Parliamentary Assembly
Assemblée parlementaire
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 15027
08 January 2020

Setting minimum standards for electoral systems in order to offer the basis for free and fair elections

Report[1]
Committee on Political Affairs and Democracy
Rapporteur: Mr Rik DAEMS, Belgium, Alliance of Liberals and Democrats for Europe

Summary

Electoral systems are key tools of representative democracy. They lay down the rules designed to organise elections and to transform votes cast into political mandates and seats in parliament, and have a strong impact on the representativity, legitimacy of, and public confidence in, democratic institutions.

The report provides a comparative analysis of various electoral systems in Europe and concludes that different systems do not provide an equal degree of fairness. While the constitutional and legal mechanisms of an electoral system may be consistent with democratic principles, the results of elections are often not, as voters do not obtain the election of persons they voted for. This is one of the reasons why populism and extremism are gaining ground.

The report further argues that a discrepancy between the political choices of the constituents as expressed in elections and the composition of elected institutions is a sign of democratic deficit and puts the fairness of the electoral system in doubt.

Accordingly, the report suggests inviting the Venice Commission to reflect on setting up minimum standards with which electoral systems must comply in order to be deemed as guaranteeing not only free elections but also fair results thereof.In addition, the report suggests considering updating the 2002 Code of good practice in electoral matters in order to keep pace with the evolving political realities observed in European societies and to face new challenges.

1. Reference to committee: Doc. 14072, Reference 4222 of 24 June 2016.

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A. Draft resolution[2]

1. The Parliamentary Assembly attaches great importance to, and recalls its constant interest in, electoral matters. It refers to its previous work in this domain, in particular Resolution 2251 (2019) "Updating guidelines to ensure fair referendums in Council of Europe member States", Resolution 1897 (2012) "Ensuring greater democracy in elections", Resolution 1826 (2011) "Expansion of democracy by lowering the voting age to 16", Resolution 1705 (2010) "Thresholds and other features of electoral systems which have an impact on representativity of parliaments in Council of Europe members States", Resolution 1590 (2007) "Secret ballot – European code of conduct on secret balloting, including guidelines for politicians, observers and voters", and Resolution 1320 (2003) "Code of good practice in electoral matters".

2. The Assembly greatly values the role of the European Commission for Democracy through Law (Venice Commission) as the leading Council of Europe expert body in electoral matters and its own long-standing co-operation with the Venice Commission in setting electoral standards in Europe.

3. In particular, the Assembly highlights the importance of the Code of good practice in electoral matters (2002) drafted on the initiative of, and in close co-operation with, the Assembly. The Code contains the underlying principles of Europe's electoral heritage and is widely recognised as a key Council of Europe document aimed at promoting the harmonisation of electoral standards and at serving as a reference for evaluating elections.

4. Free and fair elections constitute the very foundation of democratic government and a cornerstone of representative democracy. By electing representatives from among themselves to form governing bodies, citizens exercise their right to be represented in the political decision-making process.

5. The legitimacy of a democratic system depends on public confidence, in that all constituents, regardless of their political preferences, have equal access to, and are fairly represented in, decision-making institutions, and that the composition of the latter duly reflects the political spectrum of society.

6. The electoral system, as the set of rules designed to organise elections and to transform votes cast into political mandates and seats in parliament and other elected bodies, is one of the key elements of representative democracy. It has a strong impact on the representativity of, legitimacy of, and public confidence in, democratic institutions.

7. There is a vast variety of electoral systems in Europe, both in terms of legislation and its practical implementation. This variety results from different political histories, cultures and traditions. The electoral system is based, in every country, on a consensus among both political actors and society at large. Electoral systems in different countries are founded on different political principles and produce different results in terms of representativeness and governability.

8. In this context, the Assembly notes that different electoral systems do not provide an equal degree of fairness when it comes to translating the votes cast into political mandates and seats in parliament. It is concerned that, under some electoral systems, even if the legal rules are observed, substantial parts of constituents are not represented in elected institutions, or do not see in parliament the candidates which they voted for. Inversely, some systems provide the winning parties with parliamentary majorities which largely exceed the real support they enjoy among citizens.

9. This inconsistency between legality and legitimacy undermines public trust in the democratic process and creates a fertile ground for populism and extremism.

10. The Assembly believes that the failure of an electoral system to prevent a large discrepancy between the political choices of the constituents as expressed in elections and the composition of elected institutions is a sign of democratic deficit and puts its fairness in doubt.

11. The 2002 Code of good practice in electoral matters defines the principles for elections and states that, within the respect of these principles, any electoral system may be chosen. At the same time, the Code does not contain any specific criteria which an electoral system must respect in order to be deemed fair and democratic.

