Introduction

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Ladies and Gentlemen,

On behalf of the Venice Commission it is a great pleasure for me to welcome you to a new UniDem seminar for European constitutional court judges. For the first time, a seminar of this kind is to deal with electoral issues and with an aspect that is of great interest and, at the same time, of great concern for judges – cancellation of election results.

As you doubtless already know, the Venice Commission is the Council of Europe's body in charge of constitutional matters. These are construed broadly as encompassing both constitutional justice and electoral issues. Among the commission's achievements in these two areas mention can be made, firstly, as regards constitutional justice, of the CODICES database and the *Bulletin on Constitutional Case-Law*, as well as the World Conference on Constitutional Justice being held next January in Cape Town and, secondly, as regards electoral issues, of the Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev at www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp), the Council of Europe's reference document in this field, copies of which are available at this seminar, followed by the Code of Good Practice on Referendums (CDL-AD(2007)008rev at www.venice.coe.int/docs/2007/CDL-AD(2007)008-e.asp).

The seminars in the UniDem series (short for "Universities for Democracy") have been held virtually since the commission was set up and are aimed at determining common rules for the functioning of democratic states upholding human rights and the rule of law. For many years they have dealt with both constitutional justice and elections. As early as 1994, a seminar was held on the role of constitutional courts in consolidating the rule of law, followed two years later by constitutional courts and the protection of fundamental rights. Then there were a number of seminars intended specifically for constitutional courts or equivalent bodies on the themes of the principle of respect for human dignity, held in Montpellier in 1998; the right to a fair trial, held in Brno in 2000; and the resolution by constitutional courts of conflicts between central government and entities with legislative power, held in Rome in 2003. In parallel, there have been UniDem seminars concerned with new tendencies in electoral law in greater Europe, European standards of electoral law in contemporary constitutionalism, organisation of elections by an impartial body, and the preconditions for a dem-

ocratic election.[1] However, I wish to reiterate that this is the first time a seminar has been devoted jointly to constitutional justice and electoral matters. Furthermore, we are today resuming our interactive approach aimed at examining national solutions to given problems either in general, through discussion of responses to a questionnaire or, more specifically, through consideration of a case study.

Since ancient Rome, legal specialists have been well familiar with the concept that any law devoid of a judicial sanction is a *lex imperfecta*, a declaration of intent rather than a legal regulation. The judges present here today will, I am sure, concur with me on this. In electoral matters, as in other fields, people are tempted to commit fraud, to break the law. However, unlike in other spheres, breaches of electoral law can have considerable repercussions for society as a whole, since what is at issue is who will govern. It is therefore necessary that voters' rights should be safeguarded by a strong, impartial body; as stated in the Code of Good Practice in Electoral Matters,[2] this role should fall to a court, at least at last instance.

Over the next two days we shall be examining the judicial solutions to this issue, which is in essence of a highly political nature. After hearing the introductory reports, which will remind us of the issue's importance and of its different facets, we shall study the solutions adopted at national level on the basis of the replies to the Venice Commission's questionnaire. Some of the questions to be answered are: What is the legal basis for proceedings possibly leading to the cancellation of election results? Are the provisions concerned of a specific or a general nature? Can a cancellation be founded on general constitutional principles such as the right to free elections by secret ballot? In addition, although procedure is not an end in itself, it is here of vital importance. An example to be borne in mind is whether the rules allow the court dealing with the case to collect evidence of its own motion. Last but not least, an examination of the case law will enable us to determine the tangible implications of annulment proceedings.

Tomorrow will be devoted to a case study. Following the same approach as we adopted at the first UniDem seminar for constitutional court judges held in Montpellier in 1998, we consider it useful to illustrate the problem with a practical exercise. In the case study submitted to you some of the breaches are obvious, while others are more debatable with regard to national law; others concern general principles rather than specific standards. In addition, you will be asked to assess to what extent breaches of this kind should lead to cancellation of the election results, and in particular whether they influenced the election's outcome – must this question be addressed taking each breach individually or should all the breaches be considered together?

There is a lot to be said on these matters, and I am sure we will have some very interesting and fruitful discussions that will enable us to propose substantive enhancements of Europe's electoral heritage.

Lastly, I wish to thank the Constitutional Court and the Ministry of Justice and Home Affairs of Malta, without whom this seminar would not have been possible and who have organised it at short notice. We are honoured that the President of the Constitutional Court and the minister are here with us in person today.

1. See the list of publications in the series "Science and technique of democracy" at the end of this book.
2. Point II.3.3.a.

