

LAW FACULTY - LJUBLJANA

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***EUROPEAN STANDARDS AND THEIR
IMPLEMENTATION
IN THE ELECTION FIELD***

(16 December, 2013)

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LIST OF ABBREVIATIONS

ACEEEO	Association of Central and Eastern European Electoral Officials
B&H	Bosnia and Herzegovina
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CIS	Commonwealth of Independent States
CoE	Council of Europe
CM	Committee of Ministers of CoE
DEC	District Electoral Commission
EB	Electoral Board
ECHR	ECtHR
EctHR	European Court of Human Rights
EMB	Electoral Management Body
EP	European Parliament
EU	European Union
EUC	Electoral Unit Commission
GRECO	Group of States against Corruption
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of Racial Discrimination
ICMW	International Convention on Migrant Workers
ICRPD	International Convention on the Rights of the Persons with Disabilities
ICESC	International Covenant on Economic, Social and Cultural Rights
IPU	International Parliamentary Union
ODIHR	Office for Democratic Institutions and Human Rights
ToL	Treaty of Lisbon
SC	Security Council

SEC	State Electoral Commission
SEE University	South-East European University
SG	Secretary-General
UDHR	Universal Declaration of Human Rights
UN	United Nations
UK	United Kingdom
VC	Venice Commission
VL	Voters' List

Povzetek

1. Predmet in metoda raziskave

“Svobodne in pravične volitve” predstavljajo temelj sodobne demokracije. Padec komunizma leta 1990 je potekanje “svobodnih in pravičnih volitev” spremenil v razširjen fenomen v Evropi. Še posebej zaradi tega, ker se večstrankarske volitve štejejo za ključne v demokratični tranziciji nekdanjih socialističnih držav. Glede na zgoraj navedeno, so evropske organizacije: Svet Evrope (SE), Organizacija za varnost in sodelovanje v Evropi (OVSE) in Evropska Unija (EU) začele z izvedbo kontinuiranega pretoka volilnih meril. Vseeno, Splošna deklaracija človekovih pravic (SDČP), Mednarodni pakt o državljanskih in političnih pravicah ter Evropska konvencija o človekovih pravicah so položili temeljni kamen za evropsko volilno dediščino že preden se demokracija utemelji v Evropi.

Glede na to, da so volilni standardi in njihova uporaba v Evropi osrednja tema raziskave, ta disertacija analizira naslednja vprašanja:

- a. Ali obstajajo evropski standardi na področju volitev? Če obstajajo, katera je njihova vsebina, narava in značilnosti?
- b. Kateri so evropski mehanizmi z mandatom na volitvah, kakšna je njihova pristojnost in kapaciteta?
- c. Kaj je narejeno in kaj je treba še narediti, da bi se “svobodne in pravične volitve” utemeljile v Evropi, z vidika mednarodnega javnega prava?

Obrazloga zgoraj navedenega fenomena je narejena preko naslednjih hipotez:

- 1. Čeprav se evropski standardi na področju volitev lahko oblikujejo zahvaljujoč mednarodnim pogodbam in političnim prizadevanjem treh evropskih organizacij (ES, OVSE in EU), ki so določile merila za potekanje “svobodnih in pravičnih vilitev”, ti standardi niso natančni, imajo različno vrednost v hierarhiji pravnih aktov in so nepopolni, ker ne vsebujejo izbirnega standarda, s katerim bi se odrazila zahteva za “resnično predstavljanje” pri političnem odločanju.**

2. Glede na to, da “svobodne in pravične volitve” oziroma minimalni zamisel demokracije predstavlja izziv za določene države, evropske organizacije, z namenom doseganja maksimuma v svojih naporih nudenja volilne podpore, je treba: a. razložiti skupne evropske standarde na področju volitev – skupni imenovalec za vzdrževanje periodičnih “svobodnih in pravičnih volitev”; in b. ustanoviti koordinativni izborni sekretariat v okviru OVSE, da bi z mandatom nudil podporo državam v njihovi volilni reformi.

Uporabljene so bile naslednje metode verifikacije hipotez:

- a) Pravna analiza mednarodnih inštrumentov in nacionalna zakonodaja držav, ki so zavezane k evropskim volilnim standardom, in sodb, sklepov ter poročil povezanih z volitvami in njihov nadzor;
- b) Primerjalna analiza z namenom ugotavljanja podobnosti in razlik med različnimi skupinami volilnih standardov, elaboriranih s strani evropskih organizacij. Enaka metoda je uporabljena z namenom poskusa hipotez preko ocene nacionalne volilne zakonodaje z vidika evropskih volilnih standardov;
- c) Deduktivna in induktivna metoda se uporablja z namenom definiranja evropskih volilnih standardov *de lege ferenda*;
- č) Opisana metoda je uporabljena za prezentacijo in interpretacijo teoretskega in zgodovinskega okvira, ki velja za demokracijo in človekove pravice, glede na hjiigovo povezanost z volitvami;
- d) Polstrukturirani intervju z osebami, ki so na volilnih in javnih funkcijah je pomemben vir informacij o kreiranju volilne politike in prakse analiziranih mednarodnih organizacij, kot tudi za Slovenijo in Makedonijo;
- f) Analiza statističnih podatkov o vrsti in pogostosti izbornih kršitev ugotovljenih s strani Odbora za človekove pravice (OČP) in Evropskega sodišča za človekove pravice (ESČP), kot tudi o analiziranih državah, je omogočala identifikacijo trendov kršitve volilnih standardov; in
- g) Raziskava sekundarnih virov (desk research) je omogočala identifikacijo raznovrstnih elementov in interpretacij “svobodnih in pravičnih volitev” v Evropi.

Znanstveni prispevek leži v edinstvenosti definiranja evropskih standardov na področju volitev. Poleg tega, predlaga se tudi rešitev za fragmentarne volilne standarde v Evropi, z namenom omogočanja maksimalno zaščito volilne pravice z vidika mednarodnega javnega

prava. Primerjalni pregled volilne zakonodaje določenih držav, ki so zavezane k upoštevanju evropskih volilnih pravil, predstavlja dopolnilni prispevek k znanosti.

3. Teoretični in kontekstualni okvir

Teoretične osnove demokracije so bile postavljene že v obdobju antičnih grških filozofov, Aristotel in Platon, ki so se nadalje nadgrajevale v eri razuma in razsvetljenstva, nadalje pa so se razvijale preko pisanj sodobnih mislecev, kot so Schumpetter, Dahl and Lijphart.¹ Teorija naravnega prava postavlja osnove univerzalnega volilnega prava, s čemer se pozornost družbe vse več usmerja na ljudsko suverenost, legitimnost oblasti in zaščito človekovih pravic. Poleg dejstva, da je demokracija močno kritizirana, v smisli na to, da ljudje niso zmožni narediti pametne izbire, s časom je vse večje število skupin ljudi pridobilo pravico do udeležbe v javnih poslih.

Udeležba v javnih poslih in njihov neločljiv del “svobodne in pravične volitve” spadajo v skupini mednarodno priznanih pravic, kar pomeni, da so predmet mednarodne skrbi.² Uživanje človekovih pravic v demokratičnem sistemu se šteje kot preprečitev nasilja v eni državi, kot tudi mednarodnih spopadov, s čimer se ustvarja svetovni mir in varnost.³ Takšni razvoj dogodkov je spodbudil neke mislece kot sta Franck in Roth na analizo veljavnosti legitimnosti oblasti in da predstavita koncept “pravice do demokracije” kot norma, ki se začne manifestirati (emerging norm).⁴

Volitve igrajo pomembno vlogo v tranziciji iz vojne v mir, v največ primerih s pomočjo mednarodne skupnosti.⁵ Dejstvo je, da je mednarodna skupnost vse več zapletena v volilnih poslih držav, in sicer ne le pokonfliktno, temveč tudi v mirnem času. Mednarodna skupnost je določila merila za potekanje “svobodnih in pravičnih volitev” in njihov nadzor. Znanstveni teoretik Goodwin-Gill, ki je oblikoval univerzalne volilne standarde, je prepričan, da

¹ Dahl, A Preface to Democratic Theory (1956, 1984, 2006) pp. xviii, 3 and 132; and Lijphart, Patterns of Democracy (prevod v srbski jezik, objavljeno v Uradnim listom SCG Belgrad) (1999) str. 36, 37, 49, 58, 59, 75.

² Kaczorowska, Public International Law (2010) str. 369.

³ Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe (1998) str. 224. Roth, Governmental Illegitimacy in International Law (2000) str. 366-375, 377.

⁴ Ibid strp. 1-3.

⁵ Med ostalimi državami, Tunizija, Libanon, Egipt iščejo volilno podporo mednarodne skupnosti po tako imenovani arapski pomladi.

mednarodno pravo določa volilni standard "svobodnih in pravičnih volitev". To je standard: "... ki je treba uresničiti, oziroma, da volitve pripeljejo do izida, ki izraža volja ljudstva".⁶

Vo paradigmi "svobodnih in pravičnih volitev" je predviden standard "resničnega predstavljanja", ki še vedno ni konceptualiziran. Ta standard zahteva velik odziv volivcev; odraža njihovo prednost s čim manjšo mogočo izgubo glasov; zagotavlja politično predstavljanje manjšin in izvoljenemu poslancu predvideva dovolj moči, da bi vplivali na odločanje in da bi zagotovili odgovornost oblasti.⁷

Pravna kultura in zaščita stalne pravice imata pomembno vlogo v potekanju "svobodnih in pravičnih volitev", saj kažeta na obseg v katerim se ostale temeljne pravice uresničujejo s strani volivcev in kandidatov. Svoboda izražanja, združevanja, načelo nediskriminacije, pravica do mirnega zbiranja so predpogoji za ustrežanje volitev standardu "svobodnih in pravičnih volitev".

3. Volilni standardi v Evropi določeni s strani evropskih organizacij

Uvodne pripombe

Mednarodno priznana pravica do udeležbe v javnih poslih, ki zajema tudi volilno pravico, predstavlja eden med temelji evropske volilne dediščine. Evropske države to pravzaprav potrjujejo preko svoje odobritve in dostopnosti UDCP in MPGCP. 25 (b). član MPGCP določa volilne standarde za resnične volitve.⁸ Njih še vedno interpretiramo in pojasnjemo preko splošnih komentarjev KCP, negovih zaključnih ugotovitev ter odločitev v posameznih primerih. Volitve morajo temeljiti na naslednjih načelih: 1) univerzalnost volilske pravice; 2) svobodno izražanje volje volivcev; 3) proceduralna pravičnost in enakost možnosti; 4) periodičnost volitev z namenom odražanja volje ljudstva; ter 5) zakonitost in učinkovita in ustrezna pravna sredstva. Ostali univerzalni inštrumenti, ki se nanašajo na ženske pravice,⁹ delavce-izseljence,¹⁰ na osebe s posebnimi potrebami¹¹ ki prepovedajo diskriminacijo, med

⁶ Goodwin-Gill, Free and Fair Elections (2006) str. 80.

⁷ Glej spletno stran <<http://aceproject.org>>.

⁸ Centre for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) str. 11; KČP Splošni komentar št. 25.

⁹ Konvencija o odpravi vseh oblik diskriminacije žensk (KODŽ).

¹⁰ Konvencija o delavcih migrantih (KDM)

¹¹ Konvencija o pravicah oseb s posebnimi potrebami (KPOPP).

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drugim tudi v volilnih zadevah¹² predstavljajo dopolnilniv vir volilnih standardov evropskih držav. Ne samo, da zagotavljajo pregled dobre prakse v volilnih zadevah, ampak tudi kažejo na moralne vrednosti v skladu s teorijo o naravnem mednarodnem pravu.¹³

Volilne standarde, ki so pripravljene s strani evropskih ombočnih organizacij (ES, OVSE in EU) najdemo v različnih pravnih oblikah. Nekatere od inštrumentov, kot je EKCP ali Evropska listina lokalne samouprave, so mednarodne pogodbe oziroma pravno zavezujoči inštrumenti. Drugi pa niso pravno zavezujoči inštrumenti, kot so prizadevanja OVSE ali Kodeks dobre prakse v volilnih zadevah. Nekateri od inštrumentov, na primer Priporočilo Svet ministrov ES za financiranje volilne kampanje se nanašajo le na eden del volilnih zadev.¹⁴ Tudi ES je dom različnih inštrumentov in listin povezanih z volitvami, ki imajo različne ciljne skupine in različno vrednost v hierarhiji pravnih aktov.

Svet Evrope

EKCP in njene protokole kot pravno zavezujoči inštrumenti predpisujejo volilna merila za volitve najmanj enega doma zakonodajnega organa. EKCP ni volilna konvencija, ki vsebuje podrobne standarde za vsako fazo volitev, temveč *par excellence* inštrument za zaščito pravic posameznika pri izbiri skupščine. Le en člen njenega Protokola št. 1 je namenjen zaščiti volilne demokracije. S predpisovanjem načel predstavniške demokracije, je 3. člen¹⁵ postal veza med zaščito človekovih pravic in demokracijo. S tem se zagotavlja javno sodelovanje v pripravi zakonov na svobodnih, rednih in tajnih volitvah, ki rezultirajo s svobodno izvoljenimi poslanci v zakonodajni skupščini. Za razliko od ostalih določb EKCP, ki določajo legitimne namene za katere je državam dovoljeno vmešavanje v individualne pravice državljanov (v skladu z načelom proporcionalnosti) ta člen ne določa takšnih izjem. Glede na dejstvo, da sta aktivni in pasivni pravici uvrščeni (omejeni) pravici, ju lahko države omejijo zaradi različnih namenov. Vseeno bo njihova legitimnost resno preiskovana s strani Evropskega sodišča za človekove pravice (Sodišče).

¹² Konvencija o odpravi rasne diskriminacije (KORD).

¹³ Schlutter, *Developments in Customary International Law* (2010) str. 42-43, 46-49.

¹⁴ CM Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, Preamble, 1., 3., in 5. člen; GRECO Third Evaluation Round, Evaluation Report on Belgium, Transparency of Party Funding (2008).

¹⁵ 3. člen Protokola št. 1 EKČP določa naslednje: "Visoke pogodbene stranke se zavezujejo na svobodne volitve, ki bi potekale v razumnih časovnih razmikih na tajnih volitvah pod pogoji, ki zagotavljajo svobodno izražanje mnenja volivcev pri izvolitvi zakonodajne skupščine".

3.člen Protokola št. 1 je interpretiran in uporabljen s strani Sodišča, ki je razvilo sodno prakso v okviru svoje doktrine prostega preudarka (margin of appreciation). Ta doktrina kaže na to, da države lahko odločajo na svoji ravni brez vpliva s strani sodišča, če so demokratične in če uporabljajo svoje prerogative na razumnem načinu.¹⁶ Sodišče preišče ali je omejitev zakonita, ali ima legitimni namen in ali je sredstvo za doseganje cilja proporcionalno cilju, ki je treba doseči.

Najpomembnejši sodni sklepi oblikujejo zahteve za vse faze volilnega cikla. Glede na predvolilno kampanjo, se volilni prag ne šteje za nekompatibilen z EKCP.¹⁷ Prepoved diskriminacije in nepravičnega ravnanja je jasno določena s strani sodne prakse Sodišča.¹⁸ Individualna volilna pravica se lahko omeji na razumni osnovi (kot je starost ali državljanstvo) in z individualiziranim preudarkom (v zvezi z mentalnimi sposobnostmi ali z dopolnilnim pogojem za opravljanje javne funkcije).¹⁹

Neodvisnost in nepristrasnost volilne administracije sta pogoj *sine qua non* za potekanje "svobodnih in pravičnih volitev".²⁰ Svobodni mediji in dostop do medije pod enakimi pogoji za vseh kandidatov je še en potreben pogoj za volitve.²¹ Učinkovita pravna zaščita²² je nujna za vse faze volilnega cikla.

Med volitvami mora tajnost volilnega listka biti zaščiten in se volivci in kandidati morajo počutiti zaščitene in varne. Glede na določene skupine volivcev, kot so zaporniki, je Sodišče ugotovilo jasni standard po kateremu se avtomatska prepoved glasovanja zapornikov z nedoločenim trajanjem ne šteje za kompatibilna z EKCP.²³ Glede na povolilno fazo, Sodišče

¹⁶ Steiner, Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd edition) (2000) str. 854-855.

¹⁷ *Yumak and Sadak v. Turkey* št. 10226/03, sodba z dne 30. januarja 2007.

¹⁸ *Mathieu-Mohin and Clerfayt v. Belgium* št. 9267/81, sodba z dne 2. marca 1987 o enaki obravnavi različnih govornih skupin; *the Etxebarria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and Others v. Spain* št. 35579/03, 35613/03, 35626/03 in 35634/03, sodba z dne 30. junija 2009; *Sejdik and Finci v. B&H*, št. 2766/06 in 34386/06, sodba z dne 22. decembra 2009.

¹⁹ *Alajos Kiss v. Hungary* št. 38832/06, sodba z dne 20. maja 2010.

²⁰ *Namat Aliyev v. Azerbaijan*, št. 18705/06, sodba z dne 8. aprila 2010.

²¹ *Gitonas and others v. Greece*, št. 18747/91, 19376/92, 19379/92, 28208/95 in 27755/95, sodba z dne 1. julija 1997.

²² *Georgian Labour Party v. Georgia*, št. 9103/04, sodba z dne 8. julija 2008.

²³ *Greens and M.T. v. the United Kingdom*, št. 60041/08, sodba z dne 23. novembra 2010.

meni, da je treba vzpostaviti mehanizem za učinkovito razrešitev volilnih sporov²⁴ in da kandidat, ki je zmagal na volitvah dobi tudi volilno funkcijo.

Ostali mednarodni pogodbi, ki vsebujejo volilne standarde v kontekstu lokalnih volitev sta Listina lokalne samouprave in Konvencijata o sodelovanju tujcev v javnim življenjem na lokalni ravni. Čeprav se ti inštrumenti nanašajo le na eno vrsto volitev in/ali le na eno značilno vrsto volivcev, Kodeks²⁵ vseeno kaže na jasne pogoje potekanja "svobodnih in pravičnih volitev" na vseh ravneh. Ta kodeks razlaga glavna volilna načela na naslednjih podlagah: univerzalnost, enakost, svoboda, tajnost, neposrednost ter regularnost. Nadalje predvideva pogoje in proceduralno varnost, ki je lahko uvrščena za vsaki del volilnega cikla ločeno. Glavna težava v zvezi s Kodeksom je dejstvo, da ta ni pravno zavezujoči in ni predvidenega direktnega sistema za njegovo uporabo.

Priporočilo (2003) 4 SE Sveta ministrov za skupna pravila proti korupciji v financiranju političnih strank in volilnih kampanj je še ena pravno nezavezujoča listina, čeprav tudi ključni vir standardov na področju financiranja predvolilne kampanje. Skupni ukrepi za boj proti korupciji v financiranju predvolilne kampanje temeljijo na načelih pravičnosti, transparentnosti in odgovornosti.²⁶

Poročila v zvezi z volitvami, ki so pripravljena s strani Parlamentarne skupščine SE, Kongresa lokalne in regionalne oblasti in Skupine držav proti korupciji (GREKO)²⁷ predstavljajo drugotni vir volilnih standardov, ki pojasnjujejo kako se standardi SE implementirajo s strani držav.

Ne moremo zanikati obstoja standardov SE na področju volitev. Nadzor volitev s strani evropskih organizacij in zaščita individualnih pravic brez ustreznih standardov bi bili nezamisljivi. Čeprav so mednarodne pogodbe osnovni vir volilnih standardov, politične in izvedenske listine vseeno zajemajo več podrobnosti o določenih temah, kot je volilno financiranje.

²⁴ *Kerimova v. Azerbaijan*, št. 20799/06, sodba z dne 30. septembra 2010. *Mammadov v. Azerbaijan* (št. 2) 4641/06, sodba z dne 10. aprila 2012.

²⁵ CDL-EL (2002)5.

²⁶ Glej poglavja III, IV, V ter VI.

²⁷ SE parcialna pogodba.

Povzetek

Glede na dejstvo, da standardi SE potekajo iz različnih virov, vedno obstaja tveganje disonantnosti med njimi. Vendar pa so volilna načela tajnih, neposrednih, svobodnih, regularnih, univerzalnih ter enakih volitev vzajemna za vse inštrumente in mandate. Najpomembnejša točka v kateri se, metaforično rečeno, prekrivajo vsi volilni standardi SE, so države-članice, ki se strinjajo s temi standardi. Pomembno število članic SE je ratificiralo Protokol št. 1 EKCP in Listino lokalne samouprave. Kodeks določa volilna pravila in dobre prakse na evropski ravni. Iz tega izhaja, da je pomembno število članic SE pravno in moralno zavezano na tista volilna načela.

Vsi inštrumenti SE so komplementarni in se medsebojno dopolnjujejo. Primer za to je Kodeks, ki daje obširen opis pravnega okvira za potekanje predsedniških volitev, saj ta vrsta volitev ni urejena z ostalimi inštrumenti. Drugi primer je financiranje volilne kampanje, ki je komaj omenjeno pri drugih inštrumentih, razen v zgoraj navedenem Priporočilu Sveta ministrov.

Čeprav je “resnična predstavitev” pri sprejetju političnih odločitev potrjena kot temelj miru in stabilnosti in kot zaščitnik demokracije, nikjer ni vključena kot zaželeni volilni rezultat. SE je treba potruditi se koncipirati pravico do “resnične predstavitve” kot volilni standard rezultata, s čimer bi se oddaljil od minimalističnega koncepta liberalne demokracije.

OVSE

Mandat OVSE je povezan s krepitvijo miru in varnosti v Evropi, ki temeljijo na široki zamisli. Zajema zaščito demokracije in človekovih pravic. Vse države članice OVSE so se strinjale z njegovimi volilnimi prizadevanji.²⁸ Čeprav ta prizadevanja niso pravno zavezujoča, vseeno ga zavezujejo iz političnega vidika in so precej natančna. Razen tega, ima mednarodno telo (OVSE/UDIČP – Urad za demokratične institucije in človekove pravice) obvezo spremljati izpolnitev volilnih standardov s strani države članice OVSE.

Poročila OBSE/ODIHR o nadzoru volitev predstavljajo drugotni vir volilnih standardov. Slednji predstavljajo drugotni vir volilnih standardov. Dajajo popolno predstavbo o stanju v katerim se nahaja volilna demokracija v regionu OVSE. Določene države članice OVSE so

²⁸ Glej posebno, Annex 1 of the 1990 Copenhagen Document.

redno predmet nadzora volitev (Makedonija, Albanija, Ukrajina). V nekaterih od držav, kjer je UDIČP poslal misije za nadzor volitev, ni tendence stalnega izboljšanja.²⁹ Povečanje števila, vrste in resnost volilnih neregularnosti skozi leta kažejo na nevarno tendenco v določenih evropskih državah. Dobra novica je to, da volitve redko spremlja fizicko nasilje, razen, ko gre za konfliktna območja.³⁰ Iz poročil OVSE/UDIČP izhaja, da celo v razvitih demokracijah imajo lahko beneficije nepristrastnega tehničnega nadzora volilnega okvira in prakse. Negativne tendence zajemajo pomankljivosti volilne zakonodaje, neustrezna pravna sredstva, napačni volilni sezname, pritisk na opozicijo ter neustrezna vključitev žensk in manjšinskih skupin v volilni postopek³¹

Na podlagi listin OVSE namenjenih volitvam,³² poročil o nadzoru volitev in oceni UDIČP³³, so oblikovani naslednji volilni standardi za vsaki del volilnega cikla:

V predvolilnem obdobju mora obveza za redne volitve vsaj enega doma zakonodajnega organa biti opredeljena z zakonom.³⁴ Zakon o volitvah mora biti jasen in koherenten, njegove spremembe pa morajo biti uveljavljeni dovolj časa pred potekanjem volitev.³⁵ Prizadevanja OVSE zahtevajo, da države članice ob potekanju volitev povabijo mednarodne in lokalne opazovalce z namenom izboljšanja volilnega procesa in njene integritete.³⁶

Načelo univerzalnosti je določeno s prizadevanjem OVSE, skupaj z načelom enakosti.³⁷ Aktivna in pasivna volilna pravica so lahko izpostavljeni določenim restrikcijam, ki niso diskriminatorne, kot je določeno z veljavnimi mednarodnimi pogodbami. Ni pravih volitev brez ponudbe več bistvenih opcij. Dominacija le ene stranke je v nasprotju s prizadevanjem OVSE. Svoboda političnega združevanja, govora³⁸ in enako ravnanje s političnimi skupinami³⁹ morajo biti zagotovljeni.

²⁹ Za več podrobnosti glej ODIHR election observation and assessment reports at <<http://www.osce.org/odihr>>.

³⁰ Na primer lokalne volitve na Kosovu leta 2013.

³¹ Tendence so identificirane na podlagi poročil pripravljenih s strani OVSE/UDIČP o nadzoru volitev.

³² OSCE/ODIHR, OSCE Human Dimension Commitments, 1 Thematic Compilation 3rd edition (2011) št. 80-84; and Existing Commitments for Democratic Elections in OSCE participating states (2003).

³³ Podatek od <<http://www.osce.org/odihr>>.

³⁴ 1990 Copenhagen Document, 6. in 7. odstavek.

³⁵ Glej zaključna poročila o nadzoru volitev v Belorusiji (parlamentarne volitve 2012, str. 5-6), Srbija (parlamentarne in predčasne predsedniške volitve 2012, str. 22); Gruzija (ob potekanju volitev 2012 str. 7); Moldavija (lokalne volitve 2011, str 25).

³⁶ Poročilo leta 1991 sestanka strokovnjakov za nacionalne manjšine predvideva nadzor volitev v regionih z nacionalnimi manjšinami.

³⁷ 1990 Copenhagen Document, 7.3. odstavka in 2004 Sofia Annex: OSCE Action Plan for the Promotion of Gender Equality.

³⁸ Zaključno poročilo o parlamentarnih volitvah v Turčiji leta 2011, str. 18.

³⁹ OSCE Handbook on Media Monitoring for Election Observation Missions (2012) str. 13-14, 25-29; Zaključno poročilo o parlamentarnih volitvah na Hrvaškem 2011, str. 18.

Čeprav ni posebnih prizadevanj OVSE v zvezi z volilno administracijo, vseeno OVSE/UDIČP v svojih poročilih o nadzoru redno ocenjuje delo volilne administracije glede na njeno transparentnost, učinkovitost in učinkovitost.⁴⁰ Pravna zaščita volilnega procesa ni samo implicitno predstavljena v volilnih prizadevanjih, temveč predstavlja tudi nujna sestavina arhitekture OVSE za zaščito človekovih pravic. Izhaja, da v predvolilnem času morajo ustrezna pravna sredstva biti na voljo, da bi ščitile pred kakršnimi koli kršitvami ob registriranju volilcev⁴¹, pri nominiranju kandidatov, kot tudi pred kakršnimi koli kršitvami pravil volilne kampanje in medijskega predstavljanja.⁴² Pravna sredstva na področju kazenskega prava morajo biti učinkovita, da bi se zmanjšala nekaznivost v primerih povezanih z volitvami.⁴³

Na dan volitve volilci morajo imeti priložnost svoj glas dati tajno in biti prosti kakršnih koli groženj.⁴⁴ Družinsko,⁴⁵ skupno glasovanje, glasovanje preko posrednika⁴⁶ in večkratno glasovanje⁴⁷ je striktno prepovedano. Štetje glasov se mora opraviti transparentno in pošteno,⁴⁸ uradni izidi volitve pa morajo biti objavljeni za vsako volilno enoto.⁴⁹

Po volitvah se mora opraviti nepristrasna revizija financ volilne kampanje in se mora najti učinkovit način razrešitve sporov. Pošteni obračun in javna objava volilnih rezultatov mora ustrezati zavzeti funkciji kandidata, ki je dobil največje število glasov v skladu z zakonom določeno volilno formulo.⁵⁰

Ugotovljeni volilni izzivi držav-članic OVSE se osredotočajo na dva vprašanja: prvo se nanaša na konceptualizacijo volilnih standardov OVSE,⁵¹ drugo pa na njihovo implementacijo ali na pomanjkljivosti implementacije. Sodelovanje in koordinacija s

⁴⁰ O nepristrasni in neodvisni administraciji glej: OSCE Existing Commitments for Democratic Elections in OSCE Participating States (2003) str. 14.

⁴¹ OSCE/ODIHR Handbook for the Observation of Voter Registration (2012) str. 28 in 55 Izjava o preliminarnem poročilu in ugotovitvi o Armeniji, predsedniške volitve, str. 2.

⁴² Zaključno poročilo o parlamentarnih volitvah v Turčiji (2011), str 20; Zaključno poročilo o parlamentarnih volitvah v Romuniji 2012, str. 17-18.;

⁴³ Zaključno poročilo o predčasnih parlamentarnih volitvah v Kazahstanu, str. 18 in 28.

⁴⁴ Na primer, Zaključno poročilo o predčasnih parlamentarnih volitvah v Črni Gori str. 11.

⁴⁵ Zaključno poročilo o makedonskih predčasnih volitvah 2008, str 19.

⁴⁶ OSCE/ODIHR, Handbook for Monitoring Women's Participation in Elections (2004) str. 39.

⁴⁷ Poročilo o romunskih predsedniških in parlamentarnih volitvah 2004, str. 31.

⁴⁸ ODIHR Annual Report (2011) str. 9.

⁴⁹ Zaključno poročilo o volitvah v Moldaviji 2011, str. 24 in Španske predčasne volitve, str. 22.

⁵⁰ Ghebali, Debating Election and Election Monitoring Standard at the OSCE: Between Technical Needs And Politicization (...) str. 217.

⁵¹ Report from the 2012 Supplementary Human Dimension Meeting, Session I.

parlamentarno skupščino OVSE in z drugimi mednarodnimi organizacijami za nadzor volitev je dopolnilni izziv. Sodelovanje in koordinacija sta potrebna zaradi izogiba dajanja različnih izjav v zvezi z ocenami volilnega postopka, potekanja paralelnih novinarskih konferenc ter konkurenčnega vzbujanja pozornosti medijev, kot tudi zaradi krepitev neodvisnosti nadzora volitev.⁵²

Na koncu so prizadevanja OVSE, tako originalna kot interpretativna, čeprav niso pravno zavezujoča, postala norma, standard, ki oblikuje okvir "svobodnih in pravičnih volitev" v OVSE.

Evropska Unija

Že od leta 1979 je Evropski parlament (EP) te supra-nacionalne organizacije neposredno izvoljen v 5-letnih časovnih presledkih. V skladu s preambulo spremljenega Akt od leta 2002, ki se nanaša na izvolitev članov EP preko neposredne univerzalne izbire.⁵³ Volitve za EP temeljijo na prvotne in drugotne vire zakonodaje. Glede na prvotne vire zakonodaje, Lizbonska pogodba potrjuje dostop do Listine Temeljnih Pravic EU⁵⁴ v zagotavljanju volilne pravice državljanov EU za EP in za lokalne volitve.⁵⁵ Države so dolžne zagotoviti enake volilne pravice za volilce EU, ki niso državljani njihovih držav. Volitve v EP so neposredne⁵⁶ in morajo upoštevati načela "svobodnih in pravičnih volitev". Vsaka omejitev mora temeljiti na načelu proporcionalnosti.

Drugotne vire pravice EU⁵⁷ urejajo volilne sisteme,⁵⁸ enakost volilne moči, nekompatibilnost javnih funkcij ter razrešitev sporov v skladu s pravnim okvirom EU. Glede na volilni sistem: članice EU se ne morejo opredeliti za večinski sistem, ne glede na tradicijo, vendar se lahko opredelijo za različico proporcionalnega sistema. Volilni prag ne sme biti višji kot 5%. Glede na enakost glasov: to načelo je varovano tako, da nikoli ne sme dvakrat glasovati, kot tudi preko zahteve naj volilne enote odražajo proporcionalno naravo volitev. Glede na nekompatibilnost funkcij: prepovedana je kumulacija visokih EU funkcij z drugimi ali nacionalnimi funkcijami (na primer člani nacionalnih parlamentov), zaradi izogibanja nasprotja interesov, kot tudi izogibanje dvojnega plačevanja javnih skladov. Glede na spore:

⁵² Nothelle, The OSCE Parliamentary Assembly, OSCE Yearbook (2006) str. 360-361.

⁵³ Ibid.

⁵⁴ Official Journal of the European Union 30. marec 2010, št. 2010/C 83/02.

⁵⁵ 2b. odstavek 17. člena, 19. Člen Lizbonske pogodbe (Treaty on Functioning of EU).

⁵⁶ Grad, Evropsko ustavno pravo, prvi del (2010) str. 152-155.

⁵⁷ Council Decision 76/787, revidiran s strani Council Decision 2002, in Graig, de Burca, EU Law (2003) str. 76.

⁵⁸ Gallagher, Laver, Mair, Representative Government in Modern Europe (fifth edition) (2011) str. 370-371.

le spori, ki so povezani s pravnim okvirom EU se razrešujejo v EP. Kljub temu, da akt financiranja volilne kampanje ne pojasnjuje podrobnejše, vseeno podrobno obravnava financiranje političnih strank⁵⁹ z namenom spodbujanja demokracije na panevropski ravni.

Nadalje je Evropsko sodišče pravde potrdilo splošna načela EU, kot so enako ravnanje, prepoved diskriminacije ter zaščita človekovih pravic in njihova uporaba v volilnih zadevah.⁶⁰

Slednje izhaja iz koncipiranja volilnih standardov EU v skladu z volilnim ciklom. V predvolilnem času so sprejemljive različne različice proporcionalnega sistema z volilnim pragom ne večjim kot 5%. Vsi odrasli državljani EU imajo pravico neposredne izvolitve svojih predstavnikov v EP v skladu z načeli univerzalnosti, enakosti glasov in nediskriminacije.

Glede na volilno kampanjo, tukaj je zgornja meja 12.000 EUR letno po donatorju za evropske stranke.⁶¹ Stranke morajo biti transparentne in morajo enkrat letno predložiti finančno poročilo tudi o donacijah večjih kot 500 EUR. Prepovedane so anonimne donacije. Treba je imeti pravnih sredstev za aktivno in pasivno volilno pravico za osebe, ki niso državljani te države v skladu z načeli transparentnosti, enakosti in nediskriminacije.

Na dan volitve je treba zagotoviti tajnost glasovanja.

V povolilni fazi se ne dovoli objava volilnih rezultatov vse dokler se ne končajo tudi zadnje volitve. Evropski parlament je pristojen spoprijeti se z volilnimi spori v zvezi z zakonodajo EU v transparentnem postopku. Evropsko sodišče pravde je pristojno soditi v volilnih sporih v zvezi z aktivno in pasivno volilno pravico.

Kot rezultat meddržavnih pogajanj se volilni standardi EU nadgradijo na že obstoječih volilnih standardih v Evropi, prav tako pa na volilni zakonodaji držav-članic. V skladu s tem se lahko nacionalna zakonodaja uporabi kot orodje za zagotavljanje večje koherentnosti volilnih zadev s strani držav članic EU. Vendar pa so določene države zelo počasne v

⁵⁹ Regulation (EC) št. 2004/2003 of the European Parliament and of the Council, 4. november 2003, ki se nanaša na politične stranke na evropski ravni in na njihovo financiranje, revidiran s strani Regulation (EC) št. [1524/2007](#), 27. december 2007.

⁶⁰ Report from the Commission on the election of Members of the European Parliament (1976 Act, revidiran s strani Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), COM(2010) 603 final (2010) str. 10, M.G. Eman and O.B. Sevinger v. the Netherlands, C-300/04, 12 September 2006, 60. in 61. odstavek.

⁶¹ Evropske stranke so telesa skupnega evropskega interesa.

transponiranju volilne zakonodaje EU, čeprav imajo obveznost do tega, saj tudi v volilnih zadevah veljajo enaka pravila kot na drugih skupnih področjih.⁶²

Harmonizacija evropskih volilnih standardov: pogled v prihodnost

Sedanje stanje v katerim je veliko število različnih skupin standardov, tako splošnih kot posebnih, ne pojasnjuje njihovo uporabo na nacionalni ravni. Takšni “kaos“ v normativni sferi ima svoje posledice na dimenzijo “svobodnih in pravičnih” volitev, ker se ustvarja zmeda, ko se ta načela oblikujejo v konkretne in posebne standarde za vsako volilno temo.⁶³ Upoštevajoč zgoraj navedeno, za paradigmo “svobodnih in pravičnih” volitev v Evropi se predlaga naslednje:

V predvolilnem času so skupna načela svobodnih, neposrednih, rednih, univerzalnih, enakih ter tajnih volitev uporabljiva za vse vrste volitev. Standard “resnične predstavitve” ne samo, da skupinam, ki so v neugodnem stanju omogoča uresničevanje svoje volilne pravice, ampak tudi od države zahteva proaktivnost in oblikovanje kvot, ciljev ali posebnih predstavniških funkcij. Ta standard zahteva raznovrstnost volilne izbire, ki se nudi volilcev in vrsto volilnega sistema, ki bi omogočal najširšo predstavitev vseh segmenov družbe v sprejetju političnih odločitev. Volilna zakonodaja je sprejeta in revidirana v skladu z načeli o demokratične priprave zakonov.

Volilci so dobro obveščeni o političnih opcijah in poučeni o volilnem postopku. Kandidati uživajo enako obravnavo v skladu z načelom nediskriminacije. Restrikcije volilne pravice temeljijo na načelu proporcionalnosti.

Pravila financiranja predvolilne kampanje preprečujejo in zmanjšujejo korupcijo, kot tudi nasprotje interesov. Javni skladi se podelijo v skladu z načeli pravičnosti, nediskriminacije in proporcionalnosti. Transparentnost in odgovornost se popolno upoštevata. Javni in zasebni mediji so svobodni, nepristrasni in pravični⁶⁴ ob obveščanju o volilnih kandidatih v okviru predvolilne kampanje v skladu z zakonom. Dostopna so pravna sredstva za zaščito vseh aspektov predvolilnega časa. Volitve se vodijo nepristrasno in neodvisno.

⁶² Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC, COM(2012) 99 final (2012).

⁶³ Evers, OSCE Election Observation (2010) na <<http://www.core-hamburg.de>> str. 236.

⁶⁴ Izjava o preliminarnem poročilu in o ugotovitvah o Makedoniji, lokalne volitve – drugi krog 2013, str. 2, in Zaključno poročilo o predčasnih parlamentarnih volitvah v Črni gori 2012, str. 21.

Povzetek

Na dan volitev imajo volilci pravico do tajnega glasovanja, svobodnega pristopanja na volilnih enotah in pravico do ustrezne pomoči pri glasovanju (če je potrebna). Opazovalci volitev in člani strank imajo vpogled v glasovanje, štetje in sumiranje glasov. Učinkovita pravna sredstva so na voljo volilcev in kandidatov. Volilna administracija je učinkovita pri sprejemanju odločitev, učinkovito komunicira in je na voljo vseh, ki so vključeni v volitvah. Štetje in sumiranje glasov poteka transparentno in nepristransko.

V povolilnem času se volilni izidi pošteno povzemajo in se javno objavijo, brez zamude. Če se na volitvah ugotovijo nepravilnosti, se volilni rezultat v volilni enoti ali njenem delu v katerim so bile ugotovljene nezakonite aktivnosti, uniči. Nadalje je treba imeti učinkovito in ustrezno pravno sredstvo za primer domnevne kršitve pri štetju in sumiranju volilnih rezultatov. Treba je odkriti kazenska dejanja povezana z volitvam, pravočasno uvesti preiskavo, vložiti obtožbo in ponuditi dokaze, ki bi pripeljale do obsodbo in kaznovanje storilcev. Mandat se dodeli kandidatu, ki je zmagal na volitvah.

Zgoraj navedeni konsolidirani standardi SE, OVSE in EU vključujejo tudi standard "resničnega predstavljanja". Takšni volilni standardi določajo obseg in bistvo vsakega teoretičnega načela, ki je deklarirano med mednarodnimi načeli. V skladu s tem, skupni volilni standardi v Evropi omogočajo edinstveno interpretacijo načela "svobodnih in pravičnih volitev" za vse udeležence na volitvah.

Mednarodni nadzor implementacije volilnih standardov

Nadzor volitev je ključna aktivnost mednarodnih organizacij z namenom ocenjevanja o tem v kakšni meri države upoštevajo volilni standard "svobodnih in pravičnih volitev". Nadzor volitev običajno potekare v politiziranem okolju, polnim z varnostnimi izzivi. Glede na vse to, nadzor volitev se sooča z naslednjimi izzivi: a) nadzor volitev se mora pozorno načrtovati in potekati v okviru predvidenega političnega in varnostnega konteksta; b) nezadostno sodelovanje in koordinacija med mednarodnimi organizacijami lahko pripelje do izgube kredibilitete in nemožnosti pravega nadzora volitev s strani mednarodnih opazovalcev;⁶⁵ in c) empirijski nadzor pripelje do zaključek, da je nadzor volitev potreben, vendar ni dovolj za zagotovitev "svobodnih in pravičnih volitev".

⁶⁵ Izjava o preliminarinem poročilu in o ugotovitvah o Gruziji, izredne predsedniške volitve 2008, in Zaključno poročilo OVSE/UDIČP, 4. marec 2008.

Ostale oblike volilne podpore vključujejo oceno volilne zakonodaje in zaščito volilne pravice. Vendar pa manjka učinkovito spremljanje in praktična uporaba priporočil, poročil in sodb mednarodnih teles s strani domačih institucijah. Slednje morajo odpraviti vse pomankljivosti volilnega postopka, ki so bili ugotovljeni na mednarodni ravni.

4. Evropski volilni standardi nacionalnih sodnih oblasti: primerjava

Načela in posebni standardi, ki so v disertaciji koncipirani pod paradigmo “svobodne in pravične volitve” so obravnavani kot predmeti analize z namenom primerjave določenih držav raznovrstne tipologije. Vzorec raziskave vključuje dve državi nekdanje Jugoslavije: Makedonija in Slovenija, štiri “razvite demokracije” Francija, Belgija, Švica ter Združeno kraljestvo, dve državi nekdanje ZSSR: Ukrajina in Azerbajdžan. Slednja država je analizirana, da bi se prikazala ilustracija uporabe evropskih volilnih standardov države, ki ne pripada Evropi.⁶⁶

Rezultati primerjave temeljijo na presečišču dveh spremenljivk: nacionalne zakonodaje in razvitih evropskih standardov. Nalagajo mnenje, da obstaja velika skladnost med državami, ko gre za volilna načela *in abstracto*. Ko se države obravnavajo *in concreto*, obstaja velika skladnost med državami, ki pripadajo isti kategoriji. One delijo tudi skupne težave. Zgoraj navedeni izidi kažejo na to, da imajo vse obravnavane države vzhodno in zahodno od Dunaja pomanjkljivosti v določenem volilnem segmentu.

Nacionalna zakonodaja služi, in bo še služila kot vir volilnih standardov, med drugim, ker so nekatere od držav dosegle določeni nivo razvoja volilnih zadev glede na svojo dolgo volilno prakso,⁶⁷ kot tudi na tehnološki napredek, ki se odraža tudi na volilne zadeve.

5. Ugotovitve in priporočila

⁶⁶ Po vojnem spopadu leta 2001 Makedonija je bila reafirmirana kot multi-kulturna in multikonfesionalna država (Popis prebivalstva, gospodinjstev in prebivališč v RM, Zavod za statistiko (2002), str 176. Ohridski okvirni sporazum je predpisal garancije manjšinskega prebivalstva v Makedoniji, ki zajema več kot 20%. To se posebej nanaša na etnične Albance. Ohridski okvirni sporazum je prevedel nove parlamentarne volitve, na katerih podlagi se je ustvarila legitimna vlada pod spremenjenimi okoliščinami.

⁶⁷ Na primer, Združeno kraljestvo vodi v vzpostavitve in zagotovitev pogojev enakosti z namenom omogočanja popolnega uživanja pasivne volilne pravice oseb s posebnimi potrebami, z namenom povečanja njihovega števila v predstavniških organih. CRPD, Poročilo Združenega Kraljestva, str. 95.

“Svobodne in pravične” volitve se nahajajo v središču sodobne demokracije, vendar se njihova zagotovitev spreminja odvisno od političnih, kulturnih, zgodovinskih ter ekonomskih razlik med državami.⁶⁸ Volilne pravice, ki so minimalne, so širše določene in niso uporabne za namen “svobodnih in pravičnih volitev”.⁶⁹ V kontekstu regionalne volitvene zaščite, analiza kaže na to, da ponujene rešitve s strani mednarodne dimenzije samo delno ustrezajo potrebam prakse.

Vglavnem izidi kažejo na fragmentacijo in nedovolj natančne volilne standarde, od katerih so neki brez pravne moči. Najpomembnejši volilni standardi so razporejeni med SE in OVSE, ki sta organizaciji z večjim članstvom kot je EU. Vendar, le članice EU so zavezane na volilnih standardih, ki izhajajo od SE in OVSE.

Volilni standardi, razloženi s strani treh organizacij se medsebojno dopolnjujejo do določene stopnje. Na primer, ni izrečnega standarda volilne administracije v prizadevanjih OVSE, čeprav je to ena med glavnimi točkami pri nadzoru volitev. Vseeno, samo prizadevanja OVSE zahtevajo nadzor volitev. Niti OVSE niti SE meni, da je volilni sistem predpogoj za “svobodne in pravične volitve”, za razliko od EU. V EU obstaja poglobitev in kristalizacija volilnih standardov, odražena v določenim volilnim modelom (z množico možnosti), limit volilnega praga, prepoved akumulacije funkcij. Tako EU kot SE ima svoja pravila o akumulaciji funkcij. Ni izrečnega pravila v regionum ki zajema države OVSE. Dodelitev volilne pravice osebam – nedržavljanov, ni več tabu za SE in EU. Čeprav bi priznavanje volilnih standardov drugih evropskih organizacij šlo v vzajemno korist, to se dogaja sporadično, v nekaterih primerih.

Volilno stanje v katerim se nahajajo evropski standardi predstavlja težava za države članice OVSE, SE in EU.

Rezultati raziskave kažejo na pravno praznino v že ugotovljenih volilnih standardih v Evropi, ker standard resničnega predstavljanja nikjer ni koncipiran. Vendar pa je njegovo seme zasejano v mednarodno ugotovljenih standardih, kot tudi v strokovnih besedilih. Prvič, po

⁶⁸ Dixon, *International Law* (5th edition) (2005) str. 336-335.

⁶⁹ Levitsky, *Way Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post Cold War Era* (rev. 2003) str. 7.

takšnem standardu se šteje, da slab odziv volilcev predstavlja težavo za katero je treba najti rešitev.⁷⁰

Imajo preveč različnih volilnih standardov, ki jih je treba upoštevati. Številni volilni standardi v različnih kombinacijah predstavljajo težavo tudi za osebe, ki opravljajo nadzor volitev, saj imajo na voljo veliko orodij za ocenjevanje integritete volitev. Volilne ocene so bile resno zanikane s strani določenih držav, najpogosto na podlagi delitve zahod-vzhod, zaradi dvoumnosti v zvezi z volilnimi merili. Morajo obstajati omejitve na regionalni evropski ravni, ki naj bodo artikulirani v obliki konkretnih skupnih standardov. Koncipirani volilni standardi v disertaciji se ne smejo reducirat⁷¹, razen v primeru posebnih okoliščin, kot je ogrožena varnost in javni red in mir. Vendar celo v takšnem primeru mora izjema enega ali več standardov biti jasno artikulirana, objavljena v javnosti z ustreznim pojasnilom. Za takšne primere naj je pristojno mednarodni organ oziroma koordinativni sekretariat, katera ustanovitev je predložena tukaj.

Vprašanje ni to, ali je potrebna konvencija o volilnih standardih na evropski ravni, temveč ali obstaja politični sporazum med državami SE in OVSE, kot tudi EU, da bi se dosegla takšna pogodba. Upoštevajoč dejstvo, da 1) obstajajo pravno zavezujoči standardi; 2) obstajajo prizadevanja s katerimi so države politično zavezane; 3) ni pomanjkljivosti volilnih priporočil; 4) ni ustreznega trenutka za pogajanja o podrobni pravno zavezujoči konvenciji ter 5) članice teh treh organizacij so se že dogovorile in uskladile v zvezi s potekanjem volitev, evropskim organizacijam je treba imeti *de facto* pristojnost za oblikovanje edinstvenih volilnih standardov v obliki trilateralnega sporazuma, podpisan s strani treh organizacij. Ta sporazum je treba biti javno objavljen in na voljo vseh prizadetih držav.

Saj bi bil sklenjen s strani EU (kot specialni primer) bi bil del prava EU, vendar pa ne neposredno uporaben na sodiščih držav EU in ne bi dodelil neposrednih pravic in odgovornosti državljanom EU. Dalje, evropske regionalne organizacije se morajo več osredotočiti na podrobni vključitvi določb različnih volilnih zadev v nacionalnih zakonodajih v skladu s mednarodno priznanimi volilnimi standardi.

⁷⁰ Lijphart, *Patterns of Democracy* (Srbski prevod, ki ga objavljamo Sluzbeni List CG Beograd)) (1999) pp. 269-272. Glej Gallagher, Laver, Mair, *Representative Government in Modern Europe* (5th ed.) (2011) p. 127.

⁷¹ Standart "de minimus" o svobodnih in pravičnih volitvah v Evropi ne zajema tudi standard resničnega predstavljanja, ker do sedaj ni sprejet s strani nobene evropske organizacije.

Rezultati raziskave kažejo na pravno praznino v že ugotovljenih volilnih standardih v Evropi, ker standard resničnega predstavljanja nikjer ni koncipiran. Vendar pa je njegovo seme zasejano v mednarodno ugotovljenih standardih, kot tudi v strokovnih besedilih. Prvič, po takšnem standardu se šteje, da slab odziv volilcev predstavlja težavo za katero je treba najti rešitev.⁷² Drugič, volilni sistem se ne sme omejiti na maksimi, da zmagovalcu pripada vse,⁷³ s katero bi se opozicija omejila,⁷⁴ ali celo tudi udeležba državljanov v sprejetju odločitev. Tretjič, ta standard izraža obsotječe obveze političnega predstavljanja skupin, ki niso v ugodnem stanju.⁷⁵ Na koncu, ta standard zahteva tudi odnos supervizije in odgovornosti med volilcem in izvoljeno elito,⁷⁶ ker volitve niso nič več kot sredstvo ljudstva za pridovitev moči sodelovanja v sprejetju političnih odločitev.⁷⁷

Raziskava nadalje kaže na slabost uporabe in spremljanja priporočil in odločitev sprejetih s strani treh evropskih organizacij. Ustanovitev specializiranega sekretariata za sodelovanje bi lahko razrešil ta problem. Z namenom izogiba dvojne porabe virov in energije, je treba imeti jasno pristojnost za spremljanje volilnih aktivnosti po predhodnih priporočilih ne samo OVSE, temveč tudi SE in EU za posamezno državo. Predloženi organ naj ne opravlja nadzor volitev. Sekretariat naj dodeli pooblastila in pristojnosti za ugotavljanje dejstev. Prav tako je treba imeti enotni arhiv v katerim bi bile vse listine, ki so veljavne za nudenje volilne pomoči, na voljo vseh organizacij in držav. Koordinativni sekretariat se naj ustanovi v OVSE/UDIČP, upoštevajoč njegovo pristojnost, ekspertizo in kapaciteto glede na volitve, kot tudi zaradi zmanjšanja stroškov v zvezi z ustanovitvijo novega telesa. Vseeno bi se pojavila pomanjkljivost v stroških, saj bi bilo potrebno zapravljanje denarja javnih skladov. Države ne bi rade plačevale za še eno telo, ki naj bi pomagalo pri njihovi volilni reformi. One vseeno plačajo nadzor volitev, spremljanje financiranja prevolilnih kampanj in še vedno nadaljujejo kršiti evropske volilne standarde. Od tega stališča bi bili stroški za ustanovitev takšnega organa manjši kot stroške za konstantno kršitev volilnih standardov, ki predstavlja direkten napad na cilj nadzora volitev in nudenje pomoči na področju volitev.

⁷² Lijphart, *Patterns of Democracy* (Srbski prevod, ki ga objavljamo Sluzbeni List CG Beograd) (1999) pp. 269-272. Glej Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) p. 127.

⁷³ Lijphart, *Patterns of Democracy* (Srbski prevod, ki ga objavljamo Sluzbeni List CG Beograd) (1999) p. 275.

⁷⁴ Kelly, *Monitoring Democracy* (2013) p. 142

⁷⁵ Article 7 of CEDAW, Article 5 (c) of CERD, Protocol 12 of ECHR; OSCE/CoE, *National Minority Standards* (2007).

⁷⁶ Lijphart, *Patterns of Democracy* (Srbski prevod, ki ga objavljamo Sluzbeni List CG Beograd) (1999); 273-275, OSCE commitments: Paris Charter 1990; Beetham, *Defining and Measuring Democracy* (1994) pp. 89, 93.

⁷⁷ Beetham, *Defining and Measuring Democracy* (1994) pp. 70, 116, 127.

Primerjalna analiza se začne od dejstvo, da države imajo na voljo volilne standarde razvite s strani OVSE, SE in EU kot orodja za ocenjevanje kakovosti volitev. Potrjujejo se trditve, da številne standarde odpirajo težave za določene države. Najprej morajo ugotoviti katere organizacije so pomembnejše in z večjo kredibiliteto glede na volitve, da bi se izogibale treh posameznih ocen volitev. V kolikor se izbere le eno skupino standardov, to je lahko neustrezno, ker obstajajo praznine v vsaki skupini volilnih standardov, če jih pogledamo ločeno. Za ilustracijo, glavni standardi OVSE ne zajemajo neodvisnost in nepristrasnost volilne administracije. Te bistvene sestavine volitvenega ukrepa lahko manjkajo, če države nočejo sprejeti disperziranih interpretativnih standardov OVSE od drugotnih virov. V kolikor država je članice EU, se lahko odloči za standarde EU, ki so tesno oblikovani, saj se nanašajo na eno vrsto volitev. Tako, celo če ima država dobre namere upoštevati evropske standarde v volilnih zadevah, bi se vseeno soočala z težavami v naporih razvijanja komplementarnih zakonov in prakse.

Rezultati primerjalne študije glede na hipoteze pokažejo, da koncipirani enotni volilni standardi pomagajo pri zmanjšanju in izogibu zmote, kontradiktornih interpretacij ter praznin, ki jih je v sedanjih evropskih standardih volilnih zadev. Takšni edinstveni ukrep "svobodnih in pravičnih volitev" bo državam omogočal izogibati se selektivnega in delnega pristopa k volitvah. Vendar pa je treba priznati, da v prihodnem procesu standardizacije obstaja rizik mešanja v že vzpostavljenih standardih. Ravno to tveganje predstavlja argument proti uveljavitvi celovite pravno zavezujoče konvencije z jasno uporabnostjo. V kolikor je trilateralni sporazum predpisan v obliki skupnega imenovalca "svobodnih in pravičnih volitev", se lahko zgoraj omenjeni rizik zmanjša preko pogovorov z državami, njihovega povečanega sodelovanja v procesu in preko preliminarnih pogovorov med SE, EU in OVSE. Lahko se pogovarja o kakršnem koli možnem neželjenem učinku pogodbe ali pogovorov držav in se lahko adresira in razreši v tej zgodnji fazi. Rešitev, ki je ponujena s strani držav v zvezi s tveganjem in možnimi neželjenimi učinki, lahko postane del pogodbe. Na primer, v pogodbi se lahko navede, da le-ta ne bo imel direktnega vpliva na države EU, čeprav je del prava EU.

Lahko se pojavi še en rizik pri vključitvi novih standardov na evropski ravni. Takšni novi standardi se lahko predvidevajo v trilateralnem sporazumu, vendar države lahko ugovarjajo postopku, če menijo, da gre za nedovolj uravnotežen postopek. V vsakem primeru, v kolikor

je trilateralnega sporazuma, ki vključuje nove standarde, le-ta bi predstavljal močno orodje lobiranja za vzpostavitev novih standardov, ki lahko izhajajo od nacionalne zakonodaje.

Glede na predloženi standard resnične predstavitve v političnem odločanju, analiza kaže na to, da je globoko zakorenjen v demokratičnih teorijah. Poleg tega, nekateri od njegovih segmentov so že definirani v volilni zakonodaji Francije, Slovenije, Belgije ter Združenega kraljestva.⁷⁸ Njegova prilagoditev k evropskih standardih bi bila enaka vključitvi sredstva pozitivne spremembe, ki bi se nanašalo ne samo na volilni proces, temveč bi vzdrževalo tudi duh demokratičnega prizadevanja in njene obstojnosti.

Obstoj tehničnega organa v Evropi, ki bi bil specializiran za volilne reforme, lahko predstavlja koristno orodje za vse države analize. Koordinativni sekretariat bi lahko pomagal doseči večjo resnost regionalnih organizacij z namenom spodbude držav, da implementirajo priprave dane s strani različnih evropskih teles. Dalje lahko prispeva k pripravljanju volilnih “navodil” za države, povezujoč delov mozaika priporočil in odločitev v zvezi z volivami. To pripelje tudi do dosledno interpretacijo volilnih standardov, s čimer bi se delni in počasni proces volilne reforme nadomeščal z holističnim in intenzivnim procesom. Takšni pristop ne bi dovolil zlorabe volilne reforme s strani držav, če spremenijo zakonodajo v nasprotju z evropskimi volilnimi standardi, pri čem bi samo nekateri od priporočil bili izvedeni. Vendar pa si moramo spomniti, da se pomoč mora ponuditi uravnoteženo glede na državna suverenost.

Iz tega lahko sklenimo, da bo evropski volilni standardi določeni v trilateralnem sporazumu definirali de minimus pravilo o tem kaj se lahko sprejme kot “svobodne in pravične volitve”. Učinkovita podpora volilne reforme temelji na posameznem pristopu za vsako državo in zahteva holistično metodo za uporabo s strani koordinativnega sekretariata pod okriljem OVSE. Na koncu, sprejetje volilnih standardov za vsaki del volilnega cikla kot del politične in pravne kulture mora predstavljati končni rezultat.

⁷⁸ Po njegovih različnih delcev glej str. 11.

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1. Background

International law is traditionally understood as a body of law that is composed of rules and principles that regulate international relations between sovereign states; which states feel bound to observe; and which they commonly do observe in their mutual relations. International law also encompasses the rules of law regulating the activities of international organizations vis-à-vis one another, as well as vis-à-vis states and individuals. In addition, it includes certain rules of law relating to individuals and non-state entities when such duties and rights are the concern of the international community.⁷⁹

Protection of human rights is a legitimate concern of the international community.⁸⁰ The development of human rights law has engaged the responsibility of states for the protection of human rights, as well as for the creation of conditions for their enjoyment by citizens. In the parts of Europe with democratic systems (after the World War II) this trend has been nurtured by the CoE since its inception in 1949. But, for the parts of Europe with socialistic political systems, the main impetus for the protection of human rights came with the collapse of the Berlin Wall, which demonstrated that citizens will always find a way to request and fulfill their right to live in a free society and to elect their representatives.⁸¹ The democratization of the continent has been further supported by the European Union's enlargement process, which requires a democratic governance and human rights protection. Nowadays, nobody can contest that the right to participate in public affairs and its intrinsic component, election rights, represent a fundamental human right. They are foreseen in major international instruments, which oblige the states to afford their protection and to create conditions for their free enjoyment by the people.

Free and fair elections are a central feature of liberal representative democracy.⁸² They serve as a social means to enable citizens to elect key political decision-makers, thus guaranteeing

⁷⁹ Kaczorowska, *Public International Law* (2010) p. 2; Dixon, *Textbook on International Law* (1990) p. 2.

⁸⁰ See Kaczorowska, *Public International Law* (2010) p. 369.

⁸¹ Friedrich Naumann Foundation, *Short Guide of Electoral Monitoring and Electoral Systems* (1994) p. 5.

⁸² Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, *Federal Trust Report* (2007) p. 7.

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indirect citizen participation in politics at the national, regional and local levels. This model of political governance, which requires some branches of government to be freely chosen by the people, has been increasingly adopted worldwide.⁸³

Elections allow public offices to be taken by parties and individuals who enjoy the trust of the majority of voters deciding the essential question, i.e., who is going to govern the country.⁸⁴

In addition, elections contribute towards the accountability of the elected representatives who must consider the interests of the people by whom they have been elected, as the vote may also be a punishment for past actions and not only a choice of future policy.⁸⁵

Furthermore, elections serve to grant legitimacy to the government and to stabilize the political system. They serve to put into practice the idea of the sovereignty of the people in democracy.⁸⁶ Over the centuries, elections have assured a peaceful transition from one set of officials to another⁸⁷ as voters were able to freely change their minds regarding who would govern the country, and they had every right to do so.⁸⁸

One of the reasons why democratic, free and fair elections are considered to be so important for international law is that they facilitate stability, peace and security not only at a national, but also at an international level.⁸⁹ The conflict of interest of different groups is dealt with via elections and in the parliament of elected representatives. Social conflicts are resolved⁹⁰ by accepting their existence and by allowing them to be settled via competition amongst the parties and via public debates and elections.⁹¹ Therefore, an election deal is always included in a peace truce. Ballots are replacing the bullets to select who will govern countries.⁹²

⁸³ Lord, Harris, *Democracy in New Europe* (2006) p. ix. For the trends regarding the increase of the number of the states with representative democracy, see *Democratic Breakthroughs in the Balance, Selected Data from Freedom House's Annual Survey of Political Rights and Civil Liberties*, p. 23 (2013) at <http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet%20-%20for%20Web_1.pdf>.

⁸³ Duhamel, *Droit Constitutionnel, edition du Seuil*, Paris (Macedonian translation, published by SEE University) (1993) p. 25.

⁸⁴ *Ibid* p. 25.

⁸⁵ Dahl, *A Preface to Democratic Theory* (1956, 1984, 2006) p. 129.

⁸⁶ Trajkovski, *Politika na covekovite prava I del* (2005) pp. 130-133.

⁸⁷ Terchek and Conte, *Theories of Democracy: A Reader* (2001) p. 6.

⁸⁸ Duhamel, *Droit Constitutionnel, edition du Seuil*, Paris (Macedonian translation, published by SEE University) (1993) p. 25.

⁸⁹ Regardless of a classification of a conflict as inter-state or intra-state, its resolution may be a subject of international law, considering the requirements of the international humanitarian law and international human rights law.

⁹⁰ Frckovski, *Teorii za demokratijata* (1992) pp. 154-155.

⁹¹ Duhamel, *Droit Constitutionnel, edition du Seuil*, Paris (Macedonian translation published by SEE University) (1993) pp. 27-28.

⁹² Paraphrasing Abraham Lincoln: "Ballots are the rightful and peaceful successors to bullets".

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Considering the attention that elections attract as they determine the political dimension in the states that are subjects of international law, it is of the utmost importance to have public confidence in the lawfulness of the election process. Public confidence serves as an indicator of the trust that citizens have given to the party or parties that won the elections. Suppression of any kind of electoral irregularities is of vital importance to ensure that all citizens enjoy their voting rights under equal conditions. Proper safeguards against unlawful and criminal conduct, as well as against coercive competition during elections are crucial to ensure electoral integrity.⁹³ With the proper safeguards, the legitimacy of the Government and public trust in democracy as a means of organizing society are re-confirmed.

In an ideal world, the electorate consists of all citizens and residents who actively participate in political life. In contemporary states, civic status is the basis for practice of political power via elections. In antiquity, civic status was reserved only for free citizens, and there were different categories of citizens with different rights and statuses, as in Roman times, for example. In comparison, in ancient times the right to participation in public affairs had been direct, but restricted basically to the elite. Nowadays the decision-making power rests with a group. However, the big invention is that all adult members of the community have the right to decide who will belong to that group via periodical elections.

In the contemporary world, there are not just opportunities for democracy, but there are also challenges to it. Terrorism, wars, environmental changes, poverty, lack of energy, demographic trends, globalization, and technological change all represent challenges for states, who might have problems coping with these factors due to their limited capacities. Such problems might result in regimes which are corrupt, that defraud the electoral process, or who restrict and manipulate basic freedoms and refuse to be accountable to their citizens.⁹⁴

Consequently, although periodical fair and free elections with well-protected election rights lie at the heart of democracy, they are not a synonym for democracy, or a goal in and of themselves.⁹⁵ They are but an instrument⁹⁶ for achieving effective representation of citizens via elected officials. If the right to participation in public affairs were reduced merely to

⁹³ Owen, *Le Processus Électoral, Permanence et Évolutions*, Actes du Colloque Réuni au Sénat (2005) p. 207.

⁹⁴ Council of Europe, *The Future of Democracy in Europe, Trends, Analysis and Reforms* (2004) pp. 13-19, 56-61.

⁹⁵ Karakamisheva, *Elections and Electoral Systems* (2004) p. 29.

⁹⁶ Owen, *Le Processus Électoral, Permanence et Évolutions*, Actes du Colloque Réuni au Sénat (2005) p. 208.

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participation in elections, even free and fair elections might have a negative effect upon democracy. In the absence of other elements of democracy the citizens might end up being ruled by a corrupt regime.

Indeed, free and fair elections still yield outcomes that can be characterized as undemocratic and appear to give carte blanche to the majority for oppressing the minority. It could equally be said that, in some instances, electoral processes have accomplished little more than to allow voters to select from among the parties dominated by the economic and social elite with no guarantees of governmental responsiveness to popular needs or input.⁹⁷ All of this negatively affects public confidence in democratic institutions and mechanisms. This is especially true for partially or incompletely consolidated democracies.

In order to avoid the limitations inherent in a majority voting, other safeguards are necessary. These safeguards are the universal protection of human rights, education, citizens' empowerment, rule of law and ethics. While sovereignty does belong to the people and they can reclaim it from the incumbents, for a functioning (and not only declaratory) democracy, the respect for the rule of law, human rights and freedoms, separation of powers and an independent judiciary are necessary. For elections to reflect public preferences, *inter alia*, there must be a meaningful choice among candidates and policies⁹⁸, the right to join and establish political parties (crucially in opposition) and relatively autonomous organizations, as well as the existence of free information, alternative to that which is provided by the government.⁹⁹ The constitutional separation of powers is also important in order to safeguard a reliable external control for the prevention of tyranny, respect for the rule of law and equal application of the laws to all.

Concerning Europe, important matters to bear in mind are the enlargement of European Union, the acceptance of the "post-communist states" and the deepening of relations between the EU member states, which undoubtedly has a positive impact on their democratic system of governance. In particular, it could be said that the current trend towards liberal democracy results in a higher range of political standards.¹⁰⁰ In this context, it is worth mentioning that

⁹⁷ Roth, *Governmental Illegitimacy in International Law* (2000) p. 425.

⁹⁸ Terchek, Conte, *Theories of Democracy: A Reader* (2001) p. 6.

⁹⁹ Pennings, Keman, Kleinnijenhuis, *Doing Research in Political Science* (edition 2006) p. 282.

¹⁰⁰ CoE, *The Future of Democracy in Europe, Trends, Analysis and Reforms* (2004) p. 10.

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EU citizens have the right to elect their representatives in European Parliament, meaning also at the supra-national level.

In Europe, the authority to ensure that safeguards for free and fair elections are in place is endowed upon international organizations and human rights instruments. Whether there is sufficient political will, pro-activity and resources to do that in each case and in accordance with particular circumstances, remains to be seen. It also remains to be examined how and when the international community can exert pressure on freely elected candidates and governments to withdraw, since in these cases it might appear that sovereignty does not reside in the people of the country, but in international and regional organizations.

The European election rules and principles, as discussed in the text below, are set out in all major international human rights instruments, including the OSCE Commitments and CoE Code of Good Practices in Electoral Matters. International election obligations and international bodies in charge of their observation have played and have yet to play a large role in the protection of election rights and participation in public affairs. This role is even more important in these days of globalization and European integration, but also of security threats, which might result in the reduction of basic freedoms and promote aggressive behavior.¹⁰¹ Their existence confirms that European states consider it necessary to allow for wider protection -outside national borders- of the right to participate in public affairs, and election rights, by extending the possibility of any irregularities in this respect to also be addressed and remedied by public international law mechanisms.¹⁰²

As Robert Dahl stated: “Whatever form it takes, the democracy of our successors will not and cannot be the democracy of our predecessors”.¹⁰³

2. Subject Matter and Goals

The subject-matter of this Dissertation is election rights and their protection, which are afforded in Europe. The Dissertation centers on the contemporary European electoral affairs, acknowledging that the respective states have already assumed the obligation of “free and fair elections”. In fact, a number of international instruments like the ECHR, the Code of Good

¹⁰¹ Ibid p. 20.

¹⁰² The term “mechanism” is used in the sense of encompassing both the international instruments and the mechanism for their implementation.

¹⁰³ Ibid p. 12.

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Practice in Electoral Matters, the OSCE Commitments and the Charter of Local Self Government contain obligations that are relevant for elections. These instruments aim to ensure the protection of the election rights of the people in the European region as yet another essential element of a democratic society. A number of international organizations (OSCE, CoE, EU) have a mandate to complement electoral activities of the states in Europe by assessing electoral laws in light of international election standards, by conducting election observation and by adjudicating individual election-related complaints.

Despite the existence of national legal remedies and protection afforded at the European level to election rights, electoral violations and impunity for those who commit them continue to persist in Europe.¹⁰⁴ The progress of technology reflected in the voting procedures also prompts enhanced protection of voting rights.

Any attempts to come up with a ready-made formula for solving the “free and fair elections” puzzle risks being punished for its ambition in view of the cultural, political and historical diversities that exist in Europe, and for the primacy of state sovereignty in electoral matters. Still, the Dissertation contemplates solutions for ensuring that “free and fair elections” take a strong hold in Europe via enhanced impact of the international mechanisms for protection of election rights.

The hypotheses state the following:

- 1. Whereas European standards in the election field may be deduced from the treaties and political commitments of the three European organizations (CoE, OSCE and EU) that have prescribed criteria for holding periodic free and fair elections, these standards are imprecise, with varying degrees of legal value and contain a gap, as no electoral standard reflects the requirement for achieving a meaningful representation in the political decision-making.**
- 2. Since free and fair elections, the minimalist concept of democracy, represents a challenge for a number of states, the European organizations, with the aim of maximizing their electoral support efforts, should: i) elaborate uniform**

¹⁰⁴ As it could be seen in the part below containing data and analysis of the most important reports and decisions of international bodies pertaining to elections, see pp. 62, 63, 87-112 Annexes I, II, IV and VI, pp. 269, 272, 281, 285.

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European standards in the election field - a common denominator for holding periodic free and fair elections; and ii) establish a coordinative Electoral Secretariat within the OSCE, mandated to assist the states with their electoral reforms.

For the illustration of the hypothesis, the Dissertation chose to examine the following three bundles of issues:

- a. Do European standards in the election field exist? If so, what are their content, nature and attributes?
- b. Which are the election-mandated mechanisms at the European level, and what is their authority and capacity?
- c. What is being done and what should be done to ensure that free and fair elections are taking a permanent hold in Europe, seen through the prism of public international law?

The exploration starts with the origins and development of the right to democratic government and election rights, and their connectivity with the public international law instruments. Within this framework, special attention is devoted to the connection between the right to participate in government and other human rights and fundamental freedoms, such as freedom of association, of peaceful assembly, of expression and prohibition of discrimination.

The string of the exploration further unwraps on the meaning of “free and fair elections” for Europe. European constitutional and electoral heritage is founded on the following three pillars: democracy, human rights and the rule of law. The basis, that is, what is called the “hard core” of European Electoral Heritage largely comprises the relevant universal rule set out in Article 21 of the UDHR and, especially, Article 25 of the ICCPR.¹⁰⁵ Other UN election-related documents also represent a source of electoral commitments, in view of the states’ almost universal membership in the UN.

The ECHR (Article 3 of Protocol no. 1) assumes the central position within the European Electoral Heritage’s framework, by obliging the states to hold free, secret and periodic

¹⁰⁵ CoE, Code of Good Practice in Electoral Matters, pp. 5, 12.

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elections for the legislature. The relevant case-law of the ECtHR is crucial to find an answer to the curiosities surrounding the right to individual applications in the electoral context. Other CoE treaties and documents that contain electoral commitments have been also analyzed for their content and practical values.

The election-related instruments elaborated under the auspices of the OSCE and EU add to the abundance of the identified texts applicable to Europe. Analyses are provided of the most important decisions, judgments, reports and best practices of the pertinent international bodies, as a valuable source of specific election standards. Thus defined electoral commitments are translated into European standards in the election field as they stand now, with contemplations offered about their future.

The subsequent chapter explores the international mechanisms' benefits and deficiencies. The election-mandated bodies of the CoE, OSCE and EU are examined through a magnifying glass of the temporal, geographical, diplomatic, human rights and financial dimensions.

The results obtained from the examination of the first part are tested with respect to seven countries, as follows: Belgium, France, Macedonia, Slovenia, Switzerland, Ukraine and the UK in view of their similarities and differences in terms of history, democratic culture and electoral rules. Azerbaijan has been added to the list, although technically it does not belong to the European continent. However, it is bound by the CoE and OSCE commitments, thus illustrating the diversity of states to which European election standards are applicable. The afore-mentioned verification is anchored in the assessment of the compatibility of their respective legislations with election standards¹⁰⁶ deduced from treaties and other relevant international documents from the Part One. Other circumstances relevant to the quality of their elections are also taken into consideration, such as the implementation of election legislation, the type of the re-occurring electoral violations, legal remedies, citizens' activism, the availability of public information, etc. All these factors are usually dealt with in the reports prepared by election observation missions of different European organizations.¹⁰⁷ Final conclusions and recommendations, annexes and the bibliography used are at the end.

¹⁰⁶ For example, the CoE Venice Commission and OSCE Office of Democratic Institutions and Human Rights.

¹⁰⁷ Such as OSCE/ODIHR, CoE, European Parliament.

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- The main scientific contribution lies in the original conceptualization of the European standards in the election field. Similarities, differences and gaps are identified among electoral commitments coming from a variety of sources. No such academic effort has been undertaken at the European level, although at universal level standards have been defined for free and fair elections.¹⁰⁸ Further contribution is made by proposing the solutions for the fragmented election standards in Europe, with the aim to enhance the protection of election rights and curtail the impunity in this field. In addition, the doctoral dissertation contributes to the comparative legal literature, with the examination of the comparative examples of the selected European countries, as well as of the non-European countries, bound by the European standards.

3. Methodological Approach

When elections, as an intrinsic element of the right to participate in government, are the subject matter of examination, a multidisciplinary approach must be used in its dynamic context. Yet, it is the legal analysis that is primarily charged with achieving the goals of the Dissertation. The methods of analogy and comparison help identify the most similar and the most different among the universal and electoral commitments stemming from the plurality of sources. The comparative method is further used in the part devoted to the countries from the European region where they serve as the units of analysis.

International instruments and domestic law are legally analyzed for their textual and teleological meanings and interpreted in line with the human rights based-approach. Monitoring and election observation reports, judgments and decisions are scrutinized for the empirical side of the European standards in the election field. Declarations and official documents of universal and European bodies are analyzed in line with the hermeneutic principle of cultural and historical context. Descriptive method is employed to present and interpret the theoretical and historic framework relevant for democracy and human rights. Deductive and inductive methods are employed for defining the content of the European standards in the election field and for formulating plausible conclusions for protection of the “free and fair elections” in Europe.

¹⁰⁸ Goodwin-Gill, *Free and Fair Elections* (2006).

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Interviews on the basis of a pre-developed questionnaire¹⁰⁹ with electoral experts, was used for obtaining information about electoral policy and practice of the CoE and the OSCE/ODIHR, as well as about the state of the electoral affairs in Slovenia and Macedonia. On the basis of the developed questionnaire, semi-structured interviews were conducted with pre-identified officials of the OSCE/ODIHR, of the CoE (Parliamentary Assembly, CLRAE and Venice Commission - a field trip) and of the UNDP project in Macedonia, who have been directly working on legislative assessments, on election observation, or on advocacy for “free and fair elections”. Eleven officials and experts of the above-mentioned organizations were interviewed in total about the election standards developed by their respective organizations, the problems and concerns in the electoral arena, as well as about their projection regarding the future of the European election standards and their implementation. Semi-structured interviews were also conducted with five electoral experts from Slovenia and Macedonia. The interviewed experts were either public officials or NGO representatives working on electoral policy and legislation, maintenance of voters’ list, electoral management and election observation. For the UN and the rest of the countries from the sample, information was collated from election observation reports, electoral assessments, political discourse and legal documents. Collection of information by use of questionnaire proved to be either unsuccessful or impractical in the latter cases, due to time constraints, unwillingness to reply through e-mails and confidentiality requirements.

Statistical data collected with respect to the types and frequency of the electoral violations examined by the HRC, OSCE/ODIHR and ECtHR,¹¹⁰ helps identify the manner in which the “free and fair” electoral standard is breached in various countries in Europe, as well as discern the trends of the most frequent violations in this regard. The statistics further contribute to the assessment of the effectiveness of the electoral support provided by the international organizations. On a specific level, statistical data with respect to election-related offences were examined with respect to Macedonia and Slovenia, and inferences were made on this basis for their respective criminal law and sentencing policies. The statistical data were also useful to define the scale, the frequency and the type of electoral violations in the countries examined. Finally, statistical data helped identify demographic features of the selected countries and how they feed into the countries’ policies and laws for minorities’ representation.

¹⁰⁹ De Singly, *L’enquête et ses methods: Le Questionnaire* (2e edition refondue) p. 27.

¹¹⁰ See pp. 79, 82, 87-112, Annexes I, II, IV and VI, pp.269, 272, 281, 285.

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In summary, the aim of the methodological approach used is to arrive at plausible conclusions resulting from a better understanding of the theoretical and empirical sides of the analyzed phenomena.

4. Notions and Definition of Terms

Over the centuries, notions relating to democracy and elections were not understood in the same way in different societies.¹¹¹ Therefore, from the richness of definitions and theoretical conceptualizations, the following working definitions of the terms and notions have been selected and used in the Dissertation:

Election-related terms¹¹²

Etymologically, the word “election” comes from Latin “eligere” which means “choice”.¹¹³ Indeed, “elections” allow an indirect choice of one or more political options.¹¹⁴ This term is defined through its connection with democracy as it is the will of the people, which shapes the social realities.¹¹⁵

“Election district” or “constituency” is defined as a body of voters in a specified area who elect a representative member to a legislative body.¹¹⁶

“Election process” refers to a selection of political representatives from and within specific communities, regardless of whether it concerns the national, regional or local level or sometimes even the supra-national level, e.g., the European Parliament.¹¹⁷

“Election system” comprises electoral formula, number, size, magnitude (the number of seats allocated), the size of the representative body, the voting structure, threshold, etc. “Election

¹¹¹ Terchek, Conte, *Theories of Democracy: A Reader* (2001) p. 7.

¹¹² The working definitions herein serve to clarify the parts relating to the conceptualization of the election standards in the three examined regional organizations, to the explanation of the phenomenon of the electoral irregularities and to the comparative analysis of the national systems examined in the Dissertation.

¹¹³ Owen, *Le Processus Électoral, Permanence et Évolutions, Actes du Colloque Réuni au Sénat* (2005) p. 200.

¹¹⁴ Guillien, Vincent, Guinchard, Montagnier, *Lexique des termes juridiques* (12e édition) (1999) p. 220.

¹¹⁵ Harrison, *Democracy* (Serbian translation) (1993) pp. 13-14.

¹¹⁶ *Oxford Illustrated English Dictionary*, Dorling Kindersley Limited and Oxford University Press UK (1998) reprinted 2004, p. 180.

¹¹⁷ Friedrich Naumann Foundation (1994) p. 13.

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formula” is the legally defined method of transformation of the number of votes into representatives’ seats.¹¹⁸

“Electoral campaign” covers a number of different activities of the election candidates with the intention of gaining the trust of the electorate and to win more votes.¹¹⁹ In order to ensure free and fair campaigning as well as equal opportunity for all candidates to present themselves to the voters (usually the duration of the campaign), the financing, media representation and protection of the rights of the candidates in the campaign are regulated and assured.

“Electoral mandate” means election of a candidate who stood in elections and who thereby got an authorization to act in a certain manner on behalf of his or her electorate. It is a mission, which is conferred upon some of the citizens by their fellow citizens to exercise the power in their name and on their behalf. There is an imperative mandate, whereby elected representatives must comply with the wishes of their electorate who can revoke them. There is also a representative mandate, whereby the elected representatives, considered to be elected from the nation, exercise their mandate independently from their electorate: they do not receive any directions or instructions and cannot be revoked.¹²⁰

In the Short Guide of Electoral Monitoring and Electoral Systems¹²¹ “electoral monitoring” is defined as a procedure of following and observing the entire election in order to ensure that the election process is fulfilling its pre-set goals. “Election monitoring” is also defined as an activity conducted by domestic or international groups or organizations in order to ensure free and fair elections.¹²²

“Election rights” are political rights encompassing the right to vote, as an active election right, and to stand for election, as a passive election right. There exists a close connection between democracy and human rights, i.e., rights which are generally thought that every living person should have.¹²³

¹¹⁸ Trajkovski, *Politika na covekovite prava I del: Osnovni poimi*, p. 137.

¹¹⁹ *Ibid* p. 135.

