

## Right to Free Elections

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### ABSTRACT

This study examines the evolution of the European Court of Human Rights' (ECtHR) jurisprudence on the right to free elections under Article 3 of Protocol No. 1, focusing on how the Court has shaped, expanded, and systematised the concept of "universal suffrage" in response to changing political, social, and technological conditions. Although the Convention initially provided only a minimalist and institutional formulation of the right – centred on the obligation to hold free elections – ECtHR case law has transformed this provision into a substantive individual right that imposes increasingly detailed requirements on States. The chapter traces the development of this shift, showing how the Court's interpretation has gradually broadened from the early, deferential margin of appreciation toward a more robust review of electoral restrictions, franchise limitations, and procedural safeguards. After a brief overview of the development of the right to vote, the study provides a comprehensive analysis of Article 3 of Protocol No. 1, examining each element of the provision individually. Through an analysis of more than 70 judgments, the study highlights the Court's emerging concern with structural risks to electoral integrity, including conditions under which the right to vote may be subject to limitations. Particular attention is given to the Court's methods of judicial reasoning, which increasingly integrate comparative practices, Council of Europe standards, recommendations of the Venice Commission and empirical assessments of electoral impact. The chapter also offers a cursory overview of the international status of voting rights. The study argues that the ECtHR's evolving jurisprudence has become a central component of Europe's electoral heritage, contributing not only to the protection of individual political rights but also to setting normative benchmarks for democratic legitimacy. It concludes that while the Court's expanding role strengthens electoral safeguards, it also raises questions about judicial authority, uniformity of standards, and the scope of State discretion in designing electoral systems.

### KEYWORDS

right to free elections, voting rights, universal suffrage, equal suffrage, secret ballot

## 1. Introduction

'Voting is a civic sacrament' – the significance of elections could hardly be expressed more aptly than Theodore M. Hesburgh (1917–2015), an American Catholic priest and academic social activist. Similar to sacraments, which represent the most significant

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rites within Christian denominations, elections are at the heart of democracy.<sup>1</sup> The commitment to democratic values constituted a critical factor in the establishment of the Council of Europe: as the Preamble of the Statute of the Council of Europe emphasises, ‘the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy’ [emphasis added]. Even the Preamble of the Convention recalls the principle of democracy, claiming that ‘fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy [...]’ [emphasis added]. About half a century later, the Venice Commission confirmed that ‘[a]longside human rights and the rule of law, democracy is one of the three pillars of the European constitutional heritage, as well as of the Council of Europe’.<sup>2</sup> Further, it also stipulates that ‘[d]emocracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status. These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the “European electoral heritage”’.<sup>3</sup>

In the above context, it may be unexpected to learn that the text of the 1950 Convention did not refer to free elections or the right to vote. The reason is relatively straightforward: Representatives of countries that drafted the Convention were unable to reach a consensus on how elections and the right to vote should be reflected in the Convention.<sup>4</sup> As Lardy and Bates point out, two opposing positions emerged during the course of negotiations: while some states claimed that the issue of free election ‘went outside the traditional domain of human rights’, others equated the proposed right to free elections with the familiar freedoms of opinion, speech, assembly, and association.<sup>5</sup> However, further negotiations resulted in an agreement on the wording of free elections provision by the end of 1951. The right to free elections, alongside the protection of property and the right to education, was enshrined in the First Protocol, signed in March 1952 and entered into force in May 1954.

## 2. A Brief History of Voting Rights

Although the practice of electing officials is rooted in antiquity, the institution of parliament with elected representatives was consolidated in England at the end of the 17th century, and parliamentary elections were held in Europe during the 18th and 19th centuries, as well as in the United States and some Latin American countries.

1 Cf. Orr, 2023.

2 Venice Commission, 2002, p. 17.

3 Venice Commission, 2002, p. 17.

4 For further insights into the drafting process of P1-3, see Schabas, 2015, pp. 1012–1018.

5 Lardy and Bates, 2009, p. 712.

However, these elections should be considered as “pre-democratic” due to the limited franchise.<sup>6</sup>

Even during the second half of the 19th century, suffrage was considered a privilege for the few (quite often, very few). First, every state had restrictive conditions in place, meaning that suffrage was conditional on various criteria. The impact of such criteria is vividly illustrated by the fact that the 1832 Suffrage Reform Act of England, a legislative milestone in its own right, increased the number of citizens with voting rights by more than half, but gave only 7% of the population the right to vote (approximately 650,000).<sup>7</sup>

The right to vote is commonly restricted based on the following criteria: wealth or income; the French Charter of 1814 explicitly made the right to vote and the right to candidacy dependent on the amount of direct taxes paid by male citizens (300 and 1,000 francs, respectively).<sup>8</sup> Education: As per Act XXVI of 1925, suffrage in Hungary was conditional, with some being successful completion of the first four classes of elementary public school or a certificate of equivalent education.<sup>9</sup> Gender: For centuries, suffrage was the exclusive prerogative of men. Although some states (e.g. New Zealand) granted women the right to vote as early as the end of the 19th century, in most countries, women’s suffrage was not introduced until after World War I.<sup>10</sup> Origin or race: in the United States of America, the voting rights of black people were restricted until 1965).<sup>11</sup>

At the outset, the principle of equal suffrage was not universally accepted. For example, in Belgium, the Voting Rights Reform of 1893 introduced such a system, granting suffrage to all men who reached the age of 25, but also granted one or two additional votes to constituents fulfilling certain criteria regarding wealth, income, or education.<sup>12</sup> Secret ballots are indispensable elements of democratic electoral systems. However, until the end of the 19th century, most countries had open ballot systems, and many did not opt for secret ballots until the first half of the 20th century.<sup>13</sup>

The restrictions imposed on voting rights eased either gradually or abruptly over time. It was only during the first half of the 20th century that universal, equal, free suffrage became common worldwide, with a large time lag between continents and regions.<sup>14</sup> Various international human rights instruments (see Section 4) have played a significant role in the spread and consolidation of democratic suffrage. They

6 Posada-Carbó, 1996.

7 Phillips and Wetherell, 1995, pp. 413–414.

8 Crook, 2021, pp. 28–29.

9 Hollósi, 2016, pp. 57–58.

10 For the history of woman suffrage, see e.g. DuBois, 1998.

11 Warren, 1965.

12 Mahaim, 1900, p. 75.

13 See e.g. Teorell, Ziblatt and Lehoucq, 2017.

14 For an European overview, see Caramani, 2000, pp. 47–65.

stipulated, *inter alia*, the right of every citizen to participate in public affairs, vote, and be elected.

Naturally, elections are a prerequisite for the realisation of democratic suffrage. However, it is erroneous to assume that holding elections is a sufficient criterion for determining whether a country can be considered democratic. The notion that periodic elections are a sufficient condition for democracy is supported by the fact that, even during the 20th century, several authoritarian regimes – and some still exist today – did not abandon the practice of holding elections on a regular basis.<sup>15</sup> Notably, only a few countries [e.g. Saudi Arabia] do not hold any form of parliamentary election. Regarding the relationship between elections and democracy, let us quote Pildes's words: 'We can envision elections without democracy (indeed, we have plenty of experience of exactly that), but it is difficult to envision a modern democracy without meaningful elections'.<sup>16</sup>

### 3. Right to Free Elections – A Contextual Analysis

#### 3.1. Wording of Article 3 Protocol No. 1.

In contrast to the number of human rights enshrined in the Convention, only a short provision has been devoted to the right to free election. Article 3 of Protocol No. 1. (hereafter, P1-3) is 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'.

Even in the first reading, the wording about the right to free elections differs from the wording of the rights and freedoms mentioned in Section I of the Convention. Meanwhile, all other rights in Section I (and in the Protocols) refer to *individual persons* ('everyone has the right to...', 'no one shall...'), P1-3 'neither expressly confer a subjective "right" nor prohibit or abolish anything, but it is formulated as an obligation of the Member States' (i. e. 'The High Contracting Parties undertake...').<sup>17</sup> Therefore, it is not surprising that the Commission initially adopted a dismissive stance on complaints based on P1-3. For example, in *X. v. Germany* (1960), it was concluded that Article 3 does not guarantee an individual's right to vote.

It was *Mathieu-Mohin and Clerfayt v. Belgium* (1987), where the Court was asked to determine complaints under P1-3 for the first time; therefore, it deemed it necessary to indicate the meaning it ascribed to that article in the context of the instant case. With regard to the specific wording of P1-3, the Court pointed out that '[i]t has sometimes been inferred from this that the P1-3 does not give rise to individual rights and freedoms "directly secured to anyone" within the jurisdiction of these Parties

15 For non-competitive elections, see Jessen and Richter, 2011.

16 Pildes, 2012, p. 529.

17 Grabenwarter, 2013, p. 400.

[references omitted], but solely to obligations between States'.<sup>18</sup> However, the Court made it clear that such a restrictive interpretation did not stand up for scrutiny. The key statement for the interpretation of P1-3 is as follows.

'Accordingly, and those appearing before the Court agreed on this point, the inter-state colouring of the wording of Article 3 (P1-3) does not reflect any difference of substance from the other substantive clauses in the Convention and Protocols. The reason for it would seem to lie rather in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections.'<sup>19</sup>

As Lardy and Bates note, unlike case law on positive obligations, with P1-3 the Court has derived an individual right from a text which explicitly refers only to a positive obligation on the part of states to provide a collective good.<sup>20</sup>

The wording of P1-3 has another specific feature which distinguishes it from Articles 8 to 11. In the second paragraph, the latter articles explicitly address the circumstances under which the fundamental right may be subject to limitations or restrictions, referring to, for example, the interests of national security, public safety, and the prevention of disorder or crime. P1-3, however, did not include any such restrictions. It does not follow from this that the right to free election is absolute. The Court resolved this contradiction by invoking the so-called implied limitations principle, which was first developed in *Mathieu-Mohin and Clerfayt*, and subsequently elucidated in greater detail in *Ždanoka v. Latvia* (2006). In the Court's view, as P1-3 recognises the right to free elections without setting the limitations in express terms, let alone defining them, there is room for implied limitations.<sup>21</sup>

'Given that Article 3 of Protocol No. 1 is not limited by a specific list of "legitimate aims" such as those enumerated in Articles 8 to 11 of the Convention, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case. [...] In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality and

18 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 48.