Electoral disputes

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We are, of course, delighted at the interest now being shown in elections – of which this seminar is one more example. For a very long time, elections tended to be considered of secondary importance, as an exercise involving political jiggery-pokery, in which any reputable lawyer ought to refuse, or at any rate be reluctant, to get involved, with the result that parliaments – in their capacity as representative of the sovereign – traditionally judged the validity of their members' office themselves.

Nowadays, fortunately, the view is taken that, since power is based on suffrage and parliamentary elections are very often also the occasion to elect the prime minister and government by universal suffrage, the authenticity of the election is of key importance to the democratic process and public trust in that process.

Accordingly, all the stages in the electoral process must be governed by law and hence overseen by the courts and, ultimately, observance of the law is guaranteed by the intervention of a court, which may have occasion to rectify the election results or declare them void. This applies in the case of basic principles, those that the Venice Commission has defined as constituting Europe's electoral heritage (universal, equal, free, secret, direct suffrage). What is trickier is to decide on the electoral system. A wide variety is acceptable from the broad categories of majority/plurality voting, proportional representation and mixed systems: ultimately, the sole requirement is what mathematicians call monotony, in other words the requirement that the party that obtains the largest number of votes be the one that gains the most seats (except in the event of an accident, and there have been occasional accidents). The voting system is often provided for in the constitution, but not always (see the case of France).

Although the principles have therefore been decided on and compliance with them is supervised, it is difficult to apply them. The exercise involves a large number of players, since the entire population of a country turns out on election day, everyone as a voter and a few people as officers in the numerous polling stations. The rule is often that there should be one polling station per thousand inhabitants, but the number increases where constituencies are divided into municipalities (in France, for instance, there are nearly 67 000 polling stations for a population of 63 million with 44 million voters). It is inevitable, given the vast number of polling stations, that there should be operational shortcomings, which may be deliberate, in which case it is a question of electoral fraud, or unintentional, resulting from a poor grasp of the legislation and situations concerned.

Here, too, an authority is needed to redress the situation, in other words a court, for it is generally a court that assesses such irregularities and any implications they may have for the outcome of the election, by carrying out what my colleagues specialised in the field of sociology would call "The electoral normality". This is what we are going to talk about here and, if you will forgive me, I shall do so by drawing mainly on the example of France – not that I consider the situation in France to be exemplary, but it is the one with which I am most familiar, having been involved in it, and, even though other approaches are of course possible, it illustrates the main issues. These seem to centre on the place of the courts and the conduct of the electoral process.

I. The place of the courts

The first question that arises is of course which court is concerned, and the second is who has access to it, and who should have access to it if the objective of authenticity is to be attained.

Which court?

As I said, it is traditional for parliaments to decide for themselves whether their members have been lawfully elected. This arrangement still applies to a large extent in a number of countries: the Benelux countries, Denmark, Italy and the United States. It is worth pointing out that, in the case of the European countries concerned, there is proportional voting, and irregularities concerning a few votes do not necessarily have much impact on the allocation of seats, and that in the United States many elections (90% in the case of the House of Representatives) are considered to be largely undisputed, in other words there are large differences in the number of votes obtained.

Yet this system inevitably means that the lawfulness of an election is judged by a political majority. This may lead to abuses, the most frequently cited example being the withdrawal of seats from numerous Poujadist (nowadays one would say populist) members of parliament by the French National Assembly, following the elections on 2 January 1956, as a result of which, in response to a general outcry, responsibility for judging elections was transferred to the Constitutional Council set up under the 1958 constitution.

The Constitutional Court is also responsible for hearing parliamentary election disputes in Austria, Greece, Germany, Portugal and Spain but, in the last three cases, it intervenes as an appeal court after the ordinary court, a solution which is reasonably satisfactory since it provides the safeguard of two tiers of jurisdiction.

In the United Kingdom an ordinary court is responsible, while in Finland it is an administrative court (this also applies to European and local elections in France).

All these arrangements are acceptable, and there is no reason to suppose that they raise problems where they apply. The choice obviously depends on local legal and court traditions, which differ – indeed, there is no reason why they should be the same.

Under other systems, particularly in the newly fledged democracies, the matter is initially settled by local, national or federal electoral commissions, with the possibility of appeal to the Supreme Court or the Constitutional Court. This does away with the potential objection that the commissions both organise and judge the elections (which is indeed the case, and it is a criticism that can be levelled at the French system, which involves the Constitutional Council, at least in the case of referenda and presidential elections).