2. Draft resolution adopted unanimously by the committee on 9 December 2019.

12. Moreover, the Assembly believes that, almost 18 years since its adoption, the 2002 Code of good practice in electoral matters needs to be updated in order to keep pace with the evolving political realities observed in our societies and to face new challenges and also to take into account ongoing work and reflection within the Venice Commission over the years, including more recently in the context of updating the Code of Good Practice on Referendums upon the Assembly's proposal.

13. Therefore, the Assembly invites the Venice Commission to:

13.1. reflect on the issues raised in paragraphs 8, 9 and 10 above and to consider ways to set up minimum standards with which electoral systems must comply in order to be deemed as guaranteeing not only free elections but also fair results thereof;

13.2. consider the possibility of updating the Code of good practice in electoral matters, taking into account, to the extent of possible, relevant Assembly resolutions and its own work on specific issues related to the conduct of elections, as well as its country-specific reports and opinions, in particular as regards: voting rights for citizens abroad; independent candidacies; turnout requirements; thresholds; ranking order of party lists and balanced participation of women and men and equal representation of women.

14. Moreover, the Assembly welcomes the work recently done by the Venice Commission and the Council of Europe Directorate of information society and action against crime on *Digital technologies and elections* and invites the Venice Commission to remain alert to new emerging phenomena which may affect the functioning of electoral systems and, *in fine*, the quality of the democratic process, such as the:

14.1. transition to an information society and an unprecedented role and influence of social media;

14.2. misuse of both traditional and social media for spreading biased information and "fake news";

14.3. fluidity of national political landscapes with the swift emergence of new faces and new actors (e.g. political parties and movements) at the expense of "traditional" ones;

14.4. growing influence of party bureaucracies tending to overrun the choice of voters;

14.5. potential margins for abuse of political advertising.

15. Finally, the Assembly resolves to continue to follow closely, in co-operation with the Venice Commission, electoral matters, both as regards the setting of, and compliance with, relevant international standards in this field.

B. Explanatory memorandum by Mr Hendrik Daems, rapporteur

1. Introduction

1. In May 2016, I tabled a motion for a resolution on “Setting minimal standards for electoral systems in order to offer the basis for free and fair elections” which the Assembly referred to our committee for report.

2. The motion recalls that building, protecting and strengthening democracy is core business for the Council of Europe, and that electoral systems are essential tools for practicing representative democracy. It calls for a structured comparative overview of different electoral systems in Europe which would allow the establishment of basic Council of Europe standards in this area.

3. Ms Elena Centemero (Italy, EPP/CD) was appointed as rapporteur in October 2016. Under her auspices, the committee held several exchanges of views on the matter and organised two hearings with experts. In January 2017, Mr Gianni Buquicchio, President of the European Commission for Democracy through Law (Venice Commission), briefed the committee on its activities on electoral matters. Unfortunately, Dr Michael Krennerich, a widely recognised international expert in electoral field, had to cancel participation, but provided us with a valuable written contribution. In April 2017, we held a joint hearing with the Committee on Equality and Non-Discrimination, with the participation of Mr Florian Grotz, Chair of Comparative Politics, Institute of Political Science, Helmut Schmidt University of Hamburg, Ms Marilisa D'Amico, Professor of constitutional law, University of Milan, and Ms Ana Rusu, Senior Election Adviser, OSCE Office for Democratic Institutions and Human Rights (ODIHR).

4. However, Ms Centemero lost her parliamentary seat in the general elections in Italy held on 4 March 2018 and could not finalise her report. Nevertheless, in order not to waste the work done by the committee and the rapporteur, the chairperson of the committee presented on 26 June 2018, on her own behalf, the introductory memorandum prepared by Ms Centemero.

5. On 11 September 2018, the committee appointed me to complete the report.

6. In my view, the introductory memorandum prepared by Ms Centemero provides useful background information on the matter, including a comparative analysis of various electoral systems in Europe and an overview of problems which may have an impact on the proper functioning of an electoral system. I therefore keep these useful elements in my final report.

7. However, I am afraid I am not able to agree with one key statement quoted in Ms Centemero’s report with reference to the Venice Commission findings, namely, that “…none of the electoral systems in use in Council of Europe member States is undemocratic by itself…”.

8. In my view, various electoral systems are not equally democratic. Some systems, more than others, provide for a better correlation between the will of voters and the result of the vote translated into the composition of an elected body. While the constitutional and legal mechanisms of electoral systems may be consistent with democratic standards, the results are often not, as voters do not obtain the election of persons they had voted for. This is one of the reasons why populism and extremism are gaining ground.

9. I shared these concerns with the committee on 11 April 2019. Some colleagues agreed that, while elections provided legitimacy to democracy, some electoral systems, and indeed basic elements of representative democracy, were challenged in a number of countries.

10. On this occasion, one of our colleagues, Lord George Foulkes (United Kingdom, SOC), wondered if I could present the modelling of the different outcomes which would be possible when using different systems in a given country.

