

Policing and Elections: What European Standards?

Pierre Garrone, Head of the Division of Elections and Referendums,
Venice Commission, Council of Europe

I. Introduction

The topic of my presentation will be “policing at the service of human rights”. Symbolically, Dr Salgó started his intervention during a previous ACEEEO conference in London in 2003 with freedom of expression and electoral rights, not with security itself. “Respect for and protection of the rights of all individuals and groups within society is a prerequisite for a social order based on, and derived from, the rule of law”.¹

1. Scope of the discussion

As already mentioned in the concept paper, the issue of the security of elections is not a new one and has actually already been dealt with by the ACEEEO, in particular by Dr Salgó. However, one cannot say that it has been broadly discussed in literature, be it on elections or on the police.

This implies that there is no obvious definition of the term “security of elections”. The need to define our session’s aim is also made clear in the concept paper which shows that there is a narrow as well as a broad definition of the terms under consideration: policing *v.* security and the authenticity of election documents.

Concerning the *time* during which the security of elections is at stake, we have to admit that it is not sufficient to define only the term “security”; the term “elections” is not as clear as one could think at a first glance.

The issue is to know whether we just address the Election Day or deal with the whole electoral process. The answer is quite straightforward: all developments in the electoral field during the last decades have shown that an election is not just a one-day event but a whole process. An election often starts being prepared as soon as the previous one has taken place. In a more classical way, a distinction is made between the time before, during and after the election (meaning the Election Day). I shall address the issue of security during the whole period, which goes from the announcement of the elections to the settlement of disputes.

The scope of the discussion is also a question of identifying the aspects of security which need to be addressed. Security is a necessity during the whole electoral process *lato sensu*, going from registration without impediment to voter education and discussion through prevention of election-related fraud² - just as security is necessary in everyday life. The scope of this intervention will not be to address all possible problems which may arise during this period, but to focus on the most frequent ones.

¹ Ralph Crawshaw, Stuart Cullen and Tom Williamson, *Human Rights & Policing*, Leiden: Koninklijke Brill NV 2007, p. 54.

² See for example ACE Electoral Knowledge Network (<http://aceproject.org>), Voting Site Security.

2. *The risks to be avoided*

As a lawyer, I am accustomed to the idea that not everything goes smoothly. Lawyers are indeed, like medical doctors, in charge of pathology rather than of good health. This is also the role of the police, and we will have to address such cases today.

Let us take examples, from election observation, which helps identifying security risks, and election observation reports are interesting sources in this regard.

My own experience of election observation is very limited, but I did see a police intervention. The polling station was overcrowded, the electoral process was interrupted and finally the police intervened and gently asked people to go away.

Recent election reports show two features of improper behaviour by the police: by action or by omission. Let us take an example in each category. In one case, the police intervened in a disproportionate way and with brutality against opposition demonstrators, or at least obstructed or dispersed them.³ In another case, it did not prevent violence exercised by electoral contestants, during the campaign (attacks on party headquarters) as well as just after the vote, when armed persons stole the ballot boxes.⁴

II. Principles to be applied – policing at the service of fundamental rights, democracy and the rule of law

The purpose of my intervention will not be to give a practical, technical solution to such issues, but to see what *principles* have to be followed before trying and finding a solution. In other words, “security” cannot be the only objective but has to be examined in a more general context.

This context is respect for the three basic principles of the Council of Europe as expressed in the preamble to its statute: democracy, human rights and the rule of law – but it is not so simple.

1. In the electoral field, the basic principle is the *right to free elections* as expressed in a number of international conventions⁵ and of course in national constitutional law. Security of elections implies ensuring the implementation of this right, as well as of connected rights. The Code of Good Practice in Electoral Matters rightly states that “Democratic elections are not possible without respect for *human rights*, in particular freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties”⁶, as enshrined in international treaties and national constitutions.⁷

2. *General principles of policing*

³ See doc. 10751 of the Parliamentary Assembly.

⁴ AS/BUR/AHMK(2008)3, par. 35, 37.

