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THE CONDITIONS OF PARTICIPATION IN ELECTIONS AS PART OF THE FUNDAMENTAL ELECTORAL RULES

Posted on 7 Febbraio 2013 by ***Lara Trucco***

(in the judgment of the European Court of Human Rights in Ekoglasnost v. Bulgaria*)

In the case Ekoglasnost the Court of Human Rights, confirmed its previous case law concerning the Article 3 of Prot. no. 1 to the Convention (on free and fair elections), by reiterating that this Article «does not prescribe only the obligation for States to hold elections to the legislature, but also implies individual rights, including the right to vote and to stand for election» (see paragraph 57 and, here, the reference to the case Mathieu-Mohin and Clerfayt, decided March 2, 1987). Moreover, the Court confirms that the States have a broad margin of appreciation as to the application of the mentioned provision. In this sense, it affirms the compatibility, in principle, with conventional rules, of legislative provision that put certain conditions for the participation of political parties in elections. In particular, in this case, it was introduced three new conditions for the presentation of candidates for the parliamentary elections by political parties (note that these conditions had successfully passed the scrutiny of the National Constitutional Court), that is a deposit of:

- a certificate of the Court of Audit;

- a list of five thousand voters' signatures; and

- an amount of about ten thousand of Euros.

The Court found the rules clear and foreseeable and considers that the measures introduced for the elections had pursued a legitimate and important purpose for the proper functioning of a democratic system, aiming to restricting participation in the parliamentary elections to the viable political formations that were sufficiently representative in society and that complied with rules on the transparency of political financing (see § 64). This, in accordance with the considerations of the European Commission for Democracy through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (Osce/Odihr) (see the "Joint opinion" on "The Election Code of Bulgaria", of June 2011).

Otherwise, it's about temporal side of the introduction of these rules that the Court takes its complaints, in accordance with the principle of "stability" of the electoral law: in fact, this principle «is particularly important to ensure the respect of rights guaranteed by the Article 3 of Prot. no. 1 to the Convention» considered that «Fundamental electoral rules should not normally be amended too often and especially on the eve of an election, otherwise the State risks undermining respect for and confidence in the existence of the guarantees of a free election» (§ 68). On this basis, according to the Court of Human Rights, should be read the provisions of the Venice Commission not to changing "just before (within one year of) elections" the elements that are most exposed: the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries (see § II, 2, *b)* and § § 65 and 66 of the Code of Good Practice in Electoral Matters). Importantly, the Court ruled that in addition to these «three basic types of electoral rules» it must be added also the conditions of participation in elections as «equally part of the same fundamental electoral rules» requiring, therefore, to «enjoy a temporal stability as the other basic elements of the electoral system» (§ 69). In particular, the political parties wishing to participate in the elections must be able to adapt themselves to any rules introduced in the vicinity of electoral competition.

In the present case, the minimum one-year period advocated by the Venice Commission for the introduction of substantial amendments to electoral law had not been observed: the disputed amendments had been enacted two months before the date of the election and one month before the deadline for the presentation of parties' candidates to the Central Electoral Commission. In conclusion, there has been a violation of Article 3 of Prot. no. 1, due to the introduction of new requirements for participation in the election shortly (having had "only a month" of time to fulfill the requirements) before the date of elections (note, though, the same conditions were found to be met by other similar political parties, in competition). In fact, the Court has considered that this practice is «clearly incompatible with the democratic order» and «undermines citizens' trust in their country's institutions» (§ 69).

Therefore, the temporal element has played a decisive role in this case. Nevertheless, it should be noted that other elements were taken into consideration by the Court. In particular, on the side of "knowability" of these requirements, an important role was played by the publicity of parliamentary works. So, just on this basis, one of the new conditions to be candidates (the certification by the Court of Audit) was considered not unlawful. According to the Court of Human Rights' «the adoption of this measure» in fact «was to be expected» and, consequently, it could have been «take the necessary measures in order to regularize the situation». Instead, on the same basis, the Court came to a different conclusion with regard to the other two requirements (collection of subscriptions and payment of the deposit). In effect the Court is of the opinion that a bill providing this kind of restrictive measures should have been tabled, debated, enacted and published well in advance with respect to the application stage. By introducing them at a late stage into domestic law the Bulgarian authorities have failed to strike a fair balance between the legitimate interests of society as a whole and the right of the political party to be represented in the parliamentary elections.

