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ORGANISATION OF ELECTIONS BEYOND TERRITORY AND MEMBERSHIP

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Organisation of Elections beyond Territory and Membership

*Pierre Garrone*¹

I. Introduction: on globalisation

Globalisation is inescapable. We should however know exactly what this aphorism means, so that we know what we are talking about. No confusion should be made between globalisation and internationalisation.

Already 19th century lawyers considered that the world was becoming increasingly internationalised. Internationalisation means that situations that include an international element become more and more frequent. An example will show that internationalisation is not a new phenomenon. Switzerland's foreign population was nearly 15 % in 1914² whereas it has only increased to reach 22.8 % in 2011.³ This represents a difference in proportion, not in nature. The proportion of non-Europeans in the foreign population was negligible in that time whereas it is now about 15 %. This does however not make a difference in nature either. We should not forget that, 100 years ago, intercontinental migration was already an important reality, but it was an emigration from Europe (including Switzerland), mainly towards America.

Nor should globalisation be considered as an essentially economic process, relating to the development of intercontinental trade. There again I see a change in proportion (more dramatic, of course), but not in nature – except perhaps through the ever increasing part taken by international services, but this is also true for domestic services.

When talking about services, we are however on the right track. The nature of services has changed. This is the famous “third wave” described by Alvin Toffler three decades ago.⁴ We are in a post-industrial society based on information, in a world of instant communication, which is often called “the *global village*”. Transparency which was traditionally the rule in small villages has now been transposed to the whole world (in its good as well as its bad aspects). In the electoral

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² *La population de la Suisse*, World Population Year 1974, at <http://www.cicred.org/Eng/Publications/pdf/c-c47.pdf>, p. 20.

³ <http://www.bfs.admin.ch/bfs/portal/fr/index/themen/01/07/blank/key/01/01.html>.

⁴ *The Third Wave*, Bantam Books 1980.

field, this implies that information about political issues and developments all over the world is available everywhere.

The legal approach to globalisation differs from that of internationalisation. *Internationalisation* is a feature of the second wave, of industrial society. Internationalisation implies the development of *international law* (including international private law which is still mostly domestic law); this is true for universal and for regional (continental) or traditional bilateral international law.

From a legal point of view, *globalisation first* implies that ignorance of foreign law is no longer an excuse to differ. For example, the development - by the Venice Commission – of the CODICES database,⁵ on constitutions but above all on constitutional case-law, implies that variations in case-law between constitutional courts increasingly reflect conscious rather than accidental differences of approach. This new phenomenon generates a change in the nature of comparative constitutional law – it has become central.

Let us take an example from our own professional experience. Constitutional law was traditionally the core of a state's sovereignty. This explained the political obstacles to the creation of the Venice Commission as the first international governmental body in charge of constitutional issues. Now, the *trans-constitutionalism* arising from the use of CODICES enables courts to regularly draw inspiration from the constitutional practice of their counterparts. Transnational permeability of legislation and case-law applies even more to fields that are not closely associated with national sovereignty and could be called “trans-legalism”.

Second, globalisation implies that law has to deal increasingly with transnational situations, with new transnational situations and address them in a different way. In the electoral field, a number of transnational situations may be found, but the most important ones, from my point of view, can be described as follows:

- *out-of country voting/voting by residents abroad*
- *voting by foreigners*
- *international election observation (supervision of elections abroad)*
- *transnational elections*

The present report will be dedicated mainly to the examination of international hard and soft law in the field, in order to evaluate how they deal with the various issues mentioned above, and what has changed over time. On this basis, we will follow on whether these changes are linked to the third wave, to the globalised society of services, whether they have brought a new *kind* of legislation, and whether new legal developments are suitable.

⁵ <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

II. Transnational situations and international electoral law: a contrasted landscape

A. Background

“Democracy cannot be conceived without elections”: this assertion is very familiar in my day-to-day work in the field of electoral law. Since, just this once, I intend to (slightly) go off the beaten track in this report, I will read it the other way round: elections are part of democracy.

More commonly, as a Council of Europe staff member, I might remind you that democracy, just like Human Rights and the rule of law, is one of the three pillars of the Council of Europe. After twenty years of experience in the Venice Commission, I will however also have to admit that it is the less international pillar of the three, since it is at the heart of constitutional law, which was – and still widely is – considered as belonging to the sphere reserved to states. This explains why the creation of the Venice Commission as an international body in charge of constitutional matters was so difficult and its existence was only made possible by the revolutionary changes which took place in the former socialist countries from 1989 onwards.

That is why a blueprint response to a question about international rules in the field of elections is not so easy. With respect to international law on human rights, international election law still looks underdeveloped, and more a (small) part of the latter than an autonomous, coherent body of rules. We will see, in particular, that the role of hard law and soft law differs very much between the four themes under discussion (out-of-country voting, voting by foreigners, international election observation and transnational elections).