⁵ Such as Article 3 of the Additional Protocol to the European Convention on Human Rights (ECHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

⁶ Code of good practice in electoral matters (CDL-AD(2002)023rev), II.1 (emphasis added).

⁷ E.g. Art. 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR); Art. 10-11 of the European Convention on Human Rights (ECHR).

If we focus on the role of the police and other security forces, specific principles applying to such bodies have to be taken into consideration. The use of the term “policing” rather than “law-enforcement” is intentional, since it makes clear that respect for human rights is essential. “Policing is one of the means by which states meet or fail to meet their obligations under international law to secure respect for and observance of the human rights of people within their jurisdiction”.⁸

The role of the police in protecting human rights is expressed in a number of international texts. At universal level, the Code of Conduct for Law Enforcement Officials underlines that “Law enforcement officials shall at all times fulfil the duty imposed upon them by the law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession”.⁹ The terms “Serving the community” mean rendering services to members of the community, not mere subordination to state authorities.¹⁰ Moreover, “In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons”.¹¹ The Council of Europe’s European Code of Police Ethics goes into the same direction. It provides that:

“The main purpose of the police in a democratic society governed by the rule of law are:

- to maintain public tranquillity and law and order in society;
- *to protect and respect the individual’s fundamental rights and freedoms as enshrined, in particular, in the European Convention on Human Rights*”.¹²

III. Practical implications

1. Impartiality and neutrality

Respect of the rule of law and of fundamental rights – including the principle of equality - implies that public administration has to be *impartial and neutral*. It is not subordinated to the ruling party – nor to any other one - but has to apply law, including the guarantees of fundamental rights. In the electoral field, the misuse of state positions and resources in favour of the incumbent is a recurrent problem.¹³ This applies to the police, but of course not exclusively. In particular, impartiality of members of electoral management bodies is a cornerstone of democratic elections.¹⁴

Concerning the police, the most serious violations of the principle of neutrality would be disruption of the electoral process in order to favour a party – in practice, the incumbent. This may touch upon the voting or counting process itself, including through physical intervention on the ballot boxes. However, such frauds are very seldom the work of the police. What is to be feared more is practical support to such frauds by the police, if for example voters are prevented from voting or observers

⁸ Crawshaw et al. (footnote 1), p. 19.

⁹ See UN General Assembly Resolution 34/169, Code of Conduct for Law Enforcement Officials, Article 1.

¹⁰ Cf. Article 1, Commentary, c.

¹¹ Article 2.

¹² (Council of Europe) Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Appendix, I.3 (emphasis added).

¹³ CDL-AD(2006)018, Report on Electoral Law and Electoral Administration in Europe - Synthesis Study on Recurrent Challenges and Problematic Issues, par. 96, 194.

¹⁴ CDL-AD(2002)023rev, Code of Good Practice in Electoral Matters, II.3.1.

from observing. More generally, intimidation of voters has to be feared¹⁵ – massive presence of security forces, notably where they are not well-known for their impartiality, will be felt as such an intimidation.

Neutrality does not mean passivity towards the authors of illegal actions. In the electoral field perhaps more than in other areas, public authorities have positive obligations to guarantee the respect of a fundamental right, the right to free elections. Ensuring security is part of this task.

2. The subsidiary role of the police

This does not of course mean that the police has to and may do everything in the field of elections. In a state governed by the rule of law, the police does not interfere in the sphere of power of other authorities. It acts within the limits assigned to it by law. Moreover, in its *relationship with other authorities* outside its hierarchy, such as electoral management bodies, there is no subordination, either way. The police has to make its own assessment of the situation.

