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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

1. The Venice Commission has been asked by the Parliamentary Assembly to give an opinion on the problem concerning “Restrictions to the right to vote in general elections”.

Following these terms of reference, the opinion should envisage (primarily) the (active) right to vote and not the similar, but different problem of the (positive) right to be elected, even if the second one, following the interpretation given by the Court, is also embodied in Article 3 Protocol No. 1.

The purpose of the report is to examine the issue in question in the light of the European Convention on Human Rights.

2. Let me state at the outset that member states of the Council of Europe are obliged to respect the principles of parliamentary democracy, of the rule of law, of the protection of human rights and of minorities (Article 3) and to abide with the conventions ratified by them, as well as to honour the commitments accepted when becoming members of the Council of Europe. Furthermore, they are obliged to collaborate seriously and effectively in the realisation of the aims of the Council of Europe as defined in Chapter I of the Statute (Article 3 of the Statute).

Whereas the fulfilment of the first series of obligations, which have a more or less legal connotation, is relatively clear, the bearing of the last obligation is in its consequences rather vague. Of course the member states have to pursue a policy which is in accordance with the aims of the Council of Europe, but there is no legal obligation to follow the ideas emerging from the various, legally non-binding instruments (resolutions, recommendations) of the Council of Europe’s institutions, including the Code of Good Practice in Electoral Matters (Venice Commission’s document of July 2003). The same is true concerning the 1992 Convention on the participation of foreigners in public life at local level, as far as it has not been ratified by a given state.

However, even as regards to the first series of obligations, member states enjoy a large margin of appreciation in the concretisation of the principles set forth in Chapter I of the Statute. This is particularly true concerning the principle of parliamentary democracy. There are various ways of implementing this principle.

Only with respect to the protection of human rights, of minority rights and the compliance with the commitments assumed when joining the Council of Europe, the applicable legal instruments describe more or less clearly the obligations of the states concerned.

For the purpose of the present report, the European Convention on Human Rights is of primary importance. The Framework Convention and the existing bilateral instruments have to be considered too, as far as they contain provisions or rules regarding the right to vote. The same is true as regards the specific obligations assumed by member states when joining the Council of Europe (e.g. by Liechtenstein concerning the right of vote for women).

II. Reference to the right to vote in the Convention and in Protocol No. 1

1. Article 3 of Protocol No. 1 (1952) states:

Right to free elections

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.

Article 14 of the Convention may also play a role.

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. In the first decades

a) The case-law of the Court on that issue was not very extensive. To a wide extent the relevant Court judgments were related to minority rights, the right to be elected, the right to freedom of expression and of association (Articles 10 and 11), but they seldom concerned restrictions on the right to vote. Only more recently has the Court developed a considerable case-law on electoral matters, including the issue of restrictions on the right to vote.

Mathieu-Mohin and Clerfayt / B 2.3.1987, A/113

The case had an undisputed minority rights background. The main statements of the Court are the following:

Article 3 of Protocol No. 1 embodies a characteristic principle of an effective political democracy and is accordingly of capital importance in the Convention system. Like other substantive clauses in the Convention and Protocols, it does not give rise merely to inter-State obligations, it entails individual rights to vote and to stand for election.

Room exists for implied limitations: Contracting States have a wide margin of appreciation, but the said rights must not be so curtailed as to impair their very essence and deprive them of their effectiveness; there is an obligation to pursue a legitimate aim and not to use disproportionate means. "Legislature" is to be interpreted in the light of constitutional arrangements in the State concerned and does not necessarily refer only to the national parliament. In the instant case, the Flemish Council has competence and powers wide enough to make it a constituent part of the "legislature".

Choice of electoral system: Contracting States have a wide margin of appreciation. The objectives are sometimes scarcely compatible with each other, but there is a duty not only to ensure free expression but also to comply with the principle of equality of treatment of all citizens, although not all votes need necessarily have equal weight as regards the outcome of the election nor all candidates necessarily have equal chances of victory.

Contrary to the Commission, the Court, by majority, found no violation of Article 3 Protocol No. 1.

Ahmet Sadik/GR 15.11.1996 Rep 1996, 1639

The applicant was a member of the Greek Parliament, as a candidate of a party representing a part of the Muslim population of Western Thrace. In his electoral campaign, he used terms (“Turco-Muslim electorate”, “Turcs of Western Thrace”) which were considered offensive by the Greek Courts and he was condemned to prison. His candidacy for a further election was annulled “for technical reasons”.

