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ELECTORAL DISPUTES AND THE ECHR: AN OVERVIEW

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[1] All views in this paper are expressed in the author's personal capacity.

In the first draft of the European Convention on Human Rights (ECHR) that was sent to the Committee of Ministers in 1949 there was no mention of the right to free elections or the right to vote. It was argued by those experts who had excluded it that the ECHR was designed to protect individual rights and not to define the political structures which should be set up within the States' Parties. This caused a strong reaction by the UK and French experts and a draft of such "political" rights was promptly drawn up. However, pending agreement on how individual rights and "political" rights of this sort could be reconciled with each other, the right to free elections was not contained in the finalised text of the Convention and had to wait for the adoption of the First Protocol to the Convention in 1954.[2]

The case law of the Court on Article 3 of Protocol No 1[3] still echoes this fundamental disagreement as to what exactly should be the role of the Convention in this area. The jurisprudence is, for the most part, relatively recent. The Court gave its first judgment in *Mathieu-Mohin and Clerfayt v Belgium*[4] in 1987 although it was preceded by some pathfinding admissibility decisions of the former Commission which are followed by the Court to this day.[5] This provision is seen by the Court as enshrining a "characteristic principle of democracy" and has a strong link with Article 10 which affords strong protection to freedom of political debate. Together they are considered to constitute the bedrock of any democratic system.[6] Article 3 is primarily concerned with the State's positive duty to hold democratic elections at reasonable intervals and although unlike other Convention rights it is not framed as conferring a "right" as such, the Court has read into this provision both the right to vote and the right to stand for elections but accepts that both rights may be subject to restrictions provided that such restrictions are not arbitrary and do not undermine the free expression of the opinion of the people.

Since the Court's leading judgment in *Mathieu-Mohin* there have been a large number of cases, many of them concerning the electoral systems of central and eastern European countries. However there are five leading judgments which establish the Court's general approach to the interpretation of Article 3 concerning both active and passive electoral rights – *Matthews v United Kingdom*, *Hirst (No. 2) v United Kingdom*, *Ždanoka v Latvia*, *Podkolzina v Latvia* and *Yumak and Sadak v Turkey*.[7] The interpretation of Article 3 as developed in these judgments is governed by five main considerations.

First, that the right to vote and to stand for election, together with freedom of expression and especially freedom of political debate, form the foundation of any democracy.[8] However for the Court "expression of the opinion of the people is inconceivable without the assistance of a plurality of political parties, representing the currents of opinion flowing through a country's population. By reflecting those currents, not only within political institutions but also, thanks to the media, at all levels of life in society, they make an irreplaceable contribution to the political

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[2] For an analysis of the *Travaux Préparatoires* of Article 3 of Protocol No.1, see Sergey Golubok, *"Right to free elections: emerging guarantees or two layers of protection?"*(2008) – paper available in the Human Rights Library, Strasbourg.

[3] Article 3 of Protocol No. 3 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". See generally, Chapter 20, Harris, O'Boyle, Warbrick, Bates and Buckley, *The law of the European Convention on Human Rights* (revised edition forthcoming March 2009) (Oxford University Press).

[4] 2 March 1987, Series A no. 113.

[5] *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 109-11, ECHR 2006-…, for examples of some of these cases.

[6] *Bowman v United Kingdom*, Reports 1998 –I, § 42.

[7] *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I; *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX; *Ždanoka v. Latvia* [GC], no. 58278/00, ECHR 2006; *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II; *Yumak and Sadak v. Turkey* [GC], no. 10226/03, 8 July 2008.

[8] See generally in this context – the remarks of the President of the Court, Jean-Paul Costa, in "*The links between democracy and human rights under the case-law of the European Court of Human Rights*", Helsinki (5June 2008) (available at www.echr.coe.int).

debate which is at the very core of the concept of a democratic society".[9]

Second, that the State enjoys a wide margin of appreciation when assessing restrictions of these rights although the Court has indicated that it will subject restrictions on the right to vote to greater scrutiny than to restrictions on the right to stand for election which fall to be assessed against the background of the particular political traditions and customs in the country concerned.

Third, the Court has also found that Article 3 permits inherent restrictions of these rights with reference to a wider variety of legitimate state aims than is the case with the rights set out in Articles 8-11 where the aims are carefully delineated. In consequence the Court does not apply the traditional tests of "necessity" or "pressing social need" which are used in the context of Articles 8-11.

Fourth and more importantly, the Court's examination will focus on 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. Thus it will not accept restrictions that are arbitrary or are based on political discrimination and thus destroy the very essence of the right concerned.[10]

Fifth, the case law - especially the Court's leading judgments - well reflects the reluctance by the Court to meddle in the political or constitutional arrangements of the State, particularly as regards rules concerning parliamentary representation. The Court's approach reveals a certain caution or prudence in imposing a Strasbourg view of how the national constitutional order should function in place of that chosen by the "people" through national institutions. Such prudence, as earlier indicated, aptly mirrors the early debates in the *travaux préparatoires* on the appropriateness of including such "political" rights among the individual rights set out in the ECHR. As one dissenting judge has put it, the Court faces a dilemma when examining cases under Article 3 of Protocol No 1: "on the one had—it is the Court's task to protect the electoral rights of individuals; but, on the other hand, it should not overstep the limits of its explicit and implicit legitimacy and try to rule instead of the people on the constitutional order which this people creates for itself".[11]

