APPLICATION N° 24359/94

Christian ESTROSI v/FRANCE

DECISION of 30 June 1995 on the admissibility of the application

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Article 6, paragraph 1 of the Convention *Conseil constitutionnel (France) removes from office candidate declared elected in parliamentary elections and disqualifies him from standing for election for one year for breach of the rules limiting election expenses*

a) Proceedings to have the legality of an election reviewed relate to the exercise of a political right and do not determine civil rights and obligations

The right to stand as a candidate in parliamentary elections is not a civil right

b) Examination of the question whether the proceedings in the Conseil constitutionnel involve the determination of a criminal charge Importance of the classification of the act in domestic law, the nature of the offence and the nature of the penalty

On the facts, the proceedings did not involve such a determination, in that the disqualification order did not suffice to bring the offence into the domain of the criminal law and in that the sanctions provided for in Articles L 52-15 and L 113 1 of the Election Code were not applied to the applicant

Article 13 of the Convention *The provision cannot be invoked separately It is not applicable where the main complaint is outside the scope of the Convention*

THE FACTS

The applicant is a French citizen He was born in 1955 He is the Senior Vice-President of the Regional Council of Provence-Alpes-Côte d'Azur and a former député (Member of Parliament)

1 *Particular circumstances of the case*

The facts, as submitted by the parties, may be summarised as follows

The applicant stood as a candidate in the parliamentary elections of 21 and 28 March 1993 in the second electoral district of Alpes Maritimes He was declared elected following the second round of the ballot

On 5 April 1993, Mr J F, a voter in this electoral district, applied to the Conseil constitutionnel, requesting it to annul the election held on 21 and 28 March 1993 in the second electoral district of the département of Alpes-Maritimes Mr J F claimed that the applicant had exceeded the maximum limit on election expenses authorised by Article L 52-11 of the Election Code and asked the Conseil to find a violation of Article 52-8, which provides that "donations made by duly identified persons towards funding a candidate's campaign may not exceed 30,000 francs where the donor is an individual and 10% of the total election expenditure or 500,000 francs (whichever is the lesser) where the donor is a artificial person other than a political party or group An exhaustive list of artificial persons, other than political parties or groups, who have made donations to a candidate shall be attached to the candidate's election return required by Article 52-12, specifying the amount of each such donation No candidate may receive, either directly or indirectly and regardless of the type of expense involved, any contribution or material assistance from a foreign State or a artificial person constituted under the law of another State'

Mr J F claimed that an association called 'Les amis de Christian Estrosi" ('Friends of Christian Estrosi"), had acted as a parallel campaign fund-raising association for the parliamentary elections, thus allowing part of the successful candidate's expenditure to be concealed and that, in particular, this association had purchased 3,000 copies of an election propaganda book, *La décadence du socialisme* (*The decadence of socialism*), written by Mr Estrosi He further alleged that the association had contributed to promoting the book's sales by, amongst other things, financing an advertising poster campaign and organizing a number of signing sessions

On 28 May 1993, the applicant filed his election return with the National Commission on Election Accounts and Political Funding The return showed total expenses of 387,483 francs and total receipts of 728,812 francs

In a decision of 23 July 1993, the National Commission on Election Accounts having revised the applicant's return, approved it, calculating his expenditure at 463,475 francs, that is, less than the legal maximum of 500,000 francs

In a decision of 29 October 1993, the Conseil constitutionnel mandated reporting judge A V to carry out further investigations into the way in which the election had been fought

In a decision of 16 December 1993, the Conseil constitutionnel, applying Articles L 52-12 and L O 128 paragraph 2 of the Election Code, disqualified the applicant from standing for election for one year from 28 March 1993 and removed him from office on the grounds that "part of the cost of the advertising poster campaign was met by the association in question This association was created on 21 September 1992 with the objective of 'supporting Christian Estrosi's political campaign so as to contribute to his election as mayor of Nice' The judicial investigation has revealed that a company called Pisoni sent Mr Estrosi two invoices in December 1992, one for 37,133 66 francs and the other for 11,136 54 francs, corresponding to part of the cost of the poster campaign, and a company called Afficolor sent an invoice on 30 Novem ber 1992 for 13,223 90 francs, that is, the cost of printing the posters These three invoices were paid by the association 'Les amis de Christian Estrosi' Moreover, the association raised subscriptions, as well as a donation of 50,000 francs from an individual which exceeded the limit authorised by Article L 52 8 On 30 March 1993 this association received the sum of 115,000 francs from the political party to which the candidate was affiliated by way of a contribution towards the association s expenditure

The Conseil held that, this association has thanks to the above mentioned monies received, paid expenses incurred as part of Mr Estrosi's election campaign These expenses should have been borne by the candidate's campaign fund raising association, they should have been entered on the candidate's election return, as should the receipts and should have been drawn on a single bank account in accordance with Articles L 52 4 and L 52 5, which lay down mandatory procedures