B. Hard law

Today, sources of international hard law in the field of elections are rather scarce: they mainly reside in specific provisions of Human Rights conventions on the right to free elections. First, this includes Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which proclaims the right of every citizen:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (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.

In turn, Article 3 of the First Additional Protocol to the European Convention on Human Rights states:

Right to free elections

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

A similar provision may be found in Article 23 of the American Convention on Human Rights. The African Charter on Human and Peoples Rights, albeit less precise, also refers to free elections; it provides that “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law” (Article 13). At any rate, all these provisions are quite general and their implementation by international as well as national courts and other bodies is essential in order to ensure that they meet their goal to ensure democratic elections.

International treaties relating specifically to elections are very rare. The most typical example is the Convention of the Standards of Democratic Elections, Electoral Rights and Freedoms in the Commonwealth of Independent States (“the CIS Convention”).⁶ This text appears less focused on individual rights than on standards, and based on a more structural than liberal approach.⁷ It has been ratified by five states only.⁸ Although this Convention does not address out-of-country or foreigners’ vote, it includes a whole article on “status and powers of *international observers*”,⁹ which however includes provisions which could be interpreted restrictively. In particular, “international observers shall not engage in any activity unrelated with the electoral campaign. The Parties reserve the right to withdraw accreditation of international observers who violate laws, internationally accepted principles and norms of international law”, without this sanction being submitted to the principle of proportionality.¹⁰

The Association of Central and European Election Officials (now: Association of European Election Officials) adopted a draft Convention “on Election Standards, Electoral Rights, and Freedoms”, based on the CIS Convention. It was intended as a pan-European text. However, it did not receive any political support, due - at the same time - to its approach - structural rather than liberal -, and to its compulsory character. Most European states currently find the First Additional Protocol and the case-law of the Court to be sufficient safeguards of free elections.¹¹

⁶ Kishinev, October 7, 2002; can be found, *e.g.*, at [http://www.venice.coe.int/WebForms/documents/?pdf=CDL-EL\(2006\)031-e](http://www.venice.coe.int/WebForms/documents/?pdf=CDL-EL(2006)031-e).

⁷ Cf. CDL-AD(2007)007, opinion on the Convention of the Standards of Democratic Elections, Electoral Rights and Freedoms in the Commonwealth of Independent States, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)007-e), in particular par. 15.

⁸ Armenia, Kyrgyz Republic, Moldova, Russian Federation, and Tajikistan.

⁹ Article 19 (emphasis added).

¹⁰ Article 19.7; see also, *e.g.*, Article 13.6 on “abuse of the freedom of speech and freedom of mass media”, Article 15.7 on withdrawal of accreditation and CDL-AD(2007)007, par. 62, 6 and 73. See also, for a summary of this Convention’s rule on election observation, CDL-AD(2009)020rev, par. 41 ff, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)020rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)020rev-e).

¹¹ The first version of the Convention can be found at [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2003\)057-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2003)057-e).

A specific reference must be made to the Convention on the *Participation of Foreigners in Public Life at Local Level* adopted by the Council of Europe,¹² which provides (Article 6):

1. Each Party undertakes, subject to the provisions of Article 9, paragraph 1, to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.
2. However, a Contracting State may declare, when depositing its instrument of ratification, acceptance, approval or accession, that it intends to confine the application of paragraph 1 to the right to vote only.

Only eight states ratified the Convention,¹³ out of which two¹⁴ did not accept its part on the right to vote (and to be elected) of foreigners.

Let us come finally to *transnational elections*. While it is not the only example of a directly elected transnational parliament – see the Centro-American Parliament – the European Parliament is the main example. Therefore, international law concerning *transnational elections* is peculiar in nature. It is actually European Union law – primary and secondary – which applies. Citizenship of the European Union, whose benefit is ensured to all nationals of the member states, gives them “the right to vote and to stand as candidates in elections to the European Parliament... in their Member State of residence, under the same conditions as nationals of that State”.¹⁵ A specific international treaty, the Act concerning the election of the members of the European Parliament by direct universal suffrage, addresses the issue more in detail.

C. International case-law

The most developed case-law *corpus* is of course the European Court of Human Rights. Out of the four items mentioned before, most case-law addressed the issue of *out-of-country voting*.

A first landmark case in the application of Article 1 of the First Additional Protocol concerned Ukraine. In *Melnychenko v. Ukraine*,¹⁶ the Court considered that the refusal to register a candidate who has official residence in Ukraine and lived abroad as a result of fear of persecution – as a refugee in the United States - is a violation of Article 1 of the First Additional Protocol. The Court had considered “that a residence requirement for voting may be justified on the following grounds: (1) the assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of, a country’s day-to-day problems; (2) the impracticality and sometimes undesirability (in some cases impossibility) of parliamentary candidates presenting the different electoral issues to citizens living abroad so as to

¹² CETS No. 144 (emphasis added).

