteriori* scrutiny, it includes every voter (for his or her polling station), but in particular parties or groups having participated in the campaign.

K. Experience of referendums

258. As is the case with national referendums, it is in Switzerland that regional or local referendums are most frequent (at cantonal and municipal level).

259. Recourse to referendums is fairly frequent in Hungary, Italy, the Netherlands (solely at municipal level), Sweden and “the former Yugoslav Republic of Macedonia”. Local referendums are held from time to time in the Czech Republic, Denmark and Russia (over 130 examples, but the number of local and regional authorities must be borne in mind). In Estonia and Finland, local referendums

primarily concern mergers of municipalities. In France, nine institutional referendums have been held since 1958, including five in 2003; consultative referendums were held in a large number of municipalities before the introduction of local decision-making referendums. Belgium has a few experiences of consultative referendums at local, but not provincial, level. Only two local referendums have taken place in Portugal, and only one in Malta. In Poland, local referendums have only been held concerning dismissal of directly elected authorities. In Spain, only five regional referendums have been held, all relating to approval of statutes of autonomy.

260. Lastly, a number of states where regional or local referendums are permitted have no practical experience of them to date. They include Albania and Armenia.

III. The future of referendums

261. The last questions concerned the future of referendums, more precisely reforms being undertaken in this field.

262. In the Czech Republic, a constitutional law must be passed to permit the holding of constitutional referendums at national level, as provided for in the Constitution. A bill exists, but has not yet been voted. Another bill should be tabled concerning the referendum on the European Constitution.

263. Similarly, in the Netherlands, although the Constitution does not require the introduction of referendums, following the expiry of the temporary law in this field on 1 January 2005 the issue should be the subject of further debate. The referendum on the European Constitution was held on the basis of an ad hoc law.

264. Reforms are under way or at least being discussed in a number of other states. They may be part of a complete revision of the Constitution, as is the case in Austria, where the Convention working on the revision process is considering the possibilities of extending public voting rights at federal level. In Belgium, the Constitution was revised in order to make this matter a regional one, and the introduction of a consultative referendum at regional level is being envisaged. In Luxembourg, apart from the ad hoc referendum on the European Constitution (held in July 2005), a bill on popular initiatives and legislative referendums was tabled in 2003. Lastly, in “the former Yugoslav Republic of Macedonia”, the principal aim is to bring all the relevant provisions together in a single legal instrument.

265. In Sweden, although no change in the law is being discussed, a political debate is taking place regarding cases in which it would be appropriate to resort to a referendum, particularly ratification of the European Constitution.

266. In addition, a number of replies stated that new legislation had just been passed. This applied to Lithuania (2003), Poland (2004), and the Czech Republic (2004 – solely for local referendums). In Portugal, the Constitution was revised in 2005 in order to enable referendums to be held on the approval of a treaty aimed at the construction or the deepening of the European Union which addresses directly the content of the convention. In Poland, the quorum of 50% of turnout required for a referendum to be decisive remains a controversial matter. In Russia, the law of 28 June 2004 introduced the following changes, inter alia: extension of the right to initiate referendums, more complex rules on popular initiatives, stricter regulation of campaigning. In Switzerland, following the recent constitutional amendment introducing general popular initiatives (adopted in 2003 but not yet in force), a more global reform is still being discussed, although it should not be implemented in the near future.

Conclusion

267. This study confirms what was suspected from the outset: when it comes to referendums, national laws and practices vary widely. Europe has democracies which are almost entirely representative, democracies which are semi-direct, and any number of intermediary forms. Referendums are sometimes seen as a tool used by the executive branch of government, sometimes as an instrument used by groups of citizens to further their views outside traditional political party structures.

268. However, a number of general trends give us some idea of the form which a European constitutional law on referendums might take. For example, it is customary to provide for referendums (at least at national level) in national constitutions, to prohibit compulsory voting or, more specifically, to allow private funding of the collection of signatures for popular initiatives— when this system exists.

269. The rules which states share are usually minimum rules guaranteeing the democratic nature of the vote. To be truly democratic, referendums – like elections – must satisfy certain requirements. One, which recurs throughout this report, is respect for procedures provided for in law. Others are common to both elections and referendums, and cover respect for the principles inherent in Europe’s electoral heritage, which apply *mutatis mutandis* to referendums²⁰⁰. Those which are obvious are not detailed here, but those which may apply in a special way to referendums, such as the rules on election campaigns or judicial review, are examined in more depth.

270. Finally, other common democratic requirements are specific to referendums. This applies, for example, to certain aspects of voter freedom, such as respect for the principle of unity of content, and the rule that questions put to the public must be clearly phrased.

271. Thus, like the rest of constitutional law, referendums combine diversity with the need to respect the principles of Europe’s constitutional heritage.

200. See the code of good practice in electoral matters adopted by the Venice Commission at its 52nd plenary session, CDL-AD(2002)023rev.