

**On the Evolution of
International Election Norms:
Global and European Perspectives**

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and

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THE RIGHT TO FREE ELECTIONS ACCORDING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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FOREWORD

The right to participate in public life through elections has undergone an incredible evolution during the past 15 years. The innocent-looking provisions in international human rights documents dating back some half a century and establishing election elements like universal suffrage and equality of vote have become alive by actual practice in an increasing number of countries and, interestingly, through interpretations of treaty bodies such as the Human Rights Committee of the United Nations and the European Court of Human Rights. The practice and interpretations have solidified the meaning of the election elements and established a set of standards against which the performance of different countries can be analysed.

Among other human rights, participation through elections stands out through its mass nature: whereas the other human rights are in many cases enjoyed in separate operations at the individual level or merely relied upon as passive constants, an election is a mass exercise in which the entire people is invited to participate at a given point of time. An election is a collective exercise of the everyman. An election can actually be seen unfolding, and because the point of time when a particular election is held will be known in advance, it is possible to arrange the observation of participation through elections in a manner not possible for most other human rights.

This volume springs out of a long interest of the authors towards human rights in general and participation in particular. A specific field in which the use of information contained in this book is natural is the area of election observation, in which both authors have some experience. The first part of the publication, written by Mr Suksi, is of a general nature and aims at an account of the different international human rights norms dealing with elections against the background of some theoretical notions of national decision-making or internal sovereignty. A short and condensed version of this part will be produced for publication in a compendium of election standards later in 2005. The second part of the publication, written by Ms Lindblad, is an extended version of her Master's Thesis that originated within the framework of the European Master's Programme in Human Rights and Democratisation. The authors are grateful to the Institute for Human Rights at Åbo Akademi University for publishing this piece and wish to extend their warmest thanks to Ms Raija Hanski for thorough work for the technical editing of the book.

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PARTICIPATION THROUGH ELECTIONS AND REFERENDUMS¹

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1. INTRODUCTION

“The people, only the people, is the creative power, the engine of the universal history”. This sentence attributed to Mao Tse Tong, written onto a wall at the University of Urbino in Italy sometime in the 1970s, has today a meaning that probably is diametrically opposite to what Mao intended. Mao would be making spastic movements in his final place of rest if he knew what the people actually accomplished during the decades that followed after he passed away. Much of what the people has achieved has been done in the field of participation and through the possibility of the people to determine by themselves their political status and to freely pursue their economic, social and cultural development.

Below, we will explore issues related to participation and self-determination through a general framework for national decision-making. The framework will enable us to structure our discussion concerning the position of different states in relation to each other and also to analyse the content of those human rights norms that deal with participation and self-determination. Because participation is a specific human right, we will also review the content of the international norms concerning participation and especially elections, not only to carry out a discussion in the field of human rights, but more specifically also because these norms offer the standards of measuring achievement within one particular field of human rights work, that of election observation. The review of international human rights norms will be done more or less in a chronological order. Finally, a few words will be said about the discussion concerning elections at the level of international politics.

The review is based on the relevant international norms and on interpretations of treaty bodies that illustrate the content of the norms. A number of case citations are included in the footnotes, but a more comprehensive listing of cases can be found in section 5.2.²

¹ An earlier version of this text has been submitted for publication to *Ius Gentium Conimbrigae*.

² For analysis of election-related norms, see also Goodwin-Gil, 1994; López-Pintor, 2002; Nowak, 1993; Rosas, 1999; and *International Electoral Standards*, 2002.

2. GENERAL FRAMEWORK FOR NATIONAL DECISION-MAKING: ILLUSTRATION OF CONSTITUTIONAL AND POLITICAL TRANSITION

The people have, through political participation, a role in national decision-making. The people have or at least should have a share in the exercise of the sovereignty of a state. A classic textbook definition of sovereignty holds that sovereignty is the highest lasting power on a certain territory over a certain population. This is where the textbook definition often ends and fails to develop an idea of what the contents of sovereignty especially in its internal form might be.

Sovereignty is normally divided into external sovereignty and internal sovereignty, where the sphere of external sovereignty carries with it an international legal subjectivity and the subsequent capacity to enter into treaties with other subjects of international law. This external sovereignty is uninteresting for the purposes of this article. Internal sovereignty is actually what the above-mentioned definition of sovereignty mainly implies. In so far as internal sovereignty in the meaning of national decision-making can be operationalised, the main exponent of it is law-making or the power to legislate and through that to create generally binding norms applicable on the persons who reside in the state. A set of concepts parallel to those of sovereignty could be found in the area of self-determination: where the general concept of self-determination in many ways corresponds with the general notion of sovereignty, also the subdivisions of self-determination, namely external and internal self-determination, by and large find their partner concepts in the terms external and internal sovereignty. Hence in this way, a starting point for the analysis can also be found in Article 1 of the UN Covenant on Civil and Political Rights (hereinafter: the CCPR. See below).³

Internal sovereignty (or perhaps internal self-determination) is our starting point for an analysis of national decision-making. Internal sovereignty can be divided into two functional forms, namely political sovereignty and legal or legislative sovereignty. Political sovereignty denotes here the elective function, that is, that somebody is elected by some persons into a position, while legislative sovereignty denotes the norm-setting function, that is, the power to enact laws.

Because the people is our starting point, it is possible to say that these two functional forms of internal sovereignty can, at least in theory, be combined in four different ways from the point of view of the people. We will only consider three of the possible combinations (A, B, and C, below), because they exist in constitutions and at the level of practice. The fourth combination is

³ 999 UNTS 171. Adopted in 1966, entry into force in 1976.

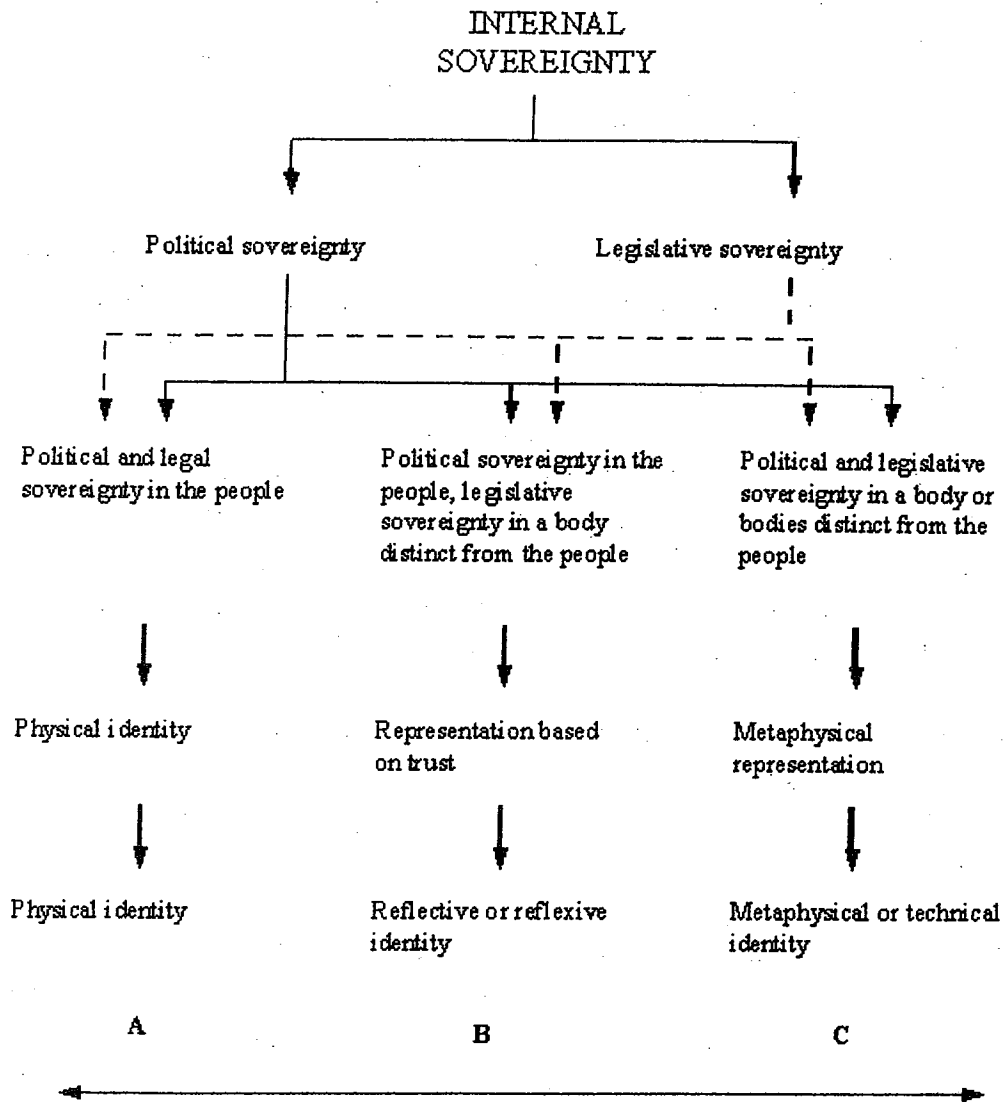
mainly of a biblical or extra-terrestrial character (the idea of the chosen people), wherefore we would not need to consider it in this more concrete context of national decision-making. An additional restriction of the topic at this point is that we will not try to define the people, although a natural starting point would be to use the term people as a reference to the total population of an existing state in the same way as seems to be the mainstream interpretation of the term people in Article 1 of the CCPR.

These three categories of internal sovereignty can be combined into a description of national decision-making in which the three combinations illustrate certain basic positions or categories into which constitutional systems can be placed for the purposes of our analysis (see Table 1).

Between the two World Wars, constitutional features were sometimes analysed in terms of a juxtaposition of physical identity or identicalness between the rulers and the ruled on the one hand and different concepts of representation on the other. The first combination, where the people holds both the elective and the norm-setting function, would seem to fit well the category of physical identity or identicalness between the rulers and the ruled, while the second category may find a corresponding description in the term representation based on trust. The third category, again, has sometimes been described by the term metaphysical representation. The case has been made that if representation of the latter sort is driven far enough, a physical identity of some kind may emerge.

Be that as it may, the juxtaposition of identity and representation is based on incommensurable terms. Instead of representation, the idea of identity between the rulers and the ruled could be used to illustrate the exercise of the elective and the norm-setting function. Hence by keeping the physical identity between the rulers and the ruled, where those ruled are the same group as those ruling, the second category could be renamed so as to denote a reflective or reflexive identity between the rulers and the ruled. Here those ruling are expected to reflect the needs and demands of those ruled. The third category could be given the description of metaphysical or, as it sometimes may be, technical identity between the rulers and the ruled. In metaphysical identity, the rulers know even without elections what those ruled want and need. The three main categories of national decision-making could therefore be said to illustrate the following relationship between the rulers and the ruled: physical identity (A), reflective or reflexive identity (B) and metaphysical (or sometimes technical) identity (C). They can be understood as points on a continuum which connects them and which can be used to express the relative (but not exact) positions of states in relation to the scheme and in relation to each other.

Table 1: Categories of National Decision-Making.⁴



A. From the point of view of the people, the first possible combination is that the people is in the possession of both the political and the legislative sovereignty. This would mean that the people exercise both the elective and the norm-setting function.

B. The second possible combination is that the people is in the possession of the political sovereignty and that the legislative sovereignty is exercised by a body which is separated from and distinct from the people. Here, the people elects, but a separate body sets the norms.

C. The third possible combination is that the people is not in the possession of any of the two functional forms of internal sovereignty. Here, the people neither elects nor sets the norms, but these functions are performed by a body or bodies that are separated from and distinct from the people.

⁴ Suksi, 1993, p. 39.

How would states and their constitutions fit this scheme of national decision-making?

The category of physical identity (A) between the rulers and the ruled is, at least for the time being, not filled by any concrete cases, because even Switzerland seems to fall somewhat short of a situation where the people would both elect its representatives and adopt the laws. The great majority of the laws at the federal level in Switzerland are made by the Federal Assembly, albeit under heavy influence of the institution of the referendum. Yet at the cantonal level we may refer to at least a few so-called *Landsgemeinde*-cantons where the criteria of a physical identity between the rulers and the ruled can be found. Situations that approach a physical identity could perhaps also be pointed at in some of the states of the United States, such as Oregon and California. The ancient Athens during the fifth century B.C. might also qualify, provided that we do not pay too much attention at how and out of whom the people were composed and who was excluded.

The category of reflective or reflexive identity (B) between the rulers and the ruled seems very easy to fill with examples of states and constitutions. Most West European countries seem to belong to that category. However, a number of countries clearly stand closer to the category of physical identity, such as Ireland, Denmark and perhaps even Italy, while countries like Finland, the United Kingdom and Norway represent the pure form of constitutional organisation that fits the category. A number of countries with a federal organisation are perhaps taking a step or two in the other direction, such as the Federal Republic of Germany and the United States. The reason for this is that the federal structure and especially the existence of judicial review introduce features in the constitutional system which qualify the position of such countries in the scheme.

The category of metaphysical (or technical, as the case may be) identity (C) between the rulers and the ruled is best illustrated by states the constitution of which identifies a certain party and ideology as the only permitted political movement in the country. Those socialist countries that still are in existence, such as China, Cuba and North Korea, would probably be relevant examples. The idea is that the Communist Party is designated as the only party by the constitution, because the socialist or communist ideology empowers that particular party with the capacity of detecting, by means of dialectical materialism, the development of history from feudalism through capitalism and imperialism to socialism and finally to communism and with the capacity of offsetting knowledge of that development into appropriate legislation. The party will know what the people really want and need, even without national elections. Countries such as Libya where the religion is identified by the constitution as a constitutional ideology that shall permeate the whole legal

system would also belong to this category, and so would countries under a monarchical rule, such as Saudi Arabia. One historical example could be mentioned, too, that of Nazi Germany, where the will of the Führer and the will of the people were identical. The most extreme form of metaphysical identity between the rulers and the ruled could be said to exist in states ruled under military dictatorship.

The constitutional and political development of East European countries at the end of the 1980s and the beginning of the 1990s could be analysed in terms of the scheme. The scheme can point at the direction of the development, which in this case was from the area of metaphysical identity towards reflexive or reflective identity and even beyond, yet at the same time recognising that, formally speaking, elections were held. The East European countries were probably not as far to the right in the scheme as, for instance, North Korea or China still are. Looking at the procedural features of the new constitutions enacted in the different states, the development was from the right part of the scheme towards the middle and, in some cases, even a few steps further in the direction of a physical identity between the rulers and the ruled.

A similar development can be detected in a number of other countries of the world. This constitutional and political transition has either stabilised or is still going on. The reasons for the movement on the continuum are manifold, but in a more philosophical vein, the speculation could be put forward that the explanation could be the degree of autonomy of the individual in a society. The lesser the degree of autonomy of the individual in a society, the more likely it is that this will be displayed in the constitutional and political system of the state in such a way that the position of the country in our scheme will be on the right hand side of it. Conversely, the greater the degree of autonomy of the individual in a society, the more likely it is that this will be displayed in the constitutional and political system of the state in such a way that the position of the country in our scheme will be in the middle or to the left of that position.

There is one term that has not been used yet, for instance, in the scheme concerning national decision-making, although the whole framework in fact deals with that. The term that has not been used is "democracy". It could perhaps be one of the strengths of the scheme concerning national decision-making that the term democracy can be eliminated, because democracy is a dichotomous term: a country is either democratic or not, which is not very analytic. In addition, it could be said that democracy is not just a matter that concerns a few procedural features, such as elections, but contains also a large substantive dimension with, for instance, the realisation of a number of other rights, such as the right to education, the freedom of movement, a social security system of some kind, etc. The idea of democracy could hence be

understood as something much broader than what can be caught in a scheme concerning national decision-making.

The scheme concerning national decision-making is designed so as to apply to states and their constitutional features. The European Community (or European Union) is formally speaking not a state, but if it were, for the sake of argumentation, regarded as a state in this discussion because it adopts normative acts that are binding on the individual in the same manner as national legislation, it should be possible to place the EC in the scheme. Starting from the highest decision-making body of the EC, which probably even after the Amsterdam Treaty and the enhanced powers of the European Parliament still is the Council of Ministers, it could be argued that the Council of Ministers represent the governments of the Member States. The governments, in turn, represent the parliaments of the Member States, while the parliaments represent the peoples of the Member States. Against this background and chain of legitimacy it would be possible to say that the people seems to be at least twice, if not thrice, removed from the highest decision-making body in the EC. This, again, would make it possible to conclude that the EC as a decision-making structure with the power to enact legislation could be placed somewhere in or near the category of metaphysical or — perhaps better — technical identity (C) between the rulers and the ruled.

Because the individual Member States of the EC are found in the category of reflexive or reflective identity (B) between the rulers and the ruled and the EC itself somewhere in the category of technical (or metaphysical) identity (C) between the rulers and the ruled, a difference between the Member States and the EC can be observed concerning their procedural features. That difference can probably be described with the term “democracy deficit”, although the term can probably also contain other dimensions, such as lack of transparency, uncertainty about the applicability of a human rights regime in the EC, etc. That difference was recognised also by the Constitutional Court of the Federal Republic of Germany, which in its ruling concerning the German ratification of the Maastricht Treaty concluded that the ratification of the Treaty was possible under the German Constitution, but any further transfer of competencies from the German Constitution to the EC would be in breach with the democracy principle of the German Constitution unless the position of the European Parliament were strengthened at the same time. Such a strengthening of the position of the European Parliament would, in turn, mean that the Parliament would be granted real legislative powers, and a consequence of that, the European Community (or European Union) would probably develop towards a federal form of government.

It is apparent on the basis of what has been said above that different countries assume varying positions on the continuum and that the transition or,

as it has been termed, democratisation of East European countries and also of other countries elsewhere in the world can be illustrated through the scheme as a movement from metaphysical (or technical) identity between the rulers and the ruled towards reflective or reflexive identity and even beyond. This is, however, not necessarily a permanent transition that will leave the countries, for instance, in the middle part of the scheme. It is completely possible to point at a reverse movement, that is, a movement in the direction of a metaphysical (or technical) identity at least in the political reality. Such a movement can be observed, for instance, in Belarus and in a number of Central Asian states that were formerly parts of the Soviet Union. In addition and as will be illustrated at the end of this article, there is a number of countries in the world which are unwilling to embark on the road of transition, at least if transition is measured in terms of the scheme concerning national decision-making. It should also be recognised that in the world, there may exist as many as 15 states in which no elections have ever been held at the national level although participation through elections is a human right. It goes without saying that the number of countries in which the elections that are held do not comply with the international election standards is much greater.

3. THE RIGHT TO PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS NORMS

3.1 The Roots in the Universal Declaration

Before the Second World War, no comprehensive set of human rights existed at the international level. Rules concerning participation were completely confined to the sphere of national legislation and were in many cases provided for in a general manner in the constitutions of the countries that existed at that point. Nonetheless, there was a hint at participation already during the First World War, when the US President Wilson developed the idea of self-determination. Although Wilson dealt with post-war arrangements in his famous speech of the Fourteen Points of 8 January 1918, the actual endorsement of the principle of self-determination and participation took place in a speech of 11 February 1918.⁵ In this context of transfer of population groups from one state to another, Wilson said that national aspirations must be respected and that peoples may now be dominated and governed only by their own consent. Wilson emphasised that self-determination would not be a mere phrase, but an imperative principle of action, which statesmen after that point would ignore

⁵ President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances. Delivered in Joint Session, 11 February 1918.

at their own peril. However, as we know, before the Second World War, a number of countries and political systems emerged which created their national decision-making along the lines of metaphysical (or technical) identity (C) between the rulers and the ruled. It might be said that the outbreak of the Second World War could even be attributed to the fact that dictatorships of all sorts emerged in Europe.

The Second World War resulted in a huge loss of life and an incredible devaluation of human life, for instance, through the genocide on Jews in Germany and in other atrocities. During and after the war, the conviction was created that individuals should be granted rights against the state and that it probably would not be enough to grant those rights at the national level, but that the rights should be granted at the international level in a binding form. The first signs of such a thinking can be traced back to the Atlantic Charter of 1941, in which Churchill and Roosevelt agreed that the United Kingdom and the United States desired to see no territorial changes after the Second World War that do not accord with the freely expressed wishes of the peoples concerned and in which they promised to respect the right of all peoples to choose the form of government under which they will live. In addition, they wished to see sovereign rights and self-government restored to those who had been forcibly deprived of them.

This was sustained by reference to the Atlantic Charter in the Declaration of Liberated Europe at the Yalta Conference in 1945, in which Stalin, too, participated. Conditions would be created for the liberated people for the exercise of the right of all people to choose the government under which they will live. This would be done, *inter alia*, by forming interim governmental authorities which are broadly representative of all democratic elements in the population and which are pledged to the earliest possible establishment through free elections of governments responsive to the will of the people. In addition, the three powers also felt that they should facilitate where necessary the holding of free elections. Hence among other issues dealing with rights, participation through elections (and possibly through referendums) was on the global agenda already at an early stage.

The efforts to advance the idea of rights of the human being continued through the creation of the United Nations after the war. The Charter of the United Nations mentioned the concept of human rights in a number of articles, but the content of human rights was not spelled out in that context.⁶ Instead, the United Nations charged a committee with the task of formulating the human rights for the purposes of adopting a Bill of Human Rights. This work led to the adoption of the Universal Declaration of Human Rights by the UN General

⁶ 1 UNTS xvi. Signature and entry into force in 1945.

Assembly in December 1948,⁷ an adoption that took place just before the so-called Cold War broke out. Some delay at that juncture would probably have meant that no human rights would have been specified at the global level. Having said that, it is, of course, also important to remember that the Universal Declaration is not a treaty about human rights, but formally speaking a non-binding resolution only. However, it contains norms which have the status of customary international law.

The adoption of the Universal Declaration marked the beginning of a development for participation as a human right. It is necessary to point out that democracy is not mentioned as a term in relation to participation in any of the human rights documents. Participation directly or through freely chosen representatives is the norm to which a number of other substantive human rights are connected. Democracy, however, is not prescribed in the Universal Declaration, nor is it defined.

In the Universal Declaration, the right to participation is included in Article 21:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. 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.

Article 21 starts by the word everyone and would not seem to make any distinction between individuals on the basis of, for instance, citizenship. However, because everyone has the right to take part in the government of his country, the norm obviously presumes an organic link of some sort to a particular country, either on the basis of residence or citizenship. Anyway, the wording seems to leave open the possibility to open up the personal extent of the group that is entitled to participate in the government of the country.

The take part clause continues from the subject of participation to a specification of the object of participation, which is the government of the country. Apparently, what is meant here in terms of levels of government is the central government, while regional and local government are left aside. This is understandable against the background of the Second World War, where states fought against each other. The body in the operation of which everyone is

⁷ UN GA Res. 217 A (III) of 10 December 1948.

entitled to participate is, however, not specified, but could be the parliament and even the executive in those cases the executive is elected. It nonetheless seems clear that the judiciary is left outside the scope of Article 21 because of the reference to government.

Participation in the government of a country should, according to Article 21, be either directly or through freely chosen representatives. It is easy to make a *prima facie* conclusion that participation is either through the referendum or through elections. In the latter case, the representatives that are chosen should be chosen through a free procedure, although direct participation could also be understood as the right to equal access to public service referred to in subsection 2 of the article. This latter dimension shall, however, not be explored in this context. At its face, Article 21(1) indicates, in our reading, a preference for such national decision-making which is in conformity with physical identity (A) and reflective or reflexive identity (B) between the rulers and the ruled, leaving the metaphysical (or technical) identity (C) outside the range of acceptable forms of national decision-making.

An operationalisation of the sentence “freely chosen representatives” is put forward in Article 21(3). Here it is said that the will of the people shall be the basis of the authority of government. The people is the starting point, much in the same way as in the categorisation of national decision-making above. The exercise of public powers is to be legitimised by the people, and not by reference to a divine authority. However, the sentence “the will of the people shall be the basis of the authority of government” does not really say very much about how the legitimacy of government is to be created, except that the creation of legitimacy is a “bottom-up” operation rather than a reference to a divine will. Instead, a minimum level of participation in government is defined after the semi-colon. What follows after the general reference to the will of the people is an explanation of how the will of the people shall be expressed. This explanation contains a number of election elements.

The first element in Article 21(3) is that elections must be held. If not, then the government does not ground its authority in the will of the people. The other election elements are periodic elections, genuine elections, universal suffrage, equal suffrage, and secrecy of the vote. The last election element is supplemented with a reference to the possibility of organising equivalent voting procedures to compensate a loss of secrecy, a dimension that has a historical explanation.

The requirement of periodic elections means that the legislation of the country should fix a certain period after which elections to the government will take place. Nothing is said about the length of the period, but because the will of the people is the starting point and because the will of the people will change over time, that period should probably not be too long. For instance, a

generation would be too long a time, as would probably also ten years. This element also contains the implicit need of an election administration or other structures for carrying out the elections.

The element of genuine elections may be understood as containing two levels. At the "higher" or broader level, the adjective genuine can be seen to bring in the so-called adjacent political freedoms and rights, such as the freedom of expression, the freedom of assembly and the freedom of association, possibly also the freedom of movement. The realisation of these adjacent political freedoms cater for the existence of a choice for the individual voter that is being created during the campaign period but exercised in a concrete fashion in the polling booth on the election day. Hence the more concrete choice between parties and candidates is the "lower" or narrower level of the genuine election. For the appropriate operation of elections, both levels of the genuine election must be realised.

Universal suffrage is tied to the term "everyone" in the opening paragraph of the whole article. Universal suffrage tries to explain who has the right to participate in elections, that is, to define the group of individuals who have the right to vote. Universal suffrage contains the idea that this group of individuals should be as inclusive as possible. The condition that can be derived from the wording of the article is that a relationship of some sort between the individual and the country in question can be required, and normally also an age requirement has been regarded as acceptable. Nonetheless, with regard to such acceptable limitations of universal suffrage, that feature of elections should normally be inclusive within the group of persons that constitute the people. The function of universal suffrage is then to define the people in its political appearance, that is, to define the electorate, naturally at the same time also taking into consideration the prohibition of discrimination indicated by the term "everyone" and established in Article 2 of the Universal Declaration. For instance, the term "his" in Article 21 does not allow a limitation of the right to vote to men, but everyone, including the women have the right to participate through elections.

The reference to equal suffrage is related to equality in the actual voting between those individuals who on the basis of universal suffrage are included in the electorate. At the outset, equal suffrage translates into the maxim "one person, one vote", that is, that the voters should have an equal number of votes at their disposal when they carry out the act of voting. This is, however, only one dimension of the equality of suffrage. The other dimension would seem to hold that each vote should count more or less with the same strength. Grading of votes, for instance, in accordance with the amount of taxes paid by the voter or the number of children in the family would not be easy to justify under the principle of the equality of suffrage. Gerrymandering, that is, opportune

changing of electoral boundaries in bad faith, would probably also raise issues of equal suffrage.

The element of secret vote is quite clear, at least in principle. The element holds that the voter should cast his or her vote in secret, that is, in a situation where nobody else can see how the voter voted. Secrecy of the vote is, of course, connected with the element of genuine elections, but where the element of genuine elections emphasises the substantive aspects of the choice, the element of secret vote emphasises the formal aspect of the choice in trying to guarantee that the person is actually in a position to vote according to his or her own conviction, free from influence and coercion from anybody else during the act of voting. The secrecy of the vote also means that it should not be possible to attribute a vote, marked in secrecy of the polling booth, to any particular voter. Instead, the ballot paper must, after it has been marked and dropped into the ballot box, be completely anonymous in relation to the voter who marked it.

The element of secret vote is supplemented with an odd condition, which says that the elections shall be held by secret vote "or by equivalent free voting procedures". This part of the article has two historical explanations that were valid by the drafting of the Universal Declaration, the one relating to the wish to prepare a possibility for Switzerland to join the United Nations despite the fact that in some of its cantons, voting took place in the open and was not secret, the other relating to the voting procedures practised in British colonies in East Africa, where elections are said to have taken place by lining up in the open behind the candidate. These historical reasons are not necessarily valid anymore, but it could perhaps be possible to give the condition a more modern reading that relates to the condition of some handicapped persons. In so far a voter with a disability that impairs his or her exercise of the right to vote needs assistance, the condition could be interpreted so as to make possible assistance at all stages of the voting, including the marking of the ballot paper.