Who has access to the court?

Here countries are torn. There is a temptation to provide broad access to the court on the grounds that, as democracy involves everyone, oversight of the democratic process should be extended to all. There is a risk, however, of the court being snowed under with applications from habitual complainers. There are people who are fanatical about disputing elections, and the court is therefore liable to deal with complaints only superficially, or else take too long in the light of another requirement, which is that parliament should rapidly be formed with its definitive membership. A majority, particularly a narrow one, cannot spend a long time with the threat of being overturned looming over it.

The generally accepted arrangement is to restrict access to those who have an interest in instituting legal proceedings, in other words unsuccessful candidates, whose interest is obvious, and voters in the constituency concerned. This is reasonable in practical terms even if it is questionable from a theoretical viewpoint, since a member of parliament is often considered to represent the nation as a whole, whereas in fact he or she is elected in a particular constituency.

The question arises as to whether a political party should be considered, as such, to have an interest in instituting legal proceedings. Logically, the answer is "yes", since the strength of a party in parliament will depend on the number of members of parliament it has, but in practice it is often "no", so firmly entrenched is the illusion that standing for parliament is an individual act, with the party merely providing support.

On the other hand, intervention by a political party is more readily accepted prior to the ballot, in disputes concerning the run-up to the election. These may relate to the electoral legislation itself (particularly if it sets unduly high exclusion thresholds: the Strasbourg Court recently considered the issue in connection with the Turkish Electoral Act, which it ultimately upheld) or to the conditions under which the election campaign took place (allocation of speaking time on radio and television, pressure from the "powers that be", and so on).

Another issue is the form which the application takes: in some cases an application may be submitted freely within a certain time of the election (10 days in France), while in others it may be submitted only if a complaint was recorded on the protocol produced by the polling station concerned (this applies in France in the case of referenda). I think this is a minor technical issue, and that the sole concern should be whether there is an effective right of appeal, in other words whether the complaint or the protest recorded on the polling station protocol is actually referred to the court responsible for assessing its merits, so that court proceedings go ahead.

II. The electoral trial

Electoral justice presupposes a state of tranquillity that is not always easy to come by, as decisions are handed down in the heat of the moment, immediately after an election campaign that has sometimes been vicious, and must comply with general principles, such as equality of arms, which is normally ensured by compliance with the principle that both parties must be represented at the hearing. It must not, however, be forgotten that the aim is not to punish any irregularity – if necessary the criminal court to which the matter is referred at the same time can do that – but to ensure that the person who occupies the seat is actually the person the voters wanted. The dispute is therefore a relative one.

The requirement that both parties be represented at the hearing

We know that the European Court of Human Rights sets great store by this principle, even though it has remained very prudent where electoral disputes are concerned.

It is clear why this principle is important here. On one side there is a member of parliament whose election is contested but who has been declared elected by the immediate supervisory authorities, and on the other an unsuccessful candidate or discontented voter, who generally has good arguments but who cannot be taken at his or her word either.

This means that, whatever the type of court, there will necessarily be an investigation. The court will seek to assess the accuracy and importance of the complaints. I do not have sufficient comparative material here and will simply talk about the situation in France.

Proceedings before the Constitutional Council take place exclusively in writing. The council receives the application, ascertains its admissibility (compliance with the deadline, voter registered in the constituency, specific complaints, etc.) and forwards it to the elected member of parliament, who drafts a writ in reply (usually with the help of a lawyer), defending himself or herself against the complaints. This memorial is forwarded to the complainant, who may reply in turn (but without adding further complaints). The complainant's memorial is passed on to the defence counsel, and so on until there appears to be nothing more to add. At this point the investigation is normally over: it is very unusual for there to be an on-the-spot check (although this is possible in certain circumstances) or a hearing of the parties or their lawyers before a decision is considered. For a long time, the Constitutional Council systematically refused to proceed in this manner, and the proceedings took place solely in writing. Things changed in 2007-08, probably because it was afraid of failing to meet the requirements of the European Court of Human Rights, and several hearings were held on the occasion of the last parliamentary elections. I am not sure that this fundamentally changes the outcome of a dispute, but it is certainly more satisfactory in terms of the principle that justice must not only be done: it must be seen to be done.

Once the investigation is over, a deputy reporting judge, who is a member of the Conseil d'Etat (the supreme administrative court) or the Auditor General's Department, prepares the case and presents it to an investigation division (comprising

three of the Constitutional Council's nine members). The division prepares a draft decision, which is then put to the plenary council, which may agree to it, amend a particular point or, though this is unusual, take the opposite view. The decision is then communicated to the persons concerned and published. It is not possible to appeal against it (the few attempts to do so before the Strasbourg Court have been unsuccessful).