19 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 50.

20 Harris et al., 2009, p. 712.

21 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 52.

whether the restriction has interfered with the free expression of the opinions of the people.’<sup>22</sup>

In the following sections, we analyse P1–3, with a focus on a detailed examination of each element of the provision.

### 3.2. ‘Reasonable Intervals’

According to the wording of the Convention, legislative elections shall be held at “reasonable intervals”. Regarding the interpretation of “reasonable time”, the Court has not pronounced itself on this issue. In *Timke v. Germany* (1995), the Commission found that

‘the question whether elections are held at reasonable intervals must be determined by reference to the purpose of parliamentary elections. That purpose is to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people. Parliament must in principle be in a position to develop and execute its legislative intentions – including longer term legislative plans. Too short an interval between elections may impede political planning for the implementation of the will of the electorate; 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. In the light of these considerations, it cannot be said that a five-year interval between elections does not ensure the free expression of the opinion of the people in the choice of the legislature’.

Meanwhile, the Commission considered that a five-year interval was acceptable, and the Court subsequently offered no further clues. Grabenwarter claims that ‘there is a large margin of appreciation in choosing the length of an election period’. In his view, election periods of four or five years are reasonable in any case, but a period of six years may be reasonable and adequate. In addition, it cannot be said that periods of two or three years would, to a lesser extent, secure the free expression of people’s will.<sup>23</sup>

The Venice Commission made some further guidelines regarding the frequency of elections:

‘Elections must be held at regular intervals; a legislative assembly’s term of office must not exceed five years.’<sup>24</sup>

22 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 115.

23 Grabenwarter, 2013, p. 402.

24 Venice Commission, 2002, p. 13.

General elections are usually held at four- or five-year intervals, while longer periods are possible for presidential elections, although the maximum should be seven years.<sup>25</sup>

A cursory examination of parliaments (or lower houses of the bicameral parliaments) of the 46 States Parties reveals that in just over two-thirds of states, parliamentary elections occur every four years, while in the remaining states (e.g. Austria, France, Italy), parliamentary term lasts five years.<sup>26</sup>

### 3.3. 'Secret Ballot'

In P1-3 provisions, 'secret ballot' seems most straightforward. As the Venice Commission notes,

'[s]ecrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure, particularly to the casting and counting of votes'.<sup>27</sup>

From the above discussion, it follows that voters must vote individually. Every form of control by one voter over the vote of another (e.g. 'family voting') must also be prohibited.<sup>28</sup>

The Parliamentary Assembly of the Council of Europe provides further guidelines for secret balloting, emphasising that it is taken for granted as a basic principle and is a vital part of all democratic processes.<sup>29</sup> The Resolution adopted on the subject lays down that

'Ensuring the secrecy of voting therefore remains a key aspect of free and fair elections. It protects voters against any threats likely to impinge on their choices and safeguards their freedom of thought and their political and other beliefs. The secret ballot plays an integral part in legitimising the democratic process. It ensures that citizens are able to express themselves freely, that elected representatives are truly representative and that legislative and executive bodies are legitimate, thereby contributing to public trust in institutions'.<sup>30</sup>

Secret balloting indicates that nobody may have access to ballots once cast to discover how anyone has voted. During the electoral process and inside the polling station,

25 Venice Commission, 2002, p. 32.

26 However, senators (members of the upper house) in France and in the Czech Republic have six-year terms.

27 Venice Commission, 2002, p. 17.

28 Venice Commission, 2002, p. 17.

29 Parliamentary Assembly, 2007a, Section 1.

30 Parliamentary Assembly, 2007a, Section 3.

secrecy of the ballot implies not only the right but also an obligation for voters to keep their votes secret.<sup>31</sup>

The issue of secrecy in the voting process has only been addressed by the Court on a few occasions in its judgments. In *Bakirdzi and E.C. v. Hungary* (2022), the Court ruled that Hungary's national minority list voting system was not available to applicants without compromising the right to secrecy. (According to the current Hungarian statutory scheme, voters may request that their status of belonging to a national minority be entered into a central electoral register. By doing so, a request for registration as a national minority voter shall contain a reference to the national minority [i.e. the voter must indicate to which national minority he or she belongs] and a statement by the voter in which the voter professes to belong to the national minority in question.) The secrecy of vote was not violated in the act of voting itself, rather indirectly: as soon as a minority voter registers, it becomes apparent which list he or she intends to vote for (e.g. Ms. Bakirdzi belongs to the Greek national minority, therefore, when entering the polling station, she is given the ballot paper of the Greek minority). Hence, all present at the polling station at the relevant time, especially members of the relevant election commissions, would come to know that the elector had cast a vote for candidates in the national minority list. Similarly, national minority voters could be linked to their votes during the counting procedure, especially at polling stations where the number of registered national minority voters was limited.<sup>32</sup>

In *Toplak and Mrak v. Slovenia*, the Court reiterated that the assistance of a voting assistant, provided that the free will of the voter with a disability is respected, is in compliance with international standards in the field, as the voting assistant is obliged to respect the secrecy of the voting procedure under, *inter alia*, the Penal Code.<sup>33</sup>

The question of secret balloting was raised in a special dimension in the case of *Magyar Kétfarkú Kutypárt v. Hungary* (2020). A few weeks before the 2016 Hungarian migrant quota referendum, the Magyar Kétfarkú Kutypárt (Hungarian Two-tailed Dog Party, a joke party) made available a mobile application called 'Cast an invalid ballot' which enabled users to upload and share anonymously photographs of their (invalid) ballot. The Court agreed with the judgment of the Supreme Court of Hungary that 'the secrecy of the ballot had not been infringed, as the mobile application had not allowed access to the personal data of the users and had thus been incapable of linking a cast ballot to a voter'.<sup>34</sup>

31 Parliamentary Assembly, 2007a, Section 4.

32 *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14, 65678/14, Judgment 3 April 2023, para. 70.

33 *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14, 65678/14, Judgment 3 April 2023, para. 125.

34 *Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14, 65678/14, Judgment 3 April 2023, para. 113.

### 3.4. 'Free Expression of the Opinion of the People' I: The Right to Vote

Although the text of P1-3 does not make this clear at first glance, this provision implies the “right to vote” (the “active” aspect) and the “right to stand for election” (the “passive” aspect).<sup>35</sup> In accordance with this dichotomy, these two rights are discussed separately below. As demonstrated in the following sections, Contracting States benefit from a wide margin of appreciation regarding the conditions governing the right to vote and the right to stand for election.

According to the Venice Commission, the five principles underlying Europe's electoral heritage are: universal, equal, free, secret, and direct suffrage.<sup>36</sup> A cursory comparison of this statement with P1-3, however, reveals that the Convention makes explicit reference to only two (“free” and “secret”) of the five principles.

#### 3.4.1. Universal suffrage and its restrictions

Unlike several human rights instruments concerning the right to vote, P1-3 does not include the term “universal”. Nevertheless, the Commission found in one of its early decisions that the undertaking of Contracting Parties to hold free elections implies the recognition of universal suffrage (*X. v. Germany* [1967]). Pursuant to the Guideline of the Venice Commission, ‘[u]niversal suffrage means in principle that all human beings have the right to vote and to stand for election’.<sup>37</sup> At first glance, this seems to be a straightforward definition; however, universal suffrage is a contested concept, and it is still a matter of debate as to how inclusive suffrage ought to be.<sup>38</sup> In *X. v. Germany* (1967), even the Commission itself warned, that ‘it does not follow that P1-3 accords the right unreservedly to every single individual to take part in elections; whereas, indeed, it is generally recognised that certain limited groups of individuals may be disqualified from voting’. However, disfranchisement was treated with caution in *Hirst v. the United Kingdom (no. 2.)* (2005) the Court ruled in principle that

‘[a]ny 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 [reference omitted]’.<sup>39</sup>

35 See e.g. *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 51.

36 Venice Commission, 2002, p. 7.

37 Venice Commission, 2002, p. 7.

38 See e.g. Beckman, 2008.

39 *Hirst v. the United Kingdom (no. 2.)*, Application no. 74025/01, Judgment 6 October 2005, para. 62.

The Venice Commission has identified three conditions under which the right to vote may be subject to limitations: age, nationality, and residence.<sup>40</sup> In addition, the deprivation of suffrage rights may be based on mental incapacity or a criminal conviction for a serious offence.<sup>41</sup>

#### 3.4.1.1. Age

Minimum age requirements are the most common restriction imposed on voting rights: there is no country where everybody can vote regardless of his/her age. Although it appears evident that the right to vote should be contingent upon a minimum age, there are also opposing views, claiming that this restriction should be rejected because its ‘competence argument’ is unreasonably controversial.<sup>42</sup> The Venice Commission regards minimum age as a kind of requirement, holding that ‘the right to vote and to be elected must be subject to a minimum age’ [emphasis added].<sup>43</sup> Although it may be reasonable to require a certain level of maturity and competency from voters, it is challenging to specify an appropriate age. The Venice Commission only affirms that the right to vote must be acquired, at the latest, at the age of majority.<sup>44</sup> However, as Peto states, the question of the correct minimum voting age has re-entered the public political debate in Europe during the last few years, and increasingly, more states have lowered the voting age to 16 or 17 years.<sup>45</sup> Furthermore, the Parliamentary Assembly of the Council of Europe addressed this issue, calling on member states to, *inter alia*, investigate the possibility of lowering the voting age to 16 years.<sup>46</sup>

As for the right to stand for election, the Venice Commission’s position on this matter is as follows:

[it] should preferably be acquired at the same age as the right to vote and, in any case, not later than the age of 25 years, except where there are specific qualifying ages for certain offices (e.g. member of the upper house of parliament, head of state).<sup>47</sup>

The question of voting age appeared only tangentially in the Strasbourg case-law: in *Hirst v. the United Kingdom*, the Court laid down that ‘the imposition of a minimum age

40 It is consistent with the Commission’s finding, stipulated in *X. v. the United Kingdom* (1976a): ‘among the conditions commonly imposed in Convention countries on the possession or exercise of a right to vote in Parliamentary elections, are citizenship, residence and age’.