¹²⁰ Guilien, Vincent, Guinchard, Montagnier, *Lexique des termes juridiques* (12e édition) (1999) p. 333.

¹²¹ Friedrich Naumann Foundation (1994) p. 13.

¹²² Trajkovski, Definition taken from *Politika na covekovite prava I del: Osnovni poimi*, p. 140.

¹²³ Crowther, *Oxford Advanced Learner’s Dictionary* (5th edition) (1995) p. 582.

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“Electoral rolls” as a term refers to establishing eligibility of individuals to cast the ballot. It is very closely connected with the notion of voting rights. Furthermore, it also confirms the legitimacy of the elections.

Europe

The term “Europe” employed herein refers to the member countries of the CoE, plus Belarus, in order to clarify the geographical coordinates of the examined subject-matter.

International standards

Since one of the goals of the Dissertation is to discern the European election standards, as a type of international standards, the working definition of international standards is provided herein. According to the “Dictionnaire de la Terminologie du Droit International”¹²⁴ the term “international standards” is defined as the usual conduct of affairs by civilized states which serves as an important reference for the correction of the behavior of a state connected with the relevant area. In addition, this term is used for the rules adopted by an international organization that must be applied by its member states. Election standards herein refer both to normative standards, which are set out in the legally-binding treaties, and to standards set out in the documents belonging to soft law.¹²⁵

Political parties

This notion is explained in light of the fact that there is no democracy without a multi-party system and without an opposition. The conditions keeping the opposition viable are an indispensable element of a sustainable democracy. The most common criteria to define a political party refers to its competing for votes in the political arena and playing a part in the formation of the government.¹²⁶ A party in a democracy cannot represent the whole of the society as illustrated by the origin of its name, part, i.e., “pars” in Latin. Political parties also serve as opposition to the ruling team, since they are vested with the authority to exercise a function of surveillance and critique by forming opinions and preparing a team, which would change the government in power¹²⁷ through elections.

¹²⁴ Published under the auspices of Union Académique Internationale, Sirey 1960 (...).

¹²⁵ Shaw, International Law (5th edition) (2003) pp. 10 and 111. See also: <<http://www.aceeeo.org/projects/standards.html>>; <<http://www.osce.org/documents>>.

¹²⁶ CoE, The Future of Democracy in Europe, Trends, Analysis and Reforms (2004) pp. 37-38.

¹²⁷ Guilien, Vincent, Guinchard, Montagnier, Lexique des termes juridiques (12e édition) (1999) p. 368.

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Power

The term “power” is defined due to its omnipresence in the electoral reality. It is understood as a factor, which influences and affects the attitudes and actions of someone else.¹²⁸ According to Max Weber “power” is the probability that an agent/a doer in a social relationship will fulfill his will.¹²⁹ In this context, the aim of democratic politics is the widest distribution of power among the citizenry.¹³⁰

¹²⁸ Ibid p. 284.

¹²⁹ Ibid p. 285.

¹³⁰ Terchek, Conte, Theories of Democracy: A Reader, (2001) p. 9.

II. THEORETICAL FRAMEWORK AND HISTORICAL DEVELOPMENT OF DEMOCRACY

Over the centuries, notions relating to democracy as government of the people, by the people, and for the people¹³¹ were not understood in the same way in different societies.¹³² Although nowadays the term “democracy”¹³³ is used as an umbrella for an amalgam of social processes, it reflects different political realities in its temporal and geographical dimensions.¹³⁴

This doctoral dissertation examines “representative democracy”. This notion refers to indirect democracy, where the people participate via their elected representatives in the decision-making process regarding the issues of public interest.¹³⁵ By examining the evolution of electoral democracy, this chapter captures the origins, pillars and development of democracy, with elections as its essential feature. It explains the root causes of democratization as a global trend, leading to an answer to why the instruments of public international law have been chosen to help in this mission.

Ancient Greece

Since the idealized version of democracy in ancient Greece had its impact on European social thought,¹³⁶ the roots of modern European democracy can be traced back to ancient Athens.¹³⁷ Here political rights were enjoyed by all male citizens (with or without property)¹³⁸ on equal terms. Females, slaves and free persons, whose parents were not citizens, were excluded from political life.¹³⁹

¹³¹ The Gettysburg Address by Lincoln, 19 November 1863.

¹³² Terchek, Conte, *Theories of Democracy: A Reader* (2001) p. 7.

¹³³ The etymology of the term democracy comes from ancient Greek: “demos” which means people, i.e., the commons and “kratos” which means rule or authority. Dahl, *A Preface to Democratic Theory* (1956, 1984, 2006) p. 156.

¹³⁴ Dahl’s opined that any attempt to develop democratic theory should recognize the duality between what is considered on one hand to be an ideal system which might not be attainable, and on the other hand, an actual, historically-existing system whose processes are attainable under certain conditions, *A Preface to Democratic Theory*, (1956, 1984, 2006) pp. xvi and 1.

¹³⁵ Trajkovski, *Politika na covekovite prava I del* (2005) p. 125.

¹³⁶ Frckovski, *Teorii za demokratijata*, (1992) p. 13.

¹³⁷ Harrison, *Democracy* (Serbian translation, published by CLIO) (1993) p. 27.

¹³⁸ In Athens there was a financial compensation foreseen for those who executed public offices, *ibid* p. 50.

¹³⁹ Harrison, *Democracy*, p. 27.

II. Theoretical Framework and Historical Development of Democracy

Ancient philosophers dwelled on the question of “good governance” and established the platform on which future political systems rested for centuries. For Aristotle, democracy referred to decision-making power in the hands of free and poor citizens, as they were in the majority.¹⁴⁰ He considered that women and persons without rational abilities were unable to discharge political service.¹⁴¹ Therefore, they should not acquire the status of citizens and should not be granted political freedom and rights.¹⁴² He considered democracy one of the worst political systems as it was in favor of the rulers (the people who were poor) and not in favor of the common good,¹⁴³ thus boosting political instability and irrationality.¹⁴⁴

Plato in “Politeia”¹⁴⁵ considered freedom as the central value of democracy, i.e., freedom of expression and freedom to act as one wished.¹⁴⁶ However, democracy ran the risk of degenerating into a tyranny as it: a) provided equality to those who were not equal, and b) the majority was composed of independent workers who did not own much and did not conduct public affairs, thus could be easily manipulated. In “Laws”,¹⁴⁷ Plato dwelled on the election process and the attributes of the electors, who had to be well-educated and capable of judging how fit the candidates were for office. He was in favor of limiting the duration of public office, so the incumbent would not stay longer than 20 years in an office.

The Roman Empire

In Rome, democracy was thought of in terms of republic, which meant freedom from the arbitrary power of tyrants in conjunction with the right of the citizens to conduct public affairs through representation in government.¹⁴⁸ Plenary gatherings and assemblies had not existed in the Roman Empire as a single body, rather there had been assemblies of specific status and social groups with different civil rights.¹⁴⁹ Women, slaves and a large foreign population were excluded from the electorate.

¹⁴⁰ Aristotle, *Politics* (Macedonian translation, published by Slovo) (2006) p. 140.

¹⁴¹ *Ibid* pp. 14 and 140.

¹⁴² Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) pp. 32-33.

¹⁴³ Aristotle, *Politics* (Macedonian translation, published by Slovo) (2006) pp. 101-102.

¹⁴⁴ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 94.

¹⁴⁵ “The Republic”.

¹⁴⁶ (Macedonian translation, published by TRI) (2002) pp. 389, 390, 400 and 401.

¹⁴⁷ Plato, *Laws* (Macedonian translation, published by TRI) (...) pp. 211-212, 214, 216.

¹⁴⁸ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 379.

¹⁴⁹ Frckovski, *Teorii za demokratijata* (1992) p. 49.

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The dichotomy between the emperor's ruling and the republican governance was examined by the famous Roman orator Marcus Tullius Cicero in his "De re publica". According to his version of "lead democracy", all Roman collective bodies (the assemblies, the senate and the magistrates) had to be led by only one leader, while maintaining the dominance of the aristocratic minority.¹⁵⁰

The Middle Ages

In the Middle Ages the legitimacy of power was derived from God.¹⁵¹ Despite the existence of some kind of assemblies in Sweden and Poland, the most important component of government was the king. Changes started in the UK with the introduction of the Magna Carta¹⁵² and the De Monfort's Parliament in an attempt to limit the king's absolute power and the inherited right to rule.¹⁵³ The first representative Parliament that was summoned in 1295, included representatives among the knights, the burgesses and the citizenry.¹⁵⁴ The 1689 Bill of Rights re-affirmed the principle of free elections of the Parliament.¹⁵⁵

The belief that royal right to rule derived from God was challenged by the theory of the social contract, which placed the origin of sovereignty in individuals with natural rights and freedoms.¹⁵⁶ For Thomas Hobbes society represented the sum of free and equal individuals who interacted with one another as owners of their skills and property. He, however, opined that sovereignty was transferred from the people to the monarch once and for all by way of universal contract.¹⁵⁷ This opinion was challenged by John Locke, who considered political power violating the natural rights of citizens as arbitrary, thus justifying revolution in such cases.¹⁵⁸ Natural rights remained and imposed limits on the actions of all, including the legislator.¹⁵⁹ The majority in the community, which naturally had the power of the community at the beginning of its unification, was empowered to create laws or to enforce

¹⁵⁰ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 532.

¹⁵¹ Frckovski, *Teorii za demokratijata* (1992) p. 68.

¹⁵² Ishay, *The Human Rights Reader: major political essays and documents from the Bible to the present* (Macedonian translation, published by MI-AN) (1997) pp. 43-45.

¹⁵³ Breay, *Magna Carta, Manuscripts and Myths* (2002) p. 7.

¹⁵⁴ House of Commons, *A Brief Chronology of the House of Commons* (2006) p. 2.

¹⁵⁵ Duhamel, *Droit Constitutionnel*, (Macedonian translation, published by SEE University) (1993) p. 109.

¹⁵⁶ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 94.

¹⁵⁷ Harrison, *Democracy* (Serbian translation, published by CLIO) (1993) p. 59.

¹⁵⁸ Frckovski, *Teorii za demokratijata* (1992) pp. 78 and 79.

¹⁵⁹ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 231.

II. Theoretical Framework and Historical Development of Democracy

them via appointed officials. Therefore, the majority was free to decide to whom to give power, and even to change the political system.¹⁶⁰

Eighteenth and Nineteenth Century Milestones

From the 18th century onwards, little-by-little representative democracy became a standard and state regimes were judged by it. Since then, the focus of democracy was on the universality of election rights, as a condition of natural equality of all human beings inherited from the tradition of the social contract. However, at that time, neither did people's sovereignty as a consequence of the social contract guarantee national elections, nor did the theoretical equality before the law guarantee civic status or participation in elections for the citizens.¹⁶¹

The limitation of power via written constitution, was established in the 18th century. The Constitution of the United States provided for a government elected by white male owners of property, and protected civil rights and liberties. Although democratic principles were established by the 1776 Declaration of Independence¹⁶², which affirmed that people were the origin of sovereignty, it took the US almost two centuries to accept and put in practice the universality of election rights, regardless of the race, gender or the property owned.¹⁶³

In Europe, the idea that the origin of sovereignty was the people, and that nobody could govern without direct authorization from the people, was enshrined in the 1789 French Declaration of the Rights of the Man and of the Citizen adopted by the National Assembly. It proclaimed that law was the expression of the collective will and that all citizens had the right to participate in its enactment either directly or through representatives. All citizens had equal opportunities to be selected for public office.¹⁶⁴ The 1791 Constitution granted the right to vote to all males older than 25 who directly paid taxes of a certain amount. Only those citizens who owned or had rented a valuable property could be elected as "electorate" by the active citizens. These restrictions regarding active election rights were further reduced by the

¹⁶⁰ Ishay, *The Human Rights Reader: major political essays and documents from the Bible to the present* (Macedonian translation published by MI-AN) (1997) p. 88.

¹⁶¹ Miller, *The Blackwell Encyclopedia of Political Thought*, edited by (Macedonian translation, published by MI-AN) (2002) p. 94.

¹⁶² Olson, Gray, Hofstadter, *An Outline of American History* (United States Information Agency) (...) p. 38.

¹⁶³ Duhamel, *Droit Constitutionnel*, (Macedonian translation, published by MI-AN) (1993) p. 120.

¹⁶⁴ Ishay, *The Human Rights Reader: major political essays and documents from the Bible to the present* (Macedonian translation published by MI-AN) (1997) p. 128.

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National Assembly and by the 1793 Constitution, which foresaw direct voting rights for all male French citizens, as well as for aliens under certain conditions. The attempts to cure political instability *inter alia* by dictatorship and by assassination of the king and political opponents contributed towards the replacement of the “First Republic” by a monarchy. Still, the most important principle from the revolution, the equality of all citizens, was retained.¹⁶⁵

The 1830 French revolution had its impact on Switzerland via the so-called “Regeneration movement”. The most industrious and protestant cantons foresaw in their constitutions active elections rights for all male citizens, a separation of powers, and democratization of parliament via public debates and legislative initiatives.¹⁶⁶

In the United Kingdom, further striving for inclusion in the political decision-making resulted, *inter alia*, in adoption of the 1872 Secret Ballot Act, stipulating the right to a secret ballot.¹⁶⁷

From the above, it transpires that in the 19th century there was a trend towards more and more groups of citizens, including persons who were economically dependent upon others and working for others,¹⁶⁸ gaining formal voting rights. Much of this came as a result not only of the “peace-time political battle” but also due to revolutions and public unrest.

The social turbulences aimed at limiting the political arbitrariness went hand in hand with the refreshing changes in the political and legal scholarship. Kant’s “contractus originarius” bound the legislator to have all its laws originating from the collective will of the people. To the contrary, the people have the right to disobey them. In his version of society, Kant retained the ancient ideas that the right to vote should not be granted to indigent persons, to subordinates or to those needing protection,¹⁶⁹ but with the caveat that natural law must not be transgressed.¹⁷⁰

¹⁶⁵ Duhamel, *Droit Constitutionnel* (Macedonian translation, published by SEE University) (1993) pp. 50-60 and 62.

¹⁶⁶ *Ibid.*, p. 138.

¹⁶⁷ Morgan, *The Oxford Illustrated History of Britain* (re-issued 2000) pp. 441, 470 and 502.

¹⁶⁸ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 80.

¹⁶⁹ Ishay, *The Human Rights Reader: major political essays and documents from the Bible to the present* (Macedonian translation published by MI-AN) (1997) p. xxv.

¹⁷⁰ *Ibid.* p. 141.

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Sovereignty was derived from the people and not from God according to Rousseau¹⁷¹ and Paine.¹⁷² The obedience of the people was owed only to the laws. Equality meant equality in law and guaranteed a free vote for each of the laws.¹⁷³ Since the people were not the proper body to execute the laws, Rousseau tackled the problem of selection of the government as the concrete executor of the laws.¹⁷⁴

For the founders of American democracy, democratic control of power rested on constitutional separation of powers.¹⁷⁵ They engaged in the practice of establishing and developing concrete political systems that reflected the philosophy of limitation of powers with the purpose of protecting the rights of individuals.¹⁷⁶ There were warnings that elections which took place often could not *per se* guarantee democracy and did not represent a reliable external control over the prevention of tyranny.¹⁷⁷ According to James Madison, men, by intrigue, corruption or other means, might first obtain suffrage and then betray the interests of the people.¹⁷⁸ Therefore, a medium of a chosen body of citizens served to refine and enlarge the public's views. For Madison, the term "republic" referred to representative government. This form of government, derived all of its powers directly or indirectly from the great body of the people and is administered by persons holding their office during pleasure, for a limited period, or during good behavior.¹⁷⁹

In the 19th century, liberal thinkers such as Alexis de Tocqueville dwelled on the question on how to connect democracy with freedom, and national loyalty with universal human rights.¹⁸⁰ He considered the principle of presidential re-eligibility encouraged the corrupting influence of power, and thus had to be limited. He further analyzed universal suffrage in America and concluded that, as a result, the ablest men were rarely placed at the head of affairs. This

¹⁷¹ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 492.

¹⁷² Ishay, *The Human Rights Reader: major political essays and documents from the Bible to the present* (Macedonian translation, published by MI-AN) (1997) p. 125.

¹⁷³ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 397.

¹⁷⁴ Harrison, *Democracy* (Serbian translation, published by CLIO) (1993) p. 82.

¹⁷⁵ Trajkovski, *Politika na covekovite prava I del* (2005) p. 127.

¹⁷⁶ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 198.

¹⁷⁷ *Ibid* p. 539.

¹⁷⁸ Dahl, *A Preface to Democratic Theory* (1956, 1984, 2006) p. 159.

¹⁷⁹ *Ibid* p. 10.

¹⁸⁰ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 223.

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tendency was partly corrected by the electoral system put in place with respect to the representatives of the Senate, who were chosen by elected bodies and not by the people directly, as it was the case with the members of the House of Representatives. The author also tackled the status of the Afro-American population that was enfranchised in most of the states where slavery had been abolished; however, coming forward to vote would have put their lives in jeopardy. Tocqueville also elaborated on the roles that liberty of the press, the rule of law and the right to political association played in American democracy.¹⁸¹

The universality of the vote was also examined by Jeremy Bentham, a leading figure of utilitarianism. He considered that each literate individual should have the right to vote for a representative. A power-sharing arrangement between elected representatives and civil servants provided a solution for the problems of representative democracy.¹⁸² However, John Dewey, one of the founders of pragmatism, warned against decisions being imposed by putative experts, who might well slide into a committee of oligarchs.¹⁸³ It followed that elections, discussion, debate, consultation and persuasion were necessary in the democratic decision-making process. Dewey was also supporter of the right to vote for women.¹⁸⁴

The general right to vote was further supported by James Mill, who named the phenomenon as “the big discovery of modern times”. Representative democracy serves the people by securing their freedom, i.e., the special and private source of the satisfaction of an individual.¹⁸⁵ He considered a government of representatives, general, regular, secret and frequent elections as the best cure for wide-spread political corruption.¹⁸⁶ Nonetheless, women and men under 40 were to be excluded from enjoying political rights.¹⁸⁷ For John Stewart Mill, everybody, even women got to vote, but it was not necessary for everybody to have an equal voting right. A system of pluralist voting would provide additional votes to educated people, while guaranteeing at least one vote to those who were illiterate and indigent. He was supporting a balanced way of organizing the government: on one hand, to

¹⁸¹ Democracy in America, Volume I (1945) pp. 131-141, 180, 188-214, 264-281 and 373.

¹⁸² Harrison, Democracy (Serbian translation, published by CLIO) (1993) pp. 118, 127, 128, 131 and 135.

¹⁸³ Miller, The Blackwell Encyclopedia of Political Thought (Macedonian translation, published by MI-AN) (2002) pp. 105-107.

¹⁸⁴ Stanford Encyclopedia of Philosophy, at <<http://plato.stanford.edu/entries/dewey-political/>>.

¹⁸⁵ Harrison, Democracy (Serbian translation, published by CLIO) (1993) pp. 84, 85 and 88.

¹⁸⁶ Miller, The Blackwell Encyclopedia of Political Thought (Macedonian translation, published by MI-AN) (2002) p. 269.

¹⁸⁷ Harrison, Democracy (Serbian translation, published by CLIO) (1993) p. 125.

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assure general participation from as many people as possible and a progressive government, and on the other hand, a bigger influence by the intellectual and moral elite.¹⁸⁸

As to the critics of democracy, according to Friedrich Nietzsche the principle of equality ran against the people who were well above the masses. He considered parliamentary democracy a means of denigrating the will for power, while making a master out of the ordinary man from the masses.¹⁸⁹ Karl Marx preferred communism to democracy. He considered that the universal right to vote would be a revolutionary measure, resulting in the superiority of the working class.¹⁹⁰ For anarchists, elections were used to trick the masses to support one or another member of the ruling class.¹⁹¹

Through the Elitist theories of the 19th century, it became clear that there was a gap which was growing wider and wider between those who executed the power and those to whom the elected representatives were accountable.¹⁹² For Gaetano Mosca, elections were a method for selection of the elites who gained legitimacy to fulfill their programmes. Relatively free composition of the political elite, their competition and the necessity of elections resolved the question of who would rule the society.¹⁹³ However, even liberal democracies were subject to manipulations, in that free elections were controlled by the political elites, i.e., the ruling class developed by each society¹⁹⁴ which tried in any possible way to preserve their dominance. The political elite often lost their power as they were unable to open up to new social forces and to unfamiliar people, or to give a proper answer to different challenges by accommodating their policies and ideas. According to Mosca, human society would always be ruled by the elite.¹⁹⁵

Contemporary World: Twentieth and Twenty-first century

¹⁸⁸ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) pp. 271-272.

¹⁸⁹ Nietzsche, *Aus Dem Nachlass Der Achtziger Jahre* (Macedonian translation, published by Makpromet-Stip) (2008) pp. 14, 129, 149-150.

¹⁹⁰ Ishay, *The Human Rights Reader: major political essays and documents from the Bible to the present*, (Macedonian translation, published by MI-AN) (1997) p. 184.

¹⁹¹ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) pp. 21-22.

¹⁹² *Ibid* p. 97.

¹⁹³ Frckovski, *Teorii za demokratijata* (1992) pp. 162-163.

¹⁹⁴ Dahl, *A Preface to Democratic Theory* (1956, 1984, 2006) p. 54.

¹⁹⁵ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) pp. 283-284.

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The twentieth century was marked with the Russian October revolution¹⁹⁶ and two world wars. The end of WWI brought an apparent victory of democracy. In many European countries including Yugoslavia, Poland and Czechoslovakia the first free elections were conducted where peasants and workers were franchised. However, democracy was still fragile especially in countries where the majority of voters were illiterate and had not yet acquired the practice of representative democracy.¹⁹⁷

Among the countries that lost WWI, partly due to economic instability, movements with authoritarian tendencies appeared.¹⁹⁸ This was the time when Hitler came to power in Germany, as his National Socialist Party obtained 230 parliamentary seats out of 670 in the 1932 election. From then onward the Nazis systematically began imposing dictatorship by using legal instruments to eliminate public liberties. The Nazi party was declared the only party while the other parties were dissolved.¹⁹⁹

In Western Europe, the end of WWII also brought an end to fascism and to the possibility of a democratic reversal in society. However, democracy was not stabilized in the south of Europe until around 1970.

During the same period in other countries of the world, certain requirements persisted for a citizen to be enfranchised. For example, in the United States of America, property qualifications for voting, especially the poll tax, one form of such qualifications, remained in a few states until 1966 when it was held unconstitutional on account of the Equal Protection Clause of the Fourteenth Constitutional Amendment.²⁰⁰ In Switzerland women were enfranchised in 1971.

With the socialist revolutions and the monoparty systems that were established as the dictatorship of the proletariat and its vanguard, no space was left for democracy and political pluralism, which was considered a synonym for states governed by the bourgeoisies.²⁰¹ In particular, freedom of association and expression were abolished, and elections, in which

¹⁹⁶ Berstein, Milza, *Histoire de l'Europe, Déchirures et Reconstruction de l'Europe le XXe Siècle (1919 á nos jours)* (1992) p. 15.

¹⁹⁷ *Ibid* pp. 34-35.

¹⁹⁸ *Ibid* pp. 35-62.

¹⁹⁹ *Ibid* pp. 76-79.

²⁰⁰ Doorsen, *The Rights of Americans, What They are What They Should be* (1970, 1971) p. 178.

²⁰¹ Frckovski, *Teorii za demokratijata* (1992) pp. 218-224.

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99% of the voters cast their vote for the only party that was allowed legally to exist, turned into a farce.²⁰²

Despite the ideological division between East and West, the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights were approved in 1948 and 1966 respectively, which contained provisions stipulating universal, periodic, secret and equal suffrage.

The trend towards democracy and elections with multi-party choice started in the 1990s with the end of the cold war, the disintegration of the Soviet Union²⁰³ and former Yugoslavia. The EU's role as a promoter of democracy and human rights cannot be left out in this regard.²⁰⁴ It extended democracy beyond the state, as adult voters in the EU have the right to cast their ballot every five years and choose representatives to the European Parliament.²⁰⁵ The process of enlargement of the EU also deserves to be mentioned, as multi-party democracy and free and fair elections are some of the political criteria which candidate countries for the EU are required to fulfill.²⁰⁶ The EU political criteria for enlargement are also contained in the documents of other international organizations at the European level, like the ECHR and the OSCE commitments. However, these criteria are still valid for its "older" members as the case of Austria clearly demonstrates. In 2000, in this country, the far right's Freedom Party, headed by its controversial leader Joerg Haider, got a significant number of votes and entered into the Government. As a consequence, the EU broke off all bilateral relations with the Austrian Government.

In the 20th and 21st centuries, elections remain the core feature of democracy.²⁰⁷ Therefore, they continued to challenge authors to search for solutions to the contemporary political problems. The so-called Constitutionalists (Friedrich van Hayek and Albert Venn Dicey)

²⁰² Lefort, *L'invention Démocratique*, (Serbian translation, published by Filip Visnjic) (2003) pp. 10-11.

²⁰³ Berstein, Milza, *Histoire de l'Europe, Déchirures et Reconstruction de l'Europe le XXe Siècle (1919 à nos jours)* (1992) pp. 307-318.

²⁰⁴ Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, A Federal Trust Report (Jan. 2007) p. 5.

²⁰⁵ Lord, Harris, *Democracy in New Europe* (2006) pp. 61, 82.

²⁰⁶ Tucny, *L'élargissement de l'Union Européenne aux pays d'Europe centrale et orientale* (2000) pp. 27-28.

²⁰⁷ Owen, *Le Processus Électoral, Permanence et Évolutions*, Actes du Colloque Réuni au Sénat (2005) p. 200.

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developed theories for limiting arbitrary actions of the Parliament by specific and clear rules and requirements for quorum in order to secure the natural rights of all men.²⁰⁸

Joseph Alois Schumpeter, a representative of elitist political thought, considered that the general will of the people could not be checked, thus turned into the basic criteria of legitimacy and control of the government. He was also suspicious of the possibility for the people to govern in any other way than as a periodical electorate or in the form of limited consultation.²⁰⁹ The role of the people as an entity which delegated its authority was replaced with an electoral body which made its choice from the political elite via voting, therefore deciding to whom to delegate its authorization for political decision-making.²¹⁰

Pluralistic theories of democracy, which appeared in the 20th century, underlined the needs for the openness of the political elite to accepting new talented people and for a minimum citizen participation via elections, lobby groups, referendum, civic initiatives, etc.²¹¹

Robert A. Dahl sketched out a theory about modern democracy, the so-called “polyarchy”, where the main accent was on the control of the leaders and which was characterized by a set of political institutions or practices. He considered that democratic theory was at a minimum concerned with the processes by which ordinary citizens exerted a high level of control over leaders. Social control was exercised by continuous political competition among individuals and parties.²¹²

More specifically on election rights’ theories, Walter James Shepard, in “The Theory of the Nature of the Suffrage” set out five conflicting theories of voting rights²¹³, as follows:

- a. Under the “Vested Privilege Theory”²¹⁴ only adults who owned property of a certain value could vote or hold office.

²⁰⁸ Frckovski, *Teorii za demokratijata*, (1992) pp. 82 – 83; Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) p. 98; Van Hayek, *New Studies*, Routledge and Paul (1978) p. 107.

²⁰⁹ *Ibid* p. 150.

²¹⁰ *Ibid* pp. 141-143.

²¹¹ Miller, *The Blackwell Encyclopedia of Political Thought* (Macedonian translation, published by MI-AN) (2002) pp. 19, 319.

²¹² Dahl, *A Preface to Democratic Theory* (1956, 1984, 2006) pp. xviii, 3 and 132.

²¹³ Doorsen, *The Rights of Americans, What They are What They Should be* (1970, 1971) pp. 177-178, 192.

²¹⁴ *Ibid* p. 178.

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- b. Under the “Natural Rights Theory”²¹⁵ the rights to vote and to stand for elections with no limitations were considered a natural right of all human beings. It was an inalienable right of citizens to participate in the electoral process.
- c. Regarding the “Government Function Theory”,²¹⁶ Shepard in his article of 1934 stated the following: “The voter does not exercise a natural right when he casts his ballot, but performs a public government office. The electorate is not identical with the people, the sovereign authority in the state and ultimate source of law: it is an organ of government, established, organized and determined by the law, which can moreover, limit, expand or totally abolish it”.²¹⁷ Therefore, it was perfectly acceptable to put certain limitations on voting rights and for example to disenfranchise criminals, paupers and the insane in order to make the electorate “a more efficient organ of government”.²¹⁸
- d. The “Ethical Theory”²¹⁹ treats voting rights as the highest form of political expression which should enjoy the same protection as the rights of expression and association. Voting was a means to moral self-realization and it was a “fundamental right, because preservative of all rights”.²²⁰
- e. The “Theory of Political Equality”²²¹ is based on the principle that, except as dictated by necessity, citizens should have equal voices in the electoral process. Political equality, as the ideal, required everyone to be permitted to vote on an equal basis. It partook of both natural rights and ethical theories couched in terms of political equality.²²² Equality of votes and voters encompassed the view that the vote was sacred and the most important instrument of democracy and freedom. Since its purpose was to serve democratic society, the outcome of the elections had to be protected, i.e., the candidate receiving more votes than any other had to receive the office.²²³

Leo Strauss, a representative of neo-conservatism, believed that society had to be hierarchically divided between those who ruled and the rest who followed. Political parties,

²¹⁵ Ibid pp. 179-180.

²¹⁶ Ibid pp. 180-182.

²¹⁷ The Encyclopedia of the Social Sciences (1934) pp. 447 and 450.

²¹⁸ Doersen, *The Rights of Americans, What They are What They Should be* (1970, 1971) p. 181.

²¹⁹ Ibid p. 182.

²²⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

²²¹ Doersen, *The Rights of Americans, What They are What They Should be* (1970, 1971) pp. 184-191.

²²² Ibid p. 184.

²²³ Ibid p. 190.

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by virtue of democratization, ceased to be the protected knowledge of the elite. Due to universal elections, the political party that responded to the wish of the majority took part in the government.²²⁴ Unfortunately, there was nothing to counterbalance egalitarianism in elections. In order for democratic society to be effective and to maintain its cohesion, the general public should not interfere with ruling.²²⁵

Consensual democracy was explored by Lijphart²²⁶ using the Netherlands as a model with its plural and progressive society. The basic premise is that political representation of different social groups in fragmented societies should govern the country by consensus. Main attributes from the electoral perspective of the consensual democracy are the proportional representation system and multipartism.²²⁷

In conclusion, the development of democracy goes hand in hand with granting election rights to more and more groups of people, as society becomes increasingly focused on values such as political equality, freedom, and popular sovereignty. At the same time, that also means overcoming the fear of the universal right to vote. In the past, those more privileged, who enjoyed voting rights, feared that the poor, less-educated majority would not indefinitely tolerate their status, wealth and power once everyone was enfranchised.²²⁸ Therefore, the mechanisms concerning how to protect minorities were also considered and built into the system of democratic governance. The protection of an individual from the majority, a contributing factor to the protection of human rights and freedoms being one of the pillars of democratic societies remains an indivisible element of democracy.

²²⁴ Lefort, *L'invention Democratique*, (Serbian translation, published by Filip Visnjic) (2003) pp. 280.

²²⁵ *Ibid* p. 190.

²²⁶ Lijphart, *Patterns of Democracy* (Serbian translation, published by Sluzbeni List SCG Beograd) (1999).

²²⁷ *Ibid* pp. 36, 37, 49, 58, 59, 75.

²²⁸ Dahl, *A Preface to Democratic Theory* (1956, 1984, 2006) p. 31.

III. SEGMENTS OF PUBLIC INTERNATIONAL LAW RELEVANT FOR ELECTIONS

When European election rights are scrutinized, there are important aspects of public international law, which must be taken into account. Those are as follows: the states' obligations and responsibility, the concept of sovereignty and equality of the states, the principles of reciprocity, international human rights law and the role of individuals, peace and security, as well as the coordination between different international organizations and their member-states. Furthermore, the sources of public international law are also important for the mosaic called "the states' obligation to hold free and fair elections".

1. State Sovereignty v. Human Rights Protection?

The ideas of justice, equality and freedom which emerged in the era of enlightenment as well as natural law theories inspired changes in human society and raised consciousness regarding human rights and freedoms. A testament to the heightened awareness of the need for amelioration of the human condition can be found in the words of Jean-Jacques Rousseau who wrote: "Man is born free, but everywhere he is in chains".

Despite controversies surrounding human rights, the adoption in 1948 of the UDHR opened the door for their universal guarantees and protection. This valuable document, although not legally-binding, was followed by other international and regional human rights instruments with special machineries for their implementation ranging from reporting systems to fully-fledged courts. Although it is undeniable that human rights are universal, their equal and efficient protection is still not commonplace in many areas of the world. Therefore, international mechanisms play an important role in their protection.

Sovereignty and the principle of territorial integrity,²²⁹ sovereign equality of states and non-interference in domestic matters²³⁰ are the basic principles of international law.²³¹ The states *inter alia* by becoming members of international organizations, or by ratifying treaties, accept

²²⁹ Kaczorowska, Public International Law (2010) pp. 188, 260, 261.

²³⁰ Ibid p. 290.

²³¹ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970). See also, *mutatis mutandis*, the Montevideo Convention on the Rights and Duties of States that entered into force on 26 December 1934 with respect to American states.

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to adhere to certain international standards. These standards apply with respect to the treatment of their own citizens, which becomes a legitimate concern for other states.²³² When individuals are granted rights at the international level, they automatically become subject to international human rights law.²³³

There are several theories explaining why states build international mechanisms for human rights protection, which can hold them accountable for their internal activities. They range from explanations that attribute this behavior to idealistic coercion or persuasion by the more powerful and democratic states, to the outcome of negotiations between the states, or to an impetus from newer democracies to consolidate democratic institutions in order to prevent future reversion to an undemocratic regime.²³⁴ In this context, the 1990 General Assembly Res. 45/150 counterbalances human rights obligations with sovereign rights and the right to self-determination. The resolution clearly stipulates that the international community's efforts to enhance the effectiveness of elections should not call into question each state's sovereign rights to freely choose and develop its political system, regardless of whether or not it conforms to other states' preferences.

Another well-established principle in public international law is reciprocity with respect to states' behavior. The relationship between this principle and the protection of human rights is also worth mentioning, since the human rights conventions were concluded in favor of individuals and not the states; and the conventions resulted in a demand for respect of the joint public order of civil liberties in Europe,²³⁵ rather than respect of states' rights. Bearing this in mind, Moravcsik theorized that well-developed and established democracies, like the UK or the Netherlands, were not in favor of binding legal rights documents, since they did not want to be encumbered by human rights obligations based on the principle of reciprocity. The countries in favor of binding human rights obligations were those who had suffered from

²³² Dahl, *A Preface to Democratic Theory* (1956, 1984, 2006) p. 252: the matters that are now regarded as human rights issues, thus of concern of the international community, used to be regarded as purely domestic issues in 19th century.

²³³ Dixon, *International Law* (5th edition) (2005) pp. 114-116; Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels*, UN (1992) p. 56.

²³⁴ Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe* (1998) pp. 218 -219, 222, 236.

²³⁵ Combacau, *Sur, Droit International Public* (5^e édition) (2001) pp. 388-389.

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totalitarian regimes, like France. He illustrated this point citing the well-established democracies' opposition to the ECHR as a binding instrument at the time when it was drafted and the full support which it enjoyed from the countries with a history of totalitarianism.²³⁶

The negotiations eventually resulted in the ECHR becoming a legally-binding treaty.

In the context of the states' responsibility to refrain from violating human rights and to protect them, major human rights instruments such as the ECHR²³⁷ or ICCPR²³⁸, allow the states to use inter-state procedures not only in cases of alleged violations of protected rights of their own citizens, but also of other individuals who are not their citizens. As a rule, any act or omission of a state body, including those of individual officials whose actions are attributable to the state, i.e., policemen, judges and local administration, shall be considered an act of the state under international law, regardless of the kind of power they exercise and the position held in the state.²³⁹ This rule makes the state responsible for the activities of all its organs, army, police, and judiciary in the eyes of other states.²⁴⁰

As a bottom line, international instruments set out internationally authorized restraints on national governments for the protection of the right of individuals.²⁴¹ Effective protection of human rights requires a balance between the long-standing principles of public international law with states as its subjects, and the requirements which the states have agreed to fulfill at the international level in line with the commitments and developments of international human rights law.

2. International Organizations – Guardians of Human Rights

International organizations play a key role in the preparation of international human rights norms and standards.²⁴² These norms and standards are derived from the following sources: treaties, customary international law and non-treaty instruments, such as declarations,

²³⁶ Maravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe* (1998) p. 220.

²³⁷ See Article 33 of the ECHR.

²³⁸ See Article 41 of the ICCPR.

²³⁹ See, *Paraguay v. USA*, provisional measure (1998); see also the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission at its 53rd session, on 3 August 2001, Articles 3, 4 and 12. The UN General Assembly took note of the Articles by its Resolution A/Res/56/83 (2002), A/56/49(Vol. I)/Corr.4.

²⁴⁰ Dixon, *International Law* (5th edition) (2005) p. 233.

²⁴¹ D'Amato, *International Law Anthology* (1994) p. 371.

²⁴² Shaw, *International Law* (5th edition) (2003) p. 250.

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recommendations, guidelines and codes of good practice, which belong to soft law.²⁴³ Treaties, e.g., the ECHR or in case of the ICCPR, its optional protocol prescribe substantive and procedural rights for the individuals to initiate and participate in proceedings before an internationally-established body, whose decisions also represent a source of international law.²⁴⁴ A treaty may also be declaratory of customary international law, which is binding also on the states that have not ratified it.²⁴⁵ Soft law, on the other hand, encompasses the rules of international law that are not legally-binding, e.g., the OSCE commitments.²⁴⁶ They may also not stipulate concrete rights or obligations. It is possible for soft law to be transformed into customary law. For example, declarations are not legally-binding, but they raise reasonable expectations, if they are supported by a large number of consenting states for certain practices which they believe are obligatory (*opinio juris*). This is the case with some provisions of the UDHR, e.g., prohibition of torture, which have been reaffirmed in subsequent UN activities. So, they appear to be in fact a statement of customary international law.²⁴⁷ The above-mentioned categorization of the sources of the international human rights obligations has repercussions on the degree of their enforcement.

Internationally mandated bodies assist in the enforcement of the human rights obligations, including free and fair elections. They may be set up by a treaty,²⁴⁸ they may be political bodies whose procedures are not treaty-based²⁴⁹ or they may be expert bodies established by an organ of a particular international organization.²⁵⁰ They also may be established on the bases of documents adopted by various high-level forums of particular international organizations, as is the case with the OSCE.²⁵¹ The internationally-mandated bodies may *inter alia* take the shape of special committees of independent experts, such as the committee set-up under the European Charter of Local Self Government; of working groups or task forces;

²⁴³ For further reference see Melander, Alfredsson, Holmström, The Raol Wallenberger Institute Compilation of Human Rights Instruments (2nd revised edition) (2004) p. xi; Dixon, International Law (5th edition) (2005) pp. 50-51; Aust, Handbook of International Law (2005) pp. 11-12, 61-62.

²⁴⁴ For further reference on the sources of Public International Law see Kaczorowska, Public International Law (2010) pp. 26-30.

²⁴⁵ Falk, Kratochwil, Mendlovitz, International Law a Contemporary Perspective (1985) pp. 252-253.

²⁴⁶ OSCE/ODIHR, OSCE Human Dimension Commitments Volume 1, Thematic Compilation (2nd edition) (2005), p. xviii.

²⁴⁷ Jokinen, International Legal Instruments Addressing Good Governance, United Nations (2002), p. 7.

²⁴⁸ Like in the case of the European Court on Human Rights, which is established by the ECHR.

²⁴⁹ For example the UN General Assembly. The ECOSOC or the former Human Rights Commission which establish procedures and mechanisms and invoke norms are seen as part of the enforcement system.

²⁵⁰ E.g. the UN Sub-commission on promotion and protection of human rights.

²⁵¹ OSCE/ODIHR, OSCE Human Dimension Commitments, Volume 1 Thematic Compilation (2005) p. xxvi.

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of intergovernmental bodies such as the one under the 1503 procedures; they may be specialized institutions within an international organization, like ODIHR or the High Commissioner on National Minorities; or special rapporteurs on specific topics or countries; or even international courts entrusted with the protection of enumerated human rights like the ECtHR.²⁵²

The procedures may range from monitoring of the implementation of a relevant treaty through periodic reports submitted by member states to quasi-judicial procedure, special procedures on monitoring and reporting about a particular human right in a number of countries, or about human rights situation or elections in a specific country, or judicial procedures before international courts.²⁵³

Taking into consideration that in Europe the universal organizations and a number of European organizations are mandated with the protection of human rights, appropriate coordination among them must be assured. The issue of coordination, not only between the UN and regional organizations, but also internally among their member states, is an important aspect of international relations. According to Moravcsik, inter-state cooperation is not only motivated by idealism and altruism, but it is also a means for democratic governance to preempt possible future opponents in the form of tyrannical regimes. Even though international and regional organizations receive their mandate from their member states, there are instances when it becomes clear that a group of states, which participates in different organizations crystallizes as opposition indicating division instead of rapprochement within the international community. Another situation is when a single state opposes the “polices” of an international organization. One such illustration is seen in the case when Russia, which is a participating state of the OSCE, limited the mandate and possibilities for ODIHR to monitor its elections.²⁵⁴ This phenomenon can also be manifested as pressure that major contributors may exert on international organizations via budget approval procedures, consequently influencing the capacities and decisions of a particular international

²⁵² Although the international courts’ decisions about violations of human rights alleged by individuals are only binding between the parties and in respect of that particular case, their case law provides important source of interpretation and authoritative guidance as to the application of particular human right norms and, as the case may be, also of the status of an existing customary law.

²⁵³ M. Dixon, *International Law* (5th edition) (2005) pp. 114-116.

²⁵⁴ See p. 164.

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organization. The coordination of the states and international organizations on the one hand, and their “grouping” in line with their interests on the other, are parallel and natural processes which regularly occur at the international level.

3. Universal Commitment for Trans-national Peace and Security

Security and Human Rights for All

Full protection of human rights and enjoyment of democracy is thought to help prevention of intra-state violence and inter-state conflicts, thus contributing to worldwide peace and security.²⁵⁵ The connection between democracy and peace has been underlined in a number of international documents. For example, Article 1 of the UN Charter²⁵⁶ stresses that no peace can be sustained without justice, and the Preamble of the Universal Declaration of Human Rights underscores that human rights’ protection by rule of law is necessary in order not to have rebellions as a last recourse. Within this context, the Helsinki Final Act, which is the founding document of the OSCE, must be mentioned. Namely, in this document, for the first time human rights standards and principles were included as an integral element of a regional security framework, based on a broader concept of security.²⁵⁷

Returning to the global level, the UN and its Security Council are charged with the important task of the preservation of global peace and security. In view of the commitments to protect human rights, the instances in which military measures may be undertaken need not only be connected with legitimate defense, but also with aim of halting atrocities. In this context, the NATO military operation in 1999 to protect the Kosovo Albanians following violent events and the abolition of their autonomy belongs. In this case, there was no Security Council

²⁵⁵ Maravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe* (1998) p. 224. See also *Governmental Illegitimacy in International Law*, Roth (2000) pp. 366-375, 377.

²⁵⁶ Article 1 of the UN Charter stipulates that the purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

²⁵⁷ OSCE/ODIHR, *OSCE Human Dimension Commitments, Volume 1 Thematic Compilation* (2005) pp. xv-xvi.

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Resolution, which illustrated that there was no full coordination of all UN members, but the operation was defined by the NATO and the G-8. This military action, Combacau argues, was *a posteriori* approved.²⁵⁸ In the subsequent Security Council Resolution 1244, the SC regretted the lack of compliance with its previous resolutions by Serbia,²⁵⁹ and established the interim UN administration (UNMIK) and a military presence with the participation of Russia.²⁶⁰ Furthermore, the Independent International Commission on Kosovo²⁶¹ stated that the NATO action was illegal, but legitimate. The Commission considered it illegal as it had never received the SC's approval. However, it concluded that the military intervention had been legitimate as a matter of degree of legality, as all non-violent measures to halt the atrocities had proven ineffective, and the intervention liberated the majority from an oppressive rule.²⁶²

Although the 1999 NATO military intervention was considered an exception,²⁶³ it shook out the basis on which the use of force was authorized by the SC. In 2005, a normative concept of the Responsibility to Protect (R2P) against genocide, war crimes, ethnic cleansing and crimes against humanity emerged following the UN World Summit.²⁶⁴ It stood up to the scrutiny of the polarized SC during the Libyan crisis.²⁶⁵ The obligation to protect civilians from atrocities and the prohibition of chemical weapons have been invoked in the Syrian crises within the R2P normative concept. So far, a variety of non-violent measures have been taken against the Syrian regime.²⁶⁶

²⁵⁸ Ibid pp. 636-637.

²⁵⁹ See the Preamble, and SC Resolutions nos. 1116, 1199, 1203 and 1239 where the SC called for a political solution of the deteriorating humanitarian situation.

²⁶⁰ Russia together with China (the SC permanent members) was perceived as being against the use of military intervention in the case of Kosovo.

²⁶¹ The Independent Commission on Kosovo came as an initiative of the Swedish Prime Minister and was endorsed by the UN Secretary General. The members acted in their personal capacity.

²⁶² See the Kosovo Report by the Independent International Commission on Kosovo, chapters on the Military Intervention and International Law and Executive Summary (NATO Air Campaign) (2000). Further reference on R2P: Sancin, Kovacic (ed.) Responsibility to Protect in Theory in Practice (2013); Evans (ed) International Law (2010) pp. 504-525; 616-645.

²⁶³ The previous history of the armed conflicts in Bosnia and Herzegovina, Croatia and Slovenia, and the Srebrenica massacre also served as an argument that prompted the NATO military intervention.

²⁶⁴ Sancin, Briefing Paper on Responsibility to Protect (2011) p. 3.

²⁶⁵ Ibid pp. 12-15. See also the 2012 Report of the UNSG, Right to Protect: Timely and Decisive Response, pp. 14-15.

²⁶⁶ On the crises in Syria see the International Coalition for the Responsibility to Protect website at <<http://www.responsibilitytoprotect.org>>.

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Free and Fair Elections for Peace and Stability

A positive and a negative correlation exists between political instability and violence on one side, and elections on the other side. Elections are in opposition to an armed conflict, as it is inconceivable to hold free and fair elections under war conditions. However, they are always held after a peace truce is signed between the parties of a conflict. Elections are generally thought of contributing to the stability of a country. Nevertheless,²⁶⁷ they can also cause the instability, e.g., in case of non-acceptance of election results by the war lords.²⁶⁸

From the cases of East Timor²⁶⁹ and Sierra Leone²⁷⁰ appears that the UN not only guaranteed that elections reflected the popular will, but took action so that the elected government was able to take up its mandate. Sometimes, this happened even by use of force when there was no possibility to employ any other measure.²⁷¹ It appears that overthrowing a government elected in free and fair elections represents *per se* a breach of international law.²⁷² However, as it can be seen from the cases of Haiti, Angola and Burma, the measures undertaken by the UN vary mostly depending on the regional context and the political power of the states that have some closer interest regarding the situation in the country concerned.

The UN activities regarding elections take place in very difficult conditions. Verification of elections may be also linked with authorization of the use of force by the Security Council, especially in case of humanitarian catastrophe, e.g., Haiti and Angola. Therefore, election observation, monitoring, verification and supervision must be perceived as neutral. Election observers must be highly competent in order to notice even the more sophisticated ways of tampering with elections²⁷³ and be sure that the results reflect the voters' will. So, no errors are allowed from international observation missions.

²⁶⁷ For example, in Cambodia elections held in 1998 restored peace and stability in the country. Taken from Roth, *Governmental Illegitimacy in International Law* (2000) pp. 391-393.

²⁶⁸ See the case of Haiti (the SC Resolution no. 948 (1994)) as well as the cases of Angola (the SC Resolutions 747 (1992) and 785 (1992)) and Burma - Union of Myanmar (the SC Resolutions nos. 46/132 (1991) 47/144 (1993) 18/150 (1994) 49/197 (1995) 50/194 (1996) 51/117 (1996) 52/137 (1998) 53/162 (1999) 54/186 (2000) 55/112 (2001) 56/231 (2002) 57/231 (2003) 58/247 (2004) 59/263 (2005) 60/23 (2006)).

²⁶⁹ Resolution no. 1704 (2006).

²⁷⁰ Resolution no. 1132 (1997). See also EU Election Observation Mission to Sierra Leone, at <<http://www.eueomsieraleone.org/Info.html>>.

²⁷¹ Roth, *Governmental Illegitimacy in International Law* (2000) pp. 377-383.

²⁷² *Ibid* pp. 366-393, 401-405.

²⁷³ *Ibid* pp. 348-363.

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Nevertheless, problems appear with respect to this type of election assessment in case of violence and political unrest. Firstly, since these missions are costly, there might be a lack of funds to conduct them, to do that on a larger scale, or to ensure a follow-up mission or action, as in some instances democratic elections do not necessarily restore stability and peace in the country concerned. Secondly, there might be a lack of time for proper preparation of the mission and/or a lack of knowledge of the political context, election law and procedures of the country concerned. There might be also a lack of capacity to properly follow all phases of the elections and not only election day. All of these might affect the evaluation of elections. Thirdly, the election assessment missions take place in very difficult political circumstances, with significant ramifications for the region. Therefore, other UN Member States might also want to protect their interests and try to pursue them through different means, e.g., block other UN actions to implement election results. Fourthly, missions might sometime give a better evaluation of the elections than deserved in order to avoid destabilizing the country concerned.²⁷⁴

The UN conducts fewer and fewer missions of this character.²⁷⁵ It focuses its energies on providing electoral technical assistance instead. With the changes in the regime introduced by the “Arab spring” since 2011, there was a high demand for electoral assistance from Tunisia, Libya and Egypt, as well as from Yemen (the Middle East). Although national authorities conducted the elections, the UN bodies and missions²⁷⁶ provided continuous support to ensure a peaceful transition of power to a new set of politicians. When it comes to election observation, often it is the EU that funds and sends the election observers under the auspices of the UN.²⁷⁷

As for Europe, the observation of elections is done primarily by the OSCE.²⁷⁸ This organization can also substantially help a country to conduct free and fair elections following a civil war or political tensions. It was heavily involved in the organization and supervision of

²⁷⁴ See *Beyond Intractability*, Braham (2004) p. 3 at <<http://www.beyondintractability.org>>.

²⁷⁵ See the UN types of electoral assistance at <http://www.un.org/wcm/content/site/undpa/main/issues/elections/types_of_assistance>.

²⁷⁶ United Nations Support Mission in Libya, UNSMIL.

²⁷⁷ See more information about the EU assessment of the Tunisian elections in 2011 and the Libyan elections in 2012 at <http://eeas.europa.eu/eucom/missions/2012/libya/index_en.htm>.

²⁷⁸ OSCE/ODIHR, *Election Observation* (2005) pp. 1-2.

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the post-war elections in Bosnia and Herzegovina²⁷⁹ and facilitating the elections where the Serb minority voted in Kosovo under circumstances of political instability.²⁸⁰

²⁷⁹ For example, general elections in 1996.

²⁸⁰ The 2012 Serbian parliamentary and presidential elections and the 2013 Kosovo local elections.

IV. ELECTIONS, HUMAN RIGHTS, DEMOCRACY: A DIRECT LINK

Respect for political rights is a condition *sine qua non* for contemporary representative democracies. The list of political rights is not limited to free participation in public affairs and election rights, but contains other necessary segments²⁸¹ that belong to the family of human rights.

Provisions ensuring political rights, are found in all major human rights treaties and other international instruments²⁸² with appropriate mechanisms for the implementation of international commitments.²⁸³ Indeed, for some regional organizations, i.e., the EU²⁸⁴ and CoE²⁸⁵, respect for certain criteria such as democratic pluralism and regular free and fair elections by secret ballot, as well as respect for the rule of law and accession to human rights instruments, including the ECHR²⁸⁶ are necessary pre-requisites for their membership.

The right to participate in public affairs

The right to participate in public affairs protects the role of individuals in the political decision-making process and hence, their right to participate and be consulted about the political processes in society.²⁸⁷ The enjoyment of this political right by individuals influences the structure of government in a direct manner by *inter alia* foreseeing a decision-making role for women, abolishing discrimination on grounds of race, ethnicity, or economic power, and ensuring broader public inclusion in political decision-making. Full enjoyment of the right to participate in public affairs shapes the policies and laws in a given society, thus bringing about profound social change.²⁸⁸

²⁸¹ D'Amato, International Law Anthology (1994) p. 371.

²⁸² Combacau, Sur, Droit International Public (5^e édition) (2001) pp. 385-386.

²⁸³ The right of all people to participate in political life in their country is enshrined in the UDHR; ICCPR; ICESCR; Proclamation of Teheran; ICERD; International Convention on Suppression and Punishment of the Crime of Apartheid and CEDAW.

²⁸⁴ See the 1993 Copenhagen Criteria of the European Council.

²⁸⁵ Statute of the CoE, Preamble, Chapter I, Chapter II Articles 3-4, and Parliamentary Assembly Resolution 1636 (2008) paragraph 2. See also reports of the Parliamentary Assembly Committee on Honoring of Obligations and Commitments by Member States of CoE at <<http://www.coe.int>>.

²⁸⁶ D'Amato, International Law Anthology (1994) p. 371.

²⁸⁷ Franck, Fairness in the International Legal and Institutional System (General Course on Public International Law) Academy of International Law Offprint from the Recueil des cours, Vol. 240 (1993 – III) pp. 99-100.

²⁸⁸ Steiner, Alston, International Human Rights in Context, Law, Politics, Morals (2nd edition) (2000) pp. 573-574.

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The broad definition of the right to take part in public affairs, besides election rights, guarantees political association, participation in political decision-making and in the formulation of public policies and their implementation, as well as equal access for the citizens not only to elected, but also to administrative offices at all levels of government. It further encompasses the right to be directly consulted through referendums, the right to peaceful assembly, and the right to bring citizen's initiatives for regulating some issues of public importance when provided for by law.²⁸⁹

Participation in public affairs is based on the following principles²⁹⁰:

- a. It must be effective, i.e. the result that is desired should be achieved. One of the sacred tenets in democratic society holds that every citizen must have a fair possibility to be consulted and to participate actively in the political life within the country, whereby human rights and freedoms are best maintained. In this context, there must be an evaluation and measurement of the impact of different policies applied by the government.
- b. It must be non-discriminatory. Any discrimination based on race, ethnicity, gender, or affiliation with national minorities or indigenous people is prohibited. Equal access to participation in government must be granted and fully enjoyed by all citizens. Participation in government must be inclusive.
- c. Accountability and responsibility are principles that state institutions must espouse in the exercise of their powers. They should act in a manner that enables full enjoyment of political rights and utilize input from the citizens in political decision-making. Likewise, in a democratic society, the people not only have the right to participate in government, but also a duty to do so in a responsible manner. That is why the notion of the responsible and informed citizen is becoming more and more important.

Although this right can be restricted in case of emergency, when the emergency is terminated, the right to participate in the political process must be restored. States must ensure that no

²⁸⁹ OSCE/ODIHR, OSCE Human Dimension Commitments, Volume 1 Thematic Compilation (2005) pp. 75, 80; ICCPR Article 25.

²⁹⁰ The principles are deduced on the bases of the major UN instruments: ICCPR and specific conventions.

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lingering negative effects on political participation remain after the termination of the state of emergency.²⁹¹

The enjoyment of the right to participate in public affairs must be protected in order not to remain merely an ethical concept reflected in the laws without proper implementation.²⁹² If no effective and efficient supervisory and verification mechanisms are in place, it will be nearly impossible to uncover and prevent violations.²⁹³ In this context, nowadays, the fact-finding not only by international organizations, but also by NGOs and other states is commonly acknowledged and accepted.

While the right to participate in public affairs is clearly defined at the universal level, by the UDHR, ICCPR, CEDAW and CRPD, at the European level the ECHR does not contain such a right to take part in public affairs. Still, the link between democratic participation, human rights and elections is made in the ECHR Preamble, which mentions the concepts of “effective political democracy” and “democratic society”. Moreover, the 2009 Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority²⁹⁴ does not ensure the enjoyment of this right at regional and national levels. So far, only 11 countries have ratified this Protocol, which indicates low interest of the governments to afford international protection of the right to participate in public affairs to their citizens.

Other Connected Rights

The universal rights to freedom of opinion, information and expression, peaceful assembly and association, as well as the right not to be discriminated against are closely connected with the right to participate in government. Their full respect creates the necessary conditions for meaningful enjoyment of the right by people to participate in political life in their country.²⁹⁵ They all constitute the essential precondition for an open electoral process. In view of their importance, they are encompassed in the existing human rights instruments.

²⁹¹ Center for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) pp. 7-10.

²⁹² Dixon, International Law (5th edition) (2005) p. 321.

²⁹³ Combacau, Sur, Droit International Public (5^e édition) (2001) p. 200.

²⁹⁴ Entered into force on 1 June 2012.

²⁹⁵ Center for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) p. 1.

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Freedom of expression and information protects receiving and imparting every subjective idea or opinion capable of transmission. The very purpose of elections is the expression of the will of the people, which allows connection with other people, allows independent thinking and change in thinking with respect to the option in power.²⁹⁶ Therefore, the right to express partisan ideas in a democratic society must be fully guaranteed.

Both ICCPR and ECHR allow for restriction of freedom of expression because of specified reasons such as national security, protection of the rights and reputation of others, and protection of morals provided that they are set out by law and necessary. The states party to both international human rights instruments may also derogate from this obligation, but only in case of public emergency threatening the welfare of the nation. Considering that people must be properly informed about the political life in the country, limitations on states' ability to invoke the above exception is extremely important. For example, if the electorate is not fully informed, it would be impossible to guarantee that elections would reflect the will of people. Therefore, free and responsible media, as well as fair media access, is indispensable for holding genuine elections.²⁹⁷ On the other hand, the state must regulate activities like hate speech, which seek to destroy basic rights.²⁹⁸ This is also vital during election periods in order to ensure a political environment which is free of intimidation.

Freedom of association guarantees the formation of and participation in a political organization. It is indispensable to the right to participate in government. It allows a plurality of choice and is closely connected with freedom of thought and expression.

The right to peaceful assembly must be also protected for the full enjoyment of election rights. The state must protect demonstrators, since public demonstrations and rallies are an integral part of democracy and elections, as well as an effective mechanism for the dissemination of political information.²⁹⁹ As with the right to freedom of expression, the above rights and freedoms can only be interfered with for justified reasons and only when there is a genuine need for a state to avail itself of a permissible restriction. The same categories of restrictions are shared with the right to freedom of association, since they are

²⁹⁶ Lefort, L'invention Democratique (Serbian translation, published by Filip Vishnjic) (2003) p. 60.

²⁹⁷ Center for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, professional training series no. 2 (1994) p. 7.

²⁹⁸ See *mutatis mutandis* CCPR *M.A. v. Italy*, Communication no. 117/1981 (1981).

²⁹⁹ Center for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) p. 8.

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closely connected. It must be underscored that the above rights and freedoms cannot be interpreted as including any activity that would infringe upon any other rights.³⁰⁰ They are also derogable.

Freedom of movement is important in the context of political associations, rallies, electoral campaign activities, and the enjoyment of the right to participate in elections. The same goes for the right to privacy, which protects individuals from unlawful wire-tapping and letter-opening. Such interference is only possible if it is in accordance with the law and necessary in the interest of security, protection of morals or health, prevention of crime and disorder, and the protection of rights and freedoms of others. Without proper safeguards, the interference with this right may easily lead to spying on members of the opposition or denying them access to public administrative offices.

The principle of non-discrimination has been regarded as having entered into the category of customary international law in light of state practice.³⁰¹ The state has a positive duty to protect against discrimination and a negative duty to refrain from it.³⁰² With respect to the right to participate in government, the right not to be discriminated against means that all persons must be ensured equal access to participation in government and the election process. Any discrimination during elections fosters intimidations and manipulations, which are impermissible if elections are to be free. On one hand, the ICCPR and ECHR do not foresee any exceptions to the right to be free from discrimination. On the other hand, Article 26 of the ICCPR and Article 14 of the ECHR and its Protocol no. 12 proscribing discrimination have not been listed among the non-derogable articles.³⁰³ Still, Article 4 of the ICCPR explicitly prohibits discriminatory measures on the bases of race, color, sex, language, religion or social origin to be employed during a public emergency, which threatens the life of the nation.³⁰⁴ In conclusion, it will be very difficult for any country to employ

³⁰⁰ Ibid p. 8.

³⁰¹ Shaw, *International Law* (5th edition) (2003) p. 257.

³⁰² Human Rights Committee's General Comment on Non-Discrimination, paragraph 13, notes that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". See also the Human Rights Committee's General Comment on Non-Discrimination, paragraph 10, Article I(4) of the ICERD, Article 4(1) of the CEDAW and Article 4(3) of the Framework Convention for the Protection of National Minorities.

³⁰³ See Article 15 of ECHR and its Additional Protocol 12.

³⁰⁴ In addition, any derogation due to public emergency must be consistent with the exigency of the situation and the international law obligations.

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discriminatory measures on the above-mentioned grounds under the public emergency justification.

Freedom of opinion as *forum internum* is protected, in particular by the ICCPR. It is absolute and cannot be restricted or interfered with in any manner. The unconditional freedom to hold a political opinion is imperative in the context of participation in public affairs and elections since to put in place the supremacy of popular will would be otherwise impossible.³⁰⁵ Freedom of conscience and religion should also be added to the list of connected rights, being necessary for the full enjoyment of political rights. The above means that persons are protected from indoctrination by authorities. No election could be considered genuine, should voters be subjected to treatment that would endanger the freedom to think or believe.³⁰⁶

The right to legal remedy by independent judiciary is indispensable since the judiciary is charged with safeguarding the rule of law before, during and after elections. The judiciary must be without partisan influence,³⁰⁷ so that the rule of law can control the conduct of elections. An independent judiciary does not replace the functioning of independent electoral bodies, but acts as a complement to them by allowing peaceful dispute resolution and by protecting candidates from any kind of intimidation and denigration.³⁰⁸ In this context, judicial control is of utmost importance, its task being the protection of the values of legality and constitutional propriety,³⁰⁹ as well as of human rights against all violations. In terms of elections, the courts not only provide the main forum for adjudicating electoral disputes, but also serve to punish those who commit electoral irregularities. Therefore, the “separation of powers doctrine” must be in place as an important safeguard of the electoral integrity and democracy.

Self-determination is also very important within the context of political rights. According to the ICCPR and ICESCR all peoples have the right, in full freedom, to determine their internal

³⁰⁵ Center for Human Rights United Nations, Human Rights and Elections, a Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994), p. 7.

³⁰⁶ See Application no. 1718/62, X v. Austria, Yearbook VIII (1965) p. 168 where compulsory voting has not been considered contrary to Article 9 of the ECHR, since it was only a duty to attend and not a duty to actually register one's vote.

³⁰⁷ Miller, The Blackwell Encyclopedia of Political Thought (Macedonian translation, published by MI-AN) (2002) p. 300.

³⁰⁸ Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) p. 8.

³⁰⁹ Cane, An Introduction to Administrative Law (3rd edition) (1996) pp. v and 8.

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and external political status when and as they wish in a democratic way without external interference, and to pursue as they wish their political, economic, social and cultural development.³¹⁰ This right initiated elections and referendums observation in colonies and trust territories as a means for the international community to validate the exercise of the right to self-determination.³¹¹ The self-determination mechanism is applicable beyond the colonial context in the territorial framework of independent states in view of the fact that it is guaranteed to “all peoples”. Still, it is balanced with the right of a state to preserve its territorial integrity, as guaranteed by public international law. As confirmed by the International Court of Justice *uti possidetis* remains a general principle, in order to avoid putting in danger new states by struggles provoked by the challenge of their frontiers.³¹² In the context of the significance of the principle of self-determination within independent states, the Human Rights Committee has encouraged states’ parties to provide details in their reports about participation in social and political structure, how political institutions function and how the people participate in the governance of their state.

The protection of the connected rights in terms of the right to participate in public affairs and election rights, provides citizens with security against the arbitrariness of the state and allows a vibrant civil society. Actually, all connected rights give a background, which ensures meaningful participation in government. Any law which restricts the freedoms of expression, of association, of assembly, and the right not to be discriminated against, must be seen as incompatible with the conduct of free and fair elections.

Democratic Entitlement

The right to participate in government and connected rights provide the complex mosaic which have summoned a school of thought, which speaks about the right to democratic

³¹⁰ See Annex III, p. 277.

³¹¹ For example in Namibia and Western Sahara the UN supervised electoral operations. See Combacau, Sur, *Droit International Public* (5^e édition) (2001) p. 664 ; Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) pp. 6-14; Franck, *Fairness in the International Legal and Institutional System* (General Course on Public International Law) Academy of International Law Offprint from the *Recueil des course*, Vol. 240 (1993 – III) p. 104.

³¹² In its Opinion no. 2 the Arbitration Commission of the European Conference on Yugoslavia stated " that it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise". See also the 1970 Declaration on Principles of International Law Concerning Friendly Relations; Kaczorowska, *Public International Law* (2010), pp. 270-271.

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governance in the international system. According to the prominent scholars Fox and Franck, there was a transformation of the right to political participation into a right to open competitive process for the replacement of authorities. They argue that if the right to political participation is to be effective, the international level should have the power to prescribe more detailed legally-binding standards regarding how participation should be effectuated and should monitor their compliance. Within this line of thought, Roth developed a theory concerning the emergence of a norm of government illegitimacy. In particular, he argues that it cannot be expected for a regime to be recognized with sovereign authority under international law only on the basis that it holds power.³¹³

The involvement of the international community in cases when people clearly express their desire to exercise their human rights and freedoms to which they are entitled by international instruments, and which have been manifestly disregarded by their own government, has been tackled by Franck.³¹⁴ This question has been increasingly gaining in importance, with the political crises, wars and internal conflicts that have been going on during the last 15 years in the Balkans, Africa, and Asia. In the context of international protection of some aspects of democratic entitlement, and in view of its importance, several issues have arisen in connection with sanctions that might be imposed by the international community, or by a state or group of states. Although it is undeniable that the UN can impose collective enforcement measures, even including military interventions,³¹⁵ the issue arises as to under which circumstances that can be possible and for which violations of democratic entitlement. Collective enforcement measures, according to past cases, can be taken when the people are oppressed by egregious racism, denied self-determination, or there is a refusal by the ruling forces to permit demonstrably free elections or to implement their results. However, in view of how the SC functions and the right to veto, sometimes there might not be sufficient conditions to make such a determination and authorize it collectively. Therefore, a state or group of states may still use military measures under the pre-text of articles 51³¹⁶ or 53³¹⁷ of

³¹³ Roth, *Governmental Illegitimacy in International Law* (2000) pp. 1-3.

³¹⁴ Franck, *The Emerging Right to Democratic Governance*, *The American Journal of International Law*, Vol 86, No. 1 (1992) pp. 46-91; D'Amato, *International Law Anthology* (1994) pp. 373-374.

³¹⁵ See p. 40.

³¹⁶ Article 51 reads as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any

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the Charter. Such unilateral initiatives, which would not be politically essential or consistent with legal procedures, might diminish the importance of the right to democratic entitlement instead of protecting it.³¹⁸

In conclusion, the right to participate in government and connected rights have a specific development, which shapes world society and defines the behavior of states on an international plan as well as towards one another. These rights are connected with security and peace at the state and international level. Due to this connection, the protection of human rights and the promotion of democracy are important components within the mandates of international and regional organizations which, in fact, indicate the consensus of their member states on this issue. Huge funds and resources are allocated by the member states to this end, since there is a prevailing opinion that the states' non-aggressiveness depends mostly on how developed domestic democracy is and how well human rights and freedoms are protected. So, with the development of democratic institutions, the conflicts may be resolved by peaceful means and spillover of crises in the neighboring states may be avoided, which in long run is much more cost-beneficial.

At the end, to conclude with Fox's words that if political participation is to have any meaning as an internationally enforceable right, the international community has to be empowered to prescribe standards detailing how participation is to occur and to insist that the parties to major treaties adopt them as law.³¹⁹ It remains to be seen if and how the right to participate in government will evolve in view of the texts, practice and political context of the international organizations.

way affect the authority and responsibility of the SC under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

³¹⁷ Article 53 reads as follows: “1. The SC shall, wherever appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the SC, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on the request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. 2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the II WW has been an enemy of any signatory of the present Charter.”

³¹⁸ D'Amato, *International Law Anthology* (1994) pp. 372-373.

³¹⁹ Roth, *Governmental Illegitimacy in International Law* (2000) pp. 338-339.

V. EUROPEAN STANDARDS IN THE ELECTION FIELD

1. The Paradigm of “Free and Fair Elections”

All major human rights treaties, agreed upon at the universal and the European level, guarantee election rights as the basis of any democratic regime.³²⁰ In such a way, elections have become the subject-matter of public international law. These internationally assumed electoral obligations represent a powerful foundation of “free and fair election”, thus creating expectations about state conduct in that regard. The overall electoral principles are embodied in the universal and/or European standard of “free and fair elections”, by which national and supra-national elections³²¹ are judged. Specific election standards represent a measurement of electoral processes, which is applied by international and domestic election observers, operating under an assumption of neutrality and impartiality. To sum-up, the expression “free and fair elections” refers to the international election standards which denote whether or not an electoral process reflects the will of the people.³²²

Due to its importance as an actual measurement of an election, a number of authors have closely examined the meaning of the “free and fair elections”. Whereas “fairness” reflects the impartiality requirement for an unbiased application of rules and reasonable distribution of resources among the competitors, “free” denotes an absence of coercion for the voters when making their choice about electoral candidates. The elections must reflect peoples’ will and must be assessed from the perspective of whether or not it contributes towards a consolidation of democracy.³²³ Whereas “free” is more about the participation and choice, “fair” refers to the equality of participation and voting and non-discrimination, thus implying the protection of human rights and absence of coercion.³²⁴

³²⁰ Bates, *The Evolution of the European Convention on Human Rights* (2010) p. 110.

³²¹ In the case of the EU.

³²² For the use of the terms “free and fair elections” see *inter alia* the OSCE commitments: Charter of Paris 1990, Moscow Document 1991, Istanbul Declaration 1999, and the 1994 Declaration on Criteria for Free and Fair Elections of the IPU.

³²³ Elklit, Svensson, *The Rise of Election Monitoring: What makes elections free and fair?* (1997) pp. 35, 38-39; Elklit, Svensson, *A Framework for the Systematic Study of Election Quality* (2005) p. 149, at <<http://aceproject.org>> accessed on 7 January 2013>.

³²⁴ Goodwin-Gill, *Free and Fair Elections* (2006) p. 73.

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For some authors there is no fixed, universal standard of electoral competition that denotes “free and fair election”.³²⁵ Other author believes that international law provides only: “... the standard to be achieved, namely that the election produces an outcome which expresses the will of the people”.³²⁶

In spite of the treaties defining electoral principles,³²⁷ there is a low probability of an existing overall political consensus about the meaning of “free and fair elections” at the universal, or European level, because of the following:

- a. No fixed, unified and precise criteria of free and fair elections exists internationally;
- b. Democracy in action is a dynamic and a complex event with many categories, interfacing with the history, the politics and democratic and legal culture. The reason to run in elections is a universal one – to gain power, but electoral context varies from region to region and from country to country. For example, elections held immediately after the end of hostilities will be measured in line with the goal of support a sustainable peace. Such elections are held in a very difficult environment, with a high probability of re-occurring violence and with internally displaced voters and refugees; and
- c. Politically, it seems very difficult at the present moment for the states in the European region to agree to any legally-binding electoral commitments.³²⁸

However, empirical studies show that even during peacetime, elections remain a challenge in Europe, to various extents. As every process of learning requires time, maybe the “free and fair elections” standard should be always set against the reality in a particular country.

³²⁵ For more on this see Elklit, Svensson, *The Rise of Election Monitoring: What Makes Elections Free and Fair?* (1997) pp. 36, 39, 41 and 43.

³²⁶ Goodwin-Gill, *Free and Fair Elections* (2006) p. 80.

³²⁷ For example: UDHR, ICCPR, CEDAW, CERD, CMW, CPRD, ECHR, CLRS and CPFPL.

³²⁸ This is implied by a lack of interest displayed by the CoE for such a legally-binding document. The lack of interest has also been confirmed in interviews with ODIHR and CoE election advisors 2007. The situation remained unchanged since then. There were also differences in the electoral assessments made by the CIS countries and ODIHR.

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Therefore, elections should be assessed from the viewpoint of their contribution towards democracy consolidation³²⁹ and regression avoidance.

Since not every election leads to democratic governance, the standard of “free and fair elections” must capture its minimal requirements in the election field. Currently, the electoral commitments are dispersed in a great number of universal and European documents. The task is how to deduce them from the relevant international instruments, in light of the specific election standards pertaining to each part of the electoral cycle.

The following elements of the “free and fair elections” overall standard can be discerned in this regard:

The term “free elections” means that there are guarantees for the universal active and passive election right. The election rights, although universal, might be subjected to reasonable restrictions, such as age, nationality, and residency. Although a lack of mental capacity is an acceptable restriction, there is a worldwide movement to lessen it.³³⁰ There are also attempts to enfranchise children for getting them accustomed to democracy, as well as for examining the effects of their voting. Granting election rights only to nationals is no longer a dogma, as some international treaties³³¹ foresee such rights also for foreigners.

“Free elections” comprises several other dimensions, as follows: 1) Freedom from intimidation, corruption, violence and other offences; 2) The electoral candidates and political parties hold political rallies, disseminate their political programmes and make their views known to the public without unreasonable interferences;³³² 3) The voters freely form and express their choice by casting a secret ballot in a direct election; and 4) Electoral processes are transparent and open to the public.

³²⁹ Elklit, Svensson, A Framework for the Systematic Study of Election Quality (2005) p. 149 at <<http://aceproject.org>> accessed on 7 January 2013.

³³⁰ For more on this topic see Vyhnanen, Mental Disability and the Right to Vote in Europe: A Few Notes on the Recent Development at <<http://juridicas.unam.mx/wccl/ponencias/1/40.pdf>>, accessed on 23 April 2013.

³³¹ See, for example, Article 6 of the Convention on the Participation of Foreigners in Public Life at Local Level and Article 1, paragraph 4.2 of the Additional Protocol of the Charter of Local Self Government.

³³² Center for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) pp. 5-6.

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“Fairness” rests on the tenet of equal opportunities for all participants in the competitive electoral process. All voters have equal power to vote, electoral districts are established on an equitable basis, and the election results accurately reflect the will of the people living in that territory.³³³ There is no unfair treatment of a political option, interfering with the plurality of elections. Effective and adequate remedies guard against abuse of public funds, political censorship and unequal access to media. Prosecution and punishment of offenders is effective, efficient and non-discriminatory.

The term-of-art “free and fair elections” refers not only to election day, but to the whole electoral cycle: a pre-election phase, an election day and a post-election phase. Each of these phases has various elements: legal framework and electoral system; electoral administration, budgeting and planning; voters’ education, information, registration; nomination of candidates; electoral campaign; election day; verification of results; and peaceful transfer of power.³³⁴ The electoral cycle connotes the regularity of elections. They should be held periodically (not more than 7 years depending on the type of election)³³⁵ in order to reflect the will of the people. Therefore, it is also necessary to deduce the specific election standards pertaining to the electoral system and law, voters, candidates, electoral campaign, media, financing, counting and tabulation, allocation of mandates and election observation. All the specific standards from a particular field feed into the overall standard of “free and fair elections” in a systematic and coherent way.

In order not to remain a theoretical construct devoid of practical effect, the standard of “free and fair elections” must be rooted in national constitutions and electoral laws. This standard may be subject to various interpretations in various countries, depending on the social and political context. Nonetheless, electoral rights represent the point of convergence, as they belong to the family of human rights.

2. Electoral Standard of Meaningful Representation

³³³ The United Nations, OCHA, Guiding Principles on Internal Displacement (2004) foresee internationally displaced persons (IDPs) to have equal rights to participate in public affairs, including voting rights (principle 29).

³³⁴ EC-UNDP, Operational Guidelines for the Implementation of an Electoral Assistance Project (2006).

³³⁵ CoE, Code of Good Practice in Electoral Matters, p. 24.

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From the political theories of democracy and its historical development,³³⁶ it follows that the democratic idea came as a response to the secretive and elitist decision-making, where the people did not have any say regarding the decisions that affected them. The doctrine of majority rule indirectly refers to the greater inclusion of various social strata and groups in the decision-making, through their elected representatives.

In view of the democratic developments worldwide that go hand in hand with a greater inclusion of women and minorities, with the requirements for more just electoral systems and greater accountability of the government, the electoral outcome requiring a meaningful representation is emerging as an electoral standard. It provides a nexus between the voters, their specific interests and their representation in the decision-making via the electoral system. Thus, the electoral system plays primary role regarding the number of votes needed and procedures applied in order to win an electoral office.

This emerging standard of electoral outcome covers a bundle of particles, as follows:

First, the meaningful representation is achieved when there is a high turnout of voters who actually vote. Second, the electoral system accurately reflects the voters' preferences, with the least possible wasted votes. It follows, that the electoral system chosen must accurately translate casted votes into the seats to the extent possible. Therefore, high electoral thresholds must be avoided. While it is states' prerogative to choose their own electoral systems, a legitimate debate is on-going about how to ensure representativeness, i.e., that the votes won by candidates ensure proportional seats, with the smallest possible distortion. Scholars argue that proportional electoral system(s) ensure better representativeness than first-past-the post.

³³⁷ The international standards do not specify the type of electoral system. Recommending the best suited electoral model falls outside of the scope of the Dissertation. Nevertheless, the author argues that the states should make an effort to allow the widest possible representation of the people living in their territories as a democratic value. The efforts should encompass various researches and analysis of the experts, as well as public discussions in this regard.

³³⁶ Referred to in Chapter II, p. 22.

³³⁷ The controversy about how well different electoral systems reflect the voters' preferences, thus contributing to a meaningful representation and inclusiveness of diversities in a society, has been pinpointed in the Electoral Systems at <<http://aceproject.org/main/english/es/onePage>> accessed on 24 April 2013. See also a discussion *mutatis mutandis* on the electoral reform in Canada, Leduc, Making Votes Count: How Well Did our Electoral System Perform? (2004) <<http://www.elections.ca>, accessed on 24 April 2013.

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The electoral systems should not be considered carved in stone; they can also change in order to suit best the realities on the ground. An innovative approach towards electoral systems is also a powerful instrument to end and mitigate hostilities and conflicts, as they can result in acceptance of the results, and in power-sharing arrangements, instead of “winners take all”. Evenmore so, that in the latter case, the opposition may find itself weakened for the next elections and unable effectively to perform its function, which is an indispensable condition for democracy.

The reserved seats for minority communities or gender quotas that correct historico-social inequalities vis-à-vis decision-making, represent the third element in this regard. The fourth element connotes that the elected representatives have sufficient power to influence the decision-making, and can hold the government accountable, which is a question that falls to be examined under political systems.³³⁸

3. Universal Instruments as a Source of European Election Standards

The UN has a long-standing experience in election observation and election support since 1960.³³⁹ Its instruments that guarantee election rights must not be ignored when the content of the European standards in the election field is analyzed. In particular, most of the countries within Europe have ratified the UN instruments containing election standards, thus are legally bound to abide by them. In view of the above, its standard-setting role in the election field worldwide is examined for its contribution to European election standards.

a) The UN Charter

The UN Charter envisages promotion and encouragement of respect for human rights and fundamental freedoms with no distinction, as one of the purposes of the UN.³⁴⁰ The Charter’s only references relating to the right to participate in public affairs are found in Article 73(b) which mandates assistance to people in non-self-governing territories in the development of

³³⁸ At <<http://aceproject.org>> accessed on 8 February 2013.

³³⁹ In 1960 the UN Trusteeship Council was authorized for the first time to observe/ supervise elections, ACE, Assistance Providers at < <http://aceproject.org/electoral-advice/electoral-assistance/assistance-providers>>.

³⁴⁰ See Articles 1, 13(1), 55(c), 56, 76(c).

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free political institutions, as well as in Article 76(b) which promotes self-government for Trust territories based, among others, on the freely expressed wishes of the peoples concerned. Thus these are guiding principles in the field of electoral assistance to independent states.³⁴¹ The Charter represents a point of departure for further developments of the right to participate in public affairs, including election rights, which has been later elaborated in the International Bill of Human Rights.³⁴²

b) UDHR

The International Bill of Human Rights has enunciated election rights as one of the pillars of the right to participate in public affairs. Article 21 of the UDHR sets out the participatory process, in which free, fair, regular and universal elections with secret and equal suffrage represent an important segment. It underlines that the freely and fully expressed will of the people shall be the basis of the authority. In order for the government to be legitimate, Article 21 makes it clear that there must be a genuine expression of popular will. When looking back at the part relating to theories of democracy,³⁴³ it is clear that the wording used in this article affects the balance of power in societies. Actually, the participatory right as defined herein opened the door for challenging a government's established hold on power, if it has not been perceived as legitimate and in accordance with international standards.³⁴⁴

c) The ICCPR

The UDHR's wording regarding elections, which lies at the core of democratic government,³⁴⁵ is also found in the ICCPR (Article 25 (b)). Unlike the UDHR, the 1966 ICCPR is a legally-binding treaty for the ratifying states, subject to such formal matters as reservations.³⁴⁶ By virtue of Article 2 the ratifying states undertake to ensure the rights guaranteed by the ICCPR to all individuals within their territory. The states parties must honor the commitments stemming from the ICCPR. Pursuant to its Article 2(2) and (3), they shall adopt necessary legislative measures within their domestic jurisdiction to give effect to

³⁴¹ Center for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) p. 6.