¹³ Albania, Denmark, Finland, Iceland, Italy, Netherlands, Norway, Sweden.

¹⁴ Albania, Italy.

¹⁵ Article 20.2.b of the Treaty on the Functioning of the European Union.

¹⁶ Application No. [17707/02](#), 19 October 2004.

secure the free expression of opinion; (3) the influence of resident citizens on the selection of candidates and on the formulation of their electoral programmes; and (4) the correlation between one's right to vote in parliamentary elections and being directly affected by the acts of the political bodies so elected."¹⁷ Stricter requirements might be imposed on the eligibility to stand for election to parliament.¹⁸ However, the Court considered that there was a violation due to the two specific elements mentioned before: the fact that the applicant had a valid registered place of official residence in Ukraine and that he had been granted refugee status because if he had stayed in Ukraine his personal safety or physical integrity might have been seriously endangered.¹⁹

A few years later, the Court took the view that having to satisfy a residence or length-of-residence requirement in order to have or exercise the right to vote in elections is not, in principle, an arbitrary restriction of the right to vote and is therefore not incompatible with Article 3 of Protocol No. 1. It had to address the request of a United Kingdom national who had been living in Belgium for more than 20 years and was refused registration in the electoral register in the United Kingdom, on the basis of legislation according to which nationals resident overseas for less than 15 years could register to vote in United Kingdom general and European elections.²⁰

The most famous case is *Sitaropoulos and Giakoumopoulos v. Greece*.²¹ This case was first dealt with by a section and was then appealed to the Grand Chamber, which took an opposite decision. Whereas the first judgment was favourable to voting from abroad, the second was not. And, at any rate, it addressed the very specific Greek situation. The issue at stake was not the right for Greek citizens residing abroad to vote in national elections – which is recognised at any rate – but their right to vote from abroad. Article 51 para. 4 of the Greek Constitution, introduced in 2001, provides that

4. Parliamentary elections shall be held simultaneously throughout the country. The conditions governing the exercise of the right to vote by persons living outside the country may be specified by statute, adopted by a majority of two thirds of the total number of members of Parliament. Concerning such persons, the principle of holding elections simultaneously does not rule out the exercise of their right to vote by postal vote or other appropriate means, provided that the counting of votes and the announcement of the results are carried out at the same time as within the country.

The first question was whether the right to vote from abroad could be inferred from the Convention. The Court first reminded all concerned that the restrictions on expatriate voting rights based on the criterion of residence were acceptable.²² It observed that “with regard to *international law*, ... neither the relevant international and regional treaties – such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on

¹⁷ Para. 56.

¹⁸ Para. 57.

¹⁹ Para. 65-66

²⁰ *Doyle v. the United Kingdom (dec.)*, No. [30158/06](#), 6 February 2007.

²¹ Application no. [42202/07](#), 15 March 2013 (Grand Chamber), 8 July 2010 (first section).

²² Judgment of 15 March 2013, para. 69.

Human and Peoples' Rights – nor their interpretation by the competent international bodies provide a basis for concluding that voting rights for persons temporarily or permanently absent from the State of which they are nationals extend so far as to require the State concerned to make arrangements for their exercise abroad".²³ When coming to *national* rules, the Court observed that "a comparative survey of the legislation of Council of Europe member States in this sphere shows that, while the great majority of them allow their nationals to vote from abroad, some do not... However, as regards those States which do allow voting from abroad, closer examination reveals that the arrangements for the exercise of expatriates' voting rights are not uniform, but take a variety of forms".²⁴ "In short, none of the legal instruments examined above forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote. As to the arrangements for exercising that right put in place by those Council of Europe member States that allow voting from abroad, there is currently a wide variety of approaches".²⁵

The second – more specific - question was whether the fact that the Constitution provided for an implementing legislation which had not been adopted – preventing any vote from abroad – could be considered a violation of Article 1 Protocol 1. The Court considered that Article 51.4 of the Greek Constitution did not impose the adoption of implementing legislation. In the absence of a violation of the Constitution on this point, no violation of the Convention had occurred either.²⁶ This was the main divergence with the first instance case, where the Court had found a violation since "such a provision [Article 51.4 of the Constitution] cannot remain inapplicable forever, depriving its content and the intention of its drafters of any normative value".²⁷ Finally, the fact that the applicants had maintained close and continuous links to Greece could not justify an exception to a rule which should be of a general nature and the inconvenience resulting from the need to travel to Greece in order to vote could not be considered as disproportionate.²⁸

Still more recently, the Court had to deal with the loss of franchise by United Kingdom nationals who have resided abroad for more than fifteen years. The applicant had actually been residing out-of-country for more than thirty years. Six years ago,²⁹ the Court had rejected such a request as manifestly ill-founded. The Court stated that "[n]either the applicant nor the Government expressly identified the legitimate aim of the restriction in the present case. However, the Court is satisfied that it pursues the legitimate aim of confining the parliamentary franchise to those citizens with a close connection with the United Kingdom and who would therefore be most directly affected by its laws".³⁰ In a very interesting statement, it remarked that "the emergence of new technologies and cheaper transport has enabled migrants

²³ Para. 72 (emphasis added).

