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ABSTRACT

On February 15th, 2013, the French Supreme Court voided the election results for a newly created legislative seat in the French Parliament representing French nationals living in the United States and Canada. This decision was the result of a lawsuit filed in June 2012, challenging the election results on the basis of significant operational concerns and difficulties encountered by voters. Although a number of novel arguments involving internet and mail-in voting procedures were before the court, the decision to annul those results and declare the legislator ineligible for a year was strictly based on campaign finance rules violation grounds.

Although the campaign finance jurisprudence was significantly clarified by this decision, a major uncertainty still remains about future overseas elections where the potential for voting operation failures, such as the internet vote, remain of significant concern.

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Pierre Ciric

On February 15th 2013, French media widely reported that the French Supreme Court voided the election results for two newly created legislative seats in the French Parliament representing French people living in the United States and in Israel. The French Supreme Court, called Conseil Constitutionnel (“High Court”) is the same court which, two months before, invalidated a 75% income tax rate the recently elected President, Francois Hollande, had introduced in the French Parliament. Parliamentary leaders expressed significant dismay against this decision, calling it a “Terrible Blow”, or a “Decision without Legal Basis!”¹.

France’s High Court, the Conseil Constitutionnel, is a 12-justice court of original jurisdiction for all legal challenges to the French presidential and legislative elections². Back in 2008, the French Congress, with only one vote over the 3/5 majority requirement for constitutional amendments, adopted sweeping constitutional changes, including the mandatory representation in Parliament of French nationals living abroad³. The rationale for this amendment came from the significant growth of French nationals living overseas, exceeding 2.5 Million. This amendment led to the creation of eleven legislative districts, amongst which the first included Canada and the United States.

For the most part, the French election system only provides for in-person or proxy voting. Special voting procedures, including internet-based and mail-in voting, were provided for overseas legislative districts, due to potential poor turn-out and the geographic dispersion of French nationals. These new procedures led to a complex voting calendar, based on a two-round voting process, allowing internet, mail-in, proxy and in-person voting procedures. This tortuous calendar led to numerous issues, such as mail-in voting material not being received in time by most voters, or internet access issues precluding many voters from accessing the internet ballot box⁴. These problems probably prevented a significant number of individuals amongst the 156,000 qualifying voters in the first overseas district (USA and Canada, hereinafter “first district”) from casting ballots.

To file an election challenge before the Conseil Constitutionnel, one faces numerous legal issues, familiar to the American litigator. First, the standing issue is easy to overcome, since either voters or candidates have statutory standing to sue either the winning candidate or the government which organized the elections. Second, the statute of limitations runs very quickly, since an action must be filed within ten days of the results’ publication. But what does “publication” exactly mean? Which round of results is involved, the first round or the second one? Third, the pleadings must raise all relevant causes of action, but no rule exists as to the particularity of those claims. Fourth, the challenger must bring to the court enough evidence to substantiate his claims. But what evidence is acceptable, and to what extent? How is a plaintiff expected to submit an affidavit from each voter who has had an issue with mail-in or internet

¹ *Europe 1*, 2-15-13; *Congressional Hearings*, French National Assembly, 17 February 2013, available at http://www.youtube.com/watch?v=Ou2nbza9xq0&feature=player_embedded.

² Articles 58 to 60, *French Constitution of the Fifth Republic*, 4 October 1958.

³ Article 24, *French Constitution of the Fifth Republic*, 4 October 1958.

⁴ *CE, W. v. Kouchner*, n° 329196, 16 June 2010.

procedures? Thankfully, there are rules that shift the burden of proof when the government is the only party with access to all the evidence, whereby a) a material mistake is made by the Government, b) the injury suffered by the voter is certain and real, c) the government's breach impacts a fundamentally protected interest (in this case the right to vote) and d) causation between the government's faulty actions and the prejudice suffered by the voter is established⁵. Fifth, the standard for voiding an election in the French system is quite clear, since a judge will void election results "only if the difference between the last selected candidate and the first unselected candidate is such that proven irregularities are likely to have affected the 'sincerity' [validity] of the vote"⁶.