³⁴² International Bill of Human Rights consists of UDHR, ICCPR and ICESCR and their optional protocols.

³⁴³ See Chapter II, p. 22.

³⁴⁴ See p. 41.

³⁴⁵ ABA CEELI, Specific Country Report ICCPR, Macedonia, pp. 34-39.

³⁴⁶ ICCPR entered into force on 23 March 1976, after 35 states have ratified or acceded to it. By 2010 the ICCPR has been ratified by 114 countries, whereas its Optional Protocol has 112 parties.

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the rights guaranteed by the ICCPR and to provide an effective remedy in case of their violation.³⁴⁷ No denunciations or withdrawals from the ICCPR are foreseen.

The Human Rights Committee (HRC),³⁴⁸ the ICCPR's enforcement mechanism, has shed light on the electoral criteria.³⁴⁹ The HRC has issued General Comment no. 25 which clarifies the scope and content of this article and serves as a guideline for the preparation of country reports. The scope of the rights set out under Article 25(b) has been clarified by the HRC in the Communication *No. 965/2000 against Austria*. The HRC considered that the right under Article 25 (b) does not cover private employment matters such as the election of an employee to a private company's work council.³⁵⁰

On the general note, election rights are individual and not collective rights.³⁵¹ Each individual citizen must have effective opportunity to enjoy these rights, regardless whether he has been born or naturalized in the respective country. It depends on the country to decide on citizenship criteria, but they must be reported in the country reports. In the individual communication *No. 760/1997* where the authors complained that their community has been administratively divided and they had been deprived of the granted rights to self-rule after the independence of Namibia, the HRC found no violation. It held that Article 25 granted the rights to individuals and not to a community and that the authors failed to substantiate in which way the individual's rights to participate in public affairs and election rights were adversely affected. However, in an individual concurring opinion, a HRC member considered that the HRC unnecessarily stressed the individual rights under Article 25, as there were situations where this article called for special arrangements for these rights to be enjoyed by members of minority and indigenous people, especially in view of other ICCPR articles.³⁵²

³⁴⁷ Dixon, *Textbook on International Law* (5th edition) (2005) p. 327.

³⁴⁸ HRC has been set up under Part IV of the ICCPR as a body to monitor the compliance of the states parties to the Covenant. It is composed of 18 independent experts with a 4-year mandate. Equitable geographical representation and representation of different legal systems and civilizations must be observed in its composition.

³⁴⁹ See, among others, General Comment no. 25 of the Human Rights Committee and individual communications under Article 25 (b) – Annex IV.

³⁵⁰ Selected Decisions of the Human Rights Committee under the Optional Protocol (Volume 7) Sixty-sixth to seventy-fourth session (1999-2002), pp. 155-159.

³⁵¹ General Comment no. 25 of the Human Rights Committee, Communication no. 760/1997. See also Steiner, Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd edition) (2000) pp. 142-144.

³⁵² Selected Decisions of the Human Rights Committee under the Optional Protocol (Volume 7) Sixty-sixth to seventy-fourth session (1999-2002), pp. 69-79.

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Active and passive election rights must not be subjected to unreasonable restrictions. Any restrictions based on property requirements, disability, extensive residence, party membership, ethnicity, religion, restriction on voting by naturalized citizens, literacy requirement, detention, abusive registration to vote cannot be accepted as reasonable restrictions.³⁵³ Restrictions must not be arbitrary, i.e., they must be lawful and based on objective and reasonable criteria,³⁵⁴ e.g., persons of older age are required to execute some public functions. Regarding individual communications, the following examples illustrate the requirements for objective and reasonable restrictions:

In the case *No. 157/1983* against Zaire,³⁵⁵ the HRC found a violation on account of the unreasonable restriction of election rights since the candidate who was entitled to stand in elections was not permitted to do so. In another case against Zaire *No. 314/1988*, the HRC concluded that prohibiting the leading opposition figure to take part in an election campaign and prepare his nomination, based on the fact that he was a member of political party other than the one officially recognized, amounted to an unreasonable restriction. In the communication *No. 500/1992* against the Netherlands, where a policemen elected to local council was not allowed to occupy the office, the HRC found no violation, as it held that since Article 25 rights are not absolute, they cannot be violated as long as the restriction was objective and not discriminatory, and in the instant case there was a conflict of interest.

The communication *No. 884/1999* against Latvia concerned the refusal by State party authorities to let an individual stand for the local elections on the basis of a language proficiency test. According to the author, the relevant law suffered from a deficiency and was open to arbitrary decisions; its requirements were contrary to Article 25 and discriminatory, she was subjected to pressure by the government when she took the test; and the procedure was flawed. In addition, she could not avail herself of any legal remedy. These arguments were accepted by the HRC, which considered that the author suffered specific injury because the annulment of her candidacy was not based on objective criteria and which the state party

³⁵³ Center for Human Rights United Nations, Human Rights and Elections, a Handbook on the Legal, Technical and Human Rights Aspects of Elections, professional training series no. 2 (1994), pp. 10-11.

³⁵⁴ See, among others, Communication No. 157/1983 against Zaire, Communication No. 500/1992 against the Netherlands, Communication No. 884/1999 against Latvia, Communication No. 932/2000 against France, Communication No. 1134/2002 against Cameroon, Communication No. 1373/2005 against Sri Lanka.

³⁵⁵ Zaire later changed its name in DR Congo.

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had not demonstrated to be procedurally correct. In case No. 1047/2002 against Belarus, the author did not have any effective and impartial remedy to challenge the ruling of the Central Election Commission rejecting his candidacy. The HRC decided that the facts amounted to an unreasonable restriction of the right to vote and to be elected.

In the communication No. 932/2000 against France, the HRC found that the differentiation between citizens to have the right to vote in a local referendum in the context of self-determination based on length of residence, but not on ethnic or political affiliation was reasonable and objective, as long as it was kept to the nature and purpose of that ballot. In a decision regarding the case No. 1134/2002 against Cameroon, the HRC found a violation when a person with a different political affiliating from the ruling party was deprived of liberty and deleted from electoral rolls.³⁵⁶ In a decision regarding communication No. 1373/2005 against Sri Lanka the author was convicted in an unfair procedure for uttering an offensive statement and sentenced to imprisonment and prohibition of election rights for 9 years. The HRC held that election rights could not be suspended on other grounds except for the ones established by law which are objective and reasonable. In the instant case, it found a breach of Article 25 (b) on the account that the state concerned failed to provide any arguments as to how the author's sentence was proportionate and reasonable taking into consideration the offence committed.

Other HRC cases where a breach of election rights³⁵⁷ was found involve Belarus, as follows: In the case No. 1553/2007 the HRC established a breach as the domestic courts seized the campaign material of an opposition presidential candidate, thereby violating the obligation to ensure the free flow of information about political and public issue by way of publishing political materials, electoral canvassing and advertising political ideas. In another case No. 1392/2005 a violation of Article 25 (b) was found of the passive election right. In particular, it was established that two candidates from the initiative group to propose the author as electoral candidate had not consented to be a part of the group. Although the non-consenting citizens were removed from the initiative group and there were no indications of any

³⁵⁶ See Annex IV, p. 280.

³⁵⁷ Since 1986 until 2010, the HRC examined 19 complaints relating to sub-paragraph (b): in seven cases a violation was found, eight of them were considered inadmissible, one of them could not be entertained due to reservation and in one case the HRC did not examine the complaint as a violation was found of another article.

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fraudulent activities from the author, he was denied the right to stand in elections. He was deprived of that opportunity without the authorities having carried out an assessment of proportionality and reasonableness in view of the importance of the right denied to the author.

As it transpires from the above, Article 25 (b) sets out the election standards for genuine elections,³⁵⁸ which are further interpreted and clarified through the HRC's general comments, concluding observations and decisions on individual communications. The elections must be:

1) Free and universal i.e., the citizens must have their right and opportunity to stand for office and vote of their own choosing ensured with no discrimination, unreasonably high fees or unduly limits in order to avoid conflicts of interest. The equality of votes must be ensured when drawing electoral boundaries and when choosing the method of allocating the votes.

2) Fair i.e., there must be no intimidations or other kinds of pressure imposed on political activists or voters. From the above it is clear that detention, imprisonment, capital punishment, and limitation of freedom of movement of political opponents are inconceivable under ICCPR, when used for political purposes. Fairness is inconceivable without the equality of the vote principle, requiring that every registered voter has an equal voting power: the same number of votes, and electoral precincts in line with such a principle.

3) Regular i.e., the period between elections must reflect the will of the people and must be determined by law, elections must not be canceled for an indefinite period, and even in case of an emergency situation, the country must ensure holding of new elections.

4) Secrecy must be ensured, i.e., any waiver of secrecy is incompatible with Article 25 (b). The assistance of voters e.g., blind, illiterate, must be impartial and they must be fully informed of their rights. The secrecy of ballots and tallying must be ensured and conducted by independent impartial body.

³⁵⁸ See Centre for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) p. 11; HRC General Comment no. 25; Annex IV.

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5. Based on law i.e., effective legal remedies by impartial bodies must be available for any kind of violations of electoral rights; electoral campaigns financing must be transparent; the election result must be implemented.

It is apparent from the Annual Reports of the HRC to the General Assembly³⁵⁹ that the principles and “philosophy” or the “policy” behind the work of the HRC remains constant, i.e., its interest in the promotion of the rights of political participation of women and minorities, the values of political pluralism, and the universality of election rights and their interdependence with other ICCPR rights, like freedom of association or the right to peaceful assembly.

d) Other UN Instruments

Different treaties co-exist in the UN that ensure protection of the right to participate in public affairs, embodying election rights. One of them is the CEDAW³⁶⁰ which is devoted to the protection of women’s rights.³⁶¹ Its Article 7³⁶² places positive obligation on the states to reinforce the universal passive and active election rights of women for all publicly - elected bodies. Thus, these rights must not only be enjoyed *de jure* but also *de facto*. Countries should put in place temporary measures to promote the participation of women in the political decision-making. Nevertheless, from the examination of the states parties’ reports it appears that women still face difficulties when exercising election rights and the number of elected women continues to be low. The CEDAW committee traces back the reasons for that to lack of informed choice, financial constraints, social and cultural stereotypes, restrictions on freedom of movement and on family voting. The responsibility to appoint women in advisory and other high positions does not rest solely with the states by way of taking different measures to this effect, but also with political parties who should include women on the candidates’ lists where they have likelihood of electoral success.³⁶³

³⁵⁹See Annual Reports at <www.ohchr.org>.

³⁶⁰ See also the Convention on Political Rights of Women, which was adopted earlier than CEDAW, but it does not foresee an enforcement mechanism.

³⁶¹ This Convention was adopted by the General Assembly of the UN on 18 December 1979³⁶¹. It entered into force on 3 September 1981. Its Optional Protocol was adopted on 6 October 1999³⁶¹ and entered into force on 22 December 2000.

³⁶² See Annex III, p. 277.

³⁶³ Steiner, Alston, International Human Rights in Context, Law, Politics, Morals (2nd edition) (2000) pp. 196-199.

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There was also a regression of women's elections rights where the percentage of women in a particular body, e.g., parliament had decreased in-between reports, and there was reduced participation of women in public affairs during the transitional period of ex-socialist countries.³⁶⁴ The requirement for incorporation of the gender perspective, and for equality of men and women in political decision-making clearly goes not only to the very heart of every domestic political system, but also of tradition, religion and social and family values. Therefore, a true change requires a change of a mind-set.

Participation in public affairs, also by way of elections, has been treated in another specific human rights' document -the ICERD. Similar to the CEDAW,³⁶⁵ it puts emphasis on some disadvantaged social groups requiring special attention.³⁶⁶ Article 5 (c) of the ICERD foresees an obligation for the ratifying states to guarantee to everyone political rights, in particular active and passive election rights based on universality and equality of the vote, without any form of discrimination.³⁶⁷ For example, if none of the representatives of a particular group is nominated to run in elections due to his/her national affiliation or gender, it is of little use that he or she is franchised.³⁶⁸

The Committee on the Elimination of Racial Discrimination³⁶⁹ issued General Recommendation no. 20,³⁷⁰ which refers to Article 5. *Inter alia* it states that the ICERD does not of itself create civil and political rights, but assumes their existence and recognition. Whenever a ratifying state imposes a restriction upon the political rights under Article 5, it must ensure its compatibility with the ICERD regarding the restriction's purpose and effect. Internal self-determination³⁷¹ is linked to the ICERD's right of every citizen to take part in the conduct of public affairs at any level. Therefore, the entire population must be represented

³⁶⁴ See Annual Reports of CEDAW available at <<http://www.ohchr.org>>.

³⁶⁵ See also 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which sets out the right to participation in public affairs for minorities.

³⁶⁶ The ICERD was adopted by the UN General Assembly on 21 December 1965, and entered into force on 4 January 1969. See the OHCHR official website at <<http://www.ohchr.org>>.

³⁶⁷ Racial discrimination is defined as: any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

³⁶⁸ European Commission, Compendium of International Standards for Elections (2nd edition) (...) p. 14.

³⁶⁹ CERD/C/70/rev.5, 5 December 2000.

³⁷⁰ Dated 15 March 1996.

³⁷¹ General Recommendation no. 21.

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by governments with no distinction as to race, color, descent or national or ethnic origin. The latter aspect is connected with the right of the peoples to determine freely their political status.

The ratifying countries are required to devote special attention to vulnerable groups of people, like refugees and displaced persons, indigenous peoples, women, Roma, and non-citizens.³⁷² Refugees and displaced persons must be able fully participate in public affairs and elections after returning to their homes of origin. Indigenous people must have equal rights with respect to effective participation in public life and in elections. They should be able to provide informed consent for any decision directly affecting their rights and interests. Countries must also devote attention to any interlinkages between racial and gender discrimination, as women often face a multiple discrimination. Regarding Roma, measures should be taken to enable their participation in public life.³⁷³ Non-citizens should also be made an active part of political life in line with the international commitments.

The Committee has expressed concerns regarding gerrymandering to the detriment of minorities; a lack of quotas/reserved seats in parliament for minorities; cancellation of elections in a part of the country where minorities are pre-dominant; a lack of proper implementation of new election law granting voting rights to women; and a low participation of tribal people in elections.

Many governments still do not wish to discuss racial discrimination and deny its existence, considering this topic a taboo. Still, the ICERD represents a step forward towards prohibition and eradication of discrimination in the enjoyment of political rights at global level. This instrument has been effectively used to protect the political rights of a group of people with some joint characteristic, i.e., minorities, tribal people, women and indigenous people.

³⁷² General Recommendations no. 22, no. 23, no. 25, no. 27 and no. 30

³⁷³ The measures recommended include the following: equal opportunities for the participation of Roma in all bodies at all levels; consultations with Roma political parties, associations and representatives, at all levels for issues of concern to Roma communities; involvement of Roma associations and representatives in policy making; awareness raising among Roma about the need for their more active participation in public affairs; and training programmes for Roma public officials and representatives for improvement of their political, policy-making and public administration skills. As for the other groups mentioned above, the CERD requests information on Roma to be included in the states parties' periodic reports, especially statistical data about Roma participation in political life and a gender perspective.

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Now turning to the ICRPD which has recognized election rights of persons with mental and physical impairments³⁷⁴ as universal human rights concerns. Its Article 29 requires that the States parties guarantee and afford to these persons full political and election rights. In particular, they should participate on an equal basis with others in elections, both as candidates and voters. Their election rights must not be hindered or violated in any way because of their disability, in line with the existing international election standards that safeguard the universality and secrecy of vote and electoral integrity. Persons with disabilities must also enjoy the right to effectively take office once elected and perform all other public functions with the appropriate assistance.

When Article 1, which covers persons with a long-term mental disability, and Article 29 of the Convention setting out political and election rights are read in conjunction, it appears that the CRPD gives rights to people with long-term psychological disorders to vote and stand for elections. In such a case the CRPD might have a profound impact on the qualifications for voters and candidates in a number of countries that require persons not to be mentally incapacitated in order to exercise those rights. In this context it is worth mentioning that there was an initiative supported by the International Foundation for Electoral Systems for franchising people with cognitive and emotional impairment. The Bill of Electoral Rights for People with Disabilities, which was also supported by SIDA³⁷⁵ and International IDEA,³⁷⁶ was launched at international conference in Sweden in 2002. It promotes rights for people with physical and psychological disabilities in all aspects of elections.³⁷⁷

The last UN treaty, which completes the framework of the UN election rights is the ICMRW. It ensures the right of migrants to participate in public affairs and election rights in their countries of origin (Article 41). However, it cannot be explicitly accepted as a source of European election standards,³⁷⁸ as no EU country has ratified the ICMRW despite large immigrant populations in the EU territory.

f) Discussion

³⁷⁴ The CRPD and its Optional Protocol entered into force on 3 May 2008.

³⁷⁵ See <<http://www.sida.se>>.

³⁷⁶ See <<http://www.idea.int>>.

³⁷⁷ See <<http://www.electionaccess.org>>; <<http://www.IFES.org>>.

³⁷⁸ It entered into force on 1 July 2003.

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Both, the UDHR and ICCPR represent a source not only of international, but also of the European standards in the election field. The former serves as an expression of a universal intent about the end state of the human condition in an ideal world. The latter has been ratified by the European states, and has thus become part of their internal legal order.

On a specific note, a genuine election³⁷⁹ mentioned in the UDHR and ICCPR pre-supposes an environment characterized by transparency, confidence, security, inclusiveness,³⁸⁰ accountability and informed choice for the voters when directly electing their representatives. It further presupposes a real choice of political options for the voters, as any unreasonable restrictions on election candidature would be incompatible with this right. No free election can be held if political opponents are detained, deprived of a possibility to organize an electoral campaign or their freedom of movement is limited,³⁸¹ or when the voters are coerced and threatened.³⁸²

Voters must have equal voting power. There is an obvious relationship between the criterion of free elections and the criterion of a secret ballot. Voters cannot waive the right to cast their vote in secret, as there is a general and automatic prohibition on disclosing for whom the vote was cast.

The regularity of elections is another universal, election-specific standard. For example, there should not be an interval of more than seven years between elections.³⁸³ From the UDHR and ICCPR texts it can be inferred that the national constitutions must not allow for an indefinite term of any elected office, including a presidential one.

The universality principle requires universal enfranchisement. It can be restricted in accordance with the rules mentioned above. For example, no disproportionate restriction of the voting right may be imposed on convicts, meaning that any such restriction must reflect

³⁷⁹ Centre for Human Rights United Nations, Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series no. 2 (1994) p. 12.

³⁸⁰ Registration of the voters should be facilitated with no obstacles or coercion – General Comment no. 25 of the Human Rights Committee.

³⁸¹ See Annex IV, p. 280.

³⁸² General Comment no. 25 of the HRC.

³⁸³ Joseph, Schultz, Castan, The International Covenant on Civil and Political Rights, Cases, Materials and Commentary (2000) p. 509.

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the severity of the crime. Voters with different physical impairments are effectively disfranchised when a polling station is physically inaccessible or when their voting assistance is not impartial.

The last criterion stipulated in the UDHR and the ICCPR requires clear, accessible and foreseeable election laws. In addition, it requires available effective legal remedies by impartial bodies to redress violations of electoral rights.³⁸⁴ No fair elections can be conducted without impartial election administration and proper implementation of law.

When this requirement is read together with the first limb of the ICCPR's Article 25 (a), it follows that unlawful, subjective or unreasonable termination of the mandate of the elected officials cannot be imposed. Actually, the direct and indirect right to participate in public affairs as the basis of the government's authority has opened the door to challenge the government's established hold on power, when it has not been constituted in accordance with the international standards, thus being perceived as illegitimate.³⁸⁵

By the same token, special UN treaties contain election standards that safeguard passive and active election rights of disadvantaged groups, like women,³⁸⁶ disabled persons,³⁸⁷ minorities³⁸⁸ and migrant workers.³⁸⁹ These special obligations partially reflect the electoral outcome standard of meaningful representation, as they require greater inclusion in the political processes of more politically vulnerable groups, on equal footing. Moreover, the HRC in its General Comment no. 25 requires that countries include in their reports how different views in their communities are represented in the elected bodies. The expressed interest of the HRC in the representation of different interests and groups in the ratifying states goes hand in hand with the meaningful representation standard. This standard requires

³⁸⁴ See Annex IV, p. 280.

³⁸⁵ Roth, *Governmental Illegitimacy in International Law* (2000) pp. 324-325; see also, *Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections*, Professional Training Series no. 2 (1994) p. 11.

³⁸⁶ Article 7 (a) of CEDAW.

³⁸⁷ Article 29 (a) of ICRPD.

³⁸⁸ Article 5 (c) of ICERD.

³⁸⁹ Article 41 of ICRMW.

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greater inclusion of the opposition, of women and of ethnic minorities in political decision-making, looking at the elections as a means to achieve those ends.³⁹⁰

It is worthwhile noting that since 1991 the General Assembly has adopted a number of resolutions relating to the promotion of democratization and “free and fair elections”.³⁹¹ These resolutions have requested for the UN to strengthen its role in enhancing regular and genuine elections and in the promotion of democratization.³⁹²

As a final remark, a large number of UN documents serve as a source of the overall international election standard of “free and fair elections”, and of specific election standards.

³⁹⁰ For more on the meaningful representation standard see pp. 57-59.

³⁹¹ [A/Res/62/150](#) (2008) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/60/164](#) (2006) “Respect for the principles of national sovereignty and diversity of democratic systems in electoral processes as an important element for the promotion and protection of human rights”; [A/Res/60/162](#) (2006) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/58/189](#) (2004) “Respect for the principles of national sovereignty and diversity of democratic systems in electoral processes as an important element for the promotion and protection of human rights”; [A/Res/58/180](#) (2004) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/56/159](#) (2002) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/56/154](#) (2002) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in electoral processes as an important element for the promotion and protection of human rights”; [A/Res/54/168](#) (2000) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”; [A/Res/54/173](#) (2000) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/52/129](#) (1998) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/52/119](#) (1998) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”; [A/Res/50/185](#) (1996) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/50/172](#) (1996) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”; [A/Res/49/190](#) (1995) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/49/180](#) (1995) “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”; [A/Res/48/131](#) (1994) “Enhancing the effectiveness of the principle of periodic and genuine elections”; [A/Res/48/124](#) (1993) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”; [A/Res/47/138](#) (1993) “Enhancing the effectiveness of the principle of periodic and genuine elections”; [A/Res/47/130](#) (1993) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”; [A/Res/46/137](#) (1992) “Enhancing the effectiveness of the principle of periodic and genuine elections”; [A/Res/46/130](#) (1992) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”; [A/Res/45/151](#) (1991) “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”; [A/Res/45/150](#) (1991) “Enhancing the effectiveness of the principle of periodic and genuine elections”.

³⁹² [A/Res/48/124](#) (1993) Section 4. See also Roth, *Governmental Illegitimacy in International Law* (2000) pp. 341-344.

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Yet, there is no single legally-binding or legally non-binding document that sets out all electoral elements and principles in detail and in a more coherent manner. The issue arises as to whether or not the present mosaic of binding and non-binding UN documents in the respective field provides a sufficient legal framework for powerful implementation of the respective standards. Alternatively, it may be that the lack of a detailed and coherent UN document on election standards allows the states to evade international election principles. The lack of unified and precise election standards might also result in the UN assessments and assistance relying mostly on the comparative election standards or on the standards belonging to another international organization.

It may be argued that since the main international election standards have been foreseen and similarly defined in all relevant international documents and since there is sufficient state practice in this respect, they have become a part of customary international law, thereby obligatory for states when they hold elections. If that were the case, a hypothetical legally-binding treaty on elections would serve the purpose of systematization of the election standards. It can be equally argued that since elections are considered internal affairs and there is no prescribed form of democracy, there is no place for a detailed document regardless of whether it is or is not legally-binding, since it is within the states' realm to regulate how the individuals will participate in public affairs and make decisions about their government depending on history and traditions. It is also questionable whether a legally-binding detailed treaty on election standards, prepared under UN auspices is needed in the European context, knowing that there are a number of European documents regulating this area. In view of different social and political realities in the world, a legally-binding electoral document might have value for the UN member states that struggle with big electoral challenges. However, such a document might be counterproductive in the European region, for the following reason: it may be used as a means to lower the election standards applicable in Europe, which have already been set out in legally-binding and legally non-binding documents.³⁹³

4. European Regional Organizations Developing Standards in the Election Field

³⁹³ For example: the OSCE political commitments, or the CoE Code of Good Practice in Electoral Matters.

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The European electoral heritage³⁹⁴ has inspired further development of electoral commitments for increased protection of an essential element of democratic society, i.e., the rights of the citizens in the election arena.³⁹⁵ The European electoral commitments are set out in a number of international documents prepared under the auspices of European organizations (the CoE, the OSCE and the EU). Some of the instruments like the ECHR and the Charter of Local Self Government are legally binding. Others, like the OSCE commitments and the Code of Good Practice in Electoral Matters are not legally binding. Some of the instruments are applicable only with respect to a particular type of election, or are lacking detail. Considering that the obligations in the election field are set out in various instruments of various European organizations, there is always a risk of disparities among them.

In view of the abundance of instruments, sources of election standards, and of the importance of free and fair elections, the question arises as to the reasons for the absence of a single legally-binding instrument in which election standards are codified. In this context, it is worth mentioning that CIS countries³⁹⁶ have prepared the Convention on Election Standards of Democratic Elections, Electoral Rights and Freedoms³⁹⁷ for which the CoE Venice Commission has prepared an Opinion.³⁹⁸ A Draft Convention on Election Standards, Election Rights and Freedoms³⁹⁹ was approved in 2002 at the meeting of the ACEEEO(6).⁴⁰⁰ However, this instrument has not been accepted by the members of the CoE, which belong to the group of old democracies.

In order to reply to the question whether or not European standards are sufficiently developed and precise to provide good basis for conducting free and fair elections, despite the aforementioned caveats, the examination of the European instruments applicable to elections is warranted.

³⁹⁴ For more on European electoral heritage see pp. 13 - 14.

³⁹⁵ Council of Europe, Code of Good Practices in Electoral Matters, Adopted Guidelines and Draft Explanatory Report, European Commission for Democracy Through Law (CDL-EL (2002) 5) section I.5.

³⁹⁶ Commonwealth of Independent States.

³⁹⁷ CDL-EL (2006) 031 and 031 rev.

³⁹⁸ CDL-AD (2007) 007.

³⁹⁹ CDL (2003) 57.

⁴⁰⁰ Association of Central and Eastern Europe Electoral Officials.

4.1. Council of Europe

Along with the OSCE and the EU, the CoE is one of the three major European pillars charged with protection of the right to participate in public affairs, including election rights in particular. The Statute⁴⁰¹ of the CoE characterizes the spiritual and moral values of its founding member states as common heritage and as the true source of individual freedom and political liberty. Founded 1949 by the Western European countries, CoE currently has 47 member states.⁴⁰² Membership in this regional system is restricted to the states geographically situated in the European region. With regard to the membership of Armenia, Azerbaijan and Georgia in the CoE, an extended geographical definition of Europe applies. It remains to be seen if membership invitations will be extended to countries from the Mediterranean basin, like Morocco.⁴⁰³

This chapter explores the instruments by which the CoE contributes to greater respect for election rights of the citizens of its member states. CoE instruments range from legally-binding treaties, which contain standards only for a particular type of an election to a detailed catalogue of election standards, but with no binding force. In view of the multiple CoE sources from which the election standards are derived and the relevant enforcement bodies, the instruments tackled in this chapter can be perceived as a CoE electoral rights protection mechanism.

4.1.1. Election of Legislature: The European Convention on Human Rights

The ECHR is *par excellence* a standard-setting instrument at the European level. It binds all members of the CoE, since any country aspiring to be a member of the CoE must ratify it.⁴⁰⁴ National courts must apply the ECHR when deciding on cases involving the rights

⁴⁰¹ See the Preamble, Articles 1 and 3.

⁴⁰² Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, B&H, Bulgaria, Croatia, Cyprus, Czech Rep., Denmark, Estonia, France, Finland, Georgia, Greece, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxemburg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Russian Federation, Romania, Serbia, Slovak Republic, San Marino, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.

⁴⁰³ See Resolution 1818 (2011) on the request for partner for democracy status with Parliamentary Assembly submitted by Morocco Parliament.

⁴⁰⁴ Combacau, Sur, *Droit International Public* (5^e édition) (2001) p. 384.

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guaranteed therein, or the ECtHR will establish a violation of the ECHR. States are left with a certain margin of appreciation due to their sovereignty,⁴⁰⁵ but in no way should the rights and freedoms guaranteed by the ECHR be impinged to the extent to impede their very essence.⁴⁰⁶ The provisions of the ECHR are interpreted in light of its object and purpose.⁴⁰⁷ This means that the ECtHR interprets the ECHR while taking into consideration important concepts defined in the Preamble like “effective political democracy” and “democratic society”.⁴⁰⁸ It further takes into consideration the relationship that exists between various human rights and freedoms, and thus looks at the ECHR as a whole.⁴⁰⁹

No appropriate conditions for free and fair elections exist, absent of the ECHR guarantees of other human rights connected with election rights. The right to freedom of expression, the right of peaceful assembly and association stipulate that everyone has the right to participate in electoral campaigns and election rallies, as well as the freedom to form and join political parties. The aforementioned rights are qualified rights, meaning that they can be interfered with when foreseen by law and for one of the aims set out in the relevant articles when necessary and in compliance with the proportionality test.⁴¹⁰

Freedom of expression and freedom of peaceful assembly and association are necessary pre-conditions for holding free and fair elections. The wording of Article 3, Protocol no. 1 of ECHR, which requires elections to be conducted under the conditions which allow for free expression of the will of the people, underlines the need for enjoyment of all connected rights. This inter linkage with other ECHR rights is underscored, considering that any interference with election rights must be compatible with the object and purpose of Article 3, Protocol no. 1 of the ECHR.⁴¹¹ The ECtHR subjects to closer scrutiny the cases where the freedom of expression of the politicians is at stake,⁴¹² because politicians also bear greater responsibility to society. This increased responsibility is due to the influence that politicians

⁴⁰⁵ Van Dijk, Van Hoof, Theory and Practice of the European Convention on Human Rights (1998), pp. 82-95.

⁴⁰⁶ Harris, Boyle, Warbrick, Law of the European Convention on Human Rights (1995) pp. 12-15.

⁴⁰⁷ Ibid pp. 6-9.

⁴⁰⁸ Ibid p. 656.

⁴⁰⁹ Ibid; Van Dijk, Van Hoof, Theory and Practice of the European Convention on Human Rights (1998), pp. 72-80.

⁴¹⁰ Ibid pp. 11, 80-82; Articles 10 and 11 of ECHR.

⁴¹¹ Van Dijk, Van Hoof, Theory and Practice of the European Convention on Human Rights (1998), pp. 72-73.

⁴¹² See on the necessity of interference, the case of *Rufi Osmani v. Macedonia*, Application no. 50841/99, Final Decision of 11 October 2001.

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have over the masses, the relatively greater ease with which they could mobilize the people to commit violent acts. No elections can be considered free and fair, if connected rights are interfered with⁴¹³, to the extent that the essence of the election rights is impaired.⁴¹⁴

In this context, the ECtHR has emphasized the key values of pluralism, tolerance and broadmindedness for a democratic society. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁴¹⁵ This reasoning of the ECtHR is based on Article 17 of the ECHR.⁴¹⁶ It goes hand in hand with the need to ensure a meaningful representation not only according to the votes cast by the majority of voters, but also by using other known mechanisms in order to provide the disadvantaged groups with an equal opportunity to be included in the decision-making.

Another ECHR article important for elections is Article 14, which prohibits discrimination. It has an auxiliary character and protects the enjoyment of the rights guaranteed by the ECHR without discrimination on any ground (sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status). Protocol no. 12⁴¹⁷ to the ECHR strengthens the non-discrimination principle. It prohibits public authorities from discriminating against any individual in the enjoyment of his or her legal rights on the basis of any characteristic linked to his or her personal status. In the electoral context, this principle is applied in the nomination of the candidates, during the electoral campaign, in the composition of the electoral administration and during the voting,

⁴¹³ On interpretation see more in Van Dijk, Van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), pp. 72-82.

⁴¹⁴ On the effectiveness of interpretation see Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) pp. 12-16.

⁴¹⁵ *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 63, Series A no. 44, *Chassagnou and Others v. France* [GC], Application nos. 25088/94, 28331/95 and 28443/95, paragraph 112, ECHR 1999-III; *Hydepark v. Moldova*, Application no. 45094/06, paragraph 24 .

⁴¹⁶ Article 17 prohibits abuse of rights set forth in the ECHR in the sense that none of the rights can be used by any state, group or persons with the aim to destroy any of the ECHR rights or limit them to a greater extent than is provided therein.

⁴¹⁷ The Protocol has entered into force on 1 April 2005.

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counting and tallying processes. However, so far only 18 CoE member states have ratified this Protocol.⁴¹⁸

The right to effective remedy⁴¹⁹ is indispensable for the resolution of electoral disputes, since it is the judiciary that is charged with safeguarding the rule of law before, during and after elections. The judiciary must be free of partisan influence, in order for the rule of law to effectively control the conduct of elections. An independent judiciary does not replace the functioning of independent electoral bodies, but acts complimentary to them by allowing for peaceful dispute resolution and by protecting candidates and voters from any kind of intimidation and denigration.⁴²⁰

In this context, it is worth noting that in a number of cases the ECtHR declared the complaints under Article 6 about the unfairness of judicial proceedings inadmissible, holding that political rights, and not civil rights were at stake. The ECtHR gave no consideration to the fact that Article 6 is applicable when an administrative decision is challenged,⁴²¹ and that in many European countries electoral disputes are processed in accordance with the administrative procedure. Nonetheless, through its decisions in several cases against Azerbaijan⁴²² under ECHR Article 3, Protocol no. 1, the ECtHR seems to have implicitly extended a number of “fair trial” safeguards to electoral arena, since it requires a thorough and effective investigation and impartial and objective examination of election-related cases by an impartial electoral administration.

Regarding foreigners’ participation in elections, Article 16 of the ECHR stipulates that restrictions on their political activities will not be considered *per se* a breach of the ECHR in view of Articles 10, 11 and 14. By analogy, it also seems possible to apply such a limitation with respect to the political rights protected by Article 3, Protocol no. 1 when foreigners’ election rights are at stake.

⁴¹⁸ The ratifying states are the following: Albania, Andorra, Austria, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxemburg, Montenegro, the Netherlands, Romania, San Marino, Serbia, Slovenia, Spain, Macedonia and Ukraine.

⁴¹⁹ Article 13 of the ECHR.

⁴²⁰ Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) pp. 163-196.

⁴²¹ Van Dijk, Hoof, *Theory and Practice of the European Convention on Human Rights* (1998) p. 397.

⁴²² See, for example, *Namat Aliyev v. Azerbaijan*, Application no. 18705/06, Judgment of 8 April 2010.

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(i) Article 3 of Protocol no. 1 to the ECHR

Whereas all member states of the CoE are parties to the ECHR, not all of them are a party to its Protocol no. 1, which contains election guarantees. Switzerland and Monaco have not ratified Protocol no. 1.⁴²³ It can only be speculated why these two countries, one of which is a model democracy, still have not ratified the Protocol, which contains the minimal criteria for “free and fair” elections of the legislature. Regarding Monaco, a constitutional monarchy, the reason may be found in the division of the legislative power that exists between the National Council (directly elected legislative body) and the prince.⁴²⁴ The fear that this delicate balance may be affected by Article 3 of Protocol no. 1 of the ECHR, may be the reason for a lack of adherence to the Protocol. As to Switzerland, the speculations focus on its specific political system. Namely, the Swiss confederation is based on the principle of subsidiarity, and a distribution of the legislative powers between the federal assembly and the cantonal assemblies. Since the cantons have legislative powers, Article 3 of Protocol no. 1 of the ECHR would also apply to them. However, the representatives of the cantonal legislative bodies are elected in different manners, with each canton having its own rules regarding various aspects of elections. Moreover, the federal assembly elections are governed by cantonal laws regarding the media, electoral administration and other specific segments, with the federal legislation only regulating general electoral principles.⁴²⁵ It follows that a lack of uniform rules might be hypothetically perceived as unequal treatment of the citizens under the ECHR. If a complaint for a lack of equal treatment would be successful, the Swiss cantons would have to harmonize their electoral systems, thus re-shaping the Swiss political landscape.

Article 3 of Protocol no. 1⁴²⁶ provides a nexus between the protection of human rights and democracy by encompassing the principles of representative democracy. Public participation

⁴²³ See CoE Treaty Office at <<http://www.coe.int>>.

⁴²⁴ See Article 4 of the 1962 Constitution of the Principality of Monaco at <<http://www.conseil-national.mc/constitution.php?idcat=3>> accessed on 24 April 2013.

⁴²⁵ See Swiss Confederation Federal Assembly Elections 23 October 2011, OSCE/ODIHR Election Assessment Mission Report, pp. 1-4.

⁴²⁶ Article 3 of Protocol no. 1 to the ECHR reads as follows: “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”.

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in the law-making is guaranteed through free and regular elections by secret ballot, resulting in freely elected representatives in the legislature.

Unlike other substantive articles contained in the above-mentioned UN documents,⁴²⁷ the respective provision does not explicitly protect other components of the right to participate in public affairs, such as access to civil service on an equal basis, consultation about legislative projects,⁴²⁸ or control of government by the legislature.⁴²⁹ It does not cover referendums either.⁴³⁰ It has been strictly construed to ensure only that regular free and fair elections are held for the legislature.

The structure of this article contains nine determinants, as follows:

First, in comparison to other substantive ECHR articles where an individual is expressly the holder of the right prescribed, this article is explicitly directed to the high contracting parties. It is their obligation to enact such electoral rules that will ensure free expression of the will of the people. The ambiguity of the language was resolved by giving the individuals and political parties the right to petition for protection of their active and passive election rights.

The ECtHR's liberal approach vis-à-vis the procedure has opened a door to invoke the protection of the electoral rights. Had the ECtHR taken a conservative approach, the protection of the electoral rights would have been ineffective, taking into consideration that – until now there has not been a single inter-state application complaining about rigged elections. In comparison, there have been 16 inter-state applications in total.⁴³¹ The lack of inter-state applications (despite the re-occurring electoral violations) may be due to the States' cautious approach when the political rights are at stake, but also to the lack of the Court's adequate remedial powers regarding rigged elections. Still, it is inconceivable that an ECHR final judgment would not be used as an argument in a political process.

Second, the language of the respective article reads “people” and not “citizens”. Therefore, it is the choice of the state whether or not to allow the non-citizens to vote or stand for elections, as there is no clear definition which categories are included in the definition of

⁴²⁷ See Annex III, p. 277.

⁴²⁸ Van Dijk, Hoof, *Theory and Practice of the European Convention on Human Rights* (1998) pp. 658-659.

⁴²⁹ Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) p. 554.

⁴³⁰ *Ibid* p. 554.

⁴³¹ Statistics available at <<http://www.echr.coe.int>> accessed on 24 April 2013.

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“people”. On one hand, it should be born in mind that Article 1 of the ECHR stipulates that all its rights are guaranteed to everyone within the jurisdiction of the ratifying states. On the other hand, the states’ practice provides evidence that election rights are granted to non-citizens fulfilling certain residence requirements for local elections, and not for national elections that are regulated by Article 3, Protocol no. 1 of the ECHR. It looks as if at the time the ECHR was drafted, the term “people” was used in the context of colonialism and self-determination, so that all groups/communities in the states would have equal rights to elect members in the legislature. However, as there is neither a clear explanation nor a definition of this term, no distinction should be made on the bases of the place of residence of the people who qualify as voters,⁴³² provided that no reservation is made by the states. Still, local conditions are always taken into account regarding the territories governed by the European states, which are situated outside of the European continent.⁴³³ At the same time, the fact that the ECHR protects individual and not collective rights must be born in mind.

Third, the ratifying states must hold elections. They must be conducted in line with the requirements in the Preamble for building and maintaining effective democracy. A democratic society by definition does not only include the majority rule, but also reflects the interests of all groups and people in the state.⁴³⁴

Fourth, there are further criteria, which must be fulfilled for the election of the legislature. The term “legislature” has been subject of extensive case-law⁴³⁵ with the ECtHR again taking a liberal approach, thus broadening the ambit of admissibility of Article 3 of Protocol no. 1 to the ECHR.

The fifth, sixth and seventh determinants are reflected in the electoral requirements of the CoE countries. The elections must be free, periodic and secret, thus indicating the most significant electoral principles. Periodic elections connote a legislature accountable to the

⁴³² Cristescu, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments* (1981) p. 39.

⁴³³ About the territories under the responsibility of the ratifying states and the applicability of local conditions, see Article 56, paragraphs 1 and 3 of the ECHR.

⁴³⁴ Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) pp. 550, 555.

⁴³⁵ See, among others, *Mathieu-Mohin and Clerfayt*, Application no. 9267/81, Judgment of 2 March 1987; *Santoro v. Italy*, Application no. 36681/97, Judgment of 1 July 2004; and *PY v. France*, Application no. 66289/01, Judgment of 11 January 2005.

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people, as elections are the biggest accountability test for an outgoing government.⁴³⁶ The composition of the legislature is a tangible outcome from the application of Article 3, P-1. Free and secret election requirements should be read together in the context of subjective election rights as safeguards from undue interference and manipulation. The rule of law, lawfulness and non-discrimination are the main weapons used by the ECtHR in combating electoral irregularities.

Further, pluralistic elections are incumbent on states, as the eighth determinant requires “a choice of the legislature”. The article is open-ended in light of the requirement to set up the criteria indispensable for free expression of the will of the people, which represents the final determinant.

Article 3 of Protocol no. 1 imposes a positive obligation on the ratifying states to hold free elections. In concrete terms, this translates into a genuine choice for voters and a lively political debate, protection of the candidates and voters from intimidations or threats, and deterrence and punishment of attempts to rig the elections. Simultaneously, it imposes a negative obligation on the states parties to the ECHR to refrain from any conduct which might endanger the free expression of the will of people by, for example, abusing the state funds and resources in an electoral campaign or by keeping political prisoners.⁴³⁷

At first glance, Article 3 of the ECHR Protocol no. 1 might appear to contain unqualified rights, its wording not containing legitimate grounds for the interference by the Government.⁴³⁸ Despite the lack of clear language stipulating any limitations,⁴³⁹ electoral rights are not absolute.⁴⁴⁰ Therefore, the Court considers that the interference with these rights is possible under the margin of appreciation doctrine.

Under Article 3 of P-1 indirect democracy is derogable. If the derogation continues beyond necessity for a long time, the question arises if other ECHR provisions can be enjoyed

⁴³⁶ Van Dijk, G. J. H. Hoof, *Theory and Practice of the European Convention on Human Rights* (1998) p. 655.

⁴³⁷ Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) pp. 19-21.

⁴³⁸ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 7.

⁴³⁹ See *Gitonas and others v. Greece*, Application nos. 18747/91, 19376/92, 19379/92, 28208/95 and 27755/95, Judgment of 1 July 1997, para. 39; *Etxeberria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03 and 35634/03, Judgment of 30 June 2009, para 48.

⁴⁴⁰ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) pp. 389-390.

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effectively under such circumstances.⁴⁴¹ In such a case, one could not speak about a democratic society, which is the essential object of protection afforded by the ECHR.

While it imposes several more specific requirements relating to elections, Article 3 of the ECHR Protocol no. 1 is not written in rigid language and does not impose an automatic outcome. Its application is flexible, as confirmed by ECtHR case-law.⁴⁴² Additionally, the Court has to review several factors in order to apply the language to different sets of facts. It follows that ECHR Article 3 of Protocol no. 1 according to its legal form is standard. The evolutive meaning given by the ECtHR to the ECHR relevant article further confirms this argument. There is diversity among the ratifying states regarding their political and legal culture. Therefore, Article 3 of Protocol no. 1 contains the lowest common denominator for conducting “free and fair” elections.

On empirical note, between 1959 and 2009, only 39 violations of Article 3 to Protocol no. 1 were found, out of which the majority of cases (15) were against Italy. This number is considerably lower in comparison to, e.g., the number of violations relating to the right to a fair trial, which have been established in approximately 500 judgments per annum.⁴⁴³ The low number of violations may be also a consequence of other factors, such as the restrictive scope of the article, delay in proceedings and the active involvement of other international organizations in the election field.

A surprising increase in the breach of election rights in 2010 and beginning of 2011 has been observed. The ECtHR established nine violations, which constitutes approximately 1/4th of the violations of this article for the period 1959-2009. The increase might be due to an increased accessibility to the ECHR and to increased knowledge about the ECHR protection system in the election arena.⁴⁴⁴

A lack of findings of violations of election rights by a particular country cannot necessarily be considered a valid indicator of full respect of election rights. For example, no violation of

⁴⁴¹ The Greek case, 12 YB 1 179-180 1969.

⁴⁴² See, for example, *Zdanoka v. Latvia*, Application no. 58278/00, Judgment of 17 June 2004.

⁴⁴³ Survey of Activities 2007, Registry of the European Court of Human Rights (2008) pp. 58-59; European Court of Human Rights Statistics.

⁴⁴⁴ The ECtHR statistics are available at <<http://www.coe.int>>.

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this article has ever been found against Macedonia.⁴⁴⁵ However, in 2008/2009⁴⁴⁶ OSCE/ODIHR and CoE PA/CLRAE⁴⁴⁷ election observers reported a number of serious violations, including violence and intimidation. For that matter, free and fair elections were set as a benchmark for the country's accession to the EU in 2008.⁴⁴⁸

(ii) Case-law and Doctrinal Approach of the European Court of Human Rights

Although the ECtHR is not bound by precedents,⁴⁴⁹ principles for the resolution of the cases brought under the ECHR are found in the ECtHR's body of case-law. The case-law pertaining to Article 3 of Protocol no. 1 to the ECHR is framed by ECtHR judicial doctrine and its interpretative tools, adjusted to the electoral context.

Turning to the interpretative tools, the ECtHR applies a teleological interpretation, in light of the ECHR's objective and spirit, i.e., the protection of human rights and democratic values.⁴⁵⁰ Its interpretation is anchored in the "effective political democracy doctrine".⁴⁵¹ This doctrine is very general, with the Court referring to the ECHR Preamble wording in a number of cases as a means for interpretation of Article 3 of Protocol no. 1.⁴⁵² Its main values are justice, non-violence,⁴⁵³ peace, freedom, rule of law and effective observance of human rights and fundamental freedoms. It follows that any system promoting and protecting them, in compliance with the requirements set out in Article 3 of the ECHR Protocol no. 1 will be

⁴⁴⁵ Annual Report 2008, Registry of the European Court of Human Rights (2009) pp. 132-133.

⁴⁴⁶ Early Parliamentary Elections, 1 June 2008, OSCE/ODIHR Election Observation Mission Final Report, pp. 25-28; and Macedonian Presidential and Municipal Elections, 22 March and 5 April 2009, OSCE/ODIHR Election Observation Mission Final Report, pp. 24-25.

⁴⁴⁷ Statement by the PACE pre-electoral delegation dated 2 March 2009 at <<http://www.coe.int>>.

⁴⁴⁸ EU, SEC(2008) 2695, 2008 Progress Report (Macedonia) p. 7-8.

⁴⁴⁹ The ECtHR, in a formation of the Grand Chamber, departs from the principles established by a precedent only when there is a good justification in order to maintain legal certainty, consistency and foreseeability as the main features of the rule of law.

⁴⁵⁰ Delmas-Marty, *The European Convention for the Protection of Human Rights* (1992) pp. 292-293; ECtHR, *What are the Limits to the Evolutive Interpretation of the Convention? Dialogue between Judges*, CoE (2011) pp. 6-7.

⁴⁵¹ Preamble of the ECHR states: "Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend".

⁴⁵² See among others, *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment of 2 March 1987; *Paksas v. Lithuanian*, Application no. 34932/04, Judgment of 6 January 2011.

⁴⁵³ In view of the exceptions allowing the state to interfere with the qualified rights with aim to protect security, public peace, rights and freedoms of others and to protect from crimes under the proportionality test.

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considered compatible with the “effective political democracy doctrine”.⁴⁵⁴ Inadequate protection of human rights and fundamental freedoms results in diminished democracy.⁴⁵⁵

The ECtHR also applies an evolutive interpretation,⁴⁵⁶ meaning that although Article 3, P-1, does not require a particular electoral system, any national electoral system must be assessed in light of the political evolution of the country concerned.⁴⁵⁷ Its cases are examined in view of the particular socio-political occurrences in the country and its history in terms of governance with the aim to protect effective and viable democracy and enable free expression of the will of the people.

The ECtHR uses a liberal doctrinal approach regarding the ECHR’s procedural requirements. The first argument lies in the acceptance of individual applications under Article 3 of the ECHR Protocol no. 1. The ECtHR has decided that the Protocol affords protection to individuals regarding their subjective electoral rights, as the Convention had to be read as a whole and there had not been a difference in substance between this article and other ECHR articles.⁴⁵⁸ The second argument along these lines lies in the wider interpretation of the normative concept of “legislature”. It encompasses not only national assemblies, but also regional assemblies with legislative power as well as the European Parliament in view of its role in the supranational decision-making. As a result, this pan-European judicial body effectively protects individual rights in a wider number of cases, relating to the election of the bodies qualified as a legislature under its case-law.

The ECtHR developed a core judicial doctrine -the margin of appreciation- as its analytical tool.⁴⁵⁹ This doctrine indicates what the states decide at local level without the ECtHR interference, as long as they are democratic and have used their power in a reasonable

⁴⁵⁴ See the ECHR Preamble.

⁴⁵⁵ See *mutatis mutandis Ahmed and Others v. the United Kingdom* (65/1997/849/1056) Judgment of 2 September 1998, paragraph 52.

⁴⁵⁶ Delmas-Marty, *The European Convention for the Protection of Human Rights* (1992) p. 292. From the ECtHR case-law, see in particular, *Mathieu-Mohin and Clerfayt v. Belgium*, cited-above, paragraph 54.

⁴⁵⁷ What are the Limits to the Evolutive Interpretation of the Convention? *Dialogue between Judges*, CoE (2011) p. 8.

⁴⁵⁸ *Mathieu-Mohin and Clerfayt v. Belgium*, cited above, paragraphs 48-51.

⁴⁵⁹ See among other authorities, Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) p. 12; Delmas-Marty, *The European Convention for the Protection of Human Rights* (1992) pp 331-334; Tiller & Cross, *What is Legal Doctrine?* *Northwestern University Law Review* Vol. 100, No. 1, p. 517.

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manner.⁴⁶⁰ In such a way, the ECtHR pays due attention to the relevant complex historico-political context of each ratifying country. It has repeatedly held that it could not substitute itself for domestic authorities in terms of assessing local needs and conditions, or substitute itself for a legislature, by imposing a legislative measure.⁴⁶¹ It follows that the margin of appreciation reflects the limits that the judges impose on themselves in line with the principle of subsidiarity and the separation of powers doctrine.

Despite the objection that by granting a space for maneuvering,⁴⁶² the ratifying states have an open door to minimize the protection of human rights (to which they must adhere by virtue of the ECHR ratification) the margin of appreciation gives a clear and consistent set of rules. These rules are used by the ECtHR to subject the states' measures and conduct to the European scrutiny, thus giving a firm message that no state may overstep the margin of appreciation.⁴⁶³ The ECHR Protocol no. 15 will supplement the Preamble with an explicit reference to the principle of subsidiarity and to the margin of appreciation (that the states enjoy in protecting the rights and freedoms of their citizens) which remains under the ECtHR's supervision.⁴⁶⁴

The "margin of appreciation doctrine" has also been applied in the adjudication of cases under Article 3 of the ECHR Protocol no. 1. Moreover, as a rule, the ratifying states enjoy a wide margin of appreciation in the electoral context.⁴⁶⁵ Similar to other types of cases the ECtHR scrutinizes closely the margin of appreciation, which is based on the following three rules:

⁴⁶⁰ Steiner, Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd edition) (2000) pp. 854-855.

⁴⁶¹ Spielmann, *Allowing the Rights Margin The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review* (version 2012) pp. 5-6 at <<http://www.cels.law.ac.uk>> accessed on 16 April 2013.

⁴⁶² Spielmann, *Allowing the Rights Margin The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review* (version 2012) p. 2, at <<http://www.cels.law.ac.uk>> accessed on 16 April 2013; *Mathieu-Mohin and Clerfayt v. Belgium*, cited above, paragraph 52. See also Delmas-Marty, *The European Convention for the Protection of Human Rights* (1992) pp 331-334.

⁴⁶³ *Handyside v. UK*, A 24, 1976, paragraphs 48-49.

⁴⁶⁴ Protocol no. 15 has been opened for signatures on 24 June 2013.

⁴⁶⁵ Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) p. 554.

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First, any interference with the qualified rights must be lawful, i.e., rooted in domestic substantive and procedural law, as well as in the ECHR.⁴⁶⁶ The law must be of a certain quality, meaning that it must be predictable, precise, clear and accessible. If it gives discretionary powers, their scope and effect must be clearly annunciated. For electoral disputes, the ECtHR relies on the Code of Good Practice in Electoral Matters: electoral rules must be adopted in timely manner before elections in compliance with the principles of fairness and transparency.⁴⁶⁷

Second, the interference must pursue a legitimate aim. As a rule, the aims whose origin lies in the protection of public good are laid down in the qualified articles. However, Article 3 of Protocol no. 1 does not contain a list of legitimate aims. The ECtHR has accepted a legitimacy of a plurality of aims such as crime prevention, protection of the rule of law, of a language arrangement that was publicly debated, and of national security. In fact, any aim mentioned in other ECHR articles or connected with institutional arrangements that reflect the public good in a democratic society, that is well-reasoned and justified, can be considered legitimate by the ECtHR. Yet, no aim that has a sole goal to punish or humiliate a person can be considered legitimate.⁴⁶⁸ The very wording of Article 3, P-1 allows a wider margin of appreciation, as the ratifying states can adduce any exception they consider befitting in circumstances. It follows that this article is more flexible, compared with articles that contain other qualified rights.

Third, there must be a necessity or pressing social need for the interference. The ECtHR applies the principle of proportionality, as the interference must be proportionate to the legitimate aim sought.⁴⁶⁹ Unlike other applications relating to the ECHR qualified rights, in election cases, the ECtHR does not examine if there is a pressing social need, as no such requirement is contained in the article. Rather, it conducts a balancing exercise between the right of an individual and protection of the public good. The balancing exercise does not mean that there are no European minimal standards, which the ratifying states must observe. On the contrary, the interference complained of must not be disproportionate or arbitrary to

⁴⁶⁶ See for example *Hirst (No. 2) v. the United Kingdom*, Application no. 74025/01, Judgment of 30 March 2004.

⁴⁶⁷ *Tănase and Chirtoacă v. Moldova* Application no. 7/08, Judgment of 18 November 2008.

⁴⁶⁸ See the Italian bankruptcy cases p. 93.

⁴⁶⁹ Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) pp. 11-12.

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the extent that it thwarts the free expression of the will of the people.⁴⁷⁰ The concept of arbitrariness encompasses the abuse of power, unfairness in the procedure and unjustified decisions in the electoral context. It refers to a mismatch between the measure chosen by the authorities and the purpose, even when the motivation for the measure is right.⁴⁷¹

The case-law presented below brings to light the criteria for holding free, fair and periodic elections under the ECHR. It also further clarifies the elements on which this article has been constructed.

a. Definition of Legislature

The ECHR only protects election rights for the election of a legislature, i.e., a parliament or regional assembly with legislative powers.⁴⁷² In a number of cases, the ECtHR examined the system of the country to see whether the body of whose elections the applicant complained was eligible for the protection of Article 3 of the ECHR Protocol no. 1. The body whose elections are at stake must possess “an inherent primary rulemaking power”⁴⁷³ to be qualified as legislature. The ECtHR has been empowered to examine more cases under the protective umbrella of the respective article, resulting from the autonomous interpretation of the term “legislature”.

In the *Mathieu-Mohin and Clerfayt v. Belgium* case, the Court reiterated that Article 3 of Protocol no. 1 must apply to election of at least one of the chambers of the legislature, if there were two chambers. In his concurring opinion, Judge Farinha considered that a requirement for free and fair elections of only one of the legislative chambers might open a door for elitist systems and undermine democracy.⁴⁷⁴ Although one could agree with the above, it might be unrealistic to increase this standard in view of the different constitutional traditions in the CoE region.

⁴⁷⁰ See *Mathieu-Mohin and Clerfayt*, Application no. 9267/81, Judgment of 2 March 1987, paragraph 52; *Gitonas and Others v. Greece*, Application nos. 18747/91, 19376/92, 19379/92, 28208/95 and 27755/95, Judgment of 1 July 1997, paragraph 39; and *Yumak and Sadak v. Turkey* [GC] Application no. 10226/03, Judgment of 30 January 2007.

⁴⁷¹ *Orujov v. Azerbaijan*, Application no. 4508/06, Judgment of 26 July 2011, paragraphs 40-42.

⁴⁷² *Mathieu-Mohin and Clerfayt v. Belgium* mentioned above, p.89.

⁴⁷³ Application. no. 11391/85, *Booth-Clibborn and others v. UK*, Decision of 5 July 1985, 43 DR 236.

⁴⁷⁴ See the concurring opinion of Judge Pinheiro Farinha regarding the case *Mathieu-Mohin and Clerfayt v. Belgium*.

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In the case *Santoro v. Italy*⁴⁷⁵ the applicant's right to vote for a regional assembly was at stake. The ECtHR concluded that the regional councils were a legislature within the meaning of Article 3 of Protocol no. 1, as they had legislative power in addition to the national parliament's law-making power, vested by the Constitution.

In *PY v. France*⁴⁷⁶ the election for the Congress of a French territory was at stake. The ECtHR, similarly to the previous cases, held that the scope of Article 3 of Protocol no. 1 was not limited to the national parliaments. The powers of the body concerned had to be interpreted in light of the constitutional structure of the state. In the instant case, the Congress had the power to initiate legislation, and to adopt status and budget. The ECtHR did not limit the definition of legislature to strictly law-making powers, with the aim of ensuring effective political democracy.

In order to examine whether or not this article should be also applicable for the elections of the European Parliament, the ECtHR examined, whether in view of its powers, the European Parliament should be considered as a legislature. In the case *Matthews v. UK*,⁴⁷⁷ the applicant who was from Gibraltar, complained that she was disfranchised from the European Parliament elections, by virtue of the European Community Act. The ECtHR concluded that the elections for the European Parliament were protected by Article 3 of Protocol no. 1, as the body concerned was a legislature with due regard being given to its principle power of accountability and its impact on the legislative process. In particular, the European Parliament had a decisive role in the creation of the Community legislation, which considerably regulated various areas in Gibraltar. In this case, the Court found a violation, as it held that even when a ratifying state transferred competence to an international organization, it still retained the responsibility for protecting rights guaranteed by the ECHR.⁴⁷⁸ In spite of the states' enjoyment of a wide margin of appreciation in the choice of electoral systems, the applicant in the instant case was completely denied the opportunity to express her opinion in the elections of the MPs.⁴⁷⁹ The judgment came 5 years after the date of submission of the application, but it had great impact, as it required a change in the UK

⁴⁷⁵ *Santoro v. Italy*, Application no. 36681/97, Judgment of 1 July 2004.

⁴⁷⁶ Application no. 66289/01, Judgment of 11 January 2005.

⁴⁷⁷ Application no. 24833/94, Judgment of 18 February 1999.

⁴⁷⁸ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 30.

⁴⁷⁹ Members of Parliament.

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electoral system, i.e., to allow its citizens to vote for the European Parliament, while ensuring the equality of votes. It also had a horizontal effect on other CoE countries with similar issues.

The ECtHR declared inadmissible the application of *Ljube Boskovski*⁴⁸⁰ regarding alleged violation of his right to stand for presidential election. After having examined the powers of the president in Macedonia, the ECtHR found that Article 3 of the ECHR Protocol no. 1 did not cover presidential elections regarding Macedonia, as the president did not have sufficient powers to qualify as a legislature.

b. The Right to Vote

The right to vote can be restricted under the ECHR. Nevertheless, no restrictions, such as residence or language requirements can be used in an arbitrary and discriminatory way, as demonstrated by the cases examined below.

Equality

The case *Mathieu-Mohin and Clerfayt v. Belgium*⁴⁸¹ concerned the elections in the regional councils in Brussels and the requirement to take an oath in the Flemish language, which automatically made the person a member of the Flemish Council. The ECtHR confirmed that the states had a wide margin of appreciation when determining the conditions attached to the election rights. However, the restrictions had to be in accordance with the law, pursue a legitimate aim and be proportionate. The ECtHR had to ascertain whether the election rights were not thwarted to such an extent so as to impair their very essence. Regardless of the election system, there had to be equality of treatment of citizens, which did not mean that all citizens had to have equal effect on the elections, or that all candidates had to have equal chances. No violation was found on the account that the citizens from both communities enjoyed the same conditions for exercise of their election rights, hence the limitations were not disproportionate. The ECtHR took into consideration the particular institutional

⁴⁸⁰ Application no. 11676/04, Decision of 2 September 2004.

⁴⁸¹ Application no. 9267/81, Judgment of 2 March 1987. The applicants complained in their double quality as elected officials and voters. The case was put under the sub-heading devoted to the right to vote, as it appears that the complaint that the voters could not elect their first choice candidate (based on ethnic criteria) for the Flemish council was of primary importance. A violation was found by the Human Rights Commission on this account.

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arrangements of Belgium, which came as a result of difficult negotiations between the two communities.

In other cases, the ECtHR also took its decisions in view of the particular politico-historical conditions in the state concerned. In particular, it attached high importance to the fact that the issue of controversy was publicly debated in line with the democratic principle of transparency, in order to ensure the “reality check” vis-à-vis that ratifying state.⁴⁸²

Incarcerated Persons

Regardless of the fact that the ECtHR examines election cases from the view point of the political evolution of each country, there are some restrictions of the active election right, which end up in a horizontal prohibition at the European level, with no exceptions.

The ECtHR examined the blanket ban of the prisoners’ vote in the cases *Hirst (No. 2) v. the United Kingdom* and *Calmanovici v. Romania*.⁴⁸³ In both cases the ECtHR found a violation, despite the wide margin of appreciation and considered the impugned blanket ban by law both arbitrary and discriminatory. In particular, it was connected with the classification of individuals as prisoners without other relevant circumstances (e.g. the offence for which they were convicted) being examined. It had also doubts about the legitimacy of aims put forward by the governments, i.e., prevention of crime, punishment of offenders and promotion of civic responsibilities and the rule of law. Since such a ban was automatically imposed, there was no assessment of the proportionality, which meant that a person could lose his voting right even in case of a minor violation. The CM⁴⁸⁴ deputies encouraged the United Kingdom to be sure to remove the consequences of such violations.⁴⁸⁵

The above judgments of the ECtHR go hand in hand with the HRC views, which require any deprivation of the voting rights to be of a short duration. Furthermore, it is more justified to

⁴⁸² See *mutatis mutandis* the case of *Fressoz and Roire v. France*, Application no. 29183/95, Judgment of 21 January 1999; and *Lindon, Otchakovsky-Laurens and July v. France*, Applications nos. 21279/02 and 36448/02, Judgment of 22 October 2007 [GC], especially the concurring opinion of the Judge Loucaidis and partly dissenting opinions of Judges Rozakis, Bratza, Tulkens and Sikuta.

⁴⁸³ See Annex VI, p. 280.

⁴⁸⁴ The CoE Committee of Ministers, which ensures the enforcement of the ECtHR judgments.

⁴⁸⁵ Communication on the activities of the Committee of Ministers, Report by the Slovenian Chair of the Committee of Ministers to the Parliamentary Assembly (April-June 2009) available at <<https://wcd.coe.int>> See also *Greens and M.T. v. the United Kingdom*, Application no. 60041/08, Judgment of 23 November 2010.

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disfranchise persons who tampered with elections or committed a crime when executing public function than in case of a simple traffic accident. As the ECtHR stated, the right to vote is no longer a privilege, but a universal right.⁴⁸⁶ The ECtHR re-affirmed these principles in the case of Frodl v. Austria.⁴⁸⁷

However, in the cases against Italy it seems, at first glance, that the above more comprehensive approach was abandoned. Namely, in the Labita⁴⁸⁸ and Santoro⁴⁸⁹ respectively, the ECtHR scrutinized the restriction on election rights when a person, who was not convicted, was placed under police supervision. The focus was on how the measure was implemented in the particular case, and not its imposition as a general measure. In the Santoro case, the ECHR found a violation on account of an unnecessary prolongation of administrative procedure for deleting/reinstating the applicant on the voters' list. In the Labita case, the applicant was acquitted of all charges, but he was disfranchised in order to stop voting for the mafia. According to the ECtHR even the fight against the mafia was not a sufficient reason to deprive a person from his voting right when he was cleared of all charges of belonging to the mafia.

Nowhere in the above cases, had the ECtHR stated that an exclusion of non-convicts from voting represented *per se* a violation of the ECHR, in view of the presumption of innocence protected by it. However, this does not mean that the ECtHR denies either. In contrast, the afore-mentioned cases against Romania and the UK were examined under the general loop of legislative assessment and the automatic imposition of disfranchisement.

Persons with Mental Impairment

In the case Alajos Kiss v. Hungary⁴⁹⁰, the applicant who was placed under a guardianship due to her mental state, was disfranchised. The ECtHR took an approach in line with the UNCRPD, which endorses voting rights for persons with mental disability. It found a violation on the account that there was a blanket and automatic prohibition for mentally

⁴⁸⁶ See also case of Scoppola v. Italy no. 3, Application no. 126/05, Judgment of 18 January 2011, where the ECtHR found a violation of election rights of a convict who lost his election right for indefinite period of time.

⁴⁸⁷ Application no. 20201/04, Judgment of 8 April 2010. See also Cucu v. Romania, Application no. 22362/06, Judgment of 13 November 2012.

⁴⁸⁸ Application no. 26772/95, Judgment of 6 April 2000.

⁴⁸⁹ Application no. 36681/97, Judgment of 2 March 1987.

⁴⁹⁰ Application no. 38832/06, Judgment of 20 May 2010.

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impaired persons to vote, without any individual examination of their particular circumstances by the authorities.

Residence

The residence requirement was examined in the case *PY v. France*,⁴⁹¹ in the political context of self-determination of a French territory. The election was a part of the package, which ended a difficult security and political situation. The applicant complained about a too lengthy residence requirement to vote for members of the Congress. The ECtHR assessed the length of residence in light of the country's political evolution. It reiterated that the features, which might have been unacceptable for one system might be justified in another due to local conditions under ECHR Article 56 (3), applicable to territories under administration. There was a positive and conclusive proof for the local requirements, which in this case were the history and status of New Caledonia and its process of self-determination.

This clear-cut case confirms that there are situations where a particular politico-historic context plays a major role, as affirmed by the ECHR.

Although, countries of origin do not have an absolute obligation to give immigrants voting rights,⁴⁹² in the more recent case of *Sitaropoulos and Others v. Greece*⁴⁹³ the respondent state was found in breach of the ECHR. The reason was that no election was organized in the places of residents of the Greek immigrants, despite the Greek Constitution requirement to regulate out-of-country voting. The trip back to Greece only to vote, imposed a financial burden on the immigrants and put them in an unequal position. The ECtHR rejected the argument that states enjoyed a wide margin of appreciation in this regard as it found that there was a European trend to organize out-of-country voting.

This ECtHR judgment clearly lacks analysis of the available systems of out-of-country voting with, e.g., estimation of the needed resources and funds for their organization, the number of citizens voting abroad at the particular polling stations, the distance they would need to travel to vote, and difficulties in safeguarding free and fair elections in case of postal or electronic voting. Such analysis would help avoid imposing too heavy burden on the state in terms of funds and protection of electoral rights. Unsurprisingly, the judgment was reversed by the

⁴⁹¹ Application no. 66289/01, Judgment of 11 January 2005.

⁴⁹² Application no. 7730/76, X v. UK, Decision of 28 February 1979.

⁴⁹³ Application no. 42202/07, Judgment of 8 July 2010.

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Grand Chamber,⁴⁹⁴ on account that neither international law nor the Constitution made it mandatory for Greece to allow the voters to vote abroad; the states enjoyed a wide margin of appreciation in this regard; and the applicants were not disproportionately burdened by the impossibility to vote in Greece.

Property

The ECtHR found a violation of election rights against Italy for temporary disenfranchisement of persons who went bankrupt. The cases of *Albanese v. Italy*, *Vitello v. Italy*, *Bova v. Italy*, *Campagnano v. Italy*,⁴⁹⁵ as well as a number of other 2006 cases refer to this issue. Although bankruptcy proceedings were not of a penal character, the applicants were penalized by being deprived of their constitutional right to vote with the only aim being to humiliate them. The ECtHR examined the domestic law that imposed such a restriction and found it incompatible with the requirements of the Convention, as it did not pursue a legitimate aim. It appears that to date, Italy has not taken a general measure to remedy the repetitive violations originating from the suspension of voting rights in case of bankruptcy.

c. The Right to Stand for Election

The right to stand for elections is also not an absolute right. States can impose even stricter criterion on this right in comparison to those attached to the right to vote. The ECtHR examined a number of complaints in this regard, ranging from a system of deposits to an election threshold.⁴⁹⁶

Lustration

A number of cases originating in Eastern Europe relate to the ineligibility of the candidates to stand for elections on the basis of their past political activities, or their involvement with the security services of the past regime. The most interesting case concerning lustration is *Zdanoka v. Latvia*⁴⁹⁷ where the applicant was declared ineligible to stand for elections due to her former membership in the Communist party which had been banned for an indefinite time. While the case was pending before the ECtHR she won a seat in the European Parliament.

⁴⁹⁴ Judgment of 15 March 2012.

⁴⁹⁵ See Annex VI, p. 280.

⁴⁹⁶ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 397.

⁴⁹⁷ Application no. 58278/00, Judgment of 17 June 2004.

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On one hand, the applicant complained that there was nothing in her personal conduct to justify the restriction of her passive election right. On the other hand, the government contended that the restriction pursued a legitimate aim, i.e., protection of democratic order from those who have turned against it and did not respect democratic principles in the past, as well as protection of national security and the state's independence. According to the government, the measure was proportionate, as it only targeted persons who actively participated in the operations threatening Latvia's independence after the attempted coup d'état supported by the applicant's party. The ECtHR Chamber found a violation, as the disqualification from elections was permanent and domestic courts did not have the possibility to examine on individual bases, if the restriction was still proportionate to the aim pursued. The dissenting judge considered that when the principles of democracy and state sovereignty might be at stake, the countries enjoy a wide margin of appreciation. Furthermore, judicial decisions could not resolve the problems of serious political character and in such cases, the ECtHR had to impose a self-restraint, as it had not been equipped to provide political analysis.

Upon the request of the Latvian government, the Grand Chamber reversed the judgment and found that Latvia did not exceed the margin of appreciation. In particular, the authorities were better placed to assess the difficulties when establishing democratic order in view of the country's historico-political context. Moreover, the aim of the ECHR was to protect democratic values and democracy as the only system, so nothing aimed at destruction of these values could attract the protection of the ECHR. As long as the statutory distinction itself was clear, proportionate and not discriminatory regarding the whole category or group specified in the legislation, the task of domestic court could be limited to establishing if the individual belonged to that group. It was not necessary for the domestic courts to assess the proportionality of the measure imposed on the applicants. However, in view of the Latvia's current stability, the ECtHR requested the legislature to review the statutory restrictions with aim to bring it to early termination, since in well-established democracies such limitation of the passive election right would be hardly deemed acceptable. In a number of dissenting opinions to the Grand Chamber judgment, it was expressed that the election ban came late, as it was not imposed when there was a threat alleged by the government for protection of the democratic constitutional system. Therefore, the restriction was a punitive measure for a person who at the time of nomination did not represent a threat to the system. It was also

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considered that the Grand Chamber took sides in a historical conflict instead to base its decision on legal analysis.⁴⁹⁸

In another case against Latvia, the *Adamsons case*,⁴⁹⁹ the applicant occupied posts, which were subordinated to the KGB during the soviet times. After the independence of Latvia, he occupied public posts including MP post. The applicant was declared ineligible to stand for the 2002 elections on the account of his past collaboration with the ex-Soviet Union security bodies. The ensuing judicial proceedings were to no avail.

The ECtHR invoked the principles set out in the above *Zdanoka* case. Therefore, it assessed the relevant legislation depriving the applicant from his right to stand for elections in light of political evolution of the country, i.e., something which was unacceptable in one system, could be justified in the context of another. The ECtHR in light of its previous case-law, recalled the principles for lustration laws, as follows:

First, the lustration law had to be clear, accessible and foreseeable. Second, it should not serve the purpose of punishment, which was the task of the criminal law. Third, the lustration law had to be precise, so that the responsibility is individualized for each person concerned. Finally, the lustration law measures had to be temporary.

In the instant case, the ECtHR established a violation of Article 3 of the ECHR Protocol no. 1, as Latvia overstepped its margin of appreciation. It concluded *inter alia* that despite the Grand Chamber's judgment in the *Zdanoka* case indicating that it was sufficient to establish if the applicant belonged to a certain defined group, after a certain period of time such group assessment was not sufficient for the ECHR's purposes. The ECtHR noted that there was no information or evidence that the applicant caused damage to Latvia's independence and its democracy. In addition, the applicant was declared ineligible to be elected 10 years after his military career, during which he had occupied public functions in independent Latvia. The Court also noted that without any explanation the lustration law was extended for additional 10 years, which again affected the applicant.

The Chambers' judgments were not reversed by the Grand Chamber in many cases, although many controversial social issues were tackled by the ECtHR. In the *Zdanoka* case, in spite of

⁴⁹⁸ See, in particular, joint dissenting opinion of Judges Mijović and Gyulumyan of the above *Zdanoka Judgment* [GC].

⁴⁹⁹ Application no. 3669/03, Judgment of 24 June 2008.

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the wide margin of appreciation, the Grand Chamber still requested termination of the measure in view of the ECHR general standards. It does not come as a surprise that in the *Adamsons* case, the ECtHR Chamber followed the reasoning of the *Zdanoka* Chamber judgment, and in some way criticized the Grand Chamber judgment for allowing too wide a margin of appreciation for Latvia, instead of following the established general principles. Latvia did not appeal the *Adamson's* judgment to the Grand Chamber, so the latter could not pronounce on this case.

There is a clear difference between the factual situations in both cases. Whereas in *Zdanoka* the applicant used to be a member of a banned party which had a role to play in the coup d'état and the applicant did not indicate her disagreement with her party's actions, in the latter case the applicant executed a number of important functions in democratic and independent Latvia. The facts of the *Zdanoka case* were sufficient for the Grand Chamber to depart from the general principles, which were confirmed also in other cases not relating to lustration. The ECtHR made its analysis based on the above general principles in the Spanish cases examined below.⁵⁰⁰

In *Petkov and others v. Bulgaria*⁵⁰¹ the ECtHR limited its examination to the protection of the effectiveness of the legal system and powers and reputation of domestic courts. On the basis of the lustration law exposing ex-collaborators of ex-security agencies, and in accordance with a certificate issued by a competent commission, the applicants were removed from the candidates' list upon their Coalition's requests. In the ensuing proceedings the administrative court quashed the decision of the electoral authorities for removal of the applicants from the candidates' list, as it found that such a decision could have only been based on the Commission's report and not on a certificate. Since the applicants were not reinstated on the candidates' lists, they complained that the refusal of the authorities to comply with the administrative court's final judgment infringed their passive election right under article 3 of Protocol no. 1. The ECtHR affirmed that any limitations imposed with respect to passive election rights had to be consistent with the rule of law and surrounded by sufficient safeguards against arbitrariness and abuse of power. It established a breach of Article 3 of the

⁵⁰⁰ See p. 97.

⁵⁰¹ Application nos. 77568/01, 178/02, 505/02, Judgment of 11 June 2009.

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ECHR Protocol no. 1 on the account that conduct of the authorities undermined the effectiveness of the legal system.

This ECtHR judgment aimed at preserving the authority of the courts as a branch of government in view of the separation of powers doctrine.

Illegal Activities

In Etxebarria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and Others v. Spain and other 2009 similar judgments against Spain,⁵⁰² the election candidates' nomination was annulled by domestic court, as the main aim of their political activity was to pursue the purposes of illegal parties. The legitimate aim for the interference was to protect democracy, and the measure used was proportional to the aim pursued, since the assessments were made individually and the measures were imposed according to the individual situation. As a result, some of the complaints were accepted by domestic courts on the basis that no sufficiently strong link was established as existing between the candidates and the dissolved parties. For those whose complaints were rejected, on the basis of evidence domestic courts established that they intended to pursue activities of dissolved parties that were supporting violence and activities of ETA. Furthermore, in regional governments there were representatives advocating political independence, which meant that there was no intention by the Spanish Government to prohibit all manifestations of the idea of independence.

The ECtHR in this case also adhered to its general principles of individualization, non-violence and protection of the freedom of expression.

In several of its judgments, the ECtHR noted the cases decided by the former Commission of Human Rights. The latter examined whether or not the decision to withdraw individual's election rights on account of his or her previous activities constituted a violation of Article 3 of Protocol No. 1. For example, the former Commission declared inadmissible the applications *X. v. the Netherlands*,⁵⁰³ *X. v. Belgium*,⁵⁰⁴ and *Van Wambeke v. Belgium*.⁵⁰⁵ In these cases the applicants, who had been convicted following the Second World War of collaboration with the enemy or treason, were permanently deprived of election rights. The

⁵⁰² See Annex VI, p. 280.

⁵⁰³ Application no. 6573/74, Commission decision of 19 December 1974, DR 1, p. 88.

⁵⁰⁴ Application no. 8701/79, Commission decision of 3 December 1979, DR 18, p. 250.

⁵⁰⁵ Application no. 16692/90, Commission decision of 12 April 1991.

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Commission considered that the purpose of legislation depriving persons convicted of treason of certain political rights was to ensure that persons who had seriously abused in wartime their right to participate in public life, were prevented in future from abusing their political rights in a manner prejudicial to the security of the state or the foundations of a democratic society. Similarly, in the case of *Glimmerveen and Hagenbeek v. the Netherlands*,⁵⁰⁶ the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic affiliation, to stand for election. On that occasion, the Commission referred to Article 17⁵⁰⁷ of the Convention, as the applicants “intended to participate in these elections and to avail themselves of the right for a purpose which the Commission [had] found to be unacceptable under Article 17”.

From the above cases, it is clear that the ECtHR attaches the greatest importance to the legal guarantees for election rights and plurality of choice for the voters. Yet, the red line of participation in and connection with the activities inciting violence and religious and racial hatred must not be crossed. When there is a criminal conviction for serious criminal cases, deprivation of election rights could be one of the measures imposed for a legitimate aim, e.g., preservation of security and democratic order, or the rights of others. As a rule, no one should be permanently deprived of election rights.

The cases of *Abil v. Azerbaijan*⁵⁰⁸ and *Atakishi v. Azerbaijan*⁵⁰⁹ examined the question of disqualification of an electoral candidate against whom there were allegations of bribe and of stirring-up social, racial, ethnic or religious hatred and hostility by his electoral campaign.⁵¹⁰ The ECtHR reiterated its previous case-law where in order to disqualify a candidate, the authorities had to offer sufficient safeguards against arbitrariness and provide good reasons in line with the rule of law principle. The ECtHR found a number of procedural errors, as well as a wrongful characterization of the alleged offence for which the applicant was disqualified from the election.⁵¹¹

⁵⁰⁶ Application nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187.

⁵⁰⁷ It reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

⁵⁰⁸ Application no. 16511/06, Judgment of 21 May 2012.

⁵⁰⁹ Application no. 18469/06, Judgment of 28 May 2012.

⁵¹⁰ The *Atakishi* case.

⁵¹¹ *Ibid.*

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One of the reasons the ECtHR found violations in both cases was the lack of sufficient and relevant evidence to disqualify a candidate. Whereas under Article 6 of the ECHR, the ECtHR does not assess the evidence and does not act as a fourth instance court, when the passive electoral right is at stake, the Court scrutinizes in-depth the proofs of the alleged electoral fraud in line with the principles laid down in the case of the *Orujov v. Azerbaijan* Judgment.⁵¹² These principles say that when electoral candidates are disqualified because of a suspicion of illegal activities, the authorities must display due diligence regarding the standard of proof against the electoral candidate and the relevant legal remedies must be adequate, impartial and effective. Otherwise, electoral candidates might be easily disqualified from the election by unfounded allegations of fraud.

Although a violation of the ECHR relevant article was found in all three above-mentioned cases, the judgments came 6 to 7 years after the elections, and thus did not represent an adequate redress for the applicants, in terms of their participation in elections. The judgments will attain their effect in the future, provided that the authorities change their practice that runs contrary to the requirements for free and fair elections.