²⁴ Para. 74.

²⁵ Para. 75.

²⁶ Para. 76-78.

²⁷ Judgment of 8 July 2010, para. 41.

²⁸ Para. 79-80.

²⁹ See *Doyle v. the United Kingdom*, footnote 19 above.

³⁰ *Shindler v. The United Kingdom*, Application No. [19840/09](#), 7 May 2013, para. 107.

to maintain a higher degree of contact with their State of nationality than would have been possible for most migrants forty, even thirty, years ago. This has led a number of States including the United Kingdom to amend their legislation to allow for the first time non-residents to vote in national elections".³¹ In other words, the Strasbourg Court stated that *globalisation has to be taken into consideration in the approach of transnational phenomena*, as suggested in the introduction to this report. However, it considered that the 15-year limit was in conformity with the principle of proportionality.³²

No specific decision on out-of-country voting can be found in the case-law of the bodies applying the International Covenant on Civil and Political Rights, the American Convention on Human Rights or the African Charter on Human and Peoples Rights.³³

There is no point for the time being in giving the *right to vote to foreigners* in elections covered by Article 1 of the First Additional Protocol (mainly elections at the highest level of the state), whereas the Convention on the Participation of Foreigners in Public Life at Local Level is not subject to the supervision of an international jurisdiction. The issue of (international or national) *election observation* does not appear to have been dealt with by international jurisprudence.

Finally, it happened that the European Court of Human Rights addressed the issue of *European (transnational) elections*. In 1999, the Strasbourg Court dealt with the issue of the right to vote for elections to the European elections in Gibraltar. United Kingdom legislation, applying Council Decision 76/787 and the Act concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976, excluded the residents of Gibraltar from the right to vote in those elections. It considered that these decisions and Act were treaties within the Community legal order, which could not be challenged before the European Court of Justice;³⁴ this did not prevent the exclusion of the Gibraltar residents from the right to vote in European elections from running against Article 3 Protocol 1 to the European Convention on Human Rights. In other words, rules on transnational elections - including primary Community (Union) legislation - have to respect human rights provision of international law.

A mere reference will be made here to the case-law of the European Court of Justice, since it is quite natural that it deals with the right to vote in European Parliament elections guaranteed to European citizens by European Union law.³⁵ An interesting case should however be quoted, which is also linked to out-of-country voting. It addresses the issue of Dutch citizens residing in the Netherlands Antilles or Aruba. While this territory belonged to the Kingdom of the Netherlands and most of its inhabitants were Dutch nationals, it was not part of the European Union. This led Dutch legislation to exclude them from the right to vote and stand for elections in national parliamentary and European elections. On the second aspect, the European Court of Justice found discrimination due to the fact that Dutch nationals residing in a

³¹ Para. 107.

³² Para. 116-118.

³³ Cf. *Sitaropoulos and Giakoumopoulos v. Greece* (Grand Chamber), para. 26-30, 72.

³⁴ *Matthews v. the United Kingdom*, 24833/94, 18 February 1999, para. 33.

³⁵ Article 20.2.b of the Treaty on the Functioning of the European Union.

non-member country were granted these rights.³⁶ The votes of Dutch nationals from Aruba and the Netherlands Antilles were therefore assimilated to out-of-country voting – and rules on out-of-country voting should not discriminate on the basis of the place of residence. Due to the transnational nature of the elections, which implies the right to vote of European Union citizens all over the Union, “out-of-country” has to be understood here as “out-of-the-European Union”.

It may be noted that the other part of the case, concerning the denial of the right to vote to Aruba residents for Netherlands parliamentary elections, was dealt with by the European Court of Human Rights, which considered that there had been no violation of Article 3 of the First Additional Protocol, neither taken alone, nor in conjunction with the principle of non-discrimination enshrined in Article 14 ECHR. The right to vote was actually ensured to those people for the Parliament of Aruba, which had extended powers. This was not the case for Dutch citizens residing in other states, which justified the difference in treatment.³⁷

D. Soft law

What is striking about international standards in the field of electoral rights is that *soft law* is of paramount importance. Contrary to hard law, soft law mainly insists, among the transnational features of elections, on *election observation*.