In his application, he complained i.a. of a violation of his rights under Articles 9, 10, 11 and 14 of the Convention and of Article 3 Protocol No. 1; the last complaint was declared inadmissible by the Commission, although it unanimously found a violation of Article 10. The Court declared the whole application inadmissible because the domestic remedies had not been exhausted.

In conclusion, neither in the report of the Commission nor in the judgment of the Court were there any considerations concerning the right to vote or to be elected. The judgment was manifestly not open-minded vis-à-vis the protection of minorities.

Gitonas and others/GR 1.7.1997 Rep 1997, 1217

The election of five members of parliament had been annulled pursuant to Article 56 of the Greek Constitution because for more than three months during the three years preceding the elections, the applicants had held public offices disqualifying them from standing for elections.

The Court stated (in summary):

States are given considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification – the possible choice on the subject is diverse.

Disqualification pursuant to Article 56 of the Greek Constitution served a dual purpose that was essential for the proper functioning and upholding of democratic regimes, namely, ensuring that candidates of different political persuasions enjoyed equal means of influence and protecting electorate from pressure from holders of public office.

The system introduced by Article 56 was somewhat complex but could not be described as incoherent, much less arbitrary.

Therefore, contrary to the majority of the Commission, the Court found no violation of Article 3 of Protocol No. 1.

Pierre Bloch/F 21.10.1997 Rep 1997, 2206

The applicant was elected as a member of parliament in 1993. After a revision of the campaign accounts, the French authorities found that the maximum permitted amounts of election expenditures had been exceeded and they imposed on him as “penalties” the forfeiture of his seat in parliament, his disqualification from standing for (further) elections for a period of one

year, an obligation to pay the Treasury a sum equal to the amount of the excess and the imposition of a fine.

The applicant relied only on procedural questions (Article 6 para.1).

The Court found that there was no criminal charge; therefore, Article 6 para. 1 was not applicable.

No reference to the right to vote or to be elected.

Ahmed and others/GB 2.9.1998 Rep 1998, 2356

The case concerned restrictions on the involvement of certain categories of senior local government officers in certain types of political activities, including the right to stand for elections.

The applicants complained that the relevant regulations constituted a violation of their rights under Articles 10 and 11 of the Convention and of Article 3 Protocol No. 1.

The Court found no violation.

As to the complaint concerning Article 3 Protocol No. 1, the Court stated (in summary):

The aim of the regulations was to secure political impartiality of senior officers. This aim legitimately restricted the applicants' rights to stand for elections. The restrictions in question only applied for as long the applicants occupied certain posts. As important as the rights under Article 3 Protocol No. 1 are, they are not absolute, as Article 3 recognises that, without setting out in express terms - let alone defining them - there is room for implied limitations. In their internal legal rules, the states may make the right to vote and to stand for elections subject to conditions which are not in principal precluded under Article 3.

Matthews/GB 18.2.1999, Rep 1999, 252

Following EU and British legislation, the applicant, resident in Gibraltar, was excluded from the European Parliamentary elections in 1994.

The Court found that the Convention had been extended to Gibraltar and Protocol 3 was applicable there: elections for the European Parliament were included in Article 3 of Protocol No. 1. There was no indication of "local requirements" (within the meaning of Article 56 § 3 of the Convention) which would limit the application of the Convention.

Therefore, contrary to the Commission, the majority of the Court (Grand Chamber) found a violation of Article 3 Protocol No. 1.

Labita/I 6.4.2000, Rep 2000

Under Italian law, persons on whom preventive measures have been imposed by a court order or by an administrative decision are disenfranchised, with the consequence that the names of the persons concerned are to be removed from the electoral register.

The applicant, even after having been acquitted of the charge of being a member of a Mafia-type-organisation, was subject to a measure of the kind described.

In the Government's pleadings, the measures in question were legitimate because the persons concerned represented a danger to society or were suspected of belonging to the Mafia.

The Court recognised that temporary suspensions of the voting rights of persons against whom there was evidence of being Mafiosi pursued a legitimate aim. But, as in the particular case, the applicant had been acquitted, the measures in question were not proportionate.