In a two-round legislative election held in the first district in May and June 2012, Frederic Lefebvre, the conservative candidate and ally of Nicolas Sarkozy, lost to the socialist candidate, Corinne Narassiguin, with a margin of 2,341 votes. In order to annul this result, the High Court should have accepted causes of action whereby the government faulty procedures had involved more than 2,341 votes.

In the analyzed case, given the significant voting operation issues, a lawsuit with multiple claims was filed: first, under French law, no poll may be published less than 24 hours before voting day, otherwise such publication triggers the voiding of the election⁷. In this case, a poll was published the day before the start of the internet vote, which raised the unresolved issue as to what constituted a "voting day".

Second, under French law, all political advertising (pamphlets, emails, ads) and campaign communications must stop 24 hours before the voting day⁸. In our case, candidates sent email messages to voters until the night before the vote, a situation for which no jurisprudence existed.

Third, an important claim relied on delays in distributing the legal notice presenting the program of each candidate. This mandatory "legal notice"⁹, called *circulaire*, was received by most of the 9,200 voters who went to the polls in person, but was not received before most of the 21,000 internet voters cast their ballots. This situation created information inequality amongst voters, which had already been held to constitute a basis for an election annulment¹⁰.

⁵ CE, *Dame Martins c/ Centre Hospitalier de Libourne*, n° 06403, 9 January 1980 ; CE, *Cohen*, n°65087, 9 December 1988 ; CE, *B.*, n° 61406, 1 March 1989 ; CE, *M.*, n°65459, 14 June 1991; CE, *M.*, n°7340319 February 1992.

⁶ CE, *Balaramin F et Cojandé E c/ Ministère des Affaires Etrangères*, n° 294889, 10 August 2007.

⁷ Article 11, Law 77-808, 19 July 1977, prohibits polling publication the day before the "voting day". Prior jurisprudence allowed voiding a local election because of a poll publication (CE, 25 January 1984, *Elections municipales d'Étampes*, *Rec. p. 14*).

⁸ Article R26, *French Electoral Code*.

⁹ Mandatory distribution of candidate program description, Articles R27 to R30, *French Electoral Code*.

¹⁰ CE, *Langlet*, n° 296005, 31 200.

Fourth, a high number of mail-in votes were rejected due to a signature verification procedure – which had already taken place – regarded as too demanding on voters who had pre-registered to submit mail-in votes¹¹.

Fifth, because a significant number of voters who requested the mail-in vote never received the relevant material before the deadline, the lawsuit claimed this was similar to an “early closing of voting station” claim. Under this rule, a material violation of voting hours could justify the annulment of an election, because a voting station must be held “continuously” open until the last published time. Premature closing of voting booths may prompt the voiding of elections if the closing led to a number of rejected voters in excess of the gap between the winning and the losing candidates¹².

Sixth, a significant number of voters, estimated to exceed 60%, could not access the internet ballot box during the internet vote period. A similar argument under the “early closing of voting station” rule was made, since the government knew that certain Java-dependent configurations had failed during prior tests.¹³ The legal issue became whether the government had an obligation to warn voters who selected the internet voting procedure about the proper configuration to use.

After the June 29th deadline to file challenges had passed, a total of 109 lawsuits were submitted for a total of 577 seats, which is a significantly higher rate than in U.S. congressional elections. For instance, the 2012 November election was dominated by litigation involving the presence of Barack Obama on the ballot, while no challenges were filed following the U.S. congressional or senate races. Under its rules, the High Court is entitled to unilaterally dismiss actions prior to any discovery, without any opportunity to be heard¹⁴. The usual grounds for such unilateral dismissals are late filings, the absence of any legal claim or sustainable legal theory, the lack of evidence, or the challenge of the first round and not the second round. On July 13th, the High Court had dismissed 53 of the 109 actions, almost half of those filed.

