



Strasbourg, 21 January 2010

CDL-JU(2010)001

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in co-operation with the

**Union of Arab Constitutional Courts and Councils
and
the Supreme Court of Lybia**

SYMPOSIUM

**"ECONOMIC AND POLITICAL RIGHTS FROM
A CONSTITUTIONAL POINT OF VIEW"**

TRIPOLI, LYBIA, 10-11 JANUARY 2010

REPORT

"POLITICAL RIGHTS FROM A EUROPEAN POINT OF VIEW"

by
Mr Harry GSTÖHL
(Member, Liechtenstein)

INTRODUCTION

After World War II the necessity to avoid in the future the atrocities which had been seen specially in Europe had led to initiatives at global and European level.

The fundamental and leading work was the UNIVERSAL DECLARATION OF HUMAN RIGHTS, adopted on the 10th of December 1948 by the General Assembly of the United Nations. This basic ruling still remained the reference text even if not being binding for the signatories.

1. THE COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

1.1. Clearly rooted in the UNIVERSAL DECLARATION OF HUMAN RIGHTS this international agreement retakes the ruling on the part of the Human Rights known as Civil and Political Rights, which are those rights which tend to most protect the individual against the Government. The other group of Human Rights, the economic, social and cultural rights, are ruled in a separate covenant.

1.2. The Covenant on Civil and Political Rights obliges the signatories to respect

1.2.1. The right to physical integrity

1.2.2. Liberty and security of person

1.2.3. Procedural rights such as fair trial and rights of the accused

1.2.4. Individual liberties

1.2.5. Political rights in the strict sense.

1.2.6. Non-discrimination

1.3. This international Covenant has instituted a monitoring system by the HUMAN RIGHTS COMMITTEE; however, even if this Committee has already given a long list of interpretations of the Covenant, it has been clearly set out, that these interpretations were no court's decisions. In 2006, this Committee has been replaced by the Human Rights Council.

2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.1. On a European level the European Convention on Human Rights, drafted by the Council of Europe in 1950 and in force since 3 September 1953, is directly rooted in the Universal Declaration of Human Rights¹. It was the concrete European answer to the atrocities which happened in Europe mainly during the War.

2.2. Technically it does protect the same group of rights as the Universal Declaration on Human Rights but, with respect to the universal Covenant, the European Convention has installed the EUROPEAN COURT FOR HUMAN RIGHTS and thus given the possibility to the individual to directly complain about the violation of a protected right and seek for remedy. The European Convention on Human Rights is the concretization – through the Convention itself, but even more precisely, through the case-law of the European Court for Human Rights – of the European **Point of View** of Human Rights in general and the Political Rights in particular.

3. THE POLITICAL RIGHTS UNDER THE EUROPEAN PERSPECTIVE

¹ Proclaimed on 10th december 1948 by the General Assembly of the United Nations

3.1. The European Convention on Human Rights protects a whole range of human rights, inclusive those known as **political rights**. It is not possible to make a very strict distinction between the political rights in the general understanding and the civil rights, as they do overlap in part. But in order to have a clearer picture it is essential to re-list those rights, which are commonly comprised in the term of "political rights" under the European point of view. It is: The Freedom of **Expression**, the Freedom of **Assembly**, the Freedom of **Association** and the right to **Free Elections**.

3.1.1. FREEDOM OF EXPRESSION [Art. 10 of the European Convention]

3.1.1.1. This right does comprise of course the freedom of **opinion** and the various **forms** of its expression, may these be private, artistic or scientific. Concretely this covers also the freedom of **press**, like printed press, and the other media such as television and radio **broadcasting** and the right of information. The freedom of press is one of the most important political rights but is not expressly named in Art. 10 of the European Convention. In fact it is one of the founding principles in order to ensure the democratic process in a nation, and thus, ensure that the individual will be put in position to better exercise his other political rights in the European understanding of the democratic societies.

3.1.1.2. The right to **information** comprises the right to freely consume broadcasting programs, whether television or radio, and consequently install the relevant technical devices such as parabolic antennas etc. But it does also mean that the individual has a right to be informed by the state on relevant matters. On the other hand this freedom means also that the individual has a right to **impart** information and ideas without interference by a public authority.