When comparing the operationalisation of the right to participation found in Article 21(3) in the Universal Declaration with our scheme concerning national decision-making, it is evident that we are mainly looking at such a model of national decision-making which fits the middle part of the scheme, that is, reflective or reflexive identity between the rulers and the ruled. Recognising the fact that the Universal Declaration is not formally speaking a treaty but a resolution of the General Assembly of the United Nations and as such not binding in relation to the Member States, it should not be too difficult to accept that the United Nations was joined by a number of countries after 1948 whose system of national decision-making was not in conformity with our reading of Article 21. The moral commitment to participation made by the states through Article 21 can probably be interpreted in different ways, and we might have reason to be somewhat disillusioned about the effect of Article 21.

The referendum, that is, direct participation of the people in deciding upon issues, is not an election, but participation in referendums follows the same elements, where applicable. Such elements would be the genuine character of the vote, universality of suffrage, equality of suffrage and secrecy of the vote.

3.2 The Elements Refined

Although the Universal Declaration is not binding in relation to states, it should be regarded as a binding norm inside the United Nations organisation. The UN bodies should, against this background, implement the Universal Declaration in the appropriate situations. One of these situations is the context of non-self-governing territories and trust territories. For that purpose and perhaps also for the implementation of the Universal Declaration, the UN adopted General Assembly Resolution 742/1953 containing Factors Indicative of the Attainment of Independence or of Other Separate Systems of Self-Government.⁸ Hence the resolution is of fairly limited application. This resolution nonetheless contains ideas and text familiar from the Universal Declaration, and in addition to them, it develops the concepts further. According to the list of factors, the following should be the case in the non-self-governing territories that were in focus:

- a) The existence of effective measures to ensure the democratic expression of the will of the people;
- b) The existence of more than one political party in the Territory;
- c) The existence of a secret ballot;
- d) The existence of legal prohibitions on the exercise of undemocratic practices in the course of elections;
- e) The existence for the individual elector of a choice between candidates of differing political parties;
- f) The absence of 'martial law' and similar measures at election times;
- g) Freedom of each individual to express his political opinions, to support or oppose any political party or cause, and to criticize the government of the day.

Letter a) uses the language of the Universal Declaration and makes a fairly open-ended statement, but the interesting thing in this context is that reference is made to the democratic expression of the will of the people. The explanation of what this means is probably the topic of letters b) through e). Letter b) is clearly a step further from Article 21: the denouncement of a one-party system is not explicitly present in Article 21, although it can probably be presumed that if a country implemented the election elements in Article 21 in full, then the consequence would be a multi-party system. The theme continues in letter e),

⁸ UN GA Res. 742 (VIII), UN Doc. A/2630 (1954).

which emphasises the choice element in requiring a choice not only between two or more parties but also between candidates of differing political parties. Political pluralism is obviously the aim of this resolution. Letter c) uses the notion of the secrecy of the vote familiar from the Universal Declaration, but to that, letters d) and f) add some important qualifications that relate to the aim of guaranteeing an atmosphere free from intimidation and improper campaigning during the campaign period and on the election day. An election should take place during normal conditions, and a state of emergency should not be in effect if the elections are to be free. Through letter g), the so-called adjacent political rights are brought in to the field of elections, but the paragraph continues with a statement that each individual should have the freedom "to criticize the government of the day". This is truly remarkable a statement and still today difficult to accept in a number of states. In fact, the statement recognises a right to opposition.

On the basis of these factors, the system of national decision-making that would be preferred in this context of non-self-governing territories is clearly that of reflective or reflexive identity (B) between the rulers and the ruled. However, the historical situation was peculiar: in 1953 when the resolution was adopted, the Korean War was coming to an end, and the Soviet Union was still in a state of retreat in the UN system. In addition, China was not a member of the UN at that point of time. The so-called "West" had therefore a possibility to work out a resolution that was in harmony with their reading of the Universal Declaration and with their understanding of how a state should be organised.

Nonetheless, the resolution containing the factors was perhaps not altogether void, at least not if compared with the decolonisation especially in Africa. In this context, former colonial territories exercised their external self-determination to free themselves from colonial domination, and at the same time they had to adopt a solution for the exercise of their internal self-determination or internal sovereignty through a certain system of national decision-making. Often, the states that declared independence from their colonial rulers (which were countries of the West) in fact adopted constitutions that were very much in line with the above-mentioned factors and consequently with the idea of reflective or reflexive identity between the rulers and the ruled (B). Yet it often happened that very soon after these first constitutions had entered into force, sometimes in the matter of months, they were changed and replaced by constitutions that gave expression for a metaphysical (or technical) identity between the rulers and the ruled (C). At this historical juncture, a movement along the continuum from the middle part of the scheme towards the right-hand part of the scheme took place.

4. DEVELOPMENTS IN EUROPE

The plan to quickly adopt at the global level a complete Bill of Human Rights of a binding nature proved to be a difficult matter, mainly because of the Cold War and the differences of opinion between the West and the East concerning the contents of human rights. Instead, steps were taken at the regional level, particularly in Europe, where the Council of Europe⁹ and its Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰ were created in 1949 and 1950, respectively. Interestingly, the European Convention on Human Rights did not in its original fashion contain any mention of participation, although the articles of the Convention made provisions concerning the adjacent political rights, that is, everyone's freedom of expression, freedom of association and freedom of assembly. A lack of a human right to participation was remarkable also against the background of the fact that the entire Council of Europe, including the Convention on Human Rights, had a political dimension. According to the idea behind this West European human rights system, it would be an association for the free countries of the West, thereby implying that the countries in the East were unfree. The European Convention on Human Rights was drafted under the influence of the Universal Declaration, and very soon, already in 1952, it was complemented with a Protocol.¹¹ In Article 3 of Protocol No. 1, a provision concerning elections is contained:

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.

The article starts in a curious way if compared with the other articles in the European Convention on Human Rights. It does not grant everyone a right to vote in elections, but places an obligation on the states to organise elections. Thus the wording of Article 3 of Protocol No. 1 does not indicate any individual right to participation in elections. Nevertheless, the European Court of Human Rights has pronounced itself on the matter and interpreted the article as an individual right on the basis of which individuals under the jurisdiction of the Member States can file individual complaints against a state. In fact, the interpretations of the Court have changed the contents of Article 3 of Protocol

⁹ Statute of the Council of Europe. ETS no. 001. Signature and entry into force in 1949.

¹⁰ ETS no. 005. Adopted in 1950, entry into force in 1953.

¹¹ Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention. ETS no. 009. Adopted in 1952, entry into force in 1954.

No. 1 so much that the article could *de facto* be read as follows: "Every citizen has the right to vote and to stand as a candidate in free elections that are held at reasonable intervals by ...". The people referred to in the article is hence to be understood as the citizens of the state in the form of the electorate. In that capacity, the people is that part of the citizenry of a state which fulfils the age requirement.

The citizenship requirement established by the Court for Article 3 of Protocol No. 1 is probably a result of the fact that voting in elections of the law-making body is actually an act of participation in the exercise of the sovereign powers of a state. Here, the group of persons entitled to be identified as the electorate has been circumscribed by reference to the formal criterion of citizenship, a feature not explicitly found in Article 21 of the Universal Declaration. The reference to legislature in Article 3 of Protocol No. 1 is also different in comparison with Article 21. Whereas Article 21 refers to the broader term "government", Article 3 is explicit about the object of elections: the operation is carried out in order to designate a legislature, that is, a body which exercises the law-making powers. Normally, this body would be the national legislature, but in so far as the national constitution creates a sub-state legislature and vests it with autonomous law-making powers, the legislature of the sub-state entity, too, is placed under the *aegis* of Article 3 of Protocol No. 1. Hence also legislatures in the constituent states of federations as well as legislatures of autonomous regions would have to be elected in accordance with Article 3 of Protocol No. 1.¹² However, the referendum is not, according to the interpretation of the Court, covered by Article 3 of Protocol No. 1, either in its decisive or its advisory form. Article 3 of Protocol No. 1 is hence very focused on elections to law-making bodies.¹³

Elections according to Article 3 of Protocol No. 1 shall, in addition, be by reasonable intervals. This qualification is somewhat more far-reaching than the principle of periodic elections in Article 21 of the Universal Declaration. In addition to the requirement of fixed intervals in national legislation, Article 3 asks the state to establish a reasonable interval for the elections. The requirement of reasonable intervals certainly excludes the possibility of fixing very long intervals, such as a generation or ten years, and indicates that a "normal" length of parliamentary period should be identified. In the Member States of the Council of Europe, that period is probably between 3–6 years. The secrecy of

¹² See the leading European Court of Human Rights (ECHR) case in this area, *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 2 March 1987, Publications of the European Court of Human Rights, Series A, no. 113.

¹³ Concerning the interpretations of Article 3 of Protocol No. 1, see the contribution of Janne Lindblad, below.

the ballot is a concept familiar from the Universal Declaration, and as concerns the free elections mentioned in Article 3 of Protocol No. 1, the concept comes very close to the idea of genuine elections in Article 21. It is not quite clear on the basis of the wording of Article 3 what the “conditions which will ensure the free expression of the opinion of the people” are, but generally speaking the idea is to facilitate an atmosphere during the election times which is free from intimidation and coercion.

When compared with the three categories in the scheme concerning national decision-making, it seems as if Article 3 of Protocol No. 1 were completely directed towards the establishment and guarantee of a reflective or reflexive identity (B) between the rulers and the ruled as a minimum level. By interpretation, the referendum is excluded from the ambit of the article, and from the very beginning, the whole system of human rights in Europe was established as a part of the West European attempt to build safeguards against those East European countries which according to our definition were based on a metaphysical identity (C) between the rulers and the ruled.

5. THE GLOBAL NORM ESTABLISHED AND ELECTION ELEMENTS RESTATED

5.1 The Right of Self-Determination

The plan to create a global Bill of Human Rights came to its completion in 1966 with the adoption of the two UN Covenants, the one on Civil and Political Rights and the other on Economic, Social and Cultural Rights¹⁴. In addition to the Charter of the United Nations and the Universal Declaration of Human Rights, the two UN Covenants implement the Universal Declaration by creating a binding set of human rights norms at the level of international law. The two Covenants are joined by a common Article 1 on the right of self-determination. At least as concerns the substance of the CCPR, common Article 1 can be understood as a meta-norm of participation, because it attributes the right of self-determination to all peoples and recognises that these peoples are entitled to exercise this right in a number of fields central to the existence of a people:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international

¹⁴ 993 UNTS 3. Adopted in 1966, entry into force in 1976.

economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

For our discussion of elections and referendums in the context of participation and self-determination, the first paragraph of common Article 1 is relevant. In Article 1(1) of the CCPR, all peoples are granted the right of self-determination. This right is not limited anymore to the exercise of self-determination in colonial situations as it used to be during the decades before 1966. Instead, all peoples in the world have this right. Of course, the crucial issue is what the meaning of “all peoples” could be and whether this reference to the term “people” could be understood as a right of secession. This is clearly not intended to be so. Instead, the interpretation seems to be that the reference to “peoples” denotes the populations in the constituted states currently in existence. In addition, the right of self-determination is not consumed after it has been once exercised, but is regarded a continuous right of the people to define and re-define its constitution. In terms of constitutional law, the right of self-determination seems to amount to the creation of a “first” constitution for a state by way of an exercise of the constituent powers (*pouvoir constituant*), followed by the possibility to exercise amending powers (*pouvoir constitué*) and — especially in the fields identified in common Article 1 — the legislative powers. It can also be argued that by granting under the constitution of a state law-making powers to sub-state legislatures, a situation that could be described as a delegation of sovereignty, the sub-state legislature thus created would acquire a share in the exercise of the internal self-determination of the state.

The characterisation of Article 1(1) of the CCPR as a meta-norm of participation follows from the fact that common Article 1, especially when read in conjunction with Article 25 of the CCPR, requires that the government of the state is representative of the whole population of the country, not only of a certain part of the population. In so far as, for instance, a minority is excluded by the state from the exercise of the self-determination of that state and if that situation amounts to severe oppression of the minority, it would, at least in theory, be possible to ask whether or not a right has emerged for the minority population to exercise its own self-determination in a fashion that could result in the creation of a separate state or in the unification with another state. When considering practical examples such as Kosovo and Chechnya, secession from an existing state seems a remote and an altogether theoretical possibility.

The same conclusion can be drawn from two other cases, the Canadian Supreme Court case concerning the *Secession of Quebec*¹⁵ in 1998 and the Russian Constitutional Court case concerning the independence of the Republic of *Tatarstan*¹⁶ in 1992. In these cases, the two courts applied not only the internal constitutional rules concerning unilateral secession, but also the right of self-determination at the level of international law. Both courts used a strikingly similar argumentation both with regard to the domestic law and international law in denouncing the attempt of the two regions to declare independence unilaterally. A similar result from the point of view of regional international law was proclaimed by the African Commission on Human and Peoples' Rights in the case of *Katangese Peoples' Congress v. Zaire*¹⁷ in 1992. The African Commission held on the basis of Article 20 of the African Charter on Human and Peoples' Rights¹⁸ that no such violations of human rights had taken place in relation to Katanga that it would be justified, under the right of self-determination, to disturb the territorial integrity and sovereignty of Zaire. Instead, the region of Katanga should look for internal constitutional solutions to satisfy its needs in the political sphere.

These judicial resolutions show that the participation of the entire population in the exercise of the internal self-determination and internal sovereignty of a state is of crucial importance, whatever the form of the state may be (unitary state, federation, or a state with autonomous regions). This is probably also a reason why the UN Human Rights Committee has pointed out in its General Comment 25 concerning participation¹⁹ that the right of self-determination in common Article 1 of the CCPR is related to, but distinct from, the rights concerning participation under Article 25 of the CCPR. It could hence be argued that common Article 1 is to be read together with Article 25 of the CCPR.

This is supported by General Comment 12 concerning self-determination in common Article 1 by the UN Human Rights Committee.²⁰ The Human Rights Committee laments the fact that many states in their reports to the Human Rights Committee confine themselves to a reference to election laws in relation

¹⁵ 20 August 1998; No. 25506 S.C.C. Reprinted in 37 ILM 1340 (1998).

¹⁶ The first Constitutional Court of Russia, Decision No. 671 of 13 March 1992.

¹⁷ Comm. No. 75/92 (not dated).

¹⁸ 21 ILM 59 (1982). Adopted in 1981, entry into force in 1986.

¹⁹ UN Doc. CCPR/C/21/Rev.1/Add.7 (1996); and UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 167–172.

²⁰ UN Doc. HRI/GEN/1/Rev.1 (1994), p. 12; and UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 134–135.

to the first paragraph of the article, although the article contains two other paragraphs. This can be understood as recognition of elections as one dimension of the right of self-determination. That conclusion is corroborated by the request of the Human Rights Committee that "with regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right". Internal self-determination is hence connected with the mode of national decision-making. Such a conclusion has been drawn also by the Committee on the Elimination of Racial Discrimination in its General Recommendation XXI on self-determination,²¹ which emphasises that the government of a state should be representative of the whole population and that there is in international law no general right to secession.

If, however, the right of self-determination is to be exercised by a population, it could be asked what the form of that exercise should be. The *Tatarstan* and *Quebec* cases indicate that the referendum certainly is one possibility to officially record the will of the population concerning the act of self-determination. Nevertheless, the exercise of self-determination would probably not always have to assume the form of a referendum, but an election could also fulfil the requirement of the expression of the will of the people. Even this could be extended in certain situations, as was demonstrated in 1975 by the International Court of Justice in its advisory opinion concerning a decolonisation situation in the *Western Sahara* case.²² The ICJ held that the referendum and elections are the primary methods of assessing the will of the people, but in some situations, the General Assembly of the United Nations could decide to assess the will of the people through other means, such as commissions of inquiry. Hence there exists a whole range of mechanisms that could be used to assess the opinions of a people concerning self-determination.

5.2 *The Right to Participation as a Legal Right*

Although Article 25 of the CCPR is about participation, it does not mention the word democracy. In fact, it deserves to be repeated that very few human rights documents do. Hence Article 25, which is a binding norm at the level of international law within the framework of the United Nations' system of human rights, does not really inform the reader of its democratic potential, but concentrates on issues that may appear as rather loose. In spite of its rather innocent appearance, Article 25 contains issues that introduce a great number

²¹ UN Doc. CERD/48/Misc.7/Rev.3 (1996); and UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 212–214.

²² Advisory Opinion, I.C.J. Reports 1975, p. 12.

of all kinds of human rights aspects in the electoral process. It could hence be said that Article 25 deals with a number of more procedural issues on human rights in general and participation in particular and appears to leave the more “substantive” issues aside. These seemingly procedural issues relate more or less directly even to the practical organisation of elections in a country. Namely, Article 25 identifies elections as a central component of participation and defines a number of election-related elements as a minimum level of participation.

In the General Comment by the UN Human Rights Committee concerning Article 25 of the CCPR, the Committee concludes that whatever form of constitution or government is in force, the CCPR requires states to adopt such legislative and other measures that may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. This statement clearly reflects the nature of the CCPR and Article 25 as a legally binding human rights document and norm which create formal obligations for the states that have signed and ratified the CCPR. Against this background, the CCPR is clearly a set of binding human rights norms at the level of international law. Correspondingly, Article 25 of the CCPR is binding in relation to the states that have ratified the CCPR, a norm that specifies the contents of Article 21 in the Universal Declaration concerning the modalities of participation in a binding form:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (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;
- (c) To have access, on general terms of equality, to public service in his country.

Article 25 of the CCPR opens up with a *chapeau* containing a reference to “every citizen”. This is clearly a specification and delimitation of the contents of Article 21 in the Universal Declaration, where the terms “everyone” and “government of his country” were used. Now the situation is clear concerning the exercise of the sovereign law-making powers: the states may limit the rights guaranteed in Article 25 of the CCPR to that group of persons the state itself chooses to identify as its citizens. In the context of the CCPR, this formulation is rather remarkable, because it is the only right in the CCPR using the term “citizenship”, while the other ones are granted to everyone in a very inclusive manner.

The reference to not only the right but also to the opportunity to take part is also a difference in relation to Article 21 in the Universal Declaration. The meaning of the reference is to make clear to the states that the right to participate should not only be guaranteed as a right *de jure*, but also as a right *de facto*. The UN Human Rights Committee looked into the meaning of the term "opportunity" in the case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*²³ and concluded that:

restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, i.e. deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of article 25 or to the provisions of the Covenant against discrimination, for example if such interference with opportunity should infringe the principle of sexual equality.

In the latter *de facto* meaning, the state should be under the requirement to take so-called positive measures to realise the right to participate. Such positive measures may include effective registration of voters in order to realise the universal suffrage in a manner which is as inclusive as possible, arranging practical mechanisms of voting for the disabled and those ill on the election day and making sure that polling stations also in rural areas are within a convenient distance for and within reach of the voters.

The distinctions referred to in Article 2 of the CCPR are distinctions of any kind. However, a number of examples are provided by the article, namely distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These grounds of distinction are examples through which prohibited discrimination can be identified. The prohibition of discrimination is thus brought into the ambit of Article 25 of the CCPR through the reference to Article 2 of the CCPR.

As concerns the unreasonable restrictions referred to in the *chapeau*, nothing specific is mentioned. This means that the content of such restrictions is a matter of interpretation. The treaty-body created to oversee the implementation of the CCPR, the UN Human Rights Committee, is obviously the body which, especially on the basis of the individual complaints received by it, determines what is to be understood by unreasonable restrictions. Comments upon such restrictions may be found, for instance, in the cases of *Peter Chiiko*

²³ Comm. 35/1978, pp. 67-71, in *Selected Decisions under the Optional Protocol*, Second to sixteenth sessions. CCPR/C/OP/1. Human Rights Committee. New York: United Nations, 1985.

Bwalya v. Zambia,²⁴ *Istvan Mátyus v. Slovakia*,²⁵ and *Antonina Ignatane v. Latvia*,²⁶ and — from the field of the European Convention on Human Rights — for instance, the so-called *Greek Case*.²⁷

Paragraph (a) of Article 25 is a so-called “take part clause”, but in comparison with Article 21 of the Universal Declaration, the institutional scope of Article 25 is much broader. Whereas Article 21 is focused on the government of a country, Article 25 of the CCPR refers to the conduct of public affairs. Institutionally speaking, participation should thus not only take place in relation to the national government, but also in relation to other levels of administration, such as the regional and local government level. In addition, it is conceivable that also other organisational forms of public administration than the regular state administration fall within the ambit of Article 25 of the CCPR.

The Human Rights Committee of the United Nations has, in its General Comment to Article 25 of the CCPR, held that direct participation in the conduct of public affairs may imply that a person appears, for instance, as a voter in elections, as a voter in referendums, as a participant in local decision-making assemblies, as a member of legislative bodies, as a person holding executive office and as a member of a body which is established to represent citizens in consultation with government. Although this list already makes reference to the possibility to act as a voter in elections, the role of elections in participation is highlighted by the expression “through freely chosen representatives”, that is, persons who are authorised to decide on issues on behalf of the citizens.

The way in which the representatives shall be chosen so that there is a free expression of the will of the people is established in paragraph (b) of Article 25. This paragraph can be understood as an operationalisation of paragraph (a) as concerns direct participation in elections as a voter and as concerns the reference to freely chosen representatives. This operationalisation actually defines what the CCPR understands with the term “elections”. According to the article, there shall be the right and the opportunity “[t]o 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”. This provision contains at least two different things. Firstly, it contains the necessary elements of elections;

²⁴ Comm. 314/1988, UN Doc. A/48/40 (1993), pp. 52–56.

²⁵ Comm. 923/2000, UN Doc. CCPR/C/75/D/923/2000.

²⁶ Comm. 884/1999, UN Doc. CCPR/C/72/D/884/1999.

²⁷ Yearbook of the European Convention on Human Rights, vol. 12 (1969).

secondly, it contains the idea of an electoral cycle or of a time-span during which the different elements of elections shall be implemented.

It is also important to mention what Article 25, paragraph (b), does not contain. Firstly, it does not contain a definition of democracy, although it seems to have a preference for a representative system of government. Direct popular decision-making is, however, not excluded. Secondly, Article 25 does not prescribe any particular electoral system.

Therefore, although Article 25 does not specifically identify legislatures as bodies that should be elected, at least the law-making bodies should be elected in a manner which conforms to Article 25. In addition, there may exist other publicly elected bodies that have decision-making authority, and also their exercise of public powers should be based on a legitimacy which derives from elections. In logical terms, elections precede the turnover of politics and policies into laws and practical application: in elections, those ruled exercise their political rights to express their preferences concerning those ruling. Therefore, elections could be said to precede the other substantive areas of human rights in the turnover of human rights norms into national rules and decisions. Such elections, especially elections to the legislature, should be created at the level of national law, and normally one would expect that the constitution of a country would contain at least the basic features of an electoral system. The more detailed provisions on elections are established in a distinct election law, which may cover all elections organised in a country, or in separate election laws for the various elections held in a country, such as parliamentary elections, regional elections, and local government elections. Participation through freely chosen representatives is exercised by means of voting processes "which must be established by laws that are in accordance with paragraph (b)" in Article 25.²⁸

As concerns the elements of election, it is possible to identify a number of distinct features, namely the right to vote, the right to stand as a candidate, genuine elections, periodic elections, universal suffrage, equal suffrage, secrecy of the ballot and the free expression of the will of the electors. In relation to Article 21 of the Universal Declaration, the right to stand as a candidate is a new dimension and definitely a very important one.

As concerns the electoral cycle, it is possible to argue on the basis of paragraph (a) of Article 25 that the right to participate in the conduct of public affairs is a continuous right. It is possible to conclude that this continuous character of the right is present also within the framework of paragraph (b) of the article, especially with reference to the periodic character of the elections. Against the "periodic" background, it is possible to argue that in the context of

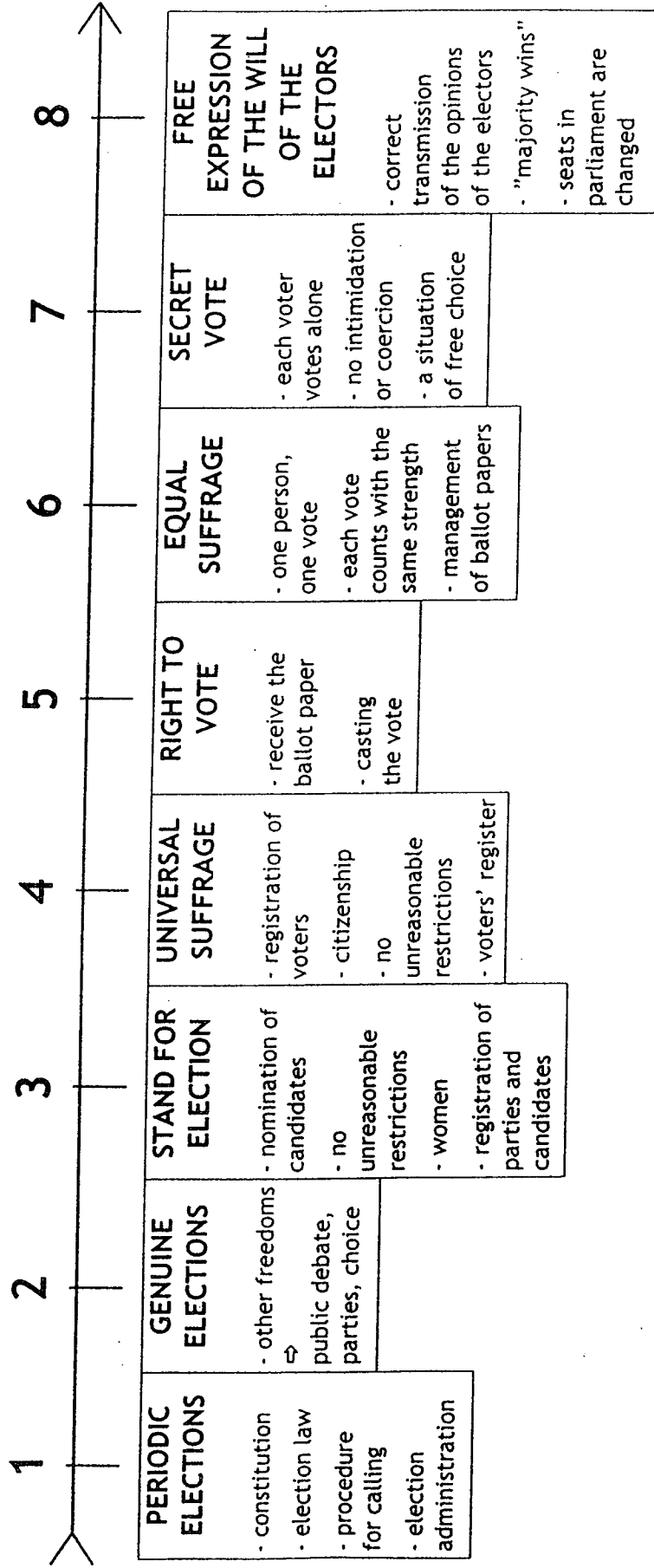
²⁸ General Comment 25, *supra* (note 19), para. 7.

elections, the election elements included in paragraph (b) of Article 25 can be organised in an order which is more or less chronological: 1: periodic elections; 2: genuine elections; 3: stand for election; 4: universal suffrage; 5: voting in elections on the basis of the right to vote; 6: equal suffrage; 7: secret vote; 8: free expression of the will of the voters (see Table 2, below). As a consequence, this attribution of a continuous character to the right to participate through elections would strongly underline the fact that the simple act of voting on the day of the elections does not exhaust elections or consume this part of participation. Instead, the continuous character of elections implies that elections are an ongoing process of a cyclical nature: when one election has been completed and those elected have assumed their seats, the process will start again from the beginning. In addition, each turn of the cycle should result in a re-evaluation of the performance of a country as concerns elections so that the next cycle would implement the necessary corrections. In this way, the subsequent electoral cycles should display an ever better realisation of the right to participation and the human rights in general.

