

# Towards a *Ius Commune* on Elections in Europe? The Role of the Code of Good Practice in Electoral Matters in “Harmonizing” Electoral Rights

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## ABSTRACT

The Venice Commission, set up in 1990 within the Council of Europe, sees the monitoring of elections and referendums in the member states as one of its main tasks. In this particular field, the Venice Commission has established a Code of Good Practice in Electoral Matters and delivers opinions on electoral legislation on a regular basis. Although formally speaking the Code and the opinions of this Commission are not legally binding upon member states, they enjoy great political authority and can certainly exert significant pressure on the national legal systems, should a deviation from the Code be detected. Moreover, starting from 2007 the European Court of Human Rights has recognized the principles enshrined in the Code of Good Practice in Electoral Matters as standards for its judgments. The article analyzes whether this development is actually leading towards a convergence of the standards observed for electoral legislation in Europe. It is argued that, while elements like the identification of the basic requirements for a free electoral competition may lead to such a conclusion, this is not case for others, like in matters of electoral justice, where deep differences among states appear to remain. Moreover, the inconsistency amongst the linguistic versions of the Code, as revealed in the Italian case, proves it difficult for the Code to actually establish a *ius commune* on elections in Europe.

**Keywords:** electoral law, Venice Commission, European Court of Human Rights, European electoral heritage, soft law

## INTRODUCTION

AS AN ADVISORY BODY created in 1990 within the Council of Europe, composed of independent experts in the field of constitutional law, the European Commission for Democracy through Law (hereinafter the Venice Commission) sees the monitoring of elections and referendums in the member

states as one of its main tasks.<sup>1</sup> It fulfils this task in coordination and with the support of the Council for Democratic Elections, by setting standards for democratic elections and then checking their compliance at the domestic level. In this particular field, upon a mandate of the bodies of the Council of Europe, the Venice Commission has established a Code of Good Practice in Electoral Matters (2002) and delivers opinions on electoral legislation on a regular basis.

Although formally speaking the Code and the opinions of this Commission are not legally binding

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<sup>1</sup>Other tasks refer to the review of national constitutional reforms and to the support of constitutional justice in the member states. See Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63(4) AM. J. COMP. L. 1 (2015).

upon member states, they enjoy great political authority and can certainly exert significant pressure on the national legal systems, should a deviation from the Code be detected.<sup>2</sup> Moreover, starting from 2007 the European Court of Human Rights (hereafter, ECtHR) has recognized the principles enshrined in the Code of Good Practice in Electoral Matters as standards for its judgments,<sup>3</sup> following its “entrenchment” in a Resolution of the Parliamentary Assembly of the Council of Europe (No. 1320/2003) and in a Declaration of the Committee of Ministers (of 13 May 2004).

Is there a guardian of the good practices in electoral matters in Europe? Does the role of the Venice Commission favor the emergence of a *ius commune* of electoral legislation in Europe? The article analyzes whether the “entrenchment” of the Code, coupled with the activity and opinions of the Venice Commission itself on the one hand and on the other with the case law of the ECtHR on electoral matters, is actually leading towards a convergence of the standards observed for electoral legislation in Europe. It is argued that, while elements like the identification of the basic requirements for a free electoral competition may lead to such a conclusion, this is not case for others, like in matters of electoral justice, where deep differences among states appear to remain. Moreover, the inconsistency between the official translations of the Code makes it difficult for the Venice Commission to effectively act as a “harmonizer” of good practices in electoral matters. This feature is shown by using the Italian translation of the Code regarding the resolution of disputes arising during the electoral process that is patently different from the other linguistic versions.

The article proceeds as follows: it first provides an overview of the contents of the Code and discusses its legal status; second, it focuses on the opinions—those addressing different issues and most often cited as references and precedents—of the Venice Commission as a vehicle of “harmonization” of electoral rules. The word “harmonization” is not used here with the meaning attached to it under EU law, namely, as the adoption of ad hoc common rules aimed mainly—albeit not exclusively—at achieving the objective of a fully integrated internal market. Rather we refer to the possibility that, thanks to the use and application of the Code of Good Practice in Electoral Matters, the Venice Commission and the ECtHR could indirectly promote the consolidation of a *ius commune* on elections in Europe. The article then assesses how