In the field of elections, the Code of Good Practice in Electoral Matters states that “every electoral law must provide for intervention by the security forces in the event of trouble”.¹⁶ That means that law should allow the police – and compel it if necessary – to intervene in order to ensure the proper exercise of political rights, from voter registration to the settlement of disputes. Such an intervention is however subsidiary to the role of the bodies in charge of elections. This was already underlined in Dr Salgó’s intervention in 2003. Proper management of the various stages of the process is the responsibility of electoral management bodies and other authorities responsible for related matters (such as, for example, civil status officers when they deal with voter registration). Moreover, protecting the right to free elections does not mean meddling in the process, e.g. by assessing whether a person has the right to vote, what the actual result of the vote is, or even running a polling station if the polling station commission does not do so properly or if its members do not show up. In short, when executing the task of ensuring the fundamental right to vote, the police has to prevent attempts to disrupt the process and remedy them, but cannot get involved in the process itself; a good expression of the subsidiary character of police intervention can be found in the sentence according to which “security forces should be present to deal with potential or actual breaches of peace and to respond to disasters”¹⁷ – and that’s it.

Interventions of the police inside polling stations should be exceptional and take place only at the request of the president of the polling station.¹⁸ This raises of course the issue of the impartiality of the president and of a balanced repartition of the functions of presidents of the various polling station commissions.

3. Adapt to circumstances – the different aspects of security at stake

The already mentioned term “intervention in the event of trouble” does not mean that the police should be inactive in the absence of actual trouble, since prevention is preferable to repression. However, the police should only intervene when necessary.

¹⁵ See Ilona Tip, Security of Elections in Southern Africa, EISA Occasional Paper Number 41, June 2006, p. 3 (available under <http://www.eisa.org.za/EISA/publications/publications.htm>).

¹⁶ CDL-AD(2002)023rev, par. 112.

¹⁷ Tip (footnote 15), p. 8.

¹⁸ Cf. Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, par. 112; Tip (footnote 15), p. 3.

The solution must therefore be adapted to the situation of every country and of every election. The situation may also be different in various parts of the same country.¹⁹ This means that a difference has to be made between “low security risk environments” and “high security risk environments”.²⁰ In countries with low security risk environments, peaceful determination of continuation or transfer of powers of governance is an established tenet of societal behaviour; the activities of the police during election time are minimal. On the contrary, high security risk environments are characterised by a high degree of distrust among the political participants.²¹ The general context has therefore to be analysed in each case. For example, stating that “security forces need to be present at polling and counting centres”²² is too general. Or, more concretely, it would be useless and even counter-productive to ensure for example high visibility of police in a place where no significant problem has arisen for decades. This would raise suspicion about the intentions of the police and/or the authorities. The situation may also evolve – hopefully in the right direction. In Geneva, where I originate from, it was acceptable to check whether voters carried arms in the 1860s, when a lot of electoral fraud and violence occurred, but it would be completely paranoid today.²³

Security of elections includes three aspects

- security of *persons* (voters, candidates, electoral officials, party workers/officials, observers, etc.);
- physical security of *premises and materials* (including ballot papers and their transportation);
- security of – immaterial – *election information*, such as computer systems and software and communication systems²⁴.

Without addressing technicalities, one can say that the response to the challenges posed by these various aspects of security will not be the same, in particular concerning the security of election information, which will only have to be managed by security forces in exceptional circumstances.

4. How to ensure the right to campaign and the right of peaceful assembly? The specific issue of demonstrations

“It is a function of the police to enable democratic political debate and other political activity in accordance with the requirements of representative and accountable government”²⁵, and in particular to allow all candidates to campaign on an equal basis, notably through access to public places.

Neutrality of state authorities, including the police, especially applies to the right to demonstrate.²⁶ As already stated, this does not mean passivity. The European Court of Human Rights already made it clear two decades ago that, even outside electoral campaigns, the state has positive obligations to protect demonstrators, including

¹⁹ See e.g. AS/BUR/AHMK(2008)3, par. 35, 37.

²⁰ Cf. Dr Salgó’s intervention at the ACEEEO London session (2003).

²¹ Distinction made by ACE Electoral Knowledge Network (<http://aceproject.org>), Voting Site Security.

²² Tip (footnote 15), p. 8.

²³ The very strict approach of ACE Electoral Knowledge Network (<http://aceproject.org>), Voting Site Security Arrangements, should apply only when there is an actual risk of disorder and/or irregularities.