In conclusion, the Court unanimously found a violation of Article 3 Protocol No. 1 (the same opinion expressed by the majority of the Commission).

Refah Partisi (The Welfare Party) and others/TR 13.12.2003, Rep 2003, Vol 2

The applicants claimed that the dissolution of the party had the consequence of the party leaders being prevented from participation in elections.

The Court found that the measures complained of by the applicants were only secondary effects of the party's dissolution, which, the court found, did not breach Article 11. Accordingly, there was no reason to examine separately the complaints under Article 3 Protocol No. 1.

In conclusion, there were no findings concerning the right to vote or to be elected.

Zadenoka/LV 17.6.2004 Rep 2004 Vol V

Because of her previous political activities (leading member of the Communist party which was considered a danger to state security), the applicant was permanently prevented from participating in national elections.

The Court found that even considering that the state enjoys a large margin of appreciation in the establishment of the parliamentary system, including the rules related to the criteria of ineligibility, the measure in question was not proportionate.

Therefore, a majority of the Court found a violation of Article 3 Protocol No. 1.

Podkolzina/LV 9.4.2002 Rep 2002

The applicant has been struck from the list of candidates for parliamentary elections because of her (allegedly) insufficient command of the Latvian language, it being the sole working language of Parliament.

The Court considered that the relevant legislation and rules requiring a sufficient command of the official language pursued a legitimate aim. However, the procedure followed by the competent bodies to certify linguistic competence lacked a fundamental guarantee of objectivity and fairness.

Therefore, the decision to strike the applicant from the list of candidates could not be considered necessary. In conclusion, the Court unanimously found a violation of Article 3 Protocol 1.

Hirst/GB (No. 2) 30.6.2004, Rep 2004

The applicant was sentenced to a term of discretionary life imprisonment because of his mental disorder, after having pleaded guilty to a charge of manslaughter and is currently detained in prison.

Under British legislation, he is barred from voting in parliamentary or local elections.

The Court stated that while Article 3 of Protocol No. 1 is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people, the Court's case-law establishes that it guarantees individual rights, including the right to vote and to stand for elections. Although those rights are central to democracy and the rule of law, they are not absolute and may be subject to limitations. The Contracting States have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness, that they are imposed in pursuit of a legitimate aim, and that the means employed are not disproportionate.

The Court referred to another recent case (H.D.U./I 28.1.2002). There, it rejected complaints of a court-imposed bar on voting under Article 3 of Protocol No. 1 where the applicant had been convicted of tax fraud offences and sentenced to three years' imprisonment, with the additional penalty of prohibition of exercising public functions for two years.

The Court made an extensive examination of the problem of restrictions of the right to vote and noted, concerning the margin of appreciation, that divergences exist in the law and practice within Contracting States. At one end of the spectrum, there are some 18 countries in which no restrictions are imposed on prisoners' rights to vote; in some 13 countries prisoners are not able to vote, due to operation of law or lack of enabling provisions; and between these extremes fall the remainder of Contracting States where loss of voting rights is tailored to specific offences or categories of offences or a discretion is left to the sentencing court. This lack of clear consensus underlines the importance of the margin of appreciation afforded to national legislatures in laying down conditions governing the right of franchise. However, the Court did not consider that a Contracting State may rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition.

Concerning the legitimate aim of the restrictive legislation (according to the Government's pleadings: to prevent crime and punish the offenders, to enhance civil responsibility and respect for whole of law), the Court seemed not to be convinced of the Government's arguments.

Notwithstanding its doubts as to the validity of either aim in modern times, the Court noted the varying political and penal philosophies and policies that might be invoked in the context and for the purposes of the particular case would refrain from ruling that those aims could not be regarded as legitimate, even on an abstract or symbolic plane. It left the question open as it was unnecessary to decide it in the particular case.

In general, regarding the proportionality test, the Court noted that restrictions as applied in the United Kingdom did distinguish between different reasons for detention and varying types of crime and might be regarded as less draconian than the regime applying in certain other

jurisdictions. The restrictions affected only those convicted of crimes sufficiently serious to warrant an immediate custodial sentence and did not apply to prisoners on remand, those imprisoned for failure to pay fines or those detained for contempt of Court. Furthermore, the incapacity was removed as soon as the prisoner ceased to be detained.