the Code has been used by the ECtHR case law,<sup>4</sup> once again as a “harmonizing” force towards electoral legislation(s) in Europe. In this regard, it should be noted, however, that the legitimation and authority of the two bodies, the Venice Commission and the ECtHR, are fairly different. The former is an independent consultative body composed of legal experts from 61 member states (14 more than the members of the Council of Europe) with a limited mandate compared to the scope of the ECtHR. The latter, instead, is an international court issuing binding judgments on the contracting parties, whose members are elected by the Parliamentary Assembly from a list of candidates provided by each state and whose reputation has gradually increased since the activation of individual applications (Protocol XI). Finally, drawing on the Italian case, the article highlights a peculiar and overlooked weakness of this Code as regards its ability to create a *ius commune* on elections in Europe, namely the discrepancy amongst its linguistic versions.

### EXPECTATIONS TOWARDS A “HARMONIZATION” OF ELECTORAL RIGHTS IN EUROPE

*The Code as a distillation of the “European electoral heritage”*

The Code of Good Practice in Electoral Matters aims to acknowledge and codify in a single document principles, conventions, and practices observed in the constitutional systems of most of the Council of Europe’s member states, enshrined in international

<sup>2</sup>The issue of the nature of the Venice Commission’s opinion can be linked to the general debate on the place of soft law in international law: see, for example, Richard R. Baxter, *International Law in “Her Infinite Variety,”* 29(4) INT’L AND COMP. L.Q. 549 (1980), and Kenneth W. Abbott-Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000). Hence, the “juridification” of the content of codes elaborated by private actors has been underlined by Gunther Teubner, *On the Linkage of “Private” and “Public” Corporate Codes of Conduct*, 18(2) IND. J. GLOBAL LEGAL STUD. 17 (2001). A specific reflection on the role of standards in elections has been collected in the Council of Europe handbook for civil society organizations, *USING INTERNATIONAL ELECTION STANDARDS* (2016).

<sup>3</sup>*Russian Conservative Party of Entrepreneurs and Others v. Russia*, Nos. 55066/00 and 55638/00, § 37, ECtHR 2007.

<sup>4</sup>To this end, the research on the relevant case law has been accomplished by using the HUDOC database and searching for the judgments where the Code was cited or quoted.

covenants and that should represent the guidelines for the holding of democratic elections.<sup>5</sup> It was not intended to impose new binding rules. Paradoxically, it is exactly its non-innovative nature that appears to constitute a “strong” point in favor of its authoritativeness and prestige.

As it is based on a distillation of existing principles collected and systematized together and developed nationally and internationally, the legal value of the Code depends on the norms to which it refers. Along these lines, the references in the Code’s Explanatory Report (ER), in particular art. 25, letter *b* of the International Covenant on Civil and Political Rights and art. 3 of Protocol I to the European Convention on Human Rights (ECHR), are identified as the “central nucleus” from which the content of the “European electoral heritage” develops.

There are five principles enshrined in the Code and “underlying Europe’s electoral heritage” (Part I): universal, equal, free, secret, and direct suffrage. Part I of the Code is then organized according to these five bulwarks of democratic elections, setting guidelines on issues like electoral registers and parity of sexes, as well as postal and proxy voting and frequency of elections.

Instead, Part II is devoted to the conditions for implementing the principles, from the respect of fundamental rights (I), to the stability of the electoral law (II) and, finally, procedural guarantees (III).<sup>6</sup> For example, the Code emphasizes the importance of the credibility of the electoral process (II.2), which is influenced by the clarity of the rules for the voters (§ 63 ER), the tools to avoid party manipulation of electoral legislation (§ 64 ER), the timing of the electoral change (so as to never reform electoral legislation within one year of elections, § 65 ER),<sup>7</sup> and the rank of electoral rules within the sources of law, preferably statute law with the more technical questions provided for by the regulations (§ 67 ER).

As for the procedural safeguards (II.3), it is recommended for instance, especially for “states with little experience of organizing pluralist elections (§ 70 ER),” to establish an independent, impartial, and permanent electoral commission as an administrative authority, composed of experts on elections, in charge of the organization of the vote (§§ 71 to 85 ER). The Code also specifies the optimal composition of such an electoral commission. It should include a judge or law officer, an equal representation of all political parties with a seat in parliament or which have gained more than a certain percentage of votes, representa-

tives of national minorities, and a representative of the Ministry of the Interior. Finally, the Code also focuses on rules on the funding of political parties and electoral campaigns (§§ 107 to 111 ER) and an effective system of appeal (§§ 92 to 103 ER).