11. On 14 November 2019, I presented to the committee the results of a study comparing the actual outcome of the last elections to the Flemish Parliament (June 2019) with the outcomes that would have been obtained if seats were distributed in accordance with different electoral systems (see appendix). Earlier, on 30 September, I shared the results of this study with Mr Gianni Buquicchio, President of the Venice Commission, at a meeting in Strasbourg. The study clearly shows that the choice of an electoral system has a strong impact on the distribution of seats and, consequently, on the representativity of an elected body, which in turn may raise questions on the fairness of elections and, more generally, weaken public confidence in the democratic process.

2. The Council of Europe's activities in the field of elections

12. Both the Assembly and the Venice Commission have attached great importance to the issues related to elections. I refer, *inter alia*, to Assembly Resolution 1897 (2012) "Ensuring greater democracy in elections", Resolution 1826 (2011) "Expansion of democracy by lowering the voting age to 16", Resolution 1705 (2010) "Thresholds and other features of electoral systems which have an impact on representativity of parliaments in Council of Europe members States", Resolution 1590 (2007) "Secret ballot – European code of conduct on secret balloting, including guidelines for politicians, observers and voters", and Resolution 1320 (2003) "Code of good practice in electoral matters". More recently, the Assembly adopted Resolution 2251 (2019) "Updating guidelines to ensure fair referendums in Council of Europe member States".

13. As regards the work of the Venice Commission, it is worth mentioning two reference documents: the Code of good practice in electoral matters (2002) and the Code of good practice for referendums (2007). The former is of particular relevance for this report. It was prepared by the Venice Commission in close co-operation with the Assembly and received its approval in the above-mentioned Resolution 1320 (2003). It was also supported by a solemn declaration of the Committee of Ministers in May 2004, and therefore enjoys a particularly prominent status.

14. Other relevant Venice Commission studies include the reports on electoral systems: overview of available solutions and selection criteria (2003), on electoral law and electoral administration in Europe: Synthesis study on recurrent challenges and problematic issues (2006), on thresholds and other features of electoral systems which bar parties from access to parliament (2008 and 2010), on the impact of electoral systems on women's representation in politics (2009), and on proportional electoral systems: the allocation of seats inside the lists (open/closed lists) (2015) and on constituency delineation and seat allocation (2017). In addition, the Venice Commission has produced, often jointly with OSCE ODIHR, dozens of country-focused studies and opinions on electoral legislation and practice.

15. The Assembly resolutions and the reports by the Venice Commission mentioned above provide detailed comparative analysis of various electoral systems and define the set of common Council of Europe standards in electoral matters. However, these standards fail to address the fact mentioned in paragraph 8 above, namely, that some systems do not adequately translate the will of voters into the composition of an elected body. Moreover, the key standard-setting document, namely the Code of good practice in electoral matters, was drafted more than 17 years ago, and might thus need to be updated, so as to take into account the latest developments in an ever-evolving European electoral practice.

16. Accordingly, I see this report as an opportunity, on the one hand, to recall the variety of electoral systems existing in Europe and sum up, without going too deep into detail, their respective advantages and weaknesses, and on the other hand, to make a case for setting minimum standards for electoral systems in order to offer the basis for free and fair elections. Additionally, I intend to focus on some other features which must be borne in mind for a proper functioning of an electoral system. In fact, I believe that there are many elements within some electoral systems which can be considered as non-democratic given the fact that they prevent a level playing field amongst candidates.

17. It is important to stress, at the outset, that the choice of a specific type of electoral system is a matter of sovereign decision by the political community of a given country. To quote Assembly Resolution 1705 (2010), "[…] There is no unique model which could be recommended to all countries as the best one. The choice depends on a number of factors including historical background and political and party systems." (para. 7). Therefore, the task of defining common minimal standards for electoral systems has its limits and should not be interpreted as an attempt to declare a given system as the best one or to impose it on a given country.

3. Electoral systems as the core element of representative democracy

3.1. Converting electoral votes into political mandates and parliamentary seats

18. Representative democracy is a system of government in which citizens exercise power by electing representatives from among themselves to form governing bodies. Thus, elections constitute the very foundation of democratic government. That is why it is widely recognised that the electoral system, as the set of rules designed to organise elections and to transform the votes cast into political mandates and seats in parliament, is one of the most fundamental elements of representative democracy.

19. Electoral systems consist of sets of rules that govern all aspects of the voting process: the timing of elections, the conditions to be able to vote and to stand as a candidate, the modus of casting and counting the ballots, limits on campaign spending, and other factors that can affect the outcome. Political electoral systems are defined by constitutions and electoral laws, are typically conducted by election commissions, and can use multiple types of elections for different offices.