41 Venice Commission, 2002, pp. 7–8.

42 Cook, 2013.

43 Venice Commission, 2002, pp. 7–8.

44 Venice Commission, 2002, pp. 7–8.

45 Peto, 2018, pp. 277–278.

46 Parliamentary Assembly, 2011, Section 7.

47 Venice Commission, 2002, pp. 7–8.

may be envisaged with a view to ensuring the maturity of those participating in the electoral process'.<sup>48</sup>

#### 3.4.1.2. Citizenship

The right to vote and the right to stand for election have long been regarded as a core right of citizenship. Conversely, voting rights are a privilege extended only to the citizens of a given state. However, in the age of globalisation, democratic governments worldwide deny millions of adults the right to vote. As Beckman highlights, '[w]ith the exception of children, the largest group excluded from participation in the democratic process are the "resident aliens"'. In this group, we found guest workers, refugees, asylums, and people immigrating for less dramatic reasons.<sup>49</sup> Although the strong link between citizenship and the right to vote seems to have weakened over the past decades, the liberalisation of political rights of noncitizens is a fairly slow process.<sup>50</sup>

The Venice Commission makes it clear regarding the universal suffrage that 'a nationality requirement may apply',<sup>51</sup> and finds it 'advisable for foreigners to be allowed to vote in local elections after a certain period of residence'.<sup>52</sup> The exemption from local citizenship requirement has already appeared in the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level, stipulating that:

'Each Party undertakes, subject to the provisions of Article 9, paragraph 1 [in time of war or other public emergency threatening the life of the nation, the this right may be subjected to further restrictions – the Author], to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.'<sup>53</sup>

The Treaty establishing the European Community made an even stronger commitment to grant the right to vote and stand for municipal elections in their EU member state of residence:

'Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal

48 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 62.

49 Beckman, 2006, p. 153.

50 Earnest, 2015.

51 Venice Commission, 2002, pp. 7–8.

52 Venice Commission, 2002, p. 8.

53 Convention on the Participation of Foreigners in Public Life at Local Level (ETS 144), Art. 6(1).

elections in the Member State in which he resides, under the same conditions as nationals of that State.<sup>54</sup>

The same article also grants the same group of persons the right to participate in European Parliament elections.<sup>55</sup>

Returning to P1-3, the Strasbourg case-law does not offer any example of the interpretation of voting rights and citizenship. It has been found in passing that '[i]n respect of the right to vote a condition of citizenship is not contrary to this provision' (*Luksch v. Italy* [1997]), but as Schokkenbroek notes, it may hardly be expected that the Court will force a breakthrough on this point.<sup>56</sup>

#### 3.4.1.3. Residence

The previous section addressed the subject of voting rights for aliens (non-citizens) residing in a particular country. This section examines if permanent expatriates in a given state are entitled to voting. To elucidate the problem, let us quote López-Guerra: 'given that permanent expatriates are no longer subject to the laws and binding decisions of their homeland, why should they have the right to decide who will govern those who do live within the country?'<sup>57</sup>

From the early 1980s, the Parliamentary Assembly of the Council of Europe adopted a number of resolutions and recommendations regarding the voting rights of citizens living abroad,<sup>58</sup> each of them clearly encouraged the member states to abolish residency requirements and enfranchise their expatriate citizens. The Venice Commission took a cautious stance in its 2002 Guidelines: on the one hand, 'a residence requirement may be imposed',<sup>59</sup> on the other hand, 'the right to vote and to be elected may be accorded to citizens residing abroad'.<sup>60</sup> However, the Venice Commission subsequently advanced the argument in favour of extending the right to vote while concluding that the principles of European electoral heritage did not, at this stage, require the introduction of a right to vote for non-residents.<sup>61</sup>

External voting is a widely adopted norm, and over the last three decades, the majority of the world's states have extended their voting rights to non-resident citizens.<sup>62</sup> The enfranchisement of citizens abroad entails a number of problems,<sup>63</sup> some of which are reflected in the Strasbourg case-law.

The relevant decisions of the Commission and the Court are consistent in that the condition of residence is not contrary to P1-3. The applicant in case *X. v. the United*

54 Treaty establishing the European Community, Art.19(1).

55 Treaty establishing the European Community, Art. 19(2).

56 Schokkenbroek, 2006, p. 921.

57 López-Guerra, 2005, p. 216.

58 See e.g. Parliamentary Assembly 1982, 1999, 2004, 2005, 2007b, 2012.

59 Venice Commission, 2002, p. 8.

60 Venice Commission, 2002, p. 8.

61 Venice Commission, 2011, p. 15.

62 Wellman, Allen and Nyblade, 2023.

63 See e.g. Lafleur, 2015.

*Kingdom* (1976a) was a United Kingdom (UK) citizen residing in Paris since 1971, and she complained that British subjects residing abroad could not participate in national parliamentary elections. In its decision, the Commission found that such a restriction can be justified for several reasons: first, the assumption that a non-resident citizen is less directly or continuously interested in and has less day-to-day knowledge of its problems; second, the impracticability for Parliamentary candidates of presenting the different electoral issues to citizens abroad to secure a free expression of opinion; third, there is a need to prevent electoral fraud, the danger of which increases in uncontrolled postal votes; finally, the link between the right of representation in the Parliamentary vote and the obligation to pay taxes, not always imposed on those in voluntary and continuous residence abroad.

Based on the above, the Commission concluded that the residence requirement in the electoral law of the UK cannot be regarded as unreasonable or arbitrary, and so contrary to P1-3, so as to interfere with the rights of the applicant. Regarding the alleged breach of the anti-discrimination provision of the Convention (Article 14), the Commission considered that the distinction between resident and non-resident citizens pursued a legitimate aim and was not a disproportionate means of achieving it. The Commission added to the *X. v UK* (1979) case that the fact that members of the UK diplomatic service or Armed Forces stationed outside the UK continue to enjoy the right to vote in parliamentary elections still does not constitute a violation of Article 14, as these persons are not living abroad voluntarily but have been sent to a country other than their own by their government in the performance of services to be rendered to their country.

The four-point reasoning set out in *X. v. the United Kingdom* (1976a) has been applied by the Commission and the Court in several subsequent cases (e.g. *Luksch v. Germany* [1997], *Hilbe v. Liechtenstein* [1999], *Doyle v. the United Kingdom* [2007], *Shindler v. the United Kingdom* [2013]). In the latter decisions, the Commission/Court also noted that it may be possible that the applicant has not severed ties with his country of origin and that some of the reasons given in *X. v. the United Kingdom* (1976a) are inapplicable to the current case. However, the law cannot consider every individual case but must lay down a general rule.<sup>64</sup>

Although the Court noted in *Shindler v. the United Kingdom* that ‘there is a growing awareness at European level of the problems posed by migration in terms of political participation in the countries of origin and residence’,<sup>65</sup> the Court’s position on voting rights for expatriate citizens remained unchanged:

‘[...] none of the material forms a basis for concluding that, as the law currently stands, States are under an obligation to grant non-residents unrestricted access to the franchise. [...] A key issue which still has to be addressed within

64 See e.g. *Luksch v. Germany*.

65 *Shindler v. the United Kingdom*, Application no. 19840/09, Judgment 9 September 2013, para. 114.

this discussion is whether the focus should be on promoting participation in the State of origin, in the State of residence or in both. Further issues concern the modalities of the exercise by non-residents of the right to vote, which give rise to practical and security considerations.<sup>66</sup>

The *Sitaropoulos and Giakoumopoulos v. Greece* (2012) differs slightly from the previous cases, as Greek citizens' applicants were already registered on the electoral roll and their right to vote was explicitly recognised in the domestic (Greek) law. Hence, they were not complaining about a restriction on their right to vote as such but about the failure to adopt the arrangements needed to give effect to that right.<sup>67</sup> Applicants living in France would have to travel to Greece to exercise their right to vote, and the financial outlay required for travel would have been significant. In addition, their professional and family lives would be disrupted because they would be obliged to leave their work and families for a few days.<sup>68</sup> However, the Court was not convinced that this would have been disproportionate to the point of impairing the essence of voting rights in question.<sup>69</sup> The Court ruled that, in general terms, P1-3 does not provide for the implementation, by Contracting States, of measures to allow expatriates to exercise their right to vote from their place of residence.<sup>70</sup>

#### 3.4.1.4. Voting rights of persons with mental disabilities

In addition to the requirements of age, citizenship, and residency, individuals may be deprived of their right to vote or be elected. According to the Venice Commission, deprivation must be based on mental incapacity or a criminal conviction for a serious offence.<sup>71</sup> It is needless to say the deprivation seriously undermines the idea of universal suffrage, therefore the exclusion from the right to vote is only possible under strict, cumulative conditions: it must be provided for by law; the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them; withdrawal of political rights or finding of mental incapacity may only be imposed by the express decision of a court of law.<sup>72</sup>

66 *Shindler v. the United Kingdom*, Application no. 19840/09, Judgment 9 September 2013, para. 114.

67 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 51.

68 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 52.

69 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 80.

70 *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 15 March 2012, para. 71.

71 Venice Commission, 2002, p. 8.

72 Venice Commission, 2002, p. 8.

Although the Parliamentary Assembly of the Council of Europe expresses concern about an unjustified link between legal capacity and the right to vote<sup>73</sup> and urges the delinking of them,<sup>74</sup> mental disability is a prevalent cause of disenfranchisement across the globe. According to Bhugra and his colleagues, over one-third of the countries worldwide (36%) deny all persons with any mental health problems a right to vote without any qualifier.<sup>75</sup> However, from a human-rights perspective, the exclusion of people with disabilities from the right to vote can hardly be justified.<sup>76</sup>

The case of *Alajos Kiss v. Hungary* (2010) was crucial to the restriction of voting rights for the mentally disabled. After being diagnosed with manic depression, the applicant was placed under partial guardianship, which automatically deprived him of his rights under the Hungarian legal framework. He argued that the judicial decision was not been preceded by any scrutiny, thus establishing a connection between his mental ailments and his capacity to vote. In his view, his condition impeded his capacity to orient himself towards political matters.<sup>77</sup> In examining the legitimate aim, the Court was persuaded by the arguments proposed by the Hungarian Government, which asserted that the statutory scheme wishes to ensure that ‘only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs’.<sup>78</sup> Regarding proportionality, the Court noted that Hungarian laws do not distinguish between those under total and those under partial guardianship.<sup>79</sup> Although States may enjoy a wide margin of appreciation when specifying the conditions of active and passive suffrage in their domestic laws, an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, does not fall within an acceptable margin of appreciation.<sup>80</sup> The Court, therefore, concluded that ‘an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote’ [emphasis added].<sup>81</sup> Accordingly, P1–3 was violated.