This omnipresent tension concerning the proper role of the Strasbourg Court between the need to protect individual rights on the one hand and the concern to do so in a manner which does not overly impinge on the constitutional order has permeated the case law from the very beginning and is graphically illustrated in the contrast between the vote-reaffirming approach of the Court in *Hirst (No. 2)* and the more cautious recent judgment in *Yumak and Sadak*. Notwithstanding the enduring difficulties of drawing the appropriate line in such cases, the Court's case law has gradually moved the cursor of protection from a baseline of minimum protection to a higher threshold of what European democracies should protect in their laws, especially in the area of the right to vote. In doing so, as will be seen below, the Court has upheld the four pillars of the European electoral heritage: universality, equality, freedom and the secret ballot. This is perhaps a slow start in a process which will prudently but surely continue to develop in an upwards direction.

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[9] *Yumak and Sadak v Turkey*, § 107.

[10] See, in this connection, *Paschalidis, Koutmeridis and Zaharakis v Greece*, judgment of 10 April 2008. One issue on which the Venice Commission has already expressed an opinion concerns restrictions on electoral rights based on multiple citizenship. In its view – based on its own *Code of Good Practice in Electoral Matters* – such restrictions could amount to violations of both Article 3 of Protocol No.1 and Article 14 – see Report of 30 October 2008 on Moldova's 2008 Amendments to the Electoral Code. This question has now been examined by the Court in the case of *Tănase and Chirtoacă v Moldova* (judgment of 18 November 2008). The applicants were not allowed to stand for election on account of their dual Romanian and Moldovan nationality. The case is considered below.

[11] See Judge Levits's remarks in the *Ždanoka* Chamber judgment (17 June 2004), §17.

The meaning of the term "legislature" in Article 3 of Protocol No 1

The right to vote is limited to guaranteeing "the free expression of the opinion of the people in the choice of the legislature". Accordingly it does not extend to the full range of elections that take place in modern democracies. However the Court has stressed that the word "legislature" in this provision does not necessarily mean the national parliament. Thus in *Mathieu-Mohin and Clerfayt v. Belgium* [12]the Court accepted that the Flemish council constituted part of the Belgian legislature by virtue of the range of its competence and powers. Also in *Santoro v. Italy* the Court accepted that regional councils were part of the legislature because they were "competent to enact within the territory of the region to which they belong, laws in a number of pivotal areas in a democratic society, such as administrative planning, local policy, public healthcare, education, town planning and agriculture".[13]

In *Matthews v. the United Kingdom* the applicant complained about the exclusion of Gibraltar from voting in the European parliamentary elections. The Court, rejecting the Government's position that, as a supranational body the European Parliament fell outside the ambit of Article 3, found that it was to be considered a "legislature" within the meaning of this provision.[14] For the Grand Chamber of the Court, Article 3 of Protocol No 1 could be applicable to the European Parliament even though it was an international organ and that, in practice, it had the characteristics of a "legislature" for the people of Gibraltar. The Court in this landmark decision acknowledged the significance of the evolution of the powers of the European Parliament and its increased role in law-making, notably since the Maastricht Treaty. Its role in this respect was no longer merely "advisory and supervisory" but had moved toward being a body with a decisive role to play in the legislative process of the European Community and, in practice, there were significant areas where community activity had a direct impact on Gibraltar. The Court also attached weight to the fact that the European Parliament "derived democratic legitimation from the direct elections by universal suffrage".[15] Since the applicant had been completely denied the opportunity to express her opinion in choosing members of the European Parliament, Article 3 was violated.

On the other hand, not every election to an institution which is considered important for effective political democracy is covered by this provision. The Court has held, for example, that Article 3 does not apply to elections to bodies which are not involved in legislative activities as such. Thus presidential elections, elections to local authorities or local governments which lack sufficient legislative authority in terms of the scope or strength of their powers and referenda on important matters are not considered to amount to elections to the "legislature" for purposes of this provision, notwithstanding the importance of such electoral exercises in a democracy.[16]

The right to vote

Although Article 3 of Protocol No.1 is expressed in general terms as a right to hold free elections, the Court has read into this provision the right to vote. Underscoring the importance of the right to vote in a democracy it has emphasised that the right to vote is not a privilege and that universal suffrage has become the basic principle in a democratic society.[17] According to the Court, "the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, frame the right to vote in terms of the possibility to cast a vote in universal, equal, free, secret and direct elections held at regular intervals".[18] The Court

[12] Supra note 4.
[13] 2004-VI, §§ 51-53.
[14] Supra note 7.
[15] Supra note 7, §§ 45-54.
[16] See *Matthews*, § 40; *The Georgian Labour Party v Georgia*, No 9103/04 (2007)(Hudoc*); Booth-Clibborn v United Kingdom*, 43 DR 236; *Cherepkov v Russia*, No.51501/99 (2000) (Hudoc).
[17] "In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power". – *Hirst (No.2*), § 59.
[18] See *Russian Conservative Party of Entrepreneurs v Russia,* judgment of 11 January 2007 (Hudoc).