At this point, it seems appropriate to dwell on the legal nature of the Code. In fact, even though at a first glance it appears to be reasonably straightforward (i.e., non-binding nature), the observation of how it has been processed and the latest jurisprudential developments on a supranational level can perhaps shed new light on the value of the Code.

Starting by considering the process whereby the Code came into being, it should not be forgotten that it was developed by the Venice Commission (and, therefore, by a technically inclined body with a purely advisory role) but on mandate from the permanent commission of the Parliamentary Assembly of the Council of Europe, which, acting on behalf of the latter, entrusted the Venice Commission with the task of “detecting and recording [...] the principles of European electoral heritage.”<sup>8</sup> Moreover, the text (including the Explanatory Report) was approved as drafted by the same Parliamentary Assembly on January 30, 2003.<sup>9</sup> Subsequently, it was also recognized by the Committee of Ministers with a declaration adopted on May 13, 2004, in which, among other things, it was defined as the “basis for possible further development of the legal framework for democratic elections in European countries.”<sup>10</sup> The acknowledgments received by the Code, from a technical body like the Venice Commission, governments, and

<sup>5</sup>The Venice Commission adopted also a Code of Good Practice on Referendums at its 70th plenary session (Venice, Mar. 16–17, 2007). However, the application of this Code is not considered in this work.

<sup>6</sup>The principles of the Code are first listed with a brief description and then developed in an Explanatory Report (also adopted by the Commission in its plenary session). So as not to confuse the numbering of the Explanatory Report with that of the rest of the Code, its parts will be marked as “ER.”

<sup>7</sup>Moreover, it is also recommended that, should the electoral legislation be changed right before the elections, the new legislation should state that “the old system will apply to the next election” (§ 66 ER).

<sup>8</sup>See Resolution 1264 of 2001, available at <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16962&lang=en>> (last accessed on Jan. 20, 2017).

<sup>9</sup>See the debate in Parliamentary Assembly of the Council of Europe, *Official Report of Debates*, 2003 Ordinary Session (first part), 27–31 January 2003, vol. I.

<sup>10</sup>Available at <<https://wcd.coe.int/ViewDoc.jsp?id=743357>> (last accessed on Jan. 20, 2017).

parliamentarians (as well as from the ECtHR afterwards) point to the significance and authority that the Code of Good Practice in Electoral Matters can enjoy. Moreover, by leaving the issue of its enforcement quite open and being recognized by the Committee of Ministers as the basis for the future developments of a (common) European legal framework for democratic elections, as it stems from the “European electoral heritage,” its potential impact can be stronger than what could be expected, given its formal legal status.

#### *The influence of the Venice Commission’s opinions*

While the drafting of the Code was the result of a joint venture between the Venice Commission and the Council of Democratic Elections—a tripartite body composed of members of the Venice Commission itself, members of the Parliamentary Assembly of the Council of Europe, and the Congress of Local and Regional Authorities within the same organization—the application of the Code, however, has been a task fulfilled primarily by the Venice Commission through over a hundred opinions and dozens of studies on elections.<sup>11</sup>

Of particular importance are the opinions of the Venice Commission on draft electoral legislation and amendments, adopted according to art. 3.2 of its Revised Statute (reformed before the proclamation of the Code),<sup>12</sup> in its advisory capacity, upon request from a member state, the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities, or the secretary general.

For example, based on the Code of Good Practice, the Venice Commission and the Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR) recommended a series of amendments to the Electoral Code of the Republic of Albania of 2009 regarding the independence and impartiality of electoral commissions at all levels (§ 45 and 68 ER), the voting procedures for military and police force personnel (§ 81 ER), and the design of the appeal system against electoral results (§ 87 ER).<sup>13</sup>

Moreover, regarding the ban to the entry of political parties in Parliament provided for by the electoral rules, the Opinion of the Venice Commission (and the Commission for Democratic Elections) on the amendments to the law for the election of the Parliament of Montenegro in 2010 drew on the

Code to strike an appropriate balance between the need to ensure the authentic representation of minorities in Parliament through reserved seats and the principle of equal suffrage, which indeed makes it possible to pursue the actual representation of minorities also by other means.<sup>14</sup>

By the same token, the Joint Opinion on the draft electoral law of the Kyrgyz Republic of 2014,<sup>15</sup> which is strongly critical of the bill in many points, also based on the Code, argues that “the draft law not only fails to address previous recommendations, but introduces additional restrictions on the right to be a candidate for president.” Indeed, by introducing an extremely strict requirement, besides many others, of “at least 15 years residence in the Kyrgyz Republic” for a citizen to be elected president, the bill contradicts what the Code states, namely that “a length of residence requirement may be imposed on nationals solely for local or regional elections (I.1.1.c.)”