The applicant applied to the Conseil constitutionnel for the decision to be reviewed on the grounds of clerical errors This application was dismissed on 13 January 1994, save in respect of an error as to a date, which was rectified

On 14 January 1994, the applicant applied to have the deputy reporting judge A V, who had been responsible for preparing a report for the Conseil on the applicant's material error" application, withdrawn from the case The applicant claimed that the reporting judge, who belonged to a different political faction from him, was not impartial and alleged that there was a well known enmity between the reporting judge and himself based on the marked political differences between them The Conseil constitutionnel refused to entertain this application

The applicant filed an application for the Conseil constitutionnel to review its decision of 16 December 1993. In a decision of 21 July 1994, the Conseil constitutionnel dismissed this application on the ground that, under Article 62 of the Constitution, no appeal lies against the decisions of the Conseil constitutionnel.

2 *Relevant domestic law*

A Election Code (Law No. 90-55 of 15 January 1990)

Article L 52-4

"During the period commencing one year before the first day of the month in which an election is held and ending on the date of the round of the ballot in which the election is won, no candidate in such election may raise funds to finance his campaign save through an agent whom he must designate by name and who shall be either an election campaign fund-raising association or an individual who shall be known as 'the financial agent'.

Where a candidate has decided to use the services of an election campaign fund-raising association or a financial agent, he may settle his election campaign expenses only through them, save for the amount of any deposit and for expenses which a political party or group agrees to pay.

In the case of a by-election or an election which is held earlier than the date on which it would normally fall due, the above provisions apply only from the date of the event which renders such an election necessary."

Article L 52-11

"In relation to all elections to which Article L 52-4 applies, there shall be a limit on the election expenses (other than such expenses of diffusing party political information as are covered directly by the State) which may be incurred by or on behalf of each candidate or each list of candidates during the period referred to in that Article.

The limit on expenses in relation to the election of députés is 500,000 francs per candidate, save that in electoral districts having fewer than 80,000 inhabitants it is reduced to 400,000 francs."

Article L 52-12

"Each candidate, or each candidate who heads a list, who is subject to the limit referred to in Article 52-11 shall make a return listing all receipts, together with the source thereof, and all expenses, together with the nature thereof, made or contracted to be made in relation to the election, whether by himself or on his behalf, during the period referred to in Article L 52-4

Expenses incurred directly for the benefit of and with the agreement (including tacit agreement) of the candidate, whether by natural or artificial persons, political groups or parties supporting him, shall be deemed to have been incurred on his behalf The candidate shall calculate and show as receipts and expenses all direct and indirect benefits, services and gifts in kind which he has received

Within the period of two months following the date of the round of the ballot in which the election was won, each candidate, or each candidate who heads a list, who took part in the first round shall file at the préfecture his election return (together with appendices) drawn up by a chartered or certified accountant and accompanied by proof of his receipts as well as invoices, quotations and any other written evidence of the amount of the expenses paid out or incurred by or on behalf of the candidate

The amount of the deposit shall not be included in the expenses Save for the payment of expenses incurred prior to the first round of the ballot, the election returns of candidates who took part only in the first round of the ballot shall not include any expenses incurred or paid after the date thereof

The residual market value of any capital assets acquired or made in the course of the period referred to in Article L 52 4 shall be deducted from the total expenses shown in the election return

The election return and its appendices shall be forwarded to the National Commission on Election Accounts and Political Funding

The commission shall have election returns published in a simplified form (see Art 9 of Law No 93 122 of 29 January 1993, which provides "There shall be published, in relation to each candidate, an exhaustive list of the artificial persons who have made him donations with the amount of each such donation' "

B Provisions of the Election Code in relation to the National Commission on Election Accounts and Political Funding (Law No 90-55 of 15 January 1990)

Article L 52-14

"There shall be a National Commission on Election Accounts and Political Funding The commission shall consist of nine members appointed for five years by decree and comprising

three members or former members of the Conseil d'Etat nominated by the Vice-President of the Conseil d'Etat after consulting the Judges' Council thereof,

- three members or former members of the Court of Cassation nominated by the President of the Court of Cassation after consulting the Judges' Council thereof, and

- three members or former members of the Court of Audit nominated by the President of the Court of Audit after consulting the Divisional Presidents thereof

The President of the commission shall be elected by the members thereof
In order to carry out its tasks, the commission may call for State employees to be seconded to it for the purposes of assisting it and may use the services of experts It may also request police officers to carry out any investigations which it considers necessary in order to achieve its objects "