3.1.1.3. *LIMITATIONS.*

Art. 10 of the European Convention is explicit: The freedom of expression and the rights inherent thereto **do** carry with it **duties** and **responsibilities**. Therefore the possibility of limitations or conditions is foreseen by Art. 10 of the European Convention itself. Limitations need to be **foreseen** by law and need to be **necessary** in a democratic society, be in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of moral and health, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3.1.1.3.1. Further on, such limitations as foreseen by law must of course follow a **legitimate** purpose and remain **proportional**.

3.1.1.3.2. Opinions expressed by individuals or the press or by broadcast may have an insulting or depreciating content. Defamation and value-judgments constitute also, up to a certain degree, a **limitation** of the freedom of expression; and the proportionality is to be seen within the differentiation between defamation and value judgments: Defamation concerns the facts and may be proven whilst a value-judgment may be seen as excessive if not sufficiently based upon facts and therefore not any more covered by the freedom of expression.

3.1.1.3.3. People being in **public life** have to suffer a wider grid of limitation than private persons; the idea being that freedom of opinion is a main pillar of the democratic process and therefore public political exponents have to accept sharper criticism.

3.1.1.3.4. The limitation of the freedom of the press is – per se – also a limitation to the right of information of the individual. This is the reason why the limitation of the freedom of the press may be seen as a special case of limitation of the Freedom of Expression and the responsibility of the journalist for the consequences of his exercising the liberty of press has been recognized by the jurisprudence of the European Court of Human Rights.

Journalists have a duty of diligence to respect and this may not be seen as an undue limitation of the freedom of the press.

3.1.2. FREEDOM OF ASSEMBLY [Art. 11 of the European Convention]

3.1.2.1. Art. 11 of the European Convention guarantees the freedom of **peaceful** assembly. An assembly can be of political, cultural or social gathering of persons and can be even of private nature; it may take place outdoors or indoors, on public or private ground.

3.1.2.2. It is commonly understood as the coming together to collectively **express** or **pursue** or **defend** common interests or to **protest** collectively in peace.

3.1.2.3. *LIMITATIONS.*

The freedom of peaceful assembly is another of the basic freedoms and its importance in the **political** and democratic process is vital. It includes the participation at political events, pre-election campaigns and the like. Due to its political impact, the limitations to the freedom of (peaceful) Assembly can be numerous and go from the simple interdiction of assemblies to the retaliation against participants.

3.1.2.3.1. Nevertheless, limitations foreseen by **law** and respecting the principle of **proportionality** are possible and foreseen by Art. 11 of the European Convention itself: Lawful restrictions to the right of assembly may be imposed to the members of the armed forces, the police or the members of the administrations of the State.

Otherwise, limitations are possible **only** within the limits of what is necessary in a democratic society and to the same extent as limitations foreseen to the freedom of expression of Art. 10 of the European Convention, which is, basically, for situations, where the State and its security is in danger.

3.1.2.3.2. Within the principle of proportionality, the pure interdiction of an assembly or the dissolution thereof are to be considered as being of last resort, which is, that such measures (still not being totally excluded) are to be carefully pondered, whilst the limitation of the duration of an Assembly or the limitation to a specific geographical area may be usually to be considered as proportional.

The classification of an association as being against the constitution could by itself be a sufficient ground to limit its right to participate at or to organize a specific assembly, if judged to be contrary to the security; but the fact to classify an association as being contrary to the constitution, would not – by itself - be sufficient to generally exclude such an association from holding a peaceful assembly.

3.1.2.3.3. Another problem is the decision on authorization of counter-demonstrations, where the authorities – within their appreciation – have to ponder a number of circumstances of the particular case in order to determinate, whether the limitation of the counter-demonstration would be proportional or not.

3.1.3. FREEDOM OF ASSOCIATION [Art. 11 of the European Convention]

3.1.3.1. Very close to the freedom of assembly, the right of association is also regulated by Art. 11 of the European Convention. Together with the freedom of expression and the freedom of assembly it is an instrument in order to properly organize the individual's participation at the political, cultural and social life. A classic example is the association as political parties

3.1.3.2. The term “association” does not necessarily mean an association in accordance with the ordinary civil legislation but can also be a form of organization, which, as a matter of fact, does exist with the intention of durability. Therefore the freedom of association does comprise the sports club as well as the association of breeding of racehorses, the political parties and trade unions, which are expressly named in Art. 11 of the European Convention.