These are only three cases in which the Venice Commission, along with other international bodies, has drawn on the Code to recommend changes to the draft electoral legislation, but many more have been found since 2003.

Finally, on a few occasions the ECtHR has asked the Venice Commission to deliver an opinion concerning a case under discussion, for instance in *Parti Nationaliste Basque v. France* of June 7, 2007, on the prohibition for political parties

<sup>11</sup>See Jan Wouters et al., *Democracy and International Law*, in XXXIV THE NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 149 (2003), and Valentina Volpe, *Guaranteeing Electoral Democratic Standards: The Venice Commission and “The Code of Good Practice in Electoral Matters,”* in GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK, 57 (S. Cassese et al. eds., 2012).

<sup>12</sup>See Resolution(2002)3—Revised Statute of the European Commission for Democracy through Law (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers’ Deputies).

<sup>13</sup>See CDL-AD(2009)005, Joint Opinion of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the Electoral Code of the Republic of Albania.

<sup>14</sup>See CDL-AD(2010)023, Joint Opinion of the Venice Commission and the Commission for Democratic Elections on the Draft Law on Amendments and Supplements to the Law on the Election of Councillors and Members of Parliament of Montenegro, paragraphs 19, 28, 51.

<sup>15</sup>See CDL-AD(2014)019, Joint Opinion of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft electoral law of the Kyrgyz Republic, paragraphs 43 to 47.

registered under French law to receive foreign funds for the electoral competition, in particular by the Spanish Basque Nationalist Party.<sup>16</sup>

*The use of the Code by the European Court of Human Rights: “Harmonization” through case law?*

It is clearly acknowledged in the Code that it gathers together the results of the evolving case law of the ECtHR, also listing the leading cases that oriented its drafting.<sup>17</sup> In turn, because of the reference of the Code to this case law as an inspirational source, the ECtHR has been using the comprehensive synthesis of electoral principles enshrined in the Code since 2007 to deal with the specific issues raised by the applicants in concrete cases.

Indeed, four years after the Code’s proclamation in 2007 the ECtHR eventually started referring to the Code as a standard for review, although *ad adiuvandum* compared to the main standard for its judgments on electoral matters: art. 3 of Protocol I to the ECHR. On January 11, 2007, in *Russian Conservative Party of Entrepreneurs and Others v. Russia*,<sup>18</sup> concerning the allegation against the Central Electoral Commission to act beyond its jurisdiction, the first section of the ECtHR repeatedly referred to and quoted the relevant sections of the Code, in particular regarding the freedom of voters to express their wishes and to combat electoral fraud and the corresponding obligation of the state to punish any kind of electoral fraud (§ 3.2).

Since then the Code has been used by the Court in a variety of cases, in order to uphold the compliance of national electoral legislation to the ECHR or to detect a violation within majority and concurring opinions. In *Yumak and Sadak v. Turkey*, for instance, the Grand Chamber held that the electoral threshold of 10% imposed nationally for Turkish parliamentary elections did not interfere with the free choice of the people to elect their legislature and hence no violation of art. 3 of Protocol I had occurred. In doing so, the Court also relied on the very broad discretion that the Code leaves in the adoption of an electoral system as long as the five principles—universal, equal, free, secret, and direct suffrage—are respected. In fact, any electoral system can pursue different aims and has to be assessed on a case-by-case basis.<sup>19</sup> The same arguments were used two years later in *Tănase v. Moldova*, where the reformed electoral legislation of banning Moldovan citizens with multiple national-

ities to run for parliamentary elections violated the European Convention on Nationality and art. 3 Protocol I to the ECHR also on the grounds of the Code, which confirms that “persons holding dual nationality must have the same electoral rights as other nationals” (§ 6.b ER).<sup>20</sup>

As said, the Code has also been used by the Court to confirm that no infringement of art. 3 Protocol I to the ECHR took place, as in *Sitaropoulos and Giakoumopoulos v. Greece*, where Greek citizens residing abroad alleged that their inability to vote for the Parliament from their place of residence amounted to disproportionate interference with the exercise of their right to vote.<sup>21</sup> Indeed, from the wording of the Code as well as from a comparative law analysis of member states’ legislation, it resulted that the majority of countries subject the exercise of the right to vote to residence requirements.<sup>22</sup>