At the universal level, the issue is dealt with by General Comment No. 25 of the Human Rights Committee.³⁸ This text cannot however deal with all issues in detail. In particular, it does not refer to transnational situations, including voting from abroad and voting by foreigners. The issue of election observation is addressed in the following manner: “There should be independent scrutiny of the voting and counting process... so that electors have confidence in the security of the ballot and the counting of the votes.”³⁹ This does not mean, however, that observation by international observers is required.

Albeit not adopted as a UN document, the 2005 Declaration of Principles for International Election Observation, followed by the Code of Conduct for International Election Observers, was prepared, *inter alia*, by the United Nations Electoral Assistance Division.⁴⁰ The content of this document, which is, in conformity with its title, dedicated to international election observation, will not be detailed here.⁴¹

³⁶ *ECJ Eman and Sevinger*, C-300/04, 12 September 2006.

³⁷ *Sevinger and Eman v. the Netherlands*, Applications Nos. [17173/07](#) and [17180/07](#), 6 September 2007 (dec.).

³⁸ <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb>.

³⁹ Para. 20.

⁴⁰ This document can be found, e.g., at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2005\)036-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)036-e)

⁴¹ A summary may be found in document CDL-AD(2009)020rev, para. 27 ff, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)020rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)020rev-e)

The well-known *CSCE Copenhagen document* (1990) includes a whole point (8) on election observation, which is drafted as follows:⁴²

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.⁴³

So there is a strong substantial as well as procedural basis for international election observation. The *Council of Europe's* soft law in the electoral field was mainly initiated by the *Venice Commission (hereafter: the Commission)*. This is the case in particular in the fields of interest for the present contribution, except for transnational elections which mainly belong to European Union law.

The Venice Commission's major document in the field of elections is the *Code of Good Practice in Electoral Matters* (the Code),⁴⁴ which is the reference document of the Council of Europe in the field. It was approved by the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, and the Committee of Ministers encouraged its implementation.

The Code does not take position on *out-of-country voting*. It provides that "the right to vote and to be elected may be accorded to citizens residing abroad."⁴⁵ In further documents, the Venice Commission moved towards a more favourable attitude towards out-of-country voting. A report endorsed in 2005 by the Commission stated:

In our view, the country of origin should find a formula to encompass this category of voters who reside abroad and want to exercise their right to vote, but cannot come to their country on Election Day. It is up to the citizen to decide whether or not he/she wishes to exercise this right. The same approach should be applied to the legal requirement for passive suffrage. Such a legislative provision will mean that every citizen who meets the general conditions required can run as a candidate for the national elections and does not have to be in his home state. The only legal connection with the state, which a citizen who wants to run for a candidate has to meet, is to be its citizen. This approach is particularly important for countries with a large numbers of its nationals living abroad, who, at the same time, maintain relations with state (although the residences of these people and their successors are abroad, they can run as Members of Parliament).⁴⁶

⁴² The OSCE Copenhagen document can be found at <http://www.osce.org/odihr/elections/14304>.

⁴³ It may be noted that the whole other issues related to elections are dealt with in one point (7). Dedicating a whole point (8) to election observation shows the importance given to it.

⁴⁴ CDL-AD(2002)023rev, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev-e).

⁴⁵ CDL-AD(2002)023rev, I.1.1.c.v.

⁴⁶ Report on the abolition of restrictions of the right to vote in general elections, CDL-AD(2005)011, para. 32, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2005\)011-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)011-e). More

The Commission adopted a specific report on out-of-country voting in June 2011.⁴⁷ The European Court of Human Rights summarised some its main elements in the *Shindler* case⁴⁸ as follows:

“In June 2011 the Venice Commission adopted a report on Out-of-Country Voting (CDL-AD (2011) 022).⁴⁹ The report noted the complexity of the issue of the right to vote of overseas electors and indicated that it was within the scope of the State’s own sovereignty to decide whether to grant the right to vote to citizens residing abroad. The report identified the following arguments in favour of out-of-country voting:

63. Legal recognition of citizens is based on the principle of “nationality”. The citizens of a country therefore enjoy, in principle, all the civil rights recognised in that country.

64. The principle of ‘out-of-country voting’ enables citizens living outside their country of origin to continue participating in the political life of their country on a “remote” basis ...

65. Out-of-country voting guarantees equality between citizens living in the country and expatriates.

66. It ensures that citizens maintain ties with their country of origin and boosts their feeling of belonging to a nation of which they are members regardless of geographical, economic or political circumstances.”

Discussing the nature and effects of restrictions imposed, the report observed:

“70. In the case of states whose citizens live abroad in large numbers, to the extent that their votes could appreciably affect election results, it seems more appropriate to provide parliamentary representation for the citizens resident abroad by pre-defined numbers of members of parliament elected by them ...

71. Given that, in the case of national elections at least, it is exceptional for foreign nationals to have the right to vote in their place of residence, citizens residing abroad are likely to be unable to vote anywhere if they do not have the right to vote in their country of origin. Denying them that right is therefore equivalent to a derogation from the right to vote. It should be possible to find a solution more in keeping with the principle of proportionality by placing certain restrictions on voting rights of citizens residing abroad.