Article L 52-15

"The National Commission on Election Accounts and Political Funding may approve or, following adversarial proceedings, reject or revise election returns Save in the circumstances referred to in Article L 118-2, it shall give a ruling within six months from the filing of the return On expiry of this period the return shall be deemed approved

Where the commission finds that the return was not filed within the prescribed period, or where it rejects the return, or where, after revising the return, it finds that the limit on election expenses has been exceeded, it shall refer the matter to the election-law courts

Where the commission finds irregularities which appear to breach the provisions of Articles L 52-4 to L 52-13 and L 52-16, it shall refer the case to the public prosecutor

Where the law allows for total or partial reimbursement of the expenses recorded in the election return, such reimbursement shall be made only after the election return has been approved by the commission Wherever the limit on election expenses has been found, in a final decision, to have been exceeded, the commission shall order the candidate to pay the Treasury a specified sum, being the equivalent of the amount of the excess This sum shall be recovered in the same way as debts owed to the State other than taxes and debts relating to the use or recovery of State property "

Article L 113 1

"Any candidate (in the case of an election by way of individual candidates) or any candidate who heads a list (in the case of an election by way of party list) who

3) exceeds the limit on election expenses set in accordance with Article L 52-11, or

4) breaches the formal requirements relating to election accounts contained in Articles L 52-12 and L 52-13

shall be ordered to pay a fine of 25,000 francs and/or sentenced to one year's imprisonment "

Article L.O. 128 paragraph 2

"Any person who has not filed his election return in the manner and within the time-limit laid down in Article L. 52-12 and any person whose election return has been lawfully rejected shall be disqualified from standing for election for one year commencing with the date of the election. A person who has exceeded the limit on election expenses under Article L. 52-11 may also be disqualified."

Article 9 of Quasi-Constitutional Law No. 95-62 of 19 January 1995, which modifies various provisions concerning the election of the President of the Republic and députés, deleted the words "commencing with the date of the election" which appear in the second paragraph of Article L.O. 128, quoted above.

Article L. 136-1

"The commission established by virtue of Article L. 52-14 shall refer to the Conseil constitutionnel the case of any candidate to whom the provisions of Article L.O. 128, paragraph 2, appear to apply. The Conseil constitutionnel shall, where appropriate, make a disqualification order and, if the candidate in question has already been declared elected, shall, in the same decision, remove him from office."

C The Constitution of 4 October 1958

Article 56

"The Conseil constitutionnel shall consist of nine members, who shall each sit for a single non-renewable term of office of nine years. One third of the membership of the Conseil constitutionnel shall be renewed every three years. Three of the members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate.

In addition to the nine members referred to above, former Presidents of the Republic are members of the Conseil constitutionnel as of right and for life.

The President of the Conseil constitutionnel shall be designated by the President of the Republic. The President has a casting vote in the case of equality of votes."

Article 59

"The Conseil constitutionnel shall decide any dispute as to the lawfulness of the election of any député or sénateur [member of the second House of Parliament]."

Article 62

"No appeal lies against the decisions of the Conseil constitutionnel They are binding on the executive and all administrative and judicial authorities."

Ordinance No.58-1067 of 7 November 1958 comprising a Quasi-Constitutional Law concerning the Conseil constitutionnel

Article 37

"As soon as an application is received, the President shall designate one of the sections to examine it and shall appoint a reporting judge, who may be chosen from amongst the deputy reporting judges."

Article 38

"The sections shall prepare the cases for which they are responsible for determination by the full Conseil However, the Conseil may, by way of reasoned decision, without any preliminary examination, dismiss applications which are inadmissible or which contain only complaints which are manifestly incapable of having any influence on the results of an election. The decision shall immediately be served upon the Assembly (House of Parliament) in question "

D. Regulations of 31 May 1959 governing the procedure to be followed before the Conseil constitutionnel in cases of disputes as to the election of députés and sénateurs

Article 17

"The proceedings in the Conseil constitutionnel are held in open court. The persons referred to in Articles 3 and 9 of these Regulations cannot request to address the court."

The second sentence of Article 17 above was deleted as a result of a decision of the Conseil constitutionnel of 28 June 1995 It has been replaced by the following sentence·

"However, the persons referred to in Articles 3 and 9 of these Regulations may request to address the court "

E Case law

Paris Administrative Court, judgment in the case of Galy-Dejean of 12 February 1993

"As regards the decisions taken by the National Commission on Election Accounts and Political Funding

" The judicial investigation revealed that Mr Galy-Dejean was elected as a député for Paris on 13 February 1991 The Conseil constitutionnel, in a final decision of 31 July 1991, held that the cost of the two opinion polls should be added back to the respondent's election expenses and calculated that the total of these expenses exceeded the legal maximum by the sum of 201,962 83 francs The National Commission gave a fresh decision on 18 October 1991, taking account of the revised total of election expenses as found by the Conseil constitutionnel, and set the amount owed to the Treasury by Mr Galy-Dejean The National Commission was obliged to give a fresh decision in order to comply with the provisions of Article L 52 15 and in order to take account of the findings of the Conseil constitutionnel in its final decision, which constituted *res judicata*