3.2. Main requirements for electoral systems: guaranteeing democracy, representativeness and governability

20. In order to provide the framework for genuinely democratic elections, electoral systems must guarantee the respect of five fundamental principles: suffrage must be universal, equal, free, secret and direct[3]. Elections must be held at regular intervals[4]. Furthermore, truly democratic elections can only be held if basic conditions of a democratic State based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met[5].

21. The Venice Commission states that "*Within the respect of the above-mentioned principles, any electoral system may be chosen*"[6]. This may be interpreted as an assertion that none of the electoral systems in use in Council of Europe member States is undemocratic by itself insofar as it guarantees the respect of above-mentioned principles, and as far as a level playing field between candidates, between parties, and within parties, is sufficiently guaranteed. As a consequence, none of these systems can be recommended as the best model for every country. However, I believe that the systems which fail to translate in a fair manner the will of voters into the composition of an elected body cannot be considered as fully democratic if democracy still means "government of the people, by the people, for the people".

22. Beyond this general democratic prerequisite, electoral systems must provide for the formation of democratic political institutions which meet two fundamental criteria: representativeness and governability. On the one hand, democratic institutions should be inclusive and provide citizens with differentiated options to participate and to be represented in the political process. On the other hand, they should allow for efficient policy-making, so that authoritative decisions are taken and implemented within a reasonable timeframe.

23. Although both criteria are crucially important for the proper functioning of democratic institutions, there is a trade-off between them: more inclusiveness usually results in less efficiency, and *vice versa*. Different electoral systems bring about different results: whereas some favour more representativeness by ensuring seats for a greater number of parties and, as a result, more fragmented institutions, others ensure better governability by providing strong majorities for big parties by excluding smaller ones. I strongly believe that a fair representation of the will of voters, i.e. representativeness, must be given priority over governability if the latter comes at the expense of the former.

3.3. Reforming electoral systems to improve democracy and shape political systems

24. Electoral systems have a strong reciprocal influence on the political structure of a country, including the number of parties represented in parliament and the relative size of party representation, and as a consequence, on the formation of government and the choice of public policies.

25. Stability of electoral law is recognised as one of the basic principles of the European electoral heritage, as mentioned above. However, since democracy is in permanent evolution and has to face new challenges, it is only natural that electoral systems, too, may need to be updated. Reforming the electoral system of a given country will inevitably reshape its political landscape and may contribute to consolidating democracy. According to the Venice Commission:

> *"A successful electoral reform is built on at least the following three elements: 1) clear and comprehensive legislation that meets international standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all the stakeholders; 3) political commitment to fully implement the electoral legislation in good faith."*[7]

3. CDL-AD (2002) 23 rev. Code of good practice in electoral matters, I. 1-5.
4. Idem, I. 6.
5. Idem, II. 1-3.
6. Idem, II. 4.
7. CDL-AD (2016)031 Armenia – Second joint opinion on the electoral code (as amended on 30 June 2016), para 16.

26. If electoral systems are to be reformed, this should be done in such a way as to guarantee the interests of all relevant stakeholders. Electoral reforms implemented unilaterally by the ruling forces may affect the long-term stability of the electoral system and thus undermine its legitimacy.

4. Main categories of electoral systems with respective advantages and weaknesses[8]

4.1. Typology of electoral systems

27. In this section, I will mainly focus on elections to multi-seat representative bodies, i.e. parliaments, regional and local assemblies.

28. There is an immense variety of electoral systems in Europe, and it would probably be impossible to find exactly the same system in two different countries. Moreover, in some cases, there are different electoral systems at national and sub-national levels in the same country (e.g. in Germany and in the United Kingdom). Each system is a result of the political consensus in the country and reflects its own political history and other peculiarities.

29. However, it is possible to categorise this diversity into several generic types, based on underlying principles and their translation into practical political results.

30. On one extreme side of the spectrum, electoral systems designed on the majority or plurality principle tend to enhance the concentration of the party system and thus ensure better governability. The most characteristic example of this type is the British plurality system in single-member constituencies (SMCs), also known as “first-past-the-post” or “winner-takes-all”. The candidate obtaining more votes than the others is elected in the single round[9].

31. Another system based on this principle is the French two-round majority vote: the candidate winning an absolute majority (50% plus one vote) is elected in the first round; otherwise, there is a run-off in which the plurality rule is applied.

32. On the opposite side, there are electoral systems based on the principle of proportional representation (PR): these seek to ensure the best possible correlation between the share of votes cast in favour of a given party and the number of seats it obtains, and thus foster the representativeness of the elected body.

33. The “purest” example of this electoral system may be found in the Netherlands, but it is also practiced, with some variations (e.g. national PR[10], constituency PR in multi-member districts[11], multi-tier PR[12]), in most Council of Europe member States.

34. Finally, there are mixed or hybrid electoral systems which attempt to combine the benefits of non-proportional and proportional systems and include the elements of plurality in SMCs and the PR at national level[13], and mixed member proportional systems[14].