has also stressed that the right to vote is not absolute and that there is room for implied limitations. It has also reaffirmed that the margin of appreciation in this area is a wide one taking into consideration the numerous ways of organising and running electoral systems and the wealth of difference *inter alia* in historical development, cultural diversity, and political thought within Europe "which it is for each Contracting State to mould into their own democratic vision".[19]

It is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No.1 have been complied with. In so doing it will consider whether the restrictive conditions do not curtail the right in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any conditions imposed must not "thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage".[20] Accordingly, conditions concerning the imposition of a minimum voting age with a view to ensuring the maturity of those participating in the electoral process or criteria such as a residence requirement or having continuous and close links to, or a stake in, the country are relevant factors.[21] In assessing the acceptability of the length of the residence requirement the Court will have close regard to the particular context under scrutiny.[22] Conditions concerning the exercise of the right to vote such as registration within a particular time limit would be likely to be considered to serve a legitimate aim, namely to ensure the proper conduct of elections and to avoid electoral fraud. Significantly the Court has emphasised that any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates.[23] Exclusions of any groups or categories of the general population must accordingly be reconcilable with the underlying purpose of Article 3 of Protocol No. 1.[24]

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[19] *Hirst* (No.2), § 61, supra note 7.

[20] Ibid., § 62.

[21] Ibid: – citing *Hilbe v Liechenstein*, decision of inadmissibility, ECHR 1999-VI: "In the present case the Court considers that the residence requirement which prompted the application is justified on account of the following factors: firstly, the assumption that a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them; secondly, the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country."

[22] In the *Polacco and Garofalo v Italy* case (Commission decision of 15 September 1997, DR 90-A) only those who had been living continuously in the Trentino-Alto Adige Region for at least four years could be registered to vote in elections for the Regional Council, which were held every five years. The former Commission took the view that that requirement was not disproportionate to the aim pursued, given the region's particular social, political and economic situation. In the case of *PY v France*, (judgment of 11 January 2005) the Court upheld a ten year residence requirement to vote in elections in New Caledonia. Even the Court conceded that such a period appeared disproportionate but argued that the situation was exceptional and was bound up with the negotiations to the Nouméa Accord which brought to an end a turbulent period of political and institutional history. The representatives of the local population had insisted during the negotiations that the results of elections should not be affected by the mass of recent arrivals who did not have strong ties to the area. The Court reasoned that such factors were to be taken into account as part of the "local requirements" rule under Article 56 of the Convention (see §§ 59-65). The ruling may thus be seen as exceptional and limited to a colonial setting. Significantly both of these decisions pre-date the *Hirst* judgment and it may be questioned whether, in the light of this judgment and the presumption it attaches to the right to vote, the Court today would have reached the same conclusion or exhibit such deference to local particularities.

[23] Ibid.

[24] See *Georgian Labour Party v Georgia*, judgment of 8 July 2008, where the Second Section of the Court found a violation of the Party's right to stand for election arising out of the disenfranchisement of some 60,000 Ajarian voters by a decision taken by an electoral commission to cancel the result of the election in two districts for electoral irregularities and not to proceed to new elections in these areas.

The judgment in *Aziz v. Cyprus* well illustrates the latter point. In this case the Court considered that the denial of voting rights to a Turkish-Cypriot resident in non-occupied territory of Cyprus violated Article 3 because it amounted to completely excluding such persons from the democratic process. It was not acceptable that the applicant, living in a government controlled part of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he was a national and where he had always lived. Such a situation had continued for a period of thirty years. The Court accordingly concluded that the very essence of the applicant's right to vote had been impaired.[25]

A similar exclusion from the right to vote occurred in the case of *Matthews v. the United Kingdom*, mentioned above, which concerned the denial of voting rights in European Parliament elections to residents of Gibraltar.[26] She had been completely denied her right to choose a member of the European Parliament and her position was thus considered different to those of persons who are denied the vote because they live outside the jurisdiction "as such individuals have weakened the link between themselves and the jurisdiction".[27] In *Labita v. Italy* the Court considered that temporarily suspending the voting rights of persons against whom there is evidence of mafia membership pursues a legitimate aim. However once a suspect was acquitted it was not justified to continue to deny the person his right to vote since the basis of the original suspicion had been found to lack a concrete basis.[28] Disenfranchisements of persons who have been declared bankrupt have also been declared to be in breach of this provision. The Court noted in the case of *Vicenzo Taiani v Italy* that the law served no purpose other than to belittle the applicant or to indicate moral condemnation on account of having become insolvent.[29] It thus was not considered to pursue a legitimate aim.

In the leading case of *Hirst v. the United Kingdom (No. 2)* the Court considered the systematic disenfranchisement of convicted prisoners in the United Kingdom without any distinction being drawn between different categories of prisoners. Could such a blanket restriction on the rights of convicted prisoners to vote be justified?[30] In the Court's view it could not. Its judgment was influenced by the fact that there had been no substantive debate by members of the UK legislature on the continued justification in the light of modern day penal policy and of current human rights standards for maintaining such a general restriction.[31] While accepting a wide margin of appreciation the Court did not consider it acceptable to strip a significant category of persons of their right to vote and to do so in a manner which was indiscriminate, applying automatically to prisoners, irrespective of the length of their sentence or of the nature or gravity of their offence and their individual circumstances. For the Court "Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible of Article 3 of Protocol No. 1."[32] In keeping with the general policy of the Court, it did not attempt to legislate on the state's behalf by indicating how the law should be amended. The matter of which categories of prisoners could be legitimately deprived of the vote fell to the UK legislature to decide. The Court's sole concern was that all convicted

