



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 18 November 2004

Study no. 306 / 2004

Restricted
CDL-EL(2004)022
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT REPORT

**ON THE ABOLITION OF RESTRICTIONS
ON THE RIGHT TO VOTE
IN GENERAL ELECTIONS**

by

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I. Introduction

The questions raised in the document of the Parliamentary Assembly on which this report is based (AS/Jur (2004) 16 of 7 June 2004) are closely connected with the core elements of democracy and particularly of the electoral system. They touch as well upon some of the constitutive characteristic of contemporary politics, organised primarily in nation-states - integrated to a greater or lesser extent in various international organisations. At the same time, they stimulate relevant debate about the need to accommodate the existing political organisations and principles to the overall societal changes.

The right to vote is one of the basic pre-conditions for preserving other fundamental civil and political rights, but at the same time it is one of the most significant characteristics of citizenship and, in that way, is closely linked to the principle of state sovereignty. Both these dimensions are sources of various legitimate or illegitimate restrictions of the right to vote.

The acceptance of the principles of universality, equality, freedom and secret and direct elections as building blocks of the European electoral heritage goes in parallel with the recognition that the right to vote is, nonetheless, connected to certain requirements. These requirements cannot be fulfilled by all human beings. As a result, the right to vote is subject to certain restrictions imposed by the states. On such grounds, restrictions based on age, citizenship and residence, criminal record and mental illnesses are commonly found in most, if not all, democratic countries. Restrictions are introduced to both dimensions of the voting right: the active dimension (the right to vote) and the passive dimension (the right to be voted). Yet, there are relevant differences between the countries.

In this respect, the present report, responding to the request of the Parliamentary Assembly, addresses questions with regard to the restrictions of the right to vote on the basis of age, citizenship or permanent residence, a criminal record and mental illnesses. Yet, some of these questions are not directly open for legal argumentation. They require previous sociological, philosophical and cultural debate and discourse for which other platforms within the Council of Europe might contribute as well.

II. Voting age restrictions

Two questions are raised in connection to the present practices to restrict the right to vote on basis of age. The first one is about the minimum age requirement which young people have to meet in order to have a right to vote. The second question is about the differences between the minimum age for active and for passive voting rights.

In connection to the first question, it seems commonly accepted in all countries that there should be a certain age of "political majority" at which young people can be expected to cast their vote. The answer to this question is based on the definition of the maturity (political maturity) and that might differ on cultural grounds. Yet, the proposition that this minimum age shall not be higher than the age at which young people are conscripted into the army (18) has strong arguments in its favour, political as well as legal. The international human rights instruments clearly provide that a person obtains political rights at age of 18. The UN Convention on the Rights of the Child¹ in its PART I, Article 1 prescribe that "For the purposes of the present Convention, a

¹ *Convention of the Rights of the Child, entry into force 2 September 1990, in accordance with Article 49.*

child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

Based on this, we are of an opinion that the minimum age for attaining voting rights should not be more than 18. The answer to the follow up question here, as to when exactly the person is considered to fulfil this criterion (in the year when elections are organised or on a day when elections are held), remains open. There is no precise rule about this, and the approach is different. Yet, the states should assure that at least all persons who fulfil the minimum age requirement on Election Day can vote from that day on.

In connection to the second question of the present differences between the minimum age for active and for passive voting rights, a comparative analysis shows that among the European states there are different minimum age conditions. The most commonly used argument is that participation in the decision-making process requires additional knowledge and life experience.

In this regard, we are of an opinion that the Venice Commission has already made clear its position that "the right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25..."

III. Citizenship and residency requirement

The right or the privilege of voting is most frequently interpreted and connected to the rights of citizenship or nationality. From this perspective, it is a duty and privilege of persons owing loyalty to a state or nation. On that basis, it is most common that constitutions and other legislation stipulate that in principle voting rights are enjoyed by people possessing state citizenship, or nationality. At the same time, there is a strong movement and process of enfranchisement of foreign residents. The process has already resulted in political and legal achievements - nationally and internationally.

Resolution A/RES/46/137 of the General Assembly (1991)² prescribes that "... the right to participate in a political system based on common and equal citizenship and universal franchise is essential for the exercise of the principle of periodic and genuine elections..."