However, in an analogous case, *Strøbye and Rosenlind v. Denmark* (2021), the Court did not conclude a breach of P1–3. Applicants were deprived of their legal capacity, which entailed forfeiture of their right to vote. From the perspective of applicants, their case was identical to that of *Alajos Kiss v. Hungary*.<sup>82</sup> The Court, however, did not share this view, as under the Danish legal framework, only a small group of persons

73 Parliamentary Assembly, 2017, Section 1.

74 Parliamentary Assembly, 2017, Section 7.2.1.

75 Bhugra et al., 2016.

76 See e.g. Barclay, 2013; Ryan, Henderson and Bonython, 2016.

77 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 30.

78 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 38.

79 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 39.

80 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 42.

81 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 44.

82 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 82.

was disenfranchised, namely, those who were both subject to guardianship and had been deprived of their legal capacity.<sup>83</sup> The Court gave great weight to the fact that

‘The Danish rules setting out the conditions for depriving a person of his or her legal capacity were very strict and closely related to the issue of whether the person in question was able to foresee the consequences of his or her decisions and to make conscious and judicious decisions’.<sup>84</sup>

The Court also ruled that the relevant Danish legislation significantly differed from the legislation examined in *Alajos Kiss*, where all persons, whether under full or partial guardianship, were subject to an automatic blanket restriction in respect of suffrage.<sup>85</sup>

In *Anatoliy Marinov v. Bulgaria* (2022), on the other hand, the Court found a violation of P1–3 similar to the reasoning elucidated in the *Alajos Kiss* case. The judgment confirmed that

‘the indiscriminate removal of the voting rights of the applicant – *without an individualised judicial review* and solely on the basis of the fact that his mental disability necessitated that he be placed under partial guardianship – cannot be considered to be proportionate to the legitimate aim for restricting the right to vote [emphasis added]’.<sup>86</sup>

#### 3.4.1.5. Voting rights of prisoners

Is it justified to disenfranchise people who have committed serious crimes? As might be anticipated, opinions are disparate on this matter: some argue in favour of the deprivation of the right to vote,<sup>87</sup> others are against the disenfranchisement of prisoners, claiming that ‘commitment with democratic participation, respect for political equality and the democratic dignity of our fellow citizens speak in favour of the inclusion, rather than exclusion, of those who are imprisoned into the electoral franchise’.<sup>88</sup> It is also the case that European countries have different legal regimes: most of them have either no restrictions on prisoners’ voting or apply some restrictions linked to the length of the sentence and/or the kind of offence a person is convicted of; while some states do not allow prisoners to vote.<sup>89</sup>

83 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 86.

84 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 87.

85 *Alajos Kiss v. Hungary*, Application no. 38832/06, Judgment 20 August 2010, para. 113. Some argue, however, that the judgment in *Strøbye and Rosenlind v. Denmark*, Applications nos. 25802/18, 27338/18, Judgment 6 September 2021 departs from and undermines the Court’s disability voting rights precedents, particularly *Alajos Kiss*; Fiala-Butora, Smith and Stein, 2021.

86 *Anatoliy Marinov v. Bulgaria*, Application no. 26081/17, Judgment 15 May 2022, para. 57.

87 See e.g. Ramsay, 2013.

88 Marshall, 2018, p. 16.

89 For comparative reports, see Horne and White, 2015; Prpic, 2023.

The case-law of the Convention organs accepted various restrictions on certain convicted persons. In the *X. v. the Netherlands* (1974), the applicant complained that he was deprived for life of the right to vote because of a conviction for uncitizen-like behaviour. However, the Commission found that depriving convicted disloyal citizens of certain political rights, including the right to vote, may be justified and, therefore, does not breach the Convention. A similar conclusion was reached in *H. v. the Netherlands* (1983).

‘The national legislator, in exercise of his margin of appreciation, may restrict the right to vote of convicted persons, even when it involves the conviction of an unconditional, conscientious objector to military service, who refused to comply with the formalities enabling him to acquire objector status.’

In the “groundbreaking” judgment *Hirst v. the United Kingdom (no. 2)* (2005), the Court established a new precedent regarding the right to vote for convicted prisoners.<sup>90</sup> The applicant, a prisoner sentenced to a discretionary life sentence for manslaughter, alleged that as a convicted prisoner in detention, had been subject to a blanket ban on voting in elections. The Government argued that

‘the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.’<sup>91</sup>

The Court admitted that, in the present case, for the first time that the Court had the occasion to consider a *general and automatic disenfranchisement* of convicted prisoners, as this issue has not been previously examined.<sup>92</sup> On the one hand, the judgment laid down that there was no place under the Convention system for automatic disenfranchisement based purely on what might offend public opinion.<sup>93</sup> However, on the other hand, this statement

‘does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the

90 For an analysis of the significance of the judgment, see Powers, 2006.

91 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 50.

92 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 68.

93 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 70.

Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, *does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations [references omitted, emphasis added].*<sup>94</sup>

According to the Government, disenfranchisement pursues the legitimate aim of preventing crime by sanctioning the conduct of convicted prisoners and enhancing civic responsibility and respect for the rule of law. The Court found no reason to exclude these aims as untenable or incompatible per se with the right guaranteed under P1-3.

Concerning the question of proportionality, the Court adopted a more rigorous stance:

'The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. 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 with Article 3 of Protocol No. 1 [emphasis added]'.<sup>95</sup>

Thus, the Court concluded that P1-3 had been violated.

Notably, five judges delivered a joint dissenting opinion. They found that a general restriction on prisoners' right to vote should, in principle, be judged in the same way that other restrictions precluded the right to vote.<sup>96</sup> As the dissenting opinion emphasises, the European legislation shows that there is little consensus about whether or not prisoners should have the right to vote.<sup>97</sup>

In applying the criteria described in the *Hirst* case to the *v. Austria* (2010) case, the court adopted the following approach. The applicant was convicted of murder, sentenced to life imprisonment, and disenfranchised. Regarding the conditions for disenfranchisement set out in domestic law, the Court found that the provisions in question were more detailed than those applicable in *Hirst* case. The Court noted that the deprivation of voting rights, in contrast to the statutory scheme of the UK, does not apply automatically to all prisoners irrespective of the length of their sentence,

94 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 71.

95 *Hirst v. the United Kingdom (no. 2)*, Application no. 74025/01, Judgment 6 October 2005, para. 82.

96 Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens, para. 4.

97 Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens, para. 6.

nature or gravity of their offence, but restricts disenfranchisement to a more narrowly defined group of persons, as it is applicable only in the case of a prison sentence exceeding one year and only to convictions for offences committed with intent.<sup>98</sup> However, Austria's legal framework has not yet "passed" the *Hirst* test, as the Court also examined how the decision on disenfranchisement was taken. At this point, the Court highlighted the following:

'Under the *Hirst* test [...] it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions [reference omitted]'.<sup>99</sup>

Subsequently, the Court held that this 'discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned' did not exist under the provisions of law which had led to the applicant's disenfranchisement. The Court therefore concluded that P1-3 had been breached.

The applicant of the *Scoppola v. Italy* (no. 3.) (2012) case was sentenced to 30 years of imprisonment and a lifetime ban from public office, which, pursuant to the Italian legal system, entails the forfeiture of the right to vote. Applying the proportionality test, the Court found that disenfranchisement is applied to individuals convicted of a series of specific offences for which express provisions are made by law (e.g. offences against the interests of the State administration) or to people sentenced to certain terms of imprisonment specified by law.<sup>100</sup> Furthermore, the Court also considered that

'the legal provisions in Italy defining the circumstances in which individuals may be deprived of the right to vote show the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender'.<sup>101</sup>

At this point, the Court undertook a comparison between the present case and the *Hirst v. the United Kingdom* (no. 2), concluding that

'in the circumstances the Court cannot conclude that the Italian system has the general, automatic, and indiscriminate character that led it, in the *Hirst* (no. 2) case, to find a violation of Article 3 of Protocol No. 1. In Italy there

98 *Frodl v. Austria*, Application no. 20201/04, Judgment 4 October 2010, para. 33.

99 *Frodl v. Austria*, Application no. 20201/04, Judgment 4 October 2010, para. 34.

100 *Scoppola v. Italy* (no. 3.), Application no. 126/05, Judgment 22 May 2012, para. 105.

101 *Scoppola v. Italy* (no. 3.), Application no. 126/05, Judgment 22 May 2012, para. 106.

is no disenfranchisement in connection with minor offences or those which, although more serious in principle, do not attract sentences of three years’

imprisonment or more, regard being had to the circumstances in which they were committed and to the offender’s personal situation.<sup>102</sup>

Furthermore, the Court ruled in favour of the Italian legislative framework stating that under Italian law, it is possible for a convicted person who has been permanently deprived of the right to vote to recover that right.<sup>103</sup> In light of the above, and in contrast to the *Hirst* case, the Court ruled that the margin of appreciation afforded to the respondent government related to the restriction of the right to vote had not been contravened.

The purpose of this chapter is not to provide a comprehensive review of all the analogous cases. It is noteworthy that since the *Hirst* case, the Court has ruled that several other states’ restrictions on prisoners’ enfranchisement violate P1-3 because of the existence of a general, automatic, and thus indiscriminate restriction on prisoners’ universal suffrage.<sup>104</sup>

Summarising its previous practice, the Court in *Kalda v. Estonia (No. 2) (2022)* held that

‘With a view to securing the rights guaranteed by Article 3 of Protocol No. 1, 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.’<sup>105</sup>

### 3.4.2. Equal Suffrage

P1-3 does not explicitly guarantee the universality of suffrage, but it also does not guarantee equality. Nevertheless, the Guidelines of the Venice Commission discuss in detail equal suffrage which entails, *inter alia*, equal voting rights and equal voting power. As for the former, each voter has, in principle, one vote; where the electoral system provides voters with more than one vote (e.g. in Germany or Hungary), each voter has the same number of votes.<sup>106</sup> Equal voting power, as the other side of equal suffrage, is related to the “weight” of the votes. It goes without saying if the number of residents in constituency “A” is 50,000 and 100,000 in constituency “B”, then the votes of the citizens in the latter constituency are worth less than the votes of those in constituency “A”.