In the case of *Paksas v. Lithuania*,⁵¹³ the applicant was barred from running in elections, as he had been impeached by the Constitutional Court, during his presidency. The ECtHR did not accept the argument of the Government that in the election cases a wide margin of appreciation ought to be granted to the states without a long democratic tradition. According to the Court, such a strict impeachment rule represented an exception in Europe. The Court found that although the restriction was based on law and pursued a legitimate aim, i.e., preservation of democratic order, the measure imposed was disproportional to the aim sought, as the election ban on the applicant was indefinite and irreversible.

Dual Citizenship

The case of *Tănase and Chirtoacă v. Moldova*,⁵¹⁴ concerned the inability of persons with multiple nationalities to stand as candidates in parliamentary elections or to take the office, by virtue of legislation. Basing its arguments on the European Convention on Nationality and

⁵¹² Application no. 4508/06, Judgment of 26 July 2011. See also *Khanhuseyn Aliyev v. Azerbaijan*, Application no. 19554/06, Judgment of 21 May 2012.

⁵¹³ Application no. 34932/04, Judgment of 6 January 2011.

⁵¹⁴ Application no. 7/08, Judgment of 18 November 2008.

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the activities of the CoE, the ECtHR agreed that the legitimate aim for the measure was to ensure the loyalty to the State, but not to the government as the latter must be held accountable by the MPs. The amendments to the law introduced less than a year before elections was especially detrimental to the opposition.

Moldova was the only country, which allowed dual nationality and yet prohibited those persons from being MPs. The ECtHR established a violation, *inter alia*, as for ensuring loyalty Moldova could use less strict measures not affecting the free expression of the people's will.

In an earlier case against the UK concerning the right to stand for election for citizens with dual citizenship, the Convention institutions⁵¹⁵ did not find a breach of the ECHR. However, the above UK case only concerned a restriction for persons who had already been a member of the legislature, not those who wished to stand for election for another country's legislature.

Electoral Deposits

The ECtHR examined the question of electoral deposits in the case of *Sukhovetsky v. Ukraine*⁵¹⁶ and found no violation of the Convention. Also from the point of view of the Code of Good Practice in Electoral Matters, it held that deposits pursued a legitimate aim, i.e., an effective, streamlined, serious representation, whilst avoiding the unreasonable outlay of public funds. In addition, there was a serious public debate before this measure was adopted, and it was subject of considerable parliamentary and constitutional court's scrutiny. The ECtHR considered that in the particular circumstances the deposits were not an obstacle to pluralism, or an impenetrable administrative or financial barrier.

Conflict of Interest

In *Ahmed and others v. UK*⁵¹⁷ the authorities introduced a regulation restricting political activities for certain higher categories of local civil servants. They were *inter alia* prohibited from standing for local, national and European elections and from campaigning. The Court did not find a violation of Article 3 of Protocol no. 1, considering that election rights were not

⁵¹⁵ The term "Convention institutions" is used to designate together the European Court of Human Rights and the European Commission of Human Rights that existed before the ECHR Protocol 11 entered into force, which introduced a permanent Court.

⁵¹⁶ Application no. 13716/02, Judgment of 28 March 2006.

⁵¹⁷ Decided under the arrangement before Protocol no. 11 entered into force.

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absolute and the states imposed different criteria for their enjoyment. The restriction complained of was not found to be disproportionate, as it pursued a legitimate aim, i.e., to avoid any appearance of bias with respect to execution of duties by local civil servants, and it was of a temporary character. As a result, it did not impair the free expression of the opinion of the people.

It seems that although the UK law could have foreseen the absence of leave for the affected civil servants until the election results were known, it does not appear that the lack of such a rule upset the balance between the choice of the electorate and the requirement for impartiality and loyalty of civil servants. Even more so, such an opportunity still provides an open door for abuse of the position by misuse of public funds, nepotism and providing partisan advice due to the loyalty owed to the party, which in some instances might be difficult to control.

Azerbaijani law does not allow clergyman while engaged in professional religious activities to run in various types of elections. In the case of *Seyidzade v. Azerbaijan* although the applicant resigned from his post, his nomination as electoral candidate was rejected based on the above law. The ECtHR based its judgment on the lack of quality of the law, which it found lacking foreseeability in the electoral context. Nevertheless, the reasons for the breach appear to be better elaborated in the concurring opinion, which based the Court's findings on the arbitrary manner of the application of the law.

The case *Kovach v. Ukraine*⁵¹⁸ concerned the invalidation of votes obtained by the leading candidate in several electoral districts, which resulted in his losing the election. The ECtHR established a violation holding that the invalidation was arbitrary. The main reason for the Court's decision was the lack of clarity of the respective legislation, which empowered the electoral commissions to invalidate votes on the basis of "other circumstances which made it impossible to establish the wishes of the voters".

Untrue Information Supplied by the Candidate

A number of cases with various factual situations were examined under Article 3 of Protocol no. 1 concerning a refusal to confirm a candidate for elections based on untrue information

⁵¹⁸ Application no. 39424/02, Judgment of 7 February 2008.

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submitted by him or her. For example, in the case of *Russian Conservative Party of Entrepreneurs and Others v. Russia*,⁵¹⁹ the applicant party candidates' list was refused since some of the leading candidates submitted untrue information about their property. By virtue of legislation, the entire candidates' list had to be rejected in such a case. Despite the fact that the ensuing judicial proceedings were favorable to the applicant party, upon a prosecutor's supervisory request the judicial decisions were reversed to the applicant's detriment. The impugned legislation was also ruled as unconstitutional at a later stage. The ECtHR found a violation on two accounts: 1) that extraordinary supervision requested by the prosecutor was against the principle of legal certainty when there was a final judgment in the case, and 2) that the applicant party and the second applicant, although had not breached the election law, had to bear consequences which were disproportionate to the legitimate aim sought, i.e., true information from the candidates about their financial situation. However, the ECtHR rejected the complaint alleging violation of the right to vote for the party applicant, holding *inter alia* that the plurality of the choice was preserved in the elections.

It appears that the ECtHR did not answer the substance of the complaint, i.e., that due to the unlawful interference of the authorities with the guarantees of Article 3 to Protocol no. 1 as ascertained by the ECtHR, the applicant was unable to cast his vote for the initial option of his own choosing. In order to ascertain whether or not the plurality of choice was indeed preserved, the Court had to embark on the analysis of political programmes, options and relations between the parties in the country, for which it was not equipped and which would have made it enter the field of political analysis.

In *Melnychenko against Ukraine*⁵²⁰, another case in connection with furnishing untrue information, the ECtHR again established a breach of the ECHR. The case concerned an applicant against whom criminal proceedings were started for the alleged disclosure of confidential information to the opposition. He was granted asylum in another state, but retained his officially registered address in Ukraine. At the next legislative elections the opposition nominated him. Because he was not in Ukraine, his candidature was rejected although he had a permanent residence there. The electoral body concluded that the document with his permanent residence contained false information. In the instant case, the ECtHR

⁵¹⁹ Application no. 55066/00, Judgment of 11 January 2007.

⁵²⁰ Application no. 17707/02, Judgment of 19 October 2004.

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considered that the electoral body should not have blindly followed the law requiring a 5-year residence in the country, but should have taken into consideration the special situation in which the applicant found himself, i.e., that he had to leave the country, fearful of political persecution.

In the *Krasnov and Skuratov v. Russia*⁵²¹ the ECtHR agreed with the Government that the measure was proportionate to the aim pursued with respect to the first applicant, since he knowingly submitted untrue information that could have affected voters' ability to make an informed choice. Perhaps it was not necessary for the ECtHR to examine the proportionality of the measure, as the aim to have true information about the election candidates and to avoid any misrepresentations to the voters seems sufficient to reject the complaint.

Regarding the second applicant, the ECtHR found a breach of the ECHR on the account that the decisions rejecting the candidacy failed to meet the Convention standards of lawfulness and foreseeability, i.e., the law had to be sufficiently precise to allow the person with an appropriate advice to foresee the consequences, which a given action might entail.

Unlike the above Russian case regarding the first applicant, in the *Sarykhanuan v. Armenia*⁵²² the ECtHR noted that there was no ill-will or intention from the candidate to conceal the information, which was minor for the candidacy. A violation of Article 3 of Protocol no. 1 was found since no reasoned assessment, corroborated with evidence was made by the domestic courts regarding the particular circumstances of the applicant.

Electoral Fraud

In the *Georgian Labour Party v. Georgia*,⁵²³ a political party complained about a compilation of the voters' lists, the composition of electoral commissions and the annulment of elections in two constituencies, without their repetition. As in the previous cases, the ECtHR found that political party that submitted candidates' list could be considered a victim of the P1-3. The ECtHR did not find a violation regarding the voters' lists and electoral administration in view of the very specific political circumstances and the conduct of the authorities who reasonable attempted to make the voters' lists more accurate. Despite concluding that there was a fundamental flaw regarding the manner of the establishment of the election administration,

⁵²¹ Application nos. 17864/04, 21396/04, Judgment of 19 July 2007.

⁵²² Application no. 39878/03, Judgment of 27 May 2008.

⁵²³ Application no. 9103/04, Judgment of 8 July 2008.

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and despite *mutatis mutandis* requirement for objective institutional independence under Article 6, the ECtHR still required concrete evidence of abuse by the election administration. The OSCE EOM reports, which expressed doubts regarding the lawfulness of the actions of the election administration were insufficient.

The ECtHR found a violation of the applicant party's right to stand for election on the ground of the annulment of the parliamentary elections in two constituencies and the failure to repeat them. Such conduct effectively deprived a large number of voters from casting their ballot, while at the same time impairing the expression of the free will of the voters. Thus, the democratic validity of a legislature elected in such a way and the laws it eventually adopts were undermined. Despite a wide margin of appreciation and the political peculiarities of the situation, which were taken into consideration by the ECtHR, it held that regardless of security problems, the state concerned still had an obligation to conduct free and fair elections country-wide. This was true even more so, since it did not declare a derogation under Article 15.

In the case of *Namat Aliyev v. Azerbaijan*⁵²⁴ the applicant complained about a number of irregularities on the election day, which made it impossible to determine the true opinion of the voters and infringed his passive election right. The ensuing legal remedies were to no avail. The OSCE/ODIHR election observation report recorded a number of serious irregularities. Interestingly enough, the ECtHR rejected the Government's argument that even if there were election irregularities they would have not effected the election outcome, as it found that what was at stake was not who would win the election, but the individual's right to stand for office. The ECtHR found a violation because the electoral commission left the applicant's complaint unexamined, and the appeals and supreme courts instead of investigating his subsequent appeals, rejected them for purely formalistic reasons. As in other election-related cases, the ECtHR re-iterated the important place that an adequate and effective legal remedy holds in a democratic society. Similarly, in another *Azerbaijani* case⁵²⁵ a violation was found when authorities did not process the irregularities in a fair and impartial

⁵²⁴ Application no. 18705/06, Judgment of 8 April 2010.

⁵²⁵ *Kerimova v. Azerbaijan*, Application no. 20799/06, Judgment of 30 September 2010. See also, *Mammadov v. Azerbaijan* (no. 2) Application no. 4641/06, Judgment of 10 April 2012; and *Hajili v. Azerbaijan*, Application no. 6984/06, Judgment of 6 December 2011 regarding annulment of electoral results.

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manner, which resulted in the annulment of elections to the detriment of the winning candidate who in no way participated in the commission of those irregularities. Unlike the previous case, the ECtHR emphasized that the election administration could and should have determined the electoral outcome despite the irregularities, as the will of the voters was clearly demonstrated. In fact, it transpires from the circumstances of this case, that the irregularities were committed with the purpose to deprive the winning opposition candidate of his right to occupy an office. So, it was not only the individual's right to stand for election what was at stake, but also the voters' choice about who was fit and trustworthy to occupy elected public office, which shows the gravity of the violation of Article 3 of Protocol no. 1 committed by the Azerbaijani authorities.

Mandate Entrusted to the Wining Candidate

A surprisingly large number of ECHR cases deal with the termination of a mandate of regularly elected officials. For example, in *Lykourazos v. Greece*⁵²⁶ the applicant, a practicing lawyer, was elected a member of parliament (MP). However, after entry into force of the legislation that proscribed professional activity with the aim of avoiding conflicts of interest for MPs, his mandate was terminated. The Court found a violation on the grounds that Article 3 of Protocol no. 1 guaranteed also the individual's right to occupy the office, once elected. In the instant case, the applicant was elected in free and fair elections, and the later disqualification was not foreseeable.

Again, the ECtHR based its reasoning on the rule of law argument, by stating that no subsequent amendments to the organization of electoral system could call the choice of the voters into question, except for compelling democratic reasons, which did not exist in the instant case. The applicant was awarded damages, but it is unclear if he was re-instated as an MP, in line with the ECtHR's judgment.⁵²⁷

In *the Paschalidis, Koutmeridis and Zaharakis*⁵²⁸ *v. Greece* the ECtHR again found a breach of the right of elected MPs to occupy the office. In fact, the Greek court changed its previous

⁵²⁶ Application no. 33554/03, Judgment of 15 June 2006.

⁵²⁷ For the stability of the electoral law see *Ekoglasnost v. Bulgaria*, Application no. 30386/05, Judgment of 6 November 2012, where the amendments to the electoral law two months before elections were considered a breach of the ECHR on the account that no proper balance was struck between the legitimate interests of the society and the right of the applicant to stand in elections.

⁵²⁸ Application nos. 27863/05, 28422/05, 28028/05, Judgment of 10 April 2008.

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decision regarding the rules of tabulation and decided that blank ballots had to be counted. As a consequence, the seats already won by the applicants were re-allocated and they lost their mandates. However, in other parts of Greece the blank ballots were not counted, which put the MPs in an unequal position.

As shown in the above cases, the ECtHR often bases its reasoning on the foreseeability requirement of the legislation, as one of the rule of law elements.

In yet another case against Greece, *Gitonas* and others,⁵²⁹ elected public officials could not occupy their posts, because of the rules not allowing public functions to be cumulated for a certain period of time. The applicants had managerial posts with public media, social security office and posts under supervision of the Prime Minister. A special court annulled their election to avoid conflict of interest. The aim was to ensure freedom from abusive advantages to the detriment of others and to protect others from undue pressures coming from persons in decision-making positions. The ECtHR found that the Greek court had reasonable motives when it decided to annul the elections. Further, the annulment was not contrary to the Greek legislation, as it was neither arbitrary nor disproportionate and did not thwart the free expression of the people. Therefore, no violation was found.

In view of other ECtHR cases which were decided later and according to which higher protection should be afforded to already-elected candidates, one question immediately comes up, although it was not addressed by the Court. Why did the Greek authorities not react earlier, at the stage when the applicants were not yet confirmed as election candidates, if the conflict of interest was so clear from the outset?

In the case of *Ilicak v. Turkey*⁵³⁰ the Court found a violation when the applicant's mandate was terminated, because she belonged to a political party, which was dissolved. However, she and the applicant in the case of *Kavakci v. Turkey*⁵³¹ complained that the real reason why their mandates were terminated was their wearing a veil in the parliament. Although the ECtHR agreed that protection of laicism, as well as protection of the rights of others was a legitimate aim, it established a violation, *inter alia*, on the account that the loss of a mandate was a very strict penalty. According to the ECtHR, the authorities had to react before the candidates were confirmed.

⁵²⁹ Application nos. 18747/91, 19376/92, 19379/92, 28208/95 and 27755/95, Judgment of 1 July 1997.

⁵³⁰ Application no. 15294/02, Judgment of 5 April 2007.

⁵³¹ Application no. 71907/01, Judgment of 5 April 2007.

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Drawing a parallel between these cases and the previous Spanish cases, it is clear that the ECtHR attaches higher guarantees to Article 3 of the ECHR Protocol no. 1 in cases when the applicants are already elected. Still, in view of the fact that the ECtHR interprets the ECHR based on all its provisions, the analysis of the situation of the women's rights in Turkey from the viewpoint of protection of the rights of others and the ECHR Article 9 seems to be missing in the reasoning of the above judgments against Turkey. Perhaps it is better to have a woman-MP with a veil, than not to have any female MPs at all.

In *Gaulidier v. Slovakia*⁵³² the applicant was made to sign a resignation letter with no date, before his election as MP. When he left his party, the letter was sent to the parliament that accepted his resignation, in spite of the applicant's denial. Although the constitutional court decided that the applicant could not be deprived of his seat under these circumstances because of the lack of genuine will to resign, it lacked the jurisdiction to quash the impugned parliamentary resolution. The case ended with a friendly settlement, a monetary compensation and a press release by the government and the Prime Minister regretting that the applicant could not obtain a redress in the situation.

In this case, again the emphasis is put on the need of effective and adequate remedy for the rights stemming from Article 3 of Protocol no. 1.

In the *Selim Sadak and Others v. Turkey*⁵³³ the ECtHR examined the situation when the dissolution of a political party meant forfeiting the parliamentary seats of the applicants, who were militating for Kurdish rights. In accordance with its consistent approach regarding similar cases, the ECtHR found a violation holding *inter alia* that the loss of mandate was a disproportionate sever penalty and that domestic courts failed to examine personal political activities of each applicant. In addition, the measure used by the Turkish authorities infringed the rights of the electorate who elected the applicants.⁵³⁴

Representation of Minorities

⁵³² Application no. 36909/97, Report of the Commission 10 September 1999.

⁵³³ Application nos. 25144/94; 26149/95-26154/95, 27100/95 and 27101/95, Judgment of 11 June 2002.

⁵³⁴ Application nos. 25144/94, 26149/95 to 26154/94, 27100/95 and 27101/95, Judgment of 11 June 2002, paragraph 40.

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In the case *Aziz against Cyprus* which also concerned a right to vote of a member of a minority, the ECtHR found a violation. The latter case differed in the sense that there was no possibility whatsoever for the Turkish Cypriots to vote in parliamentary elections, while in the Belgian case there was a mechanism in place allowing French-speaking persons to exercise their election rights. Despite the fact that the division on two voters' lists based on ethnicity was an institutional arrangement like in the Belgian case, the ECtHR found that while the factual situation changed, the legislation remained the same, thus excluding the applicant from the voters' list solely on the basis of his ethnicity. The ECtHR requested Cyprus to implement an inevitable election reform, in addition to the damages awarded. Indeed, Cyprus adopted new electoral legislation giving equal voting rights to its citizens of Turkish origin.⁵³⁵

In *Yumak and Sadak v. Turkey*,⁵³⁶ the Court examined if the electoral threshold of 10% applied nationwide in the parliamentary elections was too high. Like in the previous cases the ECtHR, including Grand Chamber,⁵³⁷ relied heavily on the aim, i.e., to strengthen the government stability in light of the specific political context and the foreseeability of the law in question. The *amicus curiae* confirmed that such a high threshold made it impossible for the Kurdish parties to obtain any seats in the national parliament, and was contrary to the ECHR requirement that various political parties be ensured a reasonable opportunity to present their candidates at national elections. The ECtHR found that the constitutional court was providing a safeguard and a balance by seeking the point of equilibrium between the principle of fair representation and governmental stability. Even the fact that Turkey had the highest threshold in Europe, not consistent with election standards, and which effectively deprived a minority from being represented in the Parliament which adopted the laws affecting them, was not sufficient to persuade the ECtHR that Turkey overstepped the margin of appreciation.

In this context, it should be born in mind that the ECHR was not conceived as an instrument for the protection of collective minority rights, but for the protection of individuals. The ECtHR examines the cases through the prism of individual rights. Therefore, other

⁵³⁵ Ministers' Deputies Decisions, CM/Del/Dec(2007)997 20 June 2007, Resolution CM/ResDH(2007)77.

⁵³⁶ Application no. 10226/03, Judgment of 30 January 2007.

⁵³⁷ Application no. 10226/03, Judgment of 8 July 2008.

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international mechanisms must be activated for the protection of collective minority rights. Still in *Grosaru v. Romania*,⁵³⁸ the ECtHR examined the rights of the Italian minority to elect its representative via the applicant, a member of that minority. However, the application was examined from the angle of the rule of law requirement, i.e., how precise and clear the applicable law was, and a violation was found on that account.

In *Podkolzina v. Latvia*,⁵³⁹ the ECtHR determined that this article protected individual, and not collective rights, despite the language requirements. It considered that the restriction pursued a legitimate aim, i.e., effective work in the legislature for which sufficient knowledge of the official language was indispensable. A violation was established on the ground that the decision to deprive the applicant of a passive election right was not proportionate to the aim pursued. Namely, the body that certified the knowledge of the language had to be impartial, with no overstepping discretion, which had to be regulated by law and with fair and objective procedure, thereby preventing an abuse of power by the authorities. In this particular case, the ECtHR found that the applicant was burdened with unreasonable requests and had to re-take the language test, unlike the majority of the candidates.

Lastly, in *Sejdik and Finci v. B&H*⁵⁴⁰ the Grand Chamber examined the rejection of two electoral candidates not belonging to the “nationality of the constitutive people of the country” as required by the Constitution. A violation was found on the basis that the rejection complained of was not proportionate to the aim pursued i.e., return of peace in the country, and that B&H could not provide objective and reasonable justification in this regard. The Grand Chamber also examined the impugned constitutional provision and found it discriminatory in breach of Article 1 of Protocol 12 to the ECHR.

In conclusion, the ECHR offers limited protection of the right to participate in public affairs in terms of the type of elections. The length of proceedings before the ECtHR and the type of remedy that can be awarded give the impression that the ECHR is not necessarily the most adequate and effective instrument in the context of elections. It also appears that due to the wide margin of appreciation given to the states, sometimes it is difficult to discern from the

⁵³⁸ Application no. 78039/01, Judgment of 2 March 2010.

⁵³⁹ Application no. 46726/00, Judgment of 9 April 2002.

⁵⁴⁰ Applications nos. 2766/06 and 34386/06, Judgment of 22 December 2009.

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ECtHR case-law wider standards in this field, which are common to the CoE region. Nevertheless, over the years the ECtHR has continuously and increasingly scrutinized the states' margin of appreciation.⁵⁴¹

At any rate, the ECHR and the ECtHR effectively execute the most important competence vested with them, i.e., judicial protection of the first dimension (election rights) Europe-wide. From the above-analyzed cases, it is clear that the ECtHR case-law covers various important issues for the conduct of elections, and provides a guidance to authorities on how to regulate elections and apply the law. The ECtHR judgments and case-law represent the most persuasive arguments, as well as an obligation to improve the national election legislation and practices in order to bring them in compliance with the international standards.

From the cases relating to the voting rights of mentally disabled persons, prisoners and lustrated persons, red lines regarding election cases can be discerned. It is clear that any permanent, non-individualized or discriminatory ban of the enjoyment of electoral rights does not fall within the ambit of the acceptable margin of appreciation. No legislation imposing such electoral criteria can be regarded as compatible with the ECHR.

Another red line is formulated in the Spanish cases cited-above. The ECtHR will never accept any use of violence that will result in abuse and even destruction of the human rights guaranteed by the ECHR, in line with the Militant Democracy Doctrine.⁵⁴²

Protection of minorities, which as a rule is connected with national security and safety, follows the general line formulated in the Convention. From the Turkish cases cited-above, it follows that the protection of minorities goes hand in hand with state laity, intimately connected with a democratic form of government. On one hand, "democratic laity" allows for an effective enjoyment of religious rights, and on the other hand it enables effective governance of state affairs by avoiding heavy fragmentation in the multicultural societies. Although minority rights as a rule belong to collective rights, the ECtHR has pronounced on

⁵⁴¹ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 399.

⁵⁴² Harvey, *Militant Democracy and the European Convention on Human Rights*, *European Law Review* (2004) 29(3) pp. 407-420.

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them from the angle of individual rights. The efforts to widen the scope of the ECHR by adding a new Protocol on minority rights has remained fruitless. For precisely that reason, the ECtHR should take a more liberal substantive approach and increase its scrutiny of the margin of appreciation in order to protect effectively the rights of minority groups. However, in the cases involving minorities, which are connected with a social conflict and may threaten national security and affect the rights of others, the ECtHR has taken a cautious approach.

Further discussion relating to the maneuvering space of the states includes the case-law relating to the submission of untrue information by the candidates. The ECtHR held that the disqualification of candidates, who submitted such information with no ill – intention or just happened to be on the candidates' list that was annulled due to untrue information, was a disproportionate measure. On the basis of the above ECtHR case-law, deleting the disclosure requirement for the fear of candidates being disqualified, would be a disproportionate measure in and on itself, as it runs contrary to the informed voters' requirement. The public must know which of the candidates it can trust and who deserves to be entrusted with a mandate.

The ECtHR's cautious approach towards the protection of political rights in comparison to the protection of civil rights has resulted in allowing a wider margin of appreciation to the ratifying states in the electoral context. Nonetheless, in some instances, the margin of appreciation doctrine does not appear to be theoretically coherent and intrinsically sound such as in the cases like *Yumak and Sadak v. Turkey* or *Zdanoka v. Latvia*. Still, detours like these ones are well reasoned and justified in line with the principles of greater clarity and consistency in the application of the European rules of the electoral game.

A word of caution, a differentiating treatment may lead to a result where no unified election standards on European soil seem possible. To avoid this jeopardy, the Court should declare a breach of the Convention whenever the minimal election standards in a particular case are lowered, even as a temporary exception. It can suspend the imposition of a penalty for a reasonably acceptable period of time, until the particular conditions warranting such an exception have expired. This change in approach would be a good defense against the double standards' arguments, i.e., that stricter standards are applied when developed democracies are

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sued in comparison to developing democracies. Simultaneously, the Court should not be discouraged by the problems it encounters with the implementation of its judgments, which have the effect of diminishing its protection in the arena of electoral rights.⁵⁴³

Indeed, the Court did not allow B&H to “get a free ride” and to be excused from the ECHR standards because of its particular political arrangement. The Court found the electoral system discriminatory for any B&H citizen who was not a Bosniac, a Serb or a Croat. The system barred smaller communities from standing in presidential and legislative elections for the House of Peoples on the ground of their ethnic affiliation. Therefore, the ECtHR suggested an alternative measure, a power-sharing arrangement, which was not discriminatory in order for B&H to meet the relevant standards agreed upon entrance in the CoE.⁵⁴⁴

(iii) Deduced European Standards in Election Field

The ECHR’s normative content and its reflection in case-law, represent pillars of the European standards in the election field, as underscored in the European electoral heritage.⁵⁴⁵ This argument rests on the premise of the ECHR’s legal value in the European legal order. Its second premise is that the standards in the election field have an agreed meaning, considering that they are interpreted by the ECtHR and accepted by the ECHR ratifying states. Finally, the standards mentioned above are comprehensive and relate to all phases of the electoral cycle: pre-election phase, election day and post-election phase.

Whereas Article 3 of Protocol no. 1 to the ECHR is meager in its wording, the ECtHR has developed rich case-law. The case-law is based on several principles that the Court applies to a different set of circumstances, in different states. The respect for the enforcement of judicial decisions has been reiterated in light of the rule of law and legal certainty concepts. Individualization of the measure and its definite duration add to the list of principles. The

⁵⁴³ *Greens and M.T. v. the United Kingdom*, Application no. 60041/08, Judgment of 23 November 2010, following the *Hirst* Judgment, Application no. 74025/01, Judgment of 30 March 2004.

⁵⁴⁴ *Sejdić and Finci v. B&H*, Application no. 27996/06, Judgment of 22 December 2009 [GC].

⁵⁴⁵ See pp. 13-14.

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cases are always examined from the angle of individual subjective rights, but the Court's examination does not constitute an assessment of the elections.

Pre-election Phase

Electoral law and system: The ECHR requires effective political democracy as a political system. Article 3 of Protocol no. 1 dictates the manner for installing such a system of governance, through elections. The minimal standard is direct election of the representatives of one chamber of a legislature.

The ECHR does not require a specific electoral system. Electoral thresholds are not considered incompatible by the ECtHR.⁵⁴⁶ Their compatibility with the ECHR is assessed in accordance with the reality on the ground, and the need for a stronger and more coherent government. There is an inherent tension between the need to prevent the government from fragmentation and the free expression of the will of the electorate. The attempts to balance this tension have resulted in a variety of electoral systems, considered the best suited in light of the particularities of a country, by the political elites. All these systems are acceptable under Article 3 of P-1, as long as they fulfill its overall standard of "free and fair" elections and satisfy the principle of non-discrimination.

Article 3 of Protocol no. 1 to the ECHR does not foresee special arrangements for ethnic or religious minorities, or women. From the ECtHR case-law⁵⁴⁷ the only clear standard that can be discerned in this respect refers to the equal treatment of members of minorities with the rest of the population.⁵⁴⁸ Any unfair treatment is prohibited. Any exception in the treatment must be objective and reasonably justified in the given politico-sociological context. Equality of treatment and the non-discrimination principles must be also respected.⁵⁴⁹

⁵⁴⁶ See *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment of 30 January 2007.

⁵⁴⁷ See, among others, *ibid*; *Mathieu-Mohin and Clerfayt v. Belgium* Application no. 9267/81, Judgment of 2 March 1987 on equal treatment of different linguistic groups; the *Etxebarria Barrena Arza Nafarroako Autodeterminazio Bilgunea and Aiarako and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03 and 35634/03, Judgment of 30 June 2009; *Sejdić and Finci v. B&H*, Applications nos. 2766/06 and 34386/06, Judgment of 22 December 2009.

⁵⁴⁸ Whereas Article 14 prohibits discrimination in relation to any of the articles from the ECHR, Protocol 12 contains general prohibition of discrimination, see p. 48.

⁵⁴⁹ *Sejdić and Finci v. B&H*, Application no. 27996/06, Judgment of 22 December 2009 [GC].

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The standard referred to by the ECtHR is “a fair representation”⁵⁵⁰ which is less stringent requirement than “a meaningful representation”. Should the latter have been the standard accepted under the ECHR, it would have required closer scrutiny of the margin of appreciation. It would have required electoral arrangements allowing for a wider representation of minorities, women and ideological groups, as well as greater influence on the Government. Such a standard would have required an amendment to the Convention; and presently there is no political will to increase the relevant standards by way of a legally-binding instrument. Nonetheless, human rights’ inclusive trend of minorities and women in public decision-making deserves to be reflected normatively in the European key human rights instrument. The hypothetical abuse of rights by groups enjoying the right to meaningful representation cannot be regarded as a valid argument against increasing election standards. Other ECHR protection mechanisms will counter-balance any attempts to destroy what has already been granted in terms of rights.

The stability of electoral law⁵⁵¹ in its key components does not mean that the law should remain unchanged, but rather that legislative changes should be made preferably a year before elections. The electoral law should be also drafted and adopted in light of the requirement for the expression of free will of the people. It is indispensable that various interests be taken into consideration when drafting the law. The ECtHR has repeatedly requested that electoral laws be accessible, precise and foreseeable. Changes in electoral law must not result in a termination of the mandate of a freely elected candidate, as it impairs the essence of election rights.

The court-made law does not impose a requirement for the countries to organize out-of-country voting, when no such provisions have been made in domestic law.⁵⁵² On the contrary, if there is a clear legislative requirement the national institutions cannot escape its implementation.

Voters: The subjective right to vote is a universal one. It is not an unqualified right, but it might be subject to reasonable requirements (such as age or nationality) and individualized

⁵⁵⁰ *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment of 30 January 2007, paras 76-77.

⁵⁵¹ *Lykourazos v. Greece*, Application no. 33554/03, Judgment of 15 June 2006.

⁵⁵² *Sitaropoulos and Others v. Greece*, Application no. 42202/07, Judgment of 8 July 2010.

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assessments (with respect to mental capacity,⁵⁵³ or additional conditions for performance of public office). The non-discrimination obligation also applies.

Article 3 of the ECHR Protocol no. 1 contains wording about the criteria enabling a free expression of the will of the people. In this wording, several implicit standards are read, as follows: voters must be secure, meaning free from pressure, manipulation, threats or violence.

When the above wording is read in conjunction with the universality requirements, it fleshes out the standards connected with the voters' list. It must not be an obstacle to casting the vote, but must accurately and lawfully register all and only eligible voters. There will be no obstacles to the ECtHR examining in substance hypothetical voter's allegations about being threatened or effectively disfranchised due to voters' list inaccuracy.

However, a hypothetical individual complaint that a voter was not well-informed about the political programs or about the voting procedure will be hardly admissible, unless other circumstances demonstrate that it concerns a systematic violation, impairing the essence of an active election right. Nonetheless, a well-educated and informed voter is implied by Article 3 of Protocol no. 1.⁵⁵⁴

Candidates: The plurality of electoral options and the universality of the passive election right requires lively political competition. The passive election right is not an absolute one, but is subject to reasonable restrictions (such as age or additional conditions for performance of public office).

The restrictions that do not represent an impenetrable obstacle for the parties and oppositionists, or unfairly exclude them, will be considered compatible with the Convention. Such restrictions include electoral deposits, disclosure of personal information about the candidates, accumulation of public offices, or holding positions that can enable the candidate to have unfair advantage over other candidates. The restrictions pursue reasonable policies of

⁵⁵³ *Alajos Kiss v. Hungary* Application no. 38832/06, Judgment of 20 May 2010.

⁵⁵⁴ See pp. 80-81.

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transparency, of equal treatment of all electoral competitors and of viable electoral competition.

Even collaboration with a non-democratic regime or membership in a dissolved political party cannot disqualify a candidate automatically and indefinitely. Any such additional requirement to execute public office must be clearly stipulated in law and accordingly implemented. In this context, the ECtHR also examines if the state provides sufficient space for a political debate regarding pressing social problems. As a bottom line, the ECHR protection cannot be afforded to applicants who seek to destroy the very rights enunciated therein under a pre-text that their rights were breached.⁵⁵⁵

Electoral Administration: The independence and impartiality of electoral administration is a condition *sine qua non* for holding free and fair elections. However, the ECtHR applies a different test from the one under ECHR Article 6 that is valid for the courts. If there is no separation of powers in the institutional set-up, a violation of Article 6 is established. The Code of Good Practice in Electoral Matters, on which the ECtHR relies in the interpretation of the election standards, requires an unbiased and independent electoral administration. Yet, the ECtHR goes further requiring actual proof of abuse of power by the electoral administration, even when its set up does not fulfill the standards for “impartial and independent” body. The ECtHR seems to have made a choice not to assess *in abstracto* the independence and impartiality of the electoral administration bodies, in view of the variety of the models in the CoE countries.⁵⁵⁶

Electoral Campaign: When reading Article 3 of the ECHR Protocol no. 1 in light of its object and as an integral part of the Convention, it follows that no free expression of the voters is possible without free media and media access under equal conditions for the candidates. Indeed, no breach was found when a winning candidate who held a managerial post with the public media was disqualified because of a conflict of interest.

Effective Legal Protection: The ECtHR has reiterated the importance of effective legal protection. It is not enough to have legal remedies and judicial review for the protection of

⁵⁵⁵ See p. 97.

⁵⁵⁶ *Namat Aliyev v. Azerbaijan*, Application no. 18705/06, Judgment of 8 April 2010.

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election rights which are only formally in place. The bodies tasked with legal protection must be independent and impartial and refrain from any abuse,⁵⁵⁷ by dependent and partial legal institutions. The ECtHR re-affirms that there is no true democracy without adherence to the rule of law doctrine.

Election Day

Voters: The secrecy of the ballot is explicit in the wording of Article 3 of the Protocol no. 1. Voters' security is a continuing requirement on Election Day, as is the voters' right to have an equal opportunity to cast their vote. These principles, not only commit the election administration to act lawfully and responsibly, but also require the same from the police, the media and the political parties.

Regarding distinct groups of voters like prisoner, the ECtHR came up with clear standards. Any indefinite automatic ban on prisoners' voting is considered incompatible with the ECHR. Any temporary ban on their election rights must be proportional to the offence. It must be imposed only in correlation with a conviction for a serious crime, or an election-related offense. Of course, the prisoners' vote must not be treated differently and it must comply with the standard of "free and fair elections".⁵⁵⁸

While the ECtHR's jurisprudence does not give a simple yes or no answer when a detainee's election rights are at stake, it does make clear that when there is no criminal conviction, no electoral exclusion is justifiable.

The ECtHR treated another group in its case-law: mentally impaired persons.⁵⁵⁹ The standard says that they must be enfranchised to the extent possible based on the individual assessment of their health condition.

Post-election phase

Effective Resolution of Electoral Disputes: A proceeding must fulfill the standard of fairness, hence no undue burden should be placed on individuals in the electoral context. Electoral remedy, which has the effect of invalidating elections that do reflect the will of people, shall not be considered adequate and effective, but merely a tool in the hands of persons wanting to

⁵⁵⁷ See for instance *Georgian Labour Party v. Georgia*, Application no. 9103/04, Judgment of 8 July 2008.

⁵⁵⁸ See p. 90.

⁵⁵⁹ See p. 91.

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falsify elections. A judicial remedy must not only be available for the resolution of electoral disputes, but must also be adequate and effective.⁵⁶⁰

The mandate entrusted to a winning candidate: The mandate must be given to the candidate who won the election in line with the electoral system formula. Therefore, any post-electoral violence must be effectively suppressed by the state.

Once a mandate is entrusted to a winning candidate in elections, the maneuvering space of countries becomes restricted. If the mandate of a winner in elections is terminated because of, e.g., a retroactive application of a law or unprecedented court interpretation, the right to run in elections will only be illusory and not effective.⁵⁶¹

The discussion now opens up to the positive and negative sides of the European standards in the elections field, deduced from the ECHR and ECtHR case-law. The positive side first lies in the form of the act in which the standards are set out, which makes it a key source of legally-binding election standards. The unique robust enforcement mechanism is the second limb for an effective protection of subjective election rights.

Second, Article 3 of the ECHR Protocol no. 1 in conjunction with other ECHR rights and freedoms, provides a sufficient legal framework to conduct free and fair elections. There exists a common election denominator, absent of which a regime cannot be called democratic.

Third, the application of the electoral standard of “free and fair” responsive to the countries’ local politico-social realities is an added value, provided that the Court maintains its case-by-case impartial and well-justified approach. The ECtHR is not blind to the fact that various European sub-regions share different realities. Moreover, electoral law and practice vary from one country to another depending on the history, tradition, political elites and system of governance. A rigid top-down approach without adequate support in the field would not help countries fulfill the “free and fair” election standard.

⁵⁶⁰ *Kerimova v. Azerbaijan*, Application no. 20799/06, Judgment of 30 September 2010. See also, *Mammadov v. Azerbaijan* (no. 2) Application no. 4641/06, Judgment of 10 April 2012.

⁵⁶¹ See pp. 98, 99, 101, 104-106.

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On a negative side, not all countries in Europe are bound by the above-mentioned standards. Some of the countries that are OSCE participating states are not CoE members. Furthermore, not all CoE members have ratified the Protocol no. 1 of the ECHR. In such cases, the ECHR remains a standard-setting instrument, strengthening the value of the election standards prescribed in UN or OSCE documents.

The ECHR gives a sufficient legal framework for free and fair elections, provided that there is political will. However, a perfect legal framework is insufficient, and the real challenge lies in its proper implementation. Bearing this in mind, Article 3 of Protocol no. 1 has its constraints. In particular, the standards for electoral law, non-discrimination, universality of voting rights, secrecy, periodicity, judicial protection, resolution of disputes and taking up electoral office are much better developed in comparison to the standards relating to the media, representation of minorities and women, electoral campaign and financing. The latter electoral elements remain a grey area. For example, a fair electoral financing is a key to “free and fair elections”. Although it has implicitly done so, the ECtHR has not yet had a chance to explicitly deal with this issue. In light of Article 10 on freedom of expression, the ECtHR might hypothetically disapprove of any ceiling on electoral campaign funding and expenses in line with the US doctrine on freedom of expression applicable to electoral matters,⁵⁶² or may follow the GRECO desiderata to limit the electoral campaign spending and incomes in order effectively to prevent and combat corruption in politics.⁵⁶³

Elections are like a magic hat. Although they look simple on the surface, the more one digs in, the more rules are required in order to satisfy the “free and fair” election standard. As a consequence, electoral fraud might occur due to the lack of elaborated election standards, if the ECtHR remained the only protection at the level of Europe.

⁵⁶² First Amendment of the U.S. Constitution prohibits the Congress from making a law that will abridge the freedom of speech or press. In this regard, see the Judgment of the Supreme Court of the United States, *Citizens United v. Federal Election Commission Appeal from the United States District Court for the District of Columbia*, No. 08–205, dated January 21, 2010.

⁵⁶³ CM Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, Preamble, Articles 1, 3 and 5. See also, among others, GRECO Third Evaluation Round, Evaluation Report on Belgium, Transparency of Party Funding (2008).

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Another lacuna in the ECHR is the lack of a meaningful representation standard. Whereas the ECtHR speaks about fair representation in its case-law, the ECHR Preamble speaks about effective political democracy. Yet, it appears that it is too early to include the standard of a meaningful representation in a legally binding-treaty, although its composite elements have been subject of a prolonged international debate. Nonetheless, meaningful representation is an aspiring element of the definition of “effective political democracy”.

Along the same lines, it is perplexing that despite the Preamble, the right to “free and fair elections” was not originally a part of the ECHR, but it was only later added in a Protocol. Furthermore, no other elements of the right to participate in public affairs, such as the right to direct participation in the decision-making, or the right to access to civil service are found in the ECHR, although they are pillars of the effective political democracy.

The bottom line is that the intention of the ECHR drafters was not to draft an international instrument that would contain detailed standards for all the phases of the electoral cycle. In such a case, it would have been an election standards Convention. On the contrary, the intention was to protect subjective election rights, as without them the protection of human rights and freedoms in Europe would have remained incomplete.

4.1.2. Local Elections: The Charter of Local Self Government and the Convention on Participation of Foreigners in Public Life at Local Level

There is no true democracy, without democratically constituted bodies. This holds true also for local democracy. The very concept of local self-government, as the closest government to the citizens, demands direct, equal, universal, free and secret ballot for local authorities. In the CoE region, two legally-binding treaties contain election standards for local elections, thus supplementing the election standards for the legislature foreseen by the ECHR.

a. The Charter of Local Self-Government and Additional Protocol on the Right to Participate in the Affairs of a Local Authority

The Charter⁵⁶⁴ contains the essential characteristics and powers of local self- government in Europe.⁵⁶⁵ The very concept of local self-government as a fundamental element of democracy

⁵⁶⁴ The European Charter of Local Self-Government has entered into force on 1 September 1988.

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requires free and fair elections.⁵⁶⁶ The textual analysis of the Charter's Article 3 affirms that "free and fair elections" are indivisible from the concept of European local self-government.⁵⁶⁷ This article operates on the basis of several key principles of free and fair election, without much detail. More detail is found in the Additional Protocol to the Charter⁵⁶⁸ linked to universality, fairness and lawfulness as electoral principles.⁵⁶⁹ This Protocol reflects the evolution of election rights as individual rights in the context of local elections.⁵⁷⁰

The election observation reports of the Congress of Local and Regional Democracy⁵⁷¹ provide the key to interpreting election standards in the local self-government context. A peer-to-peer review of the local and regional elections refers not only to international and national legal obligations, but it also looks at the overall socio-political context and political culture. The state of human rights and democracy in the country plays a major role in the assessment.

The standard of "free and fair" is individualized and applied in light of the particular circumstances in view of the country's dynamics of democratic consolidation, as the Congress makes a political assessment of the country's situation. Taking into consideration its methodology, the Congress has a limited power to observe the electoral processes, and

⁵⁶⁵ Dimitrieva, *Evropska Povelja o Lokalnoj Samoupravi, Implementacija Evropske Povelje o Lokalnoj Samoupravi u Republici Hrvatskoj*, Simpozij Osijek (1998).

⁵⁶⁶ See Explanatory Memorandum of the Charter of Local Self-Government on Article 3.

⁵⁶⁷ See the Preamble and Article 3 of the Charter. Paragraph 2 of the latter stipulates the following: "This right (to local self-government) shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute".

⁵⁶⁸ See Article 1, paragraphs 3.1-4.1, paragraphs 5.1-5.3. See also Article 2.2 (c) on facilitating access for the right to participate in local affairs.

⁵⁶⁹ "Article 1 – Right to participate in the affairs of a local authority

...
3. The law shall provide means of facilitating the exercise of this right. Without unfairly discriminating against any person or group, the law may provide particular measures for different circumstances or categories of persons. In accordance with the constitutional and/or international obligations of the party, the law may, in particular, provide for measures specifically limited to voters.

4.1 Each Party shall recognise by law the right of nationals of the Party to participate, as voters or candidates, in the election of members of the council or assembly of the local authority in which they reside.

...".

⁵⁷⁰ The Protocol has entered into force in June 2012. So far, it has entered into force with respect to 10 countries.

⁵⁷¹ Election observation reports of the CoE are accessible at

<http://www.coe.int/t/congress/Activities/Observation/default_en.asp?mytabsmenu=3>

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thus cooperates and receives information from other election observers.⁵⁷² The above facts do not deprive the election standards of their substance in the local elections context.

The nuances of compliance with the “free and fair” election standard in the case of local elections are reported in a descriptive manner, such as “largely meet European standards”,⁵⁷³ “transparency engagement, but experienced tensions”,⁵⁷⁴ “a further step in right direction”.⁵⁷⁵ The language employed quantifies the level of the domestic authorities’ adherence to the European election standard to all categories of the electoral cycle. While election standards in one electoral cycle phase can largely be met, standards from another electoral cycle phase might not be met. The “lacuna” in the implementation of the election standards leaves a grey area in the assessment of what constitutes a “free and fair elections” and gives “a margin of appreciation” regarding the assessment made by election observation team.

The key electoral requirements remain a point of action for the state in question. However, sometimes a key requirement for free and fair election is masked under a number of not so substantive recommendations, thus diminishing the pressure on the government for their implementation. For example, the Congress has reiterated time and again that local elections should not be held on the same day as national elections in order not to marginalize the former. On one hand, it is unclear how this requirement negatively affects the international standard of “free and fair election” set out in the Charter and its Additional Protocol. On the other hand, the electoral cost of holding elections in two different periods should not be underestimated, especially in a time of economic crises for many countries.

The standard of “free and fair elections”, as defined in the above-mentioned texts⁵⁷⁶ and interpreted by the Congress in the election observation reports, entails the following political and legal desiderata for each phase of the electoral cycle:

⁵⁷² More about election observation methodology and policy of the CLRAE can be found in the Resolution 306 (2010) Observation of Local and Regional Elections, Strategy and Rules of the Congress; and in the Resolution 274 (2008) Congress Policy in Observing Local and Regional Elections.

⁵⁷³ Observation of Local Elections in Bulgaria, 23 October 2011.

⁵⁷⁴ Observation of Local Elections in Albania, 8 May 2011.

⁵⁷⁵ Observation of Local Elections in Moldova, 5 June 2011.

⁵⁷⁶ Charter of Local Self-Government, Article 3 and its Additional Protocol, Article 1 and Article 2.2(c). The Code of Good Practice in Electoral Matters is also used by the CLRAE to assess local and regional elections.

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Pre-election Phase

Political/Electoral System and Law: A minimal requirement for local self-government is directly elected collective bodies.⁵⁷⁷ The election refers to local councils or assemblies without legislative power, as designated by the ratifying states in line with Article 13 of the Charter. No such a requirement is in place for the selection of the mayors, thus indicating the lack of a European election standard in this regard.

Since local democracy is inconceivable without effective powers granted to the representatives of the people, the Charter is explicit in stating that in addition to the decision-making power, the power to hold accountable executive bodies (including mayors) is entrenched in the elected bodies.⁵⁷⁸

The electoral system must enable the free election of local representatives under equal terms. The representatives must be elected by a similar number of votes. The equality of suffrage – the allocation of the same voting power does not prohibit positive action, aimed at a fair representation of minorities or women.⁵⁷⁹

The formula for the election of minority representatives must be transparent, in order to avoid any manipulation with the minorities' vote.⁵⁸⁰ The requirement for the state parties to facilitate the exercise of election rights without unfair distinction, explains in greater detail the free and fair election standard.⁵⁸¹ The above substantive provision reflects the European trend for greater inclusion of minorities and women through special measures, such as reserved seats for minorities, special candidates' lists or equitable representation on the list of candidates. The measures for greater inclusion of disadvantaged groups may be statutory, but they might also come as a result of the political parties' self-regulation.

The laws must be consistent and uniformly applied to avoid arbitrariness in the electoral processes.⁵⁸² As long as the foreseeability and transparency principles in the laws are satisfied, the states may include categories of offices or activities deemed incompatible with

⁵⁷⁷ See, in particular, Article 3.2 of the Charter.

⁵⁷⁸ Ibid.

⁵⁷⁹ The Code of Good Practice in Electoral Matters: 10 Years of the Congress Experience (2013).

⁵⁸⁰ Ibid *mutatis mutandis* p. 17.

⁵⁸¹ Additional Protocol to the Charter, Article 1.3.

⁵⁸² See *mutatis mutandis* Explanatory Memorandum of the Additional Protocol to the Charter on Article 2.

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the exercise of local representative office, entrenched in a statute or in a well-developed practice.⁵⁸³

Voters: The active participation of the voters is crucial for the legitimacy and authority of the elected organ. Therefore, the first commitment is the commitment of the universality of the active election rights. The universality principle in the context of the European local election refers to the minimal election right in the Additional Protocol; the residents, nationals of the ratifying party must have the right to vote. The implementation limb of the Protocol, emphasizing the need for the introduction of special measures to facilitate voting for disadvantaged groups, is yet another manifestation of the universality principle.

The free expression of the will of voters is a complex criterion that foresees a number of important safeguards for voters, such as physical security, freedom from coercion and bribery, access to political programmes and information, physical access to polling stations and assistance to physically impaired persons.⁵⁸⁴ An updated and accurate voters' list is a must for having confidence in the election result as many electoral frauds are done by way of manipulating voters' lists.⁵⁸⁵

Voting rights can be limited or conditioned for the reasons of public safety or effective operation of democracy. Compliance with international obligations has been added in the exhaustive list of exceptions above.⁵⁸⁶

Candidates: The universality principle also applies to the passive election right. Other desiderata for the candidates are quite straightforward. First, transparency in the process of candidates' nomination is an important safeguard of the passive election right. Second, their security must be ensured. Therefore, no government interventions, pressuring or intimidating candidates is allowed. Third, the candidates must be able to conduct free and visible campaigns, organize peaceful rallies and reach out to voters under the principle of equality of opportunity. Fourth, without properly safeguarding the rights of all candidates, especially from the opposition, no plurality of real choice will exist. By the same token, although the passive

⁵⁸³ Article 7 of the Charter.

⁵⁸⁴ The Code of Good Practice in Electoral Matters: 10 Years of the Congress Experience (2013) p. 13. See also Election Observation Report on Local Partial Elections in Armenia, 9 and 23 September 2012.

⁵⁸⁵ The Code of Good Practice in Electoral Matters: 10 Years of the Congress Experience (2013) p. 10.

⁵⁸⁶ Additional Protocol to the Charter on Local Self Government, Article 1, para 5.1.

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election right is not absolute, there must not be unreasonable and impenetrable obstacles to the nomination of the candidates.⁵⁸⁷

Financing and Electoral Campaign:⁵⁸⁸ The financing of the parties and electoral campaigns must meet the standards of fairness, transparency and responsibility for the competitors. This means that no administrative resources can be used or abused for the purpose of electoral campaigning.

It also means that the electoral campaign must be visible. In the visibility context, the media must not allow unfair advantages by giving higher discounts, or by not requesting a payment for their services. Furthermore they have a special obligation to distribute information in a responsible, balanced and transparent manner, without government involvement. Public electronic and print media must provide an accurate and fair coverage of all electoral options. The advertising space and billboards must be sufficient in number and placed in visible places.

Electoral Administration:⁵⁸⁹ All electoral bodies must be balanced in their composition, thus adhering to the principles of independence and impartiality. Their administrative and decision-making procedures must not be cumbersome, as they affect the legitimacy of the electoral process. For example, delays in declaring election results might raise suspicion of rigged elections.

Effective Legal Protection:⁵⁹⁰ The legal side of the electoral safeguards has been re-emphasized through the requirements for constitutionality, legality and compliance with international obligations. Voters and candidates have to enjoy effective administrative protection of their rights in terms of voters' registration and deletion of voters who are ineligible, as well as in terms of candidates' nomination and alleged unequal treatment by the media. There must be effective criminal law remedies sanctioning all attempts to rig elections.

⁵⁸⁷ The Code of Good Practice in Electoral Matters: 10 Years of the Congress Experience (2013) p. 18.

⁵⁸⁸ Ibid pp. 11, 21-22.

⁵⁸⁹ Ibid p. 18.

⁵⁹⁰ See *among others* Observation of Local Elections in Ukraine, 31 October 2010.

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Election Day

Polling Stations: Properly managed and accessible polling stations are a key to a successful election.⁵⁹¹ Therefore, first the assignment of the number of voters per polling station must be measured against the realistic time needed to cast a vote. Second, the polling station layout must simultaneously allow for a secret ballot and transparency about what has been happening inside the polling station.⁵⁹² In particular, no unauthorized persons are allowed in or in the near vicinity of the polling stations. Police must not be present in the polling station, unless called by an authorized person. However, they must remain vigilant and accessible in case of security threats.

Electoral Materials: The ballot boxes and screens must be such fully to protect the secrecy of voting. Sensitive material, like counterfoils must be properly stored and packed, as that is one of the safeguards of the electoral integrity.

Voters: Instructions in the languages that voters understand must be visibly displayed together with the candidates' lists.⁵⁹³ The active election right is an individual right, hence no group or family voting is allowed.⁵⁹⁴

Electoral Administration:⁵⁹⁵ The electoral administration at all levels must satisfy the requirements of independence, impartiality and professionalism. If political representatives are permitted, they must have balanced representation. The polling board members must be present during voting hours and the opening and closing of the polling station. All bodies, especially the polling boards, must be properly trained in all aspects of elections.

Effective Legal Protection: Violence, voters' manipulation, improper and non-transparent conduct of the voting procedure represent a cause for concern and must be prevented and effectively suppressed.⁵⁹⁶

⁵⁹¹ Ibid p. 21. See, among others, Observation of Local Partial Elections in Armenia, 9 and 23 September 2012.

⁵⁹² The Code of Good Practice in Electoral Matters: 10 Years of the Congress Experience (2013) p. 16.

⁵⁹³ Ibid p. 13.

⁵⁹⁴ Ibid pp. 13, 16.

⁵⁹⁵ Ibid p. 18.

⁵⁹⁶ Ibid p. 20.

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Post-election phase

Effective Resolution of Electoral Disputes: Electoral disputes must be resolved in an efficient, effective and an impartial manner, as post-election violence might occur as a result of a biased and ineffective system for the resolution of electoral disputes.⁵⁹⁷

Mandate Entrusted to a Winning Candidate: The CLRAE requires transparent and accurate counting and tallying of the votes.⁵⁹⁸ It is desirable that detailed voting results be published without any delay.⁵⁹⁹ A successful election should result in a peaceful assumption of the office by a winning candidate.

When conducting a comparative analysis of the ECHR versus the Charter and its Additional Protocol, it is evident that both regulate only the election of collective bodies. While the ECHR is applicable to the election of all kinds of legislatures, the latter only regulates local and regional elections of collective bodies without legislative power. With the Additional Protocol's entrance into force, both instruments approach elections as a manifestation of individual rights. However, the object of protection varies. Whereas the ECHR protects active and passive election rights viewed from the prism of a human rights and democracy doctrine, the Charter and the Protocol protect the local-self-government concept. The latter approach to elections from the individual rights' perspective implicitly originates from the ever-increasing importance of the meaningful representation of various groups within society. Other principles (direct, equal, secret and free) are featured in the texts of both instruments, adjusted to the electoral context. Whereas the ECHR is interpreted by legal means by judges, the CLRAE employs more political criteria for the interpretation of "free and fair" standards, as its observers are elected officials. The point of convergence for understanding the common standard of a "free and fair elections" is the Code of Good Practice in Electoral Matters. Both the ECtHR and the CLRAE refer to it, when executing their electoral competencies.

Furthermore, regarding the issue of the common "free and fair election standard", in 2003 the CLRAE required a legally-binding Convention, in addition to the Code of Good Practice in Electoral Matters of the Venice Commission, in order to single out the key electoral

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid pp. 14-15.

⁵⁹⁹ See Observation of Local Elections in B&H by the CLRAE, 13-14 September 1997.

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standards.⁶⁰⁰ While at the time the CLRAE must felt the need to announce it by way of political message, there have been no subsequent attempts in the CoE to codify electoral standards in a legally-binding treaty until now.

All CoE members have now ratified the Charter, with Belgium not considering itself bound by Article 3 paragraph 2 of the Charter. Even with the interpretative statements of Spain and France, there is a European consensus on free and fair local elections as a key European value. Switzerland and Monaco, although not bound by the ECHR, have also ratified the Charter.

b. The Convention on the Participation of Foreigners in Public Life at Local Level

The Convention⁶⁰¹ reflects the principles of local self-government within the spirit of protection of human rights. Its Preamble underlines the need to include foreigners in participation in local affairs, in view of their equal duties with citizens at the local level. It provides options for ratifying states regarding the manner and the extent to which foreigners lawfully abiding in the territory may enjoy election rights. As a rule, a foreigner has to reside in the country's territory for 5 years to enjoy active and passive election rights. There is no requirement of reciprocity. These rights are derogable.⁶⁰²

Pursuant to the Table of ratification on the official CoE site in September 2013, the Convention entered into force in only eight countries.⁶⁰³ As stated above, none of the European countries have ratified the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which foresees forms of participation in public affairs of the individuals to whom this CoE Convention also applies. All in all, it appears that there is no strong political will from the CoE member states to make inclusion of foreigners in local affairs a common standard.

⁶⁰⁰ Recommendation no. 124 (2003).

⁶⁰¹ The Convention entered into force on 1 May 1997.

⁶⁰² See Chapter C of the Convention, and its Explanatory Report.

⁶⁰³ The following CoE member states have ratified the Convention: Albania, Denmark, Finland, Iceland, Italy, Netherlands, Norway and Sweden.

4.1.3. Minorities: The Framework Convention for the Protection of National Minorities

Despite the importance of the issue of national minorities in the CoE region, it was too controversial for the CoE members to adopt any standards dealing with the minorities until 1994. The Framework Convention for the Protection of National Minorities was adopted by the CM on 10 November 1994 and came into force on 1 February 1998. Even then it was difficult for the ratifying states to come up with a definition of minorities, therefore the Convention does not contain such a definition.⁶⁰⁴

The document clearly states that the protection of national minorities is essential to stability, democratic security and peace, as well as that the protection of national minorities falls within the scope of international cooperation.⁶⁰⁵ It further specifies that these rights are to be enjoyed alone or in community with others, with a specific statement in the Commentary that the Framework Convention does not ensure collective rights. The minorities' "classical" rights that are interlinked to elections, e.g., freedom of peaceful assembly, association, expression, thought, conscience and religion, are also guaranteed.⁶⁰⁶ No assimilation policies or practices are acceptable under the Framework Convention.

The parties must undertake, only when necessary, adequate measures in order to promote inclusion of minorities in political life and ensure enjoyment of their rights on an equal footing.⁶⁰⁷ However, no election rights have been explicitly mentioned. Election rights of minorities are already covered under the principle of universality. But, this principle will not be sufficient to ensure a meaningful representation of minorities in every country. The Convention could have foreseen the possibility of including special measures for greater inclusion of minorities through indirect democracy.

⁶⁰⁴ PACE Recommendations 1201 (1993) and 1255 (1995) suggest that the term "minorities" refers to persons who reside and are citizens of a particular state; maintain longstanding, firm and lasting ties with that state; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in numbers than the rest of the population of that state or of a region of that state; and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.

⁶⁰⁵ General principles of the Convention are contained in its Section 1.

⁶⁰⁶ See, in particular, Articles 4, 6, 7 and 9 of the Convention.

⁶⁰⁷ See Article 15 of the Convention.

4.1.4. Electoral Guidelines: Code of Good Practice in Electoral Matters

The “so-called” Venice Commission is set up under the 1990 partial agreement.⁶⁰⁸ It is a consultative body consisting of independent experts, appointed by the states parties to the agreement.⁶⁰⁹ The VC and the Council for Democratic Elections⁶¹⁰ adopted the Code of Good Practice in Electoral Matters⁶¹¹ in 2002. It contains Guidelines and Explanatory Memorandum where a detailed account of the election standards based on the European electoral heritage has been set out. Although not legally-binding, the Code mentions two legally binding instruments: the ICCPR and the ECHR, as the basis for its “hard core” principles.

The Code has categorized the election standards under the following tenets: universal, equal, free, secret, direct and regular elections. It further prescribes conditions and procedural safeguards in that regard.

The legal form of the Code is rule-like and very precise in some domains, as it contains contemporary praxis based on the European electoral heritage. The free and fair electoral standard concerning each of the phases of the electoral cycle encompasses the following:

Pre-election Phase

Electoral System and Law: The principle of equality has been largely associated with the electoral system. Compared to the CoE instruments explored previously, in the Code, more precise rules define the equality requirements. The Code rules out different numbers of votes allocated to different groups or classes of people. Furthermore, the boundaries of the constituencies must take into account a number of criteria (population, residents, minors, registered voters and voters who actually cast their vote) in order to safeguard the equality of the voting power. Administrative, historic and geographical criteria may be taken into consideration when drawing the boundaries. The criteria are not only important when the

⁶⁰⁸ Its Status was revised by the 2002 CM Resolution making the Venice Commission an Enlarged Agreement.

⁶⁰⁹ Council of Europe, Building Europe together on the Rule of Law (2006) pp 9-11.

⁶¹⁰ In addition to the Venice Commission, the Council has representatives from the CLRAE and the CoE Parliamentary Assembly.

⁶¹¹ CDL-EL (2002)5.

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boundaries are first drawn, but it is a continuous requirement needing a 10-year regular revision. Gerrymandering is prohibited.

Certain protection is afforded to minorities, as the boundaries must not be revised to their detriment, and their representatives might be included in the committees delimiting the boundaries, when necessary. Drawing the boundaries of the constituencies to allow minorities to be better represented, is neither required nor prohibited.⁶¹²

The direct election principle does not exceed the requirements with respect to the election of at least one chamber of the legislature and of local councils foreseen in the ECHR and the Charter of Local-Self Government.

Election rules must be stable and included in the statute if not in the constitution. This is a condition *sine qua non* for holding free and fair elections. The rules of the game specifically regulating the electoral commission composition, drawing of electoral boundaries and the electoral system must adhere to the transparency and foreseeability requirements.⁶¹³ They are not amenable to amendments at least one year before elections.

Voters and Candidates: The universality principle⁶¹⁴ applies to the voters, as well as to the candidates. All the afore-mentioned requirements are captured regarding:

- a) limitations of election rights (age, nationality, residence, immigrants); and
- b) deprivation of election rights (lawfulness, proportionality and the reasons for deprivation: mental incapacity and serious criminal offence). The novelty in this regard is the clarification that the scrutiny applicable to the deprivation of the passive election right is less strict compared to the scrutiny applicable to the deprivation of the active election right. The two reasons for deprivation, mental incapacity and a serious criminal offence, require a court decision. The only element that is missing compared to the requirements from other CoE instruments is the individualization of the decision, depriving individuals of their election rights. Furthermore, the Code requires disfranchisement only for a serious criminal offence. However, there is no definition of what constitutes a serious criminal offence. Hence, not all

⁶¹² See pp. 16-19 on the equality principle in the Code and its Guidelines and Explanatory Report.

⁶¹³ Ibid p. 10.

⁶¹⁴ Ibid pp. 14-16.

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election-related criminal offences may qualify, as not all of them fall within the definition of a serious crime in terms of punishment. For example: election-related minor offences are not a reason for the deprivation of election rights. The temporal dimension of the deprivation of election rights based on conviction, has not been explicitly mentioned anywhere. The only inference in this regard can be made based on the principle of proportionality.

The voters' list standards have been clearly set out in comparison to the previously examined documents. Thus, the previously mentioned standard of accuracy can be best fulfilled with a permanent and regularly up-dated voters' list. Furthermore, the requirement of a transparent voters' list is prominent. However, the Code should clearly state that the transparency of the voters' list should not run counter to the right to privacy, and should not only relating to the minority affiliation non-disclosure.

The individual candidates' registration has been addressed in great detail by lowering the number of the signatures required, and foreseeing clear and precise rules. On the other side of the coin, the electoral deposit rules requires a "reasonable amount", and a deposit reimbursement, when a certain threshold of popularity is passed. Transparency and access to information regarding candidates have been clearly enunciated, being a key requirement of pluralist election.

Funding⁶¹⁵ and Media:⁶¹⁶ Equality of opportunity, as the "third face" of the equality principle, is applicable to the protection of the rights of parties and candidates in terms of financing and media. Whereas equality of opportunity is compulsory for access to public media, public funding and the organization of the electoral campaign, the states can choose its form, i.e., strict or proportional equality of opportunity.

Minimal access to private media, as foreseen by the Code, can hardly fall within the principle of equality of opportunity, despite being counterbalanced with the limits on spending and transparency. Access to private media on unequal basis can distort the fairness principle. Private media are owned by the parties, candidates and their supporters. Not only does the

⁶¹⁵ Ibid pp. 18, 19, 29, 31.

⁶¹⁶ Ibid pp. 7, 18, 25, 29.

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ruling party have better access to private media, but it may also abuse the state institutions and interfere with the private media critical of it. Therefore, the above minimal requirement must be read together with the equality of opportunity in the election campaign and in financing, in order to discern its true meaning. Minimal access to private media is construed as a further requirement relating to private media, and not as an exception to the already formulated equality of opportunities' rules.

Electoral Administration:⁶¹⁷ Regardless of the model chosen (independent, governmental or mixed) the impartiality and independence of the electoral administration must be ensured *inter alia* by setting it up as a permanent body with clear and transparent decision-making.

Effective Legal Remedies:⁶¹⁸ Effective judicial remedies must be available for voter registration and the cleaning-up of voters' list, as well as for the candidates' nomination. Any intimidation, pressure or abuse of the state apparatus in order to violate the voters' freedom to form an opinion must be sanctioned.

Adequate legal remedies must be available in case of tampering with electoral results, even to the voters, when forming a certain quorum. When elections are annulled, they must be repeated. This rule applies even when the electoral result has not been affected by the annulled votes in a polling station, as the voters in such a case will be effectively deprived of their right to vote. In any case, the electoral results where a fraud was discovered, should be annulled. Such votes must not be counted, especially if the allocation of public funds is connected with the number of the votes gained.

An adequate legal remedy is also indispensable in case of electoral campaign manipulations. Although lacking in the Code, the monitoring of media coverage and electoral campaign expenses is important in terms of prevention, as well as for the effective investigation and prosecution of such offences.

An effective legal remedy must have short and realistic deadlines, allowing a thorough examination of complaints and appeals. Short deadlines may be a good excuse for a

⁶¹⁷ Ibid pp. 26-27.

⁶¹⁸ Ibid pp. 29-30.

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superficial examination of the appeals and complaints. However, a hearing of both parties is required by the Code.

The Code does not go in detail about the types of sanctions. Not all sanctions have a deterrent effect. It might be more in the interest of the parties to pay a fine as long as they are winning elections.

Election Day

Voters: Voters need simple and clear instructions about the voting. The voting instructions must be available in the minorities' languages.⁶¹⁹

Voting procedures and electoral materials: While, non-polling station procedures may be available to safeguard the universality of the vote for various voters' groups, other principles like the secrecy, equality and free expression of the voters must not be overridden by those procedures. In all cases, the sensitive electoral material (e.g. electoral slips) must be properly safeguarded.

The equality of vote principle prohibits multiple voting. Family voting is strictly prohibited, regardless of the tradition or prevailing local culture, since it effectively deprives, mostly women, from their voting rights.

The voting procedures must be transparent, lawful and fraud impermeable.⁶²⁰ The principle of transparency is also applicable with respect to the counting. The practice in the Balkan states (Macedonia, B&H) was to lock the door after the voting had ended for safety reasons, with the electoral and party observers kept inside. However, no media have access as nobody can go out or come in as long as the results are in the process of being counted. Transparency is ensured by posting the results in front of the polling station. It appears that this practice might satisfy the minimal requirement for transparency, as long as there is a real security threat. A secret counting of votes runs counter to the principles of "free and fair elections". The transparency requirement should also continue to be observed at all levels of the electoral administration hierarchy, including during votes' tabulation.

⁶¹⁹ Ibid p. 8.

⁶²⁰ Ibid p. 20.

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Just like with other international instruments, the secrecy of the ballot is guaranteed not only while casting the vote, but also afterwards, as no one should compel another person to disclose their favorite candidate. No stamping or signing of the ballots is allowed when handed over to the voters, as it might be possible to identify the voter's ballot afterwards.⁶²¹

The Post-Election Phase

The equality of outcome in terms of, for example, equal representation of men and women is not foreseen as a requirement in the Code. It also does not require a parity of sexes in the candidates' nomination, or any other special measures to increase the participation of women in public life.

Periodic elections ensure that the elected collective body reflects the will of the electors. For the legislature, such term should not exceed 5 years.⁶²²

While detailing some of the European election principles, the Code does not devote much attention to regulation of the election campaign. In particular, the print media is not explicitly mentioned anywhere. Electoral campaign financing is also scarcely mentioned. Whereas it may be that the GRECO⁶²³ covers electoral campaign financing and there is a CoE publication on political parties and electoral campaign financing, the question arises as to why this part is barely tackled, when almost all of the most difficult problems in the West or East relating to elections are connected with the electoral campaign. Being primarily a non-legally binding product of experts, political considerations should not have played a role when determining the content of this important and well-known document.

Although adopted almost 12 years after the fall of socialism, the Code mentions that different approaches might be considered, depending on the democratic tradition, relative to election issues. Thus, it favors a more flexible approach regarding elections. Due to different democratic traditions, it might happen that some of the suggestions in the Code are not the best solution for a particular country. As an example, the Code suggests to have at least one judge and the most important political party representatives appointed to the central election

⁶²¹ Ibid pp. 9, 21, 24.

⁶²² Ibid p. 24.

⁶²³ See pp. 136-141.

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commission with the aim of ensuring its impartiality. However, in some countries, such a composition had to be changed due to allegations of partiality of the judges. In addition, the political party representatives voted along party lines, effectively taking away the right to appeal to the parties not represented in the commission.

The issue of effective compliance with the Code and the follow-up to the VC's reviews of election legislation opinions remain open. To some extent, they are ensured by other international organizations, including the OSCE/ODIHR and OSCE field operations.⁶²⁴ The quest for effective compliance and a harmonized approach towards European election standards is one of the reasons for PACE's Recommendation 1595 (2003) to the CM for the Code to be transposed into a convention, taking into consideration the OSCE/ODIHR's work and the ACCEO (at that time) draft convention. In 2003,⁶²⁵ the CM did not accept the Recommendation, in order to avoid a risk of lowering election standards. Hence, a difference in standards was found between the CoE member states, representing an obstacle to such an endeavor. In 2004, the CM adopted a Declaration underlining the value of the Code as a reference document in electoral matters.⁶²⁶ The idea regarding an election convention was not followed through. The question arises as to whether there is an urgent need to streamline international election standards, taking into consideration the existing difference in the standards between the CIS Convention, ratified only by some CoE countries and the non-binding Code.⁶²⁷

4.1.5. Financing of Electoral Campaign: Group of States against Corruption

The CoE instrument containing the most comprehensive rules about electoral campaign financing is the Committee of Ministers' Recommendation (2003) 4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns. The Recommendation focuses on transparent electoral funding, donation limits, proper financial reporting, audit and effective punishment in connection with all types of elections (parliamentary, presidential, regional and local elections). Its aim is to approximate the

⁶²⁴ See Annex I, p. 290.

⁶²⁵ See VC Opinion no. 253/2003, CDL(2003)57; CDL-EL(2004)004; CDL-AD(2004)010 and CM Document no. 9978.

⁶²⁶ Document no. 10220.

⁶²⁷ Also discussed in an interview with the VC official from the election unit in 2007.

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respective legislation of the CoE member states and contribute towards a successful fight against corruption in the CoE region.

Although the Recommendation is legally non-binding, it reflects the political will of all members of the CoE. Therefore, it cannot be considered declaratory only. It is a type of soft law. In particular, the Recommendation contains very precise rules regarding the funding of electoral candidates' and elected officials' activities. In addition, there is an institutionalized and systematic follow-up to the Recommendation by GRECO. This body is mandated to monitor the compliance of the CoE member states with the anti-corruption standards enunciated in the afore-mentioned Recommendation and the Guiding Principle for the Fight against Corruption no. 15.⁶²⁸

Under the Recommendation, the CoE member states are required to adopt national rules reflecting common standards for combating corruption in relation to electoral campaign financing. The language employed in the Recommendation is stronger regarding certain requirements and weaker regarding other requirements. However, in light of the fact that Recommendation itself is not obligatory, it is presented as a codification of the most important anti-corruption measures relating to electoral campaigns.

The common measures for fighting corruption in relation to electoral campaign financing flow from the following principles:⁶²⁹

1. Fairness

State support to political parties is allowed, when clearly prescribed by law. However, it must be allocated on an equitable basis in line with objective and reasonable criteria. The above-mentioned criteria also cover indirect public funding in terms of free air time, use of premises and tax exemptions.

⁶²⁸ The principle no. 15 of the Committee of Ministers' Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption demands the CoE member states to apply in their domestic legislation effective rules that will deter corruption related to the financing of political parties and electoral campaign.

⁶²⁹ See the Committee of Ministers' Recommendation (2003) 4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, Chapters III-Limits, Chapter IV-Transparency, Chapter V-Supervision and Chapter VI-Sanctions.

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State and public enterprises must not make donations. The obligation also extends to companies controlled by the state. The obligation is less intense in the case of state (public entities) contracted companies, whose donations may be strictly regulated or limited.

Conflicts of interest regarding the use and allocation of state resources must be avoided, when the aim is to prevent and suppress corruption. Thus, occupants of political offices and public servants must not use public resources for the benefit of their own or a party candidates' electoral campaign.

For proper application of the respective rules, there must be effective procedures to detect and punish any circumvention of the donation limits. Thus, the above rules are also applicable to the donations made to the entities connected to political parties, e.g., research institutes.⁶³⁰

As the states' law and practice differ regarding funding by corporations, the Recommendation does not foresee a prohibition on donations to political parties by corporations. The avoidance of influence on political parties and politicians by "big money" is regulated via the imposition of a limit on donations.

As a comment, the fairness principle not only safeguards equal opportunity for political parties to win the election, but it also protects them from undue pressures and interference with their autonomy. Since large contracts worth millions often represent a cause of bribery of high-ranking politicians, and considering that interference with internal politics may come from foreign entities, the Recommendation requires foreign donations to be prohibited, strictly regulated or limited.

The majority of components which make up the fairness requirement are found in the first part of the Recommendation. This part is specifically tailored to the sources of funding of political parties, and applies *mutatis mutandis* to electoral campaign financing. Such an approach leaves a gap in the regulation of the external sources of electoral campaigns. For example, there is no explicit mention of public funding of individual election candidates,

⁶³⁰ See for example, GRECO Evaluation Report on Serbia, 3E (2010) p. 22, as well as on Romania 1 F (2010) p. 36.

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which might put them at a disadvantage vis-à-vis political parties. In principle, Article 8 applies to all electoral candidates, and not only to party candidates. Furthermore, if restrictions apply to individual candidates, by analogy the advantages should apply to them also. However, the requirements for donation records or for disclosure of accounts are again made explicitly applicable solely to the political parties. In conclusion, it is unclear to what extent the individual electoral candidates' funding in terms of obligations and benefits is covered by the above Recommendation.

By the same token, the relationship between the funding of political parties and electoral campaign has been left unexplored, although it opens a space for circumventing the main aim of the Recommendation: the fight against corruption. In particular, different states differently regulate electoral campaign financing and the sources of funds. Immediately, a question pops up how to detect and account for funding of electoral campaign activities, which are not part of the electoral campaign of a candidate. It does not need to be a local committee of the electoral party, it can be a private company doing it. Such an "open space" in the electoral campaign financing may result in circumventing the upper limit of the allowed expenditures or donations. The GRECO, in its evaluation reports related to this topic, attempts to mitigate these consequences by recommending that support and expenditure pass through an election agent and election accounts, as far as possible.⁶³¹ Likewise, it expects no electoral campaign expenditures to be made outside of the electoral campaign period, as that represents a violation of the electoral campaign rules.⁶³²

2. Transparency

All sources of income used for the electoral campaign, such as donations⁶³³ (monetary or in-kind⁶³⁴ or any other advantaged bestowed on a political party), electoral candidate personal contributions party membership fees,⁶³⁵ loans⁶³⁶ and sponsorships, as well as their nature and value, must be duly recorded in the books and reported to the competent body. The lowest

⁶³¹ See, among others, Evaluation Report on Ukraine 1F (2011) p. 33.

⁶³² GRECO Evaluation Report on B&H 5F, (2010) p. 26, and on Serbia 3E (2010) p. 22.

⁶³³ GRECO Evaluation Report on Monaco 5F (2011) p. 15.

⁶³⁴ GRECO defines in-kind contributions as donations or services provided free of charge or at preferential rate. For in-kind donations there should be a uniform system for estimating and recording their commercial value.

⁶³⁵ GRECO Evaluation Report on the Russian Federation, 6E (2011) p. 39.

⁶³⁶ Ibid.

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disclosure standard is identification of the source for all donations and the type of the donation exceeding a certain amount.⁶³⁷ Anonymous donations are prohibited.⁶³⁸ It is further required that donations of private companies be disclosed to the shareholders or other individual members of a legal entity, thus deterring any “suspicious” donations.

Likewise a detailed record of all expenditures should be kept.⁶³⁹ The recommendation encompasses direct and indirect expenditure for each and every political party, each list of candidates and each candidate. Evenmore so, the accounting requirement includes local party bodies and other entities included in the campaign. A standardized format is recommended for auditing.⁶⁴⁰

The donation and expenditure commitments are valid for coalitions as accounting should be given for each member of the coalition and each electoral candidate individually, according to the GRECO evaluation reports.

While the annual reporting requirement refers to giving access to the accounts to a supervisory authority, the disclosure requirement confers the right of the public⁶⁴¹ to get regular access at least annually to political parties’ accounts, or to a summary of them.⁶⁴²

The above rules are much easier to put into legislation than to implement properly. For example, there are objections to disclosing donors of opposition parties who fear that they might suffer disadvantages regarding their business activities, e.g., winning a public contract or not receiving needed permissions. In addition, the reporting and disclosure requirements might not be fully implemented by their subjects in the absence of an effective and impartial monitoring and investigative system.

⁶³⁷ GRECO Evaluation Report on Switzerland, 4F (2011) p. 21.

⁶³⁸ See, among others, GRECO Evaluation Report on Albania 7E, Transparency on Party Funding, Conclusions, (2009) p. 24, on Austria 3E, (2011) p. 24 and on Italy 7F (2011) p. 34.

⁶³⁹ See GRECO Evaluation Reports on Azerbaijan 2E, Transparency on Party Funding (2010) p. 29 and on Monaco 5F (2011) p. 15.

⁶⁴⁰ GRECO Evaluation Report on Portugal 6F (2010) p. 25.

⁶⁴¹ GRECO Evaluation Report on Serbia 3E (2010) p. 22 and on Russian Federation 6E (2011). p. 39.

⁶⁴² GRECO Evaluation Report on Romania 1F (2010) p. 36.

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Last, but not least clear and coherent laws go hand-in-hand with the transparency requirement.⁶⁴³

3. Accountability

An independent monitoring⁶⁴⁴ in respect of the accounts of the political parties and expenses, their presentation and publication is a condition *sine qua non* to ensure the fairness and lawfulness of the system.⁶⁴⁵ The mechanism for combating corruption in the politics should also encompass specialized and trained bodies with investigative and sanctioning powers.⁶⁴⁶ Sanctions must be sufficient to demonstrate that breaking the rules does not pay off.⁶⁴⁷ Donors should also be made liable for breaching electoral financing rules.

Accountability is the biggest issue regarding electoral campaign financing.⁶⁴⁸ While auditing might be done properly by a special accounting body, the breach of electoral campaign financing rules might not receive a satisfactory follow-up in terms of prosecution and punishment, thus perpetuating impunity. The prosecution part is even made more difficult knowing that the subject of the proceedings may be high ranking officials or party members who have abused the rules for the sake of the party, and thus expect to be shielded by it. Other problems that might occur include selective targeting only of the members of the opposition. A fine line must not be crossed between accountability and the abuse of the judicial apparatus with the purpose of threatening and coercing the opposition.

4.1.6. Observations on the Council of Europe Election Standards

It is undeniable that there are CoE standards in the election field.⁶⁴⁹ It would have been inconceivable for this European organization to observe elections and afford legal protection to individuals, in absence of such standards.

⁶⁴³ GRECO Evaluation Report on Belgium 8F, Transparency on Party Funding (2008) p. 28; on B&H, 5F (2010) p. 26, and on Ukraine 1F (2011) p. 33.

⁶⁴⁴ See, among others, GRECO Evaluation Report on Romania, 1F (2010) p. 36.

⁶⁴⁵ On the requirement for effective monitoring of election campaign financing see the GRECO Evaluation Report on Albania 7E, Transparency on Party Funding (2009) p. 24 and on Azerbaijan 2E (2010) p. 29.