[25] ECHR 2004-V, §§ 26-30. The Court also found a violation of Article 14 - §§36-38.
[26] Supra note 7.
[27] At § 64.
[28] ECHR 2000-IV (GC), §§ 198-204.
[29] 13 July 2006 (Hudoc).
[30] The disenfranchisement was not completely universal though most convicted prisoners were affected by it. It did not apply to those imprisoned for contempt of court or to those imprisoned for default, for example, in paying a fine (see § 23).
[31] Supra note 7; see §§ 22 and 79. Section 3 of the Representation of the People Act 1983 re-enacted without debate Section 4 of the 1969 Act of the same name, the substance of which dated back to the Forfeiture Act 1870 which in turn reflected earlier rules of law concerning the forfeiture of certain rights by a convicted felon – the so-called "civic death" of the times of Edward III.
[32] At § 82.

prisoners should not be treated on the same exclusionary footing.

The minority in *Hirst (No.2)* cautioned the court against crossing the line between adjudication and assuming legislative functions.[33] Their disagreement went directly to the issue of the deference that an international court owes to the decisions taken by a democratically-elected parliament concerning the very system from which it derives its legitimacy. In their view the majority had trespassed on the legislative function in an area where there was little consensus amongst Council of Europe states that prisoners should enjoy the vote. They also took issue with the remarks that there had not been any substantive debate in the legislature on the grounds that it "was not for the Court to prescribe the way in which national legislatures carry out their legislative functions".

The Right to stand for election

Article 3 of Protocol no. 3 also guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament. In *Castells v. Spain* the Court noted that while freedom of expression is important for everybody "it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests."[34] Accordingly, interferences with the freedom of expression of an opposition member of parliament – call for the closest scrutiny on the part of the Court.

The Court has had fewer occasions to deal with an alleged violation of the individual's right to stand as a candidate for election (the so-called passive aspect of the rights under Article 3). Its approach in examining such cases under this aspect has been rather cautious and not as strict as in the area of voting rights[35] but nevertheless it has been willing to curb overtly anti-democratic practices.

In the leading case of *Ždanoka v. Latvia* it emphasised the importance of the historical and political context when examining restrictions: "the Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with historical and political factors specific to each state. The multiplicity of situations provided for in the constitutions and the electoral legislation of numerous member states of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned." [36]

In making its assessment the Court will also have regard to the close connection between democracy and the Convention. Democracy is seen as the fundamental feature of European public order and it has frequently stated that the realisation of human rights is best ensured by an effective political democracy. This connection is illustrated by the following cases where the Court has found violations of the right to stand.[37]

In *Sadak and others v. Turkey (No.2)* the Constitutional Court had dissolved the Democratic Party (DEP) on the basis of speeches that had been made by senior officials of the party abroad. However under Turkish law it was an automatic consequence of the party's dissolution that all of the applicants were forced to vacate their parliamentary seats. The Court considered that this was harsh and disproportionate since a forfeiture of their seats was not the

[33] The dissenters were Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens.
[34] A236, judgment of 23 April 1992, §42.
[35] The Court recognises this in *Yumak and Sadak v Turkey*, supra note 7, § 109 (v).
[36] Supra note 7, § 106.
[37] See, for example, *Yumak and Sadak*, supra note 7, §107.

consequence of their personal political activities. It thus found that the measure was incompatible with the very substance of the applicant's right to be elected and sit in parliament but that it also infringed the sovereign power of the electorate who elected them as members of parliament.[38] Similarly in *Lykourezos v. Greece* the applicant – a practicing lawyer - was required to forfeit his parliamentary seat on the ground that carrying on a professional activity disqualified him from holding such office. He had been elected in April 2000 and it was only in 2001 that a revision of the Constitution made all professional activity incompatible with the duties of a member of parliament. In finding that there had been a violation of Article 3 in this case, the Court considered that at the time of the election it could not have been imagined that an election would be called into question on the ground that the applicant was at the same practicing a profession. His disqualification thus came as a surprise both to him and his constituents, both of whom had acted in the legitimate belief that he would represent them for a full parliamentary term. The decision of the special Supreme Court that he forfeit his seat had deprived his constituents of the candidate they had chosen freely and democratically to represent them in parliament in breach of the principle of legitimate expectation.[39]

In *Melnychenko v. Ukraine*, legislation in Ukraine established a minimum residence requirement of five years as a condition on the right to stand. The applicant had maintained a residence within Ukraine during a five-year period but had been absent due to fear of prosecution which had resulted in him being granted political asylum in the United States. He had worked in the office of the President of Ukraine and was alleged to have tape recordings of conversations between the President and others concerning the disappearance of a political journalist whose decapitated body was found just before the applicant fled Ukraine. The Court found that the applicant was in an impossible dilemma. If he had stayed in Ukraine his personal safety or physical integrity may have been seriously endangered, whereas in leaving the country he was also being prevented from exercising his political rights. Since it was not part of Ukrainian law that the applicant be continuously or habitually resident in Ukraine, the Court considered that the refusal of the electoral commission to allow him to stand was in breach of Article 3 of Protocol No. 1.[40]