"As regards the argument that Articles 6 paras 3 and 7 of the European Convention on Human Rights have been breached

"It is clear from the preparatory stage of the proceedings, and indeed is not disputed, that Mr Galy-Dejean was not charged with any criminal offence

"In any event, even if one accepts that an obligation to pay the State a sum equivalent to the amount by which the limit on election expenses has been exceeded constitutes a penalty, this penalty is of a purely administrative nature, it cannot be regarded as criminal in nature and as constituting a conviction for a criminal offence Therefore, it is not within the scope of Article 7 of the European Convention Moreover, under Article L 113-1 of the Election Code, persons who exceed the maximum limit on election expenses may be punished by way of fines or imprisonment, which are in the nature of criminal sentences and which do not arise in the present case It follows that the argument that Article 7 of the European Convention was breached by the decision under appeal cannot be upheld,

"As regards the other grounds of appeal

"The wording of the final paragraph of Article 52-15 of the Election Code shows that the legislature clearly intended to leave no discretion to the National Commission, which was obliged to apply the final decision of the Conseil constitutionnel and to base its calculation of the sum due to the Treasury from Mr Galy-Dejean solely upon the amount by which the statutory limit on election

expenses had been exceeded Since it follows that this legislative provision, the validity of which cannot be contested, prescribed that the National Commission should have no discretion in this exercise of its competence, all the other arguments which the applicant raises against the decision under appeal are invalid and must be dismissed "

Conseil constitutionnel decision No 93-1504 of 25 November 1993 in relation to National Assembly elections in the 7th electoral district of Val d'Oise

A person who exceeds the limit on election expenses by the sum of 1,587 francs shall not be disqualified from standing for election

COMPLAINTS

1 The applicant alleges that there have been several violations of Article 6 of the Convention

He complains that the deputy reporting judge in charge of preparing the case for trial by the Conseil constitutionnel was not impartial Specifically, he states that the political allegiance of the reporting judge in question is different from his own and that, because of the influence which the reporting judge is capable of having on the Conseil's judgment, there is an objective risk that, in the present case, the court did not offer all the guarantees of impartiality The applicant considers that the Conseil constitutionnel's refusal to entertain his application to have the reporting judge withdrawn constitutes evidence supporting his suspicions that the latter was biased

The applicant also claims that the Conseil constitutionnel admitted fresh arguments, which had not been raised in his constituent's application for a finding that Articles L 52-8 and L 52-11 of the Election Code had been violated It was on the basis of Article L 52-12 of the Election Code that the Conseil constitutionnel issued the final disqualification order against the applicant, yet under Article L 180 of the Election Code, which provides that the election of the député can be challenged within the ten days following the declaration of the results, no new argument could be declared admissible

2 The applicant also complains that he had no effective remedy within the meaning of Article 13 of the Convention whereby to canvass his complaints since no appeal lay against the Conseil constitutionnel's judgment

THE LAW

1 The applicant complains of a number of violations of Article 6 para 1 of the Convention, which reads, in so far as relevant, as follows

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

The Government's principal argument is that the application is incompatible *ratione materiae* with the provisions of the Convention since the Conseil constitutionnel proceedings in question aimed neither to determine a dispute as to the applicant's civil rights and obligations nor to determine any criminal charge against him

As regards the absence of a dispute as to civil rights and obligations, the Government recall that election-law disputes are about the exercise of a political right and, accordingly, fall exclusively within the domain of public law They refer in particular to a decision of the Commission (No 12897/87, Desmeules v France, Dec 3 12 90, D R 67 p 166), in which the Conseil constitutionnel gave a ruling in a dispute concerning the right of a candidate to stand in parliamentary elections, and in which the Commission decided that the rights in question, political rights 'par excellence' ", could not be regarded as civil rights The fact that a candidate who exceeds the limit on election expenses is ordered to pay the Treasury the equivalent of the amount overspent cannot change the way in which the right is classified, since the operative part of the Conseil constitutionnel's judgment is limited to removing the candidate from office and disqualifying him from standing for election for a year

As regards the lack of any criminal charge, the Government point out that, so far, no application raising the question of the "criminalisation" of State restrictions on political rights has been submitted However, the Government observe that the Commission has held that a resolution by the Swiss Federal Chambers (Houses of Parliament) lifting the parliamentary immunity of one of the National Councillors (MPs) for Geneva did not involve the determination of a criminal charge against him (No 19890/92, Ziegler v Switzerland, Dec 3 5 93, D R 74 p 234)