⁶⁴⁶ GRECO Evaluation Report on B&H 5F (2010) p. 26, and on Russian Federation 6E (2011) pp. 38-39.

⁶⁴⁷ GRECO Evaluation Report on Azerbaijan 2E (2010) p. 29, and on Switzerland, 4F (2011) p. 21.

⁶⁴⁸ On the requirement for independent audit, see GRECO Evaluation Report on the Russian Federation, 6E (2011) p. 39. On the requirement for efficient auditing deadlines see the Evaluation Report on Portugal, 6F (2010) p. 25.

⁶⁴⁹ See pp. 74-143.

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The CoE standard of “free and fair elections” has been re-conceptualized time and again since the 1952 Protocol no. 1 to the ECHR. While the treaties represent the most authoritative source of election standards, political and expert documents capture in greater detail controversial topics such as electoral financing. Regardless if there was a strategy from the outset to deepen and geographically extend the election standards step-by-step, or that happened by a random choice, the fact remains that more and more election standards are emerging from the CoE bodies.

Considering that the CoE standards come from a variety of sources, there is always a risk of dissonance among them. However, the electoral principles of secret, direct, free, periodic, universal and equal elections cross-cut the boundaries of various instruments and mandates. The points of convergence among various standards from the election field are clearly enunciated in the Code of Good Practice in Electoral Matters. Of course, the most important point of convergence which holds the election standards together across CoE are its member-states, which have consented to those standards. They must harmonize their practices while implementing them. In particular, the prevailing majority of the CoE member states have ratified the ECHR P-1 and the Charter of Local Self-Government. The Code of Good Conduct in Electoral Matters represents codification of the electoral rules and best practices at the European level. It follows that a prevailing majority of the CoE members are legally bound and value the same principles applicable in the election arena.

There is no need to come up with yet another exhaustive list of election standards unifying all CoE standards. The latter cannot be perceived as merely an amalgam of various standards. On the contrary, each instrument and its respective praxis, provide guidance that is categorized on the bases of the type of election and the specific electoral standard.

No CoE document attempts to innovate in building electoral architecture. While the base of the construction remains the same, the liberal approach used to interpret them means stricter responsibility for states in implementing those standards. Although meaningful representation in decision-making has been acknowledged as a provider of peace and stability and protector of democracy, it has not been explicitly included as a desired electoral outcome. The CoE should make an attempt to conceptualize the right to meaningful representation as an

electoral standard of outcome, thus moving away from the minimalist concept of liberal democracy.

4.2. OSCE

One of the primary reasons invoked for inviting international election observers is the safeguarding of the integrity of elections. International election observation contributes to confidence in the process by the electorate and the opposition. That is the reason why the impartiality of observers is of the utmost importance, along with competence and technical expertise. At the European level, the OSCE⁶⁵⁰ is vested with a leading role with respect to election observations. The bulk of this task is carried out by ODIHR.⁶⁵¹

The OSCE⁶⁵² mandate relates to the protection of peace and security in Europe based on a broad concept, which also deals with protection of democracy and human rights. Thereby a direct link is established between the above protected values and a comprehensive concept of security.⁶⁵³ Since elections are: “a structural component of a democratic society”,⁶⁵⁴ all OSCE participating states adhere to the OSCE commitment to hold “free and fair” elections.

4.2.1. Legal Nature of OSCE Commitments

⁶⁵⁰ The creation of the OSCE, formerly known as the Conference on Security and Co-operation in Europe (CSCE) was initiated in early 1972, during the Cold War. It was only in 1994 that it changed its name into an organization. The OSCE Handbook (2007) pp. 1-2.

⁶⁵¹ The Office for Free Elections was established in Warsaw in 1990 by the Charter of Paris for a New Europe. Its initial role of the promotion of democratic elections was expended in 1992 when its name changed to the ODIHR. The institution was tasked with the support to democratic institutions and with monitoring the implementation of human dimension commitments. See Election Observation Handbook, 6th edition (2010) p. 19.

⁶⁵² The OSCE participating states are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, B&H, Bulgaria, Canada, Croatia, Cyprus, Czech Rep., Denmark, Estonia, France, Finland, Georgia, Greece, Germany, Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lichtenstein, Lithuania, Luxemburg, Macedonia, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Russian Federation, Romania, Serbia, Slovak Rep., San Marino, Mongolia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, UK, USA, Uzbekistan. See the OSCE official web site at <<http://www.osce.org>>.

⁶⁵³ OSCE Human Dimension Commitments, Vol. 1, Thematic Compilation, 3rd edition (2011) p. xvi.

⁶⁵⁴ Ibid p. 77.

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The OSCE commitments⁶⁵⁵ are a product of negotiations and agreement between the representatives of the participating states.⁶⁵⁶ They are an end product of a diplomatic process⁶⁵⁷ *par excellence*. The commitments are not legally-binding. In this context, it should be mentioned that the OSCE participating states have not yet agreed even to a constituting treaty, thus indicating that a legally-binding document in terms of elections is not high on the agenda of the OSCE participating states.

Still, it cannot be said that the OSCE commitments are just simple recommendations, because of the following:

First, they ensue from a political process and are agreed upon by all high representatives of the participating states.⁶⁵⁸ The methodology used for their elaboration and their endorsement by the OSCE participating states gives them a specific political value, meaning that they represent political obligation for the OSCE participating states.⁶⁵⁹ Besides, the OSCE is vested with a norm-setting capacity, as reaffirmed in 2005.⁶⁶⁰

Second, the content of the existing commitments is precise and detailed, which indicates a consensus among the OSCE participating states regarding their implementation. Third, the participating states have made a promise regarding particular follow-up on their implementation in good faith.⁶⁶¹ Lastly, the OSCE commitments are a manifestation of the

⁶⁵⁵ The OSCE human dimension commitments are set out in the following documents: Final Act of the Conference on Security and Cooperation in Europe (1975); Concluding Document of the Madrid Meeting (1983); Document of the Stockholm Conference on Confidence and Security Building (1986); Concluding Document of the Vienna Meeting (1989); Report on the Meeting on the Protection of the Environment (1989); Document of the Bonn Conference on Economic Cooperation in Europe (1990); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990); Charter of Paris for a new Europe (1990); Document of the Krakow Symposium (1991); Report of the CSCE meeting of Experts on National Minorities (1991); Document of the Moscow Meeting (1991); Prague Document on Further Development of the CSCE Institutions and Structures (1992); Helsinki Document: The Challenges of Change (1992); Documents of the Third and the Fourth Meeting of the Ministerial Council (1992, 1993); Budapest Document: Towards a Genuine Partnership in a New Era (1994); Lisbon Document (1996) Documents of the Sixth Meeting and the Seventh Meeting of the Ministerial Council (1997, 1998); Istanbul Document (1999); Documents of the Meetings of the Ministerial Council (2000 - 2008).

⁶⁵⁶ OSCE Human Dimension Commitments, Vol. 1, Thematic Compilation, 3rd edition (2011) p. xvi.

⁶⁵⁷ Ibid p. xvii.

⁶⁵⁸ Ibid p. xiii.

⁶⁵⁹ Coalition "All for Fair Trials", Final Report on the Institutional Response Against Election Irregularities (2009) p. 220.

⁶⁶⁰ See the OSCE Ministerial Council Decision No. 17/05.

⁶⁶¹ Istanbul 1999, Charter for European Security: II Our common foundation. In this context, arguments were made that some of Human Dimension commitments are already gaining legally-binding status through the

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UN obligations set out in the UDHR and ICCPR in support of “a global consensus for democracy [that] emerged in the 1990s”.⁶⁶²

In view of the above, the OSCE commitments are politically-binding, thus belonging to the realm of soft law.⁶⁶³ They are stipulated in a number of OSCE documents, which build on each other and represent the OSCE *acquis*, which must be accepted by the newly admitted states.⁶⁶⁴

The OSCE commitments apply equally to all states and their implementation is a concern of all, as proclaimed by the Moscow conference in 1991. Particularly, human rights are not the exclusive internal affairs of the countries “[...] as their respect represented one of the foundations of the international order [...]”.⁶⁶⁵ On balance, relations among the OSCE participating states have been based on the respect for sovereign rights and non-intervention in internal affairs.⁶⁶⁶

The OSCE commitments relating to the participation in public affairs and elections belong to the third organizational dimension, the so-called “Human Dimension”.⁶⁶⁷ The principle of multiparty democracy based on free, periodic and genuine elections was mentioned for the first time as a common value of the participating states in 1990, with the fall of the socialist system.⁶⁶⁸ The participating states have declared their commitment to pluralist and representative democracy based on free and regular elections, separation of powers and distinction between the state and political parties.⁶⁶⁹ The right of the people to take part in the

process of the formation of regional customary law. See, the OSCE Human Dimension Process and the Process of Customary International Law Formation”, OSCE Yearbook 2005, Centre for OSCE Research pp. 195-214.

⁶⁶² OSCE/ODIHR, Existing Commitments for Democratic Elections in OSCE Participating States (2003) pp. 7 and 11.

⁶⁶³ Dupuy, *La communauté internationale entre le mythe et l’histoire* (1986) pp. 53, 135-136. See also Manton, Knoll, *Monitoring within the OSCE Office for Democratic Institutions and Human Rights (ODIHR)* at <<http://www.osce.org>>.

⁶⁶⁴ OSCE/ODIHR, *The OSCE Human Dimension Commitments, A Reference Guide* (2001) p. xv.

⁶⁶⁵ See the 1991 Moscow Document, re-affirmed in the 1992 Helsinki Document: *The Challenges of Change*.

⁶⁶⁶ See the 1975 Helsinki Final Act.

⁶⁶⁷ OSCE is structured on the basis of three dimensions, as follows: 1. the politico-military dimension; 2. the economic and environmental dimension and 3. the human dimension. In the OSCE terminology, the term “human dimension” is used to describe the set of norms and activities related to human rights and democracy, OSCE Human Dimension Commitments, a Reference Guide (2001) p. xiv; OSCE/ODIHR, *OSCE Human Dimension Commitments, 1 Thematic Compilation 3rd edition* (2011) p. xvi.

⁶⁶⁸ See the 1990 Document of the Bonn Conference.

⁶⁶⁹ See the 1990 Document of the Copenhagen Meeting.

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governing of their own country is affirmed as a common value.⁶⁷⁰ Thereby, the political rights are linked with the peace and security that the OSCE has sought to establish in Europe.⁶⁷¹

4.2.2. OSCE Electoral Commitments

The OSCE has followed the same eclectic approach used for other commitments, while developing electoral commitments. Namely, they are contained in a number of documents, which have taken a form of summit declarations, ministerial council decisions or a charter in the political sense of the word.⁶⁷² The OSCE electoral tree,⁶⁷³ with each of its branches representing a commitment for holding free and fair elections, is deeply rooted in the 1990 Copenhagen Document of the Conference on the Human Dimension of the CSCE (the Copenhagen Document).⁶⁷⁴

⁶⁷⁰ In the Charter of Paris adopted at the Summit of Heads of State and of Government in 1990 the commitments to democracy as the only system of government and to free, fair, universal and accountable elections were re-affirmed.

⁶⁷¹ D'Amato, *International Law Anthology* (1994) pp. 374-375.

⁶⁷² The OSCE electoral commitments are spread in the following texts: the 1990 Copenhagen Document, the 1990 Bonn Document, the 1990 Paris Document, the 1991 Moscow Document, the 1991 Geneva Document, the 1994 Budapest Document, the 1996 Lisbon Document, the 1999 Istanbul Document, the 2002 Porto Document, the 2003 Maastricht Document, the 2006 Brussels Document and the 2010 Astana Document.

⁶⁷³ See the ODIHR logo in this regard.

⁶⁷⁴ Its Annex 1 reads as follows:

“(6) The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. They recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating State.

(7) To ensure that the will of the people serves as the basis of the authority of government, the participating States will

(7.1) - hold free elections at reasonable intervals, as established by law;

(7.2) - permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;

(7.3) - guarantee universal and equal suffrage to adult citizens;

(7.4) - ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;

(7.5) - respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;

(7.6) - respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;

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Its wording⁶⁷⁵ connotes that the OSCE participating states are committed to safeguarding the sustainability of the democratic order.⁶⁷⁶ Since a democratic system of governance is intrinsically linked with representative democracy, only free and fair elections can represent a basis for the legitimacy and authority of the government in the OSCE region. Thus, it appears that the requirement to defend democratic government against any violent attempts at overthrow is interrelated with the sustainability of the democratic order. It has already happened in modern European history that non-democratic governments have been elected. Therefore, the above “defense” commitment has been carved in light of the international and OSCE human rights protection instruments. If the contrary was the case, other OSCE human dimension commitments might be endangered by a democratically elected, but a non-democratic government. It is inferred from the Copenhagen Document that the sustainability of the democratic order has been conceived as one of the outputs of the OSCE commitments, which strives to protect and enhance peace on European soil. Therefore, the 1991 specific commitment for the support of an elected government against coup d'état,⁶⁷⁷ must be interpreted in line with the requirement to protect the democratic order and other human dimension commitments undertaken by the OSCE participating states.⁶⁷⁸

For democratic order to be established, paragraph 6 of Annex I of the Copenhagen Document requires a government to be formed on the basis of the free and fair expression of the will of

(7.7) - ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;

(7.8) - provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process;

(7.9) - ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

(8) The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.”

⁶⁷⁵ See paragraphs 6-8 of the Copenhagen Document.

⁶⁷⁶ On durability of democracy, see Beetham, *Defining and Measuring Democracy* (1994) pp. 69-73.

⁶⁷⁷ Such support is gaining increased importance world-wide, as can be seen in the case of Honduras that was excluded in 2009 from the Organization of American States for refusal to re-instate the legitimately elected president.

⁶⁷⁸ See the 1991 Moscow Document.

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the people. To attain the purpose of holding genuine elections, the Document has taken the approach of respect for the election rights of individuals.⁶⁷⁹ Thus, governments must take care that each of their citizens are able to cast his or her vote in a free and fair manner.⁶⁸⁰ However, this requirement does not limit the OSCE/ODIHR electoral observation and assistance mandate only to elections of the legislature.

The content analysis of paragraphs 6-8 of the Copenhagen Document,⁶⁸¹ divulge the following principles of the electoral model applicable in the OSCE region:⁶⁸²

1) Elections must be free in all their dimensions. In a nutshell, this means that electoral rights are universal: voters are able to make their choice freely, while the candidates' nomination is not burdened by arbitrary requirements. It also means that the media and electoral contestants can freely spread political information, as well as that effective legal and procedural safeguards are in place to protect those electoral freedoms. Since human rights translate the freedom of human beings into concrete terms, the right to political association and to peaceful assembly remain the essence of free elections.⁶⁸³

2) Fairness, as an electoral principle, cannot be separated from the non-discrimination commitment. Its architecture is based on the following pillars: the equal treatment of candidates and media on one hand, and the secrecy of vote on the other hand. Since, the fairness principle is closely linked with electoral integrity, the election observation is included in the OSCE commitments. In fact, the election observation by international and local observers is considered a means for electoral quality assurance.⁶⁸⁴

⁶⁷⁹ For the election rights of each individual, see also the Charter of Paris for a New Europe 1990.

⁶⁸⁰ The 1990 Copenhagen Document, paragraph 7.2.

⁶⁸¹ Democracy Reporting International, *Discussing International Standards for Democratic Governance, A Preliminary Research Report* (2007) p. 11; Strohal, *Democratic Elections and their Monitoring: Can This OSCE Success Story Be Sustained?* (...) p. 250.

⁶⁸² OSCE Human Dimension Commitments, Vol. 1, *Thematic Compilation*, 3rd edition (2011) p. xxii. The precision in the wording of the OSCE electoral commitments was also confirmed by OSCE/ODIHR election advisor in an interview held in 2007.

⁶⁸³ See in particular paragraph 6 and paragraphs 7.1-7.3 and 7.6 of the 1990 Copenhagen Document.

⁶⁸⁴ The 1991 Report from the Meeting of Experts on National Minorities requested election observers to be deployed in areas with national minorities.

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3) Elections must be genuine, meaning that electoral processes are carried out in a manner that ensures that their outcome reflects the true choice of the people. This principle requires that counting, tabulation and reporting of the results is done transparently, honestly and in public. The electoral outcome must be respected, meaning that the winning candidates must be installed and occupy the office until the expiration of their term.⁶⁸⁵ Regular elections go hand-in-hand with government respect for the will of the people as the source of sovereignty. Elections must be held at reasonable intervals in order to re-check the “pulse” of the electorate.⁶⁸⁶

Subsequent OSCE documents have gradually added complementary electoral commitments. Yet the principles set out above remain unchanged. With reference to the “fairness principle”, states must curtail impunity in electoral fraud cases, as it endangers stability in the OSCE region.⁶⁸⁷ Under the same principle, the requirements for equal rights with respect to access to media⁶⁸⁸ and holding rallies in the electoral context were made explicit.⁶⁸⁹ Furthermore, the “free election principle” cannot be fully observed without full enjoyment of election rights for refugees. Hence, it was set out as a requirement, along with full respect for the voting rights of minorities.⁶⁹⁰ Special attention was also devoted to the enhancement of the participation of women in political life and the prohibition of family voting, which *de facto* disenfranchises women.⁶⁹¹ To conclude, the “genuine election principle” cannot take strong hold without the accountability, transparency and public confidence that were mentioned in connection with the OSCE election-related commitments.⁶⁹²

⁶⁸⁵ Ghebali, *Debating Election and Election Monitoring Standard at the OSCE: Between Technical Needs And Politicization (...)* p. 217.

⁶⁸⁶ The Copenhagen Document, paragraph 7.1.

⁶⁸⁷ The 1996 Lisbon Document.

⁶⁸⁸ The commitment for free media from the 1994 Budapest Document was reiterated in the 2010 Astana Declaration.

⁶⁸⁹ The 1999 Istanbul Document.

⁶⁹⁰ *Ibid.*

⁶⁹¹ See the 1991 Moscow Document (paragraph 40.8), the 1999 Istanbul Document and, in particular, the Sofia 2004 Annex: Action Plan for the Promotion of Gender Equality, which requires the participating states to introduce legislative measures and mechanisms for equal participation of women in political life by *inter alia* promotion of women’s active participation in political parties, thus obtaining greater chances for elected offices. On discrimination and under-representation of women, see also Decision no. 7/09 adopted within the framework of the Athens meeting 2009. Family voting problem was tackled by 2003 Maastricht Document.

⁶⁹² The 2003 Ministerial Council meeting in Maastricht.

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The Copenhagen document regulates restrictions to the above rights by making reference to other international commitments, like the ICCPR and the UDHR, and to the principles of lawfulness and proportionality. Derogations in case of public emergency are also strictly regulated⁶⁹³, in line with the Siracusa principles.⁶⁹⁴

While respect for minorities' voting rights is included in the OSCE commitments in general terms,⁶⁹⁵ they have been largely supplemented by the Lund Recommendations on Effective Participation of National Minorities in Public Life (the Recommendations).⁶⁹⁶ The latter are not commitments in the sense that they have been agreed upon by the Heads of States or Ministers.⁶⁹⁷ Nevertheless, they are worth mentioning, as they represent one of the most effective tools for better inclusion of national minorities in decision-making, without having to undergo the process of formal ratifications. Starting from the premise that participation in public affairs is a human right, and in view of the global prohibition of discrimination, the Lund Recommendations propose concrete measures and bodies at all governance levels, respectively. Elections are especially tackled as one of the modalities for facilitating political inclusion of this specially-targeted group in democratic decision-making. In this context, states should take special care to ensure freedom from discrimination and freedom of political association, as well as types of electoral systems and boundaries of electoral districts, which should facilitate minority representation and their influence, in addition to effective judicial remedies (e. g., against decisions such as demarcation of electoral districts).

OSCE participating states are committed to the implementation of the OSCE commitments.⁶⁹⁸ In particular, in Budapest in 1994, the participating states agreed to ensure full implementation of the commitments and mandated the PC to deal with human dimension

⁶⁹³ The measures in case of derogation must be lawful, proportional and non-discriminatory, public emergency must be proclaimed officially.

⁶⁹⁴ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

⁶⁹⁵ See the 1991 Geneva Document and the 1999 Istanbul Document.

⁶⁹⁶ See also OSCE/ODIHR Guidelines to Assist National Minority Participation in the Electoral Process (2001).

⁶⁹⁷ The Recommendations were elaborated in 1999 by a group of internationally recognized experts with the support of the OSCE and the High Commissioner on National Minorities, on the basis of the relevant UN, CoE and OSCE documents.

⁶⁹⁸ The 1983 Madrid Document, the 1990 Paris Document, the 1991 Moscow Document, the 1992 Helsinki Document. See also OSCE/ODIHR Common Responsibility Commitments and Implementation (2006) p. 2. The process for reviewing of the OSCE commitments was foreseen even at the time of the first Helsinki Act by way of a follow-up and later reviewing meetings. See OSCE Handbook (2007) p. 13.

issues, dialogue and to act in case of non-implementation. In the 1999 Istanbul Document the participating states re-affirmed the commitment to implement the OSCE human dimension commitments. As pointed out by the 2006 ODIHR Report to the Ministerial Council,⁶⁹⁹ a cornerstone of effective implementation is the existence of political will by the participating States to implement the OSCE commitments, as the primary responsibility lies with them.⁷⁰⁰ They should find the ways and mechanisms for ensuring a follow-up to the OSCE electoral commitments.

4.2.3. Assurance of Election Quality by ODIHR

OSCE/ODIHR provides electoral support to its participating states in the form of election observation, or monitoring. Regardless of whether it is called observation or monitoring of elections,⁷⁰¹ this activity represents one of the most high profile tasks executed by ODIHR, since election outcomes may affect the stability of one country or of the entire region.⁷⁰² The observers focus and report on the patterns extracted during the election observation. They do not monitor or provide redress for violations of individual election rights.

Since 2002, ODIHR has been deploying observers under the premise that election commitments will be met by the participating states, but that ODIHR can comment on specific issues. ODIHR issues findings that are impartial, as well as recommendations of a concrete nature. It uses diplomatic language such as “mostly in line with international commitments” or “further substantial efforts are required for genuinely democratic elections in line with OSCE commitments”. However, in the most striking cases of electoral irregularities, ODIHR clearly states that key OSCE commitments were not met.

All participating states, except for the Holy See, have undergone ODIHR’s electoral scrutiny despite limited funds. Azerbaijan was the first country in 1995, whereby the whole of

⁶⁹⁹ P. 77 of the Report.

⁷⁰⁰ Maastricht Document, 2003.

⁷⁰¹ OSCE/ODIHR, Handbook Election Observation – A Decade of Monitoring Elections: the People and the Practices (2005). See also relevant election commitments.

⁷⁰² For the first time election observation was institutionalized by the Copenhagen Document. The ODIHR mandate to observe elections is also based on the OSCE Documents from Paris, Rome, Budapest and Istanbul. Whereas in the past the focus of election observation was put on election day, since 1994 it has changed to longer and more comprehensive observation, OSCE/ODIHR, Election Observation (2005) pp. 1-5. Regarding women participation, the 2004 Sofia Document tasked the ODIHR as part of election observation to observe and report on women’s participation in electoral processes, and when possible, to publish analysis on the situation of women in electoral processes.

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elections were monitored and not only the conduct during Election Day.⁷⁰³ Since 2002, upon governments' invitation, election assessment missions have been deployed to long-standing democracies, such as the Netherlands, Italy, the UK, and France. ODIHR also deployed a team for assessing elections for the EU parliament. According to ODIHR officials,⁷⁰⁴ the difference was that in the countries west of Vienna, the electorate had confidence in the process, unlike the countries east of Vienna where some times large numbers of observers were requested to ensure the integrity of elections.

As shown in Annexes I and II, some countries remained regular clients for election observation, such as Macedonia, Albania and Ukraine. In some of the countries where the ODIHR has deployed election observation missions, there is no consistent improvement trend. On the contrary, it seems they have been acting as “bad pupils”, as one more or less positive assessment is followed in the next elections with an assessment indicating trends of negative practices and election irregularities.⁷⁰⁵ It might be true that the assessment of the elections by ODIHR takes into consideration the particular circumstances, i.e., if the elections were organized right after armed conflict, it is more likely that any such assessment will be more positive, put in the context of stopped violence and a brokered peace agreement. Nonetheless, according to the countries' trends throughout the years, some of the countries have never managed to make a “break-through” and organize free and fair elections, in spite of numerous ODIHR reports and recommendations. This is especially true for some countries situated in South-Eastern Europe and the Caucasus. An increase in the number, type and gravity of electoral irregularities over the years indicates a dangerous trend for certain European countries. Actually, it indicates the level and sustainability of democracy in a particular country. If such a trend persists in a number of countries from the same region, it provides an indicator of the level and sustainability of democracy for the whole region. A plethora of electoral irregularities in a certain region reduces the probability of holding free and fair elections in a country from that region. The good news is that elections are seldom accompanied by physical violence in the European countries.

⁷⁰³ See at <<http://www.osce.org>>.

⁷⁰⁴ Interviews conducted in May 2007.

⁷⁰⁵ See the Annex I and II depicting the most re-occurring and wide-spread irregularities in the OSCE participating states, pp. 290, 293. For more detail, see the ODIHR election observation and assessment reports at <<http://www.osce.org/odihr>>.

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The differences between OSCE countries with respect to electoral development may be substantial, depending on the countries compared. On one hand, there are OSCE countries that are ready and assume the obligation to ensure voting rights for non-citizens, while on the other hand, in other OSCE countries citizens are substantially deprived of their election rights. From ODIHR reports it is clear that long-standing democracies can still benefit from an impartial technical eye examining their electoral framework and practice.

Trends are extracted in connection with election irregularities, with due consideration given to differences in political culture, history, number, type and intensity of election irregularities identified by the ODIHR election observation missions, as follows:⁷⁰⁶

First, deficient legislation is a widespread problem. The laws may contain restrictions on freedoms of expression, assembly, political association and the passive election right, which are incompatible with the international standards. The applicable legislation may be ambiguous and full of lacunae, which makes possible differences in interpretation and inconsistent application. Furthermore, the legislation may not provide for a clear division of competencies between various bodies and courts, which results in a lack of proper application of the law. Sometimes the competent bodies choose not to implement the legislation fully. Such conduct is equal to arbitrariness, since the law is not respected. Although some countries have embarked on electoral law reform, the new laws may have been adopted too close to the scheduled elections, or were adopted through a non-transparent procedure without proper consultation with the opposition.

Second, a lack of effective remedy is another wide spread electoral irregularity. Its occurrence goes hand in hand with partial and incompetent EMBs. It appears that the bodies responsible for the lawfulness of the process cannot cope with all the challenges. The problems in this respect may be caused by the model for the EMBs' elections, if its members are elected by the biggest parties, appointing their "party soldiers"; because the officials are subject to threats and intimidation; or due to a lack of time, knowledge or competence how to investigate and process complaints.

⁷⁰⁶ See Annex I and II, pp. 290, 293

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In many countries, the ODIHR observers have noticed a failure of these bodies to operate in a transparent manner, which raises doubts about the lawfulness of their work. A lack of accountability of the EMBs indicates a weak legal culture and disrespect for the rule of law, although it is a cornerstone of a democratic society.

A lack of access to judicial remedy for a number of violations of election rights, especially during the pre-election phase, is yet another example of a legislative deficiency. No effective remedy, let alone a judicial remedy, in cases of media-related discriminatory practices, or of insufficient financial reporting was identified.

Third, inaccurate voters' lists represent a problem in the majority of countries. The ex-socialist countries especially encounter this problem if historically, there was no proper, accurate and integrated civil register, accessible to the body maintaining the voters' lists. The problem is compounded further by a lack of effective remedy for voters who do not appear on the voters' lists, and who are thus effectively disenfranchised. Or, phantom votes were detected (e.g. dead people voting). The additional bulk of phantom votes can indeed influence the outcome of election.

Fourth, a suppression of the opposition continues to be a problem in the OSCE region. Problems range from restrictions in candidacy and restricted access to media and biased media, to state apparatus' intimidations, and even incarceration of opposition figures. When there are substantial campaign restrictions, a wide-spread media bias and an intimidating environment, it is difficult to speak about genuine elections. In particular, a low-key campaign results in uninformed voters who may not feel that they can cast the ballot freely. By the same token, campaign financing with no ceilings results in unequal chances, usually of opposition candidates, to compete in elections. Further unfair advantage is gained by abusing state and administrative resources, thus indicating an amalgam between party and state resources. The above- mentioned irregularities occur with a frequency ranging between high and medium for the examined years.⁷⁰⁷

Fifth, violations of election procedures continue to be a challenge for a number of OSCE participating states. In many instances, observers noticed that the procedures set out by law

⁷⁰⁷ See Annex II, p.293.

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were not observed, especially relating to effective legal remedies and counting and tabulation procedures. Interference with counting and tabulation procedures is becoming a more and more popular way of fixing election results, thereby assuring fraudulent electoral victory. In addition, family, proxy, group and multiple voting continue to violate the right to freely and secretly⁷⁰⁸ cast a ballot. Such irregularities cannot be considered as minor, or as part of a tradition. In fact, they indicate that women and vulnerable minorities (e.g. Roma) are mostly deprived of their voting rights. When voters are intimidated or bribed, then the electoral administration is also failing to discharge its duties properly. Transparency of the voting, counting and tallying procedures has been also raised with respect to new voting technologies.

Sixth, impunity or selective justice represents one of the biggest problems in the OSCE region. It gives a signal that committing election-related offences pays off. Sometimes such convicts even receive a presidential pardon.⁷⁰⁹ As a rule, election-related offences are committed for the benefit of an election candidate and political party, and are thought through and committed by a group. This is the main reason why violations of electoral rights and rules persist. It does indicate that competent, effective and impartial prosecution and judiciary is lacking in a number of OSCE states. Proper sanctioning policy serving as a deterrent in this regard is another facet of the problem of lack of effective remedies in the OSCE area.

Last but not least, the negative trend of inequitable representation of women continues. Minorities, as a vulnerable group, continue not to be sufficiently included in elections as candidates. Additionally, states are not sufficiently engaged in providing information in the minority language or in facilitating the vote of minorities in case of illiteracy.

Elections observed in 2012 do not offer a better picture. No remedy has been yet found for voters' lists' deficiencies, for underrepresented women and minorities, for inefficient remedies, for biased media, or for impunity.⁷¹⁰

⁷⁰⁸ The observers note a downward trend of the secrecy of the vote not being appropriately protected in 2011-2012, Annex I and II, pp. 290,293.

⁷⁰⁹ One of the Macedonian ex-Presidents granted pardon to the only convicted perpetrator for election-related offences in Prilep.

⁷¹⁰ See Annex I and II, pp. 290, 293.

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The challenges to the electoral commitments identified by ODIHR overlap with the problems depicted above.⁷¹¹ While the analyses herein are based on a frequency with which particular electoral irregularity occurs in Europe, the ODIHR analysis are focused on the most serious breaches of the electoral commitments in certain states. The ODIHR “black list” starts with the suppression of the opposition as a fundamental breach, although it is not geographically so widespread.⁷¹² The high ranking of this phenomenon comes from the threat it poses to the very survival of democracy. Arbitrary candidates’ registration and blurred separation between state and party resources are other factors that make the liberalization of the electoral outcome difficult. Predatory conduct in elections includes also intimidation of voters; unfair electoral campaign rules and conduct; and deviations in voting, counting and tabulation procedures. The bigger picture of electoral conduct in Europe demonstrates that in certain countries (or even regions) political actors, in absence of enlightened knowledge of democracy, still adhere to the old Machiavellian strategy, in order to win the prize of power!

In conclusion, electoral irregularities create a vicious circle, where the electoral rights of the citizens are not respected and no irregularities can be corrected at a later stage. The end result is a lack of accountability and public confidence, and eventually deficient democracy. The statements that there is no political will for holding free and fair elections means that the power in such societies is kept with a small elite, and that a separation of powers, the rule of law or human rights protection is deficient. Flawed elections indicate that in the particular country, democracy has not taken permanent hold, but its social system has taken a different shape, maybe more in a form of an oligarchy. The futility of efforts to restore democracy in such cases may undermine confidence in it, leading to a public perception of democracy as “the word for something that does not exist”.⁷¹³

4.2.4. From Commitments to Fully Fledged Election Standards

⁷¹¹ See the challenges to OSCE electoral commitments at <<http://www.osce.org/odihr/elections>>, accessed on 25 June 2013.

⁷¹² The intimidation of candidates (IC), the police intimidation (PI) and the candidates’ nomination restrictions (CNR) have a low frequency of occurrence. See Annex II and the measured frequencies of occurrence.

⁷¹³ Popper, *Unended Quest: An Intellectual Autobiography* (Macedonian, published by Magor) (1999) p. 9.

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The following specific election standards are deduced for each of the phases of the electoral cycle by using the OSCE commitments extracted from the election-related documents.⁷¹⁴ The ODIHR election observation and assessment reports⁷¹⁵ have been used as a secondary source for defining the specific election standards, as follows:

Pre-election Phase

Electoral system and law: The basis of the OSCE commitments is connected with democracy as a sole system of governance in the OSCE region.⁷¹⁶ Voters are guaranteed at least one electoral opportunity,⁷¹⁷ i.e., an election of one chamber of the legislature.⁷¹⁸ Whereas the commitments do not foresee a special electoral system,⁷¹⁹ it must be shaped in accordance with the assumed OSCE election-related commitments. The obligations for elections to reflect the free will of the people, and to be periodic must be enshrined in the law.⁷²⁰

From the election observation reports prepared by ODIHR, it transpires that legal framework is always scrutinized. As a rule, the electoral law must be clear and coherent, with the changes in the legislation adopted well before elections.⁷²¹

Election observation: The OSCE commitments require participating states to invite international and local observers in order to enhance their electoral process, and its integrity.⁷²² The election observation system of the participating states has been scrutinized by election observation missions, which require access to be granted by law to the observers, to all phases of the electoral process.⁷²³ Since in all OSCE participating states there have been

⁷¹⁴ OSCE/ODIHR, OSCE Human Dimension Commitments, 1 Thematic Compilation 3rd edition (2011) pp. 80-84; and Existing Commitments for Democratic Elections in OSCE participating states (2003).

⁷¹⁵ Information taken at <<http://www.osce.org/odihr>>.

⁷¹⁶ The Charter of Paris, 1990; and OSCE/ODIHR, OSCE Human Dimension Commitments, 1 Thematic Compilation 3rd edition (2011) p. xvii.

⁷¹⁷ Beetham, *Defining and Measuring Democracy* (1994) p. 50.

⁷¹⁸ *Ibid* paragraph 7.2.

⁷¹⁹ *Ibid* p. xvi.

⁷²⁰ The 1990 Copenhagen Document, paragraphs 6 and 7.

⁷²¹ For example, Final election observation reports for the Republic of Belarus, 2012 Parliamentary Elections, pp. 5-6; for the Republic of Serbia, 2012 Parliamentary and Early Presidential Elections, p. 22; for Georgia 2012 Parliamentary Elections, p. 7; for the Republic of Moldova, 2011 Local Elections, p. 25.

⁷²² The 1991 Report from the Meeting of Experts on National Minorities requested election observers to be deployed in areas with national minorities.

⁷²³ For example, Final election observation reports for the Republic of Croatia, 2011 Parliamentary Elections, p. 18; for the Republic of Slovenia, 2011 Early Elections for the National Assembly p. 8; for Spain 2011 Early Parliamentary Elections, p. 18; for Estonia, 2011 Parliamentary Elections, p. 23; Final Report on 2005 General Elections in the UK, p. 10.

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electoral observation or assessment activities, it follows that election observation has become a norm in the OSCE area.

Voters: The principle of universality is underlined in the OSCE commitments, along with the principle of equality.⁷²⁴ Participating states must guarantee equal suffrage, i.e., all adult citizens must have the same election rights without a distinction on the grounds of property, gender, social status or any other ground relating to his or her personal status.⁷²⁵ Boundaries must be drawn to give equal weight of each vote to the extent possible. Along these lines, the electoral boundaries should be drawn in a way so as to favor the representation of minorities.⁷²⁶ In view of the above requirements, the accuracy of the electoral rolls is always scrutinized by the ODIHR observers, while due consideration is given to the personal data protection requirement.⁷²⁷

Candidates: The principles of universality and equality also apply with respect to the passive election right, i.e., the right to seek office either individually or in a group. This right may be subject to certain restrictions, as set out in the relevant international treaties. However, the passive election right must be respected without discrimination.⁷²⁸ There is no genuine election without a plurality of genuine choices. Therefore, single-party dominance is contrary to the OSCE commitments.

Electoral Administration: Whereas no specific OSCE commitment exists with respect to electoral administration, from the OSCE commitments as a whole, it transpires that elections must be administered impartially and independently. The ODIHR election observation reports regularly assess the work of the election administration in terms of their inclusiveness,

⁷²⁴ See the 1990 Copenhagen Document paragraph 7.3, and 2004 Sofia Annex: OSCE Action Plan for the Promotion of Gender Equality.

⁷²⁵ Ghebali, *Debating Election and Election Monitoring Standard at the OSCE: Between Technical Needs And Politicization (...)* pp. 216-217.

⁷²⁶ See Final Report of the 2012 Ukrainian Parliamentary Elections, p. 7.

⁷²⁷ For example, 2011 Final Report on Parliamentary Elections of Croatia, p. 17. For new voters' registration technologies see 2012 Assessment of the State Automated Information System and of the Voters' Registration System of the Republic of Moldova.

⁷²⁸ The 1990 Copenhagen Document, paragraph 7.3.

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effectiveness and efficiency.⁷²⁹ Consensual decision-making is one of the indicators that partisan interests did not prevail in the electoral administration.⁷³⁰ The election bodies' work with respect to electoral disputes must be of the same quality as a decision made by an independent arbiter.

Electoral Campaign:⁷³¹ Freedom of political association, of expression⁷³² and equal treatment of political groups must be ensured, i.e., no one should gain unlawful and unfair advantage by *inter alia* abusing state resources for its own campaigning. Free political campaigning and equal media access are a prerequisite for informed voters who only then can freely express their opinion. Elections must be free from any violence⁷³³ or pressure: states must ensure that all candidates freely carry out their campaigning and that political pluralism is protected.⁷³⁴ Donations should be clearly regulated, with specific ceilings imposed.⁷³⁵ State resources must be treated separately from the party resources and must not be abused in a campaign.⁷³⁶

Media must be impartial⁷³⁷ and give access to all electoral candidates under non-discriminatory rules in terms of price and allocation of time.⁷³⁸ Similarly, election competitors must respect the rules on financing and media access, which in turn must be clear and foreseeable.⁷³⁹ Private media should not exceed the allocated agreed time.⁷⁴⁰

⁷²⁹ On impartial and independent administration see more in the OSCE Existing Commitments for Democratic Elections in OSCE Participating States (2003) p. 14.

⁷³⁰ See, among others, final reports on Macedonian 2008 Early Parliamentary Elections and 2005 Local Elections, p. 6 for both. Regarding decision-making by consensus as a rule see Lijphart, *Patterns of Democracy* (Serbian translation, published by Sluzbeni List SCG Beograd) (1999) p. 35.

⁷³¹ OSCE electoral commitments set out in the Copenhagen Document from 1990, in particular paragraphs 7.5-7.8.

⁷³² Final Report on 2011 Parliamentary Elections in Turkey, p. 18.

⁷³³ Check as secondary resource: Handbook for Domestic Election Observers (Macedonian translation, published by OSCE/ODIHR) (2005) p. 16.

⁷³⁴ For example, Final report on Kazakhstan, 2012 Early Parliamentary Elections, p. 27.

⁷³⁵ Final Report on 2010 Parliamentary Elections in the Slovak Republic, p. 11.

⁷³⁶ See paragraph 5.4 of the 1990 Copenhagen Document, stipulating that there must be a separation between political parties and the state, and they must not be mixed. See also Statement of Preliminary Findings and Conclusions 2013 Presidential Elections in Montenegro, p. 6.

⁷³⁷ Among others, see Statement of Preliminary Findings and Conclusions with respect to Macedonia, 2013 Municipal Elections 2nd round, p. 2, and 2012 Final report of the Early Parliamentary Elections in Montenegro, p. 21.

⁷³⁸ OSCE Handbook on Media Monitoring for Election Observation Missions (2012) pp 13-14, 25-29; Final Report on 2011 Croatian Parliamentary Elections, p. 18.

⁷³⁹ See, among others, the 2013 Election Assessment Mission Report on Iceland, pp. 9-10.

⁷⁴⁰ Final Report on 2010 Parliamentary Elections in the Slovak Republic, p. 14.

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Effective Remedy: Legal protection of the electoral process is not only implied in the electoral commitments, but it is also an indispensable element of the OSCE human rights' protection architecture. Bearing that in mind, an effective remedy means: a) impartial and independent administrative bodies and judiciary; b) administrative and judicial procedures which are public and transparent; c) available appeals for all aspects of the electoral process; d) proceedings concluded within short deadlines in order not to delay the final electoral results; and e) decisions that are reasoned and publicly available.⁷⁴¹

During the pre-election phase, adequate and effective remedies must be in place for the voters' registration,⁷⁴² nomination of candidates and violations of the electoral campaign rules by the candidates, the submitters of candidates' lists⁷⁴³ and the media.⁷⁴⁴ The criminal-law remedies must be effective enough to end impunity in election-related cases.⁷⁴⁵

Disadvantaged groups: The OSCE commitments require greater inclusion of women in political life, both as candidates and as members of election bodies.⁷⁴⁶ Gender quotas should be used as a mechanism to achieve it.⁷⁴⁷ As for national minorities, information about electoral processes must be available in their languages, as well as voter education programmes for those minorities prone to intimidation.⁷⁴⁸

Election Day

Voters: Voters must be able to cast a secret ballot.⁷⁴⁹ The secrecy of ballots is a safeguard of the active election right and of the integrity of elections.⁷⁵⁰ Proper identification of voters is

⁷⁴¹ Petit, ODIHR, *Resolving Election Disputes in the OSCE Area: Towards A Standard Election Disputes Monitoring System* (2000) pp. 6, 9-15.

⁷⁴² OSCE/ODIHR *Handbook for the Observation of Voter Registration* (2012) pp. 28 and 55. See also *Statement of Preliminary Findings and Conclusions with respect to Armenian Presidential Elections*, p. 2.

⁷⁴³ See, among others, *Final Report on 2011 Parliamentary Elections in Turkey*, p. 20.

⁷⁴⁴ See, among others, *Final Report on 2012 Parliamentary Elections in Romania*, pp. 17-18; *Final Report on 2010 Parliamentary Elections in the Slovak Republic*, p. 14.

⁷⁴⁵ *Final Report of the 2012 Early Parliamentary Elections in Kazakhstan*, pp. 18 and 28. Although not in Europe, Kazakhstan has been included in the analysis for better illustration of the OSCE standards to which it has consented.

⁷⁴⁶ See 2004 Sofia Document, *Action Plan for Promotion of Gender Equality*; 2011 *Final Report on Spanish Early Parliamentary Elections*, p. 19.

⁷⁴⁷ *Final Report on 2011 Parliamentary Elections in Turkey*, p. 23.

⁷⁴⁸ *Final Report on 2010 Parliamentary Elections in the Slovak Republic*, pp. 16-17.

⁷⁴⁹ The Copenhagen Document gives as an alternative other free voting procedure, which must fulfill the said conditions. See 2011 *Final Report on Parliamentary Elections in Croatia*, p. 19. This requirement applies to illiterate voters also.

⁷⁵⁰ 2011 *Final Report on Spanish Early Parliamentary Elections*, p. 21.

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indispensable for protecting the equality of votes.⁷⁵¹ Polling stations and voting must be accessible to persons with special needs in line with the principle of universality.⁷⁵² Detainees must be allowed to vote in accordance with a presumption of innocence.⁷⁵³

Intimidations or any kind of pressures on voters must be effectively prohibited and suppressed.⁷⁵⁴ Family,⁷⁵⁵ group,⁷⁵⁶ proxy⁷⁵⁷ and multiple voting⁷⁵⁸ is strictly interdicted. If e-voting is foreseen, it must be transparent and its integrity must be safeguarded.⁷⁵⁹

Counting: Counting of the votes must be done transparently and honestly,⁷⁶⁰ with official results made public for each polling station.⁷⁶¹

Security: All electoral participants, not only voters, must feel safe and secure. Any heavy unnecessary presence of the police might be intimidating not only for voters, candidates and their supporters, but also for the election administration. Therefore, effective and efficient prosecution and conviction of those held responsible for electoral offences is a necessary precondition for holding free and fair elections.

Post-election phase

Campaign Financing: The accountability of the electoral contestants is intrinsically linked with election expenditures reporting and auditing.⁷⁶² Impartial and effective media

⁷⁵¹ Final Report on 2005 General Elections in the UK, p. 14.

⁷⁵² Final Report on 2011 Parliamentary Elections in Turkey, p. 25.

⁷⁵³ Election Observation Handbook, (5th edition) (2007) p. 57.

⁷⁵⁴ For example, Final Report on 2012 Early Parliamentary Elections in Montenegro, p. 11; 2009 Macedonian Presidential and Local Elections, p. 25; Final Report on 2010 Parliamentary Elections in the Slovak Republic, p. 19.

⁷⁵⁵ See, among others, Final Report on 2008 Macedonian Early Parliamentary Elections, p. 19.

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⁷⁵⁶ Among others, ODIHR Statement on 2nd round of the 1996 Lithuanian Parliamentary Election.

⁷⁵⁷ OSCE/ODIHR, Handbook for Monitoring Women's Participation in Elections (2004) p. 39. While in some countries proxy voting is legally allowed, ODIHR always requires proper safeguards for the integrity of the voting.

⁷⁵⁸ Among others, see Assessment Mission Report of 2004 Romanian Presidential and Parliamentary Elections, p. 31.

⁷⁵⁹ OSCE/ODIHR Supplementary Human Dimension Meeting "Challenges of Election Technologies and Procedures", Final report (2005) pp. 3-4; OSCE/ODIHR 2008 Discussion Paper in preparation of Guidelines for the Observation of Electronic Voting.

⁷⁶⁰ ODIHR Annual Report (2011) p. 9.

⁷⁶¹ See, among others, 2011 Final Reports on Local Elections in Moldova, p. 24, and on Spanish Early Parliamentary Elections, p. 22.

⁷⁶² For example, see ODIHR Final Report with respect to Finnish 2011 Parliamentary Elections, pp.13-14; Final Report on 2010 Parliamentary Elections in the Slovak Republic, pp. 10-11.

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monitoring and reporting is one of the safeguards against unlawful or excessive electoral campaign expenditure.⁷⁶³

Effective Resolution of Electoral Disputes: Post-election complaints and appeals must be dealt with in a timely manner,⁷⁶⁴ to enable the results to be published as soon as possible. Delayed results might raise suspicion regarding their accuracy. It follows that transparency and publicity at the level of administrative bodies and the courts are a *sine qua non* for effective resolution of electoral disputes.⁷⁶⁵ There must be an effective remedy to challenge election results. Election results that have been tampered with must be invalidated, regardless of their impact on the electoral outcome. Otherwise, the voters whose votes were annulled could not contribute to the election of their representatives. This is also important in case of public funding received per vote gained.

Mandate Entrusted to a Winning Candidate: An honest tabulation and public reporting of the electoral outcome must result in the elected office being taken by a candidate chosen in line with the electoral formula foreseen by law. The winning candidates must be installed and occupy the office until expiration of their term, meaning that election results must be fully respected and implemented.⁷⁶⁶

4.2.5. Detecting Challenges Related to the OSCE Electoral Commitments

The last century concluded with a challenge to democratize the former socialist countries. The new century began with the challenge to deepen democracy, in spite of the changes of the political actors and global security threats.⁷⁶⁷ Many of the OSCE participating states are still facing electoral challenges, judging from the ODIHR 2012 Annual Report.⁷⁶⁸ The detected electoral challenges for OSCE participating states focus on two questions: -the first

⁷⁶³ Final Report on 2010 Parliamentary Elections in the Slovak Republic, p. 13; Final Report on 2011 General Elections in Turkey, p. 20.

⁷⁶⁴ Ibid, p. 18.

⁷⁶⁵ Final Report on 2011 Parliamentary Elections in Turkey, p. 21.

⁷⁶⁶ Ghebali, Debating Election and Election Monitoring Standard at the OSCE: Between Technical Needs And Politicization (...) p. 217.

⁷⁶⁷ For more on this topic, see Evers, OSCE Election Observation (2010) at <<http://www.core-hamburg.de>>.

⁷⁶⁸ See, pp. 8-9 of the Report.

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one relates to the conceptualization of the OSCE election standards,⁷⁶⁹ and the second one to their implementation, or rather to the lack of their proper implementation.

Relating to the first area of concern, the very existence of the OSCE electoral commitments was challenged, or alternatively they were not considered detailed enough by certain participating states. Russia and the CIS countries engaged in the debate about the supplementary election commitments, the so-called “Copenhagen Plus”,⁷⁷⁰ by stating that the OSCE election commitments did not adequately address the protection of vulnerable groups. Plus they were in their opinion only vague and non-binding standards subject to individual interpretation.⁷⁷¹ The idea of OSCE legally-binding election commitments was rejected, but the drafting of additional commitments, especially in view of new voting technologies and regarding the election rights of vulnerable groups, was considered.⁷⁷² The reason for additional election commitments was to be found in the need to make them more precise and detailed, with the purpose of facilitating their implementation and review.⁷⁷³ The supplementary election commitments should refer to: a) transparency in all elements of the electoral process, especially in view of the new voting technologies; b) accountability in the sense of effective legal remedies and responsible media; and c) public confidence, which has as a pre-condition political will for holding free and fair elections.⁷⁷⁴ New voting technologies should be also examined with respect to international standards, voters’ confidence and their impact for observation.⁷⁷⁵ Nevertheless, since the Ministerial Council decision⁷⁷⁶, no supplementary electoral commitments were adopted.⁷⁷⁷

⁷⁶⁹ See the Report from the 2012 Supplementary Human Dimension Meeting, Session I.

⁷⁷⁰ See the 2002 Porto Document and Ministerial Decision no. 5/2003.

⁷⁷¹ The CIS countries, which are also OSCE countries, started observing elections since 2002-2003. There was a difference in the opinion between the ODIHR and the CIS observers as to how much the observed elections complied with the election standards, e.g., the 2004 Ukrainian presidential elections, the 2005 Uzbekistan and Tajikistan parliamentary elections. According to the CIS Executive Secretary, the same facts were interpreted differently by the ODIHR and CIS observers. See the OSCE/ODIHR, *Common Responsibility Commitments and Implementation* (2006) p. 36; V. Ghebali, *Debating Election and Election Monitoring Standards at the OSCE: Between Technical Needs and Politicization*, OSCE Yearbook (2006) pp. 225-229.

⁷⁷² Ghebali, *Debating Election and Election Monitoring Standards at the OSCE: Between Technical Needs and Politicization*, OSCE Yearbook (2006) pp. 218-221.

⁷⁷³ OSCE/ODIHR, *Common Responsibility Commitments and Implementation* (2006) p. no xii.

⁷⁷⁴ See the ODIHR Note on Possible Additional Commitments for Democratic Elections (2005) the OSCE/ODIHR Discussion paper on Election Principles and Existing Commitments for Democratic Elections.

⁷⁷⁵ Strohal, *Democratic Elections and their Monitoring: Can This OSCE Success Story Be Sustained? (...)* p. 253.

⁷⁷⁶ *Strengthening the Effectiveness of the OSCE* (CIO.GAL/100/05 of 27 June 2005) – Recommendation of the Panel of Eminent Persons, 2006 Brussels Ministerial Conference, Decision 16/06.

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The question is raised as to whether or not the possibility of introduce supplementary commitments was at that time seen as a way to resolve the difficulties that arose between ODIHR and some participating states, linked to ODIHR's reporting of a non-observance of the OSCE electoral commitments. An additional reason might be to avoid further objections about the lack of precision of the standing commitments, which does not allow a proper electoral assessment. The ODIHR Note on the Supplementary Commitments seems to confirm this, as it states that the record of implementation of the Copenhagen Document and post-Copenhagen declarations and decisions to-date, would indicate that the discussion on additional commitments on democratic elections to supplement the existing ones was appropriate. However, since no new commitments have been agreed upon, this clearly indicates that difficulty exists in the decision-making and consensus of the participating states in this regard.⁷⁷⁸ The OSCE/ODIHR officials⁷⁷⁹ confirmed that the idea about additional commitments came from the Russian Federation. However, it appears that the problem did not lay in the commitments as such, but in their interpretation.⁷⁸⁰ The political/expert debate about the introduction of the supplementary election standards continued in 2012, concluding that the OSCE electoral principles had to be brought into compliance with the international election standards.⁷⁸¹ The idea to introduce legally-binding election standards seems to have faded away.

If there is political will, the OSCE electoral commitments may grow into being more comprehensive and precise, even if their legal form does not change. It is worthwhile to mention the difference made between the original and interpretative standards: the first ones relate to the commitments set out in the OSCE documents, while the second ones relate to the

⁷⁷⁷ The role of the civil society and the media was mentioned also in relation to elections, but only in general terms.

⁷⁷⁸ Additional commitments on elections remained on the Greek C-i-O list of priorities, Analytical Concept Paper on the Programme of the Greek OSCE Chairmanship 2009 at <<http://www.osce.org>>.

Although the proposed commitments did not materialize in the OSCE Documents, the concepts were largely used in the work of the OSCE/ODIHR, which require greater transparency and accountability in connection with the electoral campaign and e-voting, see Annex I and II, pp. 290, 293.

⁷⁷⁹ Interviews conducted in May 2007.

⁷⁸⁰ For more on this topic, see Evers, OSCE Election Observation (2010) at <<http://www.core-hamburg.de>>.

⁷⁸¹ Report from the 2012 Supplementary Human Dimension Meeting on Democratic Elections and Election Observation, see Recommendations of the Session I.

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specific standards on which ODIHR bases its election assessments.⁷⁸² Whereas the original standards contain principles that reflect the states' obligations assumed by other international instruments (UDHR, ICCPR, ECHR) they are not so precise and comprehensive with respect to the standards relating to different topics of elections. In particular, electoral campaign financing (public and private funding) has not been tackled at all, while the obligations to regulate private and public media for the purposes of electoral campaign remain a vague obligation for the states.⁷⁸³ For the latter, it is desirable to clarify the type of the media access to which the electoral competitors are entitled (proportional or strict equality).⁷⁸⁴ Regarding the participation of women, there are existing obligations, but they are placed in a gender related documents, such as the OSCE Action Plan for Promoting Gender Equality.⁷⁸⁵ Since the under-representation of women in political sphere remains a problem,⁷⁸⁶ it is desirable to include more precise "original" election-related commitments to promote the equality between genders. The same goes for an impartial electoral administration and the resolution of electoral disputes mentioned above, as supplementary, but vital commitments to ensure "free and fair elections" in the OSCE region.

The interpretative standards derived from the original commitments are much more comprehensive, precise and clear.⁷⁸⁷ In view of ODIHR's methodology, and according to ODIHR's election observation reports, it appears that the election standards have been applied consistently and coherently. Still, it is the interpretation and application of those standards by ODIHR which has been challenged by certain participating states.⁷⁸⁸

ODIHR has detected⁷⁸⁹ the problems of interference with the plurality of choice, underrepresentation of women, and a lack of minorities' participation in elections, in addition

⁷⁸² Evers, OSCE Election Observation (2010) at <<http://www.core-hamburg.de>> p. 123.

⁷⁸³ See OSCE/ODIHR, OSCE Human Dimension Commitments, 1 Thematic Compilation 3rd edition (2011) p. 123-125.

⁷⁸⁴ See Final Report on the 2011 Croatian Parliamentary Elections, p. 18.

⁷⁸⁵ The 2004 Sofia Decision, Annex.

⁷⁸⁶ See Annex I and II, pp. 290, 293.

⁷⁸⁷ Reference documents issued by the ODIHR also contribute to their unambiguous meaning, see various OSCE/ODIHR election-related handbooks and manuals quoted herein.

⁷⁸⁸ Evers, OSCE Election Observation (2010) at <<http://www.core-hamburg.de>>, pp. 245-250. On low turnout of voters as a sign of political inequality, see Lijphart, Patterns of Democracy (Serbian translation, published by Sluzbeni List SCG Beograd) (1999) p. 271.

⁷⁸⁹ See Annex I, p. 290. See also challenges to OSCE electoral commitments at <<http://www.osce.org/odhr/elections>> accessed on 25 June 2013.

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to low turnout of voters.⁷⁹⁰ Including the standard of meaningful representation in the OSCE original commitments⁷⁹¹ will guide governments to deepen democracy, especially in the plural societies of the OSCE region.⁷⁹²

As a standard of electoral outcome, meaningful representation belongs to the post-election period. However, it entails conceptualization of an electoral system that will allow political representation of all segments of society in the political decision-making. There is a synergy between meaningful representation and the universality and equality of the vote,⁷⁹³ and it can be defined as its by-product. Judging by the “electoral inclusiveness trend”,⁷⁹⁴ meaningful representation is becoming the essence of contemporary democracies.⁷⁹⁵ It not only provides a protective umbrella for marginalized groups in society, but it also defends the democratic system of governance by protecting participation in public affairs by the opposition, and asking for true accountability of the government to the representatives of the people. Furthermore, if political decisions are taken by the majority, the minorities must be protected. In absence of legal guarantees for minorities, they will be left to the mercy of the majority.⁷⁹⁶

Elections are not a goal in and of themselves, but rather, they are a method for installing, nurturing and protecting democracy. Then, what should be done when forces promoting intolerance rise to power by elections, or the opposition is wiped out in an election, or it exists only on ethnic or religious divisions? While there are practical arrangements in place for enhancement of the participation of voters, minorities and women, there is no clear method how to ensure that the minority political interests assume a meaningful place in

⁷⁹⁰ Hoynck, Former OSCE Secretary General, C-i-O Seminar on Election Related Issues, 21 July 2008, at <<http://www.oscepa.org>>; Gallagher, Laver, Mair, Representative Government in Modern Europe (fifth edition) (2011) p. 368.

⁷⁹¹ As explained above, pp. 57-59.

⁷⁹² Lijphart, Patterns of Democracy (Serbian translation, published by Sluzbeni List CG Beograd) (1999) pp. 22-23.

⁷⁹³ On the assumption of equality, see Beetham (ed.) Defining and Measuring Democracy (1994) p. 13.

⁷⁹⁴ This trend refers to including more groups of people in the elections with the aim to contribute to the decision-making.

⁷⁹⁵ On this topic see more in Lijphart, Patterns of Democracy (Serbian translation, published by Sluzbeni List CG Beograd) (1999) pp. 33, 37, 48-49, 58-59, 75-78, 171.

⁷⁹⁶ Ibid p. 340.

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democracy.⁷⁹⁷ Inclusion of a standard of meaningful representation in the OSCE commitments will assist that goal.⁷⁹⁸

Proper implementation of the OSCE commitments,⁷⁹⁹ relates to the second issue of concern.⁸⁰⁰ It goes hand in hand with the discussion about the principles and methodology on which the ODIHR based its election observations,⁸⁰¹ as the electoral watchdog.

The “proper implementation problem” of electoral commitments has three aspects. The first one relates to the lack of observance of the OSCE commitments by the participating states, as documented by the ODIHR election observation reports.⁸⁰²

The second one is closely related to election observation as conducted by ODIHR. This OSCE institution has been both admired and criticised⁸⁰³ for its election observation activities. It appears that the criticism of ODIHR’s work started when serious flaws during

⁷⁹⁷ About the majority democracy as a system excluding the opposition from a decision-making, *ibid* pp. 95-96.

⁷⁹⁸ About the types and qualities of democracies, *ibid* pp. 265-288.

⁷⁹⁹ See, ODIHR election observation reports at <<http://www.osce.org/odihr>> and Annex I and II, pp. 290, 293.

⁸⁰⁰ For example, the 2003 Maastricht Ministerial Council and Panel of Eminent Persons (2005) asked the ODIHR to consider new ways how to make the follow-up of its recommendations more effective, and report to the Permanent Council its strategy about the implementation of the recommendations.

⁸⁰¹ The ODIHR also assesses elections of the long-standing democracies since 2002 with the assessment of the American and French elections. However, the practice that the OSCE has developed in this regard to send small assessment missions was criticized by the OSCE PA which considered it as deprivation from the logistical support for the OSCE PA in breach of the 1997 Cooperation Agreement (endorsed by OSCE Ministerial Council Decision 19/06) considering election observation as common endeavor, as well as a failure to treat equally all participating states, Nothelle, *The OSCE Parliamentary Assembly, OSCE Yearbook* (2006) p. 364.

In this context, the controversies surrounding the 2000 USA presidential elections and the UK elections where fraud was detected could be mentioned, as both countries represent examples of long-standing democracies. The ODIHR, was invited by the USA Government to observe or assess elections in 2002, 2004, 2006 and 2008 and it assessed elections in UK in 2003 and 2005 (see the ODIHR relevant reports at <<http://www.osce.org>>). Another example with respect to the long-standing democracies is the assessment mission dispatched to Finland, which provided recommendations with respect to electoral campaign financing. This issue even led close to government crises and prompted the government to submit proposal for tighter campaign financing rules, Remarks by Secretary General of the OSCE PA to the C-i-O Seminar on Election Related Issues, 21 July 2008 at <<http://www.oscepa.org>>.

⁸⁰² See ODIHR election observation reports at <<http://www.osce.org/odihr>>.

⁸⁰³ Pursuant to 2006 Brussels Document, the Ministerial Council emphasized that monitoring had to be undertaken in a consistent manner in order to produce credible and reliable information. The commitment to invite election observers from other participating states, the ODIHR and the OSCE PA has been re-affirmed, as well as the commitment from the states to send competent, objective and accountable observers. In reply to the objections voiced by some participating states that EOMs were only sent to ex-socialistic countries, the ODIHR complained about a lack of funds to observe elections in all participating states. The ODIHR was tasked to further strengthen the observation methodology and support, and ensure a geographical balance as much as possible, OSCE/ODIHR, *Common Responsibility Commitments and Implementation* (2006) p. 44; Nothelle, *The OSCE Parliamentary Assembly, OSCE Yearbook* (2006) pp. 363-365.

For the criticism coming from Belarus, see the 2005 Ljubljana Document, Attachment 2 to MC.DEC/17/05.

For the criticism voiced in 2004 by the majority of the CIS members see Ghebali, *Debating Election and Election Monitoring Standards at the OSCE: Between Technical Needs and Politicization*, *OSCE Yearbook* (2006) p. 218. See also *ibid* p. 215; and George, *Election Observation – The OSCE PA, ODIHR and Russia*, PA Annual Session (2010) for criticism about the lack of ODIHR’s neutrality voiced by Russia.

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certain countries' elections were recorded by the respective EOMs.⁸⁰⁴ The ODIHR has even struggled to receive states' invitations to observe elections,⁸⁰⁵ which is a pre-condition for election observation.⁸⁰⁶

However, in order not to endorse rigged elections, the OSCE/ODIHR may also refuse to send election observation missions.⁸⁰⁷ The reasons for the refusal are to be found in the existence of conditions under which it is impossible to hold free and fair elections, like the existence of oligarchy and participation of military and persons involved in war crimes in the government.⁸⁰⁸ Limitation of the election observation mission in terms of time frame, the composition of the mission and the granting of visas to the observation team were considered obstacles⁸⁰⁹ to sending an ODIHR observation mission.⁸¹⁰

The last facet of the "proper implementation problem" underscores the need for a systematic follow-up of the ODIHR observation recommendations.⁸¹¹ In cases of persistent election violations, despite OSCE/ODIHR election assistance, there must be a well-defined and

⁸⁰⁴ OSCE/ODIHR, *Common Responsibility Commitments and Implementation* (2006) pp. 34-35. Another example of a lack of confidence in ODIHR's work is the objection of the Albanian Government to the appointment of the Ambassador of the ODIHR 2009 election observation mission to Albania.

⁸⁰⁵ In 2009 the ODIHR Director reminded the participating states to invite the ODIHR to observe their scheduled elections, as until March they have received less than half of invitations, Report by ODIHR Director, 755th Meeting of the Permanent Council, 19 March 2009 at <<http://www.osce.org>>.

⁸⁰⁶ In this context, the example with the Czech President Havel may be mentioned. After having called the Polish government to invite international observers, he had to explain that there were not two types of democracy, i.e., imperfect which needed elections observation and perfect democracy for which election observations were offensive, but that proper supervision without bad intentions contributed to the common interest, Newspaper *Dnevnik*, 5 September 2007.

⁸⁰⁷ Kelly, *Monitoring Democracy* (2013) pp. 47-48, 59.

⁸⁰⁸ For example, in 1995 the OSCE refused to observe parliamentary elections in Tajikistan, Report from Election Observation in Tajikistan for 2000 Parliamentary Elections, p. 3.

⁸⁰⁹ For 2007 the ODIHR refused to send an EOM, however the OSCE PA did send observers who were critical of the conduct of elections, see the Second Decade of OSCE PA Election Observation, Russian Federation Parliamentary Elections, 2 December 2007, p. 39.

⁸¹⁰ About non observing the elections in Russia, see OSCE Chairman Takes Note of ODIHR Decision not to Observe Russian Parliamentary Elections, Press Release 6 November 2007, at <<http://www.osce.org>> ; Newspaper *Utrinski Vesnik*, 17-18 November 2007; OSCE/ODIHR Regrets that Restrictions Force Cancellation of Election Observation Mission to Russian Federation, Press Release 7 February 2008, at <<http://www.osce.org>>; Human Dimension Implementation Meeting, side event on Elections, November 2008; Ghebali, *Debating Election and Election Monitoring Standard at the OSCE: Between Technical Needs and Politicization* (...) p. 215; *Eurasia Daily Monitor* Volume 4: Issue:202 (2007) at <<http://www.jamestown.org>>; Kelly, *Monitoring Democracy* (2013) pp. 46, 50.

⁸¹¹ OSCE/ODIHR, *The Annex to Common Responsibility Commitments and Implementation* (2006) Note Verbale No. 257/06.

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transparent course of action for the OSCE and its participating States.⁸¹² Such course of action must go beyond public statements and rejection to observe elections. The OSCE participating states must have the power to impose a penalty on the violator of the electoral commitments, amounting to terminating the cooperation and communication with such governments.

To conclude, the OSCE commitments are as alive and important today, as they were on the day when they were agreed upon for the development of genuine democracy. Although the OSCE commitments regarding election rights are not found in multilateral treaty, they must be respected by all of the OSCE participating states. They are equally applicable to all of them, regardless of the states' differences in history, development, political and legal culture, or how influential they are in building the European security policy. The original and interpretative commitments have become a norm, a standard that tailors "free and fair elections" in the OSCE region.

In light of some of the participating states' persistent failure to observe the relevant OSCE commitments, it is clear that systematic, complete and more effective follow-up is lacking. With respect to the on-going debate within the OSCE about the reform of the monitoring mechanisms in order to overcome the detected weaknesses, it is clear that it must also foresee effective remedies to deter any continued violations of the OSCE commitments, while preserving the impartiality and neutrality of the mechanism. It should also try to avoid duplications of efforts and incongruity not only with other international and regional organizations, but also between various OSCE bodies.

⁸¹² On denial of the legitimacy of elections due to electoral irregularities, see Kelly, *Monitoring Democracy* (2013) pp. 174-175.

4.3. EUROPEAN UNION

European integration started as a peace-building project on the European continent to ensure its stability, security and economic welfare,⁸¹³ as well as to promote democracy,⁸¹⁴ in a world separated by the iron curtain. Whereas the EU cannot be regarded as a state,⁸¹⁵ it does have a sophisticated legal order and arrangements that guarantee the effectiveness of EU law. It has gradually enhanced its powers by way of treaties⁸¹⁶ agreed upon by its enlarging number of member states.⁸¹⁷ In 2013, it represents a unique entity with a mixture of supra-national and intergovernmental features.⁸¹⁸

4.3.1. Democracy and Human Rights: Prominent Features of the European Union

At the very beginning of European integration in the war-torn world, democracy had not been recognized as a universal value. Yet the EU was inspired by representative democracy since its inception.⁸¹⁹ A retrospective of the EU-connected treaties shows the following:

In 1957, the “founding fathers”⁸²⁰ of the European Economic Community did not explicitly mention democracy as a corner stone of their common architecture framed by the Treaty of

⁸¹³ Gjurgilova, *From Cooperation to Membership* (2005) p. 95.

⁸¹⁴ Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, A Federal Trust Report (2007) p. 5.

⁸¹⁵ Lijphart, *Patterns of Democracy* (Serbian translation) (1999) p. 105.

⁸¹⁶ Since the EU follows the logic for operation of an international organization, international agreements regulate the powers conferred upon the EU institutions. For example: the 1957 Treaty of Rome established the European Community and defined its powers, the 1992 Treaty of Maastricht established the European Union, the 1997 Treaty of Amsterdam stipulated the EU fundamental values to be also respected by accessing states, the 2001 Treaty of Nice enabled institutional arrangements for the EU enlargement. However, the EU path is not only paved with successes. The EU Constitution had to be abandoned, because of the opposition asserted by some member states.

⁸¹⁷ The current EU member states are the following: Denmark, Ireland, the United Kingdom, France, Germany, Italy, Greece, Portugal, Spain, Belgium, the Netherlands, Austria, Finland, Sweden, Cyprus, the Czech Republic, Estonia, Hungary, Luxemburg, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, Romania and Croatia.

⁸¹⁸ For discussion about whether the EU is a supranational or an intergovernmental organization see Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) pp. 147, 151. Intergovernmentalism is defined as the weight given to the interests of each member state, whereas supranationalism refers to the overall interest of the community, Graig de Burca, *EU Law* (2003) p. 12. Accordingly, the EP has the strongest supranational aspects among the governing political bodies.

⁸¹⁹ For more on this see EP Working Document on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2010) p. 2.

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Rome.⁸²¹ By contrast, the seed of internal democracy had been already sowed for a direct universal suffrage of the European Parliament.⁸²² Similarly, the Treaty of Rome did not make mention of the first generation of human rights (civil and political rights).⁸²³ The European Court of Justice (ECJ) held that the doctrine of fundamental human rights represented a part of the general principles of Community law.⁸²⁴ In 1986, the Single European Act explicitly listed the principle of democracy, as well as respect for human rights, as a fundamental European value.⁸²⁵

In the subsequent EU Treaty and the Treaty of Amsterdam, democracy and respect for human rights as guaranteed by the ECHR were mentioned as fundamental values of the EU order.⁸²⁶ Indeed, when the Freedom's Party, led by Joerg Haider (extreme-right) gained public support in Austria, the EU took measures to prevent him from occupying public office, perceiving him as a danger to democratic order and human rights, thus reaffirming its concern for protection of democratic principles and human rights.⁸²⁷

⁸²⁰ Belgium, Germany, France, Italy, Luxemburg and the Netherlands.

⁸²¹ Treaty of Rome established the European Economic Community: one of the initial forms of the European integration. Regarding the intention for enhanced legitimacy of the European Parliament, see Article 138 of the Treaty of Rome.

⁸²² Treaty of Rome, Article 138, paragraph 3.

⁸²³ Economic and social rights belong to the second generation of human rights, whereas the third generation is connected with collective rights, like the right to development. CoE, *Compass - A Manual on Human Rights Education with Young People* at <<http://www.eycb.coe.int>>, accessed on 26 June 2013. For more on this topic, see Defeis, *Human Rights and the European Court of Justice: An Appraisal*, *Fordham International Law Journal*, vol. 31, issue 5 (2007) pp. 1106; 1107; 1110 and 1111.

⁸²⁴ *Stauder v. City of Ulm* 29/69, 12 November 1969, para 7. For more on this topic, see Birkinshaw, *European Public Law (...)* p. 55; and Defeis, *Human Rights and the European Court of Justice: An Appraisal*, *Fordham International Law Journal*, vol. 31, issue 5 (2007) pp. 1106; 1107; 1110 and 1111.

⁸²⁵ The Preamble stipulates the following: "... fundamental rights recognized in the constitutions and laws of the Member States, in the ECHR, and the European Social Charter, notably freedom, equality and social justice convinced that the European idea, the results achieved in the fields of economic integration and political co-operation, and the need for new developments correspond to the wishes of the democratic peoples of Europe, for whom the EP, elected by universal suffrage, is an indispensable means of expression, aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the UN...".

⁸²⁶ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 516.

⁸²⁷ Article 7 of ToL, which proscribes the procedure and measures that the EU can impose on its member state in case of a clear danger or existence of a breach of the EU fundamental values set out in 1A of ToL. In the Treaty of Amsterdam the provisions safeguarding human rights and democracy in EU are F and F1. On this topic also see Graig, de Burca, *EU Law* (2003) p. 45.

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The Preamble of the Charter of the Fundamental Rights of the EU⁸²⁸ (the Charter) reiterates the commitment to the principles of democracy, featuring it as one of the pillars of the Union. However, it does not contain any other element of citizen participation in public life, with the exception of elections for the European Parliament and local self-government units.⁸²⁹ The right to good administration cannot be considered sufficient to fill the lacuna in the Charter⁸³⁰, in the sense of citizen inclusiveness element.⁸³¹

In order to underpin democracy, the 2009 ToL⁸³² contains elaborated provisions for establishing a closer link between the EU institutions and citizens. It attempts to meet the concern about the citizen participation⁸³³ by reinforcing the EU internal democracy.⁸³⁴ While reiterating democracy as a sole political system of governance⁸³⁵, the ToL confers greater powers upon the EP⁸³⁶, foresees greater involvement by citizens in European affairs, and aims at increased accountability to the citizens.⁸³⁷ Nonetheless, the ToL did not rebut entirely the “democratic deficit” criticism *inter alia* due to the lack of political contestation at the EU

⁸²⁸ Official Journal of the European Union dated 30 March 2010, no. 2010/C 83/02.

⁸²⁹ Article 39 of the Charter reads as follows: “1) Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State. 2) Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.” Article 40 of the Charter reads as follows: “Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State”.

⁸³⁰ Article 41 of the Charter.

⁸³¹ See Dahl, What Large Scale Democracy Needs? *Political Science Quarterly* vol. 120, no. 2 (2005) pp. 188-189, 197.

⁸³² The Treaty on EU and the Treaty on Functioning of EU, as revised by ToL govern fundamental EU matters.

⁸³³ Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, A Federal Trust Report (2007).

⁸³⁴ In particular, the decision-making affecting citizens has gone up one level, becoming a subject of negotiations with the rest of the EU states. For the obligation to take decisions closest to the citizens, see Article 8A, paragraph 3 of the ToL. Along the same line of thought, the issue of public participation in a process which directly affects citizens is important in the context of EU enlargement, as the states wishing to join the Union must transpose thousands and thousands of pages of the EU *acquis* in whose creation they did not have a say.

⁸³⁵ See Articles 1A and 10A (on external action) of the ToL.

⁸³⁶ According to the ToL, the EP elects the President of the Commission and can dismiss the Commission by way of motion of censure (Article 9D); in the ordinary legislative procedure it exercises legislative power together with the Council of EU, whereas in the special procedure no legislation can be adopted by the Council without the EP’s participation and vice versa (Article 249A 1 and 2); and EP has a significant role in the adoption of the budget in a special procedure, Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) p. 125.

⁸³⁷ See Article 9A of the ToL and Protocols on the Role of National Parliaments in the EU and on the application of the principles of subsidiarity and proportionality. According to ToL (Article 8C) national parliaments should also contribute towards greater democratization of the EU, by playing a greater role in the EU affairs.

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level.⁸³⁸ In this context, it is also questionable how the European Council and the Council of the EU can answer for EU policies at a pan-European level, when the officials can only be held accountable at the national level.⁸³⁹ Furthermore, the EU member states have not yet transferred real power to the directly elected EP in some areas, such as enlargement. As a result, the EP's influence over certain Council decisions is reduced to approval, discussion and consultation.

Despite the “democracy deficit” criticism, the EU plays an important role in the democratization of the ex-socialist countries, through its enlargement process.⁸⁴⁰ The applicable 1993 Copenhagen Criteria⁸⁴¹ require free, fair and multiparty elections, the stability of democratic institutions, a separation of powers, good governance and protection of human rights and of the rights of minorities. For a candidate country to be successful in its aspirations, it is necessary that these criteria are observed in practice.⁸⁴² The criteria have been criticized for their broadness and over inclusiveness, which in turn causes difficulties for their objective assessment and may result in a double measuring stick for the candidate countries (especially regarding the protection of the rights of minorities).⁸⁴³ EU enlargement has been and still is an important instrument, between stick and carrot for the promotion of effective observance of democratic principles among the candidate countries.⁸⁴⁴ However, in some cases, observance of the above criteria is not the only basis for measuring the progress of a country towards the EU. Some EU countries, in order to push their own agendas, use the enlargement process, which may be counterproductive in terms of observation of democratic principles as a pre-condition for stability and security of the European continent. Such a situation is counterproductive from the point of view of democratic consolidation, as the

⁸³⁸ Sementilli, *A democratic deficit in the EU?* (2012) pp. 6-7, 14.

⁸³⁹ On the accountability, Jancic *Representative Democracy Across Levels? National Parliaments and EU Constitutionalism*, *Croatian Yearbook of European Law and Policy* (2012) p. 230. See Article 10 of the ToL (Treaty of European Union).

⁸⁴⁰ See, for example, Marktler, *The Power of the Copenhagen Criteria*, *Croatian Yearbook of European Law and Policy* (2006) pp. 344, 349.

⁸⁴¹ SN 18/1/93 Rev. 1. More on criteria for the EU membership see Accetto, *United in Crisis: The Development of the European Union through Concrete Problems*, pp. 4-6, at <http://www.ijpucnik.si/media/Accetto_-_United_in_Crisis1.pdf>, accessed on 4 May 2013.

⁸⁴² Rose, *Evaluating Democratic Governance: A Bottom Up Approach to EU Enlargement, Democratization*, vol. 15 (2008).

⁸⁴³ Kochenov, *Behind the Copenhagen Facade. The meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, *European Integration Online Papers* vol. 8 (2004).

⁸⁴⁴ The requirement for respect of democracy and human rights has been strengthened by the inclusion of the so-called “Democracy Clause” in the 2nd and 3rd generation of the Europe Agreements.

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national parliaments of the candidate countries must adopt the *acquis* as they stand. If the country has a real prospect of a membership, the lack of participation in the creation of the *acquis* can be corrected once it becomes a full EU member. However, the problem arises when a country does not have a realistic timely perspective for the EU membership, and yet undertakes a costly and lengthy transposition of the EU *acquis* into its legislation, without the real participation from its elected representatives and with no public consultations.⁸⁴⁵ The concern raised should not be ignored, since EU enlargement is an important instrument to support democracy taking a permanent hold on the European continent, thus contributing towards its stability and security.⁸⁴⁶

The EU is not only concerned with its internal democracy, or how to ensure that its future member countries will respect democratic principles. On the contrary, promotion of democracy is one of corner stones of EU foreign and security policy.⁸⁴⁷ Electoral democracy in third countries⁸⁴⁸ is promoted by way of election observation⁸⁴⁹ and election assistance programmes. The EU is the only regional organization monitoring elections other than those of its non-member states.⁸⁵⁰

4.3.2. Electoral Democracy in the EU

⁸⁴⁵ This controversy has benefited from the discussion of Professor Page at the 2009 workshop on transposing EU legislation in Macedonia.

⁸⁴⁶ See Levitsky, Way, *Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post Cold War Era* (rev. 2003) pp. 3 and 10. The authors argue that strong linkage with the west is one of the instruments for achieving democracy and not democratization as an outcome for the post-communist/post-dictatorship countries.

⁸⁴⁷ European Commission, *EC Methodological Guide on Electoral Assistance* (2006) see also EC Regulations 975/99 and 976/99.

⁸⁴⁸ Communication from the Commission on EU Election Assistance and Observation (COM) (2000) 191 final, p. 23.

⁸⁴⁹ The Union started with election observation in 1993 by observing elections in Russia. The EU has sporadically observed elections in Russia, Bosnia and Herzegovina, Kosovo, Albania and Azerbaijan. It has also declined invitations in the absence of preconditions for free and fair elections (the 1999 Kazakhstan presidential elections). Throughout the years, electoral assistance to third countries has grown considerably. Between 2005 and 2008, the EU observed more than 40 elections, but all outside the European continent. The main aim of the EU election observation missions is to contribute towards protection of democratic entitlement at global level, democratic and participatory governance having evolved in universal value, European Commission, *EC Methodological Guide on Electoral Assistance* (2006). In this context, election observation missions focusing on the whole election cycle remain one of the instruments for the achievement of the EU external democratization agenda as foreseen in the Council's Conclusions on Democracy Support in 2009.

⁸⁵⁰ Kelly, *Monitoring Democracy* (2013) pp. 35-36.