In the recent judgment of *Tanase and Chirtoaca v Moldova*, the Court examined the compatibility of a Moldovan law that did not permit holders of both Romanian and Moldovan nationality to stand in elections. The Court was prepared to accept the Government's submission that the rule pursued the aim of ensuring the loyalty of MPs to the State. However it found the restriction disproportionate, observing that Moldova was the only country which, while allowing multiple nationalities, prohibited them from standing. In fact when Moldova adopted legislation in 2002-2003 permitting Moldovans to hold double nationality there was no indication that the political rights of those who availed of the new option would be curtailed. It also noted that there were other means of securing loyalty to the State such as requiring MPs to take an oath of loyalty and that Moldova is a party to the European Convention on Nationality which guarantees to all persons holding multiple nationality equal treatment with other Moldovans. The Court emphasised that a "sizeable proportion of the population---has not only found itself banned from actively participating in senior positions in the administration of the State, failing renunciation of an acquired additional nationality, but will also face limitation on its choice of representatives in the supreme forum of the country".[41] Finally it stated that it could not overlook the inconsistency of such practice with the recommendations of the Council of Europe in the field of elections and that the promoters of the law had rejected outright the proposal from the opposition to submit the draft for examination by Council of Europe experts in accordance with Moldova's membership commitments.[42]

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[38] ECHR 2002-IV, §40.
[39] ECHR 2006-VIII.
[40] ECHR 2004-X, §§ 53-67.
[41] Judgment of 18 November 2008, § 112.
[42] The Venice Commission had issued a clear opinion that restriction of citizen's rights should not be based on multiple citizenship and that the Code of Good Practice in Electoral Matters issued by the Venice Commission

Under what circumstances is it legitimate under the Convention to impose a bar on a candidate from standing for election? This issue was addressed by the Court in the important case of *Ždanoka v. Latvia*. [43] The applicant had been a member of the communist party of Latvia (the CPL) which had taken part in two attempted coup d'états following the declaration of Latvia's independence in 1990. When she attempted to stand as a candidate in the 1998 parliamentary elections her candidacy was refused on the grounds that she had actively participated in the CPL's activities and on that basis was considered ineligible under the relevant rules. In 2002 her name was subsequently removed from the list of candidates for national parliamentary elections on the same basis. The prohibition had been considered and upheld by the Constitutional Court on 30 August 2000. In 2004 she was subsequently elected to the European Parliament.

The Court considered that while such a measure could scarcely be considered acceptable in the context of a political system which had an established framework of democratic institutions going back many decades or centuries it could nonetheless be considered acceptable in Latvia in view of the historical-political context and given the threat to the new democratic order posed by "the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime".[44] The Latvian legislative and judicial authorities were considered better placed to assess the difficulties in establishing and safeguarding the democratic order. The purpose of the measure was not to punish but rather to "protect the integrity of the democratic process by excluding from participation in the work of a democratic legislature those individuals who had taken an active and leading role in a party which was directly linked to the attempted violent overthrow of the newly-established democratic regime".[45] The Court also attached weight to the fact that the Latvian parliament had periodically reviewed the relevant legislation and that the Constitutional Court in a decision in 2000 had examined the historical and political circumstances underlying the legislation and found that the restriction was neither arbitrary nor disproportionate. The Court emphasised that Article 3 did not require "supervision by the domestic judicial authorities or the proportionality of the impugned statutory restriction in view of the specific features of each and every case". It was sufficient that the domestic courts merely established whether a particular individual belongs to the impugned category or group. Nevertheless their needed to be safeguards in the judicial process and the Court required that "the statutory distinction itself [was] proportionate and not discriminatory as regards the whole category or group specified in the legislation."[46]

The Grand Chamber therefore accepted that the restrictions imposed were acceptable under Article 3 and that they warranted the applicant's disqualification from standing even in 2006 (date of the Court's judgment) fifteen years on from the events of 1991. However in an unusual caveat the Court effectively summoned Latvia to amend its law. It expressed the view that

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specifically quoted Article 17 (1) of the European Convention on Nationality concerning the equality of rights of persons possessing double nationality with those of other nationals of the state – see §110 and §§ 108-115 generally. See also Note 10 above.

[43] See *Gitonas v Greece*, Reports 1997-IV, where the rule preventing holders of public office from standing as candidates was seen as serving the legitimate aim of preventing undue influence on the electorate or having unfair advantage over other candidates; also *Ahmed v United Kingdom*, Reports 1998-VI, where the Court did not consider it disproportionate that local authority officers were required to resign if standing in an election. The rule was considered to pursue the legitimate aim of maintaining the political impartiality of local government officers.

[44] Ibid., § 133.

[45] Ibid., § 122.

