**Short overview of the case-law of the European Court of Human Rights on the right to free elections**

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**I.  Introduction**

The European Court of Human Rights was set up to ensure observance of the undertakings of the Council of Europe Member States under theEuropean Convention on Human Rights. The Convention guarantees a range of rights, the observance of which may well arise during the electoral process. The most obvious examples of such rights are the freedom of speech which encompasses all types of political debate during the election campaign[[1]](#footnote-1) and the freedom of association which guarantees among other thing the right to form and join a political party, the latter being a key actor in the elections[[2]](#footnote-2). However, the most relevant Article, which directly deals with free elections, is Article 3 of Protocol No. 1. It reads as follows:

*“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.”*

**II.  Importance**

The European Court always underlined the significance of this provision to the protection of human rights. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court observed that “*according to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by "an effective political democracy". Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system*”.[[3]](#footnote-3)

**III.  Scope**

Now we will look at the scope of application of Article 3 of Protocol No. 1. As you can see from its wording, this article guarantees only the “choice of the legislature”. However, the “legislature” does not necessarily mean the national parliament. The Court here applies its jurisdiction over « all matters concerning the interpretation and application of the Convention and the Protocols » (Article 32 of the Convention) and gives autonomous interpretation to the term “legislature” in the light of the constitutional structure of the State in question. What the Court mainly looks at is whether the competence and powers vested in the respective authority are wide enough to make it a constituent part of the legislature within the meaning of Article 3 of Protocol No. 1.

Thus, the Court held that this provision was not applicable to referenda[[4]](#footnote-4), presidential elections in the Former Republic of Macedonia[[5]](#footnote-5) and Ukraine[[6]](#footnote-6) and to local elections in Russia[[7]](#footnote-7),Poland[[8]](#footnote-8) and Moldova[[9]](#footnote-9). At the same time, the Court considered that the regional councils in Belgium and Italy had sufficient competence and powers to make them constituent part of the “legislature” in their respective countries. Accordingly, regional elections in Belgium[[10]](#footnote-10) and Italy[[11]](#footnote-11) were considered to fall within the ambit of Article 3 of Protocol No. 1.

In several cases, the Convention organs looked at the European elections too. The development of the case-law on this issue illustrates an important principle of interpretation of the Convention, which says that the Convention is a living instrument. In 1979, in the case *Lindsay and Others v. the United Kingdom*[[12]](#footnote-12), the European Commission concluded that European Parliament is purely advisory body and therefore elections to it fell outside the ambit of Article 3 of Protocol No. 1. Twenty years later, in the case of *Matthews v. the United Kingdom*[[13]](#footnote-13), the Court observed the evolution of the European Parliament since the adoption of the Maastricht Treaty. It thus concluded that the European Parliament was “sufficiently involved in the specific legislative processes leading to the passage of legislation” and “in the general democratic supervision of the activities of the European Community” to constitute part of the “legislature” for the purposes of Article 3 of Protocol No. 1.

**IV.  Unique wording**

Unlike most of the substantive clauses in the Convention and its Protocols, which use the words "Everyone has the right" or "No one shall", Article 3 of Protocol No. 1 uses the phrase "The High Contracting Parties undertake", which might suggest that this provision does not confer any individual rights. However, the case-law of the Convention organs asserted that this provision provided for individual rights as well. As the Court summarized in the case of *Hirst (2) v. the United Kingdom*: “*Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election. Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States’ commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference.*”[[14]](#footnote-14) The Court thus established that provisions of Article 3 of Protocol No. 1 imply both the right to vote and the right to stand for elections.

**V.  Limitations**

These rights under Article 3 of Protocol No. 1, however, are not absolute. The Court always acknowledged that the right to vote and the right to stand for elections can be subject to limitations. In the *Mathieu-Mohin* judgment, mentioned above, the Court explained it the following way, “*since Article 3 recognises them [these rights] without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with;…”[[15]](#footnote-15)*

According to this concept of “implied limitations”, the Contracting States are free to rely on any aim to justify a restriction, provided the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention in the particular circumstances of a case. In assessing restrictions on electoral rights, the Court looks into “*whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people*”[[16]](#footnote-16).