The Government propose to measure the impugned proceedings against the criteria developed by the Commission and Court in relation to the concept of a criminal charge (see, most recently, Eur Court H R , Ravnsborg v Sweden judgment of 23 March 1994, Series A no 283 B, p 28, para 30)

As regards the way in which French law classifies the breach, the Government consider that the Law of 15 January 1990 on the Limitation of Election Expenses and Clarification of the Funding of Political Activities is not part of French criminal law

Moreover the Government consider that the provision in question is not of a general nature, since its objective is to lay down rules of behaviour, a sort of Code of Conduct" intended exclusively for election candidates The legal rules enabling the courts to disqualify a candidate from standing for further election are intended not so much to punish individual breaches as to ensure that the ballot takes place lawfully, without the need to bring criminal prosecutions According to the Government, there are not, on the one hand, ordinary proceedings for challenging the lawfulness of an

election and, on the other, a specific form of proceedings, in the nature of criminal proceedings, for challenging election accounts; rather, there is one single form of election-law proceedings, whose sole object is to ensure that the ballot is democratic.

Hence, the Government argue that disqualifying a candidate from standing for further election is merely the election-law sanction for non-compliance with the rules on campaign funding and claim that it would be very difficult to describe as "inherently criminal" breaches such as the failure to enter as receipts expenses incurred by an association other than the candidate's campaign fund-raising association.

Even though Articles 42 and 43 of the Criminal Code provide that disqualification from standing for election may constitute a sentence under the criminal law, the form of disqualification referred to in Article L.O 128-2 of the Election Code lasts only for one year and relates only to the election in question, the candidate remaining eligible to stand for other office. Hence, the Government consider that the sanction in question is, essentially, a specific form of loss of certain rights in relation to elections, which is limited both in time and in its practical consequences.

The Government explain that the order, if any, to pay the Treasury the equivalent of the amount overspent cannot be compared to a fine in criminal law. In fact, it is merely a purely indirect consequence of the Conseil constitutionnel judgment, which is confined to removing the candidate from office and disqualifying him from standing for election for a year.

It is for the National Commission on Election Accounts to draw the practical conclusions from the overspend found by the Conseil constitutionnel. This the National Commission does in a separate decision which can be severed from the election-law proceedings, since it can itself be the subject of an appeal to the Administrative Court. Moreover, in contrast to fines imposed in normal criminal proceedings, the amount is not set according to a fixed scale, but is the precise equivalent of the amount overspent as found by the Conseil. Finally, in domestic law the order cannot be converted into a custodial sentence in the case of non-payment, nor is it entered on the person's police record.

Finally, the Government emphasise that the Conseil constitutionnel proceedings could not lead, either directly or indirectly, to the determination of a criminal charge, since only Article L 113-1 of the Election Code provides for penalties, in the form of a fine or a custodial sentence, which are truly criminal in nature. In the present case, the National Commission on Election Accounts did not use its power under Article 52-15, paragraph 3, to refer the case to the public prosecutor with a view to a prosecution being brought under Article 113-1 of the Election Code. If criminal proceedings had been brought, the criminal courts would, in any event, have had full jurisdiction to determine the criminal charge as defined in that Article. However, the Government specify that no case was referred to the Public Prosecutor's Office in relation to the 1993 elections.

In the event that the Commission should consider that Article 6 of the Convention applies to the proceedings in question, the Government consider that the application is manifestly ill-founded

As regards the independence and impartiality of the Conseil constitutionnel, the Government consider that the length of its members' term of office and the fact that they serve only one term constitute guarantees of independence Moreover, Article 1 of the decree of 13 November 1959 confirms the members' obligation to abstain from anything which could compromise the independence and dignity of their office The restrictions to which they are subject by virtue of Article 2 of the same decree form a corpus of weighty obligations

As to the way in which the members of the Conseil constitutionnel are appointed, the Government recall that the fact that the members of a tribunal are appointed by the Government is not in itself sufficient to cast doubt on its independence (Eur Court H R , Belilos judgment of 29 April 1988, Series A no 132, p 29, para 66) In France, it was precisely a concern for independence and impartiality which led the authors of the 1958 Constitution to remove control of parliamentary elections from the Assemblies (Houses of Parliament), whose exclusive domain this had hitherto been, and to entrust it to a separate, high level, court

As regards the role of the reporting judge in the impugned proceedings, the Government explain that the deputy reporting judge does not take part in the process of forming the judgment itself, nor is he or she responsible for preparing the case for trial, under Articles 37 and 38 of the 1958 Ordinance, it is for the section, and for it alone, having heard the views of the deputy reporting judge, to submit the case to the Conseil together with a draft decision Under Article 36 of the Ordinance of 1958, reporting judges cannot vote in the deliberations Their only role is to present the conclusions of the section, of which they are merely the spokesperson, to the judges of the Conseil who will decide the case