²⁴ ACE Electoral Knowledge Network (<http://aceproject.org>), Voting Site Security.

²⁵ Crawshaw et al. (footnote 1), p. 54.

²⁶ Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, par. I.3.1.a.iii.

against counter-demonstrators.²⁷ Unfortunately, some police officers (and other authorities) still hold the view that demonstrating is *ipso facto* a breach of public order, whereas it is the normal exercise of freedom of assembly. This may lead to excessively restrictive legislation and practice. Of course, abuses of the fundamental rights of freedom of assembly and freedom of expression are possible, but they are not the rule. Prohibition of a demonstration should occur only in the presence of “an imminent threat of violence”.²⁸ In particular, “violence by a minority of participants should not automatically result in the dispersal of the entire event”.²⁹ The principle of proportionality has always to be applied.³⁰ The Council of Europe’s training programmes for the police are in particular aimed at helping police officers to behave in conformity with fundamental rights during demonstrations.

At any rate, the police, as a neutral body in charge of protecting fundamental rights, should not be perceived as biased against demonstrators (or in their favour).

The issue of *use of force* by the police has then to be raised. I will not enter into detail but briefly recall the main principles.³¹ The principle of proportionality is the first one to be observed, which implies that use of force is an *ultima ratio*, as expressed in various international texts: “law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty”³²; “the police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective”.³³

5. Training

This presentation has been brief, but the security of elections is no doubt pretty complex. Therefore, training police forces is essential. Such training includes of course the practical way to deal with threats to public order which may arise, but also the way to help ensure the exercise of fundamental rights in the electoral field, including freedom of peaceful assembly. “Police training shall be based on the fundamental values of democracy, the rule of law and the protection of human rights”,³⁴ with particular emphasis on the police as a neutral instrument at the service of the community and not of those in power. Training should also include understanding of the entire electoral process as the expression of a fundamental right.³⁵

IV. Conclusion

²⁷ ECHR, 21 June 1988, *Plattform “Ärzte für das Leben” v. Austria*, application no. 10126/82, par. 32 ff.

²⁸ OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, at paragraph 135.

²⁹ CDL-AD(2008)018, par. 35.

³⁰ Cf. Art. 10.2 and 11.2 ECHR, Art. 19.3, 21 and 22.2 ICCPR.

³¹ On the use of force by police, see in particular Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; Crawshaw et al. (footnote 1), pp. 32-33, 143 ff.; the case-law of the European Court of Human Rights, in particular ECHR *McCann and Others v. the United Kingdom*, 27 September 1995, application no. 18984/91 (violation of the right to life, Art. 2 ECHR).

³² UN General Assembly Resolution 34/169, Art. 3.

³³ (Council of Europe) Rec(2001)10 (footnote 12), par. 37.

³⁴ Rec(2001)10, par. 26.

³⁵ Tip (footnote 15), p. 4.

“The more inclusive the electoral process the less likely the potential for post election conflict”³⁶ ... “every aspect of the electoral process is crucial in securing a credible outcome, no less than that of security during the elections”.³⁷ These conclusions, albeit reached in another part of the world, are universally valid.

If we start from the principle of the respect of fundamental rights, democracy and the rule of law, this is beyond doubt. Democracy will then function in a low-risk environment where actual security issues are very limited. This is real prevention, made possible by good framework conditions.

This is the task of the authorities, but first of all those involved in the electoral process, and in particular of electoral management bodies. Professional³⁸ and impartial organisation of elections is the best argument against those who could contest the election process. It should be noted that, in those countries where there is general agreement that, simply, *votes are counted as they are*, and power shifts if the incumbent loses, potential risks for security are in general very low.

Not everything, such as the neutrality of *all* authorities during the electoral campaign and in case of demonstrations, depends on election officials. However, their role is essential in creating a good climate. The role of the police is secondary.

³⁶ Tip (footnote 15), p. 9.

³⁷ Tip (footnote 15), p. 10.

³⁸ The term «professional » refers here to the behaviour of election officials – competent and in conformity with human rights and the rule of law -, not to the composition of election commissions.