The Court does respect cultural and historical differences which affected the creation and development of the *own democratic vision* of each Contracting State[[17]](#footnote-17). It, nevertheless, as mentioned above, checks that any conditions related to elections do not thwart the free expression of the people in the choice of the legislature. The Court had accepted some such conditions, as a minimum age or residence requirement. The imposition of a minimum age, for example, was accepted to be necessary to ensure the maturity of those participating in the electoral process.[[18]](#footnote-18) In other cases, described below, such conditions or manner of their imposition had been found contrary to Article 3 of Protocol No. 1.

**(a)  Right to vote**

While some of the restrictions, as mentioned above, are considered to be compatible with the principles enshrined in Article 3 of Protocol No. 1, the Court constantly held that “*any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1*”[[19]](#footnote-19)

In the quoted *Hirst v. the United Kingdom (no. 2)* case, the Court decided that despite previous case-law on acceptability of **restrictions on the right to vote related to criminal conviction**, such restrictions should not constitute a general and automatic disenfranchisement of convicted prisoners without having due regard to relevant matters such as the length of the prisoner’s sentence or the nature and gravity of the offence. In a more recent case of *Scoppola v. Italy (no. 3)*, the Court held that “*the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. It will then be the role of the Court to examine whether, in a given case, this result was achieved and whether the wording of the law, or the judicial decision, was in compliance with Article 3 of Protocol No. 1*”[[20]](#footnote-20).

Similarly the total **ban on voting of people with mental disabilities** without due regard to their actual faculties had been found to be a disproportionate restriction on the voting rights in the case of *Alajos Kiss v. Hungary*[[21]](#footnote-21).

The Court would normally accept the **restrictions based on residence** and a wide margin of appreciation in this respect, like in the recent case of *Shindler v. the United Kingdom*[[22]](#footnote-22), which concerned disenfranchisement of a British national as a result of his residence outside the UK for more than fifteen years.

Finally, it comes as no surprise that the **restrictions based on ethnic origin** were found to be incompatible with requirements of Article 14 of the European Convention on Human Rights taken together with Article 3 of Protocol No. 1 to the Convention in the case of *Aziz v. Cyprus*, in which the applicant was unable to vote in the 2001 parliamentary elections on the grounds that, under Cyprus’ Constitution, members of the Turkish-Cypriot Community were excluded from the Greek-Cypriot electoral roll.[[23]](#footnote-23)

**(b)  Right to stand for elections**

As to passive electoral rights, the Court accepted even stricter requirements than those for voting eligibility. The residence requirement allowed with respect of active electoral rights, was thus found reasonable for the candidates in the parliamentary elections as well.

The case-law of the Court requires, however, that such a restriction is formulated with sufficient precision, so it is **clear and foreseeable**. If the relevant domestic legislation or administrative practice is ambiguous and unforeseeable, such a situation would amount to a breach of Article 3 of Protocol No. 1 like in the case of *Melnychenko v. Ukraine[[24]](#footnote-24).*

The Court’s case-law further requires protection of candidates from **arbitrary and abusive disqualification of candidates**. The Court examined a number of cases in which the applicants’ registration as candidates was cancelled for electoral misconduct[[25]](#footnote-25), providing untruthful information about property[[26]](#footnote-26) or place of residence[[27]](#footnote-27), and insufficient knowledge of the official language of the State[[28]](#footnote-28). In all of them the Court concluded that the manner, grounds and reasoning used by the domestic authorities in restricting the applicants’ passive electoral rights had lacked clarity and had appeared to be unfair and arbitrary, contrary to the requirements of Article 3 of Protocol No. 1. The Court’s case-law consistently stressed the need to avoid arbitrary decisions and abuse of power in the electoral context, especially as regards the registration of candidates[[29]](#footnote-29).

**VI.  Other issues**

In its case-law, the Court further stressed the importance of the principles of equal and free suffrage and observed the necessity to have an accuracy of electoral rolls[[30]](#footnote-30), a stability of electoral legislation[[31]](#footnote-31), an impartial body responsible for organisation of elections[[32]](#footnote-32) and an effective system of appeal within electoral process[[33]](#footnote-33).