35. When it comes to direct elections to a unique position (e.g. president, governor, mayor), there are two systems based respectively on majority run-off and plurality. The latter, where the candidate with more votes than the others is elected, is rather a rare case[15] since it may result in bringing to office of a candidate opposed by the majority of voters. Most countries use the majority system: in order to win in the first round, the candidate must obtain the absolute majority (50% plus one vote); if there is no winner, the two strongest candidates compete in the second round.

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8. This section is broadly based on the contribution of Professor Dr Florian Grotz at the hearing held on 27 April 2017 which can be found in AS/Pol/Inf (2017) 13, as well as on Mr Grotz’s report “Electoral systems and their political consequences: Elements of interest for Tunisia”, CDL-EL (2012) 008. The classification of Council of Europe member States by type of electoral system is based on a contribution by Prof. Michael Krennerich (see also footnote 16).
9. Azerbaijan also uses the plurality system.
10. Armenia, Republic of Moldova, Montenegro, San Marino, Serbia, Republic of Slovakia.
11. Albania, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Ireland, Latvia, Liechtenstein, Luxembourg, Malta, North Macedonia, Poland, Portugal, Romania, Slovenia, Spain, Switzerland, Turkey.
12. Austria, Bosnia and Herzegovina, Denmark, Estonia, Greece, Iceland, Italy, Norway, Poland, Sweden.
13. Andorra, Georgia, Lithuania, Monaco, Russia, Ukraine.
14. Germany, Hungary.
15. Azerbaijan, Bosnia and Herzegovina, Iceland.

4.2. Pros and cons of various types of electoral systems

36. As mentioned above, different types of electoral systems produce different results and the choice of a certain type of system plays a crucial role in shaping the political landscape of a country.

37. The plurality system favours strong political parties and often produces single-party majorities in parliament and single-party governments. It allows for a stable government able to implement clear and uncompromised policies (efficient governability). The dominant position of the winning party is obtained at the expense of smaller parties and seriously impairs the representation of the diversity of political views and, as a consequence, the representativeness of the elected body.

38. The majority system partly compensates this disadvantage as smaller parties can form electoral alliances before the second round and obtain seats in the elected body. The representation of the diversity of political views and the representativeness of the institution is thus increased at the expense of governability since there is a need to secure both pre-electoral and post-electoral compromises.

39. The pure PR system ensures a maximum of proportionality and the representation of the widest possible range of political opinions, in particular if combined with a low threshold (e.g. in the Netherlands, the threshold is 1/150 of the total number of valid votes, i.e. 0.67%; a party obtaining this result receives one seat in Parliament). Resulting from this diversity are very fragmented elected bodies. As no one party is in a position to secure an overall majority of votes, several parties must co-operate to form a coalition government, whose capacity to work out strong policies is diminished by necessary compromises and whose stability is at risk in case of disagreements among partners.

40. Most electoral systems in Europe tend to strike a balance between representativeness and governability to a certain extent but cannot maximise both criteria at the same time. The systems which are designed to foster governability by providing bonus seats for stronger parties in order to facilitate the formation of government inevitably affect the representation of smaller parties. As a result, more or less sizeable parts of constituents are not represented.

41. Other more or less technical aspects of the electoral machinery (e.g. thresholds, size of electoral constituencies, personalisation of votes, etc.) have an impact on the functioning of electoral systems and the extent to which they accomplish their *raison d'être*: transforming with a maximum possible precision the ballots cast into seats in elected institutions while ensuring the functionality of the latter.

42. Last but not least, the functioning of an electoral system and the results which it produces not only depend on its institutional design, but also on the political context in which it operates.

4.3. Difficulties favouring one system over another

43. The proportional representation systems appear to produce better results in terms of the degree of correlation between the expression of the will of the constituents and the composition of an elected body, but it takes some political courage to qualify these systems as more democratic than any others.

44. As mentioned above (para. 21 above), the Venice Commission does not favour one particular system over any other and finds them all equally democratic (subject to respect for the basic principles). At the hearing in the committee, Mr Gianni Buquicchio, President of the Venice Commission, was reluctant to make a qualitative assessment. Both experts who have contributed to the report, Messrs Krennerich and Grotz, also shared this position. In particular, Professor Grotz stated that "Setting uniform standards for electoral systems beyond very general guidelines (as outlined in the Code of Good Practice in Electoral Matters and other documents prepared by the Venice Commission) is extremely difficult, if possible at all."[16]

45. One reason for this is the fact that electoral systems are part and parcel of a broader political landscape of respective countries which result from national political history, culture and traditions, and are a product of a consensus among political actors and constituents. In order to genuinely judge the functioning of the political machinery of a given country, one must wholly belong to it. External views may be useful to critically assess, and make proposals to improve, some specific aspects of the functioning of the political system, but changing it must belong to its actors who see and feel it in its entirety, and pass through a broad national consensus.