All this takes place within a relatively short space of time. The simplest applications take about six months (because it is necessary to wait around four months for the decisions of the board responsible for auditing the campaign accounts if there are financial complaints) and, even though it is not bound by a deadline, the Constitutional Council endeavours to have everything settled within a year of the election, which it succeeded in doing in 2002-03 and in 2007-08. The actual subject of the dispute makes this easier.

A relative dispute

By this I mean that the electoral dispute is not an absolute dispute as is the case with, for instance, an administrative dispute, in which a substantial irregularity causes the act or decision in question to be set aside (though the court does have a degree of discretion).

In electoral disputes, what is important is whether the person who has been declared elected is actually the person who should have been elected, and the question is therefore whether or not the irregularities complained of might have altered the outcome of the election. This means that the margin by which the election was won (and this is particularly true in the case of majority voting) is a key factor. Let us suppose that 200 votes are contested in a constituency and the investigation shows that they are indeed disputable. If the election was won by 1000 votes, the reply will be that this is unfortunate (and the court will sometimes say so in order to condemn the misconduct), but that it does not call the outcome into question. If, on the other hand, the election was won by only 100 votes, the court will consider that there is cause for doubt and will declare the election void. It is worth noting that the Constitutional Council, although it has the power to do so, has never corrected the result of an election (in other words, declared the other candidate elected), whereas the Conseil d'Etat sometimes does so in the case of (minor) local elections.

This means that the court will first establish whether the complaints are accurate and assess the number of votes at issue. Sometimes this is easy: if there are 10 proxies that do not comply with the regulations, 20 ballot papers that were wrongly validated or declared spoilt and 15 cases in which the electoral roll was not signed, there are definite figures. But it can be more difficult: what is the impact of a leaflet handed out outside the permitted period, telephone calls from a mayor asking people to vote for a particular candidate, and so on? Here it is a question of precedent and experience, and there is inevitably a degree of subjectivity.

After establishing a figure, even an approximate one, for the number of votes that can be disputed, the court carries out a sort of hypothetical subtraction, fictitiously deducting these votes from the number obtained by the elected candidate. If the total is still higher than the number obtained by the other candidate, the election

is validated; if it is lower, it is declared void. This can be more elegantly summed up by the following inequations, where a and b are the number of votes obtained, respectively, by the person who has been elected and the challenger, and x is the number of votes that, on the face of it, do not comply with the regulations:

> If a - x is greater than b → election validated
>
> If a - x is less than b → election void

It will be readily acknowledged that it all depends on the way in which x is calculated, and that there can be a degree of subjectivity here. On the other hand, a rigorous approach, in which any irregularity led to the invalidation of the result, would be liable to cause the entire election to be declared void, for in any constituency, and indeed in any polling station, there are inevitably a few pardonable irregularities. And the prospect of the entire election being declared void is probably more alarming than the existence of a subjective element.

That said, it is quite acceptable that an election should be declared void regardless of the difference in the number of votes in the event of particularly serious fraud, such as ballot stuffing, falsification of the protocol of results and systematic violence. The court will then take the view that there is probably more than meets the eye (in other words, that the case file reveals only the tip of the iceberg) and that, regardless of the figures, there is a serious presumption that the entire election has been affected by irregularities.

This situation is similar to that occurring in a particular type of dispute that is, I believe, more or less confined to France: in addition to disputes concerning authenticity, there are disputes over election funding. If a candidate has broken campaign funding rules (has exceeded the expenditure ceiling or accepted prohibited donations or assistance from a public figure), the candidate will be declared ineligible and, if he or she has been elected, will lose his or her seat, and the election will be declared void. This applies even if the rule has been broken in a relatively minor way. Indeed, we are wondering whether the legislation in question, which was no doubt necessary initially to ensure that the funding rules were taken seriously, has not become too strict, and the Speaker of the National Assembly has set up a working group which is now considering the matter.

That is how electoral justice operates: there is a court, an effective right of appeal, respect for the principle that both parties must be represented and a cautious attitude on the part of the courts, which will in turn be judged by public opinion if their decisions appear palpably wrong. I must say that I believe that the decisions of electoral courts are rarely contested in established democracies, except possibly by the person adversely affected by the decision, if he or she is intent on saving face in order to make a comeback at the next election.