For different profile, is very difficult to determine the importance for the final decision of participation with some success by the applicant in all elections, since its founding (in 1990), with the acquisition of a certain

relevance in the national political context. In fact, one might think that the electoral confrontation would have been altered, as a consequence of his non-participation, (remember that this argument "realist" was attached during the Italian regional elections by our President of Republic, at "the launch", of the Legislative decree no. 29 of 5 mars 2010, not converted in law, entitled "Authentic interpretation of the provisions of the electoral process"). Similarly, it seems difficult to opine that in the decision has been made implicit reference to the situation of our country. Otherwise, there are few doubts that this *decisum* confirms the presumption contained in the mentioned Code of Good Practice of illegality of "last minute" electoral reforms (i.e., during the year preceding the election). Specifically, that this presumption – which we have already had occasion to think in other places and about other issues – to be overturned requires that it be shown that there is neither "intention manipulation" nor "immediate party political interests" (as suggested by the § 65 of the same Code of Good Practice).

* See European Court of Human Rights, case Ekoglasnost v. Bulgaria, Fourth Section, 6.11.2012, appl. no. 30386/05; only available in French (official language) and Italian (with translation by the Italian Ministry of Justice) language versions.

Article 3 – Right to free elections – provides that "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

To be precise, twenty-two political formations were registered to participate in the parliamentary elections of 25 June 2005. Ten parties and coalitions – including Ekoglasnost – were denied the right to participate on the ground that one or more of the three conditions for the presentation of candidates, as adopted in April 2005, had not been fulfilled. Seven parties and coalitions exceeded the electoral threshold of 4% of votes and obtained seats in the National Assembly. Twelve political formations obtained less than one per cent of votes and four parties among them

had less than five thousand votes each.

More precisely, as the Court considers, the obligation for all political parties to submit annual financial reports to the Court of Audit had existed since 2001. However, until April 2005 failure to comply had not made it impossible for the party to participate in the following elections; it would simply have lost the grant from the State. The statutory obligation for any party wishing to present candidates to obtain a certificate from the Court of Audit as to the validity of its annual accounts had come into force on 1 April 2005. However, the draft of the new law on political parties that provided for this measure had been tabled in Parliament in April 2003. The Bulgarian National Assembly had publicly debated it throughout 2004. Consequently, the Court finds that the adoption of the measure had been foreseeable and that the leaders of Ekoglasnost could have anticipated its introduction well before April 2005 and have taken the necessary measures to ensure that the party's situation was validated by the Court of Audit.

In this respect, in fact, the Court observed that the bill providing for the electoral deposit and the five thousand signatures of support had been tabled in Parliament only on 1 February 2005 and that the public debates on these measures had taken place between 23 March and 7 April 2005. Following those debates, the two new conditions had been considerably amended: the amount of the deposit had been halved and the five thousand signatures had been extended to any voters, not only members of the party. The leaders of Ekoglasnost had thus not been aware of the two new conditions until the date of their final enactment by Parliament, namely on 7 April 2005. As the date of the elections had been fixed for 25 June 2005 and the rule obliged parties to present their candidates no later than 46 days before the date of the elections, Ekoglasnost had had barely one month to obtain the five thousand signatures and pay the requisite election deposit.

To be precise, in the present case, in 2002 and 2003, or even in the first half of 2004.

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2005.

The applicant, named, Ekoglasnost, is a Bulgarian political party based in Sofia. On 9 May 2005 Ekoglasnost requested the Central Electoral Commission (the CEC) to register it as a participant in the coming parliamentary elections. On 12 May 2005 the CEC refused to register Ekoglasnost because the three documents had still not been filed. The party challenged that decision before the Supreme Administrative Court, which rejected the appeal. Relying on Article 3 of Prot. No. 1, Ekoglasnost complained that the introduction, shortly before Election Day, of three new conditions for parties to be able to enter candidates in the 25 June 2005 general election prevented it from taking part in the election. The application was lodged with the European Court of Human Rights on 12 August 2005.

The party presented candidates in all parliamentary elections from 1990 to 2001: its results in three of those elections gave it a number of seats in the National Assembly.