3.1.3.3. The freedom of association does also mean, under some conditions, that the individual has the right **not** to participate in an organization; therefore the freedom of assembly also protects from mandatory participation in an association. However, this negative freedom does not necessarily apply to certain organizations with public sovereign character such as bar associations .

3.1.3.4. *LIMITATIONS*

3.1.3.5. The limitations of the freedom of association are the same than those foreseen for the freedom of assembly, i.e. lawful restrictions to the right of association may be imposed upon the members of the armed forces, of the police or of the administration of the State. Otherwise limitations are possible only within the limits of what is necessary in a democratic society and to the same extent as limitations foreseen to the freedom of expression of Art. 10 and 11 of the European Convention. The fact that associations may comprise political parties of course renders the limitations specially delicate; the interdiction of political parties constitute a particular problem as well as sanctions taken against members of trade unions and the like and the respect of the rule of proportionality has carefully to be kept in sight.

3.1.3.6. According to Article 16 of the European Convention, nothing prevents the Member nations at the Convention from imposing restrictions on the political activity of foreigners. The problem of the participation of foreigners in the political life of a country from time to time comes into discussion in some countries; but it is widely accepted that the fact to be a foreigner is a sufficient

ground to exclude a person from exercising most of the political activities. One of the remedies put into discussion could be a facilitated access to citizenship.

3.1.4. THE RIGHT TO HOLD FREE ELECTIONS [1st Additional Protocol, Art. 3]

3.1.4.1. This right is in fact the essence of the democracy, where the individual is guaranteed the participation in the political life of his country. The right to free elections figures not in the original text of the European Convention on Human Rights but in the first additional Protocol of the 20th March 1952 and is in fact an obligation or commitment of the High Contracting Parties to organize such 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**.

3.1.4.2. The early interpretation of this wording has been, that the European Convention does not give an individual right to vote but an institutional right to have free elections; the European Court of Human Rights then, in its jurisprudence, did specify that the persons in fact had an individual right to vote and to be elected in such free elections.

3.1.5. The right to **FREE ELECTIONS** comprises the right

3.1.5.1.1. To vote and to be elected

3.1.5.1.1.1. This right is usually reserved by the national constitutions within Europe to citizens of the State concerned, i.e. to persons having the nationality. Aliens are excluded, in general, from the right to vote and to be elected.

3.1.5.1.1.2. However, apart from the requirement of citizenship, the right to vote and to be elected pertains to all citizens without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which correspond to the requirement of **universality** and **equality** of the suffrage.

3.1.5.1.2. It further comprises the right to be granted periodic, genuine elections which shall be at universal and equal suffrage. This means that the right to vote and to be elected has to be exercised in free elections without any coercion, e.g., to vote for a specific party or a specific candidate.

3.1.5.1.3. The requirement of **secret** ballot is a further guarantee of protection against coercion; it shall ensure that nobody takes influence on the expression of the free will of the electors.

3.1.5.1.4. Elections are to be held in reasonable (and regular) intervals which serves to guarantee also a not too short interval in order to enable elected people to achieve a minimum of work during their mandate.

3.1.5.1.5. The European Convention **does not foresee**, as does the International Covenant on Civil and Political Rights in Article 25 lit. c),

the right to have access, on general terms of equality, to public service in the country.

It guarantees the right to **vote** and to be **elected** for the legislature, i.e. the body that issues laws in the wide sense of the term. It does of course comprise the **parliaments** but not only; the European Court of Human Rights held that also the European Parliament is a legislative body and thus, the guarantee of the European Convention for Human Rights is not only valid on a national level, but also on European level.

3.1.6. *LIMITATIONS.*

3.1.6.1. It is expressly accepted [Art. 16 of the Convention] that national constitutions may (and in fact do) limit this very political right to nationals, i.e. individuals having the nationality to the exclusion of aliens.