At the same time as Article 25 of the CCPR, through its legally binding nature, gives a justification and a standard for international election observation (and probably for national election observation, too), a cyclical understanding about the process of elections in a state has implications, for instance, for the organisation of the national elections and for the work of the various election observers. For the election observers, a cyclical understanding of the process of elections is a pointer to the direction that a short time observation is clearly not enough; the main thrust of election observation must be of a long-term nature. Still, short-term election observation by the international community is an important component of the organisation of elections, for instance, for reasons of sufficient territorial coverage, contribution to the maintenance of peaceful and orderly election environment, etc.

The extension of elections far beyond the immediate act of voting on the election day also has wider implications, because it results in a need to take into account a number of other human rights closely linked with the right to participation. The so-called political rights of freedom of association, freedom of assembly and freedom of speech are brought into the election context in a more substantive manner under this cyclical understanding of elections.

Table 2: Election Elements in the Electoral Cycle.²⁹



²⁹ Hinz and Suksi, 2003, p. 4.

There is a reference in Article 25, paragraph (b), to the right to be elected. In comparison with Article 21 of the Universal Declaration, the provision is a novelty. This does not mean that the citizens would have a subjective right to become members of an elected body, but rather that all citizens that qualify under the provisions of the law should have not only the right but also the opportunity to stand as a candidate. Article 25 is clear on this point and elaborates on the right and the opportunity to be elected, that is, on the conditions under which it is possible for a voter to stand as a candidate in elections. This is important against the background of the electoral cycle: those elections where the right to vote is exercised often commence for the voters with the nomination of candidates. This right to stand for election to the legislature could then mean that, for instance, the nomination of candidates should not be left solely to the political parties, but that there should exist a mechanism through which also those with the right to vote could, under certain conditions and without the interference of the political parties (or the state, for that matter), nominate independent candidates.

This is exemplified, for instance, by the decision of the UN Human Rights Committee in the case of *Peter Chiiko Bwalya v. Zambia*. The complainant, a leading figure of a political party in opposition to the former president, had been prevented from participating in a general election campaign as well as from preparing his candidacy for this party. The Committee made the following observation:

This amounts to an unreasonable restriction on the author's right to 'take part in the conduct of public affairs' which the State party has failed to explain or justify. In particular, it has failed to explain the requisite conditions for participation in the elections. Accordingly, it must be assumed that Mr. Bwalya was detained and denied the right to run for a parliamentary seat in the Constituency of Chifubu merely on account of his membership in a political party other than that officially recognized; in this context, the Committee observes that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.³⁰

Hence a system that in fact prevents the candidacy and campaigning of a person not belonging to the only recognised party would then seem to constitute a violation of Article 25. The Human Rights Committee found an unreasonable restriction to exist also in the case of *Alba Pietraroia v. Uruguay*,³¹

³⁰ *Peter Chiiko Bwalya v. Zambia, supra* (note 24), para. 6.6.

³¹ Comm. 44/1979, pp. 76–80, in *Selected Decisions under the Optional Protocol*, Second to sixteenth sessions. CCPR/C/OP/1. Human Rights Committee. New York: United Nations, 1985.

because the complainant had been barred from taking part in the conduct of public affairs and from being elected for 15 years in accordance with an Act that created such a general punishment.

In fact, according to the interpretation of the UN Human Rights Committee, the "effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates".³² Combined with the principle that candidates cannot be required to be members of parties or of specific parties or to hold some defined political opinion, the scene is opened up for a competitive election.

As a practical matter, the element of standing for election should imply that the national law contains sufficient provisions concerning the registration of parties and candidates so that all political opinions and groupings have an equal opportunity, without any of the distinctions mentioned in Article 2 of the CCPR and without unreasonable restrictions, to officially become participants in the electoral process which leads up to election. Such registration procedures should hence not be so difficult that candidacy is inhibited (for instance, extremely high number of supporters required for candidacy or an excessive deposit required from a party before a list of candidates is accepted for elections). The free expression of the will of the electors should not be unduly restricted, but instead promoted during this stage of the electoral cycle, which is crucial for the outcome of the elections.

The election element on the right to be elected could be developed beyond the ordinary concerns related to the nomination of candidates so as to target a number of special groups that may be at a disadvantage in the exercise of their rights in general and their political rights in particular.

However, certain categories of persons may, under certain conditions, be excluded from the right to stand for elections. In the case of *Joszef Debreczeny v. the Netherlands*, it was alleged that the refusal to accept the credentials of an elected person for a seat of a local council because the person was a police sergeant in the national police force would amount to a violation of Article 25 of the CCPR. The UN Human Rights Committee noted that:

the restrictions on the right to be elected to a municipal council are regulated by law and that they are based on objective criteria, namely the electee's professional appointment by or subordination to the municipal authority. Noting the reasons invoked by the State party for these restrictions, in particular, to guarantee the democratic decision-making process by avoiding conflicts of interests, the Committee considers that the said restrictions are reasonable and compatible with the purpose of the law. In this context, the Committee observes that legal norms dealing with bias, for example section

³² General Comment 25, *supra* (note 19), para. 15.

52 of the Municipalities Act to which the author refers, are not apt to cover the problem of balancing interests on a general basis. The Committee observes that the author was, at the time of his election to the council of Dantumadeel, serving as a police officer in the national police force, based at Dantumadeel and as such for matters of public order subordinated to the mayor of Dantumadeel, who was himself accountable to the council for measures taken in that regard. In these circumstances, the Committee considers that a conflict of interests could indeed arise and that the application of the restrictions to the author does not constitute a violation of article 25 of the Covenant.³³

The restriction of the political rights of the applicant was, in this case, not deemed unreasonable.

Because the other election elements found in Article 25 of the CCPR are more or less similar in comparison with the election elements reviewed above in relation to Article 21 of the Universal Declaration, the contents of those election elements will not be reviewed here. It will hopefully be sufficient in this context to only refer to the cases that illustrate the interpretation of the various election elements.³⁴ The list of cases will include jurisprudence from both the UN Human Rights Committee and the European human rights system. It should be noted that General Comment 25 concerning the right to participation of the UN Human Rights Committee says something about virtually every election element.

From the Human Rights Committee, following cases deal with the election elements: *Peter Chiiko Bwalya v. Zambia*,³⁵ *Alba Pietrarroia v. Uruguay*,³⁶ *Joszef Debreczeny v. the Netherlands*,³⁷ *Antonina Ignatane v. Latvia*,³⁸ *Istvan Mátyus v. Slovakia*³⁹ and *Marie-Hélène Gillot et al. v. France*.⁴⁰ The cases concerning Zambia, Uruguay, the Netherlands, and Latvia deal mainly with the right to stand as a candidate, while the case concerning Slovakia deals with the issue of equality of candidates in a situation where constituencies in local government elections in relation to the mandates allocated to them are of very different size

³³ Comm. 500/1992, UN Doc. A/50/40 (1995), pp. 59–65, at para. 9.3.

³⁴ A more complete review of election-related jurisprudence can be found in Hinz and Suksi, 2003.

³⁵ *Supra* (note 24).

³⁶ *Supra* (note 31).

³⁷ *Supra* (note 33).

³⁸ *Supra* (note 26).

³⁹ *Supra* (note 25).

⁴⁰ Comm. 932/2000, UN Doc. CCPR/C/75/D/932/2000.

and the case concerning France the issue of universal suffrage in a situation of participation in a referendum for the exercise of self-determination.

From the European human rights system, an ever-growing number of cases can be connected to the election elements: the *Greek Case*,⁴¹ *Mathieu-Mohin and Clerfayt v. Belgium*,⁴² *Gitonas and Others v. Greece*,⁴³ *Labita v. Italy*,⁴⁴ *Ahmed and Others v. the United Kingdom*,⁴⁵ *Selim Sadak and Others v. Turkey*,⁴⁶ *Podkolzina v. Latvia*,⁴⁷ and *Matthews v. the United Kingdom*.⁴⁸ The first two cases concerning Greece and Belgium are broad cases that affect a number of the elements, while the case dealing with Italy and the *Matthews* case concerning the United Kingdom mainly focus on universal suffrage and the subsequent right to vote. The *Gitonas* case concerning Greece, the *Ahmed and Others* case concerning the United Kingdom, the *Sadak and Others* case concerning Turkey and the *Podkolzina* case concerning Latvia deal with the right to stand for election.

In addition, the element of genuine elections is illustrated through *Oberschlick v. Austria*,⁴⁹ *Lopes Gomes da Silva v. Portugal*,⁵⁰ *Bowman v. the United Kingdom*,⁵¹ and *Incal v. Turkey*⁵² in the freedom of expression and media area, while cases such as *Socialist Party and Others v. Turkey*,⁵³ *United Communist Party of Turkey and Others v. Turkey*,⁵⁴ *Stankov and the United Macedonian Organisation*

⁴¹ *Supra* (note 27).

⁴² *Supra* (note 12).

⁴³ ECHR, Judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV.

⁴⁴ ECHR, Judgment of 6 April 2000, Reports of Judgments and Decisions 2000-IV.

⁴⁵ ECHR, Judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI.

⁴⁶ ECHR, Judgment of 11 June 2002, Reports of Judgments and Decisions 2002-IV.

⁴⁷ ECHR, Judgment of 9 April 2002, Reports of Judgments and Decisions 2002-II.

⁴⁸ ECHR, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I.

⁴⁹ ECHR, Judgment of 23 May 1991, Publications of the European Court of Human Rights, Series A, no. 204.

⁵⁰ ECHR, Judgment of 28 September 2000, Reports of Judgments and Decisions 2000-X.

⁵¹ ECHR, Judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I.

⁵² ECHR, Judgment of 9 June 1998, Reports of Judgments and Decisions 1998-IV.

⁵³ ECHR, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III.

⁵⁴ ECHR, Judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I.

*Ilinden v. Bulgaria*⁵⁵ and the *Welfare Party v. Turkey*⁵⁶ illustrate the freedom of association and assembly.

The final election element in Article 25 of the CCPR, the element of the free expression of the will of the voters is of a summary nature and emphasises through the expression “guaranteeing” the importance of a fulfilment of the other election elements for the free expression of the will of the voters. The free expression of the will of the voters is hence the aim of Article 25 of the CCPR. This article emphasises the free expression of the will of the electors: if the voters are unsatisfied with their elected governors, the will of the electors may demand a change of those ruling. According to the UN Human Rights Committee, the freely chosen representatives exercise governmental power and “are accountable through the electoral process for their exercise of that power”.⁵⁷

For instance, political parties and candidates can, in most societies, not carry out any significant campaign without sufficient funds at their disposal. At the same time as such funds are needed and the legality of donations to such ends cannot be questioned, campaign financing may come with some strings that attach the party or the candidate to the donor. Although the party is not the person acting in his or her official capacity and although the candidate is not yet the possessor of the mandate he or she is running for, some returns or political advantages may be expected by the donors of the campaign funds. In this respect, the line between campaign funding and corruption can be very thin and unclear. To prevent the legitimate campaign funding from transgressing the line and becoming a non-legitimate method of influence, some measure of regulation concerning campaign financing could be expected.

This has been identified as an area of possible legislative action by the UN Human Rights Committee: “Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.”⁵⁸ By means of transparency, the possible strings could be made visible to the electorate and to the actors in that political process which takes place in the decision-making forums at which the elected persons eventually function. The formulation of the will of the voters is also affected as a practical matter, for instance, by the

⁵⁵ ECHR, Judgment of 2 October 2001, Reports of Judgments and Decisions 2001–IX.

⁵⁶ ECHR *Refah Partisi (the Welfare Party) and Others v. Turkey*, Judgment of 13 February 2003, Reports of Judgments and Decisions 2003–II.

⁵⁷ General Comment 25, *supra* (note 19), para. 7.

⁵⁸ *Ibid.*, para. 19.

opinion polls published before the elections. In some countries, the publication of such polls is, however, not permitted just before the elections. This could potentially be a limitation of the freedom of expression and of the press in Article 19 of the CCPR, but good reasons can be presented for such practices.

The legitimacy of the government is what Article 25 of the CCPR (and also Article 21 of the Universal Declaration) tries to provide by linking the government to the will of the people and the electorate. The element of the free expression of the will of the electors contains features of many moments of the electoral cycle, but the main thrust of this element is on the election day (elements of equal suffrage and secret vote, see above), on the counting of the votes and on the transmission of the results to the higher echelons of the election administration. On the counting of the votes, the election administration is liable for the correct representation of the result of the elections from the level of the polling station up to the highest level of election administration so that the opinions of the electors are correctly transmitted to and aggregated into an overall election result.

Normally, this element would also result in an understanding that the “majority” has won in the elections, whatever the majority may mean in a more concrete fashion. The free expression of the will of the electors should, finally, lead to the consequence that seats in the parliament (or in other bodies, as the case may be) are actually changed, that is, that the possessors of those mandates in at least one chamber of the parliament who have lost in the contest actually leave their seats to the newly chosen representatives.

The issue of the free expression of the will of the electors is, of course, not finished with the more internal safeguards in this respect, but must contain a possibility to bring issues dealing with the elections to an external review of their legality. For this reason, complaints mechanisms should be in place so that the voters as well as the parties and candidates are given the opportunity to claim their rights before the judiciary and raise claims about the conduct of the election administration all the way from voter registration to the allocation of mandates. For instance, under Article 2(3) of the CCPR, each State Party to the CCPR undertakes to ensure that any person whose rights or freedoms recognised in the CCPR are violated has an effective remedy. The remedy should preferably be a judicial one. In terms of the UN Human Rights Committee, “[t]here should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes”.⁵⁹ The ultimate remedy should be the disqualification of the elections with the

⁵⁹ General Comment 25, *supra* (note 19), para. 20.

practical outcome of new elections to be organised either in the whole country or in the constituency that has been affected by misconduct.

As our review of the contents of Article 25 of the CCPR shows, the right to participation is particularly well-specified in the area of the electoral process, within which a number of well-established rules exist. A summary of what elections should look like under Article 25 of the CCPR is contained in General Comment 25 of the UN Human Rights Committee:

Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.⁶⁰

The rules of participation in elections constitute the necessary, albeit probably not the sufficient, conditions for a viable electoral process that could, in relation to any particular elections, result in the qualification of such elections as, for instance, free and fair in the meaning of the Copenhagen Document of the Organization for Security and Co-operation in Europe (OSCE; see below). It is, however, not enough that one or a few elections are granted a quality label of that kind. For a legitimate political system to exist, the elements of the electoral cycle must be present on a continuous basis in the electoral process and should undergo constant review and perfection. Each turn of the electoral cycle should bring the process to a higher level of perfection so that the election elements are ever better implemented and realised.

The consequence of the implementation of the election elements reviewed here in relation to the scheme concerning national decision-making (see above, section 3.2) is the creation of a reflective or reflexive identity between the rulers and the ruled as a minimum level of participation through elections. Such systems of governance that are based on a metaphysical (or technical) identity between the rulers and the ruled present problems for the system of human rights. Under the interpretations of, for instance, the UN Human Rights Committee in General Comment 25 and the case of *Peter Chiiko Bwalya v. Zambia* (see above), metaphysical identity between the rulers and the ruled (C) can, in fact, be considered excluded from the range of options of governance. The governance in a country must be based on elections, and in such elections, it

⁶⁰ General Comment 25, *supra* (note 19), para. 21.

must be possible to stand as an independent candidate. If it is possible to nominate one independent candidate, it must also be possible to nominate two such candidates, and if two, then also three, four and five, and even more.

6. PARTICIPATION OF SPECIAL GROUPS

Participation is an issue also in a few more specific human rights documents, such as the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination⁶¹ (hereinafter: CERD) and the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women⁶² (hereinafter: CEDAW).

In Article 5(c) of the CERD, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee to everyone without any distinction the enjoyment of political rights, in particular the right to participate in elections through voting and through the opportunity to stand for election on the basis of universal and equal suffrage. Eligibility on equal terms is hence explicitly at the core of Article 5(c) of the CERD. The CERD emphasises non-discrimination, but it also contains an element of positive measures when establishing a guarantee of the right to participation for everyone without distinction as to race, colour, or national or ethnic origin.

This non-discriminatory right to take part in the CERD is relevant both for the government and for public affairs. The language used in this context is hence familiar both from Article 21 in the Universal Declaration and from Article 25 in the CCPR. Article 5 of the CERD is not limited to the right to participation only, but the provision also recognises the fundamental importance of the so-called adjacent political rights: in Article 5(d), the elimination of discrimination and guarantee of rights is extended to other civil rights, there among the freedom of thought, the freedom of opinion and expression, the freedom of peaceful assembly and association and the freedom of movement. At the same time as the CERD is helpful in maintaining the representative character of the government in relation to the entire population and is thus directed towards the modalities of internal self-determination of a state,⁶³ it offers an argument for, for instance, such ethnic minorities that may feel themselves disadvantaged in political life.

⁶¹ 660 UNTS 195. Adopted in 1965, entry into force in 1969.

⁶² 1249 UNTS 13. Adopted in 1979, entry into force in 1981.

⁶³ See General Recommendation XX, UN Doc. A/51/18 (1996), p. 124; and UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 211–212.

Women are clearly included among the persons who, on the basis of the Universal Declaration and the CCPR, shall have the right to participate in government or public affairs, respectively. However, the position of women in governmental structures does not reflect their share of the population, and therefore, the CEDAW has the important function of reminding everyone and especially the states of the fact that women are a part of the people.

Article 7(a) of the CEDAW promotes inclusiveness for women by prescribing eligibility for election to all publicly elected bodies, but extends inclusiveness in paragraphs (b) and (c) to the practical functioning in elective office and to participation in non-governmental organisations and associations concerned with the public and political life of the country so as to remind us of Article 20 in the Universal Declaration and Article 22 in the CCPR. This could function as a basis of special measures to support the position of women in political life. In addition, women shall, of course, have the right to vote in all elections and public referendums on equal terms with men.

The CEDAW and the CERD, together with the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,⁶⁴ in which the right of effective participation of minorities is mentioned, are a pointer in the direction that there are certain disadvantaged groups in the society which may need some special attention in terms of participation. It does not help much if these groups have the equal right to vote if the candidates nominated for election contain nobody from these groups. Therefore, it might be possible to promote the participation of these groups already at the nominations stage, for instance, by informing these groups of the necessity to avail themselves of the legal mechanisms to nominate candidates.

This perspective is very much supported in Article 5 of the CERD with a view to the groups mentioned therein. The CERD provision continues by separating from this immediate accessibility through participation the right to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service. Measures to promote accessibility are also recommended, for instance, in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, especially in Article 2 of the Declaration, which tries to enhance the effective participation of minorities. One possible way of enhancing effective participation of minorities could be so-called reserved seats for the minority groups. However, such reserved seats should be created so as not to violate the election principles more than is justifiable and necessary in the situation at hand.⁶⁵

⁶⁴ UN GA Res. 47/135 of 18 December 1992.

⁶⁵ In a European minority context, the first election-related judgment of the European Court of Human Rights, *Mathieu-Mohin and Clerfayt v. Belgium*, is very interesting because it

Against this background, it is interesting to note what the European Court of Human Rights once said about the relationship between a majority and a minority, although admittedly this conclusion comes from a completely different context, that of the (negative) freedom of association in relation to trade unions, and may thus mainly deal with political minorities, not something one could call permanent minorities.⁶⁶ The Court said that pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. “Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.” This description of hallmarks of a “democratic society”, a term of art in the European Convention on Human Rights, is very relevant also for political majority – minority constellations, because they are directly related to the ever-changing will of the people.

7. PARTICIPATION IN THE AMERICAS AND IN AFRICA, WITH A VERY SHORT NOTE ON ASIA

The Charter of the Organisation of American States⁶⁷ is already in its Preamble making an important statement concerning national decision-making when it concludes that representative democracy is an indispensable condition for the stability, peace and development of the region. In Article 2(b) of the Charter of the OAS, the promotion and consolidation of representative democracy is identified as an essential purpose of the OAS. It is therefore not surprising that the American Convention on Human Rights⁶⁸ of 1969 in its Article 23 very much repeats the language of Article 25 of the CCPR:

1. Every citizen shall enjoy the following rights and opportunities:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

deals with elections of representatives of different population groups to decision-making bodies in the national decentralisation scheme. See *supra* (note 12).

⁶⁶ ECHR *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Publications of the European Court of Human Rights, Series A, no. 44.

⁶⁷ 119 UNTS 4. Signed in 1948, entry into force in 1951.

⁶⁸ 1144 UNTS 123. Adopted in 1969, entry into force in 1978.

(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; and

(c) To have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

It seems on the basis of the article that the American Convention has a preference for that category of national decision-making we have identified in terms of reflective or reflexive identity between the rulers and the ruled. The focus on representative institutions is reiterated in the Inter-American Democratic Charter,⁶⁹ adopted by the General Assembly of the OAS in 2001. According to Article 3 of this Charter, the essential elements of representative democracy include, *inter alia*:

[r]espect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

Elections are here embedded in a broader context of constitutional features.

There is but one difference between the CCPR and the American Convention: the American Convention adds a limitation clause on the basis of which the States Parties can, in national law, regulate the exercise of the rights and opportunities to participate in government on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings. Of these, at least language and education can be considered problematic against the background of Article 25 of the CCPR, which in its *chapeau* makes a reference to the principle of non-discrimination in Article 2 of the CCPR and to the prohibition of unreasonable restrictions. The language criterion could perhaps also be problematic in relation to Article 27 of the CCPR and the recognition granted to linguistic minorities, while the educational criterion could be problematic against the background of the right to education in Article 13 of the Covenant on Economic,

⁶⁹ Document adopted by the General Assembly of the Organization of American States in Lima, September 11, 2001.

Social and Cultural Rights. If a state that is a party to the American Convention and at the same time to the CCPR chooses to use national legislation to create a legal limitation to the right of participation on grounds of language or education, it might be possible to argue that the national law is not in harmony with Article 25 of the CCPR.

On the African continent, the African Charter on Human and Peoples' Rights was concluded in 1981. In Article 13 of the African Charter, there is a participation clause that opens up in a manner which is similar to Article 25 of the CCPR and Article 21 of the Universal Declaration. However, Article 13 of the African Charter lacks an operationalisation of participation in the field of elections:

1. Every citizen shall 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.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

On the basis of the article, it is clear that citizens have the right to take part in government. It is also possible to maintain on the basis of the provision which talks about participation in the government of his country that the article is mainly targeted towards the national level, leaving the regional and local levels aside. Participation should be free, and the representatives should be freely chosen. However, Article 13(1) of the African Charter makes the implementation of the right to participation almost entirely dependent on national law. The margin of appreciation of the national law-maker is thus very broad. It should be possible to say that the national law-maker should not be able to use its legislative powers so as to extinguish the right to participation altogether.

However, nothing more concrete is said about how participation should take place and, more importantly, elections are not explicitly prescribed although Article 13(1) mentions that participation can be directly or through freely chosen representatives. The latter part of the two modes of participation seems to presuppose elections, but no elections or election elements are prescribed. Nonetheless, the practice of the African Commission on Human and Peoples' Rights indicates that at least the most extreme forms of exclusion of the people from national decision-making are not acceptable under Article 13(1) of the African Charter. Hence military coups in, for instance, Nigeria and the

Gambia have been condemned by the African Commission as violations of Article 13.⁷⁰

The language used by the African Commission in relation to the Gambia is illuminating. The African Commission declares that the military take-over of the reins of government of the Gambia on 22 July 1994 brought an end to an elected government and threatened the respect for human rights and the rule of law in that country. Therefore, the African Commission reaffirmed the fundamental principle that all governments should be based on the consent of the people freely expressed by them and through their chosen representatives. For that reason, a military government is considered to be a clear violation of this clear principle of democracy. In conclusion, the African Commission considered that the military coup in the Gambia was a flagrant and grave violation of the right of the Gambian people to freely choose their government.⁷¹

As concerns Asia, it should be concluded that no regional human rights convention and consequently no right to participation with rules on elections exist at the regional level. Instead, what could be applicable is Article 25 of the CCPR.

8. POLITICAL COMMITMENTS IN THE OSCE

The freedom of choice in the political sphere familiar to us from the Universal Declaration and the CCPR is also reflected in the OSCE principles adopted in the so-called Copenhagen Document⁷² after the era of the Cold War. In the Copenhagen Document, paragraph 3, it is declared that the participating states recognise the importance of pluralism with regard to political organisations.

⁷⁰ Resolution on the Gambia, African Commission on Human Rights 16th Ordinary Session 25 October – 3 November 1994.

⁷¹ Interestingly, the Constitutive Act of the African Union, adopted by the leaders of the African states in Lomé on 11 July 2000, contains in Article 3 as one of the objectives of the African Union the promotion of democratic principles and institutions, popular participation and good governance and in Article 4 as one of its principles of action the respect for democratic principles, human rights, the rule of law and good governance. In addition, one of the principles in Article 4 is the condemnation and rejection of unconstitutional changes of governments. In line with this commitment, Article 30 of the Constitutive Act contains a suspension provision according to which “[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union”. This suspension provision seems to be directed especially towards governments that have usurped the powers of the legitimate government by means of a military coup or a similar measure.

⁷² Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, as published in Bloed, 1993, pp. 439–465.

The Copenhagen Document maintains that “the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government”. What is emphasised is that citizens should be able “to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes”. The same idea is present in paragraph 9.3, which refers to the exclusion of any prior control — supposedly by governmental authorities — of the exercise of the freedom of association, albeit partly in a trade union context. Under the Copenhagen principles, a political party and the state shall not be united, but shall be clearly separated.

Although paragraph 5.1 of the Copenhagen Document contains the same reference to “equivalent free voting procedure” in connection to the secrecy of the vote as Article 21(3) of the Universal Declaration and is not limited to the legislature or does not outline the people as its basis, but speaks of the representatives of the electors, the paragraph is very much a repetition of Article 3 of Protocol No. 1 to the European Convention on Human Rights. There is one important detail which is not as explicitly present in any other provision reviewed here, namely the mention that the prevailing conditions shall *in practice* ensure the free expression of the opinion of the electorate. This requirement of realisation in practice of the conditions surrounding elections is probably of a similar nature as the reference to “opportunity” in the *chapeau* to Article 25 of the CCPR. The reference to practice does not necessarily only relate to the conditions of political competition, but also to the functioning of the election administration, so that the election administration will, in practice, have to see to the realisation of the freely expressed opinion of the electorate. This places additional emphasis on the importance of, for instance, the enforcement of the secrecy of the vote.

Paragraphs 7.1 and 7.2 of the Copenhagen Document make the same point at the level of political competition, and the latter of them is explicit in stipulating that the participating states will “permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote”. This is sustained in paragraph 7.6, which emphasises the necessity of legal guarantees to enable political parties and organisations to compete with each other on a basis of equal treatment before the law and the authorities. The free will of the electors is expected to arise on the basis of a competition between political contestants. However, as it has been pointed out in many contexts, it is probably impossible to achieve a completely level playing field for the political contestants.

This particular issue is addressed in somewhat narrower terms in paragraph 7.4 of the Copenhagen Document of the OSCE, when stipulating that the votes “are counted and reported honestly with the official results made

public".⁷³ The point of departure is that if all polling stations manage to make a correct representation of the result of the elections in their polling station area and if these opinions of the electors are correctly transmitted to the higher levels of election administration (for instance, regional election committees and the national election committee), then already the technical performance of the elections may warrant a positive label for the elections. Against the background of what was said about the right to vote above, the expression of the will of the voters also means that the individual voter has the right to expect that his or her vote is counted and that the vote through that counting influences the outcome of the elections in the intended way. The election administration should therefore be understood as being under an obligation to count all votes and to account for all votes cast.