The Court clarified that the phrase ‘conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’ implies essentially the

102 *Scoppola v. Italy (no. 3.)*, Application no. 126/05, Judgment 22 May 2012, para. 108.

103 *Scoppola v. Italy (no. 3.)*, Application no. 126/05, Judgment 22 May 2012, para. 109.

104 For a more detailed overview, see Celiksoy, 2020.

105 *Kalda v. Estonia (No. 2)*, Application no. 14581/20, Judgment 22 May 2023, para. 41.

106 Venice Commission, 2002, p. 9.

principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. However, equal suffrage does not entail that all votes must necessarily have equal weight with regard to the outcome of the election or that all candidates must have equal chances of victory.<sup>107</sup>

In *Oran v. Turkey* (2014), the applicant complained that Turkish citizens who had lived abroad for more than six months could only vote for the lists drawn up by the political parties but not for independent candidates (as the applicant himself). The Court found that ‘the right to vote cannot be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he had intended to vote for’.<sup>108</sup> The majority of judges (4:3) held that the restriction in question met the legislature’s legitimate concern to ensure the political stability of the country and of the government which would be responsible for leading it after the elections. Consequently, considering the respondent State’s broad margin of appreciation in this field, the Court considered that the treatment complained of by the applicant in his capacity as an unaffiliated independent candidate was based on an objective and reasonable justification.<sup>109</sup> By contrast, dissenting opinions concluded that the Turkish legal framework restricted applicants’ chances of winning votes, infringing on the principle of equal suffrage.<sup>110</sup>

The issue of equal suffrage arises in the specific context of the Hungarian legal framework that has been in force since the 2014 parliamentary election. In a mixed electoral system, voters who have a residence in Hungary have two votes: they vote for one candidate in the single-member constituency and for one party list; meanwhile, voters without a Hungarian residence have only one vote, which is cast for one party list. The rationale underlying this differentiation is straightforward: the 106 single-member constituencies, in the absence of a domicile address, the 106 single-member constituencies cannot accommodate the inclusion of voters from beyond the border. However, this raises the question: does it not violate the principle of equality of suffrage that some Hungarian citizens only have one vote, not two? As no one has yet taken the matter to the Court, it is not possible to provide a definitive response. However, having regard for the position of the Court in *Oran v. Turkey*, it is in conformity with the Convention that Hungarian citizens may have either two or only one vote, depending on their residency.<sup>111</sup>

107 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54., cf. *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment 8 July 2008, para. 112.

108 *Oran v. Turkey*, Application nos. 28881/07 and 37920/07, Judgment 8 September 2014, para. 57.

109 *Oran v. Turkey*, Application nos. 28881/07 and 37920/07, Judgment 8 September 2014, para. 66.

110 Partly Dissenting, Partly Concurring Opinion of Judges Sajó, Keller, and Lemmens, para. 6.

111 Bodnár, 2016, pp. 428–429.

### 3.5. 'Free Expression of the Opinion of the People' II: The Right to Stand for Election

#### 3.5.1. Preliminary Remarks

Concerning the right to stand as an election candidate and the passive aspect of suffrage, one may make two preliminary remarks: First, the same general conditions and principles (including the prohibition of discrimination) apply to restricting the right to vote. Second, States benefit from a broader latitude in setting the conditions for standing for election; therefore, the proportionality test is more limited. In *Melnychenko v. Ukraine* (2004), the Court accepted that 'stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility'.<sup>112</sup> The Court made its position clearer a few years later in *Etxebarria and Others v. Spain* (2009).

'[...] The right to stand for election in the legislature could be subject to stricter requirements than the right to vote. Indeed, whereas the criterion relating to the "active" aspect of Article 3 of Protocol No. 1 usually entailed a broader assessment of the proportionality of legal provisions depriving a person or group of persons of the right to vote, the Court's approach to the "passive" aspect of that provision was essentially confined to verifying the absence of arbitrariness in the domestic procedures leading to an individual's being deprived of the right to stand for election.'<sup>113</sup>

The Court's cautious stance can be explained by the fact that it acknowledges and respects the right of Member States to establish their own institutional system, especially the national parliament. As Lardy and Bates note, '[t]he Court does not want to be seen to meddle in this domain without good reason'.<sup>114</sup> In addition, it is not negligible that unlike Articles 8, 9, 10 and 11 of the Convention, P1-3 does not itself describe a list of aims, which can be considered legitimate for the purposes of restrictions of the right under that Article.<sup>115</sup>

Nor does the Venice Commission equate the level of protection of the right to vote and the right to stand as a candidate: 'conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them'.<sup>116</sup> The Commission justifies this distinction on the grounds that, in the case of passive suffrage rights, the holding of a public office is at stake, and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest.<sup>117</sup>

112 *Melnychenko v. Ukraine*, Application no. 17707/02, Judgment 30 March 2005, para. 57.

113 *Etxebarria and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03, 35634/03, Judgment 6 November 2009, para. 50.

114 Lardy and Bates, 2009, p. 719.

115 See e.g. *Kara-Murza v. Russia*, Application no. 2513/14, Judgment 4 January 2023, para. 42.

116 Venice Commission, 2002, p. 8.

117 Venice Commission, 2002, p. 20.

### 3.5.2. *Right to Stand for Election vs. Democratic Order*

Over the past few decades, the Court has had to decide whether a wide variety of restrictions on standing in elections are compatible with Article 3. Strasbourg case law abounds in cases in which the purpose of the restrictions was to maintain democratic order; many of these judgments involve the new democracies of Eastern Europe.<sup>118</sup> The applicant of *Ždanoka v. Latvia* (2004) was a member of the Communist Party of Latvia, which was declared unconstitutional and dissolved in 1991 as it backed a coup d'état against the newly independent Latvia. In 1994 and 1995, the Latvian Parliament adopted two laws on municipal and parliamentary elections, respectively, which stated that people who had actively participated in the CPL's activities after 13 January 1991, the date of the first coup d'état supported by the party, could not stand for election. Based on these laws, the applicant was automatically disqualified from standing for elections and lost her seat in the Riga City Council. The Court gave great weight to the fact that the applicant had never been convicted of a criminal offence on account of her activities and concluded that the *permanent* disqualification from standing for election to the Latvian Parliament is not proportionate to the legitimate aims which it pursued and curtails the applicant's electoral rights to such an extent as to impair their essence and that its necessity in a democratic society has not been established.<sup>119</sup> However, the Grand Chamber overturned the Chamber's judgment (*Ždanoka v. Latvia* [2006]), holding that 'impugned restriction pursued aims compatible with the principle of the rule of law and the general objectives of the Convention, namely the protection of the State's independence, democratic order and national security'.<sup>120</sup> Regarding the proportionality of exclusion, the Court attached great importance to the historical and political contexts:

While such a measure may scarcely be considered acceptable in the context of one political system, for example, in a country with an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historical-political context which led to its adoption 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.<sup>121</sup>

The Court also attached weight to the fact that the Latvian parliament periodically reviewed relevant laws.<sup>122</sup> Thus, the Court concluded that there was no violation of P1-3.

In *Ādamsons v. Latvia* (2008), the Court took a notably different view. The applicant was prevented from standing for parliamentary elections in 2002, as the law on legislative elections forbids former KGB employees to stand for elections. The Court considered that the measure at issue pursued aims compatible with the principle of

118 Lardy and Bates, 2009, p. 719.

119 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 99.

120 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 118.

121 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 133.

122 *Ždanoka v. Latvia*, Application no. 58278/00, Judgment 16 March 2006, para. 134.

the rule of law and the general objectives of the Convention, namely, the protection of the State's independence, its democratic order, its institutional system, and its national security.<sup>123</sup> Concerning the proportionality of the restriction, the Court ruled that the present case was fundamentally different from the *Ždanoka* case. Meanwhile, in the latter case, the law-maker had clearly and precisely defined the category of ineligible persons ('persons who had actively participated in the CPL's activities after 13 January 1991' – see above), the law applied in the *Ādamsons* case referred to former KGB "agents" in general, a concept that was, as such, too broad in the Courts's view. In contrast to *Ždanoka*, in the present case, it is no longer sufficient to simply find that the person concerned belonged to the group in question: '[s]ince that group is defined in too general a manner, a restriction on the electoral rights of its members must follow an individualised approach enabling account to be taken of their actual conduct [references omitted]'. In the Court's view, the need for such individualisation becomes increasingly important with the passage of time, in as much as the time at which the impugned conduct is alleged to have taken place becomes more remote.<sup>124</sup>

The Court concluded that when the authorities deprived the applicant of his right to stand for election, exceeded an acceptable margin of appreciation, however wide, and that the interference complained of is incompatible with the requirements of P1–3.<sup>125</sup>

The above-mentioned *Etxebarria and Others v. Spain* centred on the cancellation of the candidacy of electoral groups to regional elections on the grounds that they were continuing activities of political parties that had been declared illegal owing to their links with a terrorist organisation. The Court agreed with the Spanish Government's assertion that the restriction at issue pursued aims compatible with the principles of the rule of law and the general objectives of the Convention, particularly the protection of the democratic order.<sup>126</sup> Accordingly, the restriction complained of had been proportionate to the legitimate aim pursued and, in the absence of any element of arbitrariness, had not infringed on the free expression of people's opinions.<sup>127</sup>

The applicant of *Paksas v. Lithuania* (2011), a former President of Lithuania, was removed from office by the Parliament following impeachment proceedings for committing a gross violation of the Constitution. The Court found the lifetime prohibition for Paksas to be elected to the Parliament and to any other office for which it was necessary to take an oath in accordance with the Constitution was disproportionate and in violation of P1–3. The Court also referred to *Ždanoka v. Latvia* judgment, emphasising that in the present case, in contrast to *Ždanoka*, 'not only is the restriction in issue

123 *Ādamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 120.

124 *Ādamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 125.

125 *Ādamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 132.

126 *Etxebarria and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03, 35634/03, Judgment 6 November 2009, para. 52.