[46] Supra note 7, §114. " There was no obligation – for the Latvian Parliament to delegate more extensive jurisdiction to the Latvian courts to "fully individualise" the applicant's situation so as to enable them to establish as a fact whether or not she had done anything which would justify holding her personally responsible for the CPL's activities at the material time in 1991, or to re-assess the actual danger to the democratic process which might have arisen by allowing her to run for election in view of her past or present conduct" (§ 128). But see *Ādamsons v Latvia*, judgment of 24 June 2008, where the Court found a violation in respect of the exclusion of a former member of the KGB from standing for election on the grounds that it had not been shown that his behaviour warranted it.

even if Latvia could not currently be considered to have overstepped its margin of appreciation under Article 3, the Latvian parliament had a duty to keep the statutory restriction under constant review with a view to bringing it to an early end. Such a conclusion was all the more justified in view of the greater stability which Latvia now enjoyed by reason of its full European integration. A failure by the Latvian legislature to take active steps in this connection, the Court warned, could result in a different finding.[47]

For the four dissenting judges, it was considered that the prohibition had gone on too long: the point had come to condemn the restrictions imposed on Ždanoka as Latvia had now emerged far beyond the difficult times associated with the early 1990s.[48] It may have been justified during the first years of the new regime and for the sake of democratic consolidation. However 15 years after the attempted coup, five years from the Constitutional Court's decision and two years from the date of the applicant's election to the European Parliament it had lost its potency. In their view the measure had become an almost permanent one and, as such, was disproportionate as it had not been established that the restriction was necessary on the facts of the applicant's case.

In the course of its *Ždanoka* judgment the Court referred to several cases where the Commission had rejected applications as inadmissible from two persons who had been convicted, following the Second World War, of collaboration with the enemy and on that account were permanently deprived of the right to vote. The Commission considered that the purpose of legislation depriving persons convicted of treason of certain political rights was to ensure that such persons were prevented in future from abusing their political rights in a manner prejudicial to the security of the state or the foundations of a democratic society. [49] In the case of *Van Wambeke v. Belgium*, decided in 1991, the Commission declared inadmissible, on the same basis, an application from the former member of the Waffen-SS convicted of treason in 1945 who complained that he had been unable to take part in the elections to the European Parliament in 1989. [50] Although the Court made no reference to the "permanent" nature of these restrictions, it may be questioned whether they would stand up to scrutiny today in the light of the stricter approach evident in the *Hirst* (No.2) judgment.

In a similar vein the Commission had declared inadmissible the application by *Glimmerveen and Hagenbeek v. the Netherlands* which concerned the refusal to allow the applicants, who were leaders of a proscribed organisation with racist and xenophobic tendencies, to stand for election. The admissibility decision referred to Article 17 of the Convention noting that the applicants "intended to participate in these elections and to avail themselves of the right -- for a purpose which the Commission had found to be unacceptable under Article 17".[51]

While the Court has accepted the legitimacy of various conditions or requirements for candidates standing for election it has been careful to ensure that compliance with these requirements is carefully and fairly assessed. This procedural dimension imports a requirement of due process in the assessment of compliance with electoral law and is in keeping with the Court's insistence on national due process when there is an interference with a Convention right.[52] In *Podkolzina v. Latvia* the law required prospective parliamentary candidates from Latvia's Russian speaking minority to demonstrate proficiency in Latvian. The Court had no

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[47] Ibid., § 135 **– *"the Latvian Parliament must keep the statutory restriction under constant review,*** *with a view to bringing it to an early end"* ***(emphasis added).***

[48] Judges Rozakis, Zupančič, Mijovic and Gyulumyan. See also the partly dissenting opinions of Judges Wildhaber, Spielmann and Jaeger.

[49] X v the Netherlands, decision of 19 December 1974, 1DR 88 and X v Belgium, decision of 3 December 1979, 18 DR 250.

[50] No. 16692/90, Decision of 12 April 1991 – See *Ždanoka*, §§ 109-110.

[51] Decision of 11 October 1979, 18 DR 187.

[52] Articles 2 and 3 are classic examples but see also Article 5 (as regards disappearances*, Kurt v Turkey*, Reports 98-III) and Article 1 of Protocol No.1 (*Jokela v Finland*, judgment of 21 May 2002).

difficulty in accepting that such a requirement pursued the legitimate aim of ensuring the proper functioning of the Latvian legislature. It added that it was not for the Court to determine the choice of a working language of a national parliament as that choice was dictated by historical and political considerations and was a matter exclusively for the state concerned to determine. However the Court found that in this case the measure removing the applicant's name from the list of candidates had been disproportionate. The applicant had held a valid language certificate which had been issued by a committee following an examination. However she was nevertheless required for spurious reasons to sit a further language examination and to have her language proficiency assessed by a single examiner instead of a Board of Experts and the examiner was not required to observe the procedural safeguards and assessment criteria laid down in the regulations. The Court expressed surprise that during the interview she was questioned about the reasons for her political orientation, a matter that had nothing to do with her knowledge of the Latvian language. Thus the full responsibility for assessing the applicant's linguistic knowledge was left to a single civil servant who had exorbitant power in the matter. In finding a breach of Article 3 in this case the Court stressed, for the first time in this context, the importance of safeguards against arbitrariness: "the finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on behalf of the relevant authority".[53]

Electoral systems

As indicated above the Court affords States a wide latitude to design their own electoral systems to suit their own circumstances, taking into consideration their particular history and traditions. In the *Liberal Party Mrs R and Mr P* case the former Commission considered that the United Kingdom electoral system based on the principle of "first-past -the-post" (simple majority system) was overall an acceptable system for elections to the legislature and did not become unfair by reason of the small number of seats won by the Liberal Party in the election despite winning a high percentage of the national vote. Article 3 did not require that States implement a system of election based on proportional representation. The Commission was influenced by the fact that the simple majority system was one of two basic electoral systems which was used in many democratic countries even if it has an adverse effect on smaller parties. It noted that even in countries where there was a constitutional guarantee of equality of voting, supreme courts had upheld the system as being compatible with the principle of equality. It went on to hold that proportional representation was not itself incompatible with Article 3.[54] Significantly the Commission left open the question whether an issue could arise under this provision and/or Article 14 where the effect of the voting system was that religious or ethnic groups would not be represented.