1. see, for example, *Şükran Aydın and Others v. Turkey*, nos. 49197/06 et al., 22 January 2013 [↑](#footnote-ref-1)
2. see, among other authorities, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 et al., ECHR 2003‑II [↑](#footnote-ref-2)
3. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A no. 113 [↑](#footnote-ref-3)
4. *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999‑VI [↑](#footnote-ref-4)
5. *Boškoski v. “the former Yugoslav Republic of Macedonia”* (dec.), no.11676/04, ECHR 2004-VI [↑](#footnote-ref-5)
6. *Krivobokov v. Ukraine* (dec.), no. 38707/04, 19 February 2013 [↑](#footnote-ref-6)
7. *Cherepkov v. Russia* (dec.), no. 51501/99, ECHR 2000‑I [↑](#footnote-ref-7)
8. *Mółka v. Poland* (dec.), no. 56550/00, ECHR 2006‑IV [↑](#footnote-ref-8)
9. *Gorizdra v. Moldova* (dec.), no. 53180/99, 2 July 2002 [↑](#footnote-ref-9)
10. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A no. 113 [↑](#footnote-ref-10)
11. *Vito Sante* *Santoro v. Italy*, no. 36681/97, ECHR 2004‑VI [↑](#footnote-ref-11)
12. *Lindsay v. the United Kingdom*, application no. 8364/78, decision of 8 March 1979, Decisions and Reports (DR) 15, p. 247 [↑](#footnote-ref-12)
13. *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999‑I [↑](#footnote-ref-13)
14. *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005‑IX [↑](#footnote-ref-14)
15. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113 [↑](#footnote-ref-15)
16. *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109, ECHR 2008 [↑](#footnote-ref-16)
17. *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005‑IX [↑](#footnote-ref-17)
18. See, for example, *Melnychenko v. Ukraine*, no. 17707/02, ECHR 2004‑X [↑](#footnote-ref-18)
19. *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 62, ECHR 2005‑IX [↑](#footnote-ref-19)
20. *Scoppola v. Italy (no. 3)* [GC], no. 126/05, § 102, 22 May 2012 [↑](#footnote-ref-20)
21. *Alajos Kiss v. Hungary*, no. 38832/06, §§ 39-44, 20 May 2010 [↑](#footnote-ref-21)
22. *Shindler v. the United Kingdom*, no. 19840/09, 7 May 2013 [↑](#footnote-ref-22)
23. *Aziz v. Cyprus*, no. 69949/01, ECHR 2004‑V [↑](#footnote-ref-23)
24. *Melnychenko v. Ukraine*, no. 17707/02, §§ 61-67, ECHR 2004‑X [↑](#footnote-ref-24)
25. *Atakishi v. Azerbaijan*, no. 18469/06, 28 February 2012 [↑](#footnote-ref-25)
26. *Sarukhanyan v. Armenia*, no. 38978/03, 27 May 2008 [↑](#footnote-ref-26)
27. *Melnychenko v. Ukraine*, no. 17707/02, ECHR 2004‑X [↑](#footnote-ref-27)
28. *Podkolzina v. Latvia*, no. 46726/99, § 35, ECHR 2002‑II [↑](#footnote-ref-28)
29. Among other authorities, also see *Krasnov and Skuratov v. Russia*, nos. 17864/04 and 21396/04, § 42, 19 July 2007; *Lykourezos v. Greece*, no. 33554/03, § 56 *in fine*, ECHR 2006‑VIII; *Kovach v. Ukraine*, no. 39424/02, § 54, ECHR-2008; *Ādamsons v. Latvia*, no. 3669/03, 111 (e) and 117‑19, 24 June 2008; and *Petkov and Others v. Bulgaria*, nos. 77568/01, 178/02 and 505/02, § 61, 11 June 2009 [↑](#footnote-ref-29)
30. *Georgian Labour Party v. Georgia*, no. 9103/04, ECHR 2008 [↑](#footnote-ref-30)
31. *Ibid.* [↑](#footnote-ref-31)
32. *Ibid.* [↑](#footnote-ref-32)
33. *Namat Aliyev v. Azerbaijan*, no. 18705/06, 8 April 2010 [↑](#footnote-ref-33)