What is at the core of the OSCE principles regarding governance is the legitimacy of government. Free elections at reasonable intervals are prescribed so that all seats in at least one chamber of the national legislature are freely contested in a popular vote, that is, in elections. Obviously, the point of departure is a competition between two or more political parties. This strongly implies the existence of a representative government based on the reflective or reflexive identity between the rulers and the ruled where those ruling are subjected to a direct answerability before the people.

Although the Copenhagen Document and its principles concerning participation are political commitments only, they have also found their way to binding instruments of international law. The Dayton Peace Agreement⁷⁴ concluded in 1995 after the war in Bosnia includes in Annex 3 a reference to the OSCE and its principles of free, fair, and democratic elections for the purposes of laying the foundation for representative government and ensuring the progressive achievement of democratic goals in Bosnia and Herzegovina. According to Article I(1) of Annex 3 to the Dayton Peace Agreement, the parties to the Agreement shall:

[e]nsure that conditions exist for the organisation of free and fair elections, in particular a politically neutral environment; shall protect and enforce the right to vote in secret without fear or intimidation; shall ensure freedom of

⁷³ As an interesting perspective on the counting of the votes that underlines its importance, the following sentence has been ascribed to Josef Stalin, the former leader of the former Soviet Union: "It does not matter how many those are who will vote. What matters is who counts the votes." The author of this piece is grateful to Dr. Krzysztof Drzewicki, Senior Legal Adviser to the OSCE High Commissioner on National Minorities, for reminding of this sentence.

⁷⁴ General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996).

expression and of the press; shall allow and encourage freedom of association (including of political parties); and shall ensure freedom of movement.

In addition to this, the parties agree in Article I(3) to fully comply with paragraphs 7 and 8 of the OSCE Copenhagen Document, paragraphs that were attached to the Dayton Peace Agreement. Although it can be recognised that state creation necessarily does not produce instant success, the direction of development and the objective of political participation are clearly expressed in the Dayton Peace Agreement.

9. DISCUSSION AT THE LEVEL OF INTERNATIONAL POLITICS

Participation, and elections as a core area of participation, are important and also somewhat unique among human rights. Unlike the other human rights, which are not so frequently exercised by everybody, participation through elections entails a collective exercise of a human right that involves massive numbers of individuals and that is to be organised by the state in question. The people in its political composition is entailed to participate in elections that fulfil the election-related criteria in the norms concerning participation.

Despite the increasing unanimity about the impact of the effect of the correct implementation of the election elements established, for instance, in Article 21 of the Universal Declaration and Article 25 of the CCPR, there is, nevertheless, still some disagreement at the level of the UN concerning the ways in which the international community and the various states can promote the principle of periodic and genuine elections. Since 1988 and UN General Assembly Resolution 43/157, that is, when the Soviet Union already had started to implement its policies of *glasnost* and *perestroika* and when many of the socialist countries in the world already were about to enter the path of constitutional transition, the UN General Assembly has almost annually adopted a resolution entitled "Enhancing the effectiveness of the principle of periodic and genuine elections".

In the beginning, the UN, while accounting for the political rights essential for periodic and genuine elections, criticised the South African apartheid system and the tricameral parliament established under that system. For instance, the resolution of 1991 made the point that each state had its sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states, but also emphasised that the electoral

systems shall conform with the relevant requirements of the Universal Declaration and the CCPR.⁷⁵

The idea of creating an environment for elections for them to be genuine is present, for instance, already in one of the first UN Resolutions on enhancing the principle of periodic and genuine elections of 1989.⁷⁶ In this resolution the General Assembly declares that “determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others within the constitution and national legislation”.

However, after the transformation of the South African Constitution, this traditional resolution has become more focused on the electoral process and in 1997, the General Assembly noted that first-time democratic elections have already been held in many Member States, thereby making the point that by implication, there still exist states in the world in which democratic elections have never been held. In fact, according to some estimates, elections at the national level have never been held in as many as 10–15 states. The resolutions, aimed at providing electoral assistance of all kinds at the request of the state concerned, were originally supported especially by the western countries and by countries aspiring at democracy. The number of states supporting the resolution has been growing during the decade after the first resolution. Countries not supporting the resolution by abstaining from voting in, for instance, 1997 were Brunei Darussalam, China, Cuba, Democratic People’s Republic of Korea, Democratic Republic of Congo, Iran, Lao People’s Democratic Republic, Libya, Myanmar, Sudan, Syria, Uganda, United Republic of Tanzania, Viet Nam, and Zimbabwe.⁷⁷ The latest resolution in the line of so-called “Enhancing resolutions” in 2004⁷⁸ was supported by 169 states, while no state opposed the resolution. Eight states abstained from voting, and they were Brunei Darussalam, China, Cuba, Democratic People’s Republic of Korea, Libya, Myanmar, Syria and Viet Nam.

Almost from the beginning of the decade of enhancing the principle of periodic and genuine elections, a number of countries of a non-western or non-democratic nature have annually promoted a parallel General Assembly resolution on “Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes”. In these resolutions, the General Assembly recognises that the principles of national

⁷⁵ UN GA Res. 46/137 of 17 December 1991.

⁷⁶ UN GA Res. 44/146 of 15 December 1989.

⁷⁷ UN GA Res. 52/129 of 12 December 1997.

⁷⁸ UN GA Res. 58/180 of 17 March 2004.

sovereignty and non-interference in the internal affairs of any state should be respected in the holding of elections and that there is no single political system or single universal model for electoral processes equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors.⁷⁹

This is perhaps acceptable from the point of view of human rights, at least as long as the states achieve the ultimate aim of elections, the free expression of the will of the electors, by realising the election elements of Article 21 of the Universal Declaration and Article 25 of the CCPR. In essence, however, these resolutions make a counter-argument from the perspective of cultural relativism to the political rights enshrined in the international human rights instruments and they were, in 1997, supported by the same countries that abstained from voting in the matter of the so-called "Enhancing resolution" and by a number of other countries especially in the third world. Countries that voted against this so-called "Respect of national sovereignty resolution" included the western countries and the countries that had already been democratised or that were on the path towards democracy.⁸⁰ The latest resolution in this line of the so-called "Respect for the principles of national sovereignty" resolutions adopted in 2002⁸¹ is very interesting in that it actually moves in the direction of Article 21 of the Universal Declaration, *inter alia*, in reiterating that periodic, free and fair elections are important elements for the promotion and protection of human rights and in reaffirming that the will of the people shall be the basis of authority of government and that 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.

Anyway, for a number of states, the reading of Article 21 of the Universal Declaration and Article 25 of the CCPR does not indicate any strong norm of international law and, in addition, that the two provisions would imply any certain category of national decision-making. Although an understanding of the election-related norms from the perspective of human rights would seem to lead to a clear preference for such systems of national decision-making that could be described in terms of physical identity (A) or reflective or reflexive identity (B) between the rulers and the ruled, still a number of states seem to argue for an open-ended interpretation of the provisions so as to make it

⁷⁹ UN GA Res. 49/180 of 23 December 1994.

⁸⁰ UN GA Res. 52/119 of 12 December 1997.

⁸¹ UN GA Res. 56/154 of 13 February 2002.

possible in practice to operate a system of national decision-making based on a metaphysical identity (C) between the rulers and the ruled.

From a general human rights perspective, this seems to be a negative thing. With reference to the UN General Assembly resolution on enhancing the effectiveness of the principle of periodic and genuine elections, a certain logical ordering of the right to participation through elections in relation to the other human rights can be suggested. In the resolution, the Member States of the United Nations stress their

conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that [...] the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms.⁸²

This is not to deny the indivisibility of human rights or an attempt to produce a hierarchy of human rights. On the contrary, this may suggest a logical ordering of human rights so that a full realisation of the right to participation especially in the field of elections will produce a representative law-making body which is capable of catering for all the other substantive human rights.

Hence there may be a logical precedence in space and time but not a substantive precedence or difference of importance between elections on the one hand and the other human rights on the other. Undoubtedly, an argument for the abolishment of the death penalty will stand a better chance of being accepted by a law-making majority in those states of the United States that still have the death penalty than, for instance, in Saudi Arabia, where the law-maker is not accountable to the people through elections. A somewhat similar logic is suggested by the Nobel Peace Prize laureate Amartya Sen, who maintains that a democracy is better suited to avoiding famine (that is, to try to fulfil the right to food) than a state which is not a democracy.⁸³ According to Sen, there has never been famine in a democratic country, rich or poor, but the opposite is true for non-democratic states, such as one-party states, military dictatorships and territories under colonial rule. Another commonly shared opinion is that democracies do not wage war against each other, which underlines the importance of the mechanism of participation at the root of national decision-making. The original idea pointing in this direction can be found already in Immanuel Kant's philosophical work on the perpetual peace:⁸⁴ in a state where

⁸² UN GA Res. 44/146 of 15 December 1989.

⁸³ Sen, 2000, pp. 146–188.

⁸⁴ Kant, 1989, pp. 20–23.

the consent of the governed is the basis of decision-making, the persons in decision-making positions will think twice before they start a war.

Despite the fact that the term democracy is used in these more general contexts, it is possible to say that the arguments are in line with our scheme of national decision-making (internal sovereignty) above and with the identification of the three broad categories of national decision-making. Participation and exercise of internal self-determination through elections and, where applicable, through referendums must therefore be respected, protected, promoted and fulfilled as a human right.

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THE RIGHT TO FREE ELECTIONS ACCORDING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Janne Lindblad

1. INTRODUCTION

1.1 The Historical Context

The Council of Europe and the European Convention on Human Rights¹ came into existence in the aftermath of the Second World War in an attempt to create a safeguard against the atrocities and mass violations of human rights that millions of people suffered throughout the world and particularly in Europe during the preceding years. The Council of Europe was neither the first nor the only forum of international co-operation that emanated from the realisation that the traditional concept of state sovereignty had to be limited in order to ensure the protection of the physical and mental integrity of human beings, and that close international co-operation was necessary in the process. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights,² and thereafter the Council of Europe drew up the Convention to create an enforceable instrument that would secure regional implementation of the principles of the Universal Declaration of Human Rights.

The Council of Europe has proved to be a significant initiative for the protection of individual human rights in Europe, and has had a strong influence in the struggle to protect human rights in other parts of the world. The reasons are multiple, but in particular it is worth mentioning the establishment of the European Commission of Human Rights³ in 1954 and the European Court of Human Rights⁴ in 1959, the possibility of individual petition and the binding nature of the case law deriving from the Strasbourg organs.

¹ (European) Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 005, adopted in Rome 4 November 1950, entered into force 3 September 1953, as amended by Protocols No. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. Hereinafter: the Convention.

² The Universal Declaration of Human Rights, UN GA Res. 217 A (III) of 10 December 1948.

³ Hereinafter: the Commission.

⁴ Hereinafter: the Court.

The Preamble of the Convention creates a link between human rights and democracy by affirming that fundamental freedoms are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend. The Court has also, in its case law, pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society.⁵

During the drafting of the Convention it was pointed out that although elections are not an absolute guarantee for democracy, free elections are nevertheless an important part of democracy.⁶ Despite the fundamental role that elections play in a democracy, the right to free elections was not included in the Convention, but was added to it in Protocol No. 1 to the Convention in 1952.⁷ The right to free elections as protected by the Convention was not subject to the Court's review until 1987, where the Court assessed for the first time whether a State Party was complying with the requirements of the said right.⁸ At approximately the same time, the fall of the Berlin Wall and the dissolution of the Soviet Union resulted in democratisation processes in countries that previously presented the largest ideological obstacle to democracy based on free elections as the only legitimate form of rule. This evolution made it possible for various international organisations to take up the promotion of democracy and free elections. Thus, in the last 15 years democratisation initiatives have played an increasing role in the activities of, for example, the European Union, the Organization for Security and Co-operation in Europe and the United Nations.

The right to free elections laid down in Article 3 of Protocol No. 1⁹ is a reflection of the general principle expressed by the words introducing the

⁵ See, e.g., European Court of Human Rights (hereinafter: ECHR) *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgment of 7 December 1976, Publications of the European Court of Human Rights, Series A, no. 23, para. 53; and ECHR *Soering v. the United Kingdom*, Judgment of 7 July 1989, Publications of the European Court of Human Rights, Series A, no. 161, para. 87.

⁶ *Travaux préparatoires*, vol. IV, p. 24.

⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 009, adopted 20 March 1952, entered into force 18 May 1954. Hereinafter: Protocol No. 1.

⁸ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 2 March 1987, Publications of the European Court of Human Rights, Series A, no. 113.

⁹ Hereinafter: Article P1-3.

Charter of the United Nations: "We the Peoples of the United Nations ...",¹⁰ recognising that the sovereign authority of the states is rooted in the will of the people, and more specifically in Article 21 of the Universal Declaration of Human Rights, where, in paragraph 3, it is stated that "The will of the people shall be the basis of the authority of government". At the same time, Article P1-3 entails, by being a genuine human right,¹¹ a link between democracy and human rights, as expressed by the Convention's Preamble.

Elections take place to ensure that governments acknowledge that the power the government exercises derives from the people and that the ruled have a say in the appointment of the rulers. As most states have a system of representatives making the general decisions for the whole population, democracy demands that the people affected by those decisions influence the appointment of the decision-makers and that the decision-makers rule on the basis of popular sovereignty.

Elections concern us all. In the right to free elections we find the means to collectively point in the direction that we want our representatives to guide our society. As mentioned, elections do not guarantee that societies function democratically in every respect, but they provide people with the possibility of showing their disagreement with policies enforced by politicians who do not represent the opinion of the people.

1.2 Research Issues, Method and Materials

In the 1987 judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court said that Article P1-3, ensuring the right to free elections, enshrines a characteristic principle of democracy, and is accordingly of prime importance in the Convention system.¹² The article stipulates that:

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.

This paper will focus on the above-mentioned right to free elections protected by Article P1-3. What rights are contained in the right to free elections, that is: what are the state obligations according to Article P1-3 and what demands can the people under the jurisdiction of the Contracting States present to their

¹⁰ Charter of the United Nations, adopted in San Francisco 26 June 1945, entered into force 24 October 1945, 1 UNTS xvi, the Preamble.

¹¹ And not merely a political statement of principle. Herndl, 1999.

¹² ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 47.

governments? What restrictions can the Contracting States make in relation to these rights without violating the right to free elections? Which electoral systems can the Contracting States adopt with the acceptance of the Court? What constitutes "the legislature" within the meaning of Article P1-3? And how do the states ensure that the elections reflect "the free expression of the opinion of the people" within the meaning of Article P1-3?

By means of a legal dogmatic case-law analysis of the judgments deriving from the Court, this paper will answer these questions to the extent that the Court has expressed itself on the issues. During the last few years the Court has passed judgments in several cases concerning Article P1-3 and even though the number of judgments from the Court concerning Article P1-3 is still limited, the Court has developed relatively extensive argumentation in the judgments, which will be helpful when determining the content of Article P1-3. However, there are still aspects of the provision upon which the Court has not decided or expressed itself. Therefore, the analysis of admissibility decisions from the Commission and, from 1 November 1998 onwards, the Court, is an important part of this paper.

With Protocol No. 11¹³ to the Convention, the Convention's complaint system was reformed. From 1 November 1998, the Court took over the assessment of the admissibility of the complaints, a function that before this date was performed by the Commission. Another result of the reform was the creation of Committees consisting of three judges, Chambers with seven judges each, and the Grand Chamber with 17 judges.¹⁴ When a case is brought before the Court, a Committee makes an evaluation of the case, and it can decide, by unanimous vote, that an individual complaint should be declared inadmissible or struck off the list, where such a decision can be taken without further examination.¹⁵ Such a decision is final.¹⁶ If a Committee considers that the complaint poses pertinent questions in relation to the Convention, the complaint is transferred to a Chamber. The Chamber performs a second admissibility assessment, and the Chamber's decision in this respect is final.¹⁷ This means that a complaint that reaches the admissibility assessment in a

¹³ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS no. 155, adopted 11 May 1994, entered into force 1 November 1998. Hereinafter: Protocol No. 11.

¹⁴ Protocol No. 11, Article 27(1).

¹⁵ The admissibility criteria for individual complaints are found in Article 34 of Protocol No. 11.

¹⁶ Protocol No. 11, Article 28.

¹⁷ Protocol No. 11, Article 29.

Chamber, has already been evaluated once, and the complaint has been considered to pose questions that merit further evaluation by a Chamber. Consequently, it is relevant to take admissibility decisions into consideration when trying to uncover the content of a provision in the Convention, since the admissibility decisions will show which type of issues are pertinent in relation to the provision in question. The Committees' initial review of the complaint is considered to have removed any issues irrelevant to the provision in question.

Furthermore, admissibility decisions give fairly good guidance as to the likely reasoning of the Court in future judgments and to the extent that the argumentation is convincing, they will also be used in this paper. With the reform of the complaint mechanism, the admissibility decisions can be regarded as having a greater authoritative value than the decisions passed by the Commission, since today it is the Court itself that carries out the evaluation on the admissibility. The analysis will take this into consideration when referring to the admissibility decisions. Accordingly, admissibility decisions will be used to negatively and to positively describe the scope of the rights in Article P1-3 and thus, when possible, to cautiously give an estimate of the outcome of future disputes before the Court.¹⁸

When describing the content of Article P1-3, this paper will also take a critical approach to the solutions proposed by the Strasbourg organs. Though, not every topic that could give rise to supplementary assessment and critique will be discussed, some issues will be selected for a more thorough examination.

In instances where it is deemed relevant, for example, but not exclusive, if issues have not been considered in either admissibility decisions or judgments, statements made during the drafting of the Convention will be mentioned. These statements are to be found in the *travaux préparatoires* of the Convention.

It should be mentioned that the *travaux préparatoires* of international treaties do not have the same interpretative authority as is traditionally the norm in relation to national law. This stems from the fact that not all Contracting Parties have taken part in the drafting and have often not had the opportunity to influence the form and content of the treaty. Furthermore, the drafting of the Convention took place over 50 years ago and as the Convention has an in-built dynamic nature it has to be interpreted in the light of present-day conditions in order to respond to the reality of European society at any

¹⁸ According to the reformed complaint system, assessment of the merits of the complaints is in first instance done by a Chamber, and a judgment from a Chamber can be appealed to the Grand Chamber by any of the parties. See Protocol No. 11, Article 43(1). When a Chamber judgment is not appealed it becomes final after three months from the date of the judgment. If a Chamber judgment is appealed, the Grand Chamber will evaluate the merits and pass a final judgment in the case. See Protocol No. 11, Article 44.

given time.¹⁹ In addition, the *travaux préparatoires* are not sufficiently elaborate to provide the answer to every question concerning the content of the Convention. Nevertheless, the *travaux préparatoires* can give some guidance as to the ideas behind the Convention. They can also explain why certain issues were handled the way they were at the outset, even though the case law from the Strasbourg institutions changed over time. They also give the answer to why certain institutions in the Contracting States are accepted in case law from the Strasbourg institutions even though they seem hard to reconcile with a teleological interpretation of the provision.

The right to free elections as protected by Article P1-3 has previously been described in the academic literature. Relevant sources of inspiration have in this connection been van Dijk and van Hoof's *Theory and Practice of the European Convention on Human Rights* from 1998, Jacobs and White's *The European Convention on Human Rights* from 1996, Ovey and White's *The European Convention on Human Rights* from 2002, and Harris, O'Boyle and Warbrick's *Law of the European Convention on Human Rights* from 1995. This paper will take the comments made in these writings into consideration where relevant.

The Court's case law reveals that it is important to take into account that there are other issues than those with a direct connection to elections which are necessary to bear in mind when dealing with the right to free elections. Section 7 of this study points to selected issues that can have an impact on the overall political situation in a state and thereby a possible influence on the outcome of an election.

2. FREE ELECTIONS AT REASONABLE INTERVALS BY SECRET BALLOT

2.1 Free Elections

The term "free elections" relates, in addition to the behaviour of the state authorities on the election day, to the overall political arrangements in the Contracting States. The Commission said in the *Greek Case* in 1969 that the right to free elections "presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society."²⁰ Thereby,

¹⁹ ECHR *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, Publications of the European Court of Human Rights, Series A, no. 26, para. 31; ECHR *Marckx v. Belgium*, Judgment of 13 June 1979, Publications of the European Court of Human Rights, Series A, no. 31, para. 58; and ECHR *Soering v. the United Kingdom*, *supra* (note 5), para. 102.

²⁰ European Commission of Human Rights (hereinafter: EComHR) *The Greek Case*, Report of the European Commission of Human Rights, 5 November 1969, 12 Yearbook of the

the Commission shows that Article P1-3 not only contains the requirement that activities that take place on the day of an election are in compliance with the Convention. It also requires that the exercise of political power is vested in a freely elected legislature.

Elsewhere in the Convention, provisions demand that the rights listed in the Convention shall be “protected by law”,²¹ that certain activities have to be “lawful”²² and that restrictions to the Convention rights shall be “in accordance with the law”²³ or “prescribed by law”.²⁴ Van Dijk and van Hoof argue that one should assume that there is a connection between Article P1-3 and the guarantees incorporated in other substantive provisions in the Convention where restrictions to be imposed on the enjoyment of rights and freedoms have to be “prescribed by law”.²⁵ The Court’s interpretation and understanding of the principle of legality and the Convention’s requirements as to the existence of a basis in national law will then have an influence on what constitutes the “legislature” within the meaning of Article P1-3. If the link between the term “law” and the term “legislature” is a direct link, then the national norm-issuing powers that have the ability to pass legislation that applies generally must as a consequence be responsible to the electorate in accordance with the requirements in Article P1-3. Ovey and White argue along the same lines that Article P1-3 underpins the whole structure of the Convention in requiring that laws should be made by a legislature responsible to the people.²⁶

Surely, without prejudging the existence or the exact nature of a link between the term “law” and the term “legislature”, it is fair to say that Article P1-3 plays a central role in the Convention system. The Convention indeed reflects the principle that with the intervention of Article P1-3 the populations, here meaning the persons affected, of the Contracting States are able to influence, which restrictions to the rights protected by the Convention can be imposed by the legislature. However, it will be shown in section 6 of this study that the link between the term “law” and the term the “legislature” is not as direct as expressed by Ovey and White.

European Convention on Human Rights (hereinafter: YB) 179.

²¹ See, *e.g.*, Article 2 of the Convention.

²² See Article 5(1) of the Convention.

²³ See, *e.g.*, Article 8(2) of the Convention.

²⁴ Among others, Articles 9(2), 10(2) and 11(2) of the Convention.

²⁵ van Dijk and van Hoof, 1998, p. 665.

²⁶ Ovey and White, 2002, p. 331.

In the Convention system, free elections are regarded as a condition of the “effective political democracy” that is mentioned in the Convention’s Preamble.²⁷ Thereby Article P1–3 establishes the link between fundamental rights and political democracy that the Preamble brings to mind, and a link can therefore also be drawn between the rights in Article P1–3 and the concept of “a democratic society” that runs through the Convention. Accordingly, there is an inter-play between Article P1–3 and those substantive rights in the Convention in which restrictions can only be made when they are “necessary in a democratic society”.²⁸ In section 4 of this study some general observations in relation to restrictions to the rights in the Convention will be made, and different methods used by the Court will be examined.

In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court held that Article P1–3 reflects, by its wording, that the right to free election rather implies an obligation for the Contracting States to adopt positive measures to “the holding of” elections than it implies a right of non-interference, which is the case for the majority of the rights protected by the Convention.²⁹ Accordingly, Article P1–3 contains an obligation for the Contracting States to set up a normative and administrative system that deals with the organisation of elections, the proper conduct of the elections, and that ensures that the practical aspects of the elections are in order, for example the printing of ballot papers, the counting of the votes, etc. In an admissibility decision from 1994, the Commission assessed a case dealing with the authorities’ duty to provide the electors with blank ballot paper at parliamentary elections.³⁰ The applicant, a voter in the town of Chalkida in Greece, alleged that the omission of the electoral committees to provide voters with official blank ballot paper in the absence of pre-printed ballot papers for three independent candidates, had the effect that the election was held under conditions that contravened Article P1–3. The Commission noted that the three independent candidates failed to supply the relevant authorities with printed ballot papers for distribution in the town of Chalkida, and that the three independent candidates only secured nine votes out of 149,229 votes in the whole Euboea constituency, to which the town of Chalkida belonged. Approximately 24,000 persons voted in the election in the

²⁷ See also ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 47, where the Court additionally holds that Article P1–3 enshrines a characteristic principle of democracy.

²⁸ Articles 8 to 11 of the Convention.

²⁹ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 50.

³⁰ EComHR *I.Z. v. Greece*, Decision of 28 February 1994, 76 Decisions and Reports (hereinafter: DR) 65.

town of Chalkida and the quota necessary for securing a seat for a candidate in the constituency was 21,006 votes. The Commission regarded the applicant's allegation that the three independent candidates could have secured the electoral quota of 21,006 votes in the constituency as being based on a mere theoretical possibility. Accordingly, the Commission found that the conduct of the authorities was not in contravention of the article and declared the application inadmissible.

That the design of the ballot paper falls within the margin of appreciation of the state in question is not surprising. Furthermore, candidates and parties failing to comply with national rules regulating the matter can be excluded from appearing on the ballot paper.³¹

The existence and the nature of an election administration have only been examined by the Strasbourg institutions to a wider extent than expressed in the case of *Mathieu-Mohin and Clerfayt v. Belgium* in the 2002 case of *Podkolzina v. Latvia*.³² However, it should be noted that the Contracting States have widely different systems in this respect and that it is generally accepted in relation to election observation that the election administration can be created within the judicial system, the executive branch or as an independent organ composed of representatives from the competing political parties.³³ The requirements in relation to European Union election observation are that the election administration is independent, impartial, transparent and inclusive.³⁴ These same criteria cannot be read into Article P1-3 on the basis of the case law. In the case of *Podkolzina v. Latvia*, the Court said that even though the states have a wide margin of appreciation when establishing rules for eligibility, it is necessary, according to the principle of effective rights, that when candidates' eligibility is assessed, such assessment must be carried out in accordance with rules that prevent arbitrary decisions. Furthermore, the evaluation must be carried out by a body which can provide "a minimum of guarantees of its impartiality".

³¹ EComHR *Ceresa v. Italy*, Decision of 3 December 1997, Application no. 32189/96. See also ECHR *Samuelewicz v. Poland*, Decision of 7 September 1999, Application no. 31372/96, where the Court stated that the way a state chooses which technical means to employ to secure the proper conduct of the election, is a matter in which the Contracting States enjoy a wide margin of appreciation.

³² ECHR *Podkolzina v. Latvia*, Judgment of 9 April 2002, Reports of Judgments and Decisions 2002-II.

³³ See, e.g., *Handbook for European Union Election Observation Missions*, 2002, p. 63; and *OSCE Guidelines for Reviewing a Legal Framework for Elections*, 2001, pp. 11-12.

³⁴ *Handbook for European Union Election Observation Missions*, 2002, p. 12.

However, the Court did not describe any clear criteria for the determination of what constitutes these minimum guarantees.³⁵

This shows that the election administration body does not necessarily have to be without affiliation to state authorities or political parties, as long as it convinces the persons whose rights are determined by it that it acts in an impartial manner, and its decisions are fair and objective and its competence and margin of discretion is laid down in national law. The judgment will be further discussed in section 3 below.

Free elections do not rule out the possibility for the Contracting States to decide that voting is, in addition to a right, also a duty. Compulsory voting, which for example exists in Belgium, is therefore not in contravention of Article P1-3. In the 1972 case of *X v. Austria*,³⁶ the Commission said, in connection with a duty to vote subject to a pecuniary fine, that such an obligation to vote only has the aim and the effect that the elector turns up at the polling station on election day. It does not oblige the elector to go against his or her conscience and beliefs and choose one of the candidates on the official ballot paper. When the elector has the possibility of casting a blank vote or spoiling his or her vote, such compulsory voting is not in contravention of Article P1-3.