At the level of the EU, the Maastricht Treaty (Article 8) established European citizenship for all citizens of the Union: On that basis Article 8.b provides that "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 elections in the Member State in which he resides, under the same conditions as nationals of that State". As a result, all citizens of the Union are entitled to vote and to stand for election for the European Parliament and in local elections in any of the Member States. The Directive 94/80/EC for the rights related to local elections grants all citizens of the Union a right to elect and to stand for election in municipal elections in the Member States where they reside, without this right being connected to the residence in the state of their origin.

In the Council of Europe, an important development also occurred since the adoption of Recommendation 1082 (1988). In 1992 the European Convention on the Participation of Foreigners in Public Life at Local Level was opened for signature. Although the number of states that have ratified the Convention is rather small, its influence on national legislation is widely recognised.

² *United Nations General Assembly 17 December 1991 A/RES/46/137.*

In addition to this, a number of other international documents are enacted with the idea of establishing participation of foreign residents in public life.³ Recommendation 115 (2002)⁴ on the participation of foreign residents in local public life: consultative bodies is of particular interest for our study here. In item 8 of this Recommendation it is stipulated that "... foreign residents who are lastingly and legally settled in the territory of a state should be granted rights, including political rights, in return for their acceptance of duties toward the host community." In item 20, the Resolution "Invites the EU to follow the non-discriminatory approach recommended by the Council of Europe and its conventions, and accordingly to re-examine its current policies on the participation of foreign residents in public life at local level so as to secure residence-based citizenship for all foreigners whatever their country of origin and grant them the same political rights on the basis of common criteria of residence."

IV. Citizenship and residency as requirement for the right to vote

The Council of Europe and, particularly, the CRLA and the Parliamentary Assembly have devoted great attention to the issue of integration of foreigners in Council of Europe member states, especially in the area of their participation in decision making. In the past ten to twelve years, special attention was paid on the participation of non-citizens in local elections.

As a result of this approach, in some Council of Europe member states, foreign residents are allowed to vote. For example, according to the Article 70 para. 2 of the Constitution of Hungary "Persons residing on the territory of the Republic of Hungary as immigrants who do not have Hungarian citizenship also have the right to vote in local government elections of representatives and the Mayor, as well as the right to participate in local referenda and popular initiatives, in accordance with the regulations of a separate law, provided that they are present in the country on the day of the election or referendum."

The Constitution of the Portuguese Republic in its Article 15 prescribes that if "... there is reciprocity, the law may confer upon aliens who reside in the national territory the right to vote for, and to stand for election as, members of the organs of local authorities. And provided that there is reciprocity, the law may also confer upon citizens of the Member States of the European Union, who reside in Portugal, the right to vote for, and to stand for election as, Members of the European Parliament."

The Elections Act of Netherlands in Section B 3 allows that "1. Persons who are residents of the municipality on nomination day and who have attained the age of eighteen years on polling day shall elect members of municipal councils. 2. To be entitled to vote, persons who are not nationals of a European Union member state should, on nomination day, meet the following requirements: (a) They are permitted to reside in the Netherlands pursuant to section 9 or 10 of the Aliens Act or pursuant to a headquarters agreement between an international organisation and the State of the Netherlands, and (b) They have been resident in the Netherlands for an

³ Resolution 92(2000) adopted by CLRAE, the city of Strasbourg and its Consultative Council for Foreigners on 5 and 6 November 1999; Recommendation 1500 (2001) on participation of immigrants and foreign residents in political life of the Council of Europe member states, adopted by the Parliamentary Assembly and Recommendation Rec (2001) 19 of the Committee of the Ministers to member states on the participation of citizens in local public life.

⁴ Approved by the Chamber of Local Authorities on 5 June 2002 and adopted by the Standing Committee of the CLRAE on 6 June 2002.

uninterrupted period of at least five years immediately prior to nomination day and have residence rights as referred to in (a) above or residence rights pursuant to section 9a of the Aliens Act...”

In general, in many countries people who are legally residing outside of their own country as foreigners (non-citizens) are given the right to vote in local elections. This right is made conditional on a certain period of residence in the host country (community). The argumentation supporting this practice is based on number of complementary reasons such as integrationist, representative (legally residing non-national pay taxes) and human rights reasons, in particular, the right of non-citizens to express their opinion.

In our view, residency should be a criterion for allowing non-citizens the right to vote not only in local elections, but in regional, national and presidential elections as well. Equal treatment should be established for all residents (citizens and non-citizens) without differences in accordance with the number of foreign residents in proportion to the number of citizens. The reasoning for this is in that reality, most of those who are permanently residing as foreigners are more familiar or have stronger interest in the political life of the host state than in their state of origin.