The Court has pointed out in *Yumak and Sadak v. Turkey* that electoral systems often seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand to reflect faithfully the opinions of the people and, on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. It has also stressed that Article 3 does not imply that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. No electoral system can eliminate wasted votes altogether.[55]

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[53] Supra note 7, §§ 36-38.

[54] No.8765/79, 21 DR 211, at 225; Both Germany and the United States were cited. Their Constitutional Court and Supreme Court respectively had upheld simple majority systems notwithstanding the fundamental right of equality of voting. – at 225; see also *Mathieu-Mohin v Belgium*, supra note 4, at § 54.

[55] Supra note 7, § 112.

Yumak and Sadak v. Turkey concerned the question of electoral thresholds. Under Turkish law a political party was required to secure 10% of the vote nationally in order to win seats in the national assembly. The applicants stood as candidates in parliamentary elections for the Democratic Peoples Party and obtained 45.95% of the vote in their province but did not secure 10% of the vote nationally. Accordingly, they won no seats in the Assembly.

The Court observed that the national 10% threshold was the highest of all the thresholds applied in the member states of the Council of Europe. Only three other member states had opted for high thresholds (7% or 8%). It also attached importance to the views of Council of Europe bodies to the effect that the level of the Turkish national threshold was exceptionally high and had called for it to be lowered.

Nevertheless the Court considered that electoral thresholds were acceptable in principle as they served a legitimate aim: they were "intended -- to promote the emergence of sufficiently representative currents of thought within the country and of avoiding excessive and debilitating parliamentary fragmentation and thus of strengthening governmental stability". As regards the proportionality of the law, the Court observed that it could not assess a particular threshold without taking into account the electoral system of which it formed a part, although it could accept that a threshold of about 5% corresponded more closely to the member states' common practice. Crucially it considered that it should have regard to the "correctives" and other safeguards in place in the Turkish system in order to assess the real effect of the threshold requirement. For the Court, an election system that was otherwise dubious under Article 3 was redeemed since the political parties that were hampered by the threshold had managed in practice to develop strategies to attenuate some of its effects. There existed "correctives" and "other safeguards" associated with the electoral system that rendered the high threshold compatible with Article 3. In particular, the applicants could have stood as independent candidates forming a political group once elected, as had happened to the successor of their political party in the 2007 election. Likewise small parties had the possibility of forming electoral coalitions with other political groups. While the law prevented parties from presenting joint lists, political parties have developed an electoral strategy to circumvent this prohibition. This produced tangible results particularly in the 1991 and 2007 elections. In reaching its decision the Court had also been influenced by decisions of the Turkish Constitutional Court which had emphasised that the legislature could not adopt "measures tending to restrict the full expression of the opinion of the people, or subject political life to the hegemony of a political party, or destroy the multi-party system."[56]

In conclusion the Court considered that while a 10% electoral threshold appeared excessive, it was not persuaded that when assessed in the light of the specific political context of the elections in question, and given the existence of "correctives" and other guarantees which had limited the effect of the threshold in practice, the threshold has not had the effect of impairing the right secured to the applicants by Article 3.

The dissenting judges, on the other hand, considered that the very essence of Article 3 was impaired in that the 10% threshold deprived a large proportion of the population of the possibility of being represented in Parliament and that it had a profoundly negative effect on the fortunes of political parties with a regional focus, something that was hard to reconcile with the need for pluralism in a democratic society. They also questioned how an improperly functioning system could be saved by what was in effect "stratagems" used by smaller parties, especially as this was dependent on the vagaries of politics, had no guaranteed place in the system and relied on the candidates to circumvent the existing electoral rules. They had difficulty accepting that smaller parties would have to find political allies or disappear in order to achieve parliamentary representation. In their view all the above considerations went against the grain of Article 11 case-law and the importance of political pluralism and the role of parties in a

[56] Ibid., §§ 133-138.

democracy.[57]

Conclusion

The minimum standards established by the Court in the area of electoral rights contrast with the much higher protection afforded in the case law to freedom of political expression, freedom of association and freedom of assembly. This is certainly due to the weak formulation of Article 3 but also to the general reluctance of the Court to meddle in the electoral affairs of the state. However there are signs of Article 3 coming of age as the Court is asked to grapple with electoral disputes arising from the new democracies and a braver approach has been taken in many cases. The influence of leading decisions of certain national courts emphasising the importance of the right to vote have played a certain role in this.[58] This is perhaps based on a realisation that while western states by virtue of their well established democratic systems give rise to relatively few problems there is a need for such states to set the example for other less well-entrenched democracies and for the Court to insist on the application of such standards in more perilous or fragile settings. It is true that in the past it could not be maintained that Article 3 imposed a burdensome set of obligations on the state. However the Convention community of states has changed dramatically and it can be argued that in this fundamentally altered situation where new problems arise, for example, in the area of lustration laws, Article 3 is asserting itself as the central democratic right from which all else flows. In an important sense the protection of human rights generally is dependent on free and fair elections since it is the government so constituted that will have the responsibility for respecting national and international obligations in the field. As constitutional courts throughout the world have long realised the right to vote is a fundamental political right because it is "preservative of all rights".[59]