46. It is understandable that an expert body like the Venice Commission has difficulties making political statements. This is exactly the role of our Assembly, as a political organ, to state clearly that electoral systems which fail to translate in a fair manner the will of voters into the composition of an elected body cannot be

16. AS/Pol/Inf (2017) 13, p.3.

considered as fully democratic. We should give a political impetus to the Venice Commission to reconsider its position on the issue, and invite it to elaborate, in co-ordination with the Assembly, the minimum standards for electoral systems to be considered as democratic.

5. Other elements to ensure the proper functioning of an electoral system[17]

47. Electoral systems have a degree of influence on the electoral competition and, more broadly, on the functioning of the political system. Some specific elements of electoral systems may create additional difficulties for the organisation of democratic elections and should be borne in mind and addressed if the normative documents on electoral matters are to be updated.

5.1. Stability and clear regulation of electoral systems

48. The stability of electoral law is crucial to the credibility of the electoral process. Irrespective of the type of electoral system, it should therefore be avoided that electoral systems are changed too often and just before elections. Furthermore, there is a need for clear and comprehensive legislative regulation of electoral systems.

5.2. Constituency boundaries

49. The apportionment of legislative seats over a given territory and the drawing of boundaries are central to competitive elections. Issues of reapportionment and boundary readjustments are therefore important for all electoral systems that provide for single-member constituencies or multi-member districts.

50. In order to guarantee equal voting rights, seats must be evenly distributed among the constituencies on the basis of the number of citizens or registered voters. In some of Council of Europe member States, a highly uneven distribution between citizens among electoral districts may be inconsistent with the principle of equality of the vote.

51. Moreover, in all electoral systems that provide for constituencies, there is an inherent danger that constituency boundaries are drawn in favour of particular parties or candidates. Even if independent and impartial bodies (e.g. Boundary Commissions) are responsible for boundary reviews, boundary changes always have partisan effects that are hotly debated.

5.3. Single-member constituencies

52. While single-member constituencies may be important to ensure a close relationship between voters and constituency representatives, they are prone to corruption and fraud in those countries where a democratic political culture is not sufficiently established. This is due to the fact that it easier to manipulate elections at the constituency level than at the regional or national level. The majoritarian components of the mixed (parallel) electoral systems in a number of “new democracies” have been criticised as being particularly vulnerable to fraud.

5.4. Voting rights for citizens abroad

53. There is a growing tendency to allow citizens abroad to vote in national elections. As for PR systems at the national level, voting for citizens residing abroad is easy to manage since there is only one nation-wide constituency. If electoral systems provide for single- or multi-member constituencies, however, it will be necessary to assign external voters to constituencies or create specific constituencies for out-of-country voters. There should be clear and comprehensible criteria to do this.

54. In Germany, for instance, voters abroad are assigned to the constituency of their last residency. In a number of other countries, voters residing abroad have their own out-of-country districts. In order to ensure the principle of equal suffrage, however, special attention must be paid to an even distribution of voters between in-country and out-of-country constituencies.

17. This section is based on a written contribution provided by Professor Dr Michael Krennerich, University Erlangen-Nuremberg (Germany), Institute for Political Science, Chair on Human Rights and Human Rights Politics. Mr Krennerich shared it with the previous Rapporteur, Ms Centemero, but was unable to present it to the committee.

5.5. Independent candidacies

55. With proportional representation systems at the national or even constituency level, sometimes only political parties or electoral alliances are allowed to stand for elections, but not independent candidates. Even with proportional representation systems, however, allowing independent candidates to stand for elections should be allowed.

5.6. Ranking order of party lists

56. For all proportional list systems, parties must be prohibited from changing the order of candidates within an electoral list after the ballot has taken place. The voter must know who he or she is voting for, and the voter decision must be respected. The opposite situation offers too much power to party staff and results in bringing to elected office candidates for whom the voters did not vote. The concentration of political power within a narrow circle of party officials, including decision-making on the order of candidates on party lists, creates the risk of turning democracy into "partocracy".

5.7. Turnout requirements

57. In some countries, the Electoral Law contains a requirement for a minimum turnout for the election to be valid. In case the turnout threshold has not been reached, the election has to be considered as not having taken place – and a repeat election would be useless since it would normally lead to an even lower turnout. This would prevent the very establishment of the body to be elected and therefore lead to an institutional crisis. Furthermore, since turnout rates remain arbitrary without the existence of accurate voter registration, such a requirement might be problematic in some countries, and it might provoke attempts to fraudulently inflate turnout rates.