V. Citizenship and residency as requirement for the right to be voted

In most of the Council of Europe member states, citizenship is a condition for candidacy (passive electoral right). This approach is quite understandable bearing in mind the competencies of local self-government. The residents of the municipality cannot be represented by a person who is not familiar with the circumstances in the community. Therefore, electoral legislation, especially on local elections, quite justifiably prescribes citizenship as a prior condition for exercising the right to be voted. This practice is in accordance with the Convention on the Participation of Foreigners in Public Life at Local Level.

The Convention in its Chapter C - Right to vote in local authority elections, in Article 6 stipulates that “Each Party undertakes, subject to the provisions of Article 9, paragraph 1, 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. However, a Contracting State may declare, when depositing its instrument of ratification, acceptance, approval or accession that it intends to confine the application of paragraph 1 to the right to vote only.”

Article 7 of this Convention prescribes that “Each Party may, either unilaterally or by bilateral or multilateral agreement, stipulate that the residence requirements laid down in Article 6 are satisfied by a shorter period of residence.”

VI. Expatriates and right to vote in their home countries

Most of the citizens in European countries who are temporarily working or staying abroad are registered in the Voters' List in their country of origin. Those persons are mainly registered according to their last place of residence prior to the departure abroad. This clearly indicates the determination of the legislators to use residence as a basis for allocation of the citizens (who have a right to vote) in the Voters' List. In most countries, persons who have an active suffrage can exercise it, if they have or had a last residence on the territory of their home country prior to

their departure abroad, regardless of their place of residence. The method of registration of the new residence and the cancellation of the old residence or temporary residence, as well as the registration of the change of the address, is regulated on the basis of different legislation, which varies from country to country.

For example, in Article 121 paragraph 2 of the Constitution of the Portuguese Republic prescribes that “The law shall regulate the exercise of the right to vote held by Portuguese citizens resident abroad, taking account of the existence of effective links with the national community.”

Article 8 of the Electoral Code of the Republic of Albania establishes that “Voters who live in another state have the right to vote only on the territory of the Republic of Albania at the place where they are registered in the registry of civil status, provided they are registered in the National Registry of Voters, in accordance with the procedures in this Code, and possess a voter card.”

One question arises from the aforesaid facts: why do most of the states decide to follow the concept that links the right of a citizen to vote with residence? The methodology of voter registration determines the distribution of the polling stations, and accordingly results in the structure of the layout of the electoral districts. But, citizens who are abroad on Election Day in the same Council of Europe member states may exercise their right to vote in the diplomatic and consular offices or by mail. In the same countries, they would have to return to their country and cast their vote in the polling station located in the municipality where their last residence was before they left the country. They are not always and not all of them are in a position to do so.

In our view, the country of origin should find a formula to encompass this category of voters who reside abroad and want to exercise their right to vote, but cannot come to their country on Election Day. It is up to the citizen to decide whether or not he/she wishes to exercise this right. The same approach should be applied to the legal requirement for passive suffrage. Such a legislative provision will mean that every citizen who meets the general conditions can run as a candidate for the national elections and does not have to be in the state. The only legal connection with the state, which a citizen who wants to run for a candidate has to meet, is to have citizenship. This approach is particularly important for countries with a large population that lives abroad, but who maintain relations with state (although the residences of these people and their successors are abroad, they can run as Members of Parliament).

VII. Persons convicted of criminal offences or sentenced to prison

In a number of states, persons sentenced to prison or convicted of criminal offences are allowed to vote without restrictions. Yet, in some states, prisoners are not allowed to vote or are allowed to vote but not to be elected.

The Armenian Constitution in Article 27 prescribes that “...Citizens found to be incompetent by a court ruling or duly convicted of a crime and serving a sentence may not vote or be elected.”

The Constitution of the Republic of Estonia in Article 58 stipulates that “The participation in elections of Estonian citizens who have been convicted by a court of law and who are serving a sentence in a place of detention may be restricted by law.”

In Article 70 paragraph 3 of the Constitution of the Republic of Hungary “The right to vote shall not be granted ... to persons who are subject to a final legal judgment forbidding them to participate in public affairs, or to persons who are incarcerated on the basis of a final legal judgment or who are under compulsory institutional care on the basis of a final legal judgment rendered in criminal proceedings.”

The Constitution of the Republic of Poland in Article 62 paragraph 2 prescribes that “Persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum or a right to vote.”