Curiously the new Court has not yet been asked on to examine what is meant by the obligation to hold elections at "reasonable intervals".[60] Nor has it been called on to declare an election void because of a violation of Article 3 although it is certainly in the realm of possibilities that an attempt will be made to use the Court's interim measures provision (Rule 39) to request that an electoral result be suspended pending judicial examination. On the present state of the case law such a request would be most unlikely to succeed and in any event the case law reveals a general reluctance by the Court to interfere, even by way of its ordinary jurisdiction, with the day to day workings of the state in this highly sensitive area. Nor has the Court yet carried out an examination on the merits of a complaint concerning the drawing of electoral boundaries (as opposed to the choice of electoral systems) where the principle of equality of voting is placed before it.[61] The Court has yet to pronounce itself on "gerrymandering" and it is submitted that none of the preceding cases prejudice a possible future determination once an electoral system

[57] Ibid., §147.

[58] See, for example, the references to the judgments of the Canadian Supreme Court and the South African Constitutional Court in the *Hirst* (No.2) judgment - §§ 35-39.

[59] See, in this regard, *Yick Wo v Hopkins*, 118 US 356, p.370 (1886). In the words of Mr Justice Matthews – "The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

[60] The issue was examined by the Commission in the case of *Timke v Germany,* decision of 11 September 1995, 82-A DR 158. For the Commission, rejecting the complaint, the purpose of elections is to ensure that fundamental changes in prevailing opinion are reflected in the legislature. Too short an interval may impede political planning – too long an interval can lead to the petrification of political groupings in Parliament which may no longer bear any resemblance to the prevailing will of the electorate. A 5 year interval was considered acceptable from this point of view.

[61] It rejected a complaint concerning the failure of the French authorities to review electoral boundaries as manifestly-ill-founded *inter alia* on the grounds that no demographic discrepancy had been shown to exist in the applicant's constituency – *Bompard v France*, decision of 4 April 2006 (Hudoc). See also *Georgian Labour Party v Georgia*, supra note 24, §§ 82-93, concerning the importance of the proper management of electoral rolls as a pre-condition for a free and fair ballot.

has been chosen - be it the simple majority or proportional representation system - that the authorities must organise their systems in such a way that one person's vote has generally the same value as that of another person or that constituencies must be drawn up in a manner which respects the principle of equality- due regard being had to relevant political, historical and geographical features and the need to make provision for the representation of recognised minority groups. It is only a matter of time before such an issue is brought to the Court for decision and there is every reason to believe that the fundamental difference of approach that have marked the above cases will reassert itself once more.[62]

The cases discussed above have become a civilised battleground between competing judicial philosophies: the one concerned to develop democratic standards in this area and strengthen the status of the right to vote and the right to stand for election in the light of modern day electoral standards, the other to tread carefully when it comes to the design of the states' democratic system and to be wary of second-guessing the national choices made by a freely-elected legislature.[63] The latter approach is reminiscent of the policy factors underpinning the margin of appreciation doctrine generally but made more pungent in the area of electoral rights and the former presupposes the existence of a bundle of superior electoral rights waiting to be tapped into. Both approaches have their limitations – pre-supposing the existence of a freely-elected legislature surely begs the question when restrictions on electoral rights are under scrutiny and to which political system would one look in order to determine best practice in the field of electoral rights? Which state's custom and tradition should the Court choose to select as "best practice" in the field? However the tension between these positions is not necessarily an unhealthy or unproductive one and occasionally gives rise to the type of creative solutions found, for example, in the *Podkolzina v Latvia* judgment,[64] as well as an instructive dialogue between the judges as to how the Court should exercise its functions in respect of European countries that have faced the challenges of establishing democracy anew following the breakup of the Soviet empire. Its resolution can doubtless be assisted by taking into account the views of bodies such as the Venice Commission when it gives opinions on electoral matters since it is this Commission which must surely be regarded in the Council of Europe system as the equivalent, *mutatis mutandis*, of the CPT in the area of electoral disputes.[65]

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[62] The matter has been extensively litigated in the United States. Consider the stirring words of Chief Justice Warren in *Reynolds v Sims*: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavoured areas had not been effectively diluted" – 377 U.S. 533 (1964).

[63] See *Ādamsons v Latvia*, judgment of 24 June 2008, for the most recent example of different approaches to interpretation within the Court in this area with a concurring opinion by three judges and one dissenting opinion.

[64] See also the reliance on procedural safeguards in *Georgian Labour Party v Georgia*, judgment of 8 July 2008, § 141.

[65] As was in fact the case in the Court's *Tanase* judgment, infra note 40. The Venice Commission's *Code of Good Practice in Electoral Matters* has also been cited in numerous cases: *Hirst (No 2) v United Kingdom* (Fourth Section's judgment), *Yumak and Sadak v Turkey* – supra note 7. Also *Georgian Labour Party v Georgia (II)* – decision of 22/May 2007; *Petkov v Bulgaria* – decision of 4 December 2007*; Sukhovetskyy v Ukraine*, judgment of 28 March 2006.