2.2 Reasonable Intervals

Concerning the periodicity of the elections, the provision states that the elections shall take place "at reasonable intervals". The Court has not pronounced itself on the issue, since only one case concerning the right to free elections has contained a complaint that the periodicity was not respected, and the Commission declared the application inadmissible on the basis that it was manifestly ill-founded. The case was lodged against Germany in 1995 by Mr Timke, a German citizen. Mr Timke complained that a change of constitution in the Land Niedersachsen prolonged the intervals between the parliamentary elections from four to five years, and that it constituted a breach of Article P1-3. The Commission did not find that the prolongation was a violation of the right to free elections. It noted that the purpose of parliamentary elections is:

to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people. [The] 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

³⁵ ECHR *Podkolzina v. Latvia*, *supra* (note 32), para. 35.

³⁶ EComHR *X v. Austria*, Decision of 22 March 1972, Application no. 4982/71, 15 YB 468.

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. A five-year interval between elections gives appropriate weight to these considerations and duly reflects the opinion of the people.³⁷

Therefore the Commission considered that intervals of five years between elections did not go beyond what can be considered “reasonable” for the purposes of Article P1–3 in terms of an effective political democracy.

The *travaux préparatoires* give little guidance as to the accepted length of the intervals. They merely state that the intervals must be neither too short nor too long and must correspond with what is customary in free states.³⁸

However, it is clear from the wording of the provision that elections should be a recurring event and that the right to free elections contains a continuous right to participate in the appointment of the legislature. This is important since “the opinion of the people” is not of a static nature, as mentioned in the case of *Timke v. Germany*. It has a tendency to change over time, and therefore only a continuous obligation for the Contracting States to hold elections will accommodate the requirements of Article P1–3. This demand for sequences of elections requires the establishment of proper procedures for calling the elections. Therefore, the *Greek Case* can also be regarded as a conclusion of violation of the requirement of periodicity, since the Greek Government after the *coup d'état* suspended the elections, without it being clear whether or when elections to the legislature would take place.³⁹

2.3 Secret Ballot

None of the judgments from the Court deals with the issue of the secrecy of the vote. In the admissibility decision in the case of *Babenko v. Ukraine*,⁴⁰ the Court recognised that the secrecy of the vote was not entirely assured, but still declared the application inadmissible. The rationale behind the decision can be interpreted as showing that the Court had faith in the national court's evaluation of the case. The national court did not find that a lack of isolated polling booths had an influence on the outcome of the election that would justify an annulment of the election. It emphasised in that connection that the officials in the polling stations lacking isolated polling booths did not interfere

³⁷ EComHR *Timke v. Germany*, Decision of 11 September 1995, 82 DR 158.

³⁸ *Travaux préparatoires*, vol. III, p. 264 and vol. IV, p. 22.

³⁹ The *Greek Case*, *supra* (note 20), pp. 179–180.

⁴⁰ ECHR *Babenko v. Ukraine*, Decision of 4 May 1999, Application no. 43476/98.

in the process of voting. Thus a balance was struck on the national level and at the Court between the effect of an annulment of the election and the effect which the inadequate number of polling booths, compared to the number of voters, had had on the outcome of the election.

3. THE NATURE AND SCOPE OF THE RIGHTS IN ARTICLE P1-3

3.1 *Individual and Collective Rights*

The wording of Article P1-3 differs from the formulation of many of the other rights in the Convention. While most of the other rights in the Convention say that “[e]veryone has the right to...”⁴¹ or that “[n]o one shall be...”,⁴² and thus clearly describe individual rights of non-interference from state activities, Article P1-3 stipulates that “[t]he High Contracting Parties undertake to hold...”. This difference was reflected in the Commission’s initial position according to which Article P1-3 did not contain any individual rights, for example the individual’s right to vote or to stand for election, but exclusively an “institutional” right to the holding of free elections.

The approach resulted in the Commission’s declaration of inadmissibility in cases concerning individuals’ complaints that they had been denied their individual right to vote. One of these cases from 1961 concerned a Belgian national who in 1946 was sentenced to three years of imprisonment for working for the occupying forces during the Second World War. His sentence automatically entailed the forfeiture of certain civil and political rights, including the right to vote, the right to stand as a candidate and the right to be elected, for a period of 20 years. Even though the applicant did not explicitly complain about the suspension of these rights, the Commission made an *ex officio* statement concerning the suspension. The Commission noted that Article P1-3 “does not guarantee the right to vote, to stand for election or to be elected, [...] but solely the right whereby Contracting States 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’.”⁴³

⁴¹ Among others Articles 5, 8, 9 and 10.

⁴² Among others Articles 3, 4 and 7.

⁴³ EComHR *X v. Belgium*, Decision of 18 September 1961, 4 YB 324. See also EComHR *X and Others v. Belgium*, Decision of 30 May 1961, 4 YB 260, concerning Belgian nationals’ complaint relating to their forfeiture of the right to vote in Belgium, because of their long-term residence in Belgian Congo.

The Commission upheld this point of view until 1967 when the Commission changed its practice, allowing individuals to have the claim that their individual right to vote was infringed assessed by the Strasbourg institutions. The first case concerned a German citizen who was, while detained in prison, prevented from voting in the Land elections of the Saar and in the German federal elections. He complained that the prevention was in contravention of his individual right to vote and that it constituted a breach of Article P1-3. The Commission acknowledged that Article P1-3 implies the recognition of universal suffrage and therefore a complaint concerning the individual right to vote gave rise to an examination by the Commission.⁴⁴ The Commission maintained this position when deciding on the admissibility of complaints concerning the nature of the rights contained in Article P1-3, and rightly so. In the *travaux préparatoires* it is explicit that there is no difference of principle or implementation between the rights guaranteed in Article P1-3 and the other substantive rights in the Convention, regardless of the difference in the wording. The general opinion was that the difference merely stems from the fact that the rights in Article P1-3 require a more solemn and more unequivocal commitment, since they are direct functions of government action.⁴⁵

In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court evaluated the issue for the first time, and it stated, in accordance with the *travaux préparatoires* and the Commission's practice from 1967 onwards, that "the inter-State colouring of the wording of Article 3 [P1-3] does not reflect any difference of substance from other substantive clauses in the Convention and Protocols". The difference in wording is owed to the fact that the primary obligation of Article P1-3 is not an obligation of non-interference, but an obligation to adopt positive measures to hold democratic elections. The Court noted that the Commission had changed its interpretation of Article P1-3 from the idea of an institutional right concerning the holding of free elections to the concept of "universal suffrage" and then, as a consequence, to the concept of substantive rights of participation — the "right to vote" and "the right to stand for election to the legislature" and that the Court approved of the approach.⁴⁶

However, the fact that the provision contains individual rights did not prevent the Commission from upholding the opinion that Article P1-3 also contains the so-called "institutional" right to the holding of elections. The institutional right can be seen as a right for the people as a group or an entity, given to them as recognition that popular sovereignty is the basis of a

⁴⁴ EComHR X *v. the Federal Republic of Germany*, Decision of 6 October 1967, 10 YB 336. The application was declared inadmissible for other reasons. See below in section 4.

⁴⁵ *Travaux préparatoires*, vol. III, p. 16.

⁴⁶ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 51.

democratically governed state. This aspect of Article P1-3 therefore has a collective nature and is owed to the population as a whole.⁴⁷ As mentioned, the Commission held in the *Greek Case* that Article P1-3 “presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society”.⁴⁸ The Greek Parliament had been dissolved following the *coup d'état* in 1967, and there was therefore no elected legislative body in Greece. The result was that the Greek people was, in the Commission’s view, prevented from expressing their political opinions by choosing a legislature in accordance with Article P1-3. Therefore the Commission found that the Government of Greece was in violation of Article P1-3.

The Committee of Experts announced during the drafting of the Convention, that it had abandoned the idea of granting the Court competence to deal with cases of violation of Article P1-3. Cases of infringement of this article could only be submitted to the Commission.⁴⁹ This may be the reason for the Commission’s hesitation to refer the individual cases to the Court until the Commission’s change of practice in 1967. However, no reservations or separate declarations were made to Protocol No. 1, which means that all the clauses in the Convention are to be applied equally in relation to the rights in Protocol No. 1, including the provisions concerning the Commission’s competence to deal with individual cases. Therefore, there was no justification for the Commission’s hesitation or previous practice.

Thus, there is both an individual and a collective aspect of the rights guaranteed by Article P1-3.

3.2 *The Right to Vote and the Right to Stand for Election*

As mentioned above, Article P1-3 expresses, according to the practice laid down by the Court, the principle of universal suffrage, which implies both the individual right to vote and the individual right to stand for election to the legislature.⁵⁰

The principle of universal suffrage implies essentially that everyone should have the right to vote and stand for election in elections to the legislature, and the wording of Article P1-3 does not specify any explicit

⁴⁷ For the Court’s definition of what constitutes the “people” or “the population” in relation to Article P1-3, see below.

⁴⁸ *The Greek Case*, *supra* (note 20), p. 179.

⁴⁹ *Travaux préparatoires*, vol. IV, p. 24.

⁵⁰ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 51.

limitation as to the *ratione personae* of the article. However, in the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court stated that:

the phrase 'conditions which will ensure the free expression of the opinion of the people in the choice of the legislature' implies essentially — apart from freedom of expression (already protected under Article 10 of the Convention) — the principle of equality of treatment of all *citizens* in the exercise of their right to vote and their right to stand for election.⁵¹

It is therefore clear that the right to free elections is a right given exclusively to citizens of the Contracting States. As Article 16 concerning the Contracting States' possibility to limit the political activities of aliens also applies in relation to Article P1–3, it seems to be generally in line with the Convention system to limit the scope of Article P1–3 to the nationals of the Contracting States. That only citizens are granted protection concerning the right to participate in public life in a given state is also explicitly recognised in other human rights instruments, for example in Article 25 of the International Covenant on Civil and Political Rights.⁵² Therefore, it can be argued that it is generally accepted in international human rights law that the right to vote and the right to stand for election are rights that are solely owed to citizens.

This limitation in the *ratione personae* finds its justification in the fact that when the Convention was drafted most of the Contracting States had election systems that only allowed their own nationals to participate. In addition, the post-Second World War environment was dominated by a reluctance to touch upon minority issues, which evidently did not leave room for consideration of extending the right to vote to non-citizens. This is not to confuse the concept of non-citizens with the concept of minorities, since these groups are not necessarily the same nor necessarily different from each other, but the way in which states handle the issue of minorities and the issue of non-citizens has many similarities. Today, there is a growing international trend towards a more inclusive democracy, which has an effect on both these groups. The general theme in both cases is a strong focus on participation by the persons affected by the political decisions made. This allows for expanded political participation for those minorities that possess citizenship, which reveals itself in the fact that

⁵¹ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 54, emphasis added.

⁵² International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171. Article 25 of the Covenant and Article P1–3 were created after the model of Article 21 of the Universal Declaration of Human Rights, but while the latter gives the right to "everyone", the two former only grant the rights to "citizens".

several Contracting States have granted minorities special rights of participation. One manifestation of this is the reservation of special seats for minorities in national parliaments, in cases where minority groups are so small that the possibility for the group to elect a representative in the national parliament is non-existent. Such representation has been considered important in terms of protecting the groups' cultural identity and preventing conflicts between the minority and the majority. The Commission noted in a case from 1979 that attempts have also been made to create political rights for non-citizens in the country of their habitual residence.⁵³

The effect of this broadened form of democracy *vis-à-vis* non-citizens can be observed in the fact that for example Member States of the Nordic Council⁵⁴ have granted each other's citizens the right to participate in elections to local authorities.⁵⁵ In addition, the Council of Europe has, albeit not within the framework of the human rights convention, actively recognised the need for groups that have traditionally been barred from the electoral process to participate in public life.⁵⁶ Furthermore, some Member States of the Council of Europe are envisaging in their legislation the possibility of widening the group of persons with the right to participate in elections beyond the category of citizens.⁵⁷

⁵³ EComHR *X v. the United Kingdom*, Decision of 28 February 1979, 15 DR 137.

⁵⁴ The Nordic Council is a form of co-operation on governmental and parliamentary level between the Nordic countries, Denmark, Norway, Iceland, Sweden and Finland, and in addition Greenland and the Åland Islands.

⁵⁵ See, e.g., the Danish Electoral Law concerning elections to municipal councils, LBK no. 263 of the 18 April 2001, Article 1, where it is stipulated: "The right to vote in elections to the municipal councils [...] is granted to everyone, who on election day has reached the age of 18, who is a permanent resident of the municipality and who 1) is a Danish citizen; 2) is a European Union citizen; 3) is a citizen of Iceland or Norway or; 4) has been a permanent resident of the Kingdom without interruption three years prior to election day." (Author's own translation). The right to stand for election to the municipal councils is granted to the same categories in Article 3.

⁵⁶ See, e.g., Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level, ETS no. 144, opened for signature 5 February 1992, entered into force 1 May 1997. Reflected in the aforementioned Danish Electoral Law concerning elections to municipal councils, Article 1(4).

⁵⁷ Article 15(3) of the Portuguese Constitution stipulates that "Citizens of Portuguese speaking countries may, by international convention and subject to reciprocity, be granted rights not otherwise conferred to aliens, except the right of access to membership of the organs of supreme authority and the organs of self-government of the autonomous regions, service in the armed forces, and access to the diplomatic service." The Portuguese Constitution's fourth revision 1997, text according to Constitutional law no. 1/97 of 20 September. See

It shall be noted that some of the initiatives mentioned aim at participation on the local level and that elections to political organs on the local level do not necessarily fall within the scope of Article P1-3, as will be shown in section 6 of this study. However, the creation of the Convention on the Participation of Foreigners in Public Life at Local Level indicates that the individual's ability to participate in the appointment of persons making decisions that affect his or her daily life is a pertinent issue within the Council of Europe. Furthermore, it should be mentioned that Article 16 has led a rather quiet existence in the practice of the Strasbourg organs, and that some authors regard it as obsolete.⁵⁸

A case that is of interest in this connection, even though it does not specifically deal with the limitation of the right to vote for *citizens*, but rather the limitation of the right to vote for *citizens residing on the territory of the Contracting State* is the case *X v. the United Kingdom* (28 February 1979).⁵⁹ Here the Commission accepted the limitation of the right to vote for citizens residing on the territory of the Contracting State for the following reasons:

1. The assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of the day-to-day problems in the country;
2. The impracticability for and sometimes undesirability (in some cases impossibility) of parliamentary candidates of presenting the different electoral issues to citizens abroad so as to secure a free expression of opinion;
3. The influence of resident-citizens on the selection of candidates and on the formulation of electoral programmes; and
4. The correlation between one's right to vote in parliamentary elections and being directly affected by acts of the political bodies so elected.

also the United Kingdom's Representation of the People Act 2000, Part 1, Article 1 where it is said that a person is entitled to vote as an elector at a parliamentary election in any constituency if on the date of the poll he is either a Commonwealth citizen or a citizen of the Republic of Ireland. Also the 1992 Constitution of Estonia (Article 30) and the 1937 Constitution of Ireland, amended 1992 and 1997 (Article 16) envisage the possibility of non-citizens exercising the rights contained in Article P1-3.

⁵⁸ van Dijk and van Hoof, 1998, p. 750, where Article 16 is described as "a dead letter to be abolished".

⁵⁹ EComHR *X v. the United Kingdom*, *supra* (note 53).

The same argumentation is found in the 1997 cases of *Luksch v. Germany*⁶⁰ and *Luksch v. Italy*⁶¹ where the Commission declared inadmissible cases concerning a German citizen's right to vote in parliamentary elections in Italy and in Germany. The reasoning of the Commission was that the applicant was not a resident in Germany where he was a citizen, and not a citizen in Italy where he was a long-term resident. Therefore, he was not able to take part in parliamentary elections, either in Germany or in Italy.

The reasoning for not letting non-residents vote in elections seems to be that they are not affected by the day-to-day policy- and decision-making in the state in which they are citizens. On the other hand, it can be argued that (long-term or permanent) residents who are non-citizens are very much affected by the acts mentioned, and that it is in the interest of these categories of persons to take part in elections that will have an impact on many aspects of their everyday life. Nevertheless, as van Dijk and van Hoof point out,⁶² it can hardly be expected that the Strasbourg case law will force a breakthrough on this point. The Convention on the Participation of Foreigners in Public Life at Local Level has relatively few ratifications,⁶³ which indicates that there is a certain unwillingness among the Contracting States to enhance the rights of foreigners to participate in political life. It is also important to consider that political rights and elections to the legislature touch upon sensitive issues such as state sovereignty, state security and the people's right to self-determination, all issues that are closely connected to the traditional nation state and to the idea that the citizens constitute the group to which the state owes its obligations. In such matters it is not surprising that the Court will leave it to the Contracting States to expressly include such obligations in the Convention, even though it would be possible, due to the dynamic nature of the Convention, to include such obligations in Article P1-3.

In the case of *Matthews v. the United Kingdom*,⁶⁴ the Court stated in paragraph 64 of the judgment that it had found that the legislation, which emanates from the European Community, forms part of the legislation in Gibraltar and that the applicant was directly affected by it. Therefore the Court

⁶⁰ EComHR *Luksch v. Germany*, Decision of 21 May 1997, 89 DR 175.

⁶¹ EComHR *Luksch v. Italy*, Decision of 21 May 1997, 89 DR 76.

⁶² van Dijk and van Hoof, 1998, p. 662.

⁶³ By 14 December 2004, only 11 Member States of the Council of Europe had signed the mentioned convention, namely Albania, Cyprus, the Czech Republic, Denmark, Finland, Iceland, Italy, the Netherlands, Norway, Sweden and the United Kingdom.

⁶⁴ ECHR *Matthews v. the United Kingdom*, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I.

found that by denying Mrs Matthews the right to vote in the election to the European Parliament, the United Kingdom infringed the very essence of Article P1-3 and was therefore in breach of the provision. This, however, cannot be seen as the Court applying the criterion of whether the applicant was affected by the legislation in relation to the applicability of Article P1-3. The applicant was a citizen of the United Kingdom, and the Court's reference to her being affected relates to the United Kingdom's responsibility under Article 1 of the Convention to secure the rights guaranteed by Article P1-3 in Gibraltar, regardless of whether the elections were purely domestic or European, and thus a question of territorial jurisdiction and not whether Mrs Matthews as a person was entitled to protection under Article P1-3.⁶⁵

Accordingly, the Court will not take into consideration whether a person is affected by the decisions of general application that are passed by the legislature when determining who has the right to appoint members of the legislature. The criterion is whether a person is a *citizen* of the state in question.

3.3 *The Prohibition of Discrimination*

Some of the cases presented to the Court and the Commission have, in addition to complaints that Article P1-3 was not respected, contained complaints that the state in question violated the applicant's rights as protected by Article P1-3 read together with Article 14 of the Convention. As mentioned above, the Court has recognised that Article P1-3 entails the principle of *equal treatment* of all citizens in the exercise of their right to vote and their right to stand for elections. This leaves the impression that Article P1-3 in itself contains a prohibition of

⁶⁵ It shall be noted that the rules concerning the right to vote and the criteria for eligibility to the European Parliament are still left to the Member States' national legislation governing elections according to the 1976 Act concerning the election of the representatives of the Assembly by direct universal suffrage Article 7(2), OJ 1976 L 278, pp. 5-11, 08/10/1976. The Charter of Fundamental Rights in the European Union, OJ 2000 C 364/18 p. 1, 18/12/2000, which was adopted in 2000, contains in Article 39 general *principles* on elections to the European Parliament. A step further towards a uniform electoral code for elections to the European Parliament was adopted in 2002, with a Council Decision amending the 1976 Act, OJ 2002 L 283, pp. 1-4, 21/10/2002, but no common criteria on eligibility were agreed on. The Decision only concerns the electoral system to be adopted (proportional representation), maximum threshold (5 %) and some incompatibilities for holding an EU-parliamentary mandate. This means that now there are common rules regarding the basic principles for elections to the European Parliament, and that Member States cannot to the same extent as hitherto use the same rules that regulate their national elections for the elections to the European Parliament. Nevertheless, the regulations concerning eligibility are still to a large extent left to the Member States' national legislation, and thus the right to participate in the elections to European Parliament is limited to citizens of the European Union when national legislation stipulates so.

discrimination. In its case law the Court has stated that the elements of the case complained of in relation to Article 14 read together with Article P1-3 had already been assessed under Article P1-3 taken in isolation.⁶⁶ This supports the suggestion that the protection in Article 14, the prohibition of discrimination, is contained in Article P1-3 itself and thus a complaint concerning the rights within the scope of Article P1-3 would not need a further evaluation under Article 14 of the Convention.

3.4 *The Right to Take Office Once Elected*

The formulation “the right to stand for election to the legislature” does not expressly guarantee that a candidate obtaining a sufficient number of votes to obtain a seat in the legislature will in reality be able to exercise his or her mandate. It is essential that the Contracting States, to ensure that the rights in the Convention are “not theoretical or illusory, but practical and effective”,⁶⁷ set up legislation to guarantee that the substantial content of the right to stand for election is assured *de facto*. The effectiveness of democracy and political participation require that an elected candidate is able to exercise the power granted to him or her by the electorate. In the 1983 admissibility decision in the case of *M v. the United Kingdom*,⁶⁸ the applicant complained that he was not able to take his seat in the Northern Ireland Assembly to which he was elected because he was already a member of the Irish Parliament. The Commission acknowledged that a candidate must also have the right to sit as a member of the legislature once the candidate has been elected by the people, and “[t]o take the opposite view would render the right to stand for election meaningless.” However, the Commission declared the application inadmissible since the candidate’s right to take office was not restricted in a way which was inconsistent with the requirements under Article P1-3.⁶⁹

⁶⁶ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 59; and ECHR *Podkolzina v. Latvia*, *supra* (note 32), para. 42.

⁶⁷ The principle of effectiveness is used as a consideration in the Court’s interpretation of the Convention. See, e.g., ECHR *Artico v. Italy*, Judgment of 13 May 1980, Publications of the European Court of Human Rights, Series A, no. 37, para. 33; ECHR *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, para. 33; ECHR *Podkolzina v. Latvia*, *supra* (note 32), para. 35.

⁶⁸ EComHR *M v. the United Kingdom*, Decision of 7 March 1984, 37 DR 129.

⁶⁹ See further section 4 of this study.

The Commission repeated this point of view in later admissibility decisions, for example *Ganchev v. Bulgaria*⁷⁰ from 1996, but the Court did not have the opportunity to endorse the position until the *Sadak and Others v. Turkey (no. 2)* case in 2002. The case concerned 13 Turkish citizens complaining about their forfeiture of their mandate in the Turkish Parliament following the dissolution of the Democracy Party (DEP) of which they were members. Since the Turkish Constitution stipulated that only such members of the dissolved party whose actions resulted in the dissolution forfeited their seats, the Court found that Turkey had violated the applicants' right guaranteed by Article P1-3. In reaching this opinion the Court recognised that Article P1-3 guarantees the right to stand for election and, once elected, to exercise the mandate.⁷¹

3.5 Procedural Guarantees

3.5.1 General Procedural Requirements in the Convention

The question in the following is whether the proceedings leading to a determination of the rights protected in Article P1-3 have to live up to certain requirements and, if they do, where in the Convention scheme such requirements can be found.

As mentioned, the Commission held in the 1996 case of *Ganchev v. Bulgaria* that Article P1-3, along with the right to stand for election, contained the right to, once elected, sit as a member of parliament. However, the Commission refused to acknowledge that the Convention provides for any procedural rights as such in proceedings determining the eligibility for parliament.

Ganchev v. Bulgaria concerned a Bulgarian citizen, who spent a number of years in the United States of America, where he became a citizen by naturalisation. The applicant returned to Bulgaria and registered for the first time as a candidate in the parliamentary elections in 1991. The Bulgarian Constitution stipulates that only Bulgarian citizens without a second citizenship can stand for elections. In order to be able to take up his seat in Parliament the applicant gave up his United States citizenship. The dispute concerned the timing of the renouncement of his United States citizenship, because the exclusive Bulgarian citizenship had to be a reality on the date of the candidate's registration on the list of candidates. The Constitutional Court of Bulgaria terminated the applicant's term of office as a member of parliament, as a

⁷⁰ EComHR *Ganchev v. Bulgaria*, Decision of 25 November 1996, 87 DR 130.

⁷¹ ECHR *Sadak and Others v. Turkey (no. 2)*, Judgment of 11 June 2002, Reports of Judgments and Decisions 2002-IV.

consequence of its finding that the applicant had still been a United States citizen at the time of his registration. The applicant complained that the Bulgarian authorities, when examining whether he had been eligible to stand for election as a member of parliament, were partial and that the termination of his term of office was politically motivated. The Commission said, in accordance with its own case law, that Article P1-3 does contain a right to take office, once elected. However, the Commission noted, that "the Convention does not provide for procedural guarantees, as such, in proceedings determining the eligibility for Parliament", while referring to the case of *Habsburg-Lothringen v. Austria*.⁷²

The case of *Habsburg-Lothringen v. Austria* concerned, among other things, the fact that no court in Austria had competence to deal with the two applicants' complaint regarding the prohibition on the family of Habsburg-Lothringen to run for the office of Federal President of Austria. The Commission assessed whether procedural aspects of the disputes concerning rights enshrined in Article P1-3 were protected by the Convention, and asked whether it did so under Article 6(1) of the Convention. Article 6(1) gives residents in the Contracting States the right to a fair trial and stipulates, *inter alia*, that: "In the determination of his *civil rights* and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]."⁷³

The Commission held that unless the dispute concerned a "civil right", Article 6(1) would not be applicable. In the evaluation whether the right to stand for election is a civil right, the Commission outlined the conditions for Article 6(1) to be applicable. Three grounds have to be satisfied: there must be, at least on arguable grounds, a right in issue; the right in issue must be the object of a "contestation" (dispute); and the right must be civil. The Commission did not regard the rights protected by Article P1-3 as civil rights, and therefore came to the conclusion that Article 6(1) is not applicable in relation to rights protected by Article P1-3.⁷⁴

As shown, the Commission did not assess the issue in depth. It did not explain the difference between a political and a civil right, and it did not discuss why the determination of an individual's political rights does not need to comply with the demands of the right to a fair trial as protected by Article 6(1) of the Convention.

⁷² EComHR *Habsburg-Lothringen v. Austria*, Decision of 14 December 1989, 64 DR 210.

⁷³ Emphasis added.

⁷⁴ The view was already expressed by the Commission in the partial admissibility decision in the case of EComHR *Desmeules v. France*, Decision of 13 April 1989, 67 DR 166.

The Court evaluated the question in its judgment in the 1997 case of *Pierre-Bloch v. France*.⁷⁵ The case concerned a French citizen who stood for general elections and was elected member of the National Assembly in 1993. According to the French Election Code, the election campaign expenditure of parliamentary candidates must not exceed a statutory ceiling. The applicant spent a larger amount than permitted and he thus forfeited his right to take office and his right to stand for election for a year. He complained that the proceedings leading to the forfeiture of his rights did not fulfil the criteria laid down in Article 6(1). The Court therefore had to assess whether the rights in question (which fell under the scope of Article P1-3) were “civil” or if the forfeiture of the rights amounted to “criminal charges”.

Concerning the character of a civil right, the Court observed that the right to take office, once elected, and the right to stand as a candidate are “political rights” and not civil ones within the meaning of Article 6(1), and therefore disputes relating to these rights lie outside the scope of that provision. The Court came to this conclusion despite the fact that the applicant’s pecuniary interests were also at stake in the proceedings, since the decision had the effect that he could not get a reimbursement of his campaign expenses. The Court held that such an economic aspect did not mean that the proceedings concerned a “civil” obligation, since proceedings do not become civil merely because they also raise an economic issue.⁷⁶

To the question of whether this constituted a “criminal charge” the Court spelled out three criteria to be considered: the legal classification of the offence in national law; the very nature of the offence; and the nature and degree of severity of the penalty. In relation to the latter, the Court said that a disqualification from standing for election has the purpose of compelling candidates to respect the maximum limit of campaign expenditure. The penalty is thus directly a measure designed to ensure the proper conduct of parliamentary elections, and therefore, by virtue of its purpose, it lies outside the “criminal” sphere.