The Government recall that the right to have a judge withdrawn from a case relates only to those judges who actually decide the case and cannot be applied to subordinate judicial officers who assist such judges in practical and technical ways In any event, the Government note that the applicant's grounds in support of his application to have the judge withdrawn were not received by the Conseil constitutionnel until after it had already given its judgment

The applicant takes issue with the plea of inadmissibility raised by the Government He claims that his complaints cannot be incompatible *ratione materiae* with the provisions of the Convention since the legislation on election campaign funding provides that the case can be submitted to the criminal courts under Article 113-1 of the Election Code following a final decision by the Conseil constitutionnel

The function of the Conseil constitutionnel judgment is to establish whether or not there has been a material breach of election law. This finding cannot be challenged either by the National Commission on Election Accounts or by any criminal court to which the case may be submitted; the most that the latter can do is to assess whether or not the breach was committed intentionally or not Indeed, under Article 62 of the Constitution, the criminal courts will be bound by the way in which the Conseil constitutionnel has, as a matter of law, defined the act committed.

Admittedly, no criminal prosecution has yet been brought against the applicant under Article 113-1 of the Election Code, but the risk of prosecution will subsist until it becomes time-barred.

According to the applicant, his disqualification from standing for office by the Conseil constitutionnel is in the nature of a criminal sentence, and one which is particularly ignominious for a politician. It should be recalled that the applicant is the only candidate to have his election definitively annulled by the Conseil constitutionnel where the National Commission on Election Accounts had approved the election return. The disqualification should be interpreted as a penalty and decisions on this point by election-law courts have an "indisputably repressive complexion" (B. Genevoix, *Le juge de l'élection et le contrôle des comptes de campagnes ... (Election-law Courts and the monitoring of campaign accounts*, RFDA 1991, pp. 887 ff)

Finally, there is a further sanction which follows automatically from the Conseil constitutionnel's judgment and which may be imposed on a candidate whose election has been annulled, since Article 52-15, last paragraph, of the Election Code provides that, in all cases where the Conseil constitutionnel has given a final judgment to the effect that the limit on election expenses has been exceeded, the National Commission on Election Accounts shall order the candidate to pay the Treasury a specified sum, being the equivalent of the amount overspent

The applicant has not been ordered to make such a payment because the "penalty" imposed on him was based, not on a finding that the limit on expenses had been exceeded, but on a failure to enter certain receipts in his election return. However, the mere fact that such a punitive fine can be imposed when implementing the Conseil constitutionnel decision should, according to the applicant, lead to a finding that Article 6 para. 1 is applicable to the proceedings in question, all the more because the Conseil constitutionnel judgment cannot be appealed against.

As regards the question whether his application is well-founded, the applicant reiterates his doubts as to the impartiality of the deputy reporting judge, who was a member of an opposing political faction, and of the members of the Conseil constitutionnel

He emphasises that the Law of 15 January 1990 considerably extended and modified the powers of the Conseil constitutionnel in election law matters by making it responsible for monitoring, not that the ballot has taken place without any kind of

malpractice (its previous mandate), but rather that the election as a whole has been lawfully held However, the grant of these new powers has not led to the amendment of Article 62 of the Constitution, which was appropriate for the role played by the Conseil constitutionnel in 1958 but which is a little excessive nowadays in the light of the heavy penalties which may derive from that court's decisions under the Law of 15 January 1990 In addition, the Conseil constitutionnel Rules of Procedure were drawn up in 1959 and it is clear that they were not originally intended to safeguard the rights of the defence.

Thus it is quite out of order for there to be no provision for a judge to be withdrawn from a case in this context, given that it is a fundamental right and that it is obvious, looking at the composition of the Conseil at the material time and at the important role played by the deputy reporting judge, that the applicant could have legitimate doubts as to the objective impartiality of the tribunal sitting in judgment on him in a situation where there was no possibility of appeal

The Commission recalls at the outset that proceedings concerning election-law are, in principle, outwith the scope of application of Article 6 of the Convention, since monitoring the lawfulness of an election focuses on the conditions in which a political right may be exercised and not on civil rights and obligations (No 11068/84, Dec 6.5 85, D R 43 p 195)

However, the Commission observes that the three "penalties" (disqualification from standing for election, an order to pay the Treasury an amount equivalent to the amount overspent and prosecution under Article L 113-1) may be imposed on a candidate who fails to comply with the rules on election campaign funding laid down in the Law of 15 January 1990 Therefore, the Commission must examine whether the instant case did relate to "civil rights and obligations" of the applicant or to a "criminal charge" against him within the meaning of Article 6 of the Convention

The first question is whether the purpose of the proceedings in question was to rule on a dispute as to a civil right or obligation