127 *Etxebarria and Others v. Spain*, Application nos. 35579/03, 35613/03, 35626/03, 35634/03, Judgment 6 November 2009, para. 56.

not subject to any time-limit, but the rule on which it is based is set in constitutional stone'.<sup>128</sup>

The applicant party was a Moldovan political party in *Political Party 'Patria' and Others v. the Republic of Moldova* (2020), which was removed from the list of participants three days before parliamentary elections owing to the alleged use of undeclared foreign funds. The Court accepted the Government's argument that the conditions set out in the Moldovan Electoral Code pursued the legitimate aim of observing the rule of law and the protection of democracy's proper functioning which implied the assurance of equal and fair conditions for all candidates in the electoral campaign and the protection of free expression of people's opinion during elections.<sup>129</sup> However, the Court ruled that interference with applicants' electoral rights fell short of the standards required under P1-3. The disqualification was arbitrary on account of the lack of sufficient procedural safeguards.

### 3.5.3. Further Legitimate Aims

Aside from the defence of the democratic order, the Court recognised further legitimate aims capable of justifying restrictions on the exercise of the right to stand for election. In *Podkolzina v. Latvia* (2002), the Court held that the obligation to have sufficient knowledge of the official language may pursue a legitimate aim, as the interest of each State in ensuring that its own institutional system functions normally is incontestably legitimate.<sup>130</sup> (However, the process by which the applicant's language skills were evaluated constituted an infringement of the Convention's procedural requirements of fairness and legal certainty.) In *Krasnov and Skuratov v. Russia* (2007), the Court also found that requiring a candidate for election to the national parliament to submit truthful information on his or her employment and party affiliation is a legitimate aim for the purpose of P1-3, as this provision enables voters to make an informed choice regarding the candidate's professional and political background.<sup>131</sup>

In *Melnychenko v. Ukraine* (2004), the Court did not object to the five-year continuous residency requirement for potential parliamentary candidates, on the grounds that this requirement may be deemed appropriate for enabling such persons to acquire sufficient knowledge of the issues associated with the national parliament's tasks.<sup>132</sup>

In *Gitonas and Others v. Greece* (1997), the Court had to decide whether certain individuals holding public office could be precluded from standing for election and being elected in any constituency where they had performed their duties for more than three months in the three years preceding elections. According to this judgment, the disqualification of applicants was neither arbitrary nor disproportionate and

128 *Paksas v. Lithuania*, Application no. 34932/04, Judgment 6 January 2011, para. 110.

129 *Political Party 'Patria' and Others v. the Republic of Moldova*, Applications nos. 5113/15 and 14 others, Judgment 4 November 2020, para. 34.

130 *Podkolzina v. Latvia*, Application no. 46726/99, Judgment 9 July 2002, para. 34.

131 *Krasnov and Skuratov v. Russia*, Application nos. 17864/04 and 21396/04, Judgment 31 March 2008, para. 44.

132 *Melnychenko v. Ukraine*, Application no. 17707/02, Judgment 30 March 2005, para. 57.

‘serves a dual purpose that is essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many – and sometimes important – decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced’.<sup>133</sup>

The applicants in *Ahmed and Others v. the United Kingdom* (1998), serving as local government officers, claimed that their right to participate in certain forms of political activity (*inter alia*, to stand for local election) had been curtailed unlawfully. The Court again invoked political impartiality as a legitimate aim and emphasised that restrictions operate for as long as applicants occupy politically restricted posts; furthermore, any of the applicants wishing to contest an elected office is at liberty to resign from his post.<sup>134</sup> Consequently, without taking a stand on whether local authority elections are covered by P1–3, the Court concluded that there was no breach of that provision in this case.

In other cases, the Court found that the restrictions imposed on the right to stand for election were disproportionate. The precedent of the *Tănase v. Moldova* (2010) case was a law which imposed a ban on persons with dual or multiple citizenship from becoming MPs. The Government relies upon several aims to justify the prohibition introduced by the impugned law, namely, ensuring loyalty, defending the independence and existence of the State, and guaranteeing the security of the State.<sup>135</sup> The Court held that such a restriction, considering the special position of Moldova, which had a potentially high proportion of dual nationals and had only recently become independent, could have been justified after its independence in 1991.<sup>136</sup> However, the Court recalled that the ban was enforced in 2008 and not 1991, 17 years after Moldova had gained independence, and about five years later, laws were relaxed to allow dual citizenship. In these circumstances, the Court considered ‘the argument that the measure was necessary to protect Moldova’s laws, institutions and national security to be far less persuasive’.<sup>137</sup> The Court concluded that the restrictions in question curtailed the rights guaranteed by P1–3 to the extent of impairing their essence and depriving them of their effectiveness.<sup>138</sup>

133 *Gitonas and Others v. Greece*, Application nos. 18747/91; 19376/92, 19379/92, Judgment 1 July 1997, para. 40.

134 *Ahmed and Others v. the United Kingdom*, Application no. 22954/93, Report of the Commission 29 May 1997, para. 75.

135 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 164.

136 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 173.

137 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 174.

138 *Tănase v. Moldova*, Application no. 7/08, Judgment 27 April 2010, para. 179.

The background of *Kara-Murza v. Russia* (2022) was similar. Russia annulled its dual national registration as a candidate for legislative elections in 2006. The Court observed that the Russian Government did not propose any historical or political considerations explaining the necessity of the impugned restrictive measure; for example, it was not shown that there was an external threat to Russia's independence or its democracy,<sup>139</sup> and found the breach of P1-3.

In *Lykourazos v. Greece* (2006), the applicant was elected MP in 2000, but the Greek Special Supreme Court forfeited his seat as he was a practising lawyer. The decision of the Greek Court was based on the provision of the Constitution that reads as follows: '[t]he duties of a member of parliament are also incompatible with the exercise of any profession' [emphasis added]. However, this provision was enacted only after the 2000 parliamentary election; hence, the applicant was elected in 2000 in complete accordance with the law. The Court held that

'the Special Supreme Court had caused him to forfeit his seat and had deprived his constituents of the candidate whom they had chosen freely and democratically to represent them for four years in Parliament, in breach of the principle of legitimate expectation'.

Therefore, this situation is a breach of the substance of the rights guaranteed by P1-3.<sup>140</sup>

#### 3.5.4. Electoral Systems Contested

The Court also had to rule in several cases wherein the right to stand for election was not directly affected, but rather through the regulation governing the conduct of elections and the electoral system itself. The Commission's and Court's case-law suggests that there is no "optimal" electoral system, thus, the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time. In *Mathieu-Mohin and Clerfayt v. Belgium*, the Court recognised that

'[e] lectoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect fairly 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'.<sup>141</sup>

The Court also stressed the importance of the context:

139 *Kara-Murza v. Russia*, Application no. 2513/14, Judgment 4 January 2023, para. 47.

140 *Lykourazos v. Greece*, Application no. 33554/03, Judgment 15 September 2016, para. 57.

141 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54.

‘For the purposes of Article 3 of Protocol No. 1 (P1-3), any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the “free expression of the opinion of the people in the choice of the legislature”’.<sup>142</sup>

In *Tête v. France* (1987), the Commission recalled that P1-3 ‘does not create any obligation to introduce a particular electoral system such as proportional representation or majority voting’. Even the highly disproportional first-part-the-post system of the UK is compatible with the Convention (*Liberal Party, R. and P. v. the United Kingdom* [1980]); furthermore, neither majority bonus systems nor a closed list system contravene the terms of P1-3 (*Saccomanno and Others v. Italy* [2012]).

On several occasions, the Court was summoned to decide whether it is in conformity with the Convention for a Member State to impose a condition of electoral deposit of a specified number of supporting signatures as a prerequisite for standing as a candidate in elections. As for the submission of candidatures, the aforementioned prerequisites are explicitly permitted by the Venice Commission: on the one hand, ‘the presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures’<sup>143</sup>; on the other hand, ‘if a deposit is required, it must be refundable should the candidate or party exceed a certain score; the sum and the score requested should not be excessive’.<sup>144</sup>

In *Sukhovetsky v. Ukraine* (2006), the Court concluded that the obligation of paying electoral deposit ‘pursued the legitimate aim of guaranteeing the right to effective, streamlined representation by enhancing the responsibility of those standing for election and confining elections to serious candidates, whilst avoiding the unreasonable outlay of public funds’.<sup>145</sup> Although the applicant claimed that this measure was disproportionate to the aims pursued (given his low income, he was unable to meet the cost of the deposit), the Court held that ‘the deposit required of the applicant cannot be considered to have been excessive or such as to constitute an insurmountable administrative or financial barrier for a determined candidate wishing to enter the electoral race’.<sup>146</sup>

The applicant of *Mihaela Mihai Neagu v. Romania* (2014) was unable to collect 100,000 supporting signatures to contest the 2009 European Parliamentary elections; therefore, her candidature was rejected. The Court acknowledged that the requirement to collect a large number of signatures may deprive independent candidates of the possibility of representing part of the electorate, nevertheless ‘the purpose of the

142 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54.

143 Venice Commission, 2002, p. 9.

144 Venice Commission, 2002, p. 9.

145 *Sukhovetsky v. Ukraine*, Application no. 13716/02, Judgment 28 June 2006, para. 62.

146 *Sukhovetsky v. Ukraine*, Application no. 13716/02, Judgment 28 June 2006, para. 73.

measure complained of was to carry out a reasonable selection among the candidates in order to ensure their representativeness in the European Parliament and to rule out any abusive candidacies'.<sup>147</sup> In addition, the threshold of 100,000 signatures (0.55% of all citizens registered on the electoral rolls) is consistent with the Venice Commission's guidelines (a maximum of 1%).