The Romanian Constitution in Article 34 paragraph 2 states that “... as well as persons disenfranchised by a final decision of the court cannot vote.”⁵

The Danish Parliamentary Election Act in its Part 1 paragraph 4 regulates “4.-(1) Eligibility for the Folketing is accorded to anyone holding the right to vote according to section 1, cf. section 2, unless punished for an act, which in the public opinion renders him unworthy of being a Member of the Folketing, cf. the Act of the Constitution sections 30 and 33. “...”(2) A person can nevertheless always stand as candidate in an election regardless of objections in respect of non-eligibility.”

In our view, prisoners should be allowed to exercise their right to vote without restrictions. Criminal penalty with prison does not mean deprivation of one of the most important political rights - the right to vote. Provisions may be made for depriving individuals of the right to vote only in cases where the criminal conviction for a serious offence is a result of mental incapacity.

The Venice Commission in its Code of Good Practice has made the provisions for depriving individuals from their right to vote conditional on four cumulative conditions: to be provided by law, to respect the principle of proportionality, to be based on mental incapacity or a criminal conviction for a serious offence, and to be imposed by express decision of a court of law.⁶

VIII. Persons serving military service

Persons serving military service, as well as persons in the police forces, have a specific position in some societies. As a result, in some countries they are deprived of their right to vote and to be elected. On the other side, in many countries where this is not the case, the voting right of those persons is regulated with additional but not necessarily depriving norms.

According to Article 2 paragraph 6 of the Electoral Code of Armenia, “Citizens who are military servicemen performing their military service or participating in military training cannot participate in elections to local self-governing bodies and National Assembly elections ...” Article 10 of this Law even states that “... The military servicemen who are performing their military service or participating in the military training and who have not been taken off the records prior to being drafted for military service, cannot be included in the voters lists during the elections to local self-governing bodies and National Assembly elections ...”

⁵ *Similar conditions are prescribed in the legislations of Azerbaijan, Bulgaria, Cyprus, Georgia, Luxembourg, Moldova, UK and the Russian Federation.*

⁶ *CDL-AD(2002)023rev “Code of Good Practice in Electoral Matters” adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002).*

The Law on Basic Provisions on Elections and Voter Registers of Turkey, in Article 7 establishes that "... Shall not be eligible for voting 1. Privates, corporals or sergeants in active service in Turkish Armed Forces (those on leave due to any cause whatsoever shall strictly be subject to this provision), 2. Military school students ..."

The Electoral Code of Moldova in Article 13 paragraph 2 lays down that "The following cannot be elected: a) military personnel in active service; b) individuals who are incompatible under current laws, until the expiration of their incompatibilities; c) individuals who do not meet the requirements of paragraph (1) of this Article."

The argumentation behind such deprivations and restrictions is based on the specific historical experiences with the civil-military relations. Yet, the need for democratic control over the military shall not be used as an excuse to deprive persons serving military service of their voting rights. They shall also exercise full citizenship rights.

IX. Persons with mental incapacity

Participation in the democratic life of a society presupposes certain mental capacities. On this ground, limited restrictions are introduced to the voting rights of persons with mental incapacity. Such restrictions are common to most of the Council of Europe countries.

Article 45 paragraph 2 of the Constitution of Albania prescribes that "Citizens who have been declared mentally incompetent by a final court decision do not have the right to elect."

The Armenian Electoral Code Article 2 paragraph 5 regulates that "Citizens who have been recognised as incapacitated by a court ruling ... cannot elect and be elected." The Constitution of the Republic of Estonia in Article 57 paragraph 2 prescribes that "An Estonian citizen who has been declared mentally incompetent by a court of law shall not have the right to vote."

The Act on Election of Representatives to the Croatian Parliament in Article 4 regulates that "The representatives in Parliament are being elected on the basis of direct universal and equal suffrage by all the Croatian citizens ..., except those who are divested of business capacity by a valid legally court sentence ..."

The Constitution of the Republic of Poland in Article 62 paragraph 2 states that "Persons who, by a final judgement of a court, have been declared to be in a state of legal incapacity shall have no right to participate in a referendum nor a right to vote." The Constitution of Romania in Article 34 prescribes that "Mentally deficient or alienated, laid under interdiction, as well as persons disenfranchised by a final decision of the court cannot vote".

The Federal Law on the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation in Article 4 paragraph 6 states that "A citizen of the Russian Federation found incapable by a court or kept in places of confinement under a court sentence shall have no right to elect or be elected".