72. Restrictions of a formal nature or based on the voting procedure make it possible to exclude persons having no ties with the country of origin – who will probably not vote anyway. The mere fact of requiring registration on an

references to Venice Commission documents addressing the issue of out-of-country voting can be found in ECtHR *Shindler v. The United Kingdom*, Application No. [19840/09](https://www.echr.coe.int/ViewDoc.aspx?id=19840/09), 7 May 2013, para. 60 ff.

⁴⁷ CDL-AD(2011)022, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)022-e).

⁴⁸ See footnote 47.

⁴⁹ See footnote 47.

electoral roll, usually for a limited period, calls for action on the part of potential voters.

73. One might also wonder whether, instead of excluding citizens residing abroad completely, it would not be preferable to restrict the right to vote to those who have lived in the country for a certain time, and to set a limit on the period for which they retain the right to vote after leaving the country...

As regards the loss of the right to vote after a specified period of absence, the report added:

76. ... it would nevertheless be preferable for the situation to be reconsidered, rather than for provision to be made for the right to vote to be purely and simply lost.”

The Venice Commission thus considers that the grant of voting rights to non-residents is a matter of State sovereignty. It concludes that, “while the denial of the right to vote to citizens living abroad or the placing of limits on that right constitutes a restriction of the principle of universal suffrage, the Commission does not consider at this stage that the principles of the European electoral heritage require the introduction of such a right.”⁵⁰ So any limitation of the right to vote from abroad is a restriction of a fundamental right, which must be justified; the Commission does not exclude such justification for the time being, but could reconsider its position in the light of future developments.

Moreover, specific conditions may be imposed to voters abroad, such as registration in states where it is automatic in-country, or vote at embassies or consulates, which is a serious hurdle in practice but may be justified on the grounds that the other means of voting (postal vote, proxy voting, e-voting) are not always reliable. A difference should also be made between national and local elections, which are very rarely open to voters residing abroad.⁵¹

When considering the trends concerning voting by foreigners and out-of-country voting, we can conclude that both are encouraged if not yet implemented in practice.

On *voting by foreigners*, the Code is quite cautious. It follows the trend of the Convention on the Participation of Foreigners in Public Life at Local Level, thus providing that “it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence.”⁵²

In a democratic state, it is intended that a voter has the right to vote only in one place. Trends towards liberalising voting by foreigners and out-of-country voting do not go against this principle in *transnational* situations. Double vote is avoided: in the vast majority of cases, voting abroad takes place for national elections whereas voting by foreigners is designated for local elections, so no reverse discrimination has been introduced, in our *global village*, in favour of residents abroad.

⁵⁰ CDL-AD(2011)022, para. 98.

⁵¹ CDL-AD(2011)022, para. 94 ff.

⁵² CDL-AD(2002)023rev, I.1.1.b.ii.

Finally, on *election observation*, the Code provides:

- a. Both national and *international observers* should be given the widest possible opportunity to participate in an election observation exercise.
- b. Observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting.
- c. The places where observers are not entitled to be present should be clearly specified by law.
- d. Observation should cover respect by the authorities of their duty of neutrality.⁵³

The explanatory report adds that “International observers play a primordial role in states which have no established tradition of impartial verification of the lawfulness of elections.”⁵⁴

The Venice Commission later addressed the issue of election observation in detail. A first document summarised the existing international standards and overviewed national legislation⁵⁵ while a second one was dedicated to possible improvements in national electoral legislation on the basis of international election observation missions’ reports.⁵⁶ This led to *Guidelines on an internationally recognised status of election observers*.⁵⁷ Concerning the issue of international election observation which is at stake here, the guidelines underline that “*Both international and domestic election observers should be granted the same freedoms and rights. They should have common principles, rights as well as duties...*”⁵⁸

Election observation has to address the whole electoral process (pre-voting phase – including the elaboration of the legislation -, voting phase, post-voting phase, up to taking up office of elected officials).⁵⁹

The guidelines include *inter alia*, the following rights and duties:⁶⁰

⁵³ CDL-AD(2002)023rev, II.3.2 (emphasis added).

⁵⁴ CDL-AD(2002)023rev, para. 89.

⁵⁵ Report on an internationally recognised status of election observers, CDL-AD(2009)020rev, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)020rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)020rev-e).

⁵⁶ Summary of recommendations on an internationally recognised status of election observers, CDL-AD(2009)026, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)026-e).

⁵⁷ CDL-AD(2009)059, at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)059-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)059-e).

⁵⁸ CDL-AD(2009)059, para. 10.

⁵⁹ Para. 15 ff.