Concerning the obligation to pay the Treasury a sum equal to the amount of the excess the Court held that this penalty was only regarded as an administrative penalty, and was therefore not criminal in nature. The Court concluded that it also forms part of the measures designed to ensure the proper conduct of parliamentary elections and, in particular, equality of the candidates. Furthermore, no entry is made in the criminal record, the rule that consecutive sentences are not imposed in respect of multiple offences does not apply, and

⁷⁵ ECHR *Pierre-Bloch v. France*, Judgment of 21 October 1997, Reports of Judgments and Decisions 1997-VI.

⁷⁶ *Ibid.*, paras. 49–51.

imprisonment is not available to sanction failure to pay. The Court therefore concluded that disputes relating to rights protected by Article P1-3 could be neither civil nor criminal in nature, and accordingly, the proceedings in which determination of the rights protected in Article P1-3 take place, do not fall within the ambit of Article 6(1) of the Convention. In addition the Court held that since the dispute did not fall within the ambit of Article 6(1), Article 13 of the Convention — the right to an effective remedy — was not applicable either. Again, the Court does not put forward an in-depth explanation for the distinction between civil and political rights.

Judge De Meyer says in his dissenting opinion in the *Pierre-Bloch* case that it is very much regretted that the Court should have felt it necessary to withdraw nervously into its cocoon of a strict, fainthearted interpretation of Article 6(1). He argues convincingly that political rights are civil rights *par excellence* and that these rights should not be kept out of the scope of Article 6(1).⁷⁷

The Convention seeks to protect the individual from arbitrary interferences from state action. Such a protection was, and still is, deemed necessary, since individuals, and in particular those who are in opposition to the rulers, are vulnerable while facing the state apparatus, due to the state's superiority of resources in relation, for example, to financial and military power. Therefore, the rulers have the potential to prevent the opposition from taking power and this poses a threat to the "free expression of the opinion of the people", since the opinion of the people is likely to change over time and to require the coming to power of a new government that bases its legitimacy on the elected legislature. Representative democracy entails the right to free elections and the criteria for eligibility to the elections has to fulfil certain requirements (as will be shown in section 4 below). However, if the procedure used when assessing whether these requirements are fulfilled allows for arbitrary decisions that aim to keep the existing government in power, the protection in Article P1-3 is jeopardised.

The distinction that the Court draws between civil and political rights does not have a firm basis in the *travaux préparatoires*. It can also be argued that there are considerable political aspects to other substantive rights in the Convention. Some of them were even created with the aim of protecting political debate and political opposition. A closer look at the Convention and at the case law deriving from the Convention organs reveals that the political aspects of freedom of expression, the freedom of political debate, are at the very

⁷⁷ Dissenting opinion of Judge De Meyer, the case of *Pierre-Bloch v. France*, *supra* (note 75).

core of the concept of a democratic society,⁷⁸ without excluding the holders of these rights from the guarantees in Article 6(1). In the academic literature, authors use the term “political rights” to describe multiple rights without speaking of any clear distinction between civil and political rights.⁷⁹ Also in the Contracting States’ national systems, the rights falling within the scope of Article P1–3 are sometimes categorised as civil.⁸⁰

The Court has continuously, since its first judgment on the concept of “civil rights and obligations” in the case of *Ringeisen v. Austria*,⁸¹ adopted a liberal interpretation of the concept, and an increasing number of disputes must meet the requirements of “a fair trial”. Despite this, there is still considerable uncertainty in relation to the scope of Article 6(1). From an analysis of the case law Jacobs and White draw the conclusion that private disputes between two individuals fall within the scope of Article 6(1), and disputes between the state and the individual can sometimes also be categorised as “civil”. As to the determination of whether a dispute in the latter category falls within the scope of Article 6(1) Jacobs and White state that “[t]he key distinction is *perhaps* that where a decision of an essentially administrative character affects a legal relationship between private individuals, civil rights and obligations are at issue and Article 6(1) will apply”.⁸² Van Dijk and van Hoof propose that the Court, in order to end legal uncertainty and maximise effective legal protection, recognises that Article 6(1) is applicable to all cases in which a determination by a public authority of the legal position of a private party is at stake, regardless of whether the rights involved are of a private character.⁸³ Also

⁷⁸ See, e.g., ECHR *Oberschlick v. Austria (no. 1)*, Judgment of 23 May 1991, Publications of the European Court of Human Rights, Series A, no. 204; and ECHR *Schwabe v. Austria*, Judgment of 28 August 1992, Publications of the European Court of Human Rights, Series A, no. 242–B concerning the media. See also ECHR *Incal v. Turkey*, Judgment of 9 June 1998, Reports of Judgments and Decisions 1998–IV, para. 46, where the Court states, that “freedom of expression is particularly important for political parties and their active members.”

⁷⁹ Hinz and Suksi, 2002, p. 3.

⁸⁰ See, e.g., ECHR *Labita v. Italy*, Judgment of 6 April 2000, Reports of Judgments and Decisions 2000–IV, para. 77. Here the term “civil rights” is used in connection with the rights falling within the scope of Article P1–3, which seems to stem from the Italian term used in connection with the said rights.

⁸¹ ECHR *Ringeisen v. Austria*, Judgment of 16 July 1971, Publications of the European Court of Human Rights, Series A, no. 13.

⁸² Jacobs and White, 1996, p. 130. Emphasis added.

⁸³ van Dijk and van Hoof, 1998, p. 406.

Harris, O'Boyle and Warbrick discuss the desirability of a revision of the Court's approach.⁸⁴

Most of the Contracting States have systems where the determination of whether a person meets the eligibility criteria is subject to judicial review. Once the determination of the rights in question is assessed within the judiciary it seems illogical that the proceedings in such cases do not have to meet the requirements of a fair trial within the meaning of Article 6(1). The reason why political rights are kept out of the scope of Article 6 is quite possibly connected to the fact that the exercise of political rights can lead to access to parliament and thereby to the coming into power of groups of candidates who directly influence the administration of state sovereignty. Nevertheless, the importance of independent review of the decisions passed by the authorities which determine the rights protected by the Convention is crucial in particular in relation to the rights in Article P1-3.

Regardless of the benefits of van Dijk and van Hoof's proposal, it is clear from the *Pierre-Bloch v. France* judgment that the Court will not adopt such a position. Since the *Pierre-Bloch* judgment the Court has confirmed its position in admissibility decisions in the cases of *Cheminade v. France*⁸⁵ and *Cherepkov v. Russia*.⁸⁶

3.5.2 Procedural Requirements in Article P1-3

The question is, since Article 6(1) is not applicable in proceedings concerning the determination of the rights in Article P1-3, whether it is possible to read any procedural requirements into Article P1-3 itself, or whether the Court will refuse to be competent to deal with such proceedings.

In the literature, it is pointed out that a reading of procedural requirements into some of the substantive clauses in the Convention takes place in the Court's recent case law.⁸⁷ Examples can be found in relation to Articles 2,⁸⁸ 3,⁸⁹

⁸⁴ Harris, O'Boyle and Warbrick, 1995, pp. 174-186.

⁸⁵ ECHR *Cheminade v. France*, Decision of 26 January 1999, Reports of Judgments and Decisions 1999-II.

⁸⁶ ECHR *Cherepkov v. Russia*, Decision of 25 January 2000, Reports of Judgments and Decisions 2000-I.

⁸⁷ Wildhaber, 2002.

⁸⁸ ECHR *McCann v. the United Kingdom*, Judgment of 27 September 1995, Publications of the European Court of Human Rights, Series A, no. 324, para. 161.

⁸⁹ ECHR *Assenov v. Bulgaria*, Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para. 102; and ECHR *Labita v. Italy*, *supra* (note 80), para. 131.

and 8.⁹⁰ An example of a procedural requirement in relation to Article 8 — the right to respect for private and family life, home and correspondence — has been the hearing of the child in cases concerning child custody, and the Court has stated that in certain situations the failure to let the child express his or her viewpoint can result in a violation of the article.⁹¹ The Court has read these procedural rights into Article 8, even though cases concerning custody of children fall within the scope of Article 6(1). When widening the scope of Article 8, the Court has argued that the importance of the subject matter, namely, the relations between parent and child, was taken into consideration.⁹² Since Article P1-3 “enshrines a characteristic principle of democracy” and “is accordingly of prime importance in the Convention system”⁹³ it should be possible to read certain procedural rights into Article P1-3, since such method of widening the scope is possible in cases concerning Article 8.

The 2002 case of *Podkolzina v. Latvia*⁹⁴ gave the Court the opportunity to pronounce itself on the issue. The case concerned a Latvian citizen who was a member of the Russian-speaking minority in Latvia. She was included on the list of candidates in the elections to the Latvian Parliament in 1998 and in that connection provided the Latvian authorities with a certificate stating that she had sufficient knowledge of the official language, Latvian. In spite of the certificate, an examiner employed by the State Language Inspectorate came, without prior notice, to the applicant’s workplace to conduct an oral test to assess her knowledge of Latvian. During their conversation the examiner asked, among other questions, about the applicant’s reasons for supporting the party that she was a candidate for, rather than other parties. Following this conversation, the examiner judged that the applicant did not possess sufficient language skills in Latvian to be included on the electoral lists. Twelve other candidates who possessed the same certificate as the applicant were not required to undergo a test of this kind.

In the judgment the Court recognised that states have a wide margin of appreciation in relation to their eligibility conditions and that the language

⁹⁰ ECHR *W v. the United Kingdom*, Judgment of 8 July 1987, Publications of the European Court of Human Rights, Series A, no. 121; ECHR *Elsholz v. Germany*, Judgment of 13 July 2000, Reports of Judgments and Decisions 2000-VIII; ECHR *Sahin v. Germany*, Judgment of 8 July 2003, Application no. 30943/96; ECHR *Sommerfeld v. Germany*, Judgment of 8 July 2003, Application no. 31871/96.

⁹¹ ECHR *Sahin v. Germany*, *supra* (note 90), para. 73.

⁹² ECHR *Elsholz v. Germany*, *supra* (note 90), para. 52.

⁹³ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 47.

⁹⁴ See above pp. 57–58 and note 32.

requirements were pursuing a legitimate aim. However, the Court went further and asked the question whether the removal of the applicant from the list of candidates was proportionate to the aim pursued. The Court reiterated that the object and purpose of the Convention requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective. The right to stand as a candidate in an election, which is guaranteed by Article P1-3 and is inherent in the concept of a truly democratic regime, would be illusory if one could arbitrarily be deprived of it at any moment. The principle that rights must be effective requires that the decision in which the authorities find that the candidate does not fulfil the eligibility criteria complies with a number of conditions framed to prevent arbitrary decisions. In particular, such a decision or finding:

must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority.⁹⁵

As the applicant already possessed a certificate stating sufficient knowledge of Latvian and since the validity of the certificate was never disputed, the Court had grave doubts concerning the method of differentiating between the candidates (who all had certificates) who had to take an exam and those who did not. The procedure that the applicant had to go through differed fundamentally from the normal procedure for certification of linguistic competence. Full responsibility for the evaluation of the applicant's knowledge of Latvian was left to a single civil servant who had exorbitant powers in the matter. Also the nature of the questions posed to the applicant raised concern in the Court's view. The Court considered that in the absence of any guarantee of objectivity, and whatever the purpose of the second examination, the procedure applied to the applicant was in any case incompatible with the requirements of procedural fairness and legal certainty to be satisfied in relation to candidates' eligibility, and considered therefore the Latvian authorities to be in breach of Article P1-3.

Concerning the Riga Regional Court's assessment of the applicant's appeal of the result of the examination, the Regional Court accepted, as the sole basis for its judgment, the certificate, which was based on the examination that did not comply with the criteria laid down in the national rules and with Article P1-3. The Court considered that in admitting as irrefutable evidence the results of an examination, where the procedure had lacked fundamental guarantees of

⁹⁵ ECHR *Podkolzina v. Latvia*, *supra* (note 32), para. 35.

fairness, the Regional Court did not provide the applicant with a remedy for the violation committed and was therefore in breach of the Convention. This part of the Court's evaluation was also considered within the scope of Article P1-3.

Accordingly, Article P1-3 contains procedural requirements in relation to the extent of the fairness of the proceedings. It demands that the national authorities provide the person whose rights are protected in Article P1-3 with a remedy if the procedural requirements are not complied with at national level. The additional protection in Article P1-3 thus has features that resemble those rights guaranteed in Article 6(1) and Article 13 as in-built characteristics. The protection granted does not give the holders of the rights in Article P1-3 the right to access to a court, as is the case of rights that are "civil", but the body that determines the rights has to be impartial and the procedure leading to the determination has to be truly fair and objective. Furthermore, the rules for the procedure have to be provided for by national law. In addition, the case shows that when the authorities provide right-holders with a remedy for a violation of a right protected in the Convention before a national authority, such a remedy has to be effective. It has to be able to deal with the substance of the complaint and to grant appropriate relief.

As mentioned, it would be desirable if the requirements in Article 6 concerning the right to access to a tribunal that passes judgments following an impartial and public procedure could also be demanded in relation to national decisions determining eligibility. As it has been shown that this is not the case, the reading of certain procedural rights into Article P1-3 must be regarded as a step in the right direction in the attempt to optimise the protection secured by the Convention. However, it is clear that the goal has not been reached with the judgment in the case of *Podkolzina v. Latvia*, since the general rule according to the judgment is still that Article P1-3 does not guarantee access to a court or an effective remedy. Furthermore, the protection in Article P1-3 is also rather limited compared to the requirements that can be derived from Article 6. *Podkolzina v. Latvia* does not require that a remedy is provided on the national level or requires that the procedures in cases leading to the determination of eligibility are carried out by an independent body or that its decisions are taken in a public forum.

4. LIMITATIONS TO THE RIGHTS IN ARTICLE P1-3

4.1 General Observations

In Article 1 of the Convention it is stated that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms

defined in Section I of this Convention."⁹⁶ However, it has already been shown that according to the Court's judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the rights in Article P1-3 are not rights guaranteed to every person on the territory of a Contracting State. The protection in Article P1-3 is limited to the state's citizens. In the same case the Court also stated that the rights protected by Article P1-3 are not absolute and that limitations are permitted.⁹⁷ Therefore, the question is to what extent the Contracting States can limit the rights in Article P1-3 without infringing the right to free elections. Before looking further at the limitations to the rights enshrined in Article P1-3, some general remarks concerning limitations to the rights in the Convention will be made.

Because the Convention is an international treaty, the interpretation of the Convention must follow the international rules of treaty interpretation contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.⁹⁸ Article 31 stipulates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The Convention was created to prevent abuses of the individual's fundamental rights. The object and purpose of the Convention have in the Court's case law been identified as "the protection of individual human rights"⁹⁹ and the maintenance and promotion of "the ideals and values of a democratic society".¹⁰⁰ The ideals and values of a democratic society presuppose the importance of the rule of law in the legal systems of the Contracting States, ensuring legal certainty, and the principle of equal treatment in equal situations in the state authorities' application of the general norms governing society.

⁹⁶ As mentioned in section 3 of this study, Article 1 of the Convention also applies to the rights contained in Protocol No. 1.

⁹⁷ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 52.

⁹⁸ The Vienna Convention on the Law of Treaties, adopted in Vienna 22 May 1969, entered into force 27 January 1980, 1155 UNTS 331. Hereinafter: the Vienna Convention. That the Vienna Convention is applicable in relation to the Convention even though the Vienna Convention was adopted after the adoption of the Convention is bound up to the fact that the Vienna Convention is regarded as a codification of generally accepted principles of international law. See in this connection ECHR *Golder v. the United Kingdom*, Judgment of 21 February 1975, Publications of the European Court of Human Rights, Series A, no. 18, para. 29.

⁹⁹ ECHR *Soering v. the United Kingdom*, *supra* (note 5), para. 87.

¹⁰⁰ ECHR *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *supra* (note 5), para. 53.

The Convention is a law-making treaty and not a contract treaty. Therefore the consideration that has to be made when interpreting the Convention is not that it "creates reciprocal engagements between contracting states", but that it imposes "objective obligations" upon the Contracting States for the protection of human rights in Europe.¹⁰¹ If these obligations are to be foreseeable for the Contracting States and for the individuals who are granted the protection, the Court's application of the Convention has to be in accordance with the above-mentioned principles. Therefore, it can be argued that when applying the Convention, the Court has to construe the Contracting States' access to make restrictions in the individual rights in a narrow or strict fashion, in order to avoid a situation in which the Contracting States make the protection that the Convention seeks to promote illusory. The objective interpretation of the Convention allows states to impose restrictions only insofar as these restrictions pursue an aim explicitly spelled out in the Convention.

This poses a problem in relation to Article P1-3 since no permitted restrictions are explicitly mentioned in the provision, while at the same time it is clear from the wording that states have the option to limit the rights protected in the article. The Court has dealt with the issue of limitations by granting the Contracting States two manners in which they can restrict the rights in Article P1-3. The first is for the Contracting States to impose the "conditions" explicitly mentioned in the article. The other is to restrict the rights by implied limitation. Some general remarks on the doctrine of implied limitations will be made here.¹⁰²

The Court has, in its early case law, permitted the Contracting States to restrict the rights of specific groups to a larger extent than allowed for by the wording of the Convention, by applying the doctrine of implied limitations. The doctrine of implied limitations provides that specific groups have to tolerate more discomfort imposed by the state than others do, due to the special position of the group members. Such groups that have been identified are, for

¹⁰¹ ECHR *Ireland v. the United Kingdom*, Judgment of 18 January 1978, Publications of the European Court of Human Rights, Series A, no. 25, para. 239. See also the *Pfunders Case*, EComHR *Austria v. Italy*, Decision of 11 January 1961, 4 YB 116, at p. 138, where the Commission said that it is clear that "the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute".

¹⁰² The doctrine on implied limitations is sometimes referred to as the doctrine on inherent limitations. In the literature some authors use alternately the two terms. However, the two terms are expressing the same principle.

example, persons in detention¹⁰³ and military personnel.¹⁰⁴ In the 1975 case of *Golder v. the United Kingdom* concerning a prisoner's right to access to a court protected by Article 6, the Court said that "the right of access to the court is not absolute. As this is a right which the Convention sets forth [...] without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication."¹⁰⁵ Similarly the Court said in relation to military personnel in the 1976 case of *Engel and Others v. the Netherlands* concerning rights protected by Articles 5 and 6, that "when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces",¹⁰⁶ and that a system of military discipline implies by its very nature "the possibility of placing on certain of the rights and freedoms of the members of [the armed] forces limitations incapable of being imposed on civilians."¹⁰⁷

The cases mentioned concern rights that are contained in provisions that do not expressly define to what extent limitations in the rights are acceptable. But even in cases concerning Articles 8 to 11 of the Convention, where the restrictions permitted are expressly mentioned in paragraph 2 of the articles, the Court has used the doctrine of implied limitations to further limit individual rights in situations where such limitations are seen to be a natural consequence of the specific position of a certain individual. In the 1997 case of *Kalaç v. Turkey*, the Court allowed the Turkish Government to restrict the applicant's right to freedom of thought, conscience and religion as protected in Article 9 of the Convention without it amounting to an interference, since Mr Kalaç, in choosing to pursue a military career, "was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians."¹⁰⁸ This shows that the

¹⁰³ ECHR *Golder v. the United Kingdom*, *supra* (note 98).

¹⁰⁴ ECHR *Engel and Others v. the Netherlands*, Judgment of 8 June 1976, Publications of the European Court of Human Rights, Series A, no. 22.

¹⁰⁵ ECHR *Golder v. the United Kingdom*, *supra* (note 98), para. 38. The same point of view was expressed in the case of ECHR *Papon v. France*, Judgment of 25 July 2002, Reports of Judgments and Decisions 2002–VII, para. 90.

¹⁰⁶ ECHR *Engel and Others v. the Netherlands*, *supra* (note 104), para. 54.

¹⁰⁷ *Ibid.*, para. 57.

¹⁰⁸ ECHR *Kalaç v. Turkey*, Judgment of 23 June 1997, Reports of Judgments and Decisions 1997–IV, para. 28. This has been repeated by the Court in ECHR *Tepeli and Others*

Court is willing to accept that the Contracting States make further limitations in the rights spelled out in the Convention, without it being clear to what extent such limitations are permitted. The unfortunate effect of the use of the doctrine of implied limitation is that the Court does not evaluate whether the restriction is justified for reasons that are in accordance with the Convention. The Court will merely regard the limitation as implied by the person's situation, thus cutting off any further assessment. The implications of such an approach are that legal certainty in the Convention system is at stake and the approach gives rise to serious concerns.

Jacobs and White call the doctrine on implied limitations "dubious", "incorrect and unnecessary", and hold that it is so imprecise that, once adopted, it is hard to see its limits. At the same time they argue that the decisions from the Commission since the *Golder v. the United Kingdom* judgment suggest that the Commission abandoned the use of the doctrine.¹⁰⁹ In *Ovey and White*, it is stated that the notion of implied limitations is of purely historical interest in relation to Articles 8 to 11.¹¹⁰ Similarly, van Dijk and van Hoof argue that the notion of limitations by implication is not used by the Court in relation to Articles 8 to 11, but will be applied in relation to articles where restrictions are not expressly mentioned in the provisions. This position can unfortunately not be supported by the present research, as the Court in cases as late as in 1997 and 2001 accepted restrictions in the rights protected in Article 9 and Article 10 of the Convention by implied limitation. Van Dijk and van Hoof also express their disapproval of the Court's use of the doctrine by referring to it as "wrong" and stating that the whole system of the Convention appears to be opposed to the notion that rights can be subject to implied limitations.¹¹¹

Nevertheless, the Court continuously makes reference to the possibility of restricting the rights in Article P1-3 by implied limitations, which makes the content of the rights in Article P1-3 difficult to foresee.

v. Turkey, Decision of 11 September 2001, Application no. 31786/96 in relation to Article 9 and ECHR *Uyanik v. Turkey*, Decision of 11 September 2001, Application no. 32358/96 in relation to Article 10.

¹⁰⁹ Jacobs and White, 1996, pp. 299-301.

¹¹⁰ Ovey and White, 2002, pp. 198-199.

¹¹¹ van Dijk and van Hoof, 1998, pp. 763-765.

4.2 Limitations in Relation to Article P1-3

4.2.1 The Test in Article P1-3

In relation to limitations to Article P1-3, some guidance can be found in the Court's case law, which will be described below. In its early case law, the Commission tested whether the conditions or limitations imposed by the states were arbitrary and whether they interfered with the free expression of the people's opinion.¹¹² When the Court decided on the matter in the first case, the case of *Mathieu-Mohin and Clerfayt v. Belgium* in 1987, this concept was elaborated.

The case of *Mathieu-Mohin and Clerfayt v. Belgium* concerned the effects of a reform in 1980 of the Belgian electoral system. The arrangements concerned were very country-specific and can hardly be relevant in relation to other countries. They will therefore not be explained in detail here.¹¹³ The Court found that Belgium did not violate the applicants' right as protected by Article P1-3, and the judgment has been criticised for granting the state too wide a margin of appreciation and for reducing the Court's evaluation to nothing but a test of good faith. However, the case is important since the Court took the opportunity to express itself extensively on the general interpretation of the provision.

Concerning the general principles in Article P1-3 the Court said that the rights in Article P1-3 are not absolute.

Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations [...]. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 [...]. They 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 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 [...]. In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature'.¹¹⁴

¹¹² See, e.g., EComHR *W, X, Y and Z v. Belgium*, Decision of 30 May 1975, 2 DR 110.

¹¹³ For an elaborate and reader-friendly presentation of the case, see Harris, O'Boyle and Warbrick, 1995, pp. 552-553.

¹¹⁴ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 52.

The Court has upheld the use of this test when determining whether there has been a violation of Article P1-3 in its case law.¹¹⁵

The Court hereby allows for the Contracting States two ways of limiting the rights in Article P1-3. One possibility is to make use of the doctrine of implied limitations.¹¹⁶ The other possibility is to make the rights subject to other conditions.¹¹⁷ It appears that both of these forms of limitations have to fulfil the criteria mentioned in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, namely that the limitations:

- do not curtail the rights to such an extent as to impair their very essence and deprive them of their effectiveness
- are imposed in pursuit of a legitimate aim
- are proportionate; meaning that the means employed to obtain the legitimate aim are not disproportionate.

The overarching consideration is that the limitations must not thwart “the free expression of the opinion of the people”.

It will now be shown which legitimate aims the Court and the Commission have accepted in relation to Article P1-3. Under each of the rights protected by the article different categories of conditions or limitations will be described.

4.2.2 The Right to Vote

4.2.2.1 Prisoners

Concerning the right to vote, the exclusion of certain groups has given rise to numerous complaints.

The 1991 case of *van Wambeke v. Belgium* concerned a Belgian citizen who was convicted in 1945 for carrying weapons against the allied forces during the Second World War as a member of Waffen SS. He was sentenced to 15 years of imprisonment and forfeiture of his right to vote perpetually. He complained in 1990 that he could not participate in the elections to the European Parliament and the Commission declared the application inadmissible without evaluating

¹¹⁵ ECHR *Matthews v. the United Kingdom*, *supra* (note 64), para. 63; ECHR *Labita v. Italy*, *supra* (note 80), para. 201; and ECHR *Podkolzina v. Latvia*, *supra* (note 32), para. 33.

¹¹⁶ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 52, second sentence.

¹¹⁷ *Ibid.*, para. 52, fourth sentence.

whether the European Parliament formed part of the legislature. Instead, the Commission said that:

la ratio legis des lois privant les condamnés pour incivisme de certains droits politiques et plus spécialement du droit de vote est d'empêcher certaines catégories de personnes qui ont gravement abusé de leur droit de participer à la vie publique de leur pays de faire à l'avenir mauvais usage de leurs droits politiques, afin d'éviter des atteintes à la sûreté de l'Etat ou aux fondements d'une société démocratique.¹¹⁸

The Commission did not find that the prevention of the right to vote for a group of people who in the past severely abused their right to participate in public life thwarted the free expression of the opinion of the people in the choice of the legislature, and therefore the application was declared inadmissible.

In the year 2000 judgment in the case of *Labita v. Italy*,¹¹⁹ the Court assessed the situation where an Italian citizen forfeited his right to vote following a suspicion of criminal activities. Mr Labita was suspected of being involved in a Mafia-type organisation and was therefore detained without being granted bail for the period of investigation. After Mr Labita was acquitted of all charges, certain preventive supervision measures were imposed on him. Among other things, he was struck off the electoral register on the ground that his civil rights had lapsed following the imposition of the special supervision measure.¹²⁰ He complained that his right to vote was violated. The Court said that it had "no doubt that temporarily suspending the voting rights of persons against whom there is evidence of Mafia membership pursues a legitimate aim",¹²¹ but since Mr Labita's name was removed from the electoral register at a time when there was no concrete evidence on which a suspicion that he belonged to the Mafia could be based, the measure imposed by the Italian Government was disproportionate and Mr Labita's right to vote was therefore violated.

There can be little doubt that Mafia activities pose a threat to a democratic society. The fact that persons engaging in such activities can forfeit their rights to participate in public life because of their grave abuses of the said rights or their denial of the rights of their fellow human beings is to a certain extent supported by Article 17 of the Convention. However, in the present case the

¹¹⁸ EComHR *Van Wambeke v. Belgium*, Decision of 12 April 1991, Application no. 16692/90.

¹¹⁹ ECHR *Labita v. Italy*, *supra* (note 80).

¹²⁰ *Ibid.*, para. 77.

¹²¹ *Ibid.*, para. 203.

measures imposed on Mr Labita were not imposed until after his acquittal. They were therefore already clearly in violation of the principle of *nulla poena sine lege*, no punishment without law, a principle which is also part of the Convention scheme and which is found within Article 7 of the Convention.