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In spite of Article 8A, paragraph 1 of the ToL, which stipulate that the EU is based on representative democracy,⁸⁵¹ the electoral opportunity remains extended only with respect to the election of the EP,⁸⁵² although a number of top EU offices are vested with “pan-European” competencies. If the trend of deepening of relations between the EU countries continues, citizens should be vested with greater election powers in the future. In view of the important functions and tasks executed by the European Commission, it appears that the EU citizens will be very much interested in participating in direct elections of the president of the European Commission, for the following reasons:

First, the current election and appointment systems of top officials in the EU do not lead to a result where the whole of the EU is represented by a “personnage” elected by all European citizens. Direct elections of the president of the European Commission will bring EU policies closer to EU citizens, thus resulting in greater political involvement of the electors. Second, such an election will represent a counter argument to the “democracy deficit” discourse, as EU citizens will hold the president of the European Commission directly accountable. Third, it will require greater education and information on the part of the electorate, and thus it will refresh the interest of citizens in EU issues. Fourth, the candidates running for this office will have to devote much more time and energy to pan-European issues, in order to attract votes from all parts of the EU. Finally, voters do not need delegate the election of the president of the European Commission to their directly elected representatives, when they can do this job better, and with greater benefits for European integration. Any objections raised in this regard that such a system may only result in the electoral victory of candidates coming from bigger and more powerful countries may be rebutted by a nomination system based on the principles of equality, non-discrimination and fairness.

Now, turning to the EP, which has been directly elected since 1979. The EP elections, which are held at 5-year intervals, are rather perceived as being 28 separate elections⁸⁵³ and

⁸⁵¹ ToL contains the reference to “representative democracy” for the first time, Jancic *Representative Democracy Across Levels? National Parliaments and EU Constitutionalism*, *Croatian Yearbook of European Law and Policy* (2012) p. 230.

⁸⁵² For the discussion before the adoption of the ToL, see Graig, de Burca, *EU Law* (2003) pp. 74-75, 167-175. See also the discussion about the democracy deficit in the Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) pp. 155-157.

⁸⁵³ OSCE/ODIHR, *Elections to the European Parliament 4 - 7 June 2009*, Expert Group Report 11 – 30 May 2009, dated 22 September 2009, pp. 1 and 11.

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different from national elections,⁸⁵⁴ albeit EU citizens directly elect their representatives in this institution. Legal reasons, among others, for the above conclusion stem from the manner of the EP election, with the applicable provisions scattered in a number of documents. These documents do not all belong to the EU legal order;⁸⁵⁵ and those which do belong to the EU legal order vary in their legal form. According to the Preamble of the 2002 amended Act concerning the election of the representatives of the European Parliament by direct universal suffrage,⁸⁵⁶ there are three legal pillars on which the EP elections are based:

The primary pillar for the EP elections is composed of the EU primary and secondary legislation.⁸⁵⁷ In line with the universal vote principle,⁸⁵⁸ ToL has reaffirmed the Charter's⁸⁵⁹ individual approach in granting passive and active election rights to EU citizens for the EP and municipal elections, based on the place of their residence at the time of election.⁸⁶⁰ The

⁸⁵⁴ Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) p. 127.

⁸⁵⁵ See the Preamble of the revised Act on Council Decision of 25 June and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom (2002/772/EC, Euratom) Official Journal L 283, dated 21 October 2002.

⁸⁵⁶ *Ibid.*

⁸⁵⁷ The EU pieces of legislation governing the EP elections are the following: ToL- Article 9A3, amended Articles 17, paragraph 2b and 19 of Treaty on Functioning of EU; 190, paragraph 1 (EP) of ToL; Charter-Articles 39 and 52 of the Charter; Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom, Official Journal, OJ L 278, dated 8 October 1976, p. 1 amended by Council Decision 2002/772/EC, Euratom, Official Journal OJ L 283, dated 21 January 2002, p. 1; Regulation (EC) No 2004/2003 of the European Parliament and of the Council dated 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, Official Journal L 297, dated 15 November 2003, p. 1; Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, Official Journal L 329, dated 30 December 1993, p. 34; Commission Recommendation dated 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament 2013/142/EU, Official Journal L 79/29 dated 21 March 2013. The 2003 Accession Act also contains applicable provisions.

⁸⁵⁸ Article 9A3 of ToL prescribes the following: "The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot". Its Article 190 paragraph 1, which amended the Treaty on the Functioning of the EU reads as follows: "1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with the principles common to all Member States. The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements."

⁸⁵⁹ Article 39 of the Charter prescribes the following: "Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State". Its Article 40 prescribes the following: "Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State".

⁸⁶⁰ Article 17, paragraph 2b and Article 19 of ToL (Treaty on Functioning of EU).

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states are under an obligation to grant equivalent election rights to their EU co-patriot non-nationals. Thus, the principles of equality and non-discrimination underlined throughout the text of the ToL and the Charter also apply to electoral affairs.⁸⁶¹ The dynamism of the EU and of the rights to political association and the passive election right create an impetus for comprehensive electoral reform envisaged by the Treaty on the Functioning of the EU⁸⁶² as amended by the ToL.

Similar to the Charter, the revisions introduced by the ToL contain minimalist language with respect to the EU electoral rules. The EP elections must be direct.⁸⁶³ Indeed, the ToL stipulates that citizens are directly represented in the EP at the European level.⁸⁶⁴ The ToL also specifies that elections must comply with “free and fair elections” principles. These principles must be interpreted in conformity with the ECHR Protocol 1-3.⁸⁶⁵

Electoral rights may be subject to limitations⁸⁶⁶ grounded in law. However, the EU general principle of proportionality applies in this regard. A restriction must match the aim sought, it must be necessary and it must not impose too heavy a burden on an individual.⁸⁶⁷ Along with the protection of the rights of others, the Charter foresees another broadly-worded admissible aim for restriction of rights: general interest recognized by the EU.

⁸⁶¹ Regarding voting rights to the EP see Stanislas, *Electoral Rights under the Review of the European Court of Justice: Judicial Trends and Constitutional Weaknesses*, *Croatian Yearbook of European Law and Policy*, vo. 3 (2007) pp. 416, 426-439. See also ECJ Cases: C-145/04 *Kingdom of Spain v. United Kingdom of Great Britain and Northern Ireland* and C-300/04 *M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag*, concerning the principle of equality and non-discrimination regarding election rights, which are subject to national legislation. The ECJ ruled that any inequality of treatment of nationals must be objectively justified (Dutch case). It further contended that nothing precluded an EU member state from enfranchising their or another EU state non-nationals, provided that the latter have a close link with that member state (Spain-UK case).

⁸⁶² Article 190.

⁸⁶³ For more on EP elections see Grad, *Evropsko ustavno pravo, prvi del* (2010) pp. 152-155.

⁸⁶⁴ Article 8A, paragraph 2 of the ToL.

⁸⁶⁵ See Article 52, paragraph 3 of the Charter.

⁸⁶⁶ Article 52, paragraph 1 reads as follows: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

⁸⁶⁷ Graig, de Burca, *EU Law* (2003) pp. 371-373.

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More meat on the bones, figuratively speaking, is found in the secondary sources of EU law.⁸⁶⁸ The electoral systems,⁸⁶⁹ the equality of the vote, the incompatibility of functions and dispute resolution under the EU legal framework are the intersection points that cut across national boundaries. On the electoral system: - EU member states are not free to opt for the majoritarian electoral system, regardless of their traditions, but can choose variations of the proportional electoral model. Thresholds may not exceed 5%. On the equality of votes: - it is safeguarded by giving to all EU citizens the right to vote only once, and by requiring constituencies that reflect the proportional nature of the election. On the incompatibility of functions: -accumulation with high EU and/or national offices (e.g. a member of national parliament) is proscribed in order to avoid a conflict of interest, as well as double payments from public funds. On disputes: -only disputes centered around the EU legal framework are dealt with by the EP.

The Act does not elaborate much on electoral campaign financing, as it only gives the right to the states to impose a ceiling on electoral campaign financing, or to refrain from it. However, the European political parties' funding is regulated in greater detail⁸⁷⁰ with the aim of boosting democracy at the pan-European level.⁸⁷¹

Because the EP election day is not a single-day event throughout the EU, there is a requirement to make public the results only after the last of the countries has concluded its election, in order not to influence another country's election.

Last but not least, municipal elections in the member states are also regulated⁸⁷² by way of secondary legislation not in terms of "free and fair" electoral criteria, but as practical arrangements giving equal electoral rights to EU citizens, albeit non-nationals. Municipal elections do not cover national elections or elections of a regional legislature, and derogations are possible under certain general conditions. In view of the Charter of Local Self

⁸⁶⁸ See Council Decision 76/787, as revised by Council Decision 2002; and Graig, de Burca, *EU Law* (2003) p. 76.

⁸⁶⁹ Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) pp. 370-371.

⁸⁷⁰ Regulation (EC) no. 2004/2003 of the European Parliament and of the Council dated 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, as amended by Regulation (EC) no. 1524/2007, dated 27 December 2007.

⁸⁷¹ To qualify as a European party, thus become eligible for funding, in addition to legal personality, the party must be represented, in at least one quarter of the Member States, by Members of the European Parliament, or in the national or regional parliaments, or b) in at least one quarter of the Member States has received at least 3% of the votes cast at the last EP elections; must observe the founding principles of the EU; and has participated or intends to participate in EP elections.

⁸⁷² Directive 94/80/EC on the right to vote and stand as a candidate in municipal elections dated 20 January 1995, amended by the Council Directive 96/30/EC dated 13 May 1996.

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Government's list of ratifications,⁸⁷³ it follows that its "free and fair" election standards apply to EU countries' municipal elections.

The second pillar embodies the electoral principles common to all member states. In this regard, the 2009 ToL⁸⁷⁴ referring to European elections speaks about "common principles" as an alternative to "a uniform procedure in all Member States". Since the EU member states seem far from reaching an agreement on an entirely uniform electoral procedure,⁸⁷⁵ the common electoral principles should continue safeguarding the equality of treatment across EU state boundaries. In addition to EU legislation, the ECHR Protocol 1-3 also contains common principles that should be applicable in the EU, because of the following arguments: a) both the EU Charter and the ToL reaffirm the fundamental value of the ECHR in the human rights arena;⁸⁷⁶ b) each EU member is a party to the ECHR Protocol 1, Article 3;⁸⁷⁷ and c) the EP elections fall within the ambit of this article.⁸⁷⁸ Another argument, albeit not so strong legally speaking, can be made about the OSCE commitments' inclusion in the "common principles". They are approved by all EU members, and serve as a guide for enlightened understanding of "free and fair elections" in the EU region. Indeed, the ODIHR observed the EP elections in 2004 and 2009, and made recommendations in line with the OSCE political commitments.

On a broader level of principles, the general principles of the EU, like respect for fundamental rights, equality⁸⁷⁹ and proportionality, which are tackled below, should not be

⁸⁷³ See the list of treaties at <www.coe.org>.

⁸⁷⁴ See Article 190, paragraph 1.

⁸⁷⁵ See the EP MP Duff 2010 and 2012 electoral reform proposals to the EU Committee of Constitutional Affairs and the 2013 Commissions' Recommendation at <<http://www.alde.eu>>. Legal scholarship has also tackled the lack of agreement of the member countries about the same electoral model, see Lijphart, Patterns of Democracy (Serbian translation, published by Sluzbeni List CG Beograd) (1999) p. 103.

⁸⁷⁶ See Article 6, paragraph 3 of ToL and Article 52, paragraph 3 of the Charter.

⁸⁷⁷ See the Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, and paragraph 35 of its Draft Explanatory Report 47+1(2013)008 at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%282013%29008_final_report_EN.pdf> accessed on 4 May 2013. According to Article 1, of Protocol no. 1 of the Draft Agreement, the EU will accede to ECHR Article 3 of Protocol no. 1. Although the Draft Agreement on the Accession has been finalized in 2013, it still awaits conclusion of the internal procedures in the EU without a clearly foreseeable timeframe.

⁸⁷⁸ See *Matthews v. UK* cited above, p.87.

⁸⁷⁹ The differentiation in treatment of persons in a similar position is justified only if there are objectively valid reasons to it, Graig, de Burca, EU Law (2003) pp. 390-391.

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left out of the electoral sources' catalogue. With respect to electoral legislation, the general EU principles of legal certainty and legitimate expectation are also applicable in the EU and in its member states. The observance of the general principle of transparency is indispensable for elections as a safeguard of their integrity.⁸⁸⁰

Indeed, the ECJ, through its case-law, has reminded the member states that general principles of EU law like equal treatment, prevention of discrimination and respect for human rights are alive and kicking also in the electoral area.⁸⁸¹ Even more interesting is the ECJ's conclusion that a lack of general principle in the electoral franchise segment allows member state to freely regulate it.⁸⁸² What is surprising about this judgment is the ECJ's referral to the electoral principles of secret, direct, universal and free (mentioned-above), without listing equal suffrage as a key electoral principle.⁸⁸³ The ECJ omitted the principle of equal suffrage although it belongs to the European electoral heritage. Does this mean that controversy about the "digressive proportionality" in the EP⁸⁸⁴ contributes to the pragmatic interpretation of the key electoral principles? The counter-argument is rooted in the *sui generis* nature of the EU and of the EP; and in the EU's deepening pace. Yet the principle of equal suffrage should not be forgotten in the EU architecture of democracy. Even more so, given that it could be hypothetically challenged before the ECtHR.

The third pillar is the national electoral legislation of each EU state, which regulates European elections, as well as municipal elections. Yet the EU electoral rules are requisite for the EP and municipal elections. Therefore, the EU requires a transposition of the pieces of electoral legislation into the member states' legislation.

EU electoral rules are perceived by the EU as a measure to increase confidence and legitimacy of its bodies through an increased voters' turnout,⁸⁸⁵ to afford equal treatment to

⁸⁸⁰ Graig, de Burca, *EU Law* (2003) pp. 358-395.

⁸⁸¹ Report from the Commission on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), COM(2010) 603 final (2010) p. 10. See M.G. Eman and O.B. Sevinger v. the Netherlands, C-300/04, dated 12 September 2006, paras 60 and 61.

⁸⁸² Spain v. United Kingdom, ECJ (Grand Chamber), C-145-04, 12 September 2006, para 33.

⁸⁸³ Ibid. UK had encountered problems how to go about implementing the ECtHR Judgment *Matthews v. UK* referenced above p. 88, while safeguarding the equality principle.

⁸⁸⁴ Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) pp. 125-126.

⁸⁸⁵ Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing

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all EU citizens in the political life of the Union⁸⁸⁶ and to enable an everlasting political unity by promoting “Europeanization” of the political parties.⁸⁸⁷ Furthermore, the proportional electoral system foreseen in the EU rules, has an impact on the composition of the EP, as it allows for a wider representation of various parties and segments of the society when compared with the majority system.⁸⁸⁸ The imposition of an upper limit on the electoral threshold goes along the same lines. Freedom of movement and establishment within the EU goes hand in hand with granting election rights to non-nationals. In turn, it requires cooperation among the EU member states in order to compile and maintain accurate voters’ lists of the EU member states.

The picture of electoral democracy in the EU would stay incomplete without mentioning the cooperation that the EU and OSCE/ODIHR share in electoral sphere. The cooperation rests on the premises that all EU members are OSCE participating states; the EU is one of the OSCE largest financial contributors, thus bringing leverage to the latter and the possibility for greater influence at the policy level; and the OSCE/ODIHR has a specific election observation mandate, being a professional and specialized body for election observation.⁸⁸⁹

In view of the above, it does not come as a surprise that the OSCE/ODIHR shared its expertise with the EU and assessed the 2004 and 2009 EP elections.⁸⁹⁰ The election observation reports voice concerns regarding the EP elections in, at that time, 27 countries, based on difference of the electoral legislation in terms of qualifications to vote, to be nominated as a candidate, on electoral campaign and judicial remedy. It follows that the lack of proper cross boundary voter registration, coupled with different election days for different countries makes it difficult to detect multiple voting. Dissimilarities in the conditions

in a Member State of which they are not nationals, COM(2012) 99 final (2012) p. 3. A franchise inclusive of non-nationals is considered to have a positive effect on the voters’ turnout.

⁸⁸⁶ Report from the Commission on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), COM(2010) 603 final (2010) pp. 7-8. The right to allow a non-national to form a political party in the EU member states was analyzed by the Commission.

⁸⁸⁷ Regulation EC no. 2004/2003 of the European Parliament and of the Council, dated 4 November 2003 on Governing Political Parties at European Level and the Rules regarding their Funding, OJ L 297, 15 November 2003, as amended by the Decision of the EP Bureau and by Regulation EC No. 1524/2007.

⁸⁸⁸ Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) pp. 398-399.

⁸⁸⁹ Bailes, Haine, Lachowski, *Reflections on the OSCE-EU Relationship*, OSCE Yearbook (2007) pp. 68 - 70, 75.

⁸⁹⁰ See the EP-related reports at <www.odihr.org>.

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attached to election rights and to electoral campaign from national perspectives, run counter-productive to the trend of promoting European parties. The “judicial resolution lacuna” is inconsistent with the rule of law, as a fundamental value of the EU order. A low turnout indicates “disinterested voters”.⁸⁹¹ Gender representation does not achieve the same proportion in all EU countries,⁸⁹² although the equality of the sexes is one of the principles in the EU.

On-going electoral reform in the EU attempts to address some of the above-mentioned shortcomings, while at the same time deepening and harmonizing electoral democracy and accommodating the needs of all 28 EU member states.⁸⁹³ In particular, the EP elections should be held on a common day throughout Europe and political parties should disclose their alliance at the European level on the ballot, as well as their preferred candidate for the European Commission president. A motion is filed with the effect to terminate the EU funding of the rightist parties that promote intolerance and racisms.⁸⁹⁴

4.3.3 Applicable Election Standards in the EU – Electoral Cycle Approach

Considering the above legal analysis,⁸⁹⁵ the following specific “vertical” election standards can be discerned in respect of the EU electoral competition. In addition, “free and fair” election requirements⁸⁹⁶ whose validity extends horizontally to each of the EU countries are applicable to the elections for the EP.

Pre-election phase

Electoral system and law: Different variations of the proportional representation model are acceptable (closed lists, single transferrable vote, preferential vote). The electoral threshold is

⁸⁹¹ Also discussed by Graig, de Burca, *EU Law* (2003) pp. 127, 131.

⁸⁹² OSCE/ODIHR 2004 Pre-election Overview Paper, pp. 9-10.

⁸⁹³ See the aforementioned Commission Recommendation dated 12 March 2013.

⁸⁹⁴ Scotland’s Senior MEP Welcomes New Rules on Party Funding, dated 16 April 2013 at <<http://www.martinmep.com/pf>>accessed on 13 May 2013.

⁸⁹⁵ Specific election standards are drawn on the basis of the Charter, Treaty on European Union and the Treaty on Functioning of European Union, as well as on regulations and directives quoted on pp. 175-177.

⁸⁹⁶ This statement refers to the authoritative sources of election standards, such as ECHR and OSCE political commitments.

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also a subject of the predilection of the member state, but must not exceed 5%. No retroactive application of the law is allowed.

Voters: All EU adult citizens have the right directly to elect their representatives in the EP in accordance with the universality principle. National legislation governs the eligibility of the voters. However, under no circumstances (e.g. current residence) may states discriminate against EU citizens who are not their nationals. An objective justification, or conditions for derogation (e.g., in case of Luxemburg, where non-nationals exceed 20%) constitute exception to this rule.⁸⁹⁷ Active registration for non-nationals is acceptable. Information about the elections must be available to non-nationals.

The equality of votes in terms of national constituencies must be safeguarded in terms of the number of votes and the size of constituency. Therefore, countries are under an obligation to exchange information regarding their voters in order to disable double voting in two different states, and to ensure accurate voters' lists.

Candidates: The principle of equality and non-discrimination applies also with respect to the nomination of candidates, governed by national legislations of the 28 countries, as well as for the candidates proposed by the European parties.⁸⁹⁸ Regardless of the principles of non-discrimination and equality, individual candidates are not given the right to stand for EP elections in each of the EU member states. In addition, an equitable gender representation is nowhere explicitly foreseen in the EU electoral rules, although equal rights are guaranteed by the Charter.

Dual mandate is prohibited, as well as accumulation of top offices, both at national and EU levels.⁸⁹⁹

⁸⁹⁷ The EU member states are also obliged to grant election rights to the EU citizens who are non-nationals under the same conditions that apply to their nationals.

⁸⁹⁸ Mentioned for the first time in the 1992 Maastricht Treaty.

⁸⁹⁹ The office of member of the European Parliament is incompatible with that of member of a national government, of the Commission, ECJ judge, advocate-general or registrar, member of the Court of Auditors, member of the Economic and Social Committee, and of other committees or bodies under the EU treaties, member of the Board of Directors, Management Committee or staff of the European Investment or Central Banks, and active official or servant of the EU institutions or of the specialised bodies, or a member of the Committee of the Regions or Ombudsman.

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Electoral campaign: The electoral campaign financing rules foresee a ceiling of EUR 12,000 per year and per donor for the European parties.⁹⁰⁰ The parties must observe a transparency requirement in terms of annual disclosure of their financial reports and of the source of donations exceeding 500 euro. They must refuse anonymous donations, with the aim of ensuring transparent and responsible spending of EU public funds. The obligation for annual disclosure of funds disbursed to the parties also extends to the EP. Sources of funding declared inadmissible in order to avoid a conflict of interest and undue interference comprise donations from the budgets of the EP political groups, from any company under influence of a public authority, or from non-EU countries. The admissible sources of funding comprise contributions from national political parties (members of a political party at the European level) and from national political foundations (members of a political foundation at the European level), provided that they do not exceed 40% of the annual budget of the political party or foundation at the European level.

Legal remedies: They must be available regarding active and passive election rights to non-nationals under the same principles of equality and non-discrimination. The transparency principle also applies in this regard.

Election Day

Voters: There is no deviation from the “secret ballot” rule.

Voting procedure: The EP voting takes place in a 4-day span of time. Thus, EU citizens vote on different days for the EP.

Post-election phase

Election results: No publication of electoral results is allowed until the last election is concluded.

⁹⁰⁰ European parties are designated as bodies of general European interest.

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Electoral Disputes: The EP has competence to deal with electoral disputes connected with EU legislation in a transparent procedure. The ECJ also has competence to adjudicate electoral disputes relating to active and passive election rights.

The above-established specific election standards show that large portions of different elements of the electoral cycle remain governed by national legislation. As a result of the inter-state political negotiations, the EU election standards build on the already existing election standards in Europe, but also on the electoral legislation of each state. From the plans for electoral reform, it transpires that new election standards are not a priority, although there is room for improvement, as noted by the OSCE/ODIHR 2004 and 2009 election-related reports. It does not appear that unified electoral legislation will represent a sole remedy for the electoral problems detected in different countries (e.g., the impossibility to stand for election as individual candidate, a lack of judicial remedy, a dissonance in the criteria attached to the exercise of the election rights). The same effects can be achieved by way of progressive approximation of the respective national legislation.

Looking at the effects of the ECJ's aforementioned judgments that were passed 7 years ago, it appears as though the EU feels uninspired to fill-in the electoral lacunas. Indeed, the approximation of the electoral legislation even for the EP elections, keeps taking baby steps. The reasons why the member states would not feel an urgent need for a greater coherence in the electoral field, may originate from its impact on the election results, and their fear of a change affecting their national political balance. Certain member states are slow in loosening their grip on electoral rules, although they are under an obligation to transpose the EU electoral law in their national legislation under the same rules valid for other common fields.⁹⁰¹

Whereas there are no EU laws governing general or presidential elections, they should not suffer from lowering the election standards in comparison to the EP elections. For instance, the financial campaign rules valid for the EP elections should, by analogy, apply to other types of elections in the EU member states. The above-mentioned general principles of the

⁹⁰¹ For more on this topic see Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, COM(2012) 99 final (2012).

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EU also feed into national electoral rules for all types of elections. Common electoral principles, as framed by the European constitutional and electoral heritage, represent yet another facet of the generally applicable electoral rules. However, the electoral systems for the country level elections remain an undefined variable. Specific rules and measures about how to implement the common electoral principles are also sketched by the countries, with a caveat that they are still bound by the CoE and the OSCE specific or interpretative election standards.

In this context, introducing the standard of a meaningful representation as a reflection of broader inclusiveness, could address the low turnout of the voters in all 28 countries⁹⁰² by strengthening the link between the grassroots and supranational levels. It will also enhance the representation of women and minorities in the EP by clearly setting out such a requirement in EU legislation. Still, it appears that for the time being any attempt to substantially enhance EU electoral rules is doomed to fail.

5. Harmonization of European Election Standards: Outlook for the Future

The previous discussion was limited to the election standards in Europe, as they stand. The practice of electoral democracy inextricably links various sets of standards derived from the European instruments. In light of the above, the discussion inevitably opens up to the projection of the future in the electoral sphere in Europe.

The current situation of many different sets of electoral general and specific standards does not bring clarity in their country-by-country application. The turmoil in the normative sphere has been reflected in the practical dimension of “free and fair” elections, as it follows from the OSCE/ODIHR election observation reports in the European region. The turmoil is not related to the main electoral principles, i.e., free, fair, regular, universal, equal, direct. On the contrary, there is a high level of harmonization in this regard. The confusion appears when those principles are translated into concrete and specific standards for each electoral topic.⁹⁰³

⁹⁰² See <http://ec.europa.eu/news/eu_explained/130313_en.htm> accessed on 13 May 2013.

⁹⁰³ Evers, OSCE Election Observation (2010) at <<http://www.core-hamburg.de>> p. 236.

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Based on the results of the examination and on the conclusions, the following proposition is made for the outlook of the paradigm of “free and fair elections” in Europe. It is based on the principles of universal, fair, equal, regular, direct and genuine elections, as follows:

Pre-election phase

Electoral system and law

The electoral model reflects the principles of the paradigm of “free and fair” for all types of elections (legislative, presidential, municipal, regional, mayoral). Whereas the countries’ electoral systems are shaped in accordance with their traditions and needs, they incorporate the following:

- Periodic direct elections ensure that the elected collective body reflects the will of the electors. The mandate should not exceed 5 years.⁹⁰⁴
- A requirement for a meaningful representation ensures that disadvantaged groups are not impeded in the exercise of their election rights by, e.g., high thresholds. It further demands a proactive approach from the state in ensuring meaningful representation of women and minorities (e.g., by quotas, targets or reserved seats). A meaningful representation standard requires a plurality of electoral choices for the voters, and a type of electoral system that allows the widest possible representation of all segments of society in decision-making.

The electoral legislation is adopted and amended in line with democratic law-making, meaning that:

- There is an on-going dialogue with the ruling parties, the opposition and the disadvantaged groups. They are consulted, their views are taken into consideration and reasons are given when their comments are not accepted.
- The law is last amended at least a year before elections, in order to provide the conditions for a well-organized and successful election.
- The electoral legislation, which is based on the principles of equality before law, non-discrimination and inclusiveness is clear, coherent and accessible. Retroactive application of electoral legislation is prohibited.

Voters

⁹⁰⁴ Ibid p. 24.

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They have the following rights:

- To be well informed about all electoral options, including the parties, candidates, and about the political programmes offered.
- To be educated about the meaning of the election and, the ramifications in case they do not go out to vote, as well as about the voting procedures.
- To enjoy the right to a universal vote and to be included in the voters' list, when they are eligible. Permissible exceptions are: age, a lack of nationality, mental impairment (individually assessed), non-residence, conviction and imprisonment for serious or election-related crimes, but not for longer than necessary.
- To have an effective remedy regarding voter registration, not only for themselves, but also to challenge improper enfranchisement of others.
- To nominate their candidates as a group of citizens.

The States have the following obligations vis-a-vis the voters:

- To enfranchise every citizen who qualifies as a voter.
- To prepare and maintain accurate and up-to-date voters' list by introducing effective ways of registration and deletion of the persons who no longer qualify as voters from the voters' list.
- To protect personal data from the voters' list.
- To define the constituencies in line with the principle of the equality of votes, with a deviation not exceeding 10%. The delimitation should result in electoral districts of a similar size that are regularly re-adjusted, in view of the population change. The constituencies should respect ethnic, natural and geographical specificities. Gerrymandering is prohibited.

Candidates

They have the following rights:

- To be registered as candidates when they fulfill the legal requirements. Permissible restrictions relate to age, incompatibility of offices (the accumulation of elected offices, accumulation of executive, judicial, legislative and civil servants offices), mental impairments (individually assessed), a lack of residence or of citizenship, reimbursable and not excessive electoral deposit.

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-To be treated equally before the law in line with the non-discrimination principle, regardless of who nominates them, i.e., the ruling party, the opposition, or if they are individual candidates.

-To be able to reach out to the voters through the media and to organize rallies. To organize the electoral campaign under the terms that will ensure the equality of chances of winning the election.

The states have the following obligations vis-à-vis the candidates:

-To ensure transparency in the nomination and approval process.

-To protect candidates from intimidation, threats, coercion and violence, and to restrain from interfering with their electoral campaign and private life.

-To ensure freedom of expression, of association, of peaceful assembly, of movement, and the right to privacy.

-To ensure funding and other advantages with the aim of facilitating electoral campaigning under equitable and fair conditions.

Electoral campaign

The electoral campaign financing rules foresee the following:

-All types of corruption (active and passive) and conflicts of interest (including ownership or a position which entails decision-making power over the media) are prohibited.

-There is a separation between the state and the parties.

-There is an explicit limit on donations, with a lower limit for donations made by individuals. Multinational corporations, including those registered in the country, cannot make donations.

-Anonymous and foreign donations are prohibited.

-Donations cannot be made by the state, regional or municipal bodies, enterprises or companies that have contracts with those bodies or which are under their influence. No administrative resources can be used for the purpose of election campaigning.

-Public funds are disbursed to candidates under the principles of equity, non-discrimination and proportionality. Party fees can also be used for the electoral campaign.

-There is a limit to the electoral expenditure. No expenditures are allowed outside of the organized electoral campaign.

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- Inflow of cash and expenditure passes through an election agent and an election account for each organizer of the electoral campaign.
- The organizers of the electoral campaign must thoroughly record all financial details relating to elections. They must report their inflow and expenditures before, during and after the electoral campaign ends in line with the transparency requirement. They must also report all electoral campaign expenditures that were conducted in favor of their candidate by an entity/individual other than the electoral campaign organizer. A standardized financial report includes the source and the type of the source of funding (in-kind, monetary or other kind of advantage, donation, fees, loans, public subsidies), a description, the amount/value, venue and time of the activities, type and amount of the expenditure.
- The public is provided with information regarding electoral campaign financing, no later than 6 months from the day the electoral campaign ended.
- All organizers of the electoral campaign are audited by an independent auditor.
- Adequate monitoring of electoral expenses is in place.
- Legal remedy is in place for a breach of the applicable rules.

The media are regulated as follows:

- Private and public media, print and electronic media are impartial and fair⁹⁰⁵ when reporting about electoral candidates' campaign. There is no government or other unwarranted interference with the media.
- Free time is allocated by electronic public and private media under equitable and fair conditions.
- For paid electoral campaign activities, the media must not give unfair advantages by giving higher discounts, or not requesting a payment for their services. It must always be denoted who ordered the paid advertisement or a public survey poll.
- Paid advertisements are accessible under equitable and non-discriminatory rules in terms of price and allocation of time.⁹⁰⁶ The media do not exceed the allocated time per candidate.⁹⁰⁷

⁹⁰⁵ Among others, see Statement of Preliminary Findings and Conclusions with respect to Macedonia, 2013 Municipal Elections 2nd round, p. 2, and 2012 Final report of the Early Parliamentary Elections in Montenegro, p. 21.

⁹⁰⁶ OSCE Handbook on Media Monitoring for Election Observation Missions (2012) pp 13-14, 25-29; Final Report on 2011 Croatian Parliamentary Elections, p. 18.

⁹⁰⁷ Final Report on 2010 Parliamentary Elections in the Slovak Republic, p. 14.

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-There is an independent and impartial body that regulates and monitors electronic and print media.

Legal remedies

They are available to safeguard all aspects of the pre-electoral phase:

-Administrative and criminal law remedies effectively protect active and passive election rights.

-Respect for the media rules and electoral campaign financing is ensured, without undue interferences.

-The division of competencies between prosecutors, administrative bodies and the courts is clearly defined. Guarantees are in place for their independence and impartiality.

-Judicial and administrative procedures are transparent, public and efficient in view of the specific nature of elections. They are completed without causing undue delays to the declaration of the electoral results.

-Decisions are amenable to judicial review.

-Effective sanctions are in place to deter illegal behavior and suppress electoral impunity.

-No amnesty is granted to the offenders convicted of election-related offences.

Election observation

In line with the existing commitments, international and local election observers are:

-Allowed to observe elections in all their stages including counting and tallying of the votes, and protected against any attempts of coercion or threats.

-Provided with full access to polling stations, to the electoral management bodies and to court sessions.

-Provided with access to documents, including minutes from the counting and tallying, appeals, decisions and judgments.

Electoral Administration

Elections are administered impartially and independently, meaning that:

-All levels of the electoral administration are composed in a way which ensures the impartiality and independence of their decision-making. The highest electoral bodies are professional, permanent and have sufficient resources to complete their task.

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- Members of the electoral bodies are safe from threats, pressures and violence.
- Decision-making is timely, effective and open to public scrutiny.
- Decisions of the electoral bodies are public.
- Integrity of the electoral process is ensured in all phases, starting from the protection of the electoral material to imposition of fines in case of violations of electoral rules.
- Voters are educated about elections in the languages they understand.

Election Day

Voters

They have the following rights:

- To cast a secret vote free from coercion, threats, violence or manipulations.
- To obtain voting instructions, information about the candidates and ballots in their own language.
- To have access to the polling station and adequate assistance, which will not interfere with their right to cast a free and secret ballot.

States are under an obligation to:

- Ensure security for every individual involved in the elections.
- Ensure that vulnerable voters are able to cast their vote in free and fair procedure.
- Restrain from any type of intimidation.
- Suppress family⁹⁰⁸, group⁹⁰⁹, proxy⁹¹⁰ and multiple voting.⁹¹¹
- Ensure the integrity and transparency of e-voting.⁹¹²

Voting

- All sensitive material is adequately protected.
- The polling station's set up simultaneously ensures secrecy of the vote and the transparency of voting.

⁹⁰⁸ See, among others, Final Report on the 2008 Macedonian Early Parliamentary Elections, p. 19. OSCE/ODIHR Election Observation Mission Final Report

⁹⁰⁹ Among others, ODIHR Statement on 2nd round of the 1996 Lithuanian Parliamentary Election.

⁹¹⁰ OSCE/ODIHR, Handbook for Monitoring Women's Participation in Elections (2004) p. 39.

⁹¹¹ Among others, see Assessment Mission Report of 2004 Romanian Presidential and Parliamentary Elections, p. 31.

⁹¹² Council of Europe, Committee of Ministers, Recommendation Rec(2004)11 on legal, operational and technical standards for e-voting, 30 September 2004.

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-Voting is conducted in an orderly manner and, in the absence of unauthorized persons, weapons or other objects that can endanger the voting. All voters are given a chance to cast their vote.

-Police cannot enter the polling station unless called by the polling board in case of disorder or violence.

Candidates

-Have their party representatives observe the voting, electoral boards' decision-making, counting and tallying of results.

-Immediately complain about noticed irregularities in the voting and request their termination.

Election administration

-Is vigilant to all attempts to rig elections. It conducts regular inspections in the polling stations and cooperates with the police regarding security-related matters.

-Provides opportunities and effective remedies to all voters unable to cast their vote.

-Effectively makes decisions, communicates and remains accessible to all involved in the elections. It provides guidance with respect to legislation and procedures connected with the election.

-Takes care of logistics and secures the storage and distribution of election materials.

-Supervises and disciplines lower levels of electoral administration.

Counting

-Counting of votes is done transparently and honestly.

-The official results are made public for each polling station.

-Candidates and observers have access to the minutes and results from the voting.

-The results are promptly delivered to a higher competent body for tallying.

Post-elections

Electoral administration

-Electoral results are tallied honestly and pronounced publicly, with no delay.

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- Decides promptly on election complaints in a transparent procedure open to the public. It gives equal chances to all parties involved to provide their arguments and adduce evidence. The decisions relating to elections and election disputes are reasoned and well-justified.
- Declares the official electoral results with the shortest possible delay.

Electoral results

- In case of rigged elections, electoral results shall be annulled for the constituency or part of it where an illegal activity occurred.
- If electoral results are annulled, they must be repeated regardless of their impact on the electoral results. The elections will also be repeated if the voting was interrupted or did not take place at all.

Legal remedies

- There is an effective and adequate remedy to challenge the election results.
- Judicial appeals and complaints are dealt with fairly and in a timely manner in line with the requirement to publish the results as soon as possible.
- Election-related criminal offences are detected, promptly investigated and successfully prosecuted, which results in conviction and punishment of the perpetrators.

Mandate Entrusted to a Winning Candidate

- Electoral office is occupied by the winning candidate until the expiration of the elected office, except for valid legal reasons.
- Any attempts at post-electoral violence are effectively prevented and suppressed.

The above exercise is not just a simple summary or re-classification of the election standards as they stand in various European organizations. It is rather a merger of the election standards of the CoE, OSCE and EU, which also includes an emerging standard of meaningful representation. The above concrete election standards define the scope and substance of each theoretical principle declared in the international documents. Therefore, the common election standards in Europe should be seen as a practical tool for harmonious application of the Europe-wide electoral principles in national and supranational elections. They give a common key to the interpretation of the common principles of “free and fair elections” to the

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governments (organizing the elections), the opposition and the voters, on one side, as well as to the international and local election observers on the other side.

The discussion now turns to the specific standards elaborated above, as follows:

Distillation of the specific election standards offered by the three European organizations in order to conceptualize their avid version, deliberately omits a specific type of electoral system foreseen in the EP elections, for the following reasons:

-firstly, not all of the countries bound by the European election standards elaborated by the CoE and OSCE belong to the European continent; and

-secondly, huge dissimilarities exist in terms of political, cultural and legal heritage even among the countries from the European continent.

However, the maximal 5% electoral threshold foreseen in the EU standards should be kept as one of the elements of the “free and fair” election paradigm in Europe, although it has not been explicitly mentioned in the OSCE or CoE standards. The main argument in its favor starts from the premise that the countries bound by the European standards are plural societies. Without putting limits on electoral thresholds, the plurality of the societies may not be reflected in the political decision-making. However, the contemporary political, human rights and legal processes advocate for greater inclusion of minority groups via free and fair elections.⁹¹³

A curious case is the observance of the equality suffrage, or rather a lack of it, in the EP elections.⁹¹⁴ The case may be that there is a big difference in the votes by which the MPs from various EU states are elected, although they perform the same function in the same institution. Digressive proportionality also adds to the curiosity: is it possible to ensure equal suffrage in the EP, and how? Another perplexing case is the impossibility of standing as an individual candidate in the EP elections, which not only runs contrary to the OSCE and CoE election standards, but also to the non-discrimination embodied in the *acquis communautaire*. A hypothetical ECtHR scrutiny might prompt a change in this regard.

⁹¹³ See Annex I and II.

⁹¹⁴ “The way in which an EU Member State is or is not divided into multiple constituencies – as well as the applicable thresholds – has a significant effect on the final election result in each Member State”, OSCE/ODIHR, Elections to the European Parliament, 4 - 7 June 2009, OSCE/ODIHR Expert Group Report, 11 – 30 May 2009, p .19.

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Whereas there are no specific EU rules for the electoral franchise, except “the non-nationals’ universal right to vote”, EU countries must abide by the OSCE and CoE relevant standards, due to their triple membership. The OSCE, for its part, has been borrowing from the CoE standards regarding the electoral campaign financing (public and private funding), electoral administration, and access to media.⁹¹⁵ The OSCE commitments, for their part, explicitly require genuine elections as the basis of the legitimacy of government, the winning candidate occupying the office, and an environment conducive to political campaigning. The OSCE electoral commitments are spread out in its various documents and do not contain details on certain common principles that are set out in the CoE Code of Good Practice in Electoral Matters. For example, the latter devotes more attention to local and regional elections and specifies the voting requirements and counting procedures in detail.

Delimitation of electoral boundaries favoring minority representation is still fragile and has not been encompassed, as such, in the ECtHR corpus of interpretative election standards. By contrast, the ECtHR is the sole body that supported the idea that there was a conflict of interest when an electoral candidate holds a position allowing influence over public media. An ownership of a decisive share in private media has not been mentioned anywhere as an obstacle to stand for elections.

Effective and adequate legal remedies in all electoral spheres represent a target for all sets of the European election standards. However, this requirement needs to be translated into concrete terms, especially for the media rules violations. Whereas the media are subject to sanctions, the electoral candidate still benefits from the violation. The same is valid for a violation of campaign financing rules, unless national law effectively and fairly enforces a prohibition to occupy an elected office won by breaking the law. The enforcement of punitive provisions, effective sanctions and perseverance to combat impunity does not agree with according amnesty to election-related offenders. Such amnesty is usually accorded to the “party soldiers” who sacrifice themselves in the name of electoral victory. However, it is acknowledged that a prohibition on granting amnesty for election related offences has not yet been formulated as a clear electoral standard.

⁹¹⁵ Note that access to media has not been conceptualized as an EU standard.

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Although the election observation commitments have not been included in the CoE and the EU sets of electoral commitments, the fact remains that these organizations make electoral observation a part of their practice. The judicial remedy requirement and “zero tolerance” for impunity in electoral cases are indirectly imposed on the EU member states for the EP elections, via their OSCE and CoE memberships. This assumption can be verified in practice only if country-by-country analyses are conducted about their valid international and national electoral rules.

Finally, the above-proposed specific standards may vary in their impact on the EU, due to this organization’s *sui generis* nature. European harmonized standards in the electoral field will *de facto* result in greater approximation of the election rules for all types of elections in the EU countries, the EP elections included. It will represent a follow-up to the OSCE/ODIHR recommendations with respect to the EP elections. Such *de minimus*, standards will not prevent the EU from elaborating more detailed standards in the specific electoral areas as the need may be. At any rate, the EU being a champion of democracy on the European continent cannot allow itself to conduct elections under lower standards than those valid for the OSCE and CoE member states.

VI. INTERNATIONAL SCRUTINY OVER IMPLEMENTATION OF ELECTION STANDARDS

It is easier to set standards than to observe them. In view of this premise, this chapter examines advantages, drawbacks and interaction of the existing electoral oversight bodies at the European level.

1. UN Responsiveness to Electoral Irregularities

Without the UN election-mandated bodies who not only have the competence in the European region, but also regularly exchange good practices and knowledge with the European election-mandated bodies and European states, the picture of the standards' observance would remain incomplete.

The UN mechanism mandated with the observance of election standards is a mixture of treaty⁹¹⁶ and non-treaty bodies⁹¹⁷ that are responsible for a range of tasks. Their tasks include monitoring of elections, reporting, fact-finding and dealing with the inter-state⁹¹⁸ and individual complaints.⁹¹⁹ Except for the Electoral Assistance Department (EAD), the remainder of the bodies is not specialized in electoral matters.

Whereas the treaty-based bodies operate under the assumption of professionalism, expert knowledge, independence and impartiality,⁹²⁰ the assumption about the non-treaty decision-making bodies is that they work in accordance with political laws, in view of the states'

⁹¹⁶ HRC, the Committee on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Racial Discrimination, Committee on the Rights of Persons with Disabilities, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).

⁹¹⁷ General Assembly, SC, Economic and Social Council (ECOSOC) Human Rights Council, Special Procedures, United Nations High Commissioner of Human Rights (UNHCHR) The UN Electoral Assistance Division (UNEAD) United Nations Development Fund (UNDP).

⁹¹⁸ For CERD it appears that there has been no inter-state case relating to participation in public affairs and elections, see at <<http://www.bayefsky.com>>; Rooker, *Monitoring Human Rights: The Importance of the Universal Level for Roma and Sinti*, CPRSI Newsletter (1997) Vol.3, No.1.

⁹¹⁹ See among others, Centre for Human Rights, United Nations, *Civil and Political Rights: The Human Rights Committee*, Fact Sheet no. 15 (2001) p. 4; Steiner, Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd edition) (2000) pp. 738-740, 767; Symonides, *Human Rights: International Protection, Monitoring, Enforcement* (2003) p. 72.

⁹²⁰ See for example CEDAW/SP/2/Rev.1 dated 13 April 1982; Centre for Human Rights, United Nations, *Civil and Political Rights: The Human Rights Committee*, Fact Sheet no. 15 (2001) p. 4, The CERD Rules of Procedure (article 10 ICERD) CERD/C/35/rev.3, 1 January 1989.

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representativeness.⁹²¹ Action is connected with the interest shown by a powerful member or upon states' requests. In various UN bodies, the power of states is not equally distributed (e.g., the Security Council of the UN). The states are not equal *de facto*, which is also reflected in international relations.⁹²² For example, the Human Rights Commission was abolished, *inter alia*, after the objection that the commissioners' work was subjected to political laws, since its members were government officials.⁹²³ Even the Human Rights Council, since its inception has been subjected to criticism, coming mainly from the US, which voted against it, considering that the UN missed the opportunity for a thorough reform of this human rights body and that the Human Rights Council had fallen short of expectations.⁹²⁴

On their side, the UN treaty-based mechanisms face the following major problems in their efforts to protect and promote the paradigm of "free and fair" elections:

First, substantial delays in the states' reporting⁹²⁵ and incomplete reports⁹²⁶ are problems faced by all treaty-based bodies. Second, decisions regarding individual complaints do not receive a proper follow-up,⁹²⁷ with some countries even withdrawing the right to individual

⁹²¹ This means that action is only taken in case of extreme violations, if interest is shown by a powerful member or upon states' requests. See Droit International Public, Combacau, Sur (5^e édition) (2001) p. 28. For General Assembly see Steiner, Alston, International Human Rights in Context, Law, Politics, Morals (2nd edition) (2000) pp. 595-596.

⁹²² Droit International Public, Combacau, Sur (5^e édition) (2001) p. 28.

⁹²³ Steiner, Alston, International Human Rights in Context, Law, Politics, Morals (2nd edition) (2000) pp. 595 - 596. See also Kofi Annan's address to the HR Commission, Office of the Spokesman, 7 April 2007. He acknowledged that the HR Commission's declining credibility has cast a shadow on the UN system.

⁹²⁴ Shaefer, The UN Human Rights Council does not merit US Membership, Heritage Foundation and Wall Street Journal (2007) at <<http://www.heritage.org>>;< <http://www.hrw.org>>.

⁹²⁵ For example: the 2009 Report of the Human Rights Committee Volume I, (94, 95 and 96 sessions) pp. 17-18, states that 50 countries exceeded the reporting deadline for more than 5 years until 31 July 2009 and 21 initial report has not been submitted. A considerable number of countries have not submitted reports to CERD for more than ten years, the 2008 Annual Report of CERD to General Assembly, A/63/18 Supp. 18. The CERD gave the facts in the General Recommendation pursuant to which no less than 89 reports were overdue from 62 States, 42 of those reports were overdue from 15 States, each with 2 or more outstanding reports, and 4 initial reports which were due between 1973 and 1978 have not been received. It also noted with regret that neither reminders sent through the Secretary-General to States parties nor the inclusion of the relevant information in the Annual Reports to the General Assembly had the desired effect in all of the cases. See Shaw, International Law (5th edition) (2003) p. 238; Symonides, Human Rights: International Protection, Monitoring, Enforcement (2003) pp. 31-33, 35, 61-62.

⁹²⁶ See Overview of the working methods of the HRC, at <<http://www2.ohchr.org>>.

⁹²⁷ In the HRC Report to the General Assembly, the HRC deplored the certain states parties' failure to cooperate with them and stated that in such a case due weight is given to the author's allegations to the extent that they have been properly substantiated, of the Human Rights Committee Volume I, (85, 86 and 87 sessions) A/61/40 (2006) p. 76.

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complaint.⁹²⁸ In this context, it is probable that many individuals lack knowledge and awareness about this type of protection offered regarding the election rights. The third common problem is a lack of finances, especially considering the world economic crises. The failure to pay the assessed contributions by states parties affects the ability of the bodies to effectively discharge their monitoring function. The remainder of the problems includes “states’ fatigue” due to the duplication of information provided to various human rights treaties,⁹²⁹ the need to improve public information,⁹³⁰ to cooperate⁹³¹ and liaise better with various UN bodies,⁹³² and to obtain timely information from the UN agencies⁹³³ and NGOs. Some of the treaty-based bodies have even complained about undue pressures.⁹³⁴

Conduct,⁹³⁵ observation, monitoring, verification and supervision of elections are also types of electoral assistance offered by the UN.⁹³⁶ The assessment of elections may be conducted upon the concerned state’s requests, if a peace agreement provides so, or with the approval of the Security Council.⁹³⁷

⁹²⁸ E.g. Jamaica withdrew from the ICCPR’s Optional Protocol. Also, there are some views that if stricter enforcement mechanism was foreseen under the ICCPR not sufficient states would have been willing to ratify it and its Optional Protocol, in which case the ICCPR would have been left without enforcement mechanism.

Dixon, *Textbook on International Law* (5th edition) (2005) pp. 327-328.

⁹²⁹ The 1993 Vienna Declaration and the Programme of Action of the World Conference on Human Rights advise caution on elaboration of new standards and documents and explore possibilities how to ease the multiple reporting obligations for the states. Elaboration of new international standards should be done consistently with the Guidelines relating to elaborating new international instruments contained in General Assembly Resolution 41/120 of December 1986.

⁹³⁰ See 2003 Annual Report of the CEDAW Committee: Handbook for MPs on CEDAW was jointly prepared with the Inter Parliamentary Union.

⁹³¹ Coordination and cooperation has been done so far through the appointment of a focal point at the highest level in the UN, coordinators for assistance in the field, division of tasks between various UN bodies and agencies, working group for harmonizing working methods of treaty bodies, invitation of UN agencies at treaty body’s meetings, exchange of information and annual meetings of high officials in the UN and of chairpersons of the human rights treaty bodies.

⁹³² Symonides, *Human Rights: International Protection, Monitoring, Enforcement* (2003) p. 36-37.

⁹³³ See article 22 of the CEDAW.

⁹³⁴ Alarmed by the tendency of the representatives of States, organizations and groups to put pressure upon them, the CERD issued General Recommendation no. 9 dated 23 August 1990, aiming to safeguard the independence of the experts, which requests full recognition of the status of impartiality of its members.

⁹³⁵ According to Barnett and Finnemore, elections have become a measure for successfulness of an operation, thus they have been conducted pre-maturely or have validated undesirable outcomes, e.g., in Bosnia elections have validated ethnic cleansing, while in places like Africa, they have exacerbated ethnic tensions instead to prevent them, the *Politics, Power, and Pathologies of International Organizations*, International Organization, Vol. 53, No. 4 (Autumn, 1999) pp. 699-732.

⁹³⁶ The first known international election observation took place in 19th century. The Austrians, the British, the French, the Prussians, the Russians, and the Turks observed elections in the disputed territories of Moldavia and Wallachia. *Election Observation, Monitoring and Supervision* (2006) pp. 8-9. Taken from ACE Electoral Knowledge Network at <<http://aceproject.org/electoral-advice>>.

⁹³⁷ Cases of Nicaragua, Haiti, Angola, Cambodia, El Salvador and Mozambique, p. 41.

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As it stems from the above, in the UN there are a number of bodies that work in the election field as a part of their mandate.⁹³⁸ They provide a legal yardstick against which the behavior of states can be judged in the electoral field.⁹³⁹

However, elections need efficient, flexible and timely action due to their particular nature. Otherwise, it will not be possible to prevent and remedy the situation with respect to the ongoing elections, but only for future elections, provided that there is an appropriate follow-up by the state concerned. The much needed effectiveness, urgency and flexibility of action in this regard might be provided by a specially designated rapporteur that already exists for other human rights. The special rapporteur on elections shall be mandated by the UN to act only upon candidates' or citizens' complaints, or upon information from a UN body and not to wait for State's invitation. He or she should have the power to conduct fact-finding missions, to engage in a dialogue with the authorities, to issue publicly his or her findings and recommendations and to engage in the follow-up of the recommendations by the states.

Since Europe has not agreed to an exception from the global protection level, it follows that the universal bodies also measure the quality of the European elections, regardless whether that is done via direct electoral assessment, or via individual protection of election rights. However, the UN role regarding the enforcement of international election standards in Europe is mainly limited to the individual applications, which anyhow do not come in a big number from Europe, to the reporting system and to technical assistance offered on case-by-case basis.

2. Regional Organizations' Responsiveness to Electoral Irregularities

The CoE and the OSCE are two pillars on which the enforcement of European election standards within the European boundaries lie. The EU represents the third pillar, considering the importance of the European integration processes on the continent.

When the aggregate of the European election-mandated bodies is scrutinized, it comes to light that various bodies within a single organization have a range of mandates and tools at

⁹³⁸ See pp. 201-203.

⁹³⁹ Falk, Kratochwil, Mendlovitz, *International Law a Contemporary Perspective* (1985) pp. 484-485.

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their disposal. The current practice involves election observations, examination of individual applications, technical assistance, legislative assessments, and political dialogues with the governments, thus shaping the states' behavior when "free and fair elections" are at stake.

The gallery of election-related mandates indicates high decentralization of the relevant competencies, not only among the organizations, but also within one organization. It is striking that no specialized body for elections exists within the European boundaries. However, there is a court with a limited jurisdiction,⁹⁴⁰ and a number of political and expert bodies that assess the quality of elections and provide legislative assessments,⁹⁴¹ while others are more involved in the capacity building.⁹⁴²

2.1. Cooperation or Control

The outcome that the CoE, OSCE and EU seek to achieve on the basis of the devolved powers by the states are "free and fair elections" in Europe. In absence of a unified approach to what is considered "free and fair", they operate in line with their instruments' standards. The exploration of the drawbacks and benefits of each of the election-mandated bodies also means an examination of their vertical relations with the states, and of their horizontal relations with one another.

The ECtHR, as a judicial body, is neither a special court for election cases, nor does it foresee specific resources or remedies for the election-related cases. Therefore, the generic problems that the ECtHR faces on daily basis also represent a constraint for election cases. The ECtHR⁹⁴³ statistics reveal an influx of applications,⁹⁴⁴ which undoubtedly causes great difficulties in promptly processing cases.⁹⁴⁵ If there is no sharp decrease in the applications considered admissible⁹⁴⁶ as a result of the ECtHR reform,⁹⁴⁷ the current workload may even

⁹⁴⁰ ECtHR.

⁹⁴¹ ODIHR, the OSCE PA, the PACE, Venice Commission, Council for Democratic Elections.

⁹⁴² OSCE Field Missions.

⁹⁴³ Since 1998 the ECtHR exists as permanent court. Judges from all states-parties to the Convention are elected by the CoE PA. The judges act in their own name.

⁹⁴⁴ The Court statistics show a steady increase of the applications allocated to judicial bodies. In 2012, this figure amounted to 64,500 applications. See the Statistics of the ECtHR at <<http://www.echr.coe.int>> accessed on 25 May 2013.

⁹⁴⁵ Survey of Activities 2007, Registry of the European Court of Human Rights (2008) p. 2; Annual Report 2008, Registry of the European Court of Human Rights (2009) Foreword.

⁹⁴⁶ Jacobs, White, Ovey, The European Convention on Human Rights (4th edition) (2004) p. 521; Survey of Activities 2007, Registry of the European Court of Human Rights (2008) p. 59.

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endanger the protection of human rights in Europe.⁹⁴⁸ Of course, the most effective and least costly way would consist of full enforcement of the ECHR by the states.

The remedies awarded by the Court include monetary compensation, while individual and general measures for rectifying injustice are left to the discretion of the country concerned. Therefore, they do not fit best the electoral context, as the ECtHR corrects the violation, *ex-post*, within the limited scope of its competence.⁹⁴⁹ Moreover, the ECtHR also has difficulties with the enforcement of its judgments.⁹⁵⁰ On one hand, it appears that enforcement lacks sufficient safeguards to ensure the full impact of the judgments of the ECtHR.⁹⁵¹ On the other hand, there are some symptoms of crises for the enforcement as even founding states like France or the United Kingdom⁹⁵² are sometimes reluctant to enforce a judgment. There are judgments that are not enforced or are incompletely enforced despite the CM's reminder.⁹⁵³ The UK even considers temporarily withdrawing from the ECHR.⁹⁵⁴ The PACE regularly deals with the issue of the enforcement of the ECtHR judgments, recognizing that the problem of the lack of enforcement might even jeopardize the whole system for the protection of human rights.⁹⁵⁵

As a rule, the international election observation missions in Europe comprise the OSCE/ODIHR and OSCE PA observers, as well as the CoE PACE⁹⁵⁶ observers for

⁹⁴⁷ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, entered into force in June 2010.

⁹⁴⁸ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 512; *Survey of Activities 2007*, Registry of the European Court of Human Rights (2008).

⁹⁴⁹ Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 503.

⁹⁵⁰ The Committee of Ministers (CM) of CoE ensures the enforcement of the ECtHR judgments. Regarding general measures, the CM is not fully involved in any ensuing reform in the country concerned, but the Secretariat might collect and forward information to the state-party concerned, Jacobs, White, Ovey, *The European Convention on Human Rights* (4th edition) (2004) p. 495. However, the CM, being a political body, may not be best skilled or motivated to pursue effective implementation of the judgments, Harris, Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) p. 26.

⁹⁵¹ Steiner, Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd edition) (2000) p. 803.

⁹⁵² *Implementation of Judgments of the European Court of Human Rights, Progress Report, Parliamentary Assembly* (2009) As/Jur (2009) 36.

⁹⁵³ Council of Europe, *Control of the Execution of Judgments and Decisions under the ECHR* (2000).

⁹⁵⁴ Guardian, *Can Britain withdraw from the European human rights convention?* 24 April 2013 at <<http://www.guardian.co.uk/world/2013/apr/24/withdrawal-human-rights-convention-price>>, accessed on 25 May 2013.

⁹⁵⁵ In view of the subsidiarity of the Strasbourg system, PACE proposes a bigger role of the national parliaments in the supervision of the execution of the ECtHR judgments. The parliaments may exercise an oversight over the executive branch in this regard and be more involved in the assessment of the compatibility of the draft legislation or practice/legislation with the ECHR requirements. They may also submit draft legislation which remedies the deficiencies established by the ECtHR.

⁹⁵⁶ CoE Parliamentary Assembly.

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parliamentary and presidential elections. The CoE CLRAE electoral observers also join-in, when conducting peer election observations of regional and local elections.⁹⁵⁷

The OSCE/ODIHR is the watchdog of elections in Europe, although its mandate captures more than “free and fair elections”.⁹⁵⁸ Its election observation missions operate under the assumption of professionalism, impartiality and competence. However, it seems that its teeth are not sharp enough. In particular, the follow-up⁹⁵⁹ to its electoral observation reports and recommendations has been identified as a challenge,⁹⁶⁰ in addition to the problems with certain OSCE member states objecting to its methodology and selection of countries to be observed.⁹⁶¹ In addition, OSCE/ODIHR officials complained that they have limited resources and funds for any meaningful follow-up.⁹⁶² The bottom line is that any effective follow-up must be done by the participating States. The OSCE and ODIHR can only assist in that process by providing their expertise and support.⁹⁶³

The OSCE PA, which is composed of parliamentarians from the OSCE participating states, focuses on short-term observation.⁹⁶⁴ Pursuant to the 1997 Cooperation Agreement with the ODIHR, the OSCE PA assumes a political leadership role, whereas the ODIHR assesses

⁹⁵⁷ In accordance with its Resolution 274 (2008) and Explanatory Memorandum, the CoE decided to prepare strategy and methodology for election observation. The Resolution requires a more comprehensive election observation focusing on plurality of choice, voters’ information, treatment of women and minorities. At the same time, its policy for the CLRAE observers (who are politicians) to remain only short time in the observed country has not changed.

⁹⁵⁸ It encompasses the support to democratic institutions and monitoring the implementation of human dimension commitments. See the 1990 Copenhagen Document, the 1990 Charter of Paris for a New Europe, the 1993 Rome Document, the 1994 Budapest Document, the 2004 Sofia Document, OSCE/ODIHR Election Observation Handbook (6th edition) (2010) p. 19.

⁹⁵⁹ The current trend is to examine in the EOM reports, if the steps taken by the observed country in-between elections have resulted in the implementation of its past elections recommendations and if so, to which extent. See the EOM report from 2007 for parliamentary elections in Kazakhstan, the 2009 EOM report for Macedonian local and presidential elections, the 2009 EOM report on Presidential elections in Kyrgyzstan.

⁹⁶⁰ OSCE/ODIHR, The Annex to Common Responsibility Commitments and Implementation (2006) Note Verbale No. 257/06; the 2009 Vilnius Declaration of the OSCE Parliamentary Assembly, Resolution on Election Observation the OSCE, AS(0) D1E.

⁹⁶¹ See the previous discussion about Russia, Belorussia and the CIS countries.

⁹⁶² Interviews with the ODIHR officials conducted in May 2007.

⁹⁶³ Interesting to note the follow-up provided by Norway that reported which ODIHR recommendations were taken into consideration and which were not, by explaining the reasons for the latter decision.

⁹⁶⁴ The modalities for the participation of the OSCE PA in the work of the OSCE are set out in 2006 Rules of Procedure.

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elections on the basis of technocratic methods.⁹⁶⁵ Nonetheless, tensions have been mounting with respect to elections between these two OSCE institutions.⁹⁶⁶

The PACE, a deliberative body of the CoE, consists of delegations of members of national parliaments. Among its other duties⁹⁶⁷, it observes parliamentary and presidential elections⁹⁶⁸ in cooperation with OSCE/ODIHR and the EU PA.⁹⁶⁹ Unlike the OSCE/ODIHR election observation, which focuses on the technical evaluation, the election observation of the PACE⁹⁷⁰ focuses also on the assessment of the political situation.⁹⁷¹ If an applicant country refuses to accept PACE's election observation mission, its applicant's process can be adjourned in the CoE.⁹⁷²

The bodies that do not observe elections for their quality, but are entrusted with monitoring and reporting about specific aspects of electoral legislation and practice, comprise GRECO⁹⁷³ and the European Commission for Democracy through Law (the Venice Commission). The former serves the CoE member states to assure a meaningful follow-up to the common rules against corruption in the funding of political parties and electoral campaigns.⁹⁷⁴ The latter, on other hand, is in charge with the formulation and promotion of European election standards,⁹⁷⁵ as well as of legislative assessments. Since 2002, most of its activities are jointly

⁹⁶⁵ Nothelle, the OSCE Parliamentary Assembly, OSCE Yearbook (2006) p. 363.

⁹⁶⁶ OSCE PA Bureau Reactivate Election Observation Agreement, Press release 15 April 2013, accessed at <<http://www.oscepa.org>>. The modalities for the participation of the OSCE PA in the work of the OSCE are set out in 2006 Rules of Procedure.

⁹⁶⁶ Nothelle, The OSCE Parliamentary Assembly, OSCE Yearbook (2006) p. 363.

⁹⁶⁶ OSCE PA Bureau /election-observation/election-statements on 26 May 2013.

⁹⁶⁷ In this context see PACE Resolution 1407 (2004) paras. 1, 4, 9-13.

⁹⁶⁸ Despite its short-term presence in the observed country, the PACE does not only assess the election day, but also the adequacy of the election legislation, its actual implementation and the observance of the international election principles, Complementary Text to the Rules of Procedure of the Assembly, Observation of Elections by the Parliamentary Assembly (2005).

⁹⁶⁹ Rule 59 of its Rules of Procedures stipulating that special status can be granted only to the states that have signed the OSCE 1975 Helsinki Act and accepted and ratified the two UN Covenants, should be noted. For example, in 1997 the Belarus' special – guest status was suspended by the PACE, because of the undemocratic manner in which its legislature was composed, Van Dijk, Hoof, Theory and Practice of the European Convention on Human Rights (1998) p. 2.

⁹⁷⁰ The main irregularities observed so far refer to a deficient legal framework, insufficient complaint procedure – too high standards of proof, inaccurate voters' list, ballot box stuffing, proxy/family voting, inequality of the opposition in the electoral campaign, intimidation of voters, bribery and the prevailing climate of impunity, from an interview with a PACE election official in 2007.

⁹⁷¹ Interview with a PACE election official in 2007.

⁹⁷² See Van der Linden, Conclusions of the President of the Parliamentary Assembly of the Council of Europe, 15-16 February (2007) pp. 61-62.

⁹⁷³ Agreement on Establishing GRECO (99) 1.

⁹⁷⁴ CM Recommendation (2003) 4.

⁹⁷⁵ Council of Europe, Building Europe together on the Rule of Law (2006) p. 10.

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executed with the Council for Democratic Elections, which also has representatives from the CLRAE and PACE. The issue of effective compliance with the VC Code of Good Practice in Electoral Matters and election legislation recommendations remains open. To a certain extent, the above compliance is ensured by the ECtHR and the CoE election observation missions, as well as by other international organizations, including the OSCE/ODIHR and the OSCE field operations.

The results of the above examination of the relevant election protection mechanisms on the supply side point out to the same drawbacks, i.e., all these bodies struggle with a lack of resources and funds, lengthy and untimely procedures contributing to the loss of momentum, and a lack of opportunity for effective follow-up to their decisions/recommendations. The lack of mandate and the restraint coming from the principle of sovereignty of the states also have a role to play in this regard. In some instances, election observation has been seriously challenged by some states, mostly along west-east lines. They *inter alia* object that it was not clear against which international election standards the elections were assessed, because the criteria were not clearly set out in the report.

Furthermore, all examined organizations in their key documents mention their preferences for democracy, protection of human rights and the rule of law, but the question remains how to make a bridge between the democratic values and principles and the practice in the international/regional organizations? The lack of an effective mechanism for the responsibility of international organizations is not helping the better elaboration of internal democratic principles.⁹⁷⁶ Nevertheless, in fact, there are attempts these organizations to control each other depending on who their member states are. From the viewpoint of traditional international law, the states are the key actors in these organizations, so the decisions are based on their political will. However, international organizations should serve as an example for what they stand for, thereby increasing their effectiveness when supporting the states in their democratization efforts. There must be more than a mere coincidence between the effectiveness of the international organization supporting “free and fair elections” and the perceived level of democracy on whose basis that organization operates.

⁹⁷⁶ Draft Articles on Responsibility of International Organizations, International Law Commission, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 87). GA decided to put it on the agenda in 2014, as to the form to be given to the articles at <http://untreaty.un.org/ilc/guide/9_11.htm> accessed on 26 May 2013.

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Greater transparency, support for diversity, accountability, non-discrimination and effective remedy are among the elements of the inter-governmental organizations' internal democracy. Democratic principles for the functioning of the inter-governmental organizations go hand in hand with globalization.

The above approach is also in balance with the international principle of the state sovereignty, taking into consideration that international organizations represent a space for expression of competing interests and political wills. It is even more important in view of the fact that the biggest demand for democratization assistance comes from the countries who are usually not big contributors, do not have much power in decision-making, and sometimes are not even a member of the international organization. The states who are the biggest consumers of the democratization assistance usually lack a developed democratic capacity. Elections cannot be considered sufficient for a society to be considered democratic, as it could lead to a sustainable survival of competitive authoritarianisms.⁹⁷⁷ Therefore, high hopes are put in the international level. In such cases, the international factor contributes a great deal to the liberalization of election outcomes.⁹⁷⁸ An adequate answer to the expectations and public confidence is an important goal for the inter-governmental organizations, in view of its audience costs.

The efficiency and the effectiveness of electoral assistance are also undermined by the demand side. In particular, states may not be willing to invite international observers to observe their elections, as there is no mandatory duty for the states to invite international election observers.⁹⁷⁹ States may also impose many obstacles to the effect that any meaningful observation of elections is impossible, or object when it is only one person (politician/expert) making the assessment. States might not articulate well the needed assistance, or may not coordinate well the foreign election's aid with the ramifications being a waste of international funds and resources, and ineffective assistance. The recipient-state may also not put sufficient trust in the regional supervisory mechanism, accusing it of bias on

⁹⁷⁷ Levitsky, *Way Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post Cold War Era* (rev. 2003) p. 7.

⁹⁷⁸ *Ibid.*

⁹⁷⁹ D'Amato, *International Law Anthology* (1994) p. 371.

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the grounds of its composition, hidden agendas, a lack of expertise and methodology, or a privileged treatment of some states.⁹⁸⁰

The need for a cooperative approach and practice of all these bodies is evident, with the aim of having international community speak with a single voice.⁹⁸¹ Such a reaction must be balanced by impartiality, professionalism and ascertained facts.

For the OSCE/ODIHR, the internal cooperation between ODIHR and the OSCE PA is needed in order to avoid issuing diverging assessments of the observed elections, holding parallel press conferences and competing for media attention. The need for cooperation between ODIHR and the OSCE PA was also emphasized in terms of preservation of the independence of the election observation.⁹⁸² Nevertheless, their mutual cooperation and coordination resulted in a number of problems, including: a lack of joint statements for the US presidential and congressional elections; PA claiming that ODIHR did not comply with the 1997 key provisions and failed to share the complete information; did not abide by the principles of transparency and accountability; applied double standards in the election observation; and criticized the ODIHR methodology as not being flexible enough to apply to all participating states.⁹⁸³ Despite the 2008 Finish C-i-O and 2009 Greek C-i-Os' efforts to re-establish cooperation between the two institutions, some issues of concern regarding their mutual cooperation remained unresolved.⁹⁸⁴

Paradoxically, the cooperation between ODIHR and external partners, like the CoE⁹⁸⁵ seems to be perceived as more beneficial.⁹⁸⁶ The ODIHR findings are closely coordinated with the

⁹⁸⁰ Van der Linden, Conclusions of the President of the Parliamentary Assembly of the Council of Europe, 15-16 February (2007) pp. 3, 12, 22, 29, 30, 43-47.

⁹⁸¹ Haller, Election Observation by the Parliamentary Assembly of the Council of Europe (PACE) (...) pp. 7-8.

⁹⁸² Nothelle, The OSCE Parliamentary Assembly, OSCE Yearbook (2006) pp. 360-361.

⁹⁸³ The OSCE PA has criticized the OSCE decision-making as opaque and undemocratic, Nothelle, the OSCE Parliamentary Assembly, OSCE Yearbook (2006) pp. 347, 360-361. For this reference see also the 2009 Vilnius Declaration of the OSCE Parliamentary Assembly, Resolution on Strengthening the OSCE, AS(0) D1E and Remarks by Secretary General of the OSCE PA to the C-i-O Seminar on Election Related Issues, 21 July 2008, at <<http://www.oscepa.org>>.

⁹⁸⁴ OSCE Election Observation Discussed in Athens, 11 March 2009, at <<http://www.oscepa.org>>; Analytical Concept Paper on the Programme of the Greek OSCE Chairmanship 2009, at <<http://www.osce.org>>.

⁹⁸⁵ Interview with the CoE CLRAE officials conducted in May 2007.

⁹⁸⁶ The two organizations share findings, issue joint statements and coordinate interim reports. There is also a long-standing practice with the Venice Commission to produce joint legal opinions with respect to assessments of different pieces of election legislation in different countries, and the ODIHR is participating in the Council for Democratic Elections. The 1994 Budapest document re-iterates the request from 1992 for cooperation between the ODIHR and CoE, especially with its Venice Commission with respect to election monitoring. The

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EOMs from the CoE Parliamentary Assembly and the CLRAE,⁹⁸⁷ respectively in spite of sporadic problems.⁹⁸⁸

As to the EU, in addition to funding election-related activities, its member countries⁹⁸⁹ along with the US, second the largest number of election observers in ODIHR. As reported by an OSCE/ODIHR official, there is an informal agreement that the EU does not send its delegations to observe elections in the OSCE region.⁹⁹⁰

Regarding cooperation in the field between the OSCE field operations and the UN agencies, e.g., the UNDP, the effective coordination and exchange of information sometimes seems to be lacking. In longer term, it results in duplication of efforts and missed opportunities for joint lobbying with the respective government. Although the OSCE documents repeatedly request the participating states to ratify the UN Bill of Rights, the CEDAW and the CERD, all of which build the body of international election standards, as confirmed by the OSCE/ODIHR officials,⁹⁹¹ the UN documents are used only in rare cases. Although a cooperation agreement has been signed with the OHCHR that foresees regular consultations, joint work and initiatives, the interviewed officials from the OSCE/ODIHR never mentioned it. In general, the interviewed officers reported that there was no cooperation between them and the UN in the election field. One of the reasons might be that the UN is more closed⁹⁹² and not interested in cooperating with the regional organizations at the European level.

In sum, the above cases illustrate the controversial and politicized background sometimes even full of security threats, in which election observation takes place. This is not only with respect to who will win the power, but also about the direction and future of the country in view of the complex global political environment. It goes without saying that observation of

ODIHR was also tasked to prepare a framework for coordination in this field with different international organizations.

⁹⁸⁷ There is 2005 Declaration on Cooperation between the CoE and OSCE.

⁹⁸⁸ E.g. the ODIHR EOM team did not provide sufficient support for the CoE EOMs. Also, in some instances the divergence between election requirements of the OSCE and CoE caused disagreements with respect to reports or press statements issued afterwards and could not agree. Interview with the CoE VC official conducted in May 2007. See also remarks by Secretary General of the OSCE PA to the C-i-O Seminar on Election Related Issues, 21 July 2008 at <<http://www.oscepa.org>>.

⁹⁸⁹ Bailes, Haine, Lachowski, Reflections on the OSCE-EU Relationship, OSCE Yearbook (2007) p. 77.

⁹⁹⁰ Interviews conducted in May 2007.

⁹⁹¹ Ibid.

⁹⁹² For the Dissertation, except for one UNDP official none of the UN bodies working with elections made an effort to reply to the kind request to fill-in the questionnaires, which would have shed more light on the UN work in the field of elections.

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elections must be carefully planned and conducted in consideration of the political environment and its broader context. A lack of cooperation and coordination between international organizations, which may result in different assessments of elections, represents a great danger, as it can only lead to a loss of credibility and to the impossibility of any meaningful election observation being carried out by international observers.⁹⁹³ In addition, the overlapping mandates of different bodies increase the costs, while the competition may replace the desired coordination.⁹⁹⁴ In some countries where the elections have been observed for more than 15 years, they still continue to be flawed.⁹⁹⁵ Thus, the practice does not support the view that election observation is a sufficient tool for ensuring clean elections.

Although it may be argued that the existing review mechanisms are not weak and that they have a sufficiently effective cumulative effect when aggregated, it is clear that there is a problem regarding the protection of election rights in Europe. In short, the assessment of elections, election legislation and protection of election rights is not lacking at the European level, judging by the wealth of organizations committed to these goals. What is lacking is the effective follow-up of these bodies' reports and recommendations, which in turn will also prevent the election irregularities from re-occurring. The follow-up to the reports from the election observation missions and election legislation assessments is marginalized when there is no political will of both: the state and the inter-governmental organization, to secure the implementation of the most important recommendations.

A successful electoral reform is constrained by the following factors: a) the violation of various election standards might not have the same degree of seriousness, with the states picking and choosing which ones to remedy;⁹⁹⁶ b) the reforms' elevated costs burden the country and the organization; c) there are insufficient funds and expertise; d) plural societies tend to have problems that cannot be easily solved through "free and fair elections"; e) a balanced electoral assistance is lacking due to deficient coordination and cooperation at the international level and a lack of a meaningful dialogue with the relevant country, f) there is

⁹⁹³ See, e.g., the Statement of Preliminary Findings and Conclusions, Georgia-Extraordinary Presidential Election, 5 January 2008. Georgia - Extraordinary Presidential Election, OSCE/ODIHR Election Observation Mission Final Report, dated 4 March 2008.

⁹⁹⁴ Steiner, Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd edition) (2000) p. 793.

⁹⁹⁵ Symonides, *Human Rights: International Protection, Monitoring, Enforcement* (2003) p. 27.

⁹⁹⁶ For example, the breach of the election rules might consist of the refusal to leave the office to the legitimately elected officials (as the most extreme case) of violence and intimidation of the voters and candidates, or a failure timely to report the electoral campaign expenditures. Whereas all these breaches have an impact on the integrity of the elections, their degree of impact varies depending on the seriousness of the breach.

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low public awareness about the electoral reform needed, g) there is a lack of local infrastructure (political parties, NGOs) supporting the electoral reform and h) there is no appropriate penalty in case of a breach of international electoral rules.⁹⁹⁷

A meaningful follow-up may have as constraints or as boosters a number of political considerations shaping its form, when a particular country is concerned. At any rate, it is the domestic institutions that should provide the appropriate response to the detected weaknesses and later implement what has been internationally decided.

⁹⁹⁷ For example, in July 2009 in Honduras was excluded from the American States Organization, since the legitimately elected president was not reinstated in office.

VII. EUROPEAN ELECTION STANDARDS IN NATIONAL JURISDICTIONS: A COMPARISON

1. Background

The results of the study demonstrate that there are three parallel worlds of election standards in Europe: the CoE world, the OSCE world and the EU world. While most of the electoral worlds contain *ergo omnes* electoral obligations, for some of the CoE electoral sub-worlds the legal value of the standards and their specificities differ depending on the relevant instrument.

The Dissertation proposes a single set of election standards in Europe and defines its content. Since the states accumulate the electoral obligations and they are the main doers in the electoral world, this part examines electoral legislation and institutions of a group of states bound by the European values. The principles and specific standards identified in the study serve as the units of analysis in order to compare a selected diversified sample of states.

Although one of the criteria for the sample selection is for the states to be democratic,⁹⁹⁸ they vary in terms of history, tradition, membership in the relevant organizations and political organization of the society. The sample comprises two ex-Yugoslav republics: Macedonia⁹⁹⁹ and Slovenia; four “old democracies”: France, Belgium, Switzerland and UK; and two ex-USSR countries: Ukraine and Azerbaijan. The most ethnically homogeneous countries are Azerbaijan and Slovenia. Only Macedonia and Azerbaijan underwent an inter-ethnic conflict after 1990. Whereas all of the countries are members of the CoE and OSCE, not all of them are EU members.¹⁰⁰⁰ It follows that the EU election standards are not applicable to all the states from the examined sample. Azerbaijan is included in the sample to illustrate the application of the European standards to a non-European country.¹⁰⁰¹

⁹⁹⁸ Article 7 of the Constitution of Azerbaijan, Article 1 of the 1958 Constitution of France, Article 1 of the Constitution of Ukraine, Articles 51 and 54 of the Constitution of the Swiss Federation, Articles 1 and 2 of the Macedonian Constitution, Article 1 of the Constitution of the Republic of Slovenia.

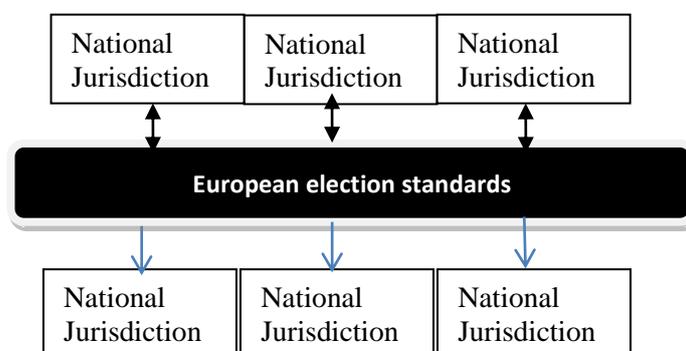
⁹⁹⁹ Report of the Republic Electoral Commission to the Parliament, dated 11 January 1991. For applicability of international standards in Macedonian law, see: OSCE, *Perspektiva na domasnata pravna ramka za sproveduvanje na izborite, poglednata od agol na megunarodni izborni standardi i dobri praktiki* (2008) p. 12.

¹⁰⁰⁰ While France, UK and Slovenia are EU members, Macedonia is struggling to become one.

¹⁰⁰¹ Following the armed conflict in 2001, Macedonia has been re-conformed as a multi-cultural and multi-confessional state (Census of Population, Households and Dwellings in the Republic of Macedonia, State

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By including national electoral jurisdictions, a big picture of the interplay between the international mechanisms, domestic laws and institutions emerges. The framework previously developed regarding elections is applied to the sample to define correlations and determine the interface of the two variables: the European election standards and the national electoral rules. Due consideration is given to the fact that the paradigm of “free and fair elections” has been first developed in the “old democracies” and then disseminated through international organizations. Therefore, the analysis of this part is firmly based on the premise that the European standards in the election field are derived from the electoral rules of the consolidated democracies, which first started to practice electoral democracy (see the diagram below).



2. National Legislation - Source of Election Standards

The scholarship¹⁰⁰² employs the term of art “free and fair elections” to express everything that is desired from an election nowadays. The paradigm of “free and fair elections” at the national level, embodies the electoral principles of universal, fair, equal, regular, direct¹⁰⁰³ and genuine election. These principles, which safeguard democracy, are reflected in the legislation of all states examined with certain variations and differences in view of the countries’ particular circumstances.

Statistical Office (2002) p. 176). The Ohrid Framework Agreement (OFA) foresaw new constitutional guarantees for non-majority communities in Macedonia, especially for the ethnic Albanians, comprising more than 20% of the population. The OFA foresaw fresh parliamentary elections to serve as the bases for the authority and legitimacy of the government under the changed circumstances.

¹⁰⁰² E.g., Goodwin-Gill, *Free and Fair Elections* (2006).

¹⁰⁰³ At least to one chamber of legislature.