1. Rights of international and domestic election observers

1.1 International and domestic election observers should enjoy all the fundamental rights considered as basic conditions for the holding of democratic elections.

1.2 Invitation

International election observation organisations should be invited far enough in advance of election day to ensure timely preparations and allow for long-term observation of the various election phases.

1.3 Elections to be covered

Observation of elections should be possible at any level (i.e. at national, regional and local levels) both for international and national election observers.

1.4 Accreditation

[detailed rules are provided for on accreditation, preventing national authorities from interfering in the selection of election observers or making accreditation difficult, limiting its territorial or temporal scope, etc.]

1.5 Phases of the electoral process to be observed

- i. Election Observation of the whole electoral process should be made possible, i.e. the pre-election, election and post-elections phases,
- ii. According to the Code of good practice in electoral matters, “the places where observers are not entitled to be present should be clearly specified by law” in conformity with the principle of proportionality,
- iii. Election observation should even be made possible when it takes place in other places than the election premises, such as courts, district or regional election commissions or the Central Election Commission,
- iv. Election observers should be able to attend any public activity as part of their observation mission.

1.6 Relationships with the domestic electoral stakeholders

- i. Election observers should have unimpeded access to all persons concerned with the electoral process, and to all parties and candidates, including any candidates or parties that have been disqualified or have withdrawn from the election,
- ii. Election observers should be free to contact political parties, coalitions, candidates, voters, citizens, representatives of the media, any individual as well as the officials and members composing the electoral bodies,
- iii. They should be able to contact and interview any person in the electoral premises (*inter alia* members of polling commissions), provided they are willing to participate in such contact.

1.7 Reporting

⁶⁰ Chapter III.

[detailed provisions address the guarantee of freedom of expression of election observers and people involved in them, as well as their right to make and obtain copies of electoral documents.]

2. Duties of international and domestic election observers

2.1 Election observers should always carry their identification and accreditation documents with them.

2.2 Election observers should comply with all national laws and regulations of the country where they observe.

2.3 Election observers should never obstruct the conduct of the election process, in any of its elements; they must not interfere in the electoral process and must be politically impartial.

2.4 International election observers should never exhibit any personal bias or preference related to issues which may have political or electoral implications and should abstain from doing any political, partisan activity. They should be free from any conflicts of interest and should uphold the principles of strict impartiality at all times in not expressing preference for any participant or party.

2.5 Election observers as individuals must avoid any comments in mass-media and should decline requests for interviews.

2.6 Election observers must present a respectful attitude towards electoral officials, other national authorities and all other participants in the process.

2.7 Election observers should behave at all times, including in their leisure time, in a professional and irreproachable manner.

2.8 The status of election observer implies a strict respect for the legal framework of the country holding the elections, and the principle of impartiality and non-interference.

2.9 Election observers must base their reports and conclusions on factual and verifiable evidence, with professional accuracy and strict respect to impartiality.

Therefore, if an election observer does not respect these principles (even when he or she is acting anonymously, in his or her leisure time), he or she could be deprived of his or her accreditation. Nevertheless, the principle of proportionality must be respected when such a decision is taken.

III. Towards a new approach? Possible conclusions and future steps

On this basis, we will wonder whether these changes are linked to the third wave, to the globalised society of services, whether they brought a new *kind* of legislation, and whether new legal developments are suitable.

Law is often considered as conservative. It is now time to see if this is true in the field under consideration. In other words, has globalisation affected the way of legally dealing with transnational situations in the electoral field? Are the changes sufficient or is further adaptation to the globalised reality necessary?

It is undisputable that the four features discussed in this paper (out-of-country voting; voting by foreigners; international election observation; transnational elections) were embryonic a few decades ago. What is the picture now and should it be improved to reflect globalisation?

Out-of-country voting is becoming more common. For the time being, no international rule or standard imposes it. However, there is a clear trend, in particular in Europe, to admit it, at least for national elections. The final judgment of the European Court of Human Rights in the *Sitaropoulos* case went indeed against the Chamber, which had concluded that the right to vote from abroad had to be recognised to Greek citizens; however, recent case-law, in a welcome reference to globalisation, clearly identifies the emergence of new technologies and cheaper transport as factors to be considered in favour of out-of-country voting. Soft law, albeit with caution, also shows increasing sympathy towards vote from abroad. The Venice Commission thus considers its limitation or denial still admissible “at this stage”. Here too, the evolution of facts has to be taken account of. Future developments could make the issue a textbook case of evolutionary interpretation.

Voting by foreigners looked odd in a rather recent past and still does at national level, where it is often a relic of the past, like in the United Kingdom – or, *mutatis mutandis*, in Neuchâtel.⁶¹ On the contrary, at local level, and even without considering the specific rules of the European Union,⁶² the trend towards extending such a right is clear, at least in Europe – even in Switzerland! The Council of Europe’s Convention on the Participation of Foreigners in Public Life at Local Level is certainly no great success, but it exists and soft law encourages developments in this field.