Also cases concerning the suspension of the right to vote as part of a sentence have been declared inadmissible in connection with crimes that do not present a threat to democratic values. The Commission evaluated in 1983 a case brought against the Netherlands by an anti-militarist serving a sentence of 18 months for conscientiously objecting to military service.¹²² While he was serving his sentence, his voting rights were suspended under national law for a period of three years exceeding his sentence. The Commission noted that the measure was imposed on all prisoners serving a sentence exceeding one year regardless of the nature of the offence, and further pointed out that a large number of the Contracting States had adopted legislation whereby the right to vote of a prisoner serving a term of imprisonment of a specific duration was suspended. The Commission was therefore of the opinion that such a practice reveals the existence of a generally recognised principle, whereby certain restrictions concerning the right to vote may be imposed on persons sentenced to certain terms of imprisonment. Consequently the application was declared manifestly ill-founded.

In a case from 1967 brought against the Federal Republic of Germany the applicant, a prisoner in a Saarbrücken prison, complained that, while in detention, he was not able to take part in elections to the Parliament and in Land elections.¹²³ The Commission stated, without going into depth in its evaluation that restrictions on convicted prisoners' right to vote while serving their sentence do not affect the "free expression of the opinion of the people in the choice of the legislature".

These above-mentioned cases show suspension of voting rights in three different situations. The first situation is suspension as part of a sentence following activities that represent a threat to democratic values, namely, *van Wambeke v. Belgium* and *Labita v. Italy*.¹²⁴ The second is suspension as part of a

¹²² EComHR *H v. the Netherlands*, Decision of 4 July 1983, 33 DR 242.

¹²³ EComHR *X v. the Federal Republic of Germany*, *supra* (note 44).

¹²⁴ Albania has in its reservation to Article P1-3 declared that the provision will not apply in the period of 2 October 1996 to 2 October 2001 to persons who during the communist rule held high public positions and who conspired to and executed crimes against humanity for political, ideological or religious motives. Considering the previous remarks on the issue, held together with Article 17 of the Convention that contains a prohibition of the abuse of rights by any state, group or person, the reservation does not appear to collide with the object and purpose of the Convention.

sentence following a “regular” crime; that is *H v. the Netherlands*. And the last is suspension, not as part of the sentence, but as what seems to be due to practical aspects of incarceration, *X v. the Federal Republic of Germany*.

Considering the existence of the use of mobile ballot boxes and the possibility to vote by correspondence for prisoners in many states, and in particular the voting facilities made available to prisoners in several Contracting States, it appears that the Strasbourg institutions allow rather wide a liberty to the Contracting States when they impose such restrictions. It could be argued that restrictions should only be permitted when the Contracting States have cogent arguments for imposing them, as for example in cases concerning persons who have been convicted for crimes that reflect their fundamental disrespect for the basic rules of a democratic society. In any case, it is difficult to see that practical aspects of incarceration should be enough to satisfy the Court. Various activities that demand careful attention of the prison personnel take place in prisons, and even if voting activities would demand some additional attention from prison personnel, it has to be kept in mind that already in the *travaux préparatoires* it is expressly mentioned that the obligations in Article P1–3 also entail the adoption of *positive measures* to hold democratic elections. Issues dealt with by the legislature are to a great extent affecting the conditions to which prisoners are subjected, both during serving their sentence and after their release. Additionally, prisoners’ conditions and the treatment of prisoners are political issues in the Contracting States, at the moment particularly in the Russian Federation and Turkey. It therefore seems to be a qualified truth to assume that restricting all prisoners’ voting rights does not raise any issues in relation to the free expression of the opinion of the people.

Recent cases concerning prisoners’ right to vote seemed to consolidate the Strasbourg institutions’ standpoint on the issue. The Commission said in the 1998 case of *Holland v. Ireland*¹²⁵ that “the fact that all of the convicted prisoner population cannot vote does not affect the free expression of the opinion of the people in the choice of the legislature”. The Court approved in the January 2003 admissibility decision in *M.D.U. v. Italy*¹²⁶ the Italian rule that a conviction was supplemented by an accessory punishment of suspension of the right to vote for two years. The Court estimated that the measure pursued a legitimate aim, namely the functioning and the maintenance of a democratic regime, and declared therefore the application inadmissible.

¹²⁵ EComHR *Holland v. Ireland*, Decision of 14 April 1998, 93 DR 15.

¹²⁶ ECHR *M.D.U. v. Italy*, Decision of 28 January 2003, Application no. 58540/00.

This, however, was changed in the judgment of *Hirst v. the United Kingdom (no. 2)* in 2004.¹²⁷ The Court here acknowledged that the Commission in the case of *Holland v. Ireland* failed to test whether the restriction imposed met the requirements of legitimacy of the aim and proportionality of the measure.¹²⁸ The Court accordingly considered that it had to look afresh at the issues arising from an automatic statutory bar on voting imposed on convicted prisoners. The Court noticed that the Contracting States handle the issues of restricting prisoners' voting rights very differently, and states that "[t]his 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".¹²⁹ However, the Court did not accept that a Contracting State relies 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 historic tradition. [...] The right to vote for those elected representatives must also be acknowledged as being the indispensable foundation of a democratic system. Any devaluation or weakening of that right threatens to undermine that system and it should not be lightly or casually removed.¹³⁰

The Court accepted that the issue of restricting prisoners' voting rights, is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions can still be justified in modern times and if so how a fair balance is to be struck. However, the Court refused to approve that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation.¹³¹

If this judgment clearly marks the direction the Court wants to go in the coming years, the Court will, in the future, be performing a stricter scrutiny and passing stricter judgments than in the past. This would be a very welcome development as the assessment in *Hirst v. the United Kingdom (no. 2)* seems to be more in line with the Convention system than the previous case law. The Court here performs a concrete evaluation of whether the restriction in question fulfils the test in Article P1-3, while earlier case law has given the impression

¹²⁷ ECHR *Hirst v. the United Kingdom (no. 2)*, Judgment of 30 March 2004, Application no. 74025/01. The judgment has been appealed to a Grand Chamber.

¹²⁸ *Ibid.*, para. 38.

¹²⁹ *Ibid.*, para. 40.

¹³⁰ *Ibid.*, para. 41.

¹³¹ *Ibid.*, para. 51.

that the Court would accept restrictions as long as they did not, seen in a general context, affect the result on election day.

4.2.2.2 Residency and Age Requirements

Many Contracting States demand that the persons constituting the electorate, in addition to being citizens, also have to be residents of the state in question and to have obtained a certain age.

In the case of *X v. the United Kingdom* (28 February 1979),¹³² the Commission declared inadmissible a complaint lodged by a British citizen employed by the European Communities, residing in Brussels. She complained that she was prevented from voting in national elections although she continued to have fiscal obligations towards the United Kingdom. The Commission recognised that some of the Contracting States allow nationals residing abroad to exercise their right to vote in their home country through various means. However, it still granted the United Kingdom the right to restrict non-residents' right to vote, because the applicant could not claim to be affected by the acts of political bodies to a similar extent as resident citizens. As mentioned above in section 3 of this study, the Court has not used the criteria whether a person is affected by the decisions in the evaluation of whether a person should be granted voting rights. The Court can be expected to be very reluctant to read such a right into the Convention, without the Contracting States expressly stating that this is an obligation they consider themselves ready to commit to. However, even though the Court has not adopted the mentioned pattern of reasoning, the result obtained is likely to be similar in a Court judgment with reference to the states' margin of appreciation.

The Commission again pronounced itself on the issue in the case *Luksch v. Germany*¹³³ from 1997. Mr Luksch was a German citizen born in Italy and a long-term resident there. He complained that he was not able to vote in federal elections in Germany, because German legislation required that he was a long-term resident in Germany or that he had been living in Germany for at least three months prior to the elections. The Commission said that citizenship, residence and age are part of the criteria frequently used by many of the Contracting States. Therefore the Commission considered the criteria was not arbitrary and thus not in contravention with Article P1-3. The Commission said that the applicant was in a different situation than nationals residing in Germany, since the acts deriving from political bodies in question were not directly aimed at him. In the Commission's opinion the difference in treatment

¹³² EComHR *X v. the United Kingdom*, *supra* (note 53).

¹³³ EComHR *Luksch v. Germany*, *supra* (note 60).

in relation to voting rights between residents and non-residents was justified. The application was thus declared inadmissible.

Regarding the limitations in the right to vote, it appears that requirements of citizenship, residence and age will not reach the Court's assessment unless the requirements are discriminatory or arbitrary.

4.2.3 The Right to Stand for Election

4.2.3.1 Citizenship

In relation to the right to stand for election, some of the same issues as in relation to the right to vote have been presented before the institutions.

In the case of *M v. the United Kingdom*,¹³⁴ the Commission declared a complaint by a citizen of the United Kingdom and the Republic of Ireland inadmissible. The applicant was several times elected member of the Northern Ireland Assembly and received in the 1978 United Kingdom Parliamentary elections over 24,000 votes. In 1982, he was nominated a member of the Irish Senate, the upper house of the Irish Parliament. Following this, an electoral court in the United Kingdom held that the applicant was disqualified for membership of the Northern Ireland Assembly on grounds that he was a member of the legislature of the Republic of Ireland, a country or territory outside the Commonwealth. The Commission recognised that the applicant was restricted from taking office, but considered that a condition that one must not be a member of another legislature is a requirement that is reconcilable with Article P1-3.

4.2.3.2 Prisoners

Concerning prisoners and their right to stand for election, a case was lodged against Finland and declared inadmissible in 2002. *Lella v. Finland*¹³⁵ deals with a situation where the applicant was convicted for aggravated debtor's dishonesty and a book-keeping offence. He requested a postponement of serving his sentence so he could participate in the Finnish parliamentary elections in 1999. The authorities denied postponing the enforcement of his sentence, which resulted in Mr Lella filing a complaint at the Court. The Court said that Mr Lella's right to stand for election was not infringed, since the refusal to postpone the enforcement, and a later refusal of prison leave on and around the election day "pursued the legitimate aim of ensuring the proper

¹³⁴ EComHR *M v. the United Kingdom*, *supra* (note 68).

¹³⁵ ECHR *Lella v. Finland*, Decision of 15 October 2002, Application no. 51975/99.

enforcement of prison sentences.” Nor did the Court find the refusals to be arbitrary or disproportionate. Even though the refusals did not formally prevent Mr Lella from standing for election, the Court “would not exclude that his campaign may have been somewhat hampered”. However, argued the Court, Mr Lella was at no stage barred from running for Parliament, and thus, with regard to the wide margin of appreciation granted to the Contracting States, the Court did not find any reason to declare the application admissible.

4.2.3.3 Age Requirements

In the 1975 admissibility decision in *W, X, Y and Z v. Belgium*,¹³⁶ the applicants claimed that the minimum age requirements, 25 years for the House of Representatives and 40 years for the Senate, constituted a breach of Article P1-3. The Commission said that the minimum requirement of 25 years for eligibility to the House of Representatives could “obviously not be regarded as an unreasonable or arbitrary condition, or one likely to interfere with the free expression of the opinion of the people in the choice of the legislature.” As to the requirement of 40 years for eligibility to the Senate the Commission said that, since Belgium has a bicameral system, candidates younger than 40 years were not prevented from entering the Parliament. It was only through the Senate they were prevented, but not through the House of Representatives. Because the Belgian system was a bicameral system the Commission did not consider it arbitrary to arrange the system so that one house is composed of persons having greater political experience by virtue of their age than the other chamber of Parliament. Thus, the Commission found the application manifestly ill-founded and therefore inadmissible. The decision has to be seen in the light of the statements made during the drafting of the Convention, in relation to an electoral system with two chambers (see section 6 below).

4.2.3.4 Disqualifications Due to Previous or Present Occupation

A few cases concerning disqualifications of persons due to their previous employment in capacities with a political aspect have been brought before the Court.

In the 1997 judgment in the case of *Gitonas and Others v. Greece*,¹³⁷ the Court came to the result that the Greek Government had not violated the applicants’ right to stand for election. The basis for the applicants’ disqualification was

¹³⁶ EComHR *W, X, Y and Z v. Belgium*, *supra* (note 112).

¹³⁷ ECHR *Gitonas and Others v. Greece*, Judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV.

Article 56 of the Greek Constitution, which presented an extensive list of persons not eligible to the legislature. The reason for their disqualification was the candidates' previous occupation as civil servants or other functions connected one way or another to public political activities during a specific period of time before the elections. The applicants claimed that the provision in the Constitution was imprecise and incoherent and, to the very least, had to be strictly construed which the applicants alleged had not happened in connection with their disqualifications. The Commission agreed with the applicants, but the Court granted the Greek Government "considerable latitude to establish in [the] constitutional order rules governing the status of parliamentarians, including criteria for disqualification."¹³⁸ The Court considered the disqualification of certain civil servants for standing as candidates serves a dual purpose, namely the ensuring that candidates enjoy equal means of influence and the protection of the electorate from pressure from officials who, because of their position, are called upon to take many and important decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice the candidate might influence.¹³⁹ The Court further pointed out that it is primarily for the national authorities to construe national law. The Court did not find that the final national decision taken by a special Supreme Court suggested that the annulments were contrary to Greek legislation, arbitrary or disproportionate, or thwarted the "free expression of the opinion of the people in the choice of the legislature". Accordingly, the Court did not find that the Greek Government committed a violation of Article P1-3 while handling the applicants' cases.¹⁴⁰

The other judgment concerning disqualifications is the 1998 case of *Ahmed and Others v. the United Kingdom*.¹⁴¹ The case dealt with restrictions on the involvement of senior local government officials in certain types of political activity, and again the Court found no violation of Article P1-3. The Court considered that the restrictions imposed had to be seen in the light of the aim pursued by the legislature by imposing the restrictions, namely to ensure the candidates' political impartiality. Since the restrictions were only operating for as long as the candidates occupied politically restricted posts, the Court did not find that the restrictions limited the very essence of the rights in Article P1-3.

¹³⁸ ECHR *Gitonas and Others v. Greece*, *supra* (note 137), para. 39.

¹³⁹ *Ibid.*, para. 40.

¹⁴⁰ *Ibid.*, para. 44.

¹⁴¹ ECHR *Ahmed and Others v. the United Kingdom*, Judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI.

In the case of *Brike v. Latvia*,¹⁴² the Court did not oppose to the Latvian rule that a candidate in parliamentary elections had to retire from her position as a judge at least one month after her registration on the list of candidates.

In some Contracting States questions have arisen whether persons elected to local political bodies can be barred from running as candidates in parliamentary elections or whether they can, once elected, be prevented from taking their seat in the parliament. A cautious estimation would be that the Contracting States' margin of appreciation stretches wide enough for the Court to accept such restrictions, having in mind the cases of *Ahmed and Others v. the United Kingdom*, *Gitonas and Others v. Greece* and *Podkolzina v. Latvia* (to be dealt with below).¹⁴³

4.2.3.5 Language Requirements

The Strasbourg organs have assessed several disputes concerning language requirements.

In 1985, the Commission said in the case of *Fryske Nasjonale Partij and Others v. the Netherlands*,¹⁴⁴ that neither Article P1–3 nor any other provision in the Convention guarantees the right to use a particular language for electoral purposes, a position it upheld in the admissibility decision in the case of *Andecha Astur v. Spain*¹⁴⁵ in 1997. The complaints in the mentioned cases were made by applicants claiming the right to use a language different from the official language in the state in question when handing in their lists of candidates to the authorities.

The Court's judgment in the case of *Podkolzina v. Latvia*¹⁴⁶ shows that also the Court accepts certain language requirements as part of the eligibility criteria.

The case of *Podkolzina v. Latvia* concerned the requirement that a candidate, in order to enrol on the list of candidates and thus stand for election, had to have a certain knowledge of the official language of the state; Latvian.

¹⁴² ECHR *Brike v. Latvia*, Decision of 29 June 2000, Application no. 47135/99.

¹⁴³ According to the 2002 amendment to the 1976 Act from the Council of the European Union (*supra*, note 65), the office of member of the European Parliament is, starting from the 2004 elections, incompatible with that of member of a national parliament or a national government, with minor exceptions.

¹⁴⁴ EComHR *Fryske Nasjonale Partij and Others v. the Netherlands*, Decision of 12 December 1985, 45 DR 240.

¹⁴⁵ EComHR *Andecha Astur v. Spain*, Decision of 7 July 1997, 90 DR 172.

¹⁴⁶ ECHR *Podkolzina v. Latvia*, *supra* (note 32).

The applicant was a member of the Russian-speaking minority in Latvia and she had to provide the Latvian authorities with a certificate that her knowledge of Latvian was sufficient or to pass an examination to prove it to enrol on the candidate list.

The Latvian Government argued that the obligation for a candidate to understand and speak Latvian is necessary to ensure the proper functioning of Parliament, in which Latvian is the sole working language. It stated that the aim of this requirement was to enable the members of Parliament to take an active part in the work of the Parliament and effectively defend their electors' interests. The Court accepted the government's arguments. It held again that the states enjoy considerable latitude to establish constitutional rules on the status of members of Parliament, including criteria for declaring them eligible. Even though the eligibility criteria have a common origin to ensure the independence of elected representatives and the freedom of electors, the Court is ready to accept that the criteria may vary in accordance with the historical and political factors specific to each state.¹⁴⁷ When the state in question seeks to ensure that its own constitutional system functions normally, such aim is incontestably legitimate. It applies all the more to the national parliament, which is vested with legislative power and plays a primordial role in a democratic state. The Contracting State's choice of working language in the national parliament falls within the state's margin of appreciation.¹⁴⁸

4.2.4 The Right to Exercise the Mandate Once Elected

In the case of *Sadak and Others v. Turkey (no. 2)*,¹⁴⁹ the Court found that Turkey violated the complainants' right to exercise their mandate, after their election to the Turkish Parliament. As previously mentioned, 13 Turkish citizens forfeited their mandates following the dissolution of the party that they represented in the Parliament. Since the Turkish Constitution stipulated that only the members of the party following whose actions the dissolution was instigated forfeited their mandates, the Court found that Turkey violated Article P1–3 in addition to national law. In relation to Article P1–3, the Court found that the interference was not proportionate, since the measures adopted by the Turkish authorities were extremely harsh. The judgment shows that the

¹⁴⁷ ECHR *Podkolzina v. Latvia*, *supra* (note 32), para. 33.

¹⁴⁸ *Ibid.*, para. 34. As mentioned in section 3 above, the Court nevertheless found that the Latvian authorities violated the candidate's right to stand for election, because the procedure used when evaluating her language skills was not fair and objective, and therefore the Court estimated that the means employed were disproportionate.

¹⁴⁹ ECHR *Sadak and Others v. Turkey (no. 2)*, *supra* (note 71).

Court, despite being slightly cautious in dealing with cases concerning the rights in Article P1–3, will not hesitate to find violations when state authorities, as in this case, are openly not treating the equal equally and the unequal unequally.

4.3 *The Margin of Appreciation*

The states' margin of appreciation plays an important role in the Court's case law, and the analysis above has shown that this also applies to cases concerning the rights in Article P1–3. The margin of appreciation is a disputed notion used by the Strasbourg institutions, and it can be difficult to determine the exact content or implications of the application of the notion. Nevertheless, it is possible to make some rough generalisations on the issue.

Traditionally, the application of the margin of appreciation is used in connection with provisions that do not lay down precise or detailed rules, and therefore a balancing of interests is often necessary. The balancing act will for example concern either the interests of an individual and the interests of society as a whole or the interests of two individuals. Traditionally, the existence of a *European common ground* in the law and practice of the Contracting States can lead to a narrow margin of appreciation and thus a stricter scrutiny by the Strasbourg authorities. Along the same lines, if on the other hand the law and practice differ among the Contracting States, the margin of appreciation may be wider.¹⁵⁰

The Strasbourg institutions have continuously stated that in general the Contracting States enjoy a wide margin of appreciation, but subject to European supervision, in relation to limitations to the rights secured by Article P1–3.¹⁵¹ At times, the Court has referred to the widely different systems that exist in the Contracting States.¹⁵² Other times, the existence of the measure complained of in "a good many States" has been the reason for the Court's acceptance of the national limitations.¹⁵³

However, in a recent case, though not concerning the rights in Article P1–3, the Court has used a different method for narrowing the states' margin

¹⁵⁰ van Dijk and van Hoof, 1998, pp. 82–93.

¹⁵¹ Among others ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 52; ECHR *Gitonas and Others v. Greece*, *supra* (note 137), para. 39.

¹⁵² ECHR *Gitonas and Others v. Greece*, *supra* (note 137), para. 39.

¹⁵³ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 57; ECHR *Federación Nacionalista Canaria v. Spain*, Decision of 7 June 2001, Reports of Judgments and Decisions 2001–VI.

of appreciation. In the 2002 case of *Christine Goodwin v. the United Kingdom*,¹⁵⁴ concerning transsexuals' need for legal recognition for their change of sex, the Court acknowledged that it previously noted in similar cases that "little common ground existed between States" and laid emphasis on "the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas" and therefore granted the Contracting States a wide margin of appreciation. The Court recognised in the *Christine Goodwin* case that there was still a lack of a common European approach, but admitted that:

the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.¹⁵⁵

On the one hand, it can be argued that the *Christine Goodwin* case only relates to the cases of legal recognition of post-operative transsexuals, which the wording of the judgment surely points towards. On the other hand, the Court has, before the *Christine Goodwin* case, continuously used the lack of a common European approach as a reason for granting a wide margin of appreciation to the Contracting States, and therefore the Court's statement in the *Christine Goodwin* case cannot be ignored. In the case of *Hirst v. the United Kingdom (no. 2)*, the Court takes to a large extent into consideration case law from the Canadian Supreme Court.¹⁵⁶ Accordingly, there is a possibility that the Court in the future will take "international tendencies" into consideration when evaluating whether the Contracting States should be granted a wide or a narrow margin of appreciation. Such a method of approach does not make the scope of application of the margin of appreciation more predictable. And

¹⁵⁴ ECHR *Christine Goodwin v. the United Kingdom*, Judgment of 11 July 2002, Reports of Judgments and Decisions 2002–VI. See also ECHR *I v. the United Kingdom*, Judgment of 11 July 2002, Application no. 25680/94.

¹⁵⁵ ECHR *Christine Goodwin v. the United Kingdom*, *supra* (note 154), para. 85.

¹⁵⁶ ECHR *Hirst v. the United Kingdom (no. 2)*, *supra* (note 127), para. 43.

another question is how to choose which countries' practice to compare with. It will be very interesting to see how the Court will go about this issue in the coming years.

5. THE ELECTORAL SYSTEM – THE REQUIREMENTS IN ARTICLE P1–3

During the drafting of the provision it was clear that Article P1–3 was not meant to create the obligation to introduce a specific electoral system.¹⁵⁷ The drafting states had different systems of proportional representation and of majority voting and therefore the provision had to reflect the idea that both a system of proportional representation and a majoritarian system would satisfy the demands of Article P1–3. The view was expressed by the Commission in *X v. the United Kingdom* (6 October 1976), where the Commission stressed that “[b]oth these forms of elections may be considered as a part of the common heritage of political traditions to which reference can be found in the Convention’s Preamble.”¹⁵⁸

The Court confirmed that the states enjoy a wide margin of appreciation in their choice of electoral system in its judgments in the cases of *Mathieu-Mohin and Clerfayt v. Belgium* and *Matthews v. the United Kingdom*. In the latter case, the Court said that:

[t]he Court makes it clear at the outset that the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured — whether it be based on proportional representation, the ‘first-past-the-post’ system or some other arrangement — is a matter in which the State enjoys a wide margin of appreciation.¹⁵⁹

The aims of an electoral system are “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.”¹⁶⁰ These aims tend to be difficult to reconcile, and therefore the Court has

¹⁵⁷ *Travaux préparatoires*, vol. VII, p. 130.

¹⁵⁸ EComHR *X v. the United Kingdom*, Decision of 6 October 1976, 7 DR 95. Thus, the Commission has declared inadmissible complaints concerning both proportional representation (EComHR *X v. Iceland*, Decision of 8 December 1981, 27 DR 145) and majority voting (EComHR *The Liberal Party, R and P v. the United Kingdom*, Decision of 18 December 1980, 21 DR 211), by referring to the state’s wide margin of appreciation regarding the electoral system.

¹⁵⁹ ECHR *Matthews v. the United Kingdom*, *supra* (note 64), para. 64.

¹⁶⁰ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 54.

interpreted the phrase “conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” in relation to the states’ choice of electoral system, to imply the principle of equal treatment of all citizens in their right to vote and their right to stand for election along with the right to freedom of expression.¹⁶¹ However, the principle of equal treatment of all citizens in their right to vote and their right to stand as a candidate does not imply that all votes cast should be represented in the legislature. Article P1–3 does not protect against so-called wasted votes, since no system would be able to avoid it. The citizens have to live with the fact that not all votes have exactly the same weight and that not all candidates have exactly the same chances of victory. When the electoral system does not favour any particular political party at the expense of another or give an individual candidate an advantage at the expense of another candidate, the Court will, due to the wide margin of appreciation that the states enjoy in the choice of their electoral systems, leave it to the state to decide which system best accommodates the particular historical and political context of the state in question.¹⁶²

However, some features of electoral systems would be difficult to reconcile with the principle of equal treatment of the citizens. Drawing up constituency boundaries can pose certain problems in this connection, but the Commission has accepted that the drawing up may result in disparities of votes behind candidates of each constituency, and that this does not infringe the rights in Article P1–3.¹⁶³ However, the article must be understood as containing a prohibition on gerrymandering.

The Northern Irish system complained of in the *Northern Irish Cases*¹⁶⁴ from 1970 also seems problematic in this relation. According to the applicants, approximately 30 percent of the population was disfranchised in the elections. The election law stipulated that no adult of 21 years of age or over could vote unless he or she was a “householder” or the spouse of a householder. Furthermore, the election law gave businessmen six votes in respect of each business they operated. According to the applicants, the respondent government had made it its policy to make public housing units available only to its supporters, and therefore non-supporters of the government were discriminated against

¹⁶¹ As mentioned in section 3 above, the freedom of expression does not fall within the scope of Article P1–3, but is protected by Article 10 of the Convention.

¹⁶² EComHR *X v. Iceland*, *supra* (note 158).

¹⁶³ EComHR *Lindsay v. the United Kingdom*, Decision of 8 March 1979, 15 DR 247.

¹⁶⁴ EComHR *The Northern Irish Cases, A and Others v. the United Kingdom*, Decision of 17 December 1970, 13 YB 340. The cases presented, apart from the issue of equal votes, also problems in relation to the term “legislature”, but were struck off the list for other reasons.

when it came to obtaining status as a “householder”. As the case was struck off the list the Commission did not arrive at an assessment of whether the applicants’ allegations were substantiated. Regardless, if a system grants different weight of the votes to electors because of their possession of property or their social status, the system may very well be regarded as infringing the principle of equal treatment of all citizens in their right to vote.¹⁶⁵

The *travaux préparatoires* reflect that the Convention was to a large extent created as a safeguard against totalitarian systems, such as communism and fascism. Therefore, it seems evident that Article P1-3 contains a safeguard against one-party systems, since such systems would not be apt to reflect the “free expression of the opinion of the people in their choice of the legislature” in a truly democratic regime as envisaged by the drafting states. In the *Greek Case*, the Commission also highlighted this aspect of the requirements to a democratic regime. Following the *coup d’état* in 1967, new Greek legislation prohibited the existence of political parties, which, in the Commission’s view, constituted a “clear and persistent breach of Article 3 of the Protocol.”¹⁶⁶ In *X v. the United Kingdom* (6 October 1976),¹⁶⁷ the Commission further held that the term “choice” reflects that different political parties must be ensured a reasonable opportunity to present their candidates at elections, thus presupposing a multi-party system. More recently, the Court held in the case of *United Communist Party of Turkey and Others v. Turkey*, that the state is the ultimate guarantor of the principle of pluralism and that the “free expression of the opinion of the people” is:

inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population. By relaying this range of opinion, not only within political institutions but also — with the help of the media — at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.¹⁶⁸

Since one of the requirements for admission to the Council of Europe is commitment to the rule of law, which is seen to include “democracy” and thereby political party pluralism,¹⁶⁹ cases concerning one-party systems will

¹⁶⁵ The same point of view is expressed in Hinz and Suksi, 2002, p. 29.

¹⁶⁶ The *Greek Case*, *supra* (note 20), p. 180.