5.8. Legal thresholds

58. There is a controversial debate on legal thresholds of representation. It refers to the legally established minimum share of valid votes that parties must obtain in order to participate in the distribution of seats. The principal aim of such thresholds is to avoid party fragmentation and to enable stable governments by excluding minor parties when translating votes into seats. This is a legitimate aim. From the perspective of inclusiveness, however, high legal thresholds, especially at the national level, might be problematic. For instance, the national threshold of 10% valid votes cast in Turkey – which is the highest in all Council of Europe member States – has been widely criticised, including by the Assembly.

59. However, the general recommendation of the Assembly to decrease legal thresholds that are higher than 3%[18] needs further discussion. In Europe, thresholds of 5% are most common. Furthermore, the effects of the threshold depend not only on the percentage, but also on the level and stage of application. Moreover, in PR systems with small and medium-sized constituencies the "natural" thresholds are much higher than 3% at the constituency level.

60. Open to discussion is whether one should apply different legal thresholds to parties and electoral alliances. In addition, it seems to be appropriate that legal thresholds are calculated based on the valid votes cast (and not of the total votes cast).

5.9. Balanced participation of women and men and equal representation of women

61. There is a broad consensus that women's parliamentary representation should be increased. Democracy is incomplete if one half of the population is not appropriately represented.

62. Mandatory or voluntary gender quotas for parties presenting candidates or candidates' lists can be considered as a "fast track" to an increased women's representation in parliament, if they provide not only for a high proportion of female candidates, but also for strict rank-order rules and effective sanctions for non-compliance. Another avenue worth considering could be increased public funding of political parties which encourage women's participation as candidates.

18. Resolution 1705 (2010), para. 22.3.

63. As for the type of electoral system, generally, with proportional representation systems it is easier for women to get access to parliament than with other types. Especially in large or even nation-wide districts, PR systems appear to be advantageous for women's nomination and representation. The more MPs that are elected per district (district magnitude) and the greater the number of seats a party expects to win (party magnitude), the more meaningful are ticket balancing strategies to include women.

64. For the same reason, legal threshold may surprisingly work in favour of an increased women's representation. Although they exclude small parties (which may represent women's interests), they allow those parties which pass the threshold to gain enough seats in order to make ticket-balancing in favour of women meaningful.

65. As for the PR list form, general recommendations can hardly be made. Depending on the respective conditions, closed or open party lists may work to the advantage or disadvantage of women.

66. Finally, it should be clear that the electoral system alone does not ensure an increased women's representation in political and public life. Additional measures are needed.

5.10. Representation of national minorities

67. In many countries, there is a strong political demand for a better representation of national minorities in parliament. In such cases, the electoral system may facilitate minority representation. In the case of nationally dispersed national minorities without regional strongholds, proportional representation systems in nation-wide or in large districts might be appropriate, especially if party lists presenting national minorities are excluded from threshold requirements. In the case of regionally concentrated national minorities, however, PR systems in small districts or even plurality systems in single-member constituencies may also ensure minority representation.

68. Alternatively, or additionally, there are sometimes provisions for reserved seats separately allocated to national minorities. If special rules are applied to national minorities, however, there must be clear criteria in the law to determine which minorities should be entitled to have related privileges such as threshold exemptions or reserved seats.

5.11. Other elements raised in the committee

69. During the discussion in the committee, a number of colleagues raised some additional issues which have emerged over the last few years and may affect the functioning of electoral systems and, *in fine*, the quality of the democratic process. These include the transition to an information society and an unprecedented role and influence of social media; the misuse of both traditional and social media for spreading biased information and "fake news"; the fluidity of national political landscapes with swift emergence of new faces and new actors (e.g. political parties and movements) at the expense of "traditional" ones; the growing influence of party bureaucracies tending to overrun the choice of voters; potential margins for abuse in the use of political advertising, etc. The list is far from being exhaustive.

70. While these issues must be borne in mind, I wonder to what extent they may be subject to be addressed by uniform regulations at the European level. Many colleagues agreed that the general political culture constitutes a necessary condition for the proper functioning of any electoral system. It certainly can be promoted but it is rather difficult to imagine how it can be codified. In any event, it is worth drawing attention to a joint report which the Venice Commission prepared with the Council of Europe Directorate of information society and action against crime on *Digital technologies and elections*, adopted in June 2019.[19]The Venice Commission also decided to prepare a list of principles for the use of digital technologies in a human rights compliant manner, in relation to elections.

6. Conclusions

71. There is a vast variety of electoral systems in Europe, both in terms of legislation and its practical implementation. This variety, resulting from different political histories, cultures and traditions, and based in every country on a consensus among political actors and societies at large, forms a European electoral heritage.

19. See CDL-AD(2019)016-e. See also the report being prepared by Mr Frihjof Schmidt (Germany, SOC) for our committee on *Democracy hacked? How to respond?* (Doc. 15028).