The Court accepted that was an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' right to vote could still be justified in modern times and, if so, how a fair balance was to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing Court should be left with an overriding discretion to deprive a convicted person of his right to vote. However, the Court observed that there was no evidence that the legislature in the United Kingdom had ever sought to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners. It could not accept that an absolute bar on voting by any serving prisoner in any circumstances fell within an acceptable margin of appreciation. The applicant in the particular case had lost his right to vote as the result of the imposition of an automatic and blanket restriction on convicted prisoners.

By unanimous vote, the Court found a violation of Article 3 Protocol No. 1.

Aziz/CYP 22.6.2004

The applicant is a member of the Turkish-Cypriot Community living in the non-occupied territory of Cyprus.

Following the applicable provisions of the Cypriot Constitution, he could not be registered in the Greek Cypriot electoral roll, even though the Constitution recognises citizens of the Republic with different ethnic origin.

The Court considered that, notwithstanding the margin of appreciation afforded to the states, they could not exclude some persons or groups of persons from participating in the political life of the country, in particular, in the choice of the legislature.

As the applicant was completely deprived of any opportunity to express his opinion in the choice of members of the parliament in the country of which he is a national and where he had always lived, the Court unanimously found a violation of Article 3 Protocol No. 1.

In the particular case, the Court also found a violation of Article 14 of the Convention, because there was a clear inequality of treatment in the enjoyment of the rights protected by the Convention, which had to be considered as a fundamental aspect of the case.

Melnychenko/UA 19.10.2004

The applicant, an Ukrainian citizen, left his country for fear of political persecution and had been living for five years in the USA. As residence, his passport indicated Kiev. His candidature for parliamentary elections in Ukraine was rejected.

The Court stated that the imposition of a residence requirement for exercising the right to vote was not, per se, unreasonable or arbitrary. As far as the right to be a candidate for elections was

concerned, even more restrictive conditions might be imposed, but, until then, the Court had never examined that requirement.

Under Ukrainian Law, a residence requirement is not absolute, and when considering the registration of a candidate, the authorities have to take into account the personal situation of the person concerned. As there was no evidence of an intention of the applicant to leave his country forever, the Court found that the refusal to register him as candidate for parliamentary elections infringed his right to stand for elections.

By a large majority, the Court found a violation of Article 3 Protocol No. 1.

b) On the other hand, there is a considerable body of case-law of the former Commission concerning electoral matters, including restrictions of the right to vote. But, generally, the applications were declared inadmissible for being manifestly ill-founded.

The following issues were addressed in the Commission's decisions:

- Persons, whether being held in custody or no longer held in custody, convicted for uncitizen-like behaviour (during World War II) may be excluded for life from the right to vote (X/NL 19.12.1974, DR 1, 87; X/B 3.12.1979, DR 18, 250).
- Leaders of racist xenophobic organisations may be excluded from the right to stand for elections (reference to Article 17 of the Convention).
- The general question, whether Article 3 of Protocol No. 1 applies to municipal elections has been left open (Glimmerveen and Hagenbeek/NL 11.10.1979, DR 18, 187).
- The possession of a second nationality may be a ground for exclusion from the right to be member of parliament (Ganchev/BG 25.11.1996, DR 87-A, 130).
Citizenship, residence and age are generally admitted criteria e.g. for restrictions of the right to vote or to be elected.
- The question whether municipal, provincial and regional bodies form a part of the "legislature" depends on the status of these bodies in the national constitutional order (Lukesch/I 21.5.1997 DR 89-A, 76).
- A four-year uninterrupted residence requirement is not in itself contrary to Article 3 Protocol No. 1 and may be legitimate (Polacco and Garofalo/I 15.9.1997, DR 90-A 5).
- It is compatible with Article 3 Protocol No. 1 to prevent someone from being member of parliament who is already a member of parliament of another state (M/GB 7.3.1984, DR 37, 129).
- Age limits in general have to be accepted (age of 40 years as a requirement for a candidate for the Senate (W, X, Y, Z/B Yb 18 1975, 236).
- A person sentenced to 18-months' imprisonment (for having refused military service as a conscientious objector) may be deprived of the right to vote for a period exceeding the length of his sentence by three years (H/NL 4.7.1983, DR 33, 242).
- The de facto deprivation of the right to vote imposed on a prisoner (convicted of serious offences and sentenced to ten years of imprisonment) does not affect his rights under Article 3 Protocol No. 1 (Holland/IRL 14.4.1998, DR 93-A, 15).
- Article 3 Protocol No. 1 is not affected by the requirement that candidates for elections register in a particular language (the official language of the state; the candidate may add a translation in that language).
(Frjske Nasjonale Partis and others/NL 12.12.1985, DR 45, 240).