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There is high level of consistency with respect to the general electoral principles in the selected sample. The principles of equal, regular, direct, universal and secret¹⁰⁰⁴ are announced at the constitutional level, thus safeguarded by the highest legal act.¹⁰⁰⁵ The principle of free elections has been directly mentioned only in the Macedonian¹⁰⁰⁶ and Ukrainian¹⁰⁰⁷ constitutions, whereas in France its substance is conveyed through guaranteed freedom of expression of the political parties.¹⁰⁰⁸

As to the differences and variations of the constitutional paradigms, there are certain principles set out in the individual constitutions, which may serve as a model for other countries. The Belgian Constitution detailing out the equality principle in elections, requires re-assessment and re-adjustment of the electoral boundaries every 10 years.¹⁰⁰⁹ Thus, the equal opportunity principle to be elected and to elect has received a constitutional guarantee.

As to the bundle of electoral rights connected with the principle of a “meaningful representation”, several constitutions reflect the requirement for political representation of women.¹⁰¹⁰ Namely, the most homogeneous country-Slovenia, is the one that foresees increased electoral guarantees for certain minorities,¹⁰¹¹ along with Belgium for the EP elections.¹⁰¹² The political plurality principle and equitable representation of parties have been mirrored only in the French Constitution,¹⁰¹³ despite being a core element of true democracy.

The electoral rights converge on the points of age qualifications for the voters¹⁰¹⁴ and citizenship requirements.¹⁰¹⁵ Furthermore, whereas horizontally disfranchisement is imposed

¹⁰⁰⁴ The Federal Constitution of Switzerland is the only exception.

¹⁰⁰⁵ In absence of codified constitution the UK has not been included in this group.

¹⁰⁰⁶ Article 22.

¹⁰⁰⁷ Article 71.

¹⁰⁰⁸ French Constitution, Article 4.

¹⁰⁰⁹ Article 63, paragraph 3.

¹⁰¹⁰ Electoral justice for women has been guaranteed directly by France, Belgium and Slovenia (Articles 1, 11-bis and 43, respectively) and indirectly by Ukraine (Article 24).

¹⁰¹¹ Article 64 of the Slovenian Constitution.

¹⁰¹² A reserved seat is foreseen for German minority.

¹⁰¹³ Article 4.

¹⁰¹⁴ Article 70 of the Ukrainian Constitution, Article 136 of the Swiss Constitution, Article 61 of the Belgian Constitution, Article 43 of the Slovenian Constitution, Article 3 of the French Constitution and Article 22 of the Macedonian Constitution. For Azerbaijan, the age requirement is stipulated in Article 12 of the Electoral Code.

¹⁰¹⁵ Article 70 of the Ukrainian Constitution, Article 136 of the Swiss Constitution, Article 61 of the Belgian Constitution, Article 43 of the Slovenian Constitution, Article 22 of the Macedonian Constitution, Article 56 of the Azerbaijani Constitution and Article 3 of the French Constitution.

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due to a general lack of legal or mental capacity as established by the court,¹⁰¹⁶ no individualization is required when voting rights are at stake. Several countries have stricter conditions for passive election rights.¹⁰¹⁷ Azerbaijan deprives its citizens with a dual citizenship from passive electoral rights, which is incompatible with the ECHR requirements.¹⁰¹⁸ Ukraine imposes a 5-year residence requirement for becoming an elected MP¹⁰¹⁹, which is incompatible with the paragraph c. iii. and iv. of the Code of Good Practice in Electoral Matters. The incompatibility uncovers itself on the points of the type of election for which a residence requirement is acceptable, as well as its length.¹⁰²⁰

The generated national principles further branch out in various pieces of electoral legislation. The legislation regulates panoply of elections depending on the country's political and electoral system, as well as on EU membership.

The hypothetical European election standards, as proposed in the doctoral dissertation, serve herein as a measuring stick in order to avoid several rounds of electoral assessments by various organizational sets of standards. In their role of an electoral performance indicator, they dissipate the dilemma about which standard or set of standards is applicable. Furthermore, they displace the focus of the standards from their persuasive power to their substance in the function of "free and fair elections".

When an electoral assessment is carried out by a specific organization or by its body, the key source of the electoral rules is clear. However, when the assessment is done by another actor, preferring one set of standards to another may entail arbitrariness. The need to harmonize the existing standards is yet another argument for elaborating common European standards by the three main stakeholders: the CoE, EU and OSCE.

The comparison among the selected countries is primarily based on national legislation and on the assessments of the countries' elections made by the CoE and OSCE bodies. On the

¹⁰¹⁶ See Article 70 of the Ukrainian Constitution, Article 61 of the Belgian Constitution, Article 56 of the Azerbaijani Constitution, Article 22 of the Macedonian Constitution and Article 3 of the French Constitution.

¹⁰¹⁷ Higher age requirements are imposed by Belgium – 21 (Article 63, paragraph 4), Azerbaijan – 25 (Article 85) and Ukraine – 21 (Article 76). It also imposes a 5-year residence requirement.

¹⁰¹⁸ See *Tănase and Chirtoacă v. Moldova*, Application no. 7/08, Judgment of 18 November 2008.

¹⁰¹⁹ Article 76 of the Constitution stipulates the following: "A citizen of Ukraine having attained to the age of twenty-one as of the day of elections, having the right to vote, and having resided in the territory of Ukraine for the past five years, may be elected people's deputy of Ukraine."

¹⁰²⁰ The universal suffrage principle from the Code of Good Practice in Electoral Matters foresees a residence requirement only for local and regional elections, and for no longer than 6 months.

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facts extracted from the above-mentioned sources, the electoral cycle approach has been applied in light of the proposed specific standards. This assessment carried out in accordance with the evolved paradigm of “free and fair elections” in the European context, discloses the following results:

Pre-election phase

Electoral system and law: - *Direct regular elections* of at least one chamber in the legislature is a common feature of all countries under examination. Since international obligations do not demand a specific electoral system or method¹⁰²¹, the countries employ different electoral systems. For example, in Macedonia the general elections are held in six constituencies under the proportional system with closed candidates’ lists.¹⁰²² Similar to Macedonia, Belgium uses the proportional electoral systems.¹⁰²³ In Slovenia, eighty-eight MPs in the National Assembly are elected in 8 constituencies, again under the proportional representation system, with the elements of the majority system. Unlike Macedonia, which does not foresee an electoral threshold, Slovenian legislation prescribes a 4% threshold.¹⁰²⁴ In the latter country, due regard is given to the personalization of voters, i.e., ensuring the influence of the voters in the choice of candidates, as required by the amended Constitutional Article 80(5).¹⁰²⁵ Whereas in Macedonia (for the post-conflict period), one of the main impetus to change the law also came from the international community in view of the election observation reports, the Slovenian experience showed that the main drive in modeling Slovenian legislation was with the political parties.¹⁰²⁶ As to the reminder of the countries from the sample, Switzerland and Ukraine use mixed electoral systems. The plurality model is used in the UK and Azerbaijan, whereas France applies the majority electoral system with two rounds.¹⁰²⁷ The EU member countries use different variations of the proportional electoral system for the EP elections.¹⁰²⁸

¹⁰²¹ Vidmar, *Multiparty Democracy: International and European Human Rights Law Perspectives*, Leiden Journal of International Law, 23 (2010) pp. 220, 223; see also Nicaragua case, ICJ and ECtHR relevant case-law mentioned above.

¹⁰²² Only for the diaspora representatives, first past the post electoral system is applied, the Electoral Code last revised in 2011, Article 4.

¹⁰²³ Belgian Constitution, Article 62.

¹⁰²⁴ Grad, Svete, Lumbar, *Predpise o Volitvah v Drzavni Zbor 2008* (2008) p. 22; Law on Defining Election Constituencies for Election of MPs in National Assembly.

¹⁰²⁵ *Ibid* pp. 22, 29.

¹⁰²⁶ For example, since 1995 there was a major proposal to change election legislation by the Social Democrats, who criticized the proportional system for not allowing sufficient personalization of the voters, *ibid*, p. 102.

¹⁰²⁷ IPU database accessed on 18 July 2013 at <www.ipiu.org>.

¹⁰²⁸ See p. 185 as well as *Matthews v. UK*, p. 88.

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-In all subjects that have undergone an examination, *the electoral intervals* for electing the legislature do not exceed a 5-year period of time. Switzerland, along with the two hereditary monarchies, is an exception to direct presidential elections.¹⁰²⁹ All countries hold elections to select the decision-making bodies at regional (if there is one) and local levels. Nevertheless, the sub-national levels in a number of countries have a mandate exceeding 5 years.¹⁰³⁰ Except for Belgium, which does not have directly elected mayors, the remainder of the countries hold periodic direct mayoral elections.

-As to the different limbs of the requirement for a *meaningful representation*, the results of the examination show the following:

Regarding its first limb, none of the examined countries, which uses a proportional representation system, has a legal election threshold higher than 5%.¹⁰³¹ The majoritarian electoral systems do not foresee a legal election threshold.

As to the second limb, Switzerland and Azerbaijan¹⁰³² do not prescribe affirmative measures for women, or if measures are prescribed their concretization is lacking, which is precisely the case of Ukraine.¹⁰³³ France is a positive example in this regard, as direct public funding is conditioned with the promotion of women candidates.¹⁰³⁴ Slovenia requires an equitable representation of women candidates on the candidates' lists. Its Administrative Court¹⁰³⁵ reviewed a case whereby the candidates' list did not fulfill the legal requirements as one of the nominated female candidates was not a resident of the municipality. The MEC deleted the next male candidate on the candidates' list, so that the legal requirement for gender equitable

¹⁰²⁹ The Swiss Federation has indirectly elected presidency, see <<http://electionresources.org>> accessed on 8 July 2013.

¹⁰³⁰ For example, in France elected officials from the regional, departmental and municipal levels have a longer duration of their mandates: - 6 years. In Belgium the local and provincial councils have a 6-year mandate. Most of the Swiss cantons hold cantonal elections every four years, see Council of European Municipalities and Regions, Local and Regional Government in Europe, Structures and Competences (2012) pp. 6, 19, 47, 53; <<http://www.gov.uk>>.

¹⁰³¹ See the Council of Europe, Thresholds and other features of electoral systems which have an impact on representativity of parliaments in the Council of Europe member states, Doc. 12107, 11 January 2010. For information per country, see also IFES Electoral Guide at <<http://www.electoralguide.org>>.

¹⁰³² See OSCE/ODIHR Republic of Azerbaijan Parliamentary Election Observation Report, 7 November 2010, pp. 15, 27.

¹⁰³³ See <<http://www.quotaproject.org>>. On increasing gender participation through gender balanced candidates' lists see the OSCE/ODIHR Ukraine Parliamentary Election Observation Report, 28 October 2012, p. 37.

¹⁰³⁴ Data taken from Idea International, financial database at <<http://www.idea.int>> accessed on 6 July 2013. For more on this topic see International IDEA, Electoral Justice Handbook (2010) p. 50.

¹⁰³⁵ Sodba U 520/2006.

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representation was fulfilled. The complainant claimed that the MEC was not allowed to correct the candidates' list. Since the complainant did not submit any evidence that it tried to correct the list within the legal deadline, the lawsuit was dismissed by the Administrative Court. Commenting on the case, it is peculiar for the MEC to decide who should be a candidate on the candidates' list based upon the gender requirement. It was the duty of the MEC to ask the candidates' list submitter who should stay or be deleted from the list of candidates, in view of their right to correct candidates' list. Therefore, it appears that the MEC acted outside its competence without a proper justification.

The countries use various ways to achieve the minority representation, ranging from specifically tailored constituencies to electoral systems and reserved seats. For instance, in Slovenia, the members of the Italian and Hungarian ethnic groups can cast two votes. Double voting rights are considered to be in line with the Constitution, as a measure of positive discrimination.¹⁰³⁶ According to the data of 2002 Census¹⁰³⁷ Italians make up 0.11% and Hungarians 0.32% of the population. They are accorded 1 reserved seat per ethnic group at the National Assembly in order to enable their greater participation in public affairs. However, Roma are not accorded the same right, although their proportion of 0.17% of the total population is slightly higher than the proportion of Italians. In order to allow the Roma, as a vulnerable group, to enhance their participation in public affairs, it is recommended to accord them with a reserved seat at the National Assembly.¹⁰³⁸

Azerbaijan¹⁰³⁹ and Ukraine¹⁰⁴⁰ still have to work on promotion and participation of minorities judging according to the ODIHR election reports. Article 11 of the Belgian Federal Constitution even proscribes discrimination of ideological and philosophical minorities in the enjoyment of their political rights. Such broad protection of the "atypical minorities" may serve as a model for other countries, as it feeds the never-ending debate about how to improve the conditions of human society.

¹⁰³⁶ Grad, *Volitve in Volilni Sistem* (2004), p. 115; Grad, Svete, Lumbar, *Predpise o Volitvah v Drzavni Zbor 2008* (2008) pp. 31 and 135.

¹⁰³⁷ See official web site of the Statistical Office of Slovenia at <<http://www.stat.si>>.

¹⁰³⁸ In this line, CERD has issued a recommendation to Slovenia to protect the right to participation in public affairs of minorities and ensure that they are represented in the Parliament, CERD Annual Report A/65/18, pp. 117-118.

¹⁰³⁹ See the OSCE/ODIHR 2010 Parliamentary Election Observation Report of the Republic of Azerbaijan, p. 16.

¹⁰⁴⁰ See the OSCE/ODIHR 2012 Parliamentary Election Observation Report of Ukraine, p. 37 which requires a specific mechanism to increase the minorities' participation.

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The third limb refers to the impossibility of democracy to function only with one choice at the disposal of the voters. The important function that the opposition plays, and its protection, is underscored only in the French Constitution.¹⁰⁴¹ In the UK, a concrete measure requires that only the parliamentary opposition receive public funds to perform its duties.¹⁰⁴²

Finally, the meaningful representation standard is connected with meaningful participation. However, only Belgium prescribes compulsory voting.¹⁰⁴³ The rest of the countries struggle with lower turnout rates ranging between 49.10% and 65.77% for parliamentary elections. By comparison, there is a higher turnout of voters in the presidential elections in France, Ukraine and Azerbaijan, with the exception of the two ex-Yugoslav republics, which in fact are the only ones in this group with a parliamentary system. On the other side, for the EP elections, the EU members struggle with the voter turnout as low as 28.33% in Slovenia, 34.48% in the UK and 40.63% in France¹⁰⁴⁴, indicating the disinterested voters' phenomena with respect to European issues.

-As to the *law-making* in the context of election, the following countries still struggle with the application of the electoral law-making standards:

The Macedonian election law and electoral system have changed often¹⁰⁴⁵, which may indicate a superficial law-making process.¹⁰⁴⁶ The changes sometimes occurred a few months before elections¹⁰⁴⁷, which is incompatible with the international election standards. In some instances, neither the ruling coalition nor the opposition were interested in amending the Election Code, e.g., regarding transparency of electoral campaign funding, as recommended by ODIHR. In short, the political will was missing to adopt some key amendments in order to

¹⁰⁴¹ Article 4, paragraph 3 of the French Constitution stipulates the following: "Statutes shall guarantee the expression of diverse opinions and the equitable participation of political parties and groups in the democratic life of the Nation."

¹⁰⁴² GRECO, Evaluation Report on UK on Transparency of Party Funding, Third Evaluation Report (2007) p. 7.

¹⁰⁴³ More on compulsory voting at <<http://www.idea.int>> accessed 6 July 2013.

¹⁰⁴⁴ The most recent available data are taken from Idea International at <<http://www.idea.int/vt/countryview.cfm?id=42://>> accessed on 2 August 2013.

¹⁰⁴⁵ Since 2006, when the election laws were codified, the Election Code changed in 2008 (amendments prepared in 2007) and again in 2011.

¹⁰⁴⁶ Coalition All For Fair Trials, Corruption Trial Monitoring Programme in the Republic of Macedonia (2008) p. 17; OSCE, Perspektiva na Domasnata Pravna Ramka za Sproveduvanje na Izborite, Poglednata od Agol na Megunarodni Izborni Standardi i Dobri Praktiki (2008) pp. 5-12.

¹⁰⁴⁷ For the 2009 presidential and local elections held in March, amendments to the Electoral Code were made in November 2008.

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harmonize the legislation with international election standards, which had ramifications on the law-making process. Still, these frequent legislative changes, coupled with the assistance offered by the civil sector in the country and the international factor, contributed to slow but steady improvements of the election legislation.

It appears that Ukraine and Azerbaijan should also improve their electoral law-making in an inclusive and transparent process.¹⁰⁴⁸ In Slovenia, while there is a vibrant civil sector with a keen interest in elections that lobbies for a greater inclusion of disabled persons, it is the opinion of the author that its prompt and systematic inclusion in the law-making process is somehow lacking. The possibility to publicly comment on electoral drafts is necessary, but not a sufficient condition for transparent law-making.¹⁰⁴⁹

The UK¹⁰⁵⁰ has undertaken an electoral reform with clear deadlines in reply to the ODIHR recommendation to consolidate the electoral legislation. So did Ukraine.¹⁰⁵¹ Such a follow-up can serve as a model for other countries, i.e., the focus should be on the usefulness of the recommendations and not on devising the ways how to by-pass them.

On a separate note, the differences in the law-making traditions are reflected in the electoral legislation of the countries from the sample. For instance, Azerbaijan and Ukraine include great detail in their electoral legislation, without leaving much space for secondary legislation. The legislative drafting method in Slovenia and Macedonia is similar, with a difference that the latter codified the legislation in the Electoral Code upon the recommendation of the OSCE/ODIHR. Electoral legislation has been also codified in Azerbaijan, Belgium and France. However, in Belgium some specific electoral matters, like the electoral campaign funding, or automatic vote remain uncoded. It is the opinion of the author, that codification of electoral legislation is not necessary as long as the relevant laws are consistent, clear and precise, although OSCE/ODIHR recommends electoral legislation codification in its election observation reports.

¹⁰⁴⁸ See the OSCE/ODIHR 2012 Ukrainian Parliamentary Election Report, p. 7; the OSCE/ODIHR 2010 Parliamentary Election Observation Report of the Republic of Azerbaijan pp. 5, 24.

¹⁰⁴⁹ Interviews with officials from the Slovenian SEC and Ministry of Public Affairs, June 2010.

¹⁰⁵⁰ The UK Government's Response to the OSCE/ODIHR's Election Assessment Mission Report on the 2010 UK Parliamentary General Election (2011) p. 3. See also UK Electoral Commission, *Electoral Legislation, Principles and Practices, a Comparative Analysis* (2012).

¹⁰⁵¹ Venice Commission & OSCE/ODIHR Joint Opinion on the Draft Amendments to the Laws on Election of People's Deputies on the Central Election Commission and on the Draft Law on Repeat Elections of Ukraine, opinion no. 727/2013, cdl-ad(203) 6 (2013) p. 3.

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Voters: - While the selected countries have firmly implanted the electoral principle of the *universal vote*, its translation into electoral rules varies in terms of qualifying criteria. The prisoners' vote dilemma in the UK unfolded from the ECtHR's scrutiny over the prisoners' disenfranchisement¹⁰⁵² and from the OSCE/ODIHR election observation report.¹⁰⁵³ The Scottish Parliament rejected the proposal to alleviate the blanket ban for prisoners, whereas the proposal to allow a 16-year old youth to vote gained its support.¹⁰⁵⁴ No other country from the sample allows children's vote in elections.¹⁰⁵⁵

As to the non-nationals' voting rights, the table of ratification indicates that none of the examined countries has ratified the Convention on the Participation of Foreigners in Public Life at Local Level.¹⁰⁵⁶ Nonetheless, except for Macedonia, Ukraine and France the remainder of the countries foresees some type of a third country's non-national voting, subject to various residency requirements.¹⁰⁵⁷ Azerbaijan explicitly foresees voting rights for stateless persons in local, presidential and general elections.¹⁰⁵⁸ Slovenia has also made a breakthrough regarding residents from ex-Yugoslavia, including stateless persons.¹⁰⁵⁹ The EU members grant election rights to non-nationals in possession of EU citizenship.¹⁰⁶⁰

Inclusion of persons with mental impairment in public life¹⁰⁶¹ is an obligation, which has been undertaken internationally by all the countries from the sample, except for

¹⁰⁵² The UK Government's Response to the OSCE/ODIHR's Election Assessment Mission Report on the 2010 UK Parliamentary General Election (2011) p. 4. See also the UK Ministry of Justice, Voting Eligibility (Prisoners) Draft Bill (2012) and the UK Ministry of Justice, Responding to Human Rights Judgments, Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2011 (2012). The reform is still on-going, see the enforcement of the ECtHR judgments at <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Hirst+&StateCode=&SectionCode=>.

¹⁰⁵³ OSCE/ODIHR Election Assessment Mission Report on the 2010 UK Parliamentary General Election, p. 7.

¹⁰⁵⁴ Scottish Prisoners Challenge Ban on Voting in Independence Referendum, The Guardian, press release, 28 June 2013.

¹⁰⁵⁵ Venice Commission and the OSCE/ODIHR expressed concerns about the protection of the secrecy of vote of persons held in house arrest. See the Joint Opinion on the Electoral Code (2013) p. 6.

¹⁰⁵⁶ Only UK and Slovenia have signed the Convention.

¹⁰⁵⁷ Groenedijk, Local Voting Rights for Non-nationals in Europe: What We Know and What We Need to Learn (2008), pp. 3-5. See for example, Article 8 of the Belgian Federal Constitution. For the length of the residence requirement see *PY v. France*, p. 88 and *Melnychenko v. Ukraine*, p.124.

¹⁰⁵⁸ Election Code of the Republic of Azerbaijan (2008).

¹⁰⁵⁹ OSCE/ODIHR Election Observation Report of the 2011 Slovenian Early Elections of the National Assembly, pp. 7-8; Accetto, Access to Electoral Rights Slovenia (2013) pp. 1-2.

¹⁰⁶⁰ See p. 180.

¹⁰⁶¹ See Article 29 of the Convention.

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Switzerland.¹⁰⁶² For instance, in Azerbaijan the court decides on active election right of a person with mental impairment.¹⁰⁶³ In Slovenia, a voter must not be fully incapacitated or placed in a guardianship, and he must understand the meaning and importance of elections for the active election right.¹⁰⁶⁴ In Belgium, a person with a mental impairment can cast a vote, if he or she is not interned, if he or she is not protected in the same way as a minor younger than 15 years, or he or she has not been incapacitated.¹⁰⁶⁵

- A remedy for an incomplete or improper *voters' registration* as it stands in the national legislations does not seem to pose any problem,¹⁰⁶⁶ nor does the requirement for maintaining and keeping voters' lists, as defined in the laws. However, the states have been struggling to preserve in practice the principles of having complete and accurate voters' lists. For example, the OSCE/ODIHR has noted as a weakness the UK's practice of allowing voters' registration without a proper identification. The author opines that the voters' identification is just a means to compile and maintain voters' lists as a function of holding free and fair elections. If the needed accuracy and completeness of the voters' lists can be achieved in another way, (for example by data cross checking) there might be no need to require a voters' identification. Simultaneously, while other selected countries do not seem to have *per se* the voters' identification problem, the OSCE/ODIHR detected a number of other problems in this area.¹⁰⁶⁷ In this context, the duty to protect personal data from the voters' lists from abuse¹⁰⁶⁸ seems shared by all states to various extents. Another practice that can be shared comes from

¹⁰⁶² All eight countries have ratified the Convention. The EU is also a party to the convention. Committee on the Rights of Persons with Disabilities at <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>>.

¹⁰⁶³ See the Report of the Republic of Azerbaijan to the CRPD Committee on Article 29.

¹⁰⁶⁴ See Uradni list RS, no. 73-3567/2003 about the abrogation of the legal provisions requiring a working ability and not being placed under continued parental supervision for the enjoyment of the active election right. The Constitutional Court found, *inter alia*, that since the Constitution did not foresee an open provision for adding more criteria for the enjoyment of the active election right, this right could only be limited with the aim of protecting the rights of others. Any such additional restriction pursuing a legitimate aim had to be proportional. The Court found that the current wording excessively restricted the right in question. The end sought could have been achieved with less restrictive measures, i.e., only those individuals who could not understand the meaning and the effects of elections should lose voting rights. The proportionality test had to be applied to each and every case in a special procedure.

¹⁰⁶⁵ See the Belgian report to the CRPD.

¹⁰⁶⁶ In addition to national electoral legislation, see also the UK, Electoral Commission, Managing Electoral Registration in Great Britain, Guidance for Electoral Registration Officers, pp. D 31-34, E 16.

¹⁰⁶⁷ See in this regard the OSCE/ODIHR election observation reports for Macedonia (2013 – local elections, p. 24), Ukraine (2012 – parliamentary elections, p. 36), UK (2010 – general elections assessment, pp. 10-12).

¹⁰⁶⁸ See for example, the 2007 Ukrainian Law on State Voters' Registration, the 2008 Electoral Code of the Republic of Azerbaijan; OSCE/ODIHR, Komentar na Izborniot Zakonik (2009) p. 98; UK Managing Electoral Registration in Great Britain, Guidance for Electoral Registration Officers (2013) p. 43; Venice Commission and OSCE/ODIHR Joint Opinion on the Electoral Code of Macedonia (2013) p. 5.

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Belgium: -voters can be added or deleted from the list of electors one day before Election Day, which allows for a greater use without abuse of the voting rights.¹⁰⁶⁹

- *Informed and educated voters* must be supported by the state. Whereas all countries stipulate an obligation for voters' education; the so-called "old democracies" minus Belgium, conduct continuous voters' education. The continuous voters' education certainly reflects good electoral practice, whose seed should be planted in other countries that put their trust in the democratic system of governance.

In 1996, the Slovenian Law on National Assembly Elections was abrogated in part, as it did not foresee publication of the national candidates' lists in the media and at the polling stations. As a consequence, the voters only knew the competing parties, but not the party candidates, meaning that the well-informed voters' element was lacking. The court found that one of the three criteria for direct elections had not been fulfilled, since the national candidates' lists were not public. Not only did the right to elect candidates rest with political parties, but the voters were not even given access to key information for elections, i.e., to which personage they might delegate their sovereign rights. The court's decision was taken in the right direction, since a system that does not promote transparency in matters, such as electoral candidates, misses an important feature of democracy.

- Another state's duty, i.e., the *delimitation of the boundaries* seems problematic in Ukraine. Not only because the magnitude of the constituencies may vary up to 12%, but also because of its impact on the representativeness of the minorities in Ukraine.¹⁰⁷⁰ In Macedonia, the equality of the vote controversy is connected with the diaspora vote, as those MPs may be elected with a considerably smaller number of votes, and the size of the electoral districts is defined in terms of continents.¹⁰⁷¹ In Slovenia,¹⁰⁷² the Constitutional Court quashed two decisions of municipal councils defining the electoral units contrary to equal voting rights and ordered it to correct the irregularity in time for the next elections. In particular, the

¹⁰⁶⁹ Schemas Chronologiques a Partir du 40eme Jour avant le Scrutin.

¹⁰⁷⁰ USAID, IFES 2012 Parliamentary Elections Boundary Delimitation Summary and Analysis (2012) p. 4; OSCE/ODIHR Election Observation Report of 2012 Ukraine Parliamentary Elections, p. 7.

¹⁰⁷¹ See the 2008 Amendments to the Electoral Code. On the delimitation of boundaries' controversies in France see the OSCE/ODIHR Election Assessment Report, Parliamentary Elections (2012) pp. 4-5. For the on-going reform relevant to the redistribution of the constituencies in the UK (their magnitudes considerably vary, thus affect the electoral outcomes) see the House of Commons, Constituencies' Boundaries: the Sixth General Review (2013).

¹⁰⁷² U-I-381/98-8, Uradni List RS, no. 66/2000.

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election units were defined in accordance with the number of voters and not the number of residents as required by law, with a significant disparity between those two numbers. In 2004, there was another judgment quashing the electoral units' boundaries due to the substantial difference in numbers of the residents in various units.¹⁰⁷³ As a rule, it is the number of residents that is used as a basis for drawing the constituencies, and not the number of voters, since the elected officials are deemed to be representatives of all people living in that particular constituency.

Candidates: - The oldest applicable document in this regard, the 1789 French Declaration of Human and Civil Rights declares merits-based *access to public offices based on equality*. After more than two hundred years, the qualifications to be nominated as an electoral candidate occupy a whole range of the eligibility spectrum. Its most restrictive interpretation is reflected in the Ukrainian law¹⁰⁷⁴ that foresees a 5-year residence requirement in order to become an MP.¹⁰⁷⁵ As a comment, this strict rule is incompatible with international standards.

- The *prisoners' nomination* for elections is yet another dilemma in the eligibility spectrum. A conviction for an election-related offence is a permissible restriction. Namely, in Azerbaijan and Ukraine, the imprisonment represents a temporary obstacle to stand in elections. Such a restriction is in place not only because of the moral aptitude, but also because of its impracticability.¹⁰⁷⁶ However, the incarceration of the opposition candidates following a trial, which presumably did not comply with the fair trial standards, cannot fall under the above-mentioned exception.¹⁰⁷⁷ By the same token, the Electoral Code of Azerbaijan¹⁰⁷⁸ gives an excessive power to the prosecution. In particular, it requires that no registered candidate be detained or convicted by the court in the absence of the prosecutors' consent. Commenting on this, it appears as though the prosecutor can interfere with the courts' dispensing justice. However, unless it is a minor offence, it is unclear how the courts would adjudicate a candidate without an indictment filed by the prosecution.¹⁰⁷⁹ The

¹⁰⁷³ Uradni List RS, no. 118/2004.

¹⁰⁷⁴ On electoral deposits see *Sukhovetsky v. Ukraine*, p. 100.

¹⁰⁷⁵ Article 76 of the Constitution stipulates the following: "A citizen of Ukraine having attained to the age of twenty-one as of the day of elections, having the right to vote, and having resided in the territory of Ukraine for the past five years, may be elected people's deputy of Ukraine".

¹⁰⁷⁶ ACE, Encyclopaedia: Parties and Candidates, p. 80.

¹⁰⁷⁷ OSCE/ODIHR, Election Observation Report of the 2012 Parliamentary Elections p. 35.

¹⁰⁷⁸ Article 70 (4).

¹⁰⁷⁹ Article 70.4 of Azerbaijani Electoral Code. See also *Abil v. Azerbaijan* and *Atakishi v. Azerbaijan*, p. 98. There is a similar provision regarding detention or indictment of EMB members, Article 27.

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Ukrainian Constitution stipulates that a person convicted for having committed an intentional crime cannot stand for parliamentary elections.¹⁰⁸⁰ Such a general Constitutional provision, which does not specify the severity of crimes or their type, e.g., if they are election-related offences, will have to be applied in line with the proportionality and individualization principles, under an objective and reasonable rationale.¹⁰⁸¹

In Macedonia, the Constitutional Court¹⁰⁸² found a violation of the applicant's passive electoral right when it established that the electoral bodies rejected his nomination without updating information about the applicant's criminal record. According to the author, this decision was rightfully adopted by the court, or else a candidate would have been deprived of his passive election right only due to a lack of information of the very body, which should have defended his election rights. In another Macedonian case, a winning candidate was sentenced to a prison sentence during elections, which resulted in a repeated election.¹⁰⁸³ In Slovenia, although a criminal conviction is not an obstacle to the passive election right, Article 9 of the Law on MPs prescribes a loss of mandate in case of conviction to an unconditional sentence of imprisonment of six or more months. In fact, such a criterion would also be an obstacle to running as an electoral candidate, as a mandate could not be verified in such a case. The current legal solution seems to be to impose a duty on the candidates' nominators to check if the above criterion has been fulfilled, which might prove difficult for verification. However, no problems in this regard have been ever reported.

Unlike Macedonia, Slovenia has never adopted a lustration law. This means that there are no criteria for the passive election right prohibiting an election candidate if they had collaborated with the ex-secret service to the detriment of human rights in the past.

Bankruptcy represents an additional reason to disqualify a person from standing in a UK election.¹⁰⁸⁴

- The incompatibility of the elected office with other types of offices ensues from a *separation of powers* doctrine.¹⁰⁸⁵ It represents the basis for the political systems of all the

¹⁰⁸⁰ See Article 76.

¹⁰⁸¹ See also *X. v. Belgium* and *Van Wambeke v. Belgium*, p. 97 on permanent ban of election rights due to wartime crimes.

¹⁰⁸² Constitutional Court decision No. 84/2009 adopted 10 February 2010.

¹⁰⁸³ See OSCE/ODIHR Election Observation Report, 2005 Macedonian Municipal Elections, p. 18.

¹⁰⁸⁴ GRECO, Third Evaluation Round, Evaluation Report on UK on Transparency of Party Funding (2007) p. 4.

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analysed countries. Since the cumulation of offices is connected with the integrity and honesty of the peoples' representatives, it is one of the controlling factors of public trust in the representative institutions.¹⁰⁸⁶ Each of the countries regulates this matter in view of its own particularities. As a rule, elected office is incompatible with other elected offices, with judicial, military and civil servants' offices, with the police service and the EMBs membership.¹⁰⁸⁷ Other relevant incompatibilities extend to the category of religious officials who are banned from standing for election in Azerbaijan¹⁰⁸⁸ and the UK.¹⁰⁸⁹ The 2011 French Electoral Code prescribes ineligibility of *inter alia* rectors and inspectors of academia.¹⁰⁹⁰ In Macedonia, MPs are not only prohibited from cumulating functions, but also from executing profitable activities, as being an MP is a full-time job.¹⁰⁹¹

The separation of powers doctrine also prohibits the use of administrative resources for campaigning purposes.¹⁰⁹² However, despite the legal obligation to respect the separation between the state and a party¹⁰⁹³, in Ukraine the OSCE/ODIHR detected an abuse of state resources.¹⁰⁹⁴ Regarding Macedonia, the efforts made to address this concern by way of legislative reform, were deemed insufficient by the OSCE/ODIHR. The prevailing reasons lie in a lack of regulation for the ministers' campaigning during municipal elections and electoral disbursement of public funds before the official start of the campaign.¹⁰⁹⁵ In Ukraine, the OSCE/ODIHR detected participation in the electoral campaign by state and local officials.¹⁰⁹⁶

¹⁰⁸⁵ See Section 77 of the Venice Commission's Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions (2013), Study no. 646 / 2011, CDL-AD(2012)027rev., p. 14.

¹⁰⁸⁶ International IDEA, Ten Years of Supporting Democracy Worldwide, pp. 69-70.

¹⁰⁸⁷ Slovenia is in a process of inserting a ban on holding dual offices: - as an MP and a member of local council. See GRECO, 4th Evaluation Round of Slovenia, Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors (2012) p. 18. See, among others, also the Electoral Code of Belgium, Article 95.

¹⁰⁸⁸ The Azerbaijani Constitution revised in 2002, Article 56. See also *Sevidzade v. Azerbaijan* on p. 101.

¹⁰⁸⁹ The prohibition applies to the category of the bishops called "Lord Spiritual", GRECO, 4th Evaluation Round of UK, Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors (2012) pp. 16-17. On the incompatibility of functions see also *Ahmed and others v. UK* on p. 100.

¹⁰⁹⁰ See Article 132 (6).

¹⁰⁹¹ Article 8 of the Macedonian Electoral Code, last revised in 2011.

¹⁰⁹² Ibid.

¹⁰⁹³ Article 74 of the Ukrainian Law on Election of the Peoples' Deputies.

¹⁰⁹⁴ OSCE/ODIHR, Observation Election Report of 2012 Ukrainian Parliamentary Elections, pp. 2, 16-16, 18.

¹⁰⁹⁵ Venice Commission and OSCE/ODIHR Joint Opinion on the Electoral Code of Macedonia (2013), pp. 4-5.

¹⁰⁹⁶ OSCE/ODIHR Election Observation Report of 2012 Ukrainian Parliamentary Elections p. 16.

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- A selection of candidates in the primaries, introduced in 2009 in France, represents a good example of *internal party democracy*.¹⁰⁹⁷ Internal party democracy is also promoted by the Slovenian model whereby the political parties are required by law to elect election candidates by secret vote. Still, no more candidates than the number of posts for which they compete are required by law.¹⁰⁹⁸ As an observation, best practices of internal party democracy do require a plurality of choice, so that there should be at least two candidates competing for the nomination. The Slovenian Administrative Court¹⁰⁹⁹ put aside the MEC's decision for rejection of the candidates' list on the basis of review of the internal procedures of the political party. The Administrative Court confirmed that the law imposes a requirement on the political parties to establish and abide by their rules for nominating candidates, along with the secrecy of vote and the residence requirement. It found that the MEC exceeded its competence, as the requirements of the MEC in that particular case were not the ones set out in the law. This case not only clarified the competencies of the MEC when reviewing internal party rules, but it also established clear limits on the MEC's actions in this regard.

- While the *principles of non-discrimination and equal treatment* are a shared value among all examined states¹¹⁰⁰, their translation into concrete terms does not come easy. For example, the UK is leading the way to ensure equal conditions for full enjoyment of the passive election right by the persons with disabilities, in order to increase their number in the representative bodies.¹¹⁰¹ See also *Mathieu-Mohin & Clerfayt v. Belgium*, where taking an oath in a particular language was made a criteria for taking an office.¹¹⁰²

Electoral Administration: -In the examined countries, *EMBs* fall broadly within three categories, as follows: a) the ex-socialist countries from the sample plus the UK¹¹⁰³ prefer the independent model, b) Belgium and Switzerland prefer the governmental model, and c)

¹⁰⁹⁷ De Luca, *Is Representative Democracy in Crisis? Research Review and Research Perspectives in France and Italy* Axe Political Parties - Turin, 7-8 February 2013; *The process of primaries in Italy and France, candidates and voters* (2013) p. 4.

¹⁰⁹⁸ Grad, Svete, Lumbar, *Predpise o Volitvah v Drzavni Zbor 2008* (2008) p. 56.

¹⁰⁹⁹ Judgment no. U. 399/2008.

¹¹⁰⁰ See for example Article 25 of the 1995 Azerbaijani Constitution as revised in 2002, Article 9 of the 1991 Macedonian Constitution as revised in 2011; Article 1 of the 1958 French Constitution; Articles 10, 11 and 11bis of the 2012 Belgian Constitution, Article 14 of the 1991 Constitution of Slovenia as revised in 2013; Article 24 of the Ukrainian Constitution as revised in 2004; Article 8 of the 1998 Federal Swiss Constitution status in 2013; and the 2010 Equality Act of the UK.

¹¹⁰¹ See the UK Report to the CRPD, p. 95.

¹¹⁰² See p. 89.

¹¹⁰³ GRECO, Third Evaluation Round, Evaluation Report on UK on Transparency of Party Funding (2007) p. 19.

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France uses a mixed model of the electoral administration.¹¹⁰⁴ In Macedonia, the composition of the State Electoral Commission, whereby only the biggest political parties can nominate candidates for members, sometimes drives the latter to vote along party lines¹¹⁰⁵ and leaves smaller parties without effective protection of their interests.¹¹⁰⁶ In 2007, the Slovenian Constitutional Court decided that the Law on Local Elections was incompatible with the Constitution, as it had not outlawed the conflict of interest between being an EB member and being a candidate's close relative, with the aim of safeguarding the impartiality of the electoral administration.

As a rule, all countries in their legislation foresee a certain level of transparency in the work of the electoral administration. As to the implementation of the transparency principle, in Ukraine, the electoral administration should put more effort into opening its decision-making to the public,¹¹⁰⁷ in order to strengthen public confidence and trust. As a confidence strengthening measure, in Macedonia the minutes from the counting and tallying of the results is made available to the public.¹¹⁰⁸

Equitable gender representation is one of the desiderata in line with the requirement to allow a greater access to public offices to women. Slovenia does not foresee a gender requirement for the composition of the EMBs, unlike Macedonia. However, while the latter foresees an equitable gender representation in the highest electoral body, it was proved in the past that the law lacks proper implementation in absence of effective sanctions.

Electoral campaign: -The indispensable segments of the *electoral campaigning* for each candidate encompass: a) access to impartial media and b) the right to hold a rally. On the first segment, all the countries foresee free time for political presentation on the public broadcaster, along with paid political propaganda.¹¹⁰⁹ Switzerland and Belgium prohibit paid political advertising on electronic media in line with the equal opportunity principle.

¹¹⁰⁴ OSCE/ODIHR, Election Observation Report, Parliamentary Elections (2012) p. 8; Data taken from Idea International at <<http://www.idea.int>> accessed on 6 July 2013.

¹¹⁰⁵ Siljanovska-Davkova, Ullom, Kranli, Skoric, Komentar na Izborniot Zakonik (2009) pp. 72-73.

¹¹⁰⁶ The 2008 changes to the Electoral Code reintroduced political parties' members in the Electoral Boards, along with civil servants. Similar comment was made by the ODIHR to Ukraine following the 2012 Parliamentary Election, p. 11.

¹¹⁰⁷ OSCE/ODIHR, Election Observation Report, Parliamentary Elections 2012, p. 11.

¹¹⁰⁸ OSCE/ODIHR and VC Joint Opinion on Electoral Code of Macedonia (2013) p. 4.

¹¹⁰⁹ See electoral campaign database at <www.idea.int>, see also Article 80 of the 2008 Azerbaijani Electoral Code.

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Information about the parties' political programmes is conveyed via public radio and TV broadcast, as well as through print media.¹¹¹⁰ As a comment, whereas such a prohibition might be seen as useful in other countries, it will only contribute to free and fair elections, if the public broadcaster ensures balanced and unbiased coverage. Otherwise, it might have an adverse effect on the freedom of expression, if the ruling party is "ruling" the public broadcaster.

In the UK, free time is allocated by electronic public and private media under equitable and fair conditions. Other indirect funding includes free postage to each voter and a use of meeting rooms free.¹¹¹¹ Indirect funding is also available in Ukraine in a form of free air time, publication of election programmes and publication of candidates' lists.¹¹¹²

The enforcement of the above rights is not an easy task.¹¹¹³ In Macedonia, the "equal media access approach" applies. Whereas the Broadcasting Council monitors broadcasters,¹¹¹⁴ the print media and internet remain without a watchdog. Even the civil organizations committed to "free and fair elections" have not shown any interest in their monitoring. In Slovenia, neither the Court of Audit nor the Media or Market Inspectorates¹¹¹⁵ are equipped for media monitoring. The civil sector also does not monitor the media. So it is difficult to establish a violation committed by the media in this regard. However, nothing is preventing the political parties from being proactive, e.g., by performing their own media monitoring and reporting the violations to the authorities. In Ukraine, the electoral campaign violations are regulated in detail. The authorities are vested with broad sanctioning power, including a suspension of a licence and a temporary ban on publication.¹¹¹⁶

The second important segment refers to the right to hold a rally within the electoral campaign framework. There are legal guarantees for the enjoyment of this right in all eight countries.

¹¹¹⁰ See OSCE/ODIHR Election Reports on 2011 Swiss Federal Elections and 2007 Belgian Parliamentary Election.

¹¹¹¹ GRECO, Third Evaluation Round, Evaluation Report on UK on Transparency of Party Funding (2007) pp. 7-8.

¹¹¹² GRECO, Third Evaluation Round, Evaluation Report on Ukraine on Transparency of Party Funding (2011) p. 8.

¹¹¹³ For the methodology on observation of media during electoral campaign see Osservatorio di Pavia at <<http://www.osservatorio.it/ist/profile.html>> that have contributed to the OSCE/ODIHR media monitoring with respect to Slovenia (2011), Switzerland (2007), France (2007) etc.

¹¹¹⁴ The Broadcasting Council in Macedonia regulates the behavior of the media during elections, issues regulations and warnings to the media, initiates misdemeanor proceedings with the courts and sanctions the media in accordance with the Law on Broadcasting.

¹¹¹⁵ In this regard, see also the OSCE/ODIHR Election Assessment Report on 2011 National Assembly Elections p. 16.

¹¹¹⁶ See Article 74 of the Ukrainian Law on Election of the Peoples' Deputies.

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However, on one hand the candidates sometimes struggle with undue interference with this right, e.g., in Azerbaijan¹¹¹⁷ and Ukraine.¹¹¹⁸ On the other hand, as a simplified example, the organizers of the electoral rally may be punished for a misdemeanour in Slovenia and Macedonia in the absence of prior notification.

Electoral campaign financing: -*Public funds* are disbursed to the candidates under the principles of equality or proportionality and non-discrimination.¹¹¹⁹ In Slovenia¹¹²⁰, the Constitutional Court abrogated a provision restricting direct public funding only to those parties that won mandates in the National Assembly. The Court opined that the provision was discriminatory. In addition, there was no proper justification for such a difference in the treatment of various political parties in view of the equality of election rights. It ordered the legislature to amend the provision to the effect that all parties reaching a certain threshold receive public funding. In the context of the need to have short deadlines when elections are tackled, the Constitutional Court took 2 years and 4 months to decide on the request submitted in 1996. Whether such a length of time was reasonable should be assessed from the viewpoint of whether or not there were elections in the meanwhile, as such a delay might have curtailed some parties' funds.

- An explicit *limit on donations* is perceived as a vital safeguard of the electoral fairness, since it is prescribed in all eight countries. The ceilings vary from country to country in terms of the donors' category and of the value of the donation.¹¹²¹ The UK regulates also the upper limit of the expenditure made by third parties with the electoral campaign framework.¹¹²²

The Macedonian experience shows that the amount of the donation made by natural persons is fixed, whereas the amount of the donations made by legal persons is flexible, depending on their annual turnover.¹¹²³ The upper admissible limit encompasses in-kind and money

¹¹¹⁷ See OSCE/ODIHR 2010 Election Observation Report on Parliamentary Elections in Azerbaijan, pp. 10-11.

¹¹¹⁸ OSCE/ODIHR 20120 Election Observation Report on Ukrainian Parliamentary Elections, p. 16.

¹¹¹⁹ Azerbaijan abrogated the provision stipulating that electoral candidates can receive public funds under certain conditions, GRECO, Third Evaluation Round, Evaluation Report on Azerbaijan, Transparency of Party Funding (2012) p. 8.

¹¹²⁰ This case refers to Slovenia, Uradni List RS, no. 24/1999.

¹¹²¹ Voluntary work is not considered in-kind contribution according to GRECO. Fighting Corruption Political Funding, Thematic Review of GRECO's Third Evaluation Round, p. 15.

¹¹²² GRECO, Fighting Corruption Political Funding, Thematic Review of GRECO's Third Evaluation Round, p. 26 (...)

¹¹²³ See Article 83 of the Electoral Code. See also the Venice Commission and OSCE/ODIHR Joint Opinion on the Electoral Code of Macedonia (2013) p. 8.

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donations. In the UK, a free supply of venue and equipment is considered an in-kind contribution.¹¹²⁴

- A prohibition of donations made by *corporations*, should be followed as it denotes best practice in the electoral campaign affairs. Such an example is French and Belgian legislation. The latter, however, allows sponsorships.¹¹²⁵ Azerbaijan proscribes donations made by corporations only to the political parties, but not to the candidates, whereas for Ukraine it is *vice versa*.¹¹²⁶ Switzerland follows its liberal policies in relation to the electoral campaign financing and allows donations to be made by corporations with the state's ownership or holding a public contract. The UK has a similar approach in this regard.¹¹²⁷

- An electoral campaign can be *funded* by party fees, provided that a reporting requirement is observed.¹¹²⁸ In particular, political parties' membership fees are among the legal sources of funding in the UK, Macedonia and France. They fall under the same regime for the limitation of the amounts of donations and for reporting of the incomes.

- Belgium¹¹²⁹, the United Kingdom, Slovenia and one of the Swiss cantons foresee specific limits on *anonymous donations*. The remainder of the countries prohibit anonymous donations, along with another Swiss canton. It appears that the rest of the Swiss cantons and the confederation do not have legislation in place in this regard.¹¹³⁰ As for France, there is no requirement for public disclosure to third parties of the donations not exceeding 3,000 Euro, which made donations insufficiently transparent.¹¹³¹

¹¹²⁴ GRECO, Fighting Corruption Political Funding, Thematic Review of GRECO's Third Evaluation Round, p. 12 (...).

¹¹²⁵ Ibid, p. 16.

¹¹²⁶ Data taken from the database of Idea International at <www.idea.int/uid/countryview.cfm?id=53> accessed on 6 July 2013.

¹¹²⁷ For a debate about financing of political parties see more in GRECO, Third Evaluation Round, Evaluation Report on UK on Transparency of Party Funding, (2007 p). 22, and the compliance reports – 2010 and 2012.

¹¹²⁸ For more on this topic see GRECO, Fighting Corruption Political Funding, Thematic Review of GRECO's Third Evaluation Round (...).

¹¹²⁹ Anonymous donation cannot exceed 125 EURO, <

http://www.ibz.rrn.fgov.be/fileadmin/user_upload/Elections2009/fr/informations_pratiques/modeles_depenses_electorales/releve_dons_personnes_physiques_candidats_annexe4.pdf>

¹¹³⁰ GRECO Evaluation Reports, Third Evaluation Round for all eight countries from the sample.

¹¹³¹ GRECO Compliance report on France, Third Evaluation Round (2011) pp. 12-13.

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- Except for Belgium and Switzerland¹¹³², the remainder of the subjects of the examination unanimously prohibits *foreign donations*. However, exceptions to this rule exist in the UK for small-scale specified expenditures¹¹³³, as well as in France for contributions from foreign individuals.¹¹³⁴

- The number of the registered voters¹¹³⁵ serves as a perimeter for *limiting the electoral expenses*. France foresees strict penalties when more funds are disbursed than the legal maximum. The foreseen penalties include a fine, stripping the winning candidate off his mandate, a loss of the right to be reimbursed, and a payment of the exceeded amount to the public treasury.¹¹³⁶ Also in Slovenia, when the limits for the allowed electoral spending are exceeded, the partial reimbursement of the costs and public funding is reduced or lost in accordance with the law. The above examples should be copied by other countries, as the loss of funds is a more effective deterrent than payment of fines. Political parties might prefer to pay a small fine, instead of ceasing the unlawful conduct, if breaking a law means increased chances to win elections.

- Whereas in Macedonia no expenditure is allowed outside of the *organized electoral campaign*, the Azerbaijani Electoral Code imposes normative standards on pre-electoral campaign activities. In the UK, Macedonia, Slovenia and France¹¹³⁷ the inflow of cash and expenditure passes through an election agent. In the UK, third parties organizing campaign activities for an electoral candidate must register with the electoral commission and must abide by the rules imposing a ceiling on their expenditure.¹¹³⁸ Other countries, like Ukraine leave financing of the entities related to a political party unregulated, thus opening up a space for illegal campaign funding.¹¹³⁹

¹¹³² Data taken from the database of Idea International at <www.idea.int/uid/countryview.cfm?id=53> accessed on 6 July 2013.

¹¹³³ GRECO, Third Evaluation Round, Evaluation Report on the UK on Transparency of Party Funding, pp. 10-11.

¹¹³⁴ GRECO, Third Evaluation Round, Evaluation Report on France on Transparency of Party Funding, p. 7.

¹¹³⁵ See Macedonian Electoral Code, last revised in 2011, and Article 84 and French Electoral Code revised in 2013, Article LO 308-1.

¹¹³⁶ See <elections-municipales2014.fr>.

¹¹³⁷ A financial representative is appointed only for the constituencies with more than 9000 inhabitants, GRECO Evaluation Report on France on Transparency of Party Funding (2009) p. 11.

¹¹³⁸ GRECO, Third Evaluation Round, Evaluation report on UK on Transparency of Party Funding (2007) pp. 4, 11.

¹¹³⁹ GRECO, Third Evaluation Round, Evaluation Report on Ukraine on Transparency of Party Funding (2011) p. 7; OSCE/ODIHR Election Observation Report, Parliamentary Election Ukraine (2012) p. 18.

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- The *financial reporting* in the UK serves as a good example of accountability for electoral campaign financing. In particular, reporting is done on quarterly basis, with an increased frequency (once per week) during the election period. Loans are also reported, except by the election candidates who report separately on other types of received incomes. Multiple donations coming from the same source must be reported, if their aggregated sum is above the amount for which no reporting is required.¹¹⁴⁰ The monitoring of electoral expenses is done by the Electoral Commission, which is in possession of investigative powers and access to documents.

Macedonia has also adopted the practice of multiple reporting.¹¹⁴¹ In particular, a financial report is submitted for a period of 10 days from the official start of the electoral campaign, with the final reporting done within fifteen days from the end of the election campaign on a standardized form. The length of the electoral campaign is only twenty days. This represents a major drawback with respect to freedom of expression, in light of the prohibition on campaigning outside of the electoral campaign period. The issue is connected with electoral campaign financing, since it is considered that there is a relationship between the length of the electoral campaign and the illegal practices. It is the opinion of the author that the idea that a longer campaign allows more time for illegal practices to occur cannot be accepted in light of its disproportionality to the principle of informed voters. Rather, other effective measures should be taken into account, like a prohibition of commercial advertisements in the media. In France, there is no continuous reporting during electoral campaign, but the electoral campaign reports must be submitted within 2 months of the election, which was judged both by the OSCE/ODIHR and by GRECO as not in compliance with European standards.¹¹⁴² The Swiss federation should also improve the transparency of their electoral campaign financing.¹¹⁴³

Legal remedies: - In some countries, legal standing to *challenge the composition of the candidates' lists* is restricted to their submitters and candidates. For instance, the Slovenian Constitutional Court examined who has the right to file an appeal with the Constitutional

¹¹⁴⁰ See more in GRECO, Third Evaluation Round, Evaluation Report on the UK on Transparency of Party Funding (2007) p. 14-16.

¹¹⁴¹ Macedonian Electoral Code, revised in 2011, Articles 84-b and 85.

¹¹⁴² OSCE/ODIHR, Election Assessment Report, 2012 French Parliamentary Elections, p. 16; GRECO, Third Evaluation Round, Evaluation Report on France on Transparency of Party Funding (2009) p. 17.

¹¹⁴³ OSCE/ODIHR, Election Assessment Report, Swiss Federal Assembly Elections (2011) p. 9.

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Court regarding confirmation of the MPs' mandates by the National Assembly.¹¹⁴⁴ The applicants, who apparently did not meet the threshold to be elected in their constituencies, complained that the national list of the party was not composed in accordance with the law. The Constitutional Court refused to examine the appeal on the merits, considering that only candidates and candidates' lists' representatives have the right to appeal as they were protecting their own rights. However, a separate opinion questioned the protection of the active election right of voters. It considered that the current right to appeal, given only to the candidates and candidate lists' representatives, did not afford effective protection to the voter. However, due care had to be given to avoid parallel protection systems, resulting in conflicting decisions. The particularity of Belgium regarding the candidates' lists' legal avenue, is the possibility to challenge the declaration of the linguistic belonging with the Conseil d'état, whereas for the ineligibility issues the appeal should be filed with the appeals court.¹¹⁴⁵

Election observation: -Countries differ in law and practice in this regard, depending on their position on the democracy scale. Whereas developing democracies from the sample usually have legal provisions detailing *election observation*, in practice electoral observers face obstacles and a lack of access. For the old democracies plus Slovenia, a lack of provisions on electoral observation does not impede effective access to the electoral processes. The frequency of international election observations differs. For comparison, in Macedonia, all elections are subject to OSCE/ODIHR scrutiny (since 1996), while in Slovenia OSCE/ODIHR election observation is a recent trend.

Election Day

Voting: -Countries with a democratic tradition foresee *postal and proxy voting*, as yet another way to provide universal access to balloting. On balance, important safeguards must be in place to protect electoral integrity, as well as to avoid redundancy in voting procedures.¹¹⁴⁶

¹¹⁴⁴ Mp – 1/96.

¹¹⁴⁵ IBZ (Internal Public Federal Service of Belgium), Schemas Chronologiques a Partir du 40eme Jour avant le Scrutin at<www.bbz.rn.fgov.be>.

¹¹⁴⁶ For France, UK, Switzerland, Belgium see the OSCE/ODIHR Election Reports on French Parliamentary Elections (2012) pp. 6-7; on the UK General Elections (2010) pp. 12-13; on the Swiss Assembly Elections (2011) pp. 13-14, Belgian Electoral Code, Article 180. See also the Slovenian National Assembly Elections Act, Article 82.

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By contrast, in Azerbaijan, Ukraine¹¹⁴⁷ and Macedonia voters can cast their ballot only in person.

-The legal requirement for a *secret and free vote* is transcendent of the countries' boundaries. The subjects of examination converge on the point of the vote buying prohibition, which aims at protecting the free expression standard of the voters.¹¹⁴⁸

-As to the *voting instructions* in the minority languages, Ukrainian legislation seems restrictive, as Ukrainian is the sole language in which electoral materials may appear. However, such a prohibition proved difficult to defend in practice.¹¹⁴⁹

-As a rule, *visually impaired persons* are assisted by another person in order to cast their vote. The OSCE/ODIHR recommended to France (but that is applicable also for other states) to look closely into the matter in order to protect their right to a secret vote.¹¹⁵⁰ For example, in Ukraine in each polling station there are available ballot stencils for this purpose.¹¹⁵¹

With respect to giving voters a fair chance to cast their vote, the legal solution of the Azerbaijani Code (Article 35, paragraph 3.1) which foresees polling stations with 1,500 voters does not seem to give a realistic opportunity to the voters to cast their vote.

Intimidation: -*Intimidation of voters* before and during election day was recorded as a problem in the 2008 and 2009 elections in Macedonia. Although ODIHR and local election observers received a considerable number of credible allegations of intimidation during the 2009 elections, the authorities asserted that no complaint was registered with the state bodies. However, when looking at the substance of the complaints submitted to the SEC by the candidates, a number of them allege intimidation of voters. Since the SEC rejected a majority of the complaints, it could be accepted that in such cases no irregularities occurred, provided that the complaints were thoroughly examined. Still, in the few cases where the SEC granted

¹¹⁴⁷ 2011 Ukrainian Law on Election of the Peoples' Deputies, Article 8; Macedonian Electoral Code; Azerbaijani Electoral Code, Preamble.

¹¹⁴⁸Data taken from the database of Idea International at <www.idea.int/uid/countryview.cfm?id=53> accessed on 6 July 2013.

¹¹⁴⁹ OSCE/ODIHR Election Observation Report on 2012 Ukrainian Parliamentary Elections, p. 23.

¹¹⁵⁰ OSCE/ODIHR Election Assessment Report French Parliamentary Elections (2012) p. 2.

¹¹⁵¹ Ukrainian Law on Election of the Peoples' Deputies (2011) Article 85 (6).

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the complaint, it failed to ensure proper follow-up in terms of initiating criminal or misdemeanor proceedings, despite its legal obligation to report crimes.¹¹⁵²

Technical novelties:- While, among others, France and Belgium use *e-voting*, certain safeguards must be in place to ensure the compliance with the international standards. For instance, the system must be publicly procured and reliable, the voters must be educated for its use and they must have a possibility to make corrections.¹¹⁵³

Security: -As to *the security* during Election Day in Macedonia, the police has an obligation to maintain peace and order but only from a certain distance from the polling station. It can only enter and intervene when called by the electoral board in case of disorder or violence.¹¹⁵⁴ Similarly, in Belgium the president of an electoral board can ask for police assistance to restore peace and order in a polling station.¹¹⁵⁵

- In France, the Constitutional Council *monitors the voting* in the polling stations to check the regularity of the process.¹¹⁵⁶ In Macedonia, it is the state electoral commission that monitors the voting procedures in the polling stations and can terminate the voting in case of gross irregularities.¹¹⁵⁷

Counting: In Macedonia, a criminal offence entitled electoral deceit prohibits election officials from changing the number of votes cast for the candidates, from manipulating the numbers during *counting* and tallying and from reporting fake election results. In Azerbaijan, significant problems were spotted during the counting of the votes. Violations included a presence of unauthorized persons during counting, a lack of legally prescribed reconciliation and interference with the process.¹¹⁵⁸ Counting of the votes in Slovenia posed a problem in 1997, because of the short deadlines for receiving the ballots. Upon a Constitutional Court's decision, the deadline within which the ballots received by mail were counted, was prolonged in order to include as many votes in the counting as possible. In UK, ODIHR recommended

¹¹⁵² See OSCE/ODIHR Election Observation Reports on Macedonian local and parliamentary elections (2008 and 2009).

¹¹⁵³ OSCE/ODIHR Election Assessment Report, Republic of France Parliamentary Elections (2012) pp. 10-12.

¹¹⁵⁴ Macedonian Electoral Code, last revised in 2011, Article 102.

¹¹⁵⁵ Belgian Electoral Code, Article 109.

¹¹⁵⁶ See information about the constitutional council at http://127.0.0.180/conseil_conseil/root/core/d0001/04965.

¹¹⁵⁷ See Macedonian Electoral Code.

¹¹⁵⁸ OSCE/ODIHR Election Observation Report, Republic of Azerbaijan, Parliamentary Elections (2010) p. 20.

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the allocation of voters and polling station members to be measured in proportion to the needs to enable all voters to cast their votes.¹¹⁵⁹

Post-election Period

Electoral results: *Tallying* of the results must be a transparent process in order to inspire public confidence in the winner of the electoral competition. However, in Azerbaijan, the transparency requirement was not fully observed during the tabulation of the 2008 electoral results.¹¹⁶⁰ Belgium in 2007 encountered a different, but not insignificant problem during the tabulation due to a breakdown of the electronic equipment.

Audit: -In Ukraine and the UK, the *oversight of the electoral campaign funding* is done by the main electoral commission, receiving reports about the sources, types and value of the incomes and expenditures. In Macedonia, the oversight task is allocated to the State Audit Office.¹¹⁶¹ Reckoning that its competence by law is only limited to auditing of public funds, the State Audit Office does not audit the expenditures made from private funds, despite the public interest involved. In fact, this means that independent candidates' expenditures are never audited, since they do not receive public funds. On balance, the reports are subject to public disclosure and are also received by the State electoral commission and the anti-corruption commission. In addition, the State Audit Office only audits the biggest parties' electoral campaign expenditures in accordance with its annual plan, due to the shortage of resources and funds. Slovenia has solved this problem by giving its Audit Court competence also to audit subjects that do not receive public funds, thus protecting the public interest in free and fair elections, as well as the rights of others.¹¹⁶²

Legal remedies: -Various *corrective justice measures* are at the disposal of the countries, with various arbiters ranging from electoral commissions to courts. As to the electoral disputes in France, the Constitutional Council deals only with complaints relating to general elections, whereas the remainder of election-related complaints are processed by the administrative

¹¹⁵⁹ OSCE/ODIHR Election Assessment Report on UK General Election, p. 21.

¹¹⁶⁰ OSCE/ODIHR Election Observation Report, Republic of Azerbaijan Presidential Election (2008), p. 24.

¹¹⁶¹ See Article 85 of the 2011 Electoral Code, and 2007 Law on State Audit, Article 6.

¹¹⁶² The Slovenian Audit Court submitted the initiative for the constitutionality review of the Slovenian Law on Electoral Campaign, which stipulates its competence to audit also the electoral campaign organizers that were not receiving public funding. The initiative was rejected, see U-I-171/97.

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courts.¹¹⁶³ The administrative court, along with the state electoral commission, represents the forum for the resolution of electoral disputes in Macedonia. The deadlines within which these adjudicative bodies must adopt a decision are among the shortest ones in comparison to other countries from the sample. Short deadlines coupled with a huge number of objections¹¹⁶⁴ and lawsuits, substantially weaken the effectiveness of the electoral disputes' for the sake of the efficiency requirement. In order to reconcile efficiency with effectiveness, Macedonia could look into the possibility of introducing mediation as a way to resolve electoral disputes. In this country, public hearings are regularly conducted, dissimilar to Slovenia where public hearings before the administrative and supreme courts in connection with elections are not a statutory requirement.¹¹⁶⁵ In Switzerland, a majority of the electoral disputes are resolved even before reaching the court, which contributes to the efficiency of the system.

- A *challenge to election results* is granted to diverse stakeholders, ranging from political party representatives and candidates to registered voters.¹¹⁶⁶ France has the most "generous" solution in this regard, as the voters have also the right to challenge the validity of elections. A similar legal solution has been accepted in Ukraine¹¹⁶⁷, since an election observer may also challenge the electoral result. It is the opinion of the author, that the downside of such a solution is when election observers are denied access. Furthermore, the issue of a conflict with the observers' impartiality may arise, especially when there is a "hidden" connection with some of the electoral candidates. Finally, the observers might not be equipped to start legal proceedings, thus legal protection for a lawful elections, should be shared among a diversified portfolio of stakeholders.¹¹⁶⁸

-As a rule, the prerogative to *annul an election result* or a part of it rests with the court. In Macedonia and Azerbaijan¹¹⁶⁹, such power is also vested in the highest electoral administrative body.¹¹⁷⁰ In the latter country, the court and the central election commission have concurrent jurisdiction, which might result in contradictory decisions. Furthermore, the

¹¹⁶³ See International IDEA, Electoral Justice Handbook (2010), pp. 128-129.

¹¹⁶⁴ For example, in the 2009 elections, the SEC received 98 objections only in the first round.

¹¹⁶⁵ In accordance with OSCE commitments the courts should be dealing with election disputes on a public session, thus increasing the transparency of the process and giving an opportunity to the parties better to present their case.

¹¹⁶⁶ See the database on electoral justice at <www.idea.int>.

¹¹⁶⁷ See also *Kovach v. Ukraine* on p. 101.

¹¹⁶⁸ 2011 Law on Election of Peoples' Deputy, Article 108.

¹¹⁶⁹ With respect to electoral irregularities see *Namat Aliyev v. Azerbaijan* and *Kerimova v. Azerbaijan* on p. 104.

¹¹⁷⁰ Azerbaijani Electoral Code, Article 114.

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grounds for annulling the results are drafted in broad terms, which is contrary to the requirement of legal certainty and consistency. Even more so, irregularities benefiting a losing candidate are not foreseen as a ground to cancel elections. This is a broadly drafted provision, prone to abuse, as it fails to take into consideration the consequences that such irregularities bear on other “losers” of the election. By contrast, the Macedonian law stipulates an annulment of elections in a polling station in the case of established irregularities, which serves as a remedy. However, the voting can only be repeated when election results are affected. Such a stipulation effectively disenfranchises the voters and takes away the possibility of the political parties to obtain a refund from public funds, if the election is not repeated.¹¹⁷¹ Elections are repeated when irregularities have been discovered that affect the election result. By contrast, in Slovenia, if irregularities are discovered which do not affect the election result, the elections are not annulled. In France, a complaint with no effect on election results can be rejected, but the rejection must be justified.¹¹⁷² Nonetheless, it needs to be stated that when there is no annulment, the irregularities committed remain unsanctioned unless other types of legal remedies are pursued.¹¹⁷³ In addition, it is unclear how those votes are counted in order to receive public funds.

- As to the sanctioning, in Ukraine a variety of *sanctions*, including warnings, are at the disposal of the authorities for the correction of electoral irregularities. Acknowledging the fact that no sanctions were ever imposed until 2011 in this regard, it follows that the authorities have not effectively used the means at their disposal to combat impunity in the electoral financing realm.¹¹⁷⁴

In UK, more flexible sanctions have been introduced by way of secondary legislation.¹¹⁷⁵ While the use of secondary legislation as an instrument of punishment may be more efficient, it may not be acceptable to other countries, which may consider the Parliament a better-suited forum to determine sanctions especially in the electoral campaign realm.

¹¹⁷¹ See, among others, Coalition “All for Fair Trials”, Final Report on the Institutional Response against Election Irregularities (2009); OSCE, *Perspektiva na domasnata pravna ramka za sproveduvanje na izborite, poglednata od agol na megunarodni izborni standardi i dobri praktiki* (2008). See also the Code of Good Practice in Electoral Matters.

¹¹⁷² French Electoral Code, LO 183.

¹¹⁷³ Elections are also repeated upon SEC decisions, if upon a complaint, the National Assembly or the Constitutional Court does not approve a mandate.

¹¹⁷⁴ GRECO, Third Evaluation Round, Evaluation Report on Ukraine on Transparency of Party Funding (2011) pp. 18-19.

¹¹⁷⁵ GRECO, Second Compliance Report (2012) p. 6.

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Remedies for breach of the electoral financing rules are well-developed in France, and include a loss of public funds, fines, a loss of exemption from supervision by the Audit Court and imprisonment. From the statistics presented in the GRECO report, until 2009 there were not a significant number of cases in quantitative terms, relating to electoral campaign violations.¹¹⁷⁶ However, some of the cases including the recent ones, involve the decision-makers, former French presidents, indicating the resolve of judicial authorities to protect the paradigm of “free and fair elections” from corrupt practices.

In Slovenia, there is a lenient sentencing policy. Such a policy might ensue from a low rate of election-related criminality. In particular, only in one case was a person convicted for having committed a crime against voting rights and elections in 2008, whereas there were no convictions in 1995, 2000 and 2004 – 2007.¹¹⁷⁷ According to the 2002 crime statistics, there were only a few cases of criminal investigations, which appeared to be low-profile.¹¹⁷⁸ In particular, there were 7 cases in total, in connection with the right to vote and elections, out of which 1 concerned a violation of the free choice of voters and the remainder referred to the destruction, or forgery of election documents. Only in the case connected with the violation of the free choice of voters was the complaint rejected and in the rest of the cases, the perpetrators were not discovered. Regarding the trial stage in 2002, there were four indictments for a violation of the right to vote. In all four cases the indictments were rejected and the procedures stopped.¹¹⁷⁹ The above statistical information may also indicate a lack of effective investigation on the part of the authorities, taking into consideration that election irregularities did occur, as it is shown in the part devoted to electoral disputes.¹¹⁸⁰ Moreover, in case of irregularities, the EMB members have a statutory obligation to report criminal behavior to the prosecution. The above statement about the possible lack of effective investigation is further supported by the fact that between 1998 and 2004 only 1 out of 14 requests for misdemeanors filed by the Court of Audit was processed. The rest were declared inadmissible mainly because the statute of limitations had expired.¹¹⁸¹ Slovenia might wish to

¹¹⁷⁶ For more on this topic GRECO, Third Evaluation Round, Evaluation Report of France on Transparency of Party Funding (2009) pp. 20-21, 23-24.

¹¹⁷⁷ Information taken from <<http://www.stat.si>>; 2009 Statistical Yearbook of the Republic of Slovenia, p. 214.

¹¹⁷⁸ In the interviews carried out with the SEC and Ministry of Public Administration officials in June 2010, none of them was aware of any criminal cases in relation to elections.

¹¹⁷⁹ Jacović, *Crime 2002*, Statistical Office of the Republic of Slovenia (2005).

¹¹⁸⁰ As stated in *Exploring Crime Analysis* “The crime described in the police reports does not provide a full picture of the crime in the society, as only the reported crimes or crime activities known to the police are the ones counted [in the statistics]”, International Association of Crime Analysts (2004) p. 247.

¹¹⁸¹ GRECO Eval III Rep (2009) 6E, Theme II (2007) p. 22, more explained below.

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reconsider its approach towards prosecutorial and sentencing policy in relation to elections with the aim of preventing and effectively deterring election-related offences.

As a rule, if a country has legislation regulating presidential pardon or amnesty, the electoral offences are not excluded from the general regime.

- Office occupied by the winning candidate: A positive example comes from Belgium, which requires a *wholesome*, balanced and honest approach from the elected representatives to their constituencies and not only to the voters who voted for them.¹¹⁸²

As a bottom-line, the results of the examination of the national electoral legislation and its implementation through the prism of the evolved European standards demonstrate that no country is immune from the problems in electoral realm. As a result, the assumption that consolidated democracies from the sample have no concerns with respect to electoral democracy is replaced with the assumption that consolidated democracies have fewer worries with electoral democracy in comparison to democracies in development. Indeed, it was shown that the EU member states from the sample struggle with electoral campaign financing, low turnout of voters and the universality of the vote.¹¹⁸³ Democracies that are in the process of consolidation, still face problems that speak to the fundamentals of democracy, such as arbitrary limitations of freedoms of association and expression, of freedom of movement and continuing to mix the ruling parties with the state.

For further analysis, the countries are divided into four groupings on the basis of their similarities and common challenges. The first grouping covers all eight countries. In view of the afore-mentioned assumption, the work shows that despite differences among the compared countries, they all face common problems at a systematic level. The common challenge, primarily, refers to electoral campaign financing and its various segments, including lawful sources, reporting, monitoring, transparency and auditing.¹¹⁸⁴ Another common challenge refers to sustainable electoral participation of minorities and women, which seems to meet some reluctance from the established political elites, as it shapes the societies within. In fact, greater inclusion of minorities and women in public affairs is a question of democratic culture, and not of rules and regulations. It is recommended for the

¹¹⁸² See Belgian Constitution, Article 42.

¹¹⁸³ See pp. 183-185, 189.

¹¹⁸⁴ See pp. 232-236, 239.

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countries that have not done so, to lower the voting age and allow 16 years old to vote, in order to get used to democracy from a young age. Further recommendation across the groupings is to prohibit donations from corporations in order to reduce oligarchic influence in politics.

The second selected grouping of countries includes only the EU member states. The common challenge is embodied in a low voter turnout in the European elections, which in substance symbolizes low interest in European affairs. A lack of provisions regulating election observation is yet another shared feature.

For the selected grouping of democracies in consolidation¹¹⁸⁵ inclusive and participatory law-making represents one of the main challenges in the electoral arena. Accurate and updated voters' lists, along with an abuse of administrative resources during the time of elections, belong also to the group of common problems, which these countries need to resolve. On a separate note, Ukraine and Azerbaijan, as a sub-grouping of countries that do not geographically belong to Europe, struggle to protect and maintain a meaningful opposition, and fail to protect the right of the opposition to hold a rally.¹¹⁸⁶

Switzerland as a model democracy, but a non-EU member state, stands alone in this exercise. The examination shows a surprising result regarding its federal elections that appear to be under-regulated and mostly driven by separate cantonal rules.¹¹⁸⁷ Such a result may highlight the value of a long-standing electoral practice, which does not necessitate strict laws or sanctions to be self-perpetuating, for it has become a part of the political culture of the country. Nevertheless, the Swiss Federation needs to address certain shortcomings regarding electoral campaigning for federal elections. In particular, it should look at prohibiting certain types of donations in accordance with European standards. Prohibition of foreign and anonymous donations will enhance electoral campaign transparency, while interdiction of receiving donations from public or publicly contracted companies will prevent corruption. Finally, for greater promotion of the universality of election rights, the Swiss Federation should invest greater effort into inclusion of persons with disabilities as electoral candidates with a real prospect of being elected.

¹¹⁸⁵ This category covers Macedonia, Azerbaijan and Ukraine.

¹¹⁸⁶ See pp. 220, 221.

¹¹⁸⁷ See pp. 232-234, 245.

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From the individual examination of the remainder of the countries from the selected sample, the following is observed:

Azerbaijan, figuratively speaking, needs to fight the “free and fair elections” battle on several battlefields. First, it should strive for more inclusive and transparent law-making in the electoral arena, without including too much detail in the law that can otherwise be put in secondary legislation. Second, it should increase the effectiveness of its justice system and clarify the role of the prosecutor who seems to be taking over the role of the courts regarding hypothetical incarcerations of electoral candidates. Third, it should put in place specific measures for increased participation of women and minorities in public affairs. Fourth, freedom of peaceful assembly must also be protected for the opposition, and not only for the ruling party. Fifth, PSs should be re- fashioned in accordance with the realistic number of voters per PS. Sixth, transparency of counting and tallying procedures should be enhanced to increase public confidence in election results. Finally, it should introduce continuous education for voters.¹¹⁸⁸

Next country in alphabetical order, Belgium has also certain electoral desiderata to fulfil. For example, it should cut the sub-national electoral mandates that are longer than five years in order to avoid concentration of power in hands of the elites, as well as for renewed legitimacy of the decision-making bodies. It should further prohibit foreign donations, which might influence the course of domestic politics to detriment of eligible voters. It should also ensure that the e-voting is done in line with the applicable European election standards.¹¹⁸⁹

France should also consider shortening the mandates of elected sub-national bodies to five instead of six years for the same reasons as above. It should also improve its electoral campaign reporting to re-gain transparency and prevent corruption.¹¹⁹⁰ France should also improve secrecy of the vote for blind persons by foreseeing ballot stencils for the blind.¹¹⁹¹

¹¹⁸⁸ See pp. 218, 220, 221, 223, 227, 229, 232, 238, 239, also Annex II for problems detected by OSCE/ODIHR, p. 293.

¹¹⁸⁹ See Annex II, p. 293.

¹¹⁹⁰ See pp. 234, 236, 238, 246.

¹¹⁹¹ See Annex II, p. 293.

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A number of substantial electoral changes should be introduced by Macedonian authorities regarding several electoral variables, in line with European standards. Regarding legislative variables, modifications to election legislation (also when initiated by international factor) should not be seen as a possibility for introducing provisions that are inconsistent with the “free and fair elections” standard. Regarding the electoral eligibility variable, Macedonia should look into the possibility to extend election rights for local elections to non-nationals and stateless persons, in order to get their commitment and involvement in communal interest. Furthermore, it must also ensure the equality of vote in diaspora voting, unless it has a proper justification why the voters from the diaspora are in a more privileged position than the rest of the voters. It should also consider including a requirement for continuous education of voters, e.g., through citizens’ schools of democracy. Furthermore, there must be put in place an adequate protection of voters from threats and intimidations. Last but not least, Macedonia should foresee ballot stencils for blind voters. Regarding electoral campaign variable, a clear separation between party and administrative resources must be maintained. Authorities may also wish to extend the period for the electoral campaign to enable better information for the voters. While a shorter electoral campaign is beneficial in cases when public order and safety might be jeopardized during the election period, Macedonia is no longer in such a phase, judging by its past elections. As for the electoral campaign financing, there must be an effective impartial audit of the funds of the candidates and political parties coming from private sources. Flexible donations from companies should not be allowed. The EMBs variable requires representativeness of smaller parties in order to satisfy the fairness principle. The country may also look into the possibility of systematic inclusion of the minority communities in the EMBs. Finally, the adequate remedy variable requires a repetition of the vote whenever elections are annulled, even when the electoral outcome has not been affected. A lack of re-run might make sense when there are security threats, but in Macedonia that is no longer a case. A lack of re-run not only deprives voters of their right to effectively cast their vote, but also deprives the candidates from obtaining an accurate picture about the number of votes won in the elections, and has its repercussions on the public funds received.¹¹⁹²

While Slovenia should be commended for its efforts to promote internal party democracy, the law should require at least two competing candidates for the primaries. Further possibilities

¹¹⁹² See pp. 222, 224, 226, 229, 230, 232, 233, 238-241.

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for improvement encompass a reserved seat for Roma at the national level, on equal terms with the rest of the minority communities; and a requirement for equitable representation of women in EMBs (including at the highest level). Slovenia must improve its media monitoring, thus curbing impunity in this area. Greater inclusion of the civil sector in electoral law-making is also desirable with the aim of properly addressing their concerns and dwelling on their proposals.¹¹⁹³

The UK should also address a number of electoral concerns. It should strive to individualize circumstances under which prisoners could or could not vote, instead of opting for a blanket prohibition. Prohibition of voting for persons who went bankrupt should be abolished. The UK should also prohibit donations from public companies or companies holding a public contract and should make more realistic estimations about the number of voters per PS.¹¹⁹⁴

The last country, Ukraine should introduce a number of improvements in the legislative arena. First, it should improve transparency in its electoral law-making process, and should avoid including too many details in the laws, thus making them inflexible. Second, it should look into possibilities for making stateless persons and non-nationals eligible in line with the universality principle. Third, the authorities need better implementation of the equality principle when drawing electoral boundaries. Fourth, separation of powers must be strictly guarded during the electoral campaign in order to satisfy the fairness principle. For the same reason, a transparent decision-making of its EMBs must be fully preserved as the fifth recommendation. Sixth, candidates should not be required to satisfy a five-year residence requirement and must have their right to rally protected in order to safeguard the plurality of elections. Seventh, there must be voting instructions in the minority language to satisfy the “informed voter requirement”.¹¹⁹⁵

The summed-up results based on the interface of the two variables used, i.e., the national legislation and the evolved European election standards suggest that there is a high convergence among the states relating to the electoral principles *in abstracto*. On their application *in concreto* the convergence is higher among the states belonging to the same

¹¹⁹³ See pp. 221-223, 229, 231, 232, 237, 240, 242, 247. For problems detected by OSCE/ODIHR see Annex II, p. 293.

¹¹⁹⁴ Ibid. See also pp. 222, 224, 228, 234, 239, 242.

¹¹⁹⁵ Ibid.

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category.¹¹⁹⁶ Similarly, the problems are also shared among the states from the same category. The importance of the number of adopted rules and regulations decreases with an increase of the acceptance of the democratic electoral culture.

The results of the above exercise, demonstrating that all examined countries struggle with a certain electoral segment, do not disprove the theory that national election standards can serve as a source of European election standards. The reasons are as follows:

Firstly, the exercise identified a high level of convergence among the states regarding the constituent elements of the “free and fair” electoral paradigm. A majority of the examined states use similar qualifications for the enjoyment of the electoral rights, although some of them differ regarding their limitation. Furthermore, they converge on the points of the upper value of the electoral threshold, on the electoral interval of parliamentary elections, on voters’ education, on creating equal electoral conditions for disabled, on the incompatibility of functions with certain nuances states, on audit and on corrective justice measures.¹¹⁹⁷

Secondly, some of the states show progressive rules and practices in certain electoral areas. For instance, the UK is leading the way to ensure equal conditions for full enjoyment of the passive election right by the persons with disabilities, in order to increase their number in the representative bodies.¹¹⁹⁸ A further positive example comes from Azerbaijan that includes stateless persons in a different category than foreign nationals, and grants them wider election rights.¹¹⁹⁹ The electors in consolidated democracies traditionally enjoy high confidence due to respect for the rule of law principle. The positive examples may be shared with other states wanting to enhance their electoral democracy, thus inspiring them to accept new European election standards.