In addition, in *Grosaru v. Romania*, the Code was the center of a dispute between the majority and the concurring opinion over the interpretation of what is meant exactly by “effective system of appeal,” following the election.<sup>23</sup> The applicant claimed a violation of art. 13 ECHR—right to an effective remedy—in conjunction with art. 3 Protocol I to the ECHR as he had no effective and impartial remedies against the refusal to gain a seat in Parliament as a representative of the Italian minority in Romania.<sup>24</sup> According to the majority of the Court, the Romanian electoral legislation violated the invoked review

<sup>16</sup>See Alessio Pecorario, *Argomenti comparativi e giurisprudenza Cedu: il ruolo della Commissione di Venezia in materia di diritto elettorale*, in *Diritticomparati.it* (2010). The case was later decided with the ruling *Parti Nationaliste Basque- Organisation Régionale D’Iparralde v. France*, No. 71251/01, ECtHR 2007.

<sup>17</sup>In detail, refer to the rulings *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81, ECtHR 1987-1, and *Gitonas and Others v. Greece*, Nos. 18747/91, 19376/92, 19379/92, ECtHR 1997, concerning the universality and equality of the vote.

<sup>18</sup>Paragraphs 37 and 38 of the judgment. The case became final on April 11, 2007.

<sup>19</sup>*Yumak and Sadak v. Turkey* [GC], No. 10226/03, § 54-55, ECtHR 2008.

<sup>20</sup>*Tănase v. Moldova* [GC], No. 7/08, § 86, ECtHR 2010.

<sup>21</sup>*Sitaropoulos and Giakoumopoulos v. Greece* [GC], No. 42202/07, § 22, ECtHR 2012, paragraph 22.

<sup>22</sup>See point I.1.1.c.v of the Code.

<sup>23</sup>*Grosaru v. Romania*, No. 78039/01, §§ 22 and 56, ECtHR 2010, paragraphs 22 and 56.

<sup>24</sup>The seat, instead, was assigned by the Central Electoral Office to a representative of the same community who had obtained a lower percentage of votes (paragraph 9 of the ruling).

standards as no court could intervene in the proceeding, whereas the Code “recommends judicial review of the application of electoral rules, possibly in addition to appeals to the electoral commissions or before parliament.”<sup>25</sup> By contrast, in the concurring opinion Judge Ziemele argued that, based on chapter 3.3. of the Code, “an effective appeal can exist where such appeals are heard not only by courts but also by electoral commissions” and, hence, “the fact that no judicial appeal was available in general, and to the applicant in particular, is not sufficient to answer the question that Article 13 ECHR poses.”<sup>26</sup>

However, a later ruling is of the utmost interest for our purposes. In *Ekoglasnost v. Bulgaria*,<sup>27</sup> the Court actually invoked the Code in relation to point II.2.b., concerning the stability of electoral rights in the period immediately prior to the consultations. Furthermore, the Court considered the Code as a minimum limit that cannot be transgressed by the legislation of the member states. The Code identifies three types of fundamental rules for the electoral process and “prohibits” amendments during the year preceding the elections (and, should this be the case, it recommends such amendment be included in a source placed above ordinary legislation). According to these preconditions, the Court confirmed the link between conventional legality and the stability of the Bulgarian cardinal rules on the voting system during the pre-electoral year, as such changes could lead to the perception of a link with contingent interests, which, in extreme cases, could “benefit the political parties in power” and therefore constitute a “practice incompatible with democratic order.”<sup>28</sup> Moreover, the Court stressed that the Code’s list (detailing the methods for electoral scrutiny, the composition of electoral commissions, and the division of polling stations into constituencies) is not exhaustive, and further requirements can be added in relation to the conditions for political parties to participate in the elections. Finally—although in this regard the new conditions for taking part in the elections were recognized as pursuing legitimate scopes<sup>29</sup>—the Court found that they had only been introduced two months before the elections and therefore within a shorter timeframe than the year identified by the Code. As a consequence, for the sole reason of having been introduced “late,” the amendments to the Bulgarian electoral law were considered as violating art. 3 of Protocol I to the ECHR.<sup>30</sup>

## WEAKNESSES AND LIMITS OF THE CODE

### *The advisory function of the Venice Commission and the marginal use of the Code in the ECtHR case law*

Despite the use of the Code by the Venice Commission and the ECtHR to promote a progressive “harmonization” of electoral rights in Europe, the Code is affected by a series of weaknesses and limits.