The parallel evolutions of out-of-country voting and voting by foreigners cannot be looked at separately, but constitute a coherent package in a globalised world: out-of-country voting is focused on national elections; voting by foreigners on local ones. Dual voting keeps being avoided save rare exceptions. The same trend is to be found at European Union’s level: the right to vote at local level is already guaranteed by European Union law to all European citizens at their place or residence,⁶³ whereas the right to vote in national elections is in general guaranteed to them by national legislation whatever their place of residence. It is true that a number of national legislations still submit the right to vote to a condition of residence or

⁶¹ With the loss of the King of Prussia’s rights.

⁶² Article 20.2.b of the Treaty on the Functioning of the European Union.

⁶³ See previous footnote.

provide for its loss after a certain time abroad. However, such rules appear more and more at odds with the concept of European citizenship and the enjoyment of rights attached to it, such as the right to move and reside freely with the Union.⁶⁴ That is why the European Commission recommends that, “[w]here Member States’ policies limit the rights of nationals to vote in national elections based exclusively on a residence condition, Member States should enable their nationals who make use of their right to free movement and residence in the Union to demonstrate a continuing interest in the political life in the Member State of which they are nationals, including through an application to remain registered on the electoral roll, and by doing so, to retain their right to vote”⁶⁵.

In short, albeit implicitly, the idea of globalisation is becoming integrated: it implies a universal right to vote at any level but no right to reverse discrimination. Of course, we are at the starting point, but the trend is clear.

If we come back to the issue of globalisation, and contrary to what could appear at first sight, it is much more out-of-country voting which is linked to novelty, to globalisation, than voting by foreigners. As said in the introduction, (even massive) migrations are not a new phenomenon: they are an expression of the second wave, of a society which needs movement of goods and persons to ensure exchanges, of classical internationalisation. Voting by foreigners is linked to the territory where they live. On the contrary, voting from abroad is largely based on the existence of information available without a need for the citizen to collect it in its country of origin – so mostly to information available through electronic channels, in particular online. It is the expression of a society of (information) services, of the third wave. Its recognition appears more and more necessary, whereas voting by foreigners would rather be its consequence: as soon as everybody is entitled to vote in national elections (out-of-country), the same should be true for local ones (at one’s place of residence). The extreme consequence of globalisation could be that, even at local level, everybody would vote in his or her country of origin... a real paradox since out-of-country voting appears at first sight much more conservative than voting by foreigners...

International election observation does not appear first as an expression of globalisation. The development of election observation, be it national or international, was actually more linked to the fall of the iron curtain and the wave of democratisation which followed than to economic or social developments. One could rightfully argue that the development of the information society made autocracies obsolete, but the link is tenuous.

Finally, what about *transnational elections*? For the time being, as long as supra-nationality is confined to the European Union, they are essentially linked to European integration, and therefore to European Union law, which had to address the issue.

⁶⁴ Article 20.2.a of the Treaty on the Functioning of the European Union.

⁶⁵ Commission recommendation of 29 January 2014 addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement (2014/53/EU), Official Journal of the European Union, L 32/34, 1.2.2014; see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement, COM(2014)33 final.

In our introduction, we wondered whether *a new kind of legislation* was brought by globalisation. The development of *soft law* is undisputable but it would be audacious to see it as an effect of globalisation – it is largely regional. *Supra-national legislation*, as the expression of European integration, goes beyond mere internationalisation, but is clearly no global legislation. Global supra-nationality is not on the order of the day, nor is therefore global supranational law.

By way of consequence, European Parliament elections are an expression of one of the federal-like aspects of the European Union, and have a number of common features with national elections in a federal state – including the right for citizens of other member states to vote for such elections at their place of residence.⁶⁶ This implies, according to our opinion, that the discussion on the possibility – or even the need – for the European citizen to vote for candidates from different country lists is not a priority, in the absence of precedents at national level of possibilities to vote for candidates from various constituencies.

Let us now summarise the results of this research in a few words:

- Electoral law on transnational situations has developed in the last decades and is still developing. It addresses in particular:
 - out-of-country voting
 - voting by foreigners
 - international election observation
 - transnational elections;
- Such issues are dealt with by national as well as by international law (hard and soft law);
- Globalisation has influenced such legislation, but has not led to the creation of a new kind of legislation;
- Among the four transnational situations mentioned above, out-of-country voting appears as the most closely related to globalisation. Voting by foreigners at local level completes out-of-country voting at national level. International election observation and transnational elections look as more akin to specific historical developments with only an indirect link to globalisation (democratisation, European integration).

⁶⁶ Even if the vote for lists of the country of origin is not excluded – this appears as one expression of the intermediate situation of the European Union, between a state and an international organisation.