Similar but somewhat specific regulations are found in other countries. The Federal Electoral Law of Germany in Article 13 paragraph 3 introduces such restrictions on citizens who are "accommodated in a psychiatric hospital under an order pursuant to Article 63 of the Penal Code in conjunction with Article 20 of the Penal Code." The Hungarian Constitution in Article 70 paragraph 3 regulates that "The right to vote shall not be granted to persons who are under

guardianship limiting or excluding their capacity, to persons who are subject to a final legal judgement forbidding them to participate in public affairs, nor to persons who are incarcerated on the basis of a final legal judgment or who are under compulsory institutional care on the basis of a final legal judgment rendered in criminal proceedings.” The Law on Basic Provisions on Elections and Voter Registers of Turkey, in Article 8 prescribes that persons who have been placed under the care of a guardian and who are barred from public service shall not be entitled to vote.

The legal basis for such restrictions is the possibility of losing the right to vote. Such provisions must clearly be defined in law. The deprivation of the right to vote and to be elected, as a result of mental incapacity, may only be imposed by a decision of a court of law.

X. National minorities and dual nationals

Article 15 of the Council of Europe’s Framework Convention for Protection of National Minorities states that: “Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.”

The affirmative action in the sphere of electoral rules is one of the ways to establish effective participation of persons belonging to national minorities. The Venice Commissions' Code of Good Practice in Electoral Matters provides some basic principles for developing electoral affirmative action rules in accordance with Europe's electoral heritage, such as: Parties representing national minorities, guaranteed reserved seats for members of nationals, electoral thresholds should not affect the chances of national minorities to be represented, electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.

Also, the possession of dual or multiple nationality should be no obstacle for exercising voting rights in both countries.⁷ This approach is completely consistent with Article 17, para. 1 of the European Convention on Nationality, which stipulates that those citizens enjoy the same rights and duties on the territory of the country where they live as the other citizens in that country.

XI. CONCLUSIONS

1. In most of the counties examined the minimum age requirement is established at the age of 18, while minimum age requirement for the right to be voted varies. With regard to this, we emphasise the Venice Commission recommendation that "the right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25..."⁸

2. There is a trend in the counties compared that residency prevails over nationality as a precondition for the right to vote. The counties of the Council of Europe should follow this approach at least for local elections, and under the condition of a certain minimum period of

⁷ *Election Law of Bosnia and Herzegovina in its Article 1.5. States that “A citizen of Bosnia and Herzegovina who holds dual citizenship pursuant to Article 1(7)(d) of the Constitution, shall have the right to register and to vote, only if Bosnia and Herzegovina is the country of his or her permanent residence.*

⁸ *CDL-AD(2002)023rev “Code of Good Practice in Electoral Matters” adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002).*

residence. With regard to the right to be voted, the same approach is applicable with a requirement of a longer period of minimum residence.

3. In most of the countries compared, persons convicted of criminal offences are allowed to enjoy the right to vote (with or without restrictions). The number of countries where prisoners are allowed the right to be elected is small. On the basis of the existing court practice, it can be concluded that restrictions on the right to vote on grounds of criminal conviction are difficult to defend from a human rights perspective. The restrictions on the right to be elected have serious argumentation.

4. In some countries, the voting rights of persons serving military service as well as persons in the police forces are subject to restrictions - are not allowed to vote or to be elected. This practice is against the more common approach that avoids the restriction of the voting right of those persons while applying certain additional regulations directed at enabling them to participate in elections without any restrictions.

5. The restrictions on the voting rights on grounds of mental incapacity are the most common ones in countries compared. This criterion of deprivation of the right to vote and to be elected is accepted by all member states of Council of Europe. Yet, these restrictions are legitimate when imposed by a decision of a court of law.

In general, the analysis of the questioned restrictions on the voting rights in the member states of the Council of Europe shows that the restrictions are most often not in contradiction with the principles of human rights and the practices of citizenship. The voting rights are not absolute citizenship rights and, as such, the restrictions could be justified as far as they are introduced on a non-discriminatory base. The real question is not whether the present restrictions on the voting rights on grounds of minimum age, residence and nationality, mental incapacity, criminal conviction etc. are legal or legitimate, but whether there is a need for enabling persons with these characteristics to participate in the democratic decision-making process. If the normative orientation is to broaden the electoral body, then the limits on imposing such restrictions shall be stricter and closer to universal.