Thirdly, elections are held by the states and not by the inter-governmental organizations. It is the states that are electoral units and not the organizations. If the European standards are developed only vertically by the international actors, such a process will divorce theory from practice with all negative ramifications.

¹¹⁹⁶ See pp. 244-245.

¹¹⁹⁷ See pp. 217, 219, 224-226, 228, 229, 231-233, 237, 239-241.

¹¹⁹⁸ See the UK Report to the CRPD, p. 95.

¹¹⁹⁹ See p. 224.

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Fourthly, national legislation provides a wealth of concrete measures (or electoral interpretive standards) about the enforcement of the paradigm of “free and fair elections”.

Lastly, elections are not frozen unchangeable matter. On the contrary, they constantly develop through the practice of democracy and ever-changing technological progress. Therefore, rules and practices of the most progressive states in this regard, could be used as an indicator of the electoral progress in the “post-communist” era.

It follows that the European election standards will be impoverished and could not keep pace with electoral developments if there was no constant exchange between the international and the national level.

VIII. CONCLUSIONS AND RECOMMENDATIONS

a) Commitment to Free and Fair Elections

The ideological dimension of international law rests on the democratic principles, respect for human rights and justice in view of its correlation with the worldwide peace.¹²⁰⁰ Democracy and its theoretical thought are under constant change, taking various shapes through time. The constraints of the modern world gave birth to various theories of democracy. Some of them underscore accountability and representation,¹²⁰¹ others procedural democracy, political equality and opportunity for participation¹²⁰². According to O'Donnell there is no clear and consistent democratic theory, at any rate, democratic theory needs to be re-thought in light of the experience of the emerging democracies.¹²⁰³

Some scholars ponder on the pre-conditions for democracy such as economic wealth, mentality or education of the citizens. The arguments that only rich countries with well-educated and free minded citizens can enjoy democratic constitutional order are similar to the arguments asserted at the time against the universality of vote, i.e., that the enjoyment of political rights should be granted only on the basis of the capacities attributed to the individuals depending on their affiliation with a certain social group. Democracy by definition is what is desired by the majority, and what is at stake is to put in place proper instruments for democratic institutions to become operational. The values that are the pillars of any democratic system such as justice, equality, pluralism, inclusion and responsiveness to various social interests must be born in mind. If the focus is only on the procedures (that can be thwarted) and the goals of democracy are not kept in mind, democracy may be devoid of its meaning, and no procedures can ensure its substance.

The people's right to participate in elections lies at the heart of contemporary democracy. The fact remains that the guarantees for "free and fair elections" vary depending on the cultural,

¹²⁰⁰ Kelly, *Monitoring Democracy* (2013) p. 26.

¹²⁰¹ Samuel Huntington and Giovanni Sartori are the proponents of the elitist theory of democracy. However, the affiliation to the elites must also be established in accordance with the democratic principles as argued by other theories of democracy.

¹²⁰² Charles Linblom and Robert Dahl are the representatives of the revisionist pluralist democracy focusing on procedural democracy.

¹²⁰³ O'Donnell, *Democratic Theory and Comparative Politics*, *Studies in Comparative International Development* vol. 36 no. 1 (2001).

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political, historical and economic differences of the states.¹²⁰⁴ However, election rights that are minimal, vaguely defined and not enforceable do not serve the purpose of democracy. Holding of elections cannot be considered sufficient for a society to be considered democratic, as it could lead to a sustainable survival of competitive authoritarianisms¹²⁰⁵, especially when the connected political rights are not sufficiently protected.

Although elections are not a synonym of democratic governance, they are the most important element when judging by the complex mosaic of the international and regional legally-binding and legally non-binding instruments and mechanisms devoted to their protection. Huge electoral assistance and election observation was provided, especially with regard to the ex-socialist countries. Nevertheless, according to the relevant international reports, the problem with rigged elections over a longer period of time persists in many countries. According to Levitsky's and Way's theory in a number of countries instead of democracy there is competitive authoritarianism.¹²⁰⁶ Although pluralist competitive elections are allowed, the election outcomes are manipulated by the political elite to remain in power.¹²⁰⁷

It is not only the emerging democracies that are struggling with observation of the election standards. The ODIHR assessments indicate a number of weaknesses in this area in the developed democracies, as well. In addition, the low election turnout, which is a wide-spread problem may not only indicate a lack of interest or information from the voters, but also a lack of public trust.¹²⁰⁸

The question arises as to the reasons behind the illegal behavior and impunity associated with the rigged elections. Although the decision-making power, access to public funds and positions are at stake for the political elites when standing for election, in a democratic society there must be clear rules about how the power is obtained and used in-between elections. This is the common standpoint of all the above-examined international and regional instruments.

¹²⁰⁴ Dixon, *International Law* (5th edition) (2005) pp. 336-335.

¹²⁰⁵ Levitsky, Way, *Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post Cold War Era* (rev. 2003) p. 7.

¹²⁰⁶ *Ibid.*

¹²⁰⁷ Howard, Roessler, *Liberalizing Electoral Outcomes in Competitive Authoritarian Regimes*, *American Political Science Review* vol. 50 no. 2 (2006). According to the authors to liberalize election outcomes, the civil society and citizens must mobilize together to create a strong opposition.

¹²⁰⁸ The fourth European Conference of Electoral Management Bodies, Council of Europe "Fighting Against Electoral Fraud – Complaints and Appeals Procedures" (2007) pp. 14, 27-41, 91-105.

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b) European perspective

Within the context of regional electoral protection, the election standards in Europe remain a controversial topic for examination and subject to many constraints. In particular, there is vast and inaccessible data,¹²⁰⁹ a divergence among the states in terms of legal, political and social culture, subjectivity in interpreting international standards, internal cultures of the examined international/regional organizations, the sovereign rights of the states, the plurality of democratic theories. While acknowledging the above constraints, the examination clearly indicates that the solutions offered by the international dimension only partially respond to the needs of the praxis, as the citizens are still unable in many European countries to freely cast their vote or stand for elections. The problem is a multidimensional one even when only external factors are examined. The realist approach requires the discussion relating to the European standards in elections be expended on the following three dimensions:

The first dimension relates to whether or not these standards lack the required precision and legal force to be binding upon the states. The previous chapters¹²¹⁰ paint the picture of the election standards found in a number of contracts and pledges at the UN and the European level. It is notable for the UN that there is no single comprehensive document setting out the election standards in greater detail, except for a provision in the ICCPR. From the interviews carried out with the CoE and OSCE officials working on elections it became clear that in their work they do not rely on UN standards, although they are taken into consideration as election standards by the OSCE.¹²¹¹

The most important election standards for Europe are dispersed in the documents of the OSCE and CoE, organizations with a larger membership than the EU. Since the electoral principles enunciated by these organizations overlap, their reflection in the specific standards mirrors each other. All three organizations robustly safeguard the requirement of legality. While the OSCE uses the ECtHR judgments and the Code of Good Practice in Electoral Matters as an auxiliary source for the specific standards, the CoE electoral bodies benefit from the ODIHR's practical field experience with respect to electoral operations and procedures.¹²¹² The above "happy situation" resulting from a mutual recognition of the

¹²⁰⁹ None of the UN election officials asked to fill-in a questionnaire replied to the request, except for a UNDP official situated in Macedonia.

¹²¹⁰ See pp. 59-189.

¹²¹¹ See OSCE/ODIHR, *Existing Commitments For Democratic Elections in OSCE Participating States* (2003).

¹²¹² *Ibid.*

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standards set by another organization is not compulsory, i.e., it has not become a norm. It rather comes in a sporadic way, on a case-by-case basis. Regarding the third organization of the electoral triumvirate -the EU, it is the only organization with all its members having a parallel membership in the CoE and the OSCE. It follows that only EU member states are bound by the electoral commitments originating from all three main sources at the European level.

Furthermore, the CoE and EU election standards are overwhelmingly conceptualized in terms of protection of individual human rights and liberties under the liberal democracy model. In the OSCE region, the onus is put on the states to organize elections in line with its commitments.

As to the content, if the legal hierarchy of the three sets of standards is ignored, the OSCE and CoE commitments may be perceived as duplication from their common member states' perspective. However, there is a difference between them¹²¹³, as it is only the CoE instruments that require free and fair elections for the local self-government units, even for non-citizens.¹²¹⁴ Furthermore, an explicit requirement for an impartial electoral administration is missing from the OSCE political commitments, although it is one of the major points of its electoral examination. On the other hand, it is only the OSCE commitments that require election observation scrutiny. Neither the OSCE nor the CoE consider a special type of electoral system as a vital precondition for "free and fair elections", dissimilar to the EU. The latter's valid election standards are contracted, and concentrate on the elections of its interest. As a ramification, in the EU there is a deepening and crystallization of the election standards, reflected to a specific electoral model (with a diapason of possibilities), an explicit upper limit of the electoral threshold and a prohibition on the accumulation of certain types of offices. The EU has also passed well-developed rules about electoral campaign funding from EU public funds. Whereas both the EU and the CoE have rules about the accumulation of functions, no such explicit rules exist in the OSCE region. For the CoE and the EU to grant election rights to non-nationals at the local level is not taboo. Finally, all three organizations rely on the generally permissible reasons for the limitation of the electoral rights, balanced under the principle of proportionality.

¹²¹³ For concrete examples in the context of projected election standards see pp. 130-135,111-202, 157-162,185-189.

¹²¹⁴ The Charter of Local-Self Government and the Convention for the Participation of Foreigners in Public Life at Local Level.

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All three organizations use instruments of a different nature. Whereas the CoE has a combination of legally and non-legally binding texts, the OSCE participating states are obliged to follow the politically-binding commitments. The EU, as a mixture of an inter-governmental and a supranational organization, varies in its approach and the policy regarding elections from the CoE and OSCE, in that its electoral pieces of legislation are legally-binding upon its members. Although the instruments are to some extent complementary, a combination of substance, a hierarchy of acts and mass electoral observations makes the OSCE political commitments more precise and demanding in practice when compared to the CoE legal norms. However, the only pan-European legally-binding provisions for legislative bodies and local self-government bodies are elaborated under the auspices of the CoE. In any case, no legally-binding document detailing the European election standards exists. The ECHR is only applied to the elections of a legislature. Even then, from the ECtHR case-law it is visible that the countries enjoy a wide margin of appreciation, which seems to confirm what has been put in the Code: the existence of different traditions when elections are at stake makes difficult application of common standards. Neither the ECHR, nor the Charter or other conventions herein provide more detail regarding common election standards. It is only the Code which offers more substance regarding the international election standards, and it is used as a comprehensive guideline for conducting elections. Nevertheless, the Code does not elaborate much about election campaign funding and media regulation.¹²¹⁵ The CoE has already developed specific electoral campaign recommendations, with a follow-up procedure, dissimilar to the OSCE.¹²¹⁶

The issue of the lack of legally-binding precise election standards gains more importance in view of the fact that a number of the CoE and OSCE countries are already bound by a convention on election standards differing from the ones set out in the CoE documents. This issue has been also emphasized in the part devoted to the OSCE and has already caused problems in practice during election observation.

In view of the above, one cannot escape the impression that the picture relating to the European election standards is rather eclectic. In particular, there is no deepening of the election standards, but a proliferation of documents and declarations devoted to them.¹²¹⁷ The

¹²¹⁵ See p.130.

¹²¹⁶ See p. 137

¹²¹⁷ Also the UN advises caution regarding establishment and proliferation of new standards.

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greatest detail in this regard is offered by the election observation reports, guidelines, decisions, judgments and views of international bodies, but they either pertain to a particular country or to a case with its specific features, or have no binding force. As stated above, the ECtHR heavily relies on the margin of appreciation and the specific historical-political context when examining election-related cases. So, on one hand, objective standards can be found in the international documents, but they are not detailed enough. On the other hand, the more detailed explanations found in international decisions pertaining to individuals or countries are colored with the particular circumstances of the case. In spite of the proposals, ideas and demands for detailed election norms at the regional level, the existing commitments remain spread out in many texts. The question arises as to whether or not the current situation creates a patchwork, or an effective frame for conducting and assessing the elections?

The answer to the above question is that the general election principles and specific standards in Europe are set out in the documents with various legal value of the European electoral triumvirate.¹²¹⁸ While reckoning the value of the above instruments for uncovering the European paradigm of “free and fair” elections, the objection that they lack detail and precision with respect to specific electoral topics is valid.

The practical problems stemming from the lack of precision and unequal legal force creates problems in using the international election observation as a tool to assess the integrity of elections. Election assessments have been seriously challenged by some states, mostly along west-east lines, because of electoral criteria not being clearly set out in the relevant reports. The recipient-state may also not put sufficient trust in the regional supervisory mechanism accusing it of the application of double standards, which as a ramification might have a loss of reputation for the international law subjects. Agreeing on precise and detailed election standards instead of offering three electoral nuances will help solve the above-mentioned inter-state problems.

The second dimension questions whether or not it is possible to define common election standards valid for all the states and European organizations and, if so, in which form. The fact remains that there are substantial economic¹²¹⁹ cultural, historical and political differences

¹²¹⁸ Council of Europe, *Building Europe together on the Rule of Law* (2006) p. 50.

¹²¹⁹ Although economic factors in the social system are considered extremely important, the examination of their impact goes beyond the scope of the Dissertation.

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between the states in Europe, in addition to the states' asymmetric powers. However, in comparison to the global level, the pro-regionalists' argument that the members of a regional organization can find a common ground easier because of their convergence in culture and tradition, should also be valid with respect to elections.

There is already an electoral convention agreed upon by the CIS countries, as well as an ACCEO proposal for the draft-convention on election standards. Nevertheless, the interviews carried out with CoE and OSCE election officials showed that in these organizations there was no willingness to accept such a convention. The reason asserted was that such a convention would lower the already existing standards. However, if the CIS countries which are CoE and OSCE members have already been legally bound by a convention with lower election standards, what are the reasons for not accepting their proposal and elaborating a more detailed CoE convention, which would be up to present standards? Such a convention could be also used for effectively bridging the gap between the East and the West, which appears to be growing wider when elections are at stake. If the polarization on "Eastern European standards" and "Western European standards" continues, the electoral gap between the two groups of states may grow even wider, resulting in two separate standards of "free and fair elections" by function of geography and political culture. Such a situation risks rendering current sets of electoral standards of the CoE and OSCE ineffective for a considerable number of countries that are still in the process of democratic consolidation.

So, the issue that arises here is not whether or not a convention on European election standards is needed, but rather whether there is a political agreement among the CoE and OSCE states, as well as the EU to arrive at such a convention. It will only be useful if it sets out detailed election standards encompassing the existing CoE, OSCE, UN and possible EU standards¹²²⁰, addressing the noticed re-occurring election irregularities and foreseeing an efficient supervisory mechanism, complementary to the existing ones. However, the fact remains that the European organizations vary in terms of their membership, goals and connectivity between their members. Election standards are seen by them through various prisms, i.e., of a deeper union, of a more secure Europe, or of a sustainable democracy and fully protected human rights.

¹²²⁰ For instance: granting election rights to non-nationals in local elections.

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According to Prof. Karakamisheva there should be a single Convention devoted to the election standards. Such a convention should contain the most important parts from the “soft law” and shall contribute towards harmonization of the European election standards. The existing differences among the states were something expected and should not cause major problems in the implementation of the election standards.¹²²¹

By contrast, one of the reasons asserted against the election standards’ convention might be found in the states’ sovereignty. The states, especially the powerful ones, might not be willing to be bound by detailed election norms, considering that such an instrument will interfere with their sovereignty.¹²²² Indeed, if there were to be negotiations for such a convention, a concerted effort of the states to lower the election standards, if legally-binding, should be expected. Such a hypothetical convention should not spell out only the major principles, if the aim is to provide added value. It should, actually go well deep in the issues like the funding of financial campaign, anti-corruption measures, the freedom of the media, impartiality of the EMBs, plurality of choice and informed voters, election operations, counting and tabulation procedures, evidence and procedure for remedying electoral irregularities, criminal law elements against impunity and maybe even giving a framework for the political parties’ and NGOs’ conduct.¹²²³ If the hypothetical convention were only a shallow agreement, because it lacks precision and (as the case may be) enforcement measures¹²²⁴, the only effect that it might produce would be to lower the existing standards. In conclusion, the argument against the election standards’ convention is not based on an assumption that the present documents are sufficiently detailed and cover all the issues, since in many instances it is difficult to persuade the governments what are the applicable election standards regarding a specific issue. Rather, the argument against the election standards’ convention is based on the nature of international law and its principles, as well as on the political argument based on the observation of the states’ behavior, when elections are at stake. In addition, the issue is burdened with the east-west division and different political outlook.

¹²²¹ Karakamisheva, *International and European Election Standards with Special Focus on the Code of the Venice Commission for Good Practice in Electoral Matters* (...) at <<http://www.pravo.org.mk>> p. 6.

¹²²² Steiner, Alston, *International Human Rights in Context, Law, Politics, Morals* (2nd edition) (2000) p. 572.

¹²²³ *Discussing International Standards for Democratic Governance, A Preliminary Research Report*, by Democracy Reporting International (2007) pp. 20-21.

¹²²⁴ Raustiala, *Form and Substance in International Agreements*, *American Political Science Review* vol. 99 no. 3 (2005).

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The ratification of a treaty might be advantageous in case a state refuses to honor the existing commitments. Still, the current mix of legally and non-legally binding standards, do influence the state behavior, although their influence might originate more from the world of politics than from the world of law. The existing mosaic of the election standards' pledges and norms at the international level do represent a solid legal framework in case there is firm political support to preserve the integrity of elections.

Taking into consideration that: 1) there are legally-binding election standards; 2) there are politically binding electoral commitments; 3) there is no shortage of electoral guidelines and recommendations; and 4) there is no momentum for negotiating a detailed legally-binding convention, the following is recommended:

First, in order to avoid a proliferation of documents in the electoral arena, which might add to more confusion, the common European election standards should take the legal form of a trilateral agreement for cooperation signed by the CoE, the OSCE and the EU. The agreement will unify and ensure coherence among the election standards of the three organizations, by providing an exhaustive list of concretely defined standards for each phase of the electoral cycle. It should be publicly promoted and made accessible in each of the states concerned. According to Kelly whereas there is a continuing debate about what a proper election means, at "operational level that is quite workable". Under this presumption, it will suffice to articulate at the international political level what the operational level has already established under the paradigm of "free and fair elections" in a legal form of an agreement.¹²²⁵ Furthermore, since the members of the three European organizations have already agreed and subscribed to certain conduct in terms of elections, the European organizations should have a *de facto* mandate to conceptualize common election standards in the form of a trilateral agreement signed among the three European organizations. A legally-binding trilateral agreement will not only clearly define European standards in the election field, but it will also set out the responsibilities, goals and forms of cooperation between the signatories.

The above-mentioned agreement will need the approval of the decision-making bodies of the three organizations in line with their internal rules. Since a problem of approval might be encountered at this level, a memorandum of understanding can be used as an alternative. This

¹²²⁵ Monitoring Democracy (2013) p. 26.

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“softer” legal instrument can be still used for articulating common European standards, which must be sufficiently precise and clear, in order to have any added value.

Whereas this agreement will not create direct rights of individuals and will not be enforceable in local courts¹²²⁶, it raises an issue about its potential direct effect in EU. Since it will be concluded by EU bodies, the agreement will become part of EU law. However, whether or not it will have direct effect it is a complex issue that warrants further examination. Looking at the conditions for direct effect of international agreements, it appears that its first condition, the provisions to be clear and precise enough, might be easily fulfilled. The second “unconditionality” condition may be also fulfilled. However, the third condition, not requiring any further implementing measures, will not be fulfilled as elections in the EU countries will continue to be governed by their respective electoral legislation, and not by the trilateral agreement. It is not and it cannot be the role of the agreement to substitute for national election legislation, and directly interfere with the electoral area, which is traditionally a prerogative of a sovereign state. Furthermore, the agreement will not be directly enforceable in the courts of the EU member states, and will not grant directly rights and responsibilities to individuals. However, the agreement will indirectly create obligations for the states belonging to all three organizations to bring their electoral legislation into compliance with the election standards stipulated in the agreement.¹²²⁷

Second, instead of focusing on an electoral convention, the European regional organizations should increase their focus on the inclusion of detailed provisions on various electoral topics in the member states’ national laws, in line with the internationally recognized election standards. The richness of comparative systems provides an additional basis to achieve this objective and provides a justification for using the regional approach¹²²⁸. Although it is not necessary to have a single system of election standards among the European organizations, their interpretation should be as consistent as possible. They should be widely disseminated not only to the political actors and state bodies, but also to the citizens. The second face of the god Janus, signals that the concerted advocacy effort might be undermined by a lack of resources and funds, lengthy and untimely procedures contributing to the loss of momentum, and a lack of opportunity for an effective follow-up in this regard. A lack of explicit mandate

¹²²⁶ See, *mutatis mutandis* Mendez, *The Legal Effects of EU Agreements* (2013) pp. 4-6.

¹²²⁷ Davies, *Understanding European Union Law* (2013) pp. 73-75.

¹²²⁸ The regional approach refers to a joint cooperation between IOs and several countries from the same region in the electoral matters.

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and the restraint coming from the principle of sovereignty of the states might also have a role to play in this regard. Recalling that the elections are a system of a vertical accountability to the citizens, respect for free and fair elections can only contribute to citizens' expression of sovereignty.

The third dimension points to the lacunae in the existing European election standards. There is an intention to improve and reform the existing OSCE, CoE and EU commitments, in a spirit of time, to keep abreast with the theoretical and technological electoral innovations (e-voting, internet) to the extent allowed by the political negotiations. In this endeavor, clear articulation of the standard of electoral outcome is missing. This standard is connected with the quality of the representative democracy. It is inconceivable that democracy will perpetuate itself indefinitely, or that it will be sustained by an invisible hand, in the absence of the pre-conditions for its very existence.

The pillars of the architecture of the meaningful representation standard have been already set in a theoretical thought and in the internationally recognized standards. According to Lijphart, a low voter turnout signals political inequality and uninterested voters.¹²²⁹ The conversation should not be limited to informed and educated voters, but should open up to the quality of the political options. If there is a monopolization of political life, with no new ideas and solutions offered to the voters, a low turnout will be a proof of that. Therefore, it is important to maintain the relationship of supervision and accountability between the voters and the elected elite.¹²³⁰ The electoral system cannot be limited to the "winner takes all"¹²³¹, thus not leaving much space to the opposition¹²³² or the citizens. An election cannot be considered a goal in and on itself, but a means to empower people through their expended representation.¹²³³ Last, but not least, the meaningful representation standard should articulate already existing obligations for the political representation of disadvantaged groups.¹²³⁴

¹²²⁹ Lijphart, *Patterns of Democracy* (Serbian translation, published by Sluzbeni List CG Beograd) (1999) pp. 269-272. See Gallagher, Laver, Mair, *Representative Government in Modern Europe* (fifth edition) (2011) p. 127.

¹²³⁰ Lijphart, *Patterns of Democracy* (Serbian translation, published by Sluzbeni List CG Beograd) (1999); 273-275, OSCE commitments: Paris Charter 1990; Beetham, *Defining and Measuring Democracy* (1994) pp. 89, 93.

¹²³¹ Lijphart, *Patterns of Democracy* (Serbian translation, published by Sluzbeni List CG Beograd) (1999) p. 275.

¹²³² Kelly, *Monitoring Democracy* (2013) p. 142

¹²³³ Beetham, *Defining and Measuring Democracy* (1994) pp. 70, 116, 127.

¹²³⁴ Article 7 of CEDAW, Article 5 (c) of CERD, Protocol 12 of ECHR. For minorities see also OSCE/CoE, *National Minority Standards* (2007).

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Since the general ideas expressed through the meaningful representation standard are omnipresent, the practical arrangements to observe such a standard vary from state to state depending on their realities. Some states have put in place compulsory voting, other states have legislative or party arrangements for a representation of women and minorities, or use referendums and public debates for a verification of their policies, or give a possibility to recall elected representatives.

The more recent changes requiring a balance between the political elites and the voters, between the sexes, between the majority and the minority need a legal reflection at the European level. Articulating a standard of a meaningful representation in the “free and fair” paradigm will mirror those changes in the legal sphere.

If there is a lack of standards by which all the subject of international law are measured, the only guarantee against arbitrary decisions, driven by the state interests of the decision-making states are to be found in the world three of Karl Popper¹²³⁵, i.e., in the world of the ideas. The formula for measuring internal democracy of an international or regional organization cannot only be a simple sum of the number of its member states considered democratic, as suggested by Pevehose¹²³⁶. In the world nowadays, it cannot be expected that democratic states or organizations intuitively always act in accordance with the morality and justice at the international level, even when the respective action is not complementary to the defined national interests. Therefore, some constraints must exist at the international level, which in case of elections should be articulated in a form of specific common election standards.

c) Ensuring Synergy in the European electoral assistance

The cooperation and coordination among various election support bodies are mentioned, as they represent a key to the effective electoral assistance. They allow for a better use of the resources and provide a bigger leverage in the dialogue with the government(s). Indeed, the examined bodies use various forms to enhance their cooperation mostly at the highest level. However, a strengthened cooperation at the technical and field level will also contribute towards more effective individualized election support according to the country’s needs.

¹²³⁵ Popper, *Unended Quest: An Intellectual Autobiography* (Macedonian translation, published by Magor) (1999).

¹²³⁶ The higher the democratic density of an international organization, i.e., its member states the more likely liberalization requirements will exist and be enforced. Pevehose, *With a Little Help from my Friends? Regional Organizations and the Consolidation of Democracy*, *American Political Science Review* vol. 46 no. 3 (2002).

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A specialized international body mandated with ensuring a meaningful follow-up for remedying the detected electoral weaknesses will represent a solution to the problem. However, the weaknesses noted before and unnecessary expenditure must be avoided, in order to avoid creating just another labyrinth of international bureaucracy.¹²³⁷

Such a body should be established in the form of a coordinative secretariat, under the principles of impartiality, professionalism and equitable representation. The above-mentioned trilateral agreement may also include a chapter on the establishment and duties of the coordinative secretariat. This body should be clearly mandated to ensure the follow-up to the election actions instigated by OSCE, CoE and EU regarding a particular country. So, its efforts should not only be focused on making the assessments and recommendations, but on effective manners and procedures to change the states' behaviour in the elections' arena.

In order to fulfil its mandate related to effective electoral reform, the coordinative secretariat should be equipped with the following powers: 1) Fact-finding powers, meaning that it will have access to any type of information either oral or in writing that it deems necessary for whichever country; 2) The ability to receive information and grievances from political parties and NGOs; and 3) The power to issue warnings to the state concerned and public warnings, as well as to propose to the CoE and OSCE political bodies to sanction the state concerned, in accordance with their own rules. However, such a proposal should come only when the state ignores the repeated warnings in relation to serious electoral defects.

These powers are important for a prompt, systematic and flexible response to the election irregularities, in order they to be remedied in the on-going elections. Further, the proposed body could be used as an advisory body for the states when they wish to conduct an electoral reform, as well as for the international organizations when they do their planning for election support.

The coordinative secretariat should keep a single public repository, containing information from the relevant election support bodies, accessible to all organizations and states. The repository will contribute to the improved post electoral coordination and cooperation. In

¹²³⁷ For international organizations as bureaucracies that can be controlled to varying degrees by their political masters, see Hawkins, Lake, Nielson, Tierney, *Delegations and Agency in International Organizations*, Cambridge University Press (2006).

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particular, such a database will have all the reports, assessments, recommendations projects, judgments/decisions, opinions and the reform attempts pertaining to a particular country in a given period of time. It will enable an exchange of information and can be used as an effective tool for planning of projects, resources and expertise, and for ensuring a consistent interpretation and application of the election standards. In addition, the inclusion of the demand side in both the decision-making and the offered expertise will have beneficial effects on the electoral assistance. In consequence, the efforts should no longer be focused only on making the assessments and recommendations, but also on effective manners and procedures to change the states' behavior in the elections' arena. The follow up to recommendations will be done in a structural and consistent manner instead on an *ad hoc* basis.¹²³⁸

In order to avoid any duplication of resources and efforts, the secretariat may be placed either within the OSCE/ODIHR, or within the CoE in view of their geographical mandates. In the interviews carried out with the CoE and the OSCE election officials, they agreed that their organizations had to have wider competencies with respect to elections for more effective electoral assistance. It is recommended that the proposed coordinative secretariat be placed under the auspices of the OSCE/ODIHR because of the following reasons: 1) If the body is set up under the CoE auspices, it may have to deal with non-CoE member states, therefore it may risk a lack of mandate; 2) It is the OSCE/ODIHR that has the overall responsibility for election observation in Europe. This body has already created a database of the practice, theory and shortcomings in the electoral area of the OSCE participating states. For its part, the CoE sends only small election observation missions under the auspices of the OSCE/ODIHR; 3) The OSCE/ODIHR has an overall mandate to observe and assist the states in all types of elections, unlike CoE where different bodies are each in charge with a specific type of elections; 4) Whereas the OSCE/ODIHR has technical electoral experts who continuously work on election issues, in CoE election observation is done by politicians, and legislative support by experts – members of its bodies, on *ad hoc* basis; 5) The OSCE has greater election-related capacity in comparison to the CoE, as it not only observes elections, but also conducts, organizes and facilitates election process in conflict regions. It also has field missions whose presence and experience represent a valuable contribution to electoral reforms of the countries where they have been placed; and 6) The secretariat will build on

¹²³⁸ In the interviews carried out with the CoE and the OSCE election officials, they agreed that their organizations had to have wider competencies with respect to elections.

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already existing experience, knowledge and resources of the OSCE/ODIHR, thus cutting its costs.

The coordinative secretariat should have a steering committee with permanent members from the OSCE/ODIHR, OSCE/PA, CoE VC, ECtHR, CoE/CLRAE, CoE PA and EU/EP. It may also have temporary members such as from the UN election bodies and representatives from the particular states where election reform is on-going as a follow-up to the CoE and the OSCE/ODIHR recommendations, as well as from the donor states. The steering committee will have decision-making power. It will define general policy and give directions for the work of the coordinative secretariat.

The drawback of establishing a coordinative secretariat within the OSCE/ODIHR is in its cost, as it will require more money from the taxpayers. Therefore, the states might not be willing to pay for yet another body mandated to assist them with their electoral reform. However, the states are willing to pay for electoral observation, for monitoring of their electoral campaign financing and still continue to violate the European election standards. From that view point, it looks like the overall costs of establishing such a body will be lesser than the cost of persisting violations of election standards, which frustrates the purpose of election observation and providing recommendations for electoral reform.

d) Implications of the Comparative Study

This analysis departs from the premise that the countries (as electoral units) are the main actors, which safeguard the paradigm of “free and fair elections” in Europe. If any of the countries from the sample were to assess its electoral theory and practice for a compliance with the European election standards, it would have faced the same dilemma:

-Which tools to use for such an exercise?

The states have at their disposal election standards developed by the OSCE, the CoE, or even the EU, as measuring tools of electoral quality. However, the state will first have to decide which organization to consider more credible in order to avoid a triple electoral assessment. If it decides that it is a waste of time to assess and re-assess its electoral theory and practice by different sets of tools coming from various European organizations, it may well decide to use European election standards developed under one of the European organizations.

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If the state decides to utilize the CoE electoral tools, considering them more credible because of their legal value, it will have to decide which set of the CoE electoral keys opens the magical paradigm of “free and fair elections”. As demonstrated above, the CoE election standards encompass a number of different election standards that vary in terms of legal value, specific topic and acceptance by the states. However, when they are examined separately, the results show various lacunae in all sets of the election standards valid for Europe.¹²³⁹

The OSCE compilation of election standards from its various documents¹²⁴⁰ also contains gaps vis-a-vis the “free and fair elections” paradigm. For instance, the OSCE core election standards do not encompass the independence and impartiality of the EMBs. Thus, vital elements of the electoral measurement may be lacking, if the state is not willing to accept the dispersed OSCE interpretative standards from the secondary sources.

If the state is an EU member, it may select to follow only the EU election standards, which are narrow in the sense that they regulate only a certain type of election, or of an electoral segment.¹²⁴¹

To sum-up, even if the state has the best intention to abide by the European standards in the electoral field, it will encounter many difficulties in developing legislation and practice consistent with the European election standards.

The results of the comparative study in light of the hypothesis show that the conceptualized single set of the European standards helps avoid confusion, contradictory interpretations and lacunae, which exist in the current European standards in the election field. Such a common denominator of “free and fair elections” will enable the states to avoid a selective and partial approach towards their electoral legislation and practice. However, it should be acknowledged that a future “standardization process” entails a risk of interference with already well-established election standards. It is this risk precisely, which mitigates against adoption of a comprehensive legally-binding treaty, with an explicit enforcement value. If a

¹²³⁹ See pp. 74-143.

¹²⁴⁰ See pp. 157-162.

¹²⁴¹ See pp 185-189.

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trilateral agreement is foreseen as a form for the common denominator of “free and fair elections”, the above-mentioned risk might be mitigated by way of discussions with the states, their greater inclusion in the process and preliminary agreements among the CoE, EU and OSCE. Any potential “unwanted” effects of the agreement or objections by the states may be discussed, addressed and resolved at this stage. Solutions to the risks and potential unwanted effects uttered by the states may become part of the agreement itself. For example, the proposed agreement may stipulate that it will not produce direct effect in the EU, albeit a part of the EU law.

Another risk is entailed in the process of inclusion of new standards at the European level. Such new standards could be included in the trilateral agreement, but the states might object to the process, if they perceive it as an unbalanced exercise. At any rate, an existing trilateral agreement among the European organizations, which includes a new electoral standard will already represent a powerful tool to advocate for new election standards that might be derived from national legislation.

As to the proposed standard of a meaningful representation in political decision-making, the examination shows that it has its roots deeply planted in democratic theories.¹²⁴² In addition, some of its segments are already clearly defined in the electoral legislation of France, Slovenia, Belgium and the UK.¹²⁴³ Its inclusion in the European standards will equal an inclusion of an agent of positive change, affecting not only the mechanics of the electoral process, but going deeply in the spirit of democratic commitment and its sustainability.

The trilateral agreement mentioned above should contain all the elements of “free and fair elections” conceptualized and proposed in the Dissertation,¹²⁴⁴ minus the meaningful representation standard,¹²⁴⁵ if it to be of any value for the states. There are multiple reasons in favour of such a proposal. All elements that make the European election standards are in one way or another already valid for the European continent. They have already been agreed upon by the states. Therefore, it makes no sense to start re-negotiating the same electoral standards. Evenmore so, such a process entails a risk of lowering the existing European standards. The

¹²⁴² See pp. 260-261.

¹²⁴³ On its various particles see pp. 217-220.

¹²⁴⁴ See pp. 217-220.

¹²⁴⁵ The minimal threshold of “free and fair elections” standard in Europe, may not embody the meaningful representation standard, as it has not been accepted (as such) by any of the three European organizations.

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main aim for the conceptualization of European standards in the election field is not just to produce a simple inventory, but to craft a tool that can be effectively used by the states while undertaking electoral reform and implementing election standards. Clearly spelling out the conceptualized standards for “free and fair elections” in a single document, signed by all organizations that have developed them (with their members’ consent), will help avoid future disputes about the meaning and interpretation of those standards. In addition, these standards are valid, have been already used and continue to be used in election observation and in the election legislation reforms.

In view of the fact that certain elections take place right after a conflict or in a tense security situation, the agreement may foresee an exception to some election standards for security and safety reasons. Such an exception, as invoked by a state, should be examined on case-by-case basis by a European body that should have the power to decide whether or not such an exception is legitimate or not before elections take place. As an example, the conceptualized election standards foresee a repetition of elections, whenever they have been annulled. However, an exception to this rule is legitimate when repeated voting poses a threat to the security of the people, provided that the outcome of those elections would not have any impact on the overall results. Similarly, the counting might be better done in a counting centre with the results publicized there, if counting in the polling stations represents too high a security risk. The counting should be done only in presence of accredited observers, if transparency poses security risks for the operation. Furthermore, whereas the five years election interval might be prolonged in case of public emergency, the period of prolongation should be legitimized with the coordinative secretariat.

Any security and safety exceptions must be compiled and made public. The coordinative secretariat (whose establishment is proposed in the Dissertation) is the best-placed body to deal with the cases where extenuating circumstances that may lower election standards exist. Primarily, because no other body has such *ex-ante* power. Secondly, the proposed secretariat is conceived as a cross-organizational body, mandated with the observance of common European standards. On one hand, the above-proposed solution will provide sufficient flexibility to address any state-specific security and political concerns. On the other hand, it will act as a watchdog against lowering the European “free and fair elections” standard.

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The results from the research show that all states from the sample have been invited at the inter-governmental level to remedy different aspect of their elections. Despite the fact that some of the states have received considerable attention by the international bodies mandated to propagate “free and fair elections”, the pace of the implementation of the recommendations has been very slow.¹²⁴⁶ On one hand, it does not appear that the lack of resources and funds was ever invoked as an excuse.¹²⁴⁷ On the other hand, historico-geographic factors and cultural divergence have been used as an excuse for not bringing the legislation up to compliance with the regional election standards.¹²⁴⁸

In a reply to the states’ sovereignty argument, it is reiterated that the election standard of “free and fair elections” in Europe conceptualized above¹²⁴⁹ contains what has already been agreed upon by the states at the European level. Even for the newly proposed standard of a meaningful representation, the bases have been laid down, previously.¹²⁵⁰ Therefore, the states should take legislative, judicial, administrative and other measures to translate the conceptualized election standards into electoral practice for all types of elections. The primary focus of the conceptualized election standards is on how to enable a free expression of the will of people -which represents the basis of sovereignty. The conceptualized election standards thus leave room to the states to elect their electoral system, electoral threshold, forms and procedures for various legal remedies, the types of financial and media supervision, conditions for exercising election rights, minorities’ representation, sentencing policy as long as they fall within the scope of the standards agreed upon at the European level. The conceptualized election standards do not propose a single electoral model or a single electoral solution ready-made for all. That would be impossible in view of the diversity of conditions in which elections take place in Europe. However, elections that are enabling free expression of the will of people as the basis of sovereignty can take place only when certain principles and conditions are present. Those principles and conditions have been spelt out in the conceptualized election standards proposed in the Dissertation.

¹²⁴⁶ See pp. 210, 213, 214.

¹²⁴⁷ Just as an illustration, in Macedonia in 2010, the SEC Secretariat had 100 permanent employees, whereas in Slovenia, a similar sized country, the SEC Secretariat had only 5 permanent employees.

¹²⁴⁸ For example, in Macedonia, tradition has been invoked to justify family voting.

¹²⁴⁹ See pp. 189-197.

¹²⁵⁰ For more on this please see pp. 80, 81.

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As to the second limb of the Hypothesis, a European body specialized in electoral reform might prove a useful tool with respect to all countries from the sample, because of the following reasons:

The coordinative secretariat mentioned-above will ensure greater leverage for the regional organizations to inspire the states to implement the recommendations given by various European bodies. Furthermore, it may provide an electoral reform roadmap for the states by assembling the puzzle of recommendations and judgments issued in their case. It will also provide a consistent interpretation of the election standards. Thereby, a partial and slow process of electoral reform will be replaced by a holistic and intensive process. Such an approach will ban the states from (ab)using electoral reform and amending some parts of the legislation contrary to the European election standards, while implementing few recommendations. Still, the electoral assistance must always be provided in balance with the states' sovereignty. Therefore, a key to a success of the proposed specialized election follow-up body would be its impartiality, dedication and commitment of its members to "free and fair elections" in compliance with the international electoral standards.

To conclude, European election standards set out in a trilateral agreement will define the threshold for the states of what should be accepted as "free and fair elections". Effective assistance for electoral reform based on an individualized approach for each of the states requires the use of a holistic method by future specialized coordinative secretariat under the auspices of the OSCE/ODIHR. Finally, acceptance of the election standards for each part of the cycle as part of the political and legal culture of the states should be the end result of such an exercise

ANNEX I – ODIHR ELECTION OBSERVATION (1995-2012)

Year	Participating States¹²⁵¹	Trend of irregularities
1995	Azerbaijan-EOM	family/multiple voting; restrict. campaigning & media; count irreg.; breach of voters' rights, freedom of express. & assembly
1996	Albania-EOM; Armenia-EOM; B&H-monitoring; Bg-EOM; MK-EOM; Lithuania-EOM; Moldova-EOM; Romania-EOM; Russia-EOM	law violated; not transparent funding; police intimidation; restrict. campaign.; freedom of assembly breach; restrict. observers; police intimidation; biased media; proxy&family voting; tabulat./count irregular.; viol. of right to vote; irregular. absentee voting; restricted media access; VL inaccurate; flawed admin. of elections; gmnt. interfere.; ED procedures flawed; no effective remedy; breach secrecy of vote; flawed laws
1997	Albania-EOM; B&H-EOM; Bg-EOM; Croatia-EOM; Montenegro-EOM; Serbia-EOM	election process flawed; unclear laws; media bias& restrict.; dom. observers excluded; intimidation; VL inaccurate; counting irregularities; family voting; candidacy restriction; partial EMBs
1998	Albania-EOM; Armenia-EOM; Azerbaijan-EOM; B&H-EOM; Czech Rep.-EOM; MK-EOM; Hungary-EOM; Latvia-EOM; Moldova-EOM; Montenegro-EOM; Slovakia-EOM; Ukraine-EOM	unclear& flawed laws; VL inaccurate; no effective remedy; ballot box stuffing; candidacy restriction; no transparency; breach of freedom of assembly&association.; delayed results; restricted & biased media; partial EMBs; gmnt. interf.; electi. proced. violated; intimid.; violence; late passage of laws; observers' restriction
1999	Armenia-EOM; Estonia-EOM, MK-EOM; Georgia-EOM; Russia-EOM; Slovakia-EOM; Ukraine-EOM	VL inaccurate; EMBs& media bias; interference PP ¹²⁵² ; flawed laws; inconsist. implement.; restricted&non-transparent camp.; state resources misuse; proxy voting; no secret vote; tabulation proc breach.; observers restrict; intimidation; breach freedom of assembly, express.&ass.; lack of transparency & accountab.; no effect. remedy; restr.competit.&candidacy; breach ED procedures; gmnt. influence; opp. suppres.; violence; ballot stuffing
2000	Albania-EOM; Belarus-technical; Croatia-EOM; MK-EOM; Georgia-EOM; Kyrgyzstan-EOM; Montenegro-EOM; Romania-EOM; Russia; Serbia-EOM	limited campaigning; media restr.&bias; violence; breach election proced.; tabulation/counting not transpar. & manipulated; results delayed; partial EMBs; restr. candid.; breach of freedom of ass., assembly& express.; irregul. ED ¹²⁵³ proced.; breach minor. rights; VL inaccurate; influence PP; gmnt. interf.; observ. restriction; suppressed opp.; misuse state resources; unclear laws & inconsis. interpretation; non-transparent funding; proxy&family voting
2001	Albania-EOM; Azerbaijan-EOM; Belarus-LEOM; Bg-EOM; Croatia-EOM; Moldova-EOM; Montenegro-EOM	restrict. & bias media; tabul. /count. irreg.; underrep. minor.; restrict observers; opp. suppressed; flawed laws; campaign restriction; intimidation.; limit. observers; gmnt. interference; delayed published results; voting irregu.; police pressure; no effective remedy; law not implem.; no posting of results at PS ¹²⁵⁴
2002	B&H-EOM; Czech Rep.-limited; MK-EOM; France-EAM; Hungary-EOM; Latvia-LEOM; Montenegro-EOM; Serbia-EOM; Slovakia-LEOM; Turkey-EAM; Ukraine-EOM	restrict. on pol. parties and candidacy; no effective remedy; media bias; campaign restrictions; flawed laws; inconsist. appl.; breach elect. proced; biased EMBs lack competence; tabul. irreg.; restrict. observers; police intimid.; breach of secrecy; gmnt. interfere.; campaign not transparent; min. rights not respected; violence
2003	Albania-EOM; Armenia-EOM; Azerbaijan-EOM; Croatia-LEOM; Estonia-NAM; Georgia-EOM; Moldova-EOM; Montenegro-EOM; Russia-EOM; Serbia-EOM; UK-EAM	breach secrecy of vote; restrict. observers; intimidation; restriction. candidacy& opposition; no effective remedy; count./ tabul. irregul.; breach freedom assembly; violence; inaccurate VL; oppos. suppressed; non implem. of law; ballot box stuffing; media biased&restricted; flawed laws; minority rights breached; delayed publish. results; multiple voting; partial EMBs; campaign financing not transparent; impunity; misuse of state resources; police intimidation.; breach freedom of ass.; ED proced. irreg.
2004	Albania-EOM; Belarus-EOM;	legal deficiency; inaccurate VL; counting irreg.; misuse of admin.

¹²⁵¹ Countries are included in the Table which, although not belonging to Europe geographically, have also consented to the OSCE European standards.

¹²⁵² PP-political parties.

¹²⁵³ Election Day.

¹²⁵⁴ Polling Station.

	B&H-EOM; Georgia-EOM; Mk-EOM; Romania-EOM; Russia-EOM; Serbia-EOM; Slovak.-EOM; Spain-AM ¹²⁵⁵ ; Ukraine-EOM	resources; group and family voting; biased media; irreg. in elector. procedures; biased EMBs; suppression of opposition; improper implementation; lack of media access; results not transparent; lack of adequate and proper remedies.
2005	Albania-EOM; Armenia-EOM; Azerbaijan-EOM; Bg-EAM; MK-EOM; Moldova-EOM; UK-EAM	interfere. by biggest PP or gmnt.; viol. of right to vote; financing not transparent; campaign restrict.; police intimid.; e-voting integrity breach; no effect. remedy; breach voting proced.; family & proxy voting; irregu. tabul/count; elect. fraud; breach secrecy of vote; limited. observers; impunity; intimid&exclus. of opposit.; state resources misuse; restrict. media; inaccur. VL; restr. opp.; no effective remedy; impunity; non-equal vote; violence; count irreg.; underrepresented Roma and women; non-transparent EMBs; media bias
2006	Azerbaijan-LEOM; Belarus-EOM; Belgium-expert study; B&H-EOM; Bg-EOM; MK-EOM; Georgia-EOM; Italy-EAM; Latvia-LEOM; Montenegro-EOM; Netherlands-EAM; Ukraine-EOM	restrictions on observers; restrictions right to vote for prisoners; discriminatory. practices; no effective remedy; EMBs incompet. & partial; tabulation /counting irregular.; late amendments; big restrict. on funding; Roma & min. voters' rights breached; vote buying; opposition suppressed; intimidation; breach of freedom of ass., assembly&express.; no effective remedy; inaccurate VL; pressure on voters; breach secrecy of vote; gmnt. interference; breach of ED procedures; flawed laws; biased media; proxy, family, multiple voting; integrity e-voting; PP interfere.; gender represent. low; restrict. on candidacy; non-transparent funding
2007	Albania-EOM; Armenia-EOM; Belgium-EAM; Croatia-LEAM; Estonia-EAM; Finland-NAM; France-EAM; Ireland-EAM; Moldova-EOM; Poland-EAM; Serbia-EOM; Switzerland-EAM; Turkey-EAM; Ukraine-EOM	limitation of candidats pol. parties influence; not even 1 chamber elected by popular vote; breach of freedom of ass.&assembly; irreg. e-vote; fraud; delayed publication of results; group&family voting; laws unclear&flawed; media bias&limited access; misuse state assets; universal suffrage restrict.; observers limited access; inequality of vote; restrict. media; partial & incompetent EMBs; lack of secrecy; election results inaccurate; minority & women particip. not sufficient; no effective remedy; no effect. media monitoring; gmnt. interference.; impunity; intimidation; non-transparent&unlimited financing; breach ED procedures; VL inaccurate; breach voters' rights; restricted opp.; breach secrecy of vote; family&proxy voting; opposition. suppr.
2008	Armenia-EOM; Azerbaijan-EOM; B&H-NAM; Belarus-EOM, MK-EOM; Georgia-EOM; Italy-EAM; Montenegro-EOM; Serbia-LEOM ¹²⁵⁶ ; Spain-EAM	irreg. tabulation/count; biggest PP & gmnt. influence; partial EMBs&media; state resources misuse; fraud; no effect. remedy; breach of freedom express., ass. & assembly; unclear&flawed laws; limited access to media; group&family voting; selective prosecution; improper law implementation; undefined competence; inaccurate VL; violence; no transparent funding; unequal access to media; no media monitor; discriminatory practice.; gmnt. interfere.; media bias; campaign restr.; voters pressured; results not properly published; multiple voting; ballot box stuffing; opposition suppressed.; secrecy of vote; minority rights not respected; restrictions on observers
2009	Albania-EOM; BG-LEOM; EU-Exploratory; MK-EOM; Iceland-NAM; Lithuania-NAM; Liechtenstein-NAM; Moldova-EOM; Montenegro-EOM; Portugal-NAM;	unclear laws; late amendments; inconsistent application; EMBs not transparent, depend. & incompetent; inaccurate VL; pre-campaign activities not regulated; no transparent funding; vote buying; pressure on voters & regulatory bodies; tabulation/count irregular.; delayed criminal prosecution; limited access to media; low no. female candidates; family voting; no effective remedy; unequal campaigning; breach of freedom of assembly; unequal vote; observers. restricted; underrepresented minorities; absentee voting irregularities
2010	Croatia-LEOM, Greece, Hungary-	inaccurate VL; legislation deficiencies; electoral campaign

¹²⁵⁵ Assessment Mission.

¹²⁵⁶ Limited election observation mission.

Annexes

	EAM, Austria-NEAM, Belarus, UK-NAM, Czech-NAM, Iceland, Georgia-EOM, Netherlands-NAM, Slovakia-NAM, Belgium, Poland, Hungary-NAM, Moldova, Sweden-NAM, Latvia-NAM, B&H-EOM, Ukraine-EOM, Azerbaijan-NAM, Moldova-EOM	financing concerns; lack of effective remedy; proxy voting; one party domination; unequal opportunities for all electoral competitors; biased and restricted media; biased EMBs; women underrepresented; low level of public confidence; impunity
2011	Croatia –LEOM; Russia-EOM; Slovenia-EAM; Spain-EAM; Bulgaria-LEOM; Switzerland-EAM; Latvia-LEOM; MK-EOM; Moldova-EOM; Turkey EAM; Norway-expert team; Estonia-EAM; Finland-EAM; Albania-EAM; Cyprus-EAM	secrecy of vote not secured; inaccurate VL; legislation deficiencies; lack of effective remedies; unequal opportunities for all electoral competitors; biased media; biased EMBs; no legal right for election observation, insufficient sanctions; results not posted in front of PS and not sufficiently public; insufficient monitoring and reporting of electoral expenses; lack of freedom of expression; women underrepresented; insufficient inclusion of Roma
2012	Russia-EOM; Armenia-EOM; Greece-EAM; Serbia-LEOM; France-EAM; Netherlands-EAM; Belarus-EOM; Romania-expert team; Ukraine-EOM; Montenegro-LEOM	VL deficiencies; women and minorities underrepresented; lack of timely remedies; a lack of environment conducive to free media; insufficient sanctioning and investigative powers; insufficient accountability and transparency regarding election campaign

ANNEX II – DISAGGREGATED DATA PER COUNTRY

CF = campaign financing irregularities	CFR = campaign financing reporting problem
CNR = candidates' nomination restrictions	CTI = non transparent and problematic counting and tallying of results
EC = restricted electoral campaign	I = impunity
II = improper implementation of law	IC = intimidation of candidates
IV = intimidation of voters	LD = legislative deficiency
LR = inadequate and ineffective legal remedies	MA = unequal access to media
MAR = misuse of administrative resources	MB = media biased reporting
PDEMBs = partial and dependent EMBs	PI = police intimidation
PM = inadequate inclusion of minorities	PR = lack of publishing of results
PSA = access to PS	PP = lack of public or accurate protocols
PW = low participation of women	RO = restrictions on election observation
RVR = restricted voting rights	VI = vote inequality
VER = violation of election rights (family, proxy, multiple and group voting, ballot boxes staffing, ballots tampering, vote buying)	VL = voters' list incomplete/ inaccurate
VPI = voting procedures irregularities	UV = breach of universality of vote

Participating state ¹²⁵⁷	Year	Problems detected
Albania	1996	II; VL; RO; PI, MA; MB; PDEMBs; VPI; VER; PP; CTI
	1997	VL; CTI; IC; IV
	2000	LD; MA; LR; VPI; VL
	2001	VER; PDEMBs; MB; PI; PW; IC; IV
	2003 and 2004	LD; VL; VER; I; PSA; MA; PW
	2005	IV; IC; MAR; VER; II; I; PDEMBs; RO; VL; MB; LR; PW; PM
	2007	IC; IV; II; CFR; PDEMBs; VL; I; MB; LR; PW; PM; RO; CTI
	2009	IC; IV; CFR; CTI; II; PDEMBs; I; RO; VL, MB; LR; PW; PM
	2011	IC; IV; CFR; CTI; II; PDEMBs; I; VL; MB; LR; PM; VER; CNR
2013	Report not yet published	
Andorra	2011-NAM ¹²⁵⁸	CFR, VI, RO
Armenia	1996	PI, IV, CTI, PDEMBs, MB
	1998	LD; VI; CI; PDEMBs; RO; MB

¹²⁵⁷ ODIHR election observation and assessment. The participating states have been selected on the basis of their CoE membership. The focus is on the type of irregularities, and no distinction is made between the types of election.

¹²⁵⁸ Needs assessment mission.

	1999	LD; I; IV; IC; LR; PDEMBs; VL; CTI
	2003 (2 reports)	VER; I; MB; IV; PR; RO; LD; LR; VL; PSA
	2007	LD; I; LR; PDEMBs; MB; VI; PW; VER; MB; VL; PR; MAR; ECR; EC; CF
	2008	IV; VER; RVR; VL; PDEMBs; MAR; MA; MB LR; CFR; PSA; VPI
	2012	VER; I; II; VL; LER; PW; PSA; UV; CFR; EC
	2013	I; UV; VL; LD; CF; MB; LR; RO; PSA; VER; MAR
Austria	2009-expert report	LD
	2010	VPI; LD; RO; LR
	2013	Report not yet published
Azerbaijan	1995	EC; VER; MB; RO; VPI; CTI; CNR
	1998	LD; PDEMBs; II; VL; MAR; RO; MB; VER; EC
	2000 and 2001	PDEMBs; LD; I; PR; LR; VL; MAR; MB; RO; VPI; VER
	2003	VER; I; IC; PI; PDEMBs; LR; PW; BM; EC
	2005	PDEMBs; LR; IC; VL; CTI; PW; VER
	2006	IV; RO; PDEMBs; LR; MB; VPI; VER; CTI; PSA; MA
	2008	LD, PDEMBs; VL; CNR; EC; MB; LR; VER; MA
	2010	CNR; PDEMBs; MB; CTI; VER; LR; PW; VI
Belarus	2001	LD; LR; PDEMBs; IC; MA; VL; VPI; RO
	2004	CF; CTI; LD; II; CNR; IV; PDEMBs; MB; MA
	2006	LD; I; IV; IC; PDEMBs; VPI; VL; EC; CF
	2008	EC; LD; PDEMBs; CNR; MB; LR; VPI
	2010	PDEMBs; EC; IC; LD; MB; VL; CF; RO LR; CTI
	2012	PDEMBs; LR; CNI; CTI; VL; IC; LD; II; RO
Belgium	2007	VPI (E-vote)
	2006	VPI (E-vote)
B&H	1996	CTI; LR; IC; IV
	1997 (2 reports)	VL; PR; VER; MA; MB; LR; LD; VPI; CNR; CFR
	1998	VL; LD; PR; VPR
	2002	LD; MP; LR; VL
	2004	I; LD; PR
	2006	CNI; EC; CTI; PW
	2008-NAM	No particular concerns
	2010	I, MB; PW; VER; CFR
Bulgaria	1997	LD; VL; CNR; CF
	2001	PM; VER; VPI; CF
	2005	LD; EC; VER; VPI
	2006	LD; PDEMBs; VL; VER; CTI; EC
	2009	VER; LD; I; MA; LR; PM
	2011	I; LD; EC; PDEMBs; VL; IV; LR; CTI; PM
	2013	VL; VER; PM; LR; UV
Croatia	1997 (2 reports)	LD; VER; II; VI; RO; VL; MA; IC; IV; EC; PDEMBs; MB; PI; MAR
	2000	UV; VPI; PM; VL; LD; MB; LR; VER; PSA
	2001	LD; LR; PM; PDEMBs; MB; VER; CFR; CNI
	2003	LD; I; MP; VPI; CTI; MB
	2007	LD; II; CFR; MB
	2009-2010	VL; EC; LD; I; CFR; LR
	2011	LD; VL
Cyprus	2001 - expert report	No particular concerns
	2011	PW; LD; CF
	2013	PW; CF; LD
Czech Rep.	1998	LD

	2002	RO; LD; VL; II; LR; MA
	2009 –(2 reports)	LD, CNR
	2010-NAM	CF
	2013	CNR; VL; CFR; LR; I; RO; VPI
Denmark	2009	LD; CFR
	2011-NAM	LD; LR; MA
Estonia	1999	CNR
	2003-NAM	MP
	2007	EC; MP; VPI (e-vote)
	2009	CNR
	2011	MP; MAR; EC; CFR; PL; PW
Finland	2007-NAM	CFR
	2011	CNR; LR; VI; MA
	2012-NAM	CNR; LR
France	2002	MP; RO
	2007	LD; VPI; VL
	2012 (2 reports – NAM)	LR; VPI; LD
Georgia	1999	LD; VI; VL; PDEMBs; II; CF; CNR; IV; IC; VPI; PR; LR
	2000	MAR; LD; PDEMBs; VL; CNR; MA; MB; PI; VER; CTI
	2003	VER; VL; MAR; MA; MB; PDEMBs; VPI; CTI
	2004 (2 reports)	VER; VL; MAR; MA; MB; PDEMBs; VPI; CTI; LR; IO
	2006	MAR; LD; LR; VL; VPI; CTI
	2008 (2 reports)	IC; MAR; CTI; PDEMBs; VL; LD; PW; MB; MA; VER; VPI; LR
	2010	LD; VI; CNR; RVR; VL; IC; MAR; MA; MB; LD; VER; CTI; PW
	2012	EC; IV; IC; LD; VI; LR; VL; II; RO
	2013 (interim report)	No assessment
Germany	2009 (2 reports)	LR; LD; CFR; RO
Greece	2009 (2 reports)	PW; VER; VPI; RO; CNR
	2012	RO; CNR; VL; PW; IMA; CF; CFR
Hungary	1998	LD
	2002	PDEMBs; II; CNR; MB; MA; CFR; LR; PM
	2010	VI; VER; PM; CNR; CFR; CF
Iceland	2009	LD; VI
	2013-NAM	RO; VI; LD
Ireland	2007	CF; EC; VL; RO
	2009-EP	No particular concerns
	2011-NAM	CFR; PM; LR; PW
Italy	2006	MAR; LR; MA; MB; LD
	2008	LD; LR; MA; MB; PW
	2013-NAM	PW; CNR; MB; MA; LR; LD; CFR
	2007	CNR; RVR; UV; MA; LD; PR; PDEMBs; MAR; IC; LR; RO; PW; PM; I; VL; LR; CF; IV
	2009	CF; CI; MAR; UV; MB; MA; VER; VL; II; CTI; PR
	2010	LD; CNR; UV; VL; RVR; IC; MA; MB; LR; CTI; PP
Latvia	1998	LD; PI; VPI; VI; VER; CTI; PR
	2002	PI; CF; VER
	2006	PM; CFR; VER; CNR
	2009-EP	No particular concerns
	2010	CNR; MAR; MB; MA; PW; CTI; UV

Annexes

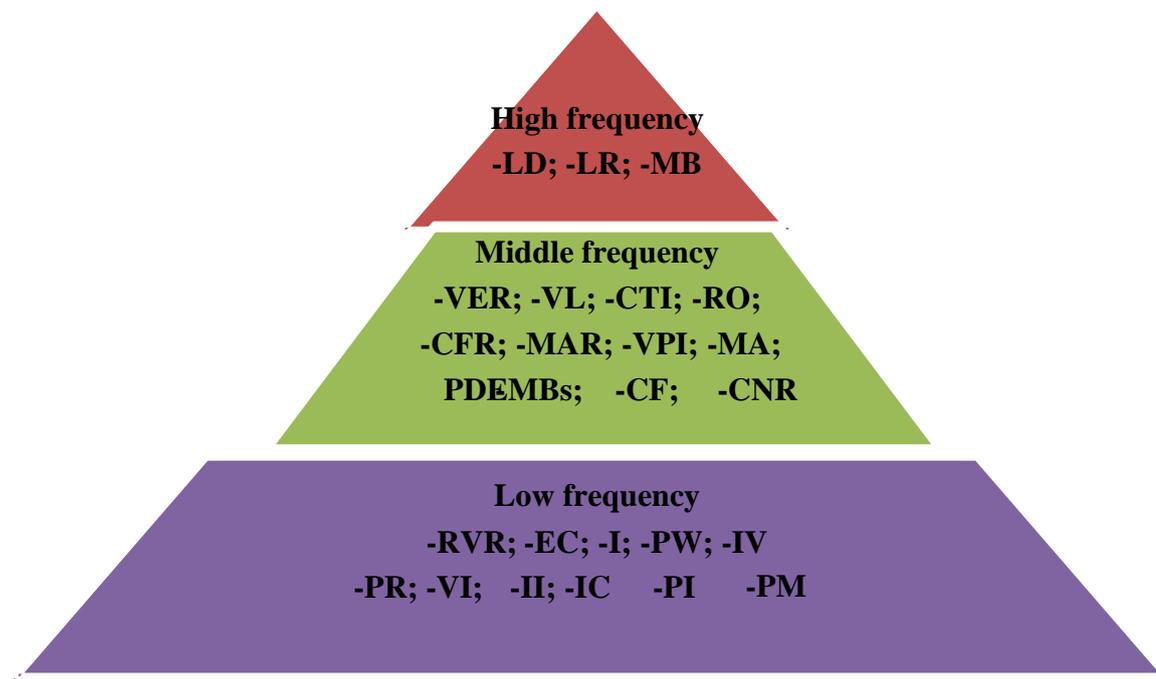
	2011	CNR; VI; RVR; PM
Lichtenstein	2009-NAM	LD; PW
Lithuania	1996	VPI; VER; PM
	2009-NAM	No particular concerns
Luxemburg	2012	RO; IV; PM; CFR
	2009-EP	No particular concerns
	2013-NAMP	No particular concerns
Macedonia	1998	LD; MB; VPI; VER; VL; CF
	1999	LD; MB; VPI; VER
	2000	IC; IV; VER; LD; II; MB
	2002	IC; IV; II; MB; MA; LD
	2004	VER; LD; VL; PM; CTI; LR; I
	2005	VER; UI; UV; II; IC; IV; MB; PW
	2006	IV; VER; II; CFR; CF; IC; MAR; PM; MB; MA; LR; CTI
	2008	II; IV; CFR; MB; MA; LR; MAR; I; IC
	2009	IV; PDEMBS; VER; PM; WP; LR; CTI
	2011	LD; VPI; VL; PM; MB; CF; MAR; VI; LR
	2013	DPEMBS; MAR; VI; VL; LR; MB
Malta	2009 - EP	LR
	2013	RO; CNR; CFR; LR; LD; MB
Moldova	1996	LD; VL; VPI
	1998	UV; LD; VL; MA; MB
	2001	VER; PR; CTI; MA; VL; PM; EC
	2003	MB; IC; MAR; CF
	2005	MA; RVR; IV; PI; CF; LD; PM; CTI; DPEMBS
	2007	MA; CNR; RVR; CF; CFR; MB; LD; PW; I; II; VL
	2009 (2 reports)	IC; IV; MB; CF; MAR; PR; LD; VL; PR; CRI; LR
	2010	LD; II; I; VPI; VL; PW
2011	VL; CF; LD; CFR; CTI; VER; LR	
Monaco	2013	UV; CNR; CFR; RO
Montenegro	1997	LD; IV; II
	1998	LR; VL; MA
	2000	MB; LD; PDEMBS; LR; VL; CNR
	2001	PI; PM; II; IV; LD
	2002 (2 reports)	CNR; MAR; LD; IDEMBS; PM; PW; CF; EC
	2003 (2 reports)	LD; MAR; IV; VER; MA
	2006	LD; CF; VER; PW
	2008	MAR; I
	2009	MAR; I; PM; LD; UV; VL
	2012	VL; CFR; LR; MAR; II; MB
	2013	MAR; LD; UV; CFR; CF; VL; MA; MB
Netherlands	2006	CFR; VPI (e-vote)
	2009	CNR
	2010	LR; CFR
	2012	LD; CFR; LR
Norway	2009	VL; CNR; LR; VER; PM
	2011	Internet voting technical comments
Poland	2007	MA; MB; VP; VER
	2009 – EP	LD
	2011	VP; CNR; CFR; EC; LR; VER
Portugal	2009	CNR; VI; VL; RO
Romania	1996	II; LD; VL
	2000	PM; PW; LD; RO; CFR
	2004	LR; PR; VPI; MAR; CF; MA; LD; RO; PR; PM

Annexes

	2009 (2 reports – EP)	VPI; PR
	2012	RO; CF; PM
Russia	1996	CF; MB; MAR
	1999	IC; PR; MB; MAR; II
	2000	CF; MB; MA; MAR; VPI; II
	2003	MAR; CF; VER; I; CNR; MA; II
	2004	VER; CF; MB; MAR; VI; CNR; CTI
	2011	CNR; MB; IV; VER; PR; II; LD; DPEMBs; MA; MAR; IC; RO; CTI; IU; LR
	2012	MB; CTI; DPEMBs; CTI; VL; LR
San Marino	2012	CF; LR; VPI; PW; RO; CNR
Serbia	1997	LD; II; PDEMBs
	2000	MB
	2002 (2 reports)	VER; MP; RO; DL; CF
	2003	VL; VR; VPI; LD; CNR; UV
	2004	II; MW; MA
	2007	PDEMBs; LD; II
	2008 (2 reports)	LD; II; CF; CFR; RO; LR; VL
	2012	CFR; MB; VL; VER; PDEMBs; LR; RO; VI; PM; VER; I
Slovak Rep.	1998	MB; LD; PDEMBs; CNR; RO
	1999	LD
	2002	LD; I; II; LR; CF; RO; PR; RSR; MA; PM
	2004	LD; LR; MA; CFR; I; PM
	2010	LD; II; CF; CFR; PM; PW; LR; VER
	2012 – NAM	CFR; PM
Slovenia	2009 – EP	CNR, LD
	2011	RO; EAM; VI; CFR; MA; PSA
Spain	2004	VER; RO
	2008	VPI; VI; MA
	2009 – EP	CNR
	2011	VI; CNR; CFR; MA
Sweden	2009 – EP	CNR, LD; CFR
	2010-NAM	RO; CFR; PM
Switzerland	2007	CFR; RO
	2011	LD
Turkey	2002	PM; LD; RO
	2007	LD; LR; MP
	2011	VI; CF; IC; PW; CNR
Ukraine	1998	MAR; CI; VI; PM; LD; MB; MA; VER; VPI; LR
	1999	LR; MB; MAR; MA; VPI; VER; CTI
	2002	VER; MA; MB; LR; IV; IC; MAR; PDEMBs; CF; LD; PR; VL
	2004	MAR; CF; VER; PI; IV; UV; ER
	2006	LR; VPI; LD; CFR; VL
	2007	VL; LD; RVR; VPI; LR; IV; PDEMBs; MA
	2010	VER; MAR; CTI; II; I; MB; LR
	2012	MAR; CFR; MB; MA; CTI; I; MB; VER; LD; CF; PP; VL; CNR; IC; LR; RO; DPEMBs; PW; IV
UK	2003	RO; VPI; EC; VL
	2005	LD; RO; VPI
	2010	LD; RO; VPI

FREQUENCY OF IRREGULARITIES

Low = L (40 <); Middle = M (40-80); High = H (< 80)



ANNEX III - RELEVANT ARTICLES OF THE UN HUMAN RIGHTS INSTRUMENTS

<u>Name of the UN instrument</u>	<u>Entry into force</u>	<u>Text of relevant articles</u>
Charter of the United Nation	24.10.1945	<p>Article 73</p> <p>Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: ...</p> <p>b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement...</p> <p>Article 76</p> <p>The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: ...</p> <p>b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely addressed wishes of the peoples concerned, and as may be provided by in the terms of each trusteeship agreement...</p>
The Universal Declaration of Human Rights	adopted on 10.12.1948	<p>Article 21</p> <p>(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.</p> <p>(2) Everyone has the right of equal access to public service to his country.</p> <p>(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine</p>

		elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure.
International Covenant on Civil and Political Rights	23.3.1976	<p><u>Article 25</u></p> <p>Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:</p> <p>(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;</p> <p>(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;</p> <p>(c) To have access, on general terms of equality, to public service in his country.</p>
Convention for Elimination of all Forms of Discrimination against Women	3.9.1981	<p><u>Article 7</u></p> <p>States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:</p> <p>(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;</p> <p>(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;</p> <p>(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.</p> <p><u>Article 8</u></p> <p>States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.</p>
Convention for Elimination of all Forms of Racial Discrimination	4.1.1969	<p><u>Article 5</u></p> <p>In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...</p> <p>(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service...</p>
Convention on the Rights of Persons with Disabilities	3.5.2008	<p><u>Article 29</u></p> <p>States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:</p> <p>(a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:</p> <p>(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;</p> <p>(ii) Protecting the right of persons with disabilities to vote by secret ballot</p>

		<p>in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;</p> <p>(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;</p> <p>(b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:</p> <p>(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;</p> <p>(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.</p>
<p>Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</p>	<p>1.7.2003</p>	<p><u>Article 41</u></p> <p>1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.</p> <p>2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.</p> <p><u>Article 42</u></p> <p>1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.</p> <p>2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.</p> <p>3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.</p>

ANNEX IV - OPTIONAL PROTOCOL – INDIVIDUAL COMMUNICATIONS

Year	No. of comm./ Country	Art. 25 complaint	Admissib.	Violation found
1986	138/1983 Zaire	25(a) MPs not allowed to part. in public affairs as recalled and persecuted due to publication of open letter to President	Yes	Yes, deprivation of right to participate in public affairs
	157/1983 Zaire	25(b) denied the rights to run in elections	Yes	Yes, unreasonable restrict. elect. rights
	147/1983 Zaire	25(a) denied particip. in public affairs due to political persecution and detention	No	
1987	190/1985 Uruguay	25(c) not hired because of law allowing redress for civil servants who were dismissed on political grounds	Yes	No, law being a measure to redress injustice
	217/1986 the Netherlands	25(c) complaint about recruitment policy of international organization	No, <i>ratione personae</i>	
1989	203/1986 Peru	25(c) unlawf. dismissal from civil service	Yes	Breach of other art.
1990	195/1985 Columbia	25(c) teacher subject to persecution & dismissed due to his theological views	Yes	Yes, continued harass. made work in civil service impossib.
	241&242/1987 Zaire	No follow-up to views finding violation of art. 25 and continuing persecution	Yes	No for subsequently described acts
	318/1988 Columbia	25(b) different allegations for incompatibility of the election system with this article	No, no victim & dom remed. not exhau.	
1992	205/1986 Canada	25(a) failure to invite rep. of indigenous population at conference on their status	Yes	No unlimit. right to choose how to participate
	347/1988 France	25(c) suspended from civil service for defacing road signs in Breton language	No, not substanti.	
	348/1989 France	25(c) could not enter civil service for defacing road signs in Breton language	No, not substanti	
1993	314/1988 Zambia	25(a)(b) prevention of leading opposition politic. figure to participate in elections	Yes	Yes, election rights unreason. restricted
	496/1992 Hungary	25(a) denial of active participation in gmnt unless cooperative with authorities	No, not substanti.	
1994	468/1991 Equatorial Guinea	25(a) impossibility to take part in public affairs for pol. Opponents	No, not substanti.	
	567/1993 Mauritius	25(c) fair trial rights breached as women were discriminated in access to civ. serv.	No, no victim	
1995	500/1992 the Netherlands	25(b)&(c) policeman who was elected was not allowed to have a seat	Yes	No, object. with aim, rights not absolute
1996	454/1991 Spain	25(c) civil servant not granted special status	No, dom. remedies not exhau.	
	542/1993 Zaire	25(c) military officer stripped off of his rights for sympathizing with opposition	No, not substant.	
1997	552/1993 Poland	25(c) civil servant re-classified, dismissed due to reorganization & not re-employed	Yes	No guarantee for every citizen for public employment
	758/1997 Spain	25(c) civil servant about promotion policy not based on objective criteria	No, not substant.	
1998	623-624-626-627/1995 Georgia	25(a) political opponent persecuted because of pol. views and prevented from political activity	Yes	No, HRC did not proceed as it found breach of another art.
2000	760/1997 Namibia	25(a)&(c) self-rule and elected bodies not restored after state's independence preventing participation in pub. affairs	Yes	No, individuals' rights claim not substantiated
	824/1998 Bulgaria	25(c) civil servant transfer to lower post & dismissed due to mafia interference	No, not substantia.	
	965/2000 Austria	25(b) private matters not covered by Art. 25(b)	No	
2001	884/1999 Latvia	25 language proficiency test barred author from running in elections	Yes	Yes, candid. annulm. not object & reasona.

	630/1995 Cameroon	25(c) civil servant who was accused for part. in coup d'etat & dismissed, was not reinstated in accordance with law	Yes	Yes, proceedings too long and his career not restored
	727/1996 Croatia	25 persecuted due to pol. activities and party membership, barred from participating in elections	Partly ratione temporis	No, reminder of complaints not substantiated
	866/1999 Spain	25(c) arbitrary process of selection of civil servants	No, not substant.	
	949/2000 Canada	25(c) discrimination in dismissal of civil servant from indigenous group	No, not substant.	
2002	641/1995 DR Congo	25(a) & (c) suspension of school director on pol. Grounds	(a) not substant. (c) Yes	Yes, no effective legal procedure to protect his rights
	859/1999 Columbia	25(a) pol. party activists constantly harassed, had to go in exile	Yes	HRC found breach of othe. art, 25 not exam
	865/1999 Spain	25(c) civil servant suspended & not taken back to active duty	Yes	No, failure timely to pursue his case
	906/2000 Peru	25(c) policeman dismissed from his post, won the case in court, but never re-instated	Yes	Yes, failure to execute court judgment
	921/2000 Belarus	25 prohibition to run for MP due to administrative convic. 1 y. before elec.	No, no victim	
	923/2000 Slovakia	25(a)&(c) election candidate complains about equality of votes	Yes	Yes, error acknowledg. by const. court & state
	932/2000 France	25(b) denial to vote in referendum due to residence requirements set out by law	Yes	No, length of required residence not unreason.
	940/2000 Cote d'Ivoire	25(b) denial of election rights due to race	No, no victim	
2003	814/1998 Belarus	25(c) dismissal of a judge before his tenure expired	Yes	Yes, attack to independent judiciary
	933/2000 DR Congo	25(c) dismissal of judges by virtue of law	Yes	Yes, it violates gener. equality terms
	872/1999 Poland	25(c) dismissal from police due to membership in political party	No, ratio temporis	
	972/2001 Cyprus	25(c) nepotism and breach of equality when appointing a judge	No, not substant.	
	1038/2001 Ireland	25(b) deprivation of voting rights of the citizens living abroad, discrimination	No, no victim	
	1082/2002 Belgium	25(b) Act on Automated Voting incompatible with art. 25	No, not substant. & domestic rem exha.	
2004	943/2000 Belgium	25(c) criteria public office access based on pol. party memb.& gender, lacks procedure	Yes	No, measure is proportional & justified
	1138/2002 Germany	25(a) political party membership not allowed for scientology followers	No, not substanti.	
2005	1134/2002 Cameroon	25(b) removal from VL of detainee and rejection of candidacy	Yes	Yes, arbitrary removal
	968/2001 the Repub. of Korea	25(a)&(b) journ. convicted for published opinion poll during election campaign	No, not substant.	
	1182/2003 Cyprus	25(c) not re-hired in public service, did not accept the conditions	No, not substant.	
	1210/2003 Cyprus	25(c) hired in non-existing position in civil service, violation of equal treatment	No, not substant.	
	1336/2004 Austria	25 general complaint	No, not substant.	
2006	1009/2001 Belarus	25(b) convicted for calling boycott of elections	Yes	Violation found for art. 19
	1016/2001 Peru	25(c) dismissal of civil servant based on age limit, discriminatory	Yes	No, dismiss. based on general restrict. plan
	993-995 France	25(b) elections annulled upon voters appeals, candidates lost offices		Could not be considered due to reservation
	1062/2002 Czech Republic	25(c) rejection to be hired in civil service	No, not substant.	

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	1400/2005 France	25(a) ratific. ICC statute, public debate comments not taken into consideration	No, not substanti.	
	1093/2002 Spain	25(c) discriminatory non extension of civil post	No, not substant.	
	1403/2005 Germany	25(c) application for status of civil servant rejected based on age limit, discriminatory	No dom. remedies exhausted	
	1434/2005 France	25(c) not given similar post like other civil servants in comparable situation	No, rights abuse	
<u>2007</u>	1047/2002 Belarus	25(b) refusal to register a candidate, lack of efficient remedy	Yes	Yes, lack of effective remedy
<u>2008</u>	1223/2003 Estonia	25(b) refusal to issue permanent residence results in disfranchising	No, dom. rem not exhausted	
	373/2005 Sri Lanka	25(b) 9 years disfranchising as a result of conviction for contempt of court	Yes	Yes, restriction not proportional
	1376/2005 Sri Lanka	25(c) dismissal of a judge as outcome of disciplinary proceedings	Yes	Yes, proceedings did not respect fairness
	1413/2005 Spain	25(c) promotion procedure for military personal lacked objectivity	No, not substantiated	
	1358/2005 Belarus	25(b) denial of the right to candidacy	No, not substantiated	
	1745/2007 Spain	25(b) denied right to be elected king	No, incomp. ratione materia	
<u>2009</u>	1553/2007 Belarus	25 (b) denial of free campaigning	Yes	Yes, no free environment to campaign
	1122/202 Spain	25 (c) infringement of the right to equal access to public post	No, not substantiated	
<u>2010</u>	1392/2005 Belarus	25 (b) refusal to admit candidates' list, no effective remedy	Yes	Yes, no assessment of proportionality or reasonableness was carried out to justify the denial of passive election right

ANNEX V - QUESTIONNAIRE (CoE PA, CLRAE, VC & OSCE Election and Democratization Departments)

1. Which international documents containing election standards have been drafted or are in the process of preparation in the CoE (in your department)? Which were the reasons for their preparation? Do you know if a new international document containing election standards is in the process of preparation?
2. Which international documents containing election standards does your department use when conducting activities related to elections (election observation, assessment of laws)?
3. In view of the fact that there is a number of international documents on election standards from different international organizations which are not legally binding, would you consider it possible and useful to have a legally binding Convention on election standards, at global and/or European level? If yes, which would be the best mechanism to achieve that, considering that international organizations involved in the elections have different member states.
4. What do you think about the ACCEO draft Convention, which is the level of its importance? Which would be its contribution for holding free and fair elections? Could this draft Convention compile all existing international documents?
5. Would it be helpful if such a Convention also tackles the principle of equality of votes by promoting creation of electoral districts with the approximately similar number of voters?
6. Which of the activities your particular organization (CoE, OSCE, EU, UN) is particularly good at: 1. electoral systems; 2. electoral legislation; 3. electoral commissions and other institutions (training of commissioners included) and 4. electoral observation?
7. Have you ever cooperated with the OSCE/ODIHR, EU or UN in respect of the elections? How could this cooperation be improved?
8. Which mechanism from international public law could be used in order to suppress the election irregularities? Which mechanism would be the most effective (in the sense of mobilizing the political will for suppression of election irregularities)?
9. Which obstacles/problems have you encountered in your work/work of your department in relation to elections?
10. Would you consider that enlarged competence could help you/your department in the work relating to elections field? Would such enlarged competence help suppress election irregularities? If so, what kind of enlarged competence would you have in mind?

ANNEX VI - ECtHR LIST OF JUDGMENTS

Ordinal no.	Judgments
1	* Matthews v. UK , Application no. 24833/94, judgment of 18 February 1999
2	* Labita v. Italy , Application no. 26772/95, judgment of 6 April 2000
3	* Gaulieder v. Slovakia , Application no. 36909/97, judgment of 18 May 2000
4	* Rafah Partisi and Others v. Turkey , Application nos. 41340/98-41344/98, judgment of 31 July 2001
5	* Podkolzina v. Latvia , Application no. 46726/00, judgment of 9 April 2002
6	* Selim Sadak and Others v. Turkey , Application nos. 25144/94; 26149/95-26154/95, 27100/95 and 27101/95, judgment of 11 June 2002
7	* Refah Partisi and Others v. Turkey , Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, judgment of 13 February 2003
8	* De Savoie v. Italy , Application no. 53360/99, judgment of 24 April 2003
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