Between July and November 2012, a number of answers and replies were exchanged between the plaintiff in *Ciric c/Narassiguin*, and the defendants, here Corinne Narassiguin, the winning candidate, and the government, which organized the elections.

¹¹ CE, *W. v. August Kouchner*, n° 329196, 16 June 2010.

¹² CE, *élect. mun. Owéa*, n° 1989-647074, 20 December 1989 ; *Rec. CE, tables p. 701* ; CE, *élect. cant. Pointe à Pitre*, n° 13873, 24 January 1994.

¹³ In February 2012, the French Government published the results of a test showing that only 30% of users were able to access the internet ballot box. See Luc Alain, *VOTE PAR INTERNET - Edouard Courtial présente les résultats du test*, *Le Petit Journal*, 13 February 2012, available at <http://www.lepetitjournal.com/expat-politique/2013-01-14-14-01-21/francais-de-l-etranger/95446-vote-par-internet-e-courtial-presente-les-resultats-des-tests->. It was later confirmed that this issue was primarily the result of Mac users blocked by a Java version which was incompatible with the internet ballot box software. See *ELECTIONS – Qui est responsable de ce fiasco général?* *Le Petit Journal*, 4 June 2012, available at <http://www.lepetitjournal.com/expat-politique/2013-01-14-14-01-21/francais-de-l-etranger/110005-elections-qui-est-responsable-de-ce-fiasco-general->; see also Alexis Buisson, *Vote par Internet : y'a comme un bug*, 26 May, 2012, *French Morning*, available at <http://frenchmorning.com/vote-par-internet-ya-comme-un-bug/>.

¹⁴ Article 38, 7 November, 1958 *Ordonnance*.

Then, on November 28th 2012, the plaintiff in the action, received a notice from the High Court announcing that the government had rejected Narassiguin's campaign finance account submissions. The High Court also asked the plaintiff to prosecute the case on campaign finance grounds on behalf of the High Court. This development shifted the litigation to campaign finance rules.

In the U.S., state campaign finance regulation schemes are based on different methods, such as disclosure-based rules, contribution limit-based rules, and public financing rules. The public financing rules can rely on a matching fund system, where the candidate raises private money which is then matched by taxpayer dollars up to a maximum, or on a fully publicly funded system, where the candidate raises some funds, and is then eligible for a public grant covering all campaign costs, in exchange for strict spending limits.¹⁵

The French campaign finance regulation scheme is essentially a "hybrid" system, which allows candidates to gather small donations throughout the election campaign, but also provides a block grant to the candidate to cover most of the expenses through a reimbursement and audit procedure. In 1990, a special government commission was created to ensure that political campaign spending was tightly controlled and subject to strict cap rules, under the condition that such political spending was reimbursed by the government¹⁶. The basic principle of a government-sponsored campaign finance system is that political parties and candidates are reimbursed for the spending related to political campaigning. However, candidates and parties have to subject themselves to significant controls and disclosure rules. Beyond the strict cap rules, this system assumes that the political candidate is always segregated from any contact with campaign funds through complex rules. Failure to comply with these rules would generate a number of potential severe consequences, such as criminal prosecution, ineligibility for subsequent elections, and the refusal to reimburse campaign expenses.

This process is quite extensive, as all candidates who receive more than 1% of the votes must file a campaign accounting submission, which is fully audited by a special government commission¹⁷, in a fashion similar to an administrative adverse proceeding. The potential outcomes of these proceedings are that the reimbursement is approved either with or without changes and within rules maintaining expenses caps, or that the rejection of the application leads to either civil or criminal judicial proceedings¹⁸. In the case we are now analysing, the commission decided to reject the application and initiated civil proceedings. Since the plaintiff had already filed a civil proceeding against that candidate, the High Court consolidated both cases, and transformed the civil plaintiff into the de-facto prosecutor of the campaign finance case.

¹⁵ *Statement of Ciara Torres-Spelliscy Counsel, Brennan Center for Justice at NYU School of Law For the New York Senate Elections Committee*, 3 June, 2009, available at <http://www.brennancenter.org/analysis/testimony-new-york-senate-elections-committee>.