3.1.6.2. Other limitations may be accepted by legal provision and always under the respect of the principle of **proportionality** for persons who have suffered a criminal condemnation for specific crimes; but the **exclusion** of entire groups of persons (such as e.g. the condemned persons or the prisoners) would not be acceptable under the European Convention.

3.1.6.3. The European Court on Human Rights has accepted that the fact, for a candidate to a political charge, to have to pay a sum of money for his candidature is not violating the European Convention; this, for the reason that the intention of such rule was to exclude possible non serious persons from candidature.

3.1.6.4. The system of the threshold, which is the requirement of a minimum percentage of votes for a political party in order to enter Parliament, has to respect the principles of proportionality in the sense that the percentage has not to be excessively high; whilst a 5% threshold had been retained as legitimate, a 10% limit was judged excessive, although presently not a violation of the European Convention, due to several very specific conditions and to the political background, which tempered the effect of such clause in the view of the Court.

3.1.6.5. Lost votes.

3.1.6.5.1. According to different electoral systems, e.g. such as the system of plurality, where between several candidates the winner (even with less than 50% of votes) takes all, those voters who did not vote for the winning candidate could argue that their votes were lost. However, it has been held that in all electoral systems on democratic basis, a number of votes are to be considered to remain without influence. This was retained to be in conformity with democratic principles and the rules of the European Convention, because the electoral system itself did not violate the European Convention.

3.2. POLITICAL RIGHTS under the European Convention on Human Rights and their Positioning under a National Constitutional Point of View inside Europe

3.2.1. The political rights, understood as part of the European Convention on Human Rights follow the general criteria and limitations of the European Convention

itself. There are limitations to the field of application of the Convention and the most important are:

3.2.2. RESERVATIONS made by the Contracting States.

3.2.2.1. As a general fact, the European Convention allows for the various member states to make some reservations on specific matters, provided that such reservations are not against the scope of the European Convention or are excluded or limited in the Convention itself. Many states have made reservations according to Art. 57 of the Convention and most of these reservations concern the guarantees on the due process or fair trial.

3.2.2.2. However, such reservations have to be made within narrow borders, must be specific and have to be underlined by explanations.

3.2.3. SUSPENSION of the Convention

3.2.3.1. According to Article 15 of the Convention on Human Rights, a Member State may suspend its obligations under the Convention, if not inconsistent with other international commitments. Measures to suspend may occur in time of **war** or other **public emergency** threatening the life of the Nation of a High Contracting Party. The limitation itself from derogation is set out in paragraph 2 of Article 15 and concerns basic human rights such as the right to life, the interdiction of torture and the interdiction of slavery and humiliating imprisonment as well as the principle of the interdiction of punishment without a law punishing the acts at the moment when committed.

3.3. Under a point of view of a national Constitution, the European Convention on Human Rights constitutes a **minimum requirement** of protection. It allows the Member States to go further in protecting rights in their Constitutions.

But – if the guarantee of freedom in one Constitution is higher than that of the European Convention - then the text of the Convention may **not** be taken to limit or derogate any human right and fundamental freedom protected under a national Constitution or another international commitment of one of the Contracting States (Art. 53 of the Convention). On the other hand, if, the protection of freedoms guaranteed by the European Convention on Human Rights could be regarded as qualitatively higher than the protection guaranteed by a specific national constitution; then it should be retained, that the national interpretation has to get closer to the European interpretation.

3.4. The European Convention does not require a specific positioning within the Constitutions of its member States. But even without such positioning the Member States have incorporated the Convention either as being a part of the National Constitution² or even higher ranking³ or as being between⁴ the national laws and the national Constitution or as being on the same level than the national laws⁵ but as a source for the interpretation of national basic rights.

² E.g. Austria

³ E.g. Netherlands

⁴ E.g. Switzerland, Liechtenstein

⁵ Germany,

- 3.4.1. Even if the contents of the European Convention is widely incorporated in National Constitutions, the singularity of the European Convention lies in the fact that it is subject to evolution through the dynamism of the EUROPEAN COURT OF HUMAN RIGHTS which helps to develop the understanding of the minimum guarantees and to adapt wherever necessary. This is also – in some way – the particularity of the European Point of View on the Political Rights and which distinguishes the European Understanding from the more general understanding under the Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.