The electoral threshold, applied in several Member States, was also challenged before the Court. In *Partija 'Jaunie Demokrāti' and Partija 'Mūsu Zeme' v. Latvia* (2007), the Court considered that the 5% threshold laid down by the Latvian law cannot be held to be contrary to the requirements of that provision, in so far as it favours sufficiently representative schools of thought and makes it possible to avoid excessive fragmentation of Parliament. The Court reiterated its statement made in *Mathieu-Mohin and Clerfayt*, namely, from P1-3 '[i]t does not follow, however, 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. Thus, no electoral system can eliminate "wasted votes"'.<sup>148</sup>

In *Partei Die Friesen v. Germany* (2016), the question arose as to whether a party representing a minority should be exempted from the electoral threshold. The applicant party asserted that it represented the Frisian people; however, the number of Frisians was so low in Lower Saxony that the party could not meet the 5% threshold requirement in parliamentary elections (it attained merely 0.3% of the overall votes); therefore, its right to participate in elections without being discriminated against had been violated. Although the Court accepted the applicant party's argument that the minimum threshold had a chilling effect on potential voters who may not have wanted to "waste" their votes on a political party unable to pass the threshold,<sup>149</sup> the Court also revoked that the 'Convention did not compel the Contracting Parties to provide for positive discrimination in favour of minorities'.<sup>150</sup> The Court also noted that the Framework Convention for the Protection of National Minorities did not oblige Member States to exempt national minority parties from electoral thresholds.<sup>151</sup> *Strack and Richter v. Germany* (2016) also centred on the 5% threshold; however, this time, the case had been referred to the Court by two voters, who claimed that the 5% threshold, applied in the 2009 European Parliament election, resulted in seven parties not being considered for seats, even though they would have won one or two seats had the threshold not existed. According to the applicants, 10.8% of the votes were thus "wasted". Although the German Federal Constitutional Court ruled that the threshold was unconstitutional and thus void, the Court concluded that Germany

147 *Mihaela Mihai Neagu v. Romania*, Application no. 66345/09, Judgment 6 March 2014, para. 34.

148 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 54.

149 *Partei Die Friesen v. Germany*, Application no. 65480/10, Judgment 28 April 2016, para. 34.

150 *Partei Die Friesen v. Germany*, Application no. 65480/10, Judgment 28 April 2016, para. 42. It has been ruled for the first time in *Magnago and Südtiroler Volkspartei v. Italy*, Application no. 25035/94, Judgment 15 April 1996.

151 *Partei Die Friesen v. Germany*, Application no. 65480/10, Judgment 28 April 2016, para. 43.

had not overstepped the wide margin of appreciation, which the Convention affords Contracting States in these matters.

Based on the above, what is the highest tolerable threshold? In *Yumak and Sadak v. Turkey* (2008), the Court took an ambivalent view. Although it considered a 10% electoral threshold (applied in Turkey) as excessive, it was not persuaded that

‘when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1’.<sup>152</sup>

Accordingly, the Court found no infringement of P1–3, although it concurred with the organs of the Council of Europe, which stressed the exceptionally high level of the threshold and recommended that it be lowered.

### 3.6. ‘Choice of the Legislature’

Elections can occur at various levels of government. In addition to parliamentary elections, local (municipal), regional, European parliamentary, and presidential elections have been held. However, it should be stressed that the Convention concerns only the ‘choice of the legislature’. Accordingly, the Court laid down that P1–3 applies only to the election of the “legislature”, or at least of one of its chambers if it has two or more (*c-Mohin and Clerfayt v. Belgium*). Furthermore, in the same case, the court elucidated that “the word “legislature” does not necessarily mean only the national parliament, however, it has to be interpreted in the light of the constitutional structure of the State in question’.<sup>153</sup> In conclusion, it can be stated that, according to the case-law of the Court, the legislature is not confined to the national parliament; the word “legislature” has to be interpreted in the light of the constitutional structure of the State in question.

As for the local (municipal) elections, the Court has consistently maintained that these elections do not fall within the scope of P1–3 In *X. v. the United Kingdom* (1976b), the Commission found in relation of the status of local authorities in Northern Ireland

‘that insofar these local authorities have a legislative function it is confined to the making of by-laws applicable within their areas and these powers are rigidly limited by statute and they have no powers to make rules other than in accordance with the powers conferred by Parliament’.

152 *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment 8 July 2008, para. 147.

153 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 53.

Consequently, the Commission does not consider that these authorities are covered by the term “legislative”, as it is employed in P1-3. In *Booth-Clibborn and others v. the United Kingdom* (1985), the Commission was of a similar opinion: despite the significant scope of their functions, the metropolitan county councils cannot properly be said to form part of the “legislature” of the UK; therefore, the cancellation of elections to those bodies cannot raise an issue under P1-3. The Court applied similar reasoning in the *Salleras Llinares v. Spain* (2000) when it noted that the Spanish Constitution confers the exercise of legislative power on the parliament (*Cortes Generales*); thus, municipal councils clearly do not exercise legislative power and do not, therefore, form part of the “legislature” within the meaning of P1-3.

The Court’s practice is volatile at the regional level, depending on the powers and competencies of the body affected by the complaint. Neither the regional councils in France nor the regional assemblies in Poland could be considered “legislatures” within the meaning of P1-3. (*Malarde v. France* [2000g and *Mółka v. Poland* [2006], respectively). As regards the previous one, the Court held that ‘in France, the legislative function was exercised by Parliament and the powers of the regional councils were limited to regulating, through deliberations, the economic, social, health, cultural and scientific affairs of the region’. In *Mółka v. Poland*, the Court followed a similar approach. Following an examination of Poland’s constitutional system, the Court concluded that Poland’s regional assemblies (similar to municipal and district councils) are the repositories of power of an administrative nature concerning the organisation and provision of local services. Consequently, these bodies do not possess any inherent primary rule-making power and do not form part of the legislature of the Republic of Poland. Accordingly, P1-3 is not applicable to elections to these organs.

In *Mathieu-Mohin and Clerfayt v. Belgium*, the Court took a different view. According to the judgment,

‘the 1980 reform vested the Flemish Council with competence and powers wide enough to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian “legislature” in addition to the House of Representatives and the Senate’.

The legislative assembly of the Autonomous Community of the Canary Islands was similarly assessed by the Court of Justice: in accordance with the structure of the Spanish State’s Autonomous Communities (*Comunidades autónomas*), their legislative assemblies participate in the exercise of legislative power and are, therefore, part of the “legislature” within the meaning of P1-3 (*Federación nacionalista Canaria v. Spain* [2001]). In *Repetto Visentini v. Italy* (2021), following an examination of the Italian Constitution and the Regional Statute of the Trentino-Alto Adige region, the Court concluded that both the regional council and the provincial councils of Trento and Bolzano could be considered to be constituent parts of the “legislature”. It followed that P1-3 was applicable in the present case. In a subsequent case, also concerning Italy, the court advanced a similar line of argument a few months later

(*Miniscalco v. Italy* [2021]). It is clear from this that in accordance with the federal structure of the German State, the diets of the German Länder, are “legislature” within the meaning of P1–3 (*Timke v. Germany*).

The wording of P1–3 may lead one to conclude that presidential elections are clearly beyond the scope of the article as this provision concerns ‘the choice of the legislature’ and not the appointment of a Head of State, such as the Federal President of Austria (*Habsburg-Lothringen v. Austria* [1991]). In a recent study, Şahin indicates that the Court declares applications regarding presidential elections incompatible *ratione materiae*, without going into details, especially in cases where the President is equipped with ceremonial powers (e.g. *Habsburg-Lothringen v. Austria*, *Baskauskaite v. Lithuania* [1998], *Anchugov and Gladkov v. Russia* [2013]). However, in applications made against countries where the President has broader powers than usual, the Court examines in detail whether these powers could be construed as falling within the scope of legislative power.<sup>154</sup> The Court was the first to make this point in *Boškoski v. the former Yugoslav Republic of Macedonia* (2004), claiming that the Court does not exclude the possibility of applying P1–3 to presidential elections. It was undoubtedly a major turning point when the Court ruled that P1–3

‘enshrines a characteristic of an “effective political democracy”, for the ensuring of which regard must not solely be had to the strictly legislative powers which a body has, *but also to that body’s role in the overall legislative process* [emphasis added]. Should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a “legislature” within the meaning of Article 3 of Protocol No 1.’

(However, in the present case the Court found no indication that the powers of the Head of the State are such as to make it part of the “legislature” of the respondent State.)

In the *Boškoski* decision, the Court delineated the powers that a president must possess for Article 3 to be applicable to the election of the president: power to initiate and adopt legislation; absolute veto power; unlimited discretion to dissolve the national parliament; unlimited discretion to appoint or dismiss the government or its members.

In Şahin’s view, ‘It is impossible to apply these criteria cumulatively. In a country with at least minimum democracy, all these powers cannot be given to the President’.<sup>155</sup> In addition, Schokkenbroek claimed that the reasoning underlying the *Boškoski* case was unconvincing.<sup>156</sup>

154 Şahin, 2023, pp. 756–757.

155 Şahin, 2023, p. 757.

156 Schokkenbroek, 2006, p. 930.

It cannot be said that the court consistently applied the criteria defined in the *Bošković* judgment in its subsequent decisions. In some cases, the role of the President was not assessed (*Brito Da Silva Guerra and Sousa Magno v. Portugal* [2008]; *Paksas v. Lithuania*; *Anchugov and Gladkov v. Russia*), whereas in others, the powers of the Head of State were examined in greater detail (*Georgian Labour Party v. Georgia* [2008]; *Krivobokov v. Ukraine* [2013]). However, P1–3 has never been applied to any presidential elections so far.

In addition, the Court was tasked with determining whether the European Parliament falls to be considered as the “legislature” or part of it. The question was first addressed in *Matthews v. the United Kingdom* (1999), in which the court had to answer whether the European Parliament, at the relevant time, had the characteristics of a “legislature” in Gibraltar. Bearing in mind that since the Maastricht Treaty, the European Parliament’s powers are no longer expressed to be “advisory and supervisory”, thus moved towards being a body with a decisive role to play in the legislative process of the European Community, and having regard to the fact that the European Parliament also has functions in relation to the appointment and removal of the European Commission, the Court found that the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty, and insufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the “legislature” of Gibraltar for the purposes of P1–3. A similar approach was followed in *Occhetto v. Italy* (2013).