First of all, as for the advisory activity of the Venice Commission, it is worth recalling that the latter cannot act on its own initiative: rather, it can only be requested to deliver an opinion by specific institutions, bodies, or states. Moreover, its opinions mainly deal with developing democracies involved with an overall reform of their electoral legislation. Only occasionally are the addressees of the Venice Commission’s opinions the authorities of more consolidated European democracies, usually when the national government itself asks for the intervention of the Commission.<sup>31</sup>

With regard to the application of the Code in the ECtHR jurisprudence, three different limits can be found to its possible pushes to the “harmonization” of electoral rights.

First, *Ekoglasnost v. Bulgaria* raises the alert that a violation of the Code may remain unsanctioned within the legal system of the Council of Europe if just the Venice Commission is involved in ascertaining *ex ante* the compliance of new electoral rules and the Court is not asked to intervene afterwards. Moreover, the Code seems to resort to a list of minimum standards that are therefore susceptible to further extension by the ECtHR. In other words, the application of the Code definitely benefits from being used by the ECtHR rather than by the Venice Commission only, the effectiveness of whose opinions remains much more uncertain than the follow-up of the Court’s judgments.

<sup>25</sup> *Grosaru v. Romania*, § 56.

<sup>26</sup> *Grosaru v. Romania*, concurring opinion of Judge Ziemele, § 5.

<sup>27</sup> *Ekoglasnost v. Bulgaria*, No. 30386/05, ECtHR 2012.

<sup>28</sup> *Ekoglasnost v. Bulgaria*, § 69.

<sup>29</sup> *Ivi*, § 64.

<sup>30</sup> *Ivi*, §§ 7 and 72.

<sup>31</sup> See, for instance, the Opinion of the Venice Commission of 23 June 2015 on a Citizens’ Bill on Public Participation, Citizens’ Bills, Referendums and Popular Initiatives and Amendments to the Provincial Electoral Law of the Autonomous Province of Trento (CDL-AD(2015)009), requested by the Presidency of the Italian Council of Ministers.

Second, the enforcement of the Code through the Court promotes only a limited “harmonization” of a European *ius commune* in electoral matters. When coming to electoral issues, in fact, the review standards are usually those already mentioned in art. 3 of Protocol I as well as in arts. 13 and 14 (non-discrimination) of the ECHR, and the Code is managed by the European judges as an interpretative aid.

Finally, the Code is cited or quoted only in a limited number of cases dealing with elections and voting rights and, for instance, the very much discussed and famous *Hirst (No. 2)*,<sup>32</sup> on the automatic disenfranchisement of prisoners in the UK (besides similar cases affecting other member states), completely neglects the contribution of the Code to the point.

*The inconsistency among the official linguistic versions of the Code: The case of the Italian translation*

Although the developments in both the activity of the Venice Commission and the ECtHR case law have fostered a convergence in the principles of electoral legislation across Europe, such a convergence is still limited on many electoral issues. This is the case, for example, of the systems of appeal against (contested) electoral results to which the Code dedicates a chapter within its Part II, significantly titled “Conditions for the effectiveness of the principles contained in the first part.” Therefore, the existence and feasibility of actions against the alleged violation of the principles enshrined in the Code are considered a precondition for the effectiveness of the principles themselves. In this field a clear difference appears between the Italian linguistic (official) version of the Code on the systems of appeal (§ II.3.3.a, second sentence), modelled on the peculiar system for the parliamentary verification of the election in force in Italy and grounded in art. 66 of the Italian Constitution, and the other linguistic versions (English, French, German, and Russian). Indeed, art. 66 of the Italian Constitution, which has been repeatedly criticized by international observers,<sup>33</sup> forbids the appeal to courts (either ordinary, special, or other kinds) to challenge the results of parliamentary elections.<sup>34</sup>

All the language versions of the Code other than the Italian one agree that while an intervention by the Parliament as a site for resolving any disputes that may arise during the electoral process may be admissible in a “first instance,” “in any case” the

appeal to a judicial authority must be foreseen. By contrast, while the Italian version of the Code considers that “in *all other* cases [other than parliamentary elections], an appeal before a court must be possible as a last resort,” it immediately sets an exception to this rule for the case of the elections to the Houses of Parliament. Paradoxically, the Italian version of the Explanatory Report to the Code is coherent with the others, and an appeal before Parliaments “is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible” (§ 94 ER, so contradicting § II.3.3.a).