The only issue in the present case is whether the Conseil constitutionnel, in removing the applicant from office and disqualifying him from standing for election for a year, had to decide a dispute falling within the scope of Article 6 of the Convention. The Commission notes that the National Commission on Election Accounts did not order the applicant to make a payment for having exceeded the limit on expenses, so that it is not necessary to examine whether such an order could be considered as a civil obligation

The Commission recalls that Article 6 para 1 extends to "contestations" (disputes) over civil rights and obligations which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether they were also protected under the Convention (see Eur. Court H R , Editions Périscope judgment of 26 March 1992, Series A no 234-B, p 64, para 35)

The right at issue in the proceedings before the Conseil constitutionnel was the applicant's right to stand in parliamentary elections This right, which is closely bound up with the electoral system, is a political right and cannot be considered as a civil right

Consequently, the Conseil constitutionnel was not called upon to decide a dispute as to one of the applicant's civil rights and obligations within the meaning of Article 6 para 1 of the Convention when it removed the applicant from office and disqualified him from standing for election for a year.

The second question is whether the proceedings in question related to a "criminal charge" within the meaning of Article 6 of the Convention. The Commission recalls the "autonomy" of the concept of "criminal" as conceived of under Article 6 (see Bendenoun v France, Comm. Report 10.12.92, para. 59, Eur. Court H R., Series A no. 284, p. 27). The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law, next, the nature of the offence and finally the nature and degree of severity of the penalty that the person concerned risked incurring must be examined (Bendenoun judgment, Comm report, *op. cit* , p 27, para 60)

I Nature of the offence under domestic law

The acts of which the applicant was accused, namely that his election return did not comply with the rules laid down in Article 52-12 of the Election Code, constituted a breach of "election-law" prejudicing the equality of opportunity of candidates in an election The acts in question were governed by Law No. 90-55 of 15 January 1990 on the Limitation of Election Expenses and Clarification of Political Funding and by Quasi-Constitutional Law No. 90-383 of 10 May 1990 on the Funding of the Campaign to Elect the President of the Republic and Députés

In the Commission's view, there is no doubt that the provisions in question, which are mirrored in the Election Code, are not part of the criminal law but of the regulations governing the exercise of a political right which, as such, does not fall within the scope of Article 6 of the Convention (see No. 11068/84, Dec. 6.5 85, D.R. 43 p 195).

II. Nature of the offence under Article 6 of the Convention

However, the Commission recalls that the indications provided by the domestic law of the State in question have only a relative value. The second criterion referred to above - the nature of the offence itself - is a more important factor

The Commission notes in this respect that the "offence" in the present case consisted of a breach of the procedures for drawing up the election return of a candidate in parliamentary elections. This "offence" cannot be described as criminal without going against, not merely the indications provided by French law, but also those which can be deduced from those legal rules which are common currency amongst the Contracting States and whose aim is to ensure that elections are lawful and are seen to be lawful. Therefore the "offence" in question cannot be regarded as criminal in nature

III. Nature and degree of severity of the penalties

Despite the fact that such behaviour does not constitute a criminal offence, the nature and degree of severity of the penalties to which the perpetrator is liable - the third criterion - may bring the question into the "criminal" sphere. In the present case the Commission recalls that there are three possible "penalties" for a candidate who breaches the rules on the maximum legal limit on election expenses. These will be examined in turn below

a Disqualification

Where the National Commission on Election Accounts refers to the Conseil constitutionnel the case of any candidate who has, according to the commission, failed to make an election return in the manner and within the time limit laid down in Article L 52-12 of the Election Code (or where, as in the present case, such a case is referred by any voter from the relevant electoral district) the Conseil constitutionnel may, under L O. 128 para. 2 of that Code, disqualify any candidate whom it finds to have breached the said rules from standing for election for one year If, as in the present case, the candidate in question has already been declared elected, the Conseil constitutionnel must remove him from office (Article L 136-1)

In the applicant's view, disqualification for a year, which is a new penalty introduced by the 1990 Law, is a typical criminal penalty, both inherently and by reason of its effects. The Commission does not share this analysis. Admittedly, disqualification is one of the forms of deprivation of civil rights envisaged under French criminal law (see Articles 42 and 43 of the Criminal Code), but there the sanction is a secondary sentence, which can be imposed only in conjunction with a primary sentence. However, in the present case, the only "penalty" which the Conseil constitutionnel had the power to impose was disqualification from standing for election and forced resignation cannot be regarded as a primary "sentence". Moreover, here the disqualification is limited in time since it is only valid for one year from the date of the election.