Although P1–3 centres on elections, the issue of referendum is worth a closer examination. The Commission first held in *X. v. the United Kingdom* (1975) that the obligations of the High Contracting Parties under P1–3 were limited to elections concerning the choice of the legislature. In contrast, the British Referendum on European Economic Community membership was not an election concerning the choice of legislature; therefore, it did not fall within the scope of P1–3. The Commission and the Court maintained this stance for decades (see e.g. *Bader v. Austria* [1996]; *Nurminen and Others v. Finland* [1997]; *Castelli and Others v. Italy* [1998]; *Ž. v. Latvia* [2006]; *Moohan and Gillon v. the United Kingdom* [2017]). In *Cumhuriyet Halk Partisi v. Turkey* [2017], the Court provided a more detailed explanation as to why referendums are not covered by P1–3 (as either a constitutional referendum or an independence referendum):

‘It cannot be inferred from the ordinary meaning of the term “elections” in Article 3 of Protocol No. 1 that a “referendum” would fall within the scope of that provision. Firstly, referendums, unlike elections, are not held “at reasonable intervals” owing to the fact that in most, if not all, cases they represent a system of ascertaining the opinion of the people on a matter that is not a recurrent subject, such as the Constitutional Referendum in the present case, which is limited to a particular time and a particular subject. Secondly, and importantly, referendums are not usually organised as a means of electing

citizens to certain posts, in other words as an election giving the electorate the possibility to choose the legislature.’

Based on the above, the Court appears to have completely excluded referendums from the scope of P1–3. However, this is not entirely the case: as noted in the *Moohan and Gillon v. the United Kingdom*,

‘the Court has not excluded the possibility that a democratic process described as a “referendum” by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1. However, in order to do so the process would need to take place “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”’.

It is therefore unclear what distinguishes a referendum that meets the aforementioned criteria from an election to legislature. Nevertheless, the Court has thus far not considered Article 3 as applicable to any case related to referendums.<sup>157</sup>

#### 4. International Status of Voting Rights: A cursory overlook

The right to vote and stand for election is a well-established norm of international law. Several conventions, declarations, and other soft law instruments address the issues of voting rights and free elections, although the exact wording differs from text to text.

Article 21(3) of the Universal Declaration of Human Rights (UDHR, 1948) stipulates the following:

The will of the people shall be the basis of the authority of government; this will/shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

In contrast to the UDHR, the International Covenant on Civil and Political Rights (ICCPR, 1966) emphasises the individual’s rights. Article 35 puts:

‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [i. e. race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status – the Author] and without unreasonable restrictions:  
[...]

157 On the relationship between referendums and P1–3, see Fasel, 2023. The author claims that law-initiated referendums and citizen-initiated referendums that concern the form of the legislature should also fall under its scope.

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; [...]

The Document of the Copenhagen Meeting of the Conference on the Human Dimension (or the Copenhagen Declaration) is a text agreed upon by the Conference on Security and Co-operation in Europe in June 1990. At the time, during the years of democratisation in East-Central Europe, the document was hoped to be a ‘European constitution on human rights’, and it was ‘undoubtedly a major step forward on the road to common European standards in the field of human rights and humanitarian issues’.<sup>158</sup> Section 7 of the document goes into much more detail than the previous human rights instruments on the right to vote and guarantee fair elections. The 35 signatory states, including countries of the former socialist bloc, have declared, *inter alia*, the following:

‘To ensure that the will of the people serves as the basis of the authority of government, the participating States will: hold free elections at reasonable intervals, as established by law; permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote; guarantee universal and equal suffrage to adult citizens; ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public; respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination; respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations [...]; ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere [...].’

In contrast to the UDHR, the ICCPR, or the ECHR, the Copenhagen Declaration not only contains provisions on the right to vote itself but also sets requirements for the legal and political environment of elections (e.g. political campaigning and unimpeded access to the media).

The *Charter of Fundamental Rights of the European Union* (2000) stands out from previous documents as it enshrines certain political, social, and economic rights for European Union (EU) citizens and residents under EU law. Unlike previous declarations and conventions, the Charter only addresses the European Parliament elections and municipal elections:

158 Bloed, 1991, p. 42.

‘Article 39 – Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40 – Right to vote and to stand as a candidate for municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.’

As Rosas notes, ‘the Charter is to be seen as a constitutional rather than international instrument, proclaimed as it was by the Union and for Union purposes’.<sup>159</sup> This explains why the Charter does not cover national parliamentary elections: while EU regulations pertain to participation in the European Parliament and local elections,<sup>160</sup> national parliamentary elections are not subject to the EU law.

In addition to the above documents, several other non-binding recommendations serve as benchmarks for regulating the right to vote. These include General Comment No. 25 (The right to participate in public affairs, voting rights and the right of equal access to public service) issued by the Office of the United Nations High Commissioner for Human Rights in 1996 and the Code of Good Practice in Electoral Matters drafted by the Venice Commission (2002).

Concerning regional human rights instruments, these three documents are worth a cursory look. Article 13 of the African Charter on Human and Peoples’ Rights (1981) stipulates that ‘every citizen should have the right to participate freely in the government of his country, either directly or through freely chosen representatives, in accordance with the provisions of the law’.

However, it makes no explicit reference either to free elections or to voting rights. According to Article 23 of the American Convention on Human Rights (1969),

‘Every citizen shall enjoy the following rights and opportunities: [...] b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters’.

Finally, Article 24(3) of the Arab Charter on Human Rights (first version: 1994; updated version: 2004) reads as follows: ‘Every citizen has the right to stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will’.

159 Rosas, 2021, p. 1757.

160 See e.g. Treaty on the Functioning of the European Union, Art. 20(2)(b).

A brief comparison of the ECHR with the other documents mentioned above reveals that the ECHR is similar to the UDHR and the Copenhagen Declaration in that it places less emphasis on individual rights and more on obligations for States Parties.

## 5. Summary

As described above, P1-3 has been drafted in a “parsimonious” manner, thus the provision on the right to free elections, from a certain aspect, says less than the relevant provisions of the ICCPR or even of the UDHR. For example, the right to vote and the right to stand for election are not set out explicitly (unlike the ICCPR), and neither the universality nor the equality of suffrage are enshrined in P1-3 (unlike the UDHR). The “difficult birth” of Article 3 and its “minimalist approach” can be explained by the fact that there was a significant divergence of opinion among the Contracting States regarding the content and scope of the provision.

Not independent of this, the Commission initially adopted a dismissive stance regarding complaints based on P1-3, claiming that an individual’s right to vote is not guaranteed by the provision in question. In this respect, *Mathieu-Mohin and Clerfayt v. Belgium* (1987) was a breakthrough case, as in its judgment the Court explicitly approved the shift that had evolved in the previous decades:

‘From the idea of an “institutional” right to the holding of free elections, the Commission has moved to the concept of “universal suffrage” and then, as a consequence, to the concept of subjective rights of participation – the “right to vote” and the “right to stand for election to the legislature” [references omitted].<sup>161</sup>

Harris and his colleagues concluded in 2009 that ‘Strasbourg jurisprudence is much richer than it was just a few years ago’.<sup>162</sup> Indeed, in recent decades, a number of landmark judgments have had a significant impact on a relatively wide range of citizens and have compelled Member States to amend their legal frameworks (e.g. *Hirst v. UK [No 2]*, *Zdanoka v. Latvia* or *Alajos Kiss v. Hungary*).

Nevertheless, there is no doubt that the court will have to interpret and apply P1-3 very frequently. The rate of judgments affecting the right to free elections hovers around 1%, which means, as Bodnár states, ‘Strasbourg is still not the typical forum for voters and political parties when seeking remedies for violations of their right to free elections’.<sup>163</sup> Notably, during the period between 1959 and 2020, the Court

161 *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment 2 March 1987, para. 51.

162 Harris et al., 2009, p. 711.

163 Bodnár, 2017, p. 53.

identified a total of 31,418 instances of noncompliance with the provisions set forth in the Convention. Of these instances, only 102 cases pertained to P1-3, which corresponds to approximately 0.3% of the total number of identified violations.<sup>164</sup>

If we want to assess the case-law of the Court, it should be noted at the outset that the court's interpretation differed depending on whether the "active" or "passive" aspect of the right to vote was at stake in the case.<sup>165</sup> With some simplification, we can conclude that the Court takes the most activist approach in cases relating to the right to vote ("active" aspect). This was mainly reflected in the fact that the case-law has continued to develop the requirement of universal suffrage, which is, as the Court's Guide on P1-3 notes, 'now the benchmark principle'.<sup>166</sup> The Court has sought to broaden the scope of the universality of the right to vote, in particular, to facilitate the right to vote for disabled people (often under guardianship) and prisoners. Of course, it is not that these two groups of people cannot be excluded from the right to vote but that a blanket ban is not in conformity with the Convention.

Regarding the right to stand for election ("passive" aspect), the Court has been yet more reserved, giving the Contracting States a broader margin of appreciation. The Court approved that the right to stand for election to the legislature could be subject to stricter requirements than the right to vote. Accordingly, as ruled in *Ādamsons v. Latvia*, the Court is 'even more cautious' in its assessment of restrictions imposed on the right to vote: the assessment is 'essentially limited to verifying the absence of arbitrariness in the domestic procedures leading to the deprivation of an individual of the right to stand for election'.<sup>167</sup> In summary, the Court seeks to respect the marked diversity of state laws governing candidature and the qualifications of representatives, given the politically more sensitive nature of passive electoral rights.<sup>168</sup> For these reasons, the Contracting States enjoy even wider leeway regarding regulations governing the conduct of elections and the electoral system itself. Whether the subject of the complaint is the mechanism of the electoral system, the electoral threshold, the electoral deposit, or supporting signatures, the Court has been yet more reserved.

As the chapter has shown, the court must protect the rights of individuals vis-à-vis states without interfering in the electoral law of the states to such an extent that it could be interpreted as a violation of sovereignty. Although some scholars criticise the way the Court interprets and applies P1-3,<sup>169</sup> others conclude that 'there is still a huge potential hidden behind the brief wording of P1-3',<sup>170</sup> and urge a more activist

164 For statistics from 1959 to 2020, see European Court of Human Rights, 2021. Notably, the former communist states of Central and Eastern Europe are slightly overrepresented among the Court's violation judgments regarding P1-3. Azerbaijan is most often in breach of P1-3 (25 judgments), followed by, rather surprisingly, Italy (17).

165 Bodnár, 2017, p. 57.

166 European Court of Human Rights, 2024, p. 6.

167 *Ādamsons v. Latvia*, Application no. 3669/03, Judgment 1 December 2008, para. 111.

168 Harris et al., 2009, p. 715.

169 See e.g. Zysset, 2019.

170 Golubok, 2009, p. 390.

approach concerning free elections,<sup>171</sup> the Court has undeniably played a pivotal role in defending the right to free elections and, as a consequence, safeguarding Europe's electoral heritage over the past decades.

| 171 Bodnár, 2017. |

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