72. The fundamental principles of democratic elections are summed up and explained in the 2002 Code of good practice in electoral matters drafted by the Venice Commission in co-operation with the Parliamentary Assembly and widely recognised as a key Council of Europe document aimed at promoting the harmonisation of electoral standards and at serving as a reference for evaluating elections.

73. Electoral systems in different countries are founded on different political principles and produce different results in terms of representativeness and governability. In particular, different electoral systems do not provide an equal degree of fairness when it comes to translating the votes cast into political mandates and seats in parliament. Under some electoral systems, even if the legal rules are observed, substantial parts of constituents are not represented in elected institutions, or do not see in parliament the candidates which they voted for. Inversely, some systems provide the winning parties with parliamentary majorities which largely exceed the real support they enjoy among citizens.

74. This inconsistency between legality and legitimacy undermines public trust in the democratic process and creates a fertile ground for populism and extremism. Failure of an electoral system to prevent a large discrepancy between the political choices of the constituents as expressed in elections and the composition of elected institutions is a sign of democratic deficit and puts its fairness in doubt.

75. The 2002 Code does not contain any specific criteria which an electoral system must respect in order to be deemed fair and democratic. This lacuna must be filled in. Accordingly, the Venice Commission should be invited to reflect on the problem of the systemic incapacity of some electoral systems to transfer votes to seats in a fair manner and to consider ways to set up minimum standards with which electoral systems must comply in order to be deemed as guaranteeing not only free elections but also fair results thereof.

76. Moreover, democracy is a living process. The guidelines on elections may need to be updated in order to keep pace with the evolving political realities observed in our societies and to face new challenges. My main proposal is therefore to consider whether the 2002 Code should be updated, also to take into account, to the extent of possible, relevant Assembly resolutions and the work of the Venice Commission on some specific issues related to the conduct of elections.

77. Furthermore, country-specific reports and opinions produced by the Venice Commission contain a wealth of analytical information on the variety of legal frameworks and real-life political practice observed in elections in many Council of Europe member States, and concrete proposals on the ways of addressing systemic shortcomings and practical dysfunctions. These may also be taken into account when considering the need to update and fine-tune the Code.

Appendix – Comparison of electoral systems

Are different electoral systems equally democratic? Comparison of the outcomes of different electoral systems with the same given electoral result

basis = electoral result flemish parliament 2019 / system A

Question 1: how different is the distribution of seats to any given party by running the same result through different existing systems

answer: variation from 25% of the seats up to 66% of the seats with same electoral result

Question 2: who fills the seats

answer 1: in multicandidate lists the vast majority of the seats go to the pre-designated candidates by the party (small variation cfr. preferential votes)

answer 2: in sytems E and F the sole candidate gets elected but is pre-designated by the party (small number of independant candidates)

key issues: (1) proportionality/representability versus governability, (2) democracy versus particracy, (3) voters will versus result

system A = proportional / 6 districts / hurdle 5%

system B = proportional / global / hurdle 5%

system C = proportional / global / no hurdle

system D = proportional / global / no hurdle / winner gets 25 + (cfr Greece)

system E = first past the post small districts (cfr United Kingdom)

system F = two turns majority small districts (cfr France)

	global %	system A		system B		system C		system D		system E		system F
Open Vld	13,13%	16	12,90%	17	13,71%	16	12,90%	16	10,74%	**6**	4,84%	pm
N-VA	24,83%	**35**	28,23%	31	25,00%	31	25,00%	**56**	37,58%	**82**	66,13%	pm
VLAAMS BELANG	18,50%	23	18,55%	23	18,55%	23	18,55%	23	15,44%	**12**	9,68%	pm
CD&V	15,40%	19	15,32%	20	16,13%	19	15,32%	19	12,75%	21	16,94%	pm
PVDA	5,32%	4	3,23%	**7**	5,65%	**7**	5,65%	**7**	4,70%	0	0,00%	pm
UF	0,68%	0	0,00%	0	0,00%	**1**	0,81%	1	0,67%	1	0,81%	pm
GROEN	10,11%	**14**	11,29%	13	10,48%	13	10,48%	13	8,72%	**2**	1,61%	pm
sp.a	10,14%	**12**	9,68%	13	10,48%	13	10,48%	13	8,72%	**0**	0,00%	pm
Be.One	0,10%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
Burgerlijst	0,05%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
de coöperatie	0,03%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
DierAnimal	0,87%	0	0,00%	0	0,00%	**1**	0,81%	1	0,67%	0	0,00%	pm
D-SA	0,11%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
Genoeg vr iedereen	0,06%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
Piratenpartij	0,22%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
PRO	0,13%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
PV&S	0,07%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
RP	0,04%	0	0,00%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
sp.a-one brussels	0,21%	**1**	0,81%	0	0,00%		0,00%	0	0,00%	0	0,00%	pm
		124		**124**		**124**		**149**		**124**		