In these circumstances, the Commission considers that the disqualification order made by the Conseil constitutionnel is a measure which does not fall within the scope of Article 6 of the Convention either by its nature or by its degree of severity

b Orders to pay the Treasury the equivalent of the amount overspent

This obligation was introduced by Article L 52-15 of the Election Code, which provides that, wherever it has been held, in a final judgment (that is, a judgment of the Conseil constitutionnel), that the statutory limit on expenses has been exceeded, the National Commission on Election Accounts shall order the candidate to pay a specified sum, being the equivalent of the amount overspent, to the Treasury According to the applicant, such an order, which may flow from the Conseil constitutionnel judgment, is comparable to being sentenced to pay a fine

However, the Commission notes that the National Commission on Election Accounts has not made any such order against the applicant, since the reason why his election was annulled and he was disqualified from standing for election was not that he had exceeded the limit on election expenses but that he had breached the substantive rules on the drawing up of his election return

Therefore it is not necessary for the Commission to decide, in the instant case, whether such an order can be regarded as a criminal sanction or not

c Criminal law proceedings which may be brought under Article L 113 1 of the Election Code

Article L 113-1 provides that any candidate who breaches the rules on the drawing up of election returns under Articles L 52-12 and 52-13 shall be fined 25,000 francs and/or sentenced to one year's imprisonment Pursuant to Article L 52-15 of the Election Code, the National Commission on Election Accounts is responsible for referring the case to the public prosecutor, particularly where the commission has found breaches which appear to contravene the above-mentioned provisions

The Commission notes that the offence and the penalties referred to in Article L 113-1 fall, without any question, into the domain of the criminal law However, for the applicant to be able to avail himself of the guarantees laid down in Article 6 of the Convention, he would have had to have been prosecuted under this Article But this was not the case and the applicant cannot rely, to support his argument that Article 6 guarantees should apply, on the spectre of a possible criminal prosecution where the proceedings have already reached the stage of the Conseil constitutionnel, which has neither the power to set criminal proceedings in motion nor, *a fortiori*, to impose criminal sanctions on the individual concerned On the facts, therefore, it is vain to speculate as to the scope of the discretion, as to questions of fact and of law, which the criminal courts might enjoy under the provisions of Article 62 of the Constitution

Having regard to all the above factors, the Commission takes the view that the only "penalty" imposed on the applicant in the present case - that is, disqualification from standing for election for one year as ordered by the Conseil constitutionnel - is not such as to lend the Conseil constitutionnel proceedings the characteristics of proceedings whose purpose is to determine a criminal charge against the applicant

Therefore, the Commission considers that the complaints based on an alleged violation of Article 6 should be rejected as incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 27 para. 2 of the Convention.

2. The applicant also complains that he had no effective remedy whereby to raise his complaints based on the violation of his right to a fair trial. He invokes Article 13 of the Convention which provides that

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government recall that the right to a remedy under Article 13 covers only rights protected by the Convention. Accordingly, if the Commission agrees that Article 6 of the Convention is inapplicable to the present case, it will be obliged to reject the complaint based on the alleged violation of Article 13 of the Convention

In any event, the complaint must also be arguable. Alternatively, therefore, if the Commission considers, as the Government invite it to, that the complaints based on the alleged violation of Article 6 are manifestly ill-founded, it cannot regard them as arguable for the purposes of Article 13 of the Convention

Further, the Government recall the Pizetti case (Pizetti v Italy, Comm Report 10 12 91, para 41, Eur Court H R , Series A no 257-C, p 41), where it was held that "Article 13 is not applicable when the alleged violation of the Convention is embodied by a judicial decision" and "the provisions of the Convention cannot be held to oblige States to set up bodies to exercise supervision over the judicial authorities". The same reasoning applies to the present case since the applicant is complaining of breaches of the rules of due process guaranteed by Article 6 of the Convention

Finally, the Government recall that the Convention organs have consistently held that Article 13 of the Convention does not go so far as to guarantee a remedy allowing a Contracting State's laws, as such, to be challenged before a national authority on the ground of being contrary to the Convention (Eur Court H R , James judgment of 21 February 1986, Series A no 98, p 47, para. 85) Yet the impugned proceedings are essentially a consequence of the Ordinance of 7 November 1958 comprising a Quasi-Constitutional Law The same applies to the Constitution, since "Article 13 does not guarantee an effective remedy in respect of a constitutional provision" (Johnston and others v Ireland, Comm Report 5 3.85, para. 152, Eur. Court H R., Series A no. 112, p 54)

The Commission has examined the complaints based on Article 6 of the Convention It has held that those complaints are outwith the scope of the Convention

It follows that Article 13 does not apply, either, in the present case. On this point, the Commission refers to its established case-law (No. 9984/82, Dec. 17.10.85, D.R. 44 p. 54). Therefore this complaint must be dismissed as being incompatible, *ratione materiae*, with the provisions of the Convention pursuant to Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.