¹⁶ CNCCFP: *Commission des Comptes de Campagne et des Financement Politiques* (or *Commission for Campaign Accounting and Financing of Political Campaigns* . Created by Law 90-55, 15 January 1990)

¹⁷ CNCCFP.

¹⁸ Articles L52-15 & LO136-1, *French Electoral Code*.

By the end of 2012, the campaign finance jurisprudence was in turmoil. Prior to April 2011, the rejection of a campaign accounting submission by the government commission was sufficient to cause the automatic ineligibility of the violator, as well as the annulment of election results. This rule was reversed in 2011, both by jurisprudence¹⁹ and by statute²⁰, whereby a rejection by the government commission would require a court to void the election only when it found an “intent to defraud or [...] a particularly serious breach of campaign finance rules”. The only case relying on this new standard was decided on November 29th 2012, hereby the High Court excused the candidate who violated a ban on institutional gifts²¹. Although the commission had rejected the candidate’s campaign accounting, the High Court refused to annul the election, because of “the lack of influence [of the violation] on the election due to the gap in votes between the winning and losing candidate”²². After this decision, the legal community was widely confused as to how to predict the impact of the new legal standard defined as “intent to defraud or a particularly serious breach of campaign finance rules” on the cases before the High Court.

Between November 2012 and February 2013, the plaintiff in the “consolidated” case proceeded to the discovery of all documents relevant to the candidate’s campaign finances, which included all documents related to the administrative adverse proceedings with the commission. The main finding was the continuous use of two bank accounts, one in France and one in the U.S. for all activities throughout the campaign. However, one of the critical rules of campaign finance laws is the use of a single account for all campaign receipts and expenses, which must be based in France²³. In addition, all account movements must be controlled by a single person, the “Legal Representative” or Mandataire of the candidate.

Therefore, the legal strategy used was to fully brief the single issue as to whether, after the 2011 changes, a continuous violation of the single account rule constituted evidence of an “intent to defraud” or of a “particularly serious breach of campaign finance rules”. In fact, during the single hearing held on this case before the High Court on February 7th 2013, the only issue debated was the campaign accounting violation, and not a single question was raised about other voting operations claims.

In its February 15th 2013 decision, the High Court concluded that the violation of article LO136-1 of the French Electoral Code was sufficient to trigger the voiding of election results, but the decision did not say which prong of the test of “intent to defraud or [of] a particularly serious breach of campaign finance rules” the Court relied on²⁴. By then, in addition to this suit, only 6 out of 577 election results had been voided.

¹⁹ CE, , *Elections régionales d’Ile-de-France Mme A., M. M.*, 4 July 2011.

²⁰ Law 2011-412, 14 April 14 2011 *modifying the Electoral Code’s Article LO136-1* (Article 16).

²¹ CC, A.N., *Loir-et-Cher 3rd*, n° 2012-4603, 29 November 2012.

²² *Id.*

²³ Article L52-6, *French Electoral Code*.

²⁴ “[G]iven the materiality of the violation of the rules, of which Ms. Narassiguin could not ignore the extent and impact, the court must, pursuant to section LO 136-1 of the Electoral Code, rule that Ms. Narassiguin is ineligible for any mandate for a period of one year from the date of this decision, and that, without the need to review the other claims in the complaint, the elections that took place in the first

Although the campaign finance jurisprudence was significantly clarified by this decision, a major uncertainty still remains about future claims involving voting operation failures, such as the internet vote, which already raised a number of concerns with other European countries which refused to implement internet voting in such a scale²⁵.

district of French nationals living overseas must be voided.” CC, , *A.N., Français établis hors de France (1ère circ.)*, *Ciric v. Narassiguin.*, n° 2012-4551, 15 February 2013

²⁵ *Cour Constitutionnelle Fédérale Allemande*, 3 march 2009, 2BVC 3/07, 2BVC 4/07, available at http://www.bundesverfassungsgericht.de/entscheidungen/cs20090303_2bvco00307.html.