III. Conclusions

1. Whereas the former Commission was rather reluctant to inquire into the various restrictions of the right to vote or to be elected provided for in the internal legal orders of member states – indeed the applications were mostly declared inadmissible for being manifestly ill-founded - since approximately five years the Court has been developing an extensive case-law on Article 3 Protocol No. 1. In this context, the Court considered Articles 10 and 11 of the Convention too, but very seldom examined the problem in question in the light of Article 14 of the Convention. Generally, the Court has found that there is no need to examine this issue separately because it constitutes only one aspect of the rights complained of under Article 3 Protocol No. 1.

Gender restrictions on the institution of family voting would clearly infringe the right of non-discrimination and/or of individual vote. Also the system of public voting would be inconsistent with the principle of “secret ballot” provided for in Article 3 Protocol No. 1.

On the other hand, the institution of a binding legal vote for women is questionable; it would hardly be compatible with the principle of “equal voting” and constitute a discrimination in the sense of Article 14 of the Convention, whereas measures in favour of a minority constitute an acceptable positive discrimination following Article 4 § 3 of the Framework Convention. But these issues have never been addressed by the Court.

In any case, Article 3 Protocol No. 1 covers implicitly the right to be elected.

The principles developed on the right to vote and the right to be elected are applicable – *mutatis mutandis* – vice versa.

“Legislature” within the meaning of Article 3 Protocol No. 1 refers not only to the national parliament; it may include regional legislative bodies too, as far as the regional parliament has some important legislative powers (Mathieu-Mohin and Clerfayt / B 1987); administrative elections seem not to be covered by Article 3 Protocol No. 1.

On the other hand, elections to the EU-Parliament are envisaged by Article 3 Protocol No. 1 (Matthews/GB, 1999).

The Court constantly emphasises that in the field of Article 3 Protocol No. 1 there is room for inherent limitations and that the states enjoy a large margin of appreciation, of course under the control of the Court. However, measures of the state must not impair the very essence of the rights protected under Article 3 Protocol No. 1.

The measures in question must pursue a legitimate aim and not be arbitrary or disproportionate. Perhaps one may deduce from the last judgments cited above (Labita / 3, 2002; Zdenoka / LV, 2004; Hirst / GB, 2004) that the Court tends to accept restrictions only if they are based on a serious ground.

The citizenship requirement for the right to vote or to be elected has never been questioned in the case-law of the Court, and the requirement of a certain period of residence has also been considered legitimate (Polacco and Garofalo / I, 1997).

However, electoral rights for immigrants not having acquired the citizenship of the host country are not deducible from the Court's case-law (here, considering administrative elections, the EU-rules are different).

Restrictions of the electoral rights for persons convicted and/or imprisoned may be legitimate, but to that end, important and serious reasons must be adduced (*Labita / I*, 2000; *Hirst / GB*, 2004). At any rate, in this respect the recent case-law of the Court is much more differentiated than the decisions of the former Commission.

The same seems to be true as regards persons detained for mental reasons.

The question of minimum age has never been addressed by the Court. It is to be expected that, on this issue, the Court will give room to different provisions in the national legislation. However, distinct age limits for the right to vote and to be elected have an objective basis and are not discriminatory.

Language requirements for the right to be elected (but not for the right to vote) are, as such legitimate but they must not be disproportionate (*Podkolzina / LV*, 2002).

2. Modern instruments of Council of Europe bodies concerning the right to vote or to be elected pursue a legitimate aim and their tendencies may generally be welcomed. But, at the present, they find hardly any support in the existing case-law of the Court, and they cannot be considered as representing the applicable Convention Law.

It may be that in the future the evaluative case-law of the Court will, to a certain extent, go in the same direction, relying on a more flexible interpretation of the requirements of "legitimate aim" and "proportionality".