This patent inconsistency appears difficult to justify unless attributing it to either a simple mistake or a (quite disputable) decision by jurilinguists at the moment of drafting the Code, who gave precedence to the compliance with Italian constitutional law in the Italian version rather than to the standardization of a comparable formula with other languages. The consequences of such discrepancy on the interpretation of the Code are not easy to identify. The most suitable solution would be to apply the criteria encoded in art. 33 of the Vienna Convention on the Law of Treaties in relation to the interpretation of the treaties authenticated in two or more languages. In this context, it is stipulated that “when a comparison of authentic texts reveals a difference in meaning,” “complementary means of interpretation” must be used, such as preparatory works and practices developed in the meantime. From this point of view, the preparatory works for the Code confirm the impression that the anomaly should be identified in the Italian version. The preliminary works of the Venice Commission on the Code show that, although the appeal to the parliamentary bodies against electoral results had been considered (at least in more established democracies),

<sup>32</sup>*Hirst (No. 2) v. the United Kingdom* [GC], No. 74025/01, ECtHR 2005.

<sup>33</sup>Organization for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights, *Italy. Parliamentary Elections 9–10 April 2006. Election Assessment Mission Report* (Warsaw, June 9, 2006), at 21: “Notwithstanding the constitutional basis for the existing complaint procedure, the new parliament should consider measures to provide for impartial and timely resolution of electoral disputes, including the possibility of an appeal to a court.”

<sup>34</sup>In this regard, see Nicola Lupo, *Considerazioni conclusive. Sistema elettorale e legislazione “di contorno,”* in LE EVOLUZIONI DELLA LEGISLAZIONE ELETTORALE “DI CONTORNO” IN EUROPA. ATTI DEL III COLLOQUIO ITALO-POLACCO SULLE TRASFORMAZIONI ISTITUZIONALI, 426 (Gian C. De Martin et al. eds., 2011).

it concluded that an appeal before the courts constitutes the “best response” and (as a minimum standard) the existence of an appeal to courts can be “equally acceptable.”<sup>35</sup>

### CONCLUSIONS

The Code of Good Practice in Electoral Matters somewhat assumes that a “European electoral heritage” common to the member states, as results from its text (Part I), is already in existence and constitutes a tie among the countries of the Council of Europe. However, does the Code actually advance the consolidation of a *ius commune* on elections in Europe? For the time being the answer to this question appears nuanced.

First of all, the non-binding nature of the Code paralleled by the way it is drafted, i.e., by recognizing shared principles and values, are on the one hand elements that favor its accreditation as a set of authoritative guidelines for electoral reforms, but on the other hand, they cause the lack of appropriate enforcement mechanisms.

Second, and related to this, is the role of the Venice Commission, which has been a major champion in the promotion of the Code. Nevertheless, as the opinions of the Venice Commission are delivered upon the request of other institutions, bodies, or states, they usually address electoral issues preferably towards states that are democracies in transition or in consolidation. Moreover, as its opinions are devoid of binding effects, the Venice Commission alone is not able to ensure the application of the Code in those countries where a more correct and effective implementation of it is recommended.

Third, the ECtHR has endorsed the importance of the Code through its case law, a development that could not be taken for granted in 2003. This notwithstanding, the use of the Code by the Court is

not systematic in all the cases concerning electoral issues and is only *ad adiuvandum* vis-à-vis legally binding parameters for review enshrined in the ECHR and its protocols. Of course, the Court could develop its case law further and manage the Code as providing a set of inalienable standards for national electoral legislation, whose violation does not tolerate any leeway for the use of the margin of appreciation doctrine. However, this has not happened so far.

Finally, there is a further element that makes the “harmonization” of the principles of electoral legislation in Europe through the Code problematic. This is the difference between the many linguistic versions of the Code that impairs the very ability of this instrument to provide common guidelines on electoral issues for all the member states. If the contents of the Code vary according to the national legal framework on elections, then the aspiration to acknowledge and foster Europe’s electoral heritage is undermined.

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<sup>35</sup>The preparatory works are gathered together in the document CDL (2002) 7. See pp. 15–16 of the English version and 16–17 of the French one.