¹⁶⁷ EComHR *X v. the United Kingdom* (6 October 1976), *supra* (note 158).

¹⁶⁸ ECHR *United Communist Party of Turkey and Others v. Turkey*, *supra* (note 67), para. 44. See section 3 of this study.

¹⁶⁹ Meron and Sloan, 1996, p. 143 ff.

only be presented to the Court when the Contracting State in question already is in breach of the requirements for membership of the Council of Europe.

The principle of equal treatment of all citizens in their right to vote and their right to stand for election entails that the voters are protected against discrimination.¹⁷⁰ As mentioned, both proportional representation and majority voting are accepted electoral systems in relation to the right to free elections. While proportional representation in its pure form does not seem to present problems in relation to the prohibition on discrimination contained in Article P1-3, majority voting often creates disadvantages for small parties and minority groups.

In *The Liberal Party, R and P v. the United Kingdom*,¹⁷¹ the Commission paid attention to, but left open, the question “whether or not specific features in the voting behaviour could raise an issue under [Article P1-3] [...] if religious or ethnic groups could never be represented because there [is] a clear voting pattern along these lines in the majority.” However, a few years later, the Commission stated without any reservation in the admissibility decision in the case of *G and E v. Norway*¹⁷² that the Convention does not guarantee any specific rights for minorities. Therefore, the article does not give such groups a right to special representation or positive discrimination in situations where majority voting *de facto* cuts out such groups from any representation in the legislature. Although the Court has not expressed this view explicitly in a judgment, it seems to be clear that the Convention does not contain the right to special measures in favour of minority representation in the legislature.¹⁷³

¹⁷⁰ See section 3 of this study.

¹⁷¹ EComHR *The Liberal Party, R and P v. the United Kingdom*, *supra* (note 158).

¹⁷² EComHR *G and E v. Norway*, Decision of 3 October 1983, 35 DR 30. The position was upheld in EComHR *Magnago and Südtiroler Volkspartei v. Italy*, Decision of 15 April 1996, Application no. 25035/94.

¹⁷³ In ECHR *Young, James and Webster v. the United Kingdom*, Judgment of 13 August 1981, Publications of the European Court of Human Rights, Series A, no. 44, para. 63, the Court stated that: “Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.” However, this comment was directly connected to the issue of membership of trade unions and closed shop agreements, and can therefore not be regarded as a basis for special rights for minorities.

With the adoption of Protocol No. 12¹⁷⁴ there is now a general prohibition on discrimination in the European human rights protection system. Protocol No. 12 guarantees the principle of equality of treatment and of non-discrimination as a prerequisite for achieving *de jure* and *de facto* equality. The principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination. On the one hand, Protocol No. 12 does not require the adoption of special measures for certain disadvantaged groups in order to promote equality or to eliminate *de facto* inequalities. On the other hand, Protocol No. 12 does not prohibit these special measures, or positive discrimination, but marginalised groups will not be able to base their claim for such measures on Protocol No. 12.¹⁷⁵ Accordingly, the Convention system does not impose obligations for the Contracting States to introduce special measures for minorities or other disadvantaged groups.

Other features in the Contracting States' electoral systems can have the effect of disfavoured or even excluding representation of specific "weak" groups of society. Having regard to the wide margin of appreciation that the Contracting States are granted, such features will be accepted, unless they aim directly for the exclusion of one specific group. The Commission has declared inadmissible several complaints concerning minimum thresholds for the allocation of seats in the national parliaments.¹⁷⁶ In *Federación Nacionalista Canaria v. Spain*,¹⁷⁷ the Court noted that "even a system which fixes a relatively high threshold, for example, as regards the number of signatures required in order to stand for election or, as in the present case, a minimum percentage of votes on the national level, may be regarded as not exceeding the margin of appreciation permitted to States in the matter". The law in question demanded that:

the only lists to be taken into account shall be those of the parties or coalitions that have obtained the greatest number of valid votes in each of the constituencies and the other [lists] that have obtained at least 30% of the valid votes cast in a single constituency or, adding together the votes for each constituency, at least 6% of the valid votes cast in the Autonomous Community as a whole.

¹⁷⁴ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 177, opened for signature 4 November 2000, had not entered into force by 14 December 2004. Hereinafter: Protocol No. 12.

¹⁷⁵ See Explanatory Report to Protocol No. 12.

¹⁷⁶ EComHR *Tete v. France (no. 1)*, Decision of 9 December 1987, 54 DR 52; EComHR *Fournier v. France*, Decision of 10 March 1988, 55 DR 130.

¹⁷⁷ ECHR *Federación Nacionalista Canaria v. Spain*, *supra* (note 153).

In addition, the Court noted that such measures are found in many of the systems in Europe.

Attributes of the electoral system that the Commission clearly regards as compatible with the provision are the requirements of monetary guarantees for inscription on electoral lists or the requirement of a certain number of votes as a prerequisite for refund of expenses during the electoral campaign. In the admissibility decision in *André v. France*,¹⁷⁸ the applicant complained that the demand for a deposit of FF 100,000 as a prerequisite for standing as a candidate in the election for the European Parliament amounted to a *de facto* refusal of candidates that represented a financial minority, namely the homeless, the long-term unemployed, the deaf and the blind, to stand for election. The Commission declared the complaint inadmissible by referring to the aim of the measure, namely the promotion of the emergence of a sufficiently clear and coherent political will. In this connection it could be argued that the Strasbourg institutions grant the Contracting States a margin of appreciation that stretches slightly too far. At any rate, the present case surely makes one ask the question whether such a sizeable deposit does not pose a problem in relation to the principle of equal treatment of all citizens in their right to vote and their right to stand for election when lists are created in order to represent groups that constitute financial minorities.

Also the requirement of a certain number of signatures of potential voters has been regarded as clearly consistent with Article P1-3.¹⁷⁹

The reason for the latitude of the Strasbourg institutions towards the states and the wide margin of appreciation in relation to the electoral system has to be seen as recognising that a state's choice of the electoral system goes to the very core of state sovereignty. However, it would be desirable if the Court recognised that features such as large financial guarantees are not without impact on the group of persons that want to stand as candidates. When the aim is to promote currents of thoughts that are sufficiently representative of the opinion of the people, the Court should be ready to perform a modest degree of scrutiny to ensure that certain groups are not *de facto* barred from taking actively part in the public life by standing for election.

¹⁷⁸ EComHR *André v. France*, Decision of 18 October 1995, Application no. 27759/95.

¹⁷⁹ EComHR *X, Y and Z v. the Federal Republic of Germany*, Decision of 18 May 1976, 5 DR 90; and EComHR *Asensio Serqueda v. Spain*, Decision of 9 May 1994, Application no. 23151/1994.

6. IN THE CHOICE OF THE LEGISLATURE

6.1 General Remarks

Since Article P1–3 according to the wording only applies to elections to the “legislature”, it has to be established what constitutes a legislature within the meaning of Article P1–3.

In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court stated that the word “legislature” does not necessarily mean only the national parliament, but that it has to be interpreted in the light of the constitutional structure of the state in question.¹⁸⁰

Furthermore, during the drafting of the article, it was stated that the article was carefully drafted to avoid that the article was understood as not permitting the existence of chambers of the legislature that are, either in whole or in part, not elective. Such existed in some of the Contracting States, for example in the United Kingdom, where seats in the Upper House were hereditary or in Belgium, where one of the chambers consists of appointed members.¹⁸¹ Such arrangements should be allowed to exist after the entry into force of Protocol No. 1. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court held that Article P1–3 applies only to the election of the “legislature”, “or at least of one of its chambers if it has two or more”.¹⁸²

Harris, O’Boyle and Warbrick argue that the test to determine if a body forms part of the “legislature” within the meaning of Article P1–3 depends on whether the body has an independent power to issue norms having the force of law.¹⁸³ This section will show whether this test is still applicable.

¹⁸⁰ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 53.

¹⁸¹ *Travaux préparatoires*, vol. VIII, pp. 50–52.

¹⁸² ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 53. In his concurring opinion in the judgment judge Pinheiro Farinha argues that the wording found in the *travaux préparatoires* and supported in the judgment “or at least of one of its chambers if it has two or more” is “inadequate and dangerous”. He argues that it would allow of a system that might lead to a corporative, elitist or class system which does not respect democracy. He suggests that the wording used should be replaced with “or at least of one of its chambers if it has two or more, on the two-fold condition that the majority of the membership of the legislature is elected and that the chamber or chambers whose members are not elected does or do not have greater powers than the chamber that is freely elected by secret ballot.” The Court, however, did not adopt this formulation.

¹⁸³ Harris, O’Boyle and Warbrick, 1995, p. 553.

6.2 Referendums

It seems very clear from the decisions of both the Commission and the Court that referendums do not fall within the scope of Article P1-3. The first decision concerned the British referendum on EEC membership, and the Commission said that since the referendum was of purely consultative character and there was no legal obligation to organise such a referendum, the right to participate in the referendum could not be derived from Article P1-3.¹⁸⁴ In the 1996 case of *Bader v. Austria* concerning a referendum on Austria's accession to the European Union, the Commission did not refer to the nature or status of the referendum; it just stated that the provision does not extend to referendums.¹⁸⁵ The Court confirmed the position in 1999 in a case concerning Liechtenstein.¹⁸⁶ The applicant complained that he, as a citizen of Liechtenstein, could not take part in referendums in Liechtenstein since he had his domicile in Switzerland. He did not refer to any specific referendum, and since the Court remarked that Article P1-3 does not extend to referendums, without distinguishing between consultative or mandatory referendums, it must therefore be clear that Article P1-3 does not apply to any kind of referendum.¹⁸⁷

6.3 Appointment of the Government and the Head of State

During the drafting of the provision, the appointment of the government was deliberately omitted from the provision, since there was unanimity that the choice of the government was not necessarily to be made directly by the people.¹⁸⁸ However, the provision implies that the government bases its legitimacy on the parliament elected in accordance with the requirements in Article P1-3.

¹⁸⁴ EComHR *X v. the United Kingdom*, *supra* (note 158). See section 5 of this study.

¹⁸⁵ EComHR *Bader v. Austria*, Decision of 15 May 1996, Application no. 26633/95. See also EComHR *Nurminen v. Finland*, Decision of 26 February 1997, Application no. 27881/95; and EComHR *Castelli and Others v. Italy*, Decision of 14 September 1998, 94 DR 102, where the Commission upheld its position.

¹⁸⁶ ECHR *Hilbe v. Liechtenstein*, Decision of 7 September 1999, Reports of Judgments and Decisions 1999-VI.

¹⁸⁷ Latest confirmed in ECHR *Borghi v. Italy*, Decision of 20 June 2002, Reports of Judgments and Decisions 2002-V. Critical in this connection, see De Meyer, 1993, p. 556; and Harris, O'Boyle and Warbrick, 1995, p. 554.

¹⁸⁸ *Travaux préparatoires*, vol. VIII, p. 52.

The appointment of the head of state has been in question before the Commission, but not yet before the Court.¹⁸⁹ In the first case, *X v. Austria* concerning the election of the Federal President of Austria, the Commission did not comment on whether the president formed part of the legislature, but declared the application inadmissible for other reasons.¹⁹⁰ However, the Commission declared in 1989 in the case of *Habsburg-Lothringen v. Austria* that the provision concerns “the choice of the legislature” and not the appointment of the head of state, such as the Federal President of Austria. This can be seen as the Commission saying that since the election of the government does not fall within the scope of Article P1–3, the election of the head of state is also falling outside the scope. However, the Commission did not expressly refer to the head of state as part of the government. The view expressed in the 1989 case was followed in 1998 in *Baskauskaitė v. Lithuania*, where the Commission pointed to the principle laid down in the case of *Habsburg-Lothringen v. Austria*, but further stressed that there was no indication that the powers of the President of Lithuania could be construed as “legislature” within the meaning of Article P1–3. This shows that insofar the head of state does not possess any inherent law-making power the election of a head of state does not fall under the scope of Article P1–3, irrespective of whether the head of state is part of the government. Accordingly, it cannot be ruled out in cases where the head of state has an independent law-making prerogative that his or her appointment would have to comply with Article P1–3.

6.4 Sub-State Entities

The question of the provision’s application in cases concerning local authorities was first raised in the *Northern Irish Cases*.¹⁹¹ Here, the government submitted that it was clear from the *travaux préparatoires* and from the wording of the article that “the choice of the legislature” does not include election to a local authority, which is subordinate to a national or regional authority and has only limited powers to pass by-laws of purely local application.¹⁹² As the case was struck off the list the Commission did not pronounce itself on the issue.

¹⁸⁹ EComHR *X v. Austria*, *supra* (note 36); EComHR *Habsburg-Lothringen v. Austria*, *supra* (note 72); EComHR *Baskauskaitė v. Lithuania*, Decision of 21 October 1998, Application no. 41090/98.

¹⁹⁰ The case concerned compulsory voting, which was not found to be in contravention of Article P1–3.

¹⁹¹ See section 5 of this study.

¹⁹² See EComHR *The Northern Irish Cases, A and Others v. the United Kingdom*, *supra* (note 164), p. 412.

However, the government's reasoning seems to have been in line with the requirements of Article P1-3. The Commission had the opportunity to look into the matter again in a case in 1976, where a resident in Northern Ireland complained that election to the local government had been suspended since 1969. The Commission then said that insofar these local authorities have a legislative function that is confined to the making of by-laws applicable within their areas and these powers are rigidly limited by statute and therefore the local authorities have no powers to make rules others than in accordance with the powers conferred by the parliament, the Commission does not consider the local government covered by the term "legislature" within the meaning of Article P1-3.¹⁹³ Therefore, the local government in Northern Ireland was not considered to fall within the term of legislature of Article P1-3. The same has been decided by the Commission concerning the municipal councils in Belgium¹⁹⁴ and the metropolitan councils in the United Kingdom,¹⁹⁵ and confirmed by the Court concerning the municipal councils and the mayors in Russia,¹⁹⁶ local councils in Malta,¹⁹⁷ the French regional councils,¹⁹⁸ Spanish municipal councils,¹⁹⁹ Moldovan municipal councils,²⁰⁰ and the Italian provincial councils.²⁰¹

Some of the Contracting States are federal states with substantial part of the legislative power vested in the federal units. Germany is such an example, and the German *Länder* are being regarded as part of the legislature.²⁰² The same must be the case of the cantons in Switzerland and the federal units of Austria.

¹⁹³ EComHR *X v. the United Kingdom*, Decision of 12 July 1976, 6 DR 13.

¹⁹⁴ EComHR *Clerfayt and Others v. Belgium*, Decision of 17 May 1985, 42 DR 212.

¹⁹⁵ EComHR *Booth-Clibborn v. the United Kingdom*, Decision of 5 July 1985, 43 DR 236.

¹⁹⁶ ECHR *Cherepkov v. Russia*, *supra* (note 86).

¹⁹⁷ ECHR *Xuereb v. Malta*, Decision of 15 June 2000, Application no. 52492/99.

¹⁹⁸ EComHR *Tete v. France (no. 2)*, Decision of 10 March 1988, Application no. 11802/85; and ECHR *Malarde v. France*, Decision of 5 September 2000, Application no. 46813/99.

¹⁹⁹ ECHR *Salleras Llinares v. Spain*, Decision of 12 October 2000, Reports of Judgments and Decisions 2001-XI.

²⁰⁰ ECHR *Gorizdra v. Moldova*, Decision of 2 July 2002, Application no. 53180/99.

²⁰¹ ECHR *Santoro v. Italy*, Decision of 16 January 2003, Application no. 36681/97.

²⁰² EComHR *Timke v. Germany*, *supra* (note 37).

As to other regional arrangements, the Commission did not pronounce itself in the case of *Polacco and Garofalo v. Italy*²⁰³ on the nature of the Italian regional councils, since both the applicant and the government regarded the Regional Council of Trentino-Alto Adige as part of the legislature. The issue was presented to the Court in *Santoro v. Italy*, which in 2003 declared the application admissible concerning the issues relating to elections to the regional council. In the 2004 judgment in the case of *Santoro v. Italy*,²⁰⁴ the Court, in accordance with the view expressed by Suksi,²⁰⁵ held that the Italian Regional Councils are to be regarded as legislatures within the meaning of Article P1-3.²⁰⁶ Similarly the legislative assemblies of the autonomous communities in Spain are considered by the Court to be a part of the Spanish legislature within the meaning of Article P1-3.²⁰⁷

In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court agreed with the parties appearing before it that the Flemish Council, the French Community Council and the Walloon Regional Council were vested with competence and powers wide enough to make them a constituent part of the Belgian legislature in addition to the House of Representatives and the Senate.²⁰⁸

6.5 *Supra-State Entities*

As shown above the term “legislature” can refer to sub-state entities, but also the question whether supra-national entities can be regarded as forming part of the legislature has been brought before the Commission and the Court. The cases have concerned the European Parliament.

The Commission decided in 1979 that since the European Parliament did not possess a legislative power *in stricto sensu*, but was rather a consultative body with certain controlling and budgetary powers, the European Parliament did not form part of the legislature within the meaning of Article P1-3.²⁰⁹ In the following cases concerning the same issue the Commission upheld the position.

²⁰³ EComHR *Polacco and Garofalo v. Italy*, Decision of 15 September 1997, Application no. 23459/94.

²⁰⁴ ECHR *Santoro v. Italy*, Judgment of 1 July 2004, Application no. 36681/97, para. 52.

²⁰⁵ Suksi, 1998, p. 169.

²⁰⁶ This point was still not disputed between the parties.

²⁰⁷ ECHR *Federación Nacionalista Canaria v. Spain*, *supra* (note 153).

²⁰⁸ ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 53.

²⁰⁹ EComHR *Alliance des Belges v. Belgium*, Decision of 10 May 1979, 15 DR 259.

However, it kept at the same time a door open for a change in its standpoint, in case the role of the European Parliament in the legislative process would change.²¹⁰ After the entry into force of the Treaty on European Union on 1 November 1993, the Commission regarded the role of the Parliament in the legislative process to have increased to an extent that the Commission had to leave the matter to the Court to decide.²¹¹ In the subsequent judgment from the Court in 1999, the case of *Matthews v. the United Kingdom*,²¹² the Court came to the conclusion that the European Parliament now constituted a part of the legislature in the European Union Member States, and therefore, elections to the Parliament had to conform to Article P1–3. In reaching this conclusion the Court pointed out that the legislative process in the European Community involves the participation of the European Parliament, the European Council and the European Commission. For the Court to ensure that “effective political democracy” is properly served in the states, one cannot only look to the strictly legislative powers, which a body has, but also at the body’s role in the overall legislative process. Since the Parliament’s functions were regarded as being no longer “advisory and supervisory”, the European Parliament has moved towards being a body with a decisive role to play in the legislative process of the European Community. The Court noticed that the European Parliament has functions in relation to the appointment and removal of the European Commission, which can ultimately lead to a situation where the European Commission has to resign as a body. The Court continued by recognising that even though the European Parliament has “no formal right to initiate legislation, it has the right to request the European Commission to submit proposals on matters on which it considers that a Community act is required”. In conclusion the Court therefore found that the European Parliament was “sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty, and [...] sufficiently 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 [Article P1–3].”²¹³

From the cases cited above it is seen that the conditions of whether a body forms part of the legislature have somewhat changed. The Commission

²¹⁰ EComHR *Tete v. France (no. 1)*, *supra* (note 176); EComHR *Fournier v. France*, *supra* (note 176); and EComHR *André v. France*, *supra* (note 178).

²¹¹ EComHR *Matthews v. the United Kingdom*, Decision of 16 April 1996, Application no. 24833/94.

²¹² ECHR *Matthews v. the United Kingdom*, *supra* (note 64).

²¹³ *Ibid.*, para. 54.

used in its early case law the criteria for whether the body in question had an independent power to issue norms having the force of law, as mentioned above, and thereby regard was had to whether that power belonged to an institution that traditionally was considered to be a norm-issuing institution. The primary condition for a body to constitute part of the legislature was its ability to independently pass norms with the force of law, and if the body in question did not possess such an inherent rule-making power it would not be considered part of the legislature in the meaning of Article P1-3.

These criteria are to a large extent still applicable. However, the Strasbourg organs' approach seems to have shifted from an institutional approach to more of a functional approach. With the statements in the Court's judgment in *Matthews v. the United Kingdom* concerning the European Parliament's role in the legislative process and in the Commission's decision in *Baskauskaitė v. Lithuania*, it seems as if the fact that a body or a person has a "decisive role to play in the legislative process" has the effect that the appointment of that body or that person has to meet the requirements in Article P1-3. In the evaluation the Court has once assessed the body's "role in the overall legislative process". The European Parliament does not have the power to independently pass legislation, and some heads of states, for example the French President, have at least a position similar to that of the European Parliament in the law-making process. Therefore, a change in the Court's position may be anticipated.

If a functional approach of this kind is the method that the Court will apply in relation to determination of whether a body forms part of the legislature, questions arise in relation to whether there is a correlation between the situations where a Convention provision requires that a certain state restriction in the rights and freedoms guaranteed by the Convention is "prescribed by law" or "in accordance with law" and the term "legislature" within the meaning of Article P1-3. If we assume that the link is direct, then the appointment of the members of the bodies with a decisive role to play in the legislative process should take place in accordance with the requirements in Article P1-3, namely universal suffrage, reasonable intervals, etc. And that would also mean that the interpretation of the requirements of "a basis in national law" for example in Articles 8 to 11 of the Convention, meaning in the material sense of the word law according to the Court's practice,²¹⁴ has a direct effect on the Court's interpretation of what constitutes the legislature within the meaning of Article P1-3.

²¹⁴ ECHR *Kruslin v. France*, Judgment of 24 April 1990, Publications of the European Court of Human Rights, Series A, no. 176-A, para. 29; and ECHR *Kopp v. Switzerland*, Judgment of 30 July 1998, Reports of Judgments and Decisions 1998-II, para. 60.

The Commission has, in an admissibility decision from 1983 concerning professional bodies vested with legislative powers, decided that the Dutch Royal society for the cultivation of flower bulbs could not be regarded as a part of the legislature, since its legislative powers were limited only to the enactment of regulations needed to uphold the interests of firms engaged in the production and sale of flower bulbs.²¹⁵ This point of view corresponds well with the Court's statement that insofar as a body does not have inherent law-making powers it will not be considered part of the legislature within the meaning of Article P1-3. But with a functional approach to the determination of whether a body is part of the "legislature" professional bodies would not automatically be excluded from falling within the scope of Article P1-3, since they could be regarded as part of the "legislature" because they in some countries are regarded as "a body with a decisive role to play in the legislative process". This will be illustrated in the following example.

A recent admissibility decision concerning the requirement of basis in national law from the Court shows that it is possible that general rules with the force of law that affect the whole population can stem from professional bodies. The 2002 case of *Madsen v. Denmark*²¹⁶ concerns the rules regulating the Danish labour market. By tradition, the Danish legislature plays a minor role as regards governing wages, salaries and employment conditions and therefore the rules imposed by statute in other countries have in Denmark been obtained by agreements between the labour market partners, namely on the one side the employees and their unions and on the other side the employers and their federations. The dispute under consideration concerned the employer's managerial right or his right to carry out control measures — a principle laid down in the so-called September Agreement of 1899, negotiated between the two labour market partners. An employer's right to manage and control work has been acknowledged in numerous collective agreements, courts of arbitration and the Danish Labour Court, but is not to be found in statutory law. The applicant pointed out in his submission to the Court that the shipping trade, where he was employed, is not covered by any central agreement between an employer's federation on the one side and trade union federations on the other side. The Court held that according to the "Danish Model" the content and scope of the employer's managerial right depend on labour law principles as laid down in agreement between private partners in negotiation in the September Agreement of 1899. The dispute before the domestic authorities between the applicant and his employer was therefore to be solved on the basis of case law and practices in labour market matters. In these

²¹⁵ EComHR *X v. the Netherlands*, Decision of 1 March 1983, 32 DR 274.

²¹⁶ ECHR *Madsen v. Denmark*, Decision of 7 November 2002, Application no. 58341/00.

circumstances the Court was satisfied that the measure that Mr Madsen's employer introduced and that was considered by the national authorities to be legal, was introduced "in accordance with law".²¹⁷

Article P1-3 contains the right to effective political democracy. This means that individuals have a right to elect representatives who will make the general rules of society. It gives individuals the right to control, by means of elections with reasonable intervals, the persons who have the right to pass laws for the people in general to comply with. With the decision of *Madsen v. Denmark* the Court accepts that collective bargaining in relation to the labour market in Denmark has resulted in the issuance of "law" as mentioned in the requirement that an interference in the right to respect for private life shall be "in accordance with the law" (see Article 8(2)). The Court also stated that a professional body is not regarded as part of the "legislature" within the meaning of Article P1-3 if the body only has legislative powers conferred to it by delegation.²¹⁸ The labour market partners in Denmark are not conferred with legislative powers by direct delegation from the Parliament, but rather by the absence of statutory law in the area. To foresee the outcome of a case at the Court concerning a citizen's right to political participation is a difficult, if not impossible, task. Van Dijk and van Hoof point out that the "broad interpretation of the word 'legislature' would also seem to follow from the broad interpretation in the case-law of the word 'law'".²¹⁹ Surely, there seems to be a connection between the two terms, but it also appears rather unlikely that the Court will demand that the appointment of members of professional bodies "with a decisive role to play in the legislative process" has to comply with the requirements in Article P1-3. However, it cannot be ruled out. International human rights law traditionally only regulates disputes between states and persons under their jurisdiction and not the relationship between private parties, even though the outcome of case law from the Court at times has an effect on the relationship between private persons when disputes between private parties give rise to and depend on the outcome of an international human rights dispute.²²⁰ However, such an effect is secondary, since the Court will only evaluate the *legislation*, adopted by a state, that regulates the relationship between private persons. It can be argued that the existence of the "Danish Model" depends on the absence of statutory law and that legislation *could* be issued by the Parliament at any given time. Therefore, the system exists

²¹⁷ In the material sense of the word.

²¹⁸ EComHR *X v. the Netherlands*, *supra* (note 215).

²¹⁹ van Dijk and van Hoof, 1998, p. 665.

²²⁰ ECHR *Marckx v. Belgium*, *supra* (note 19). See section 1 of this study.

solely due to acceptance of the system by the legislature, a situation, which could create the link between the "law" and the "legislature".²²¹ What seems clear, is that the correlation between the "law" and the "legislature" within the meaning of Article P1-3 is not a direct link, but rather an indirect one, where, as pointed out by van Dijk and van Hoof, the broad interpretation of the "law" allows for and incites to a broad interpretation of the "legislature".

7. FREE EXPRESSION OF THE OPINION OF THE PEOPLE

7.1 *The Requirements of Article P1-3*

As mentioned in section 4 of this study, the Court held in the case of *Mathieu-Mohin and Clerfayt v. Belgium* that the states can make the rights in Article P1-3 subject to conditions, as long as these conditions "do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness", the conditions are "imposed in pursuit of a legitimate aim" and "that the means employed are not disproportionate. In particular, such conditions must not thwart the 'free expression of the opinion of the people in the choice of the legislature'."²²²

The term "the free expression of the opinion of the people" has a summary nature. This indicates that when the rights enshrined by the article are not restricted in contravention of the requirements mentioned above, then the elections are "free". Certainly they are free within the meaning of Article P1-3. Nevertheless, it is also important to acknowledge that other provisions of the Convention and other activities that take place in the society in the Contracting States in general, and not necessarily in the proximity of an election, can have crucial influence on the outcome of an election. Access to media was briefly mentioned in the case of *United Communist Party of Turkey and Others v. Turkey* in section 5 of this study. Voter education, the granting of citizenship, the possibility of political contestation and what Suksi calls the adjacent political rights, such as the right to freedom of expression, association, assembly and

²²¹ It can also be argued that the outcome of *Madsen v. Denmark* merely states that customary law forms part of the "basis in national law" that is required in the Convention system, and that there is no connection between such a statement and the establishment of which bodies form part of the "legislature" within the meaning of Article P1-3. However, such a position would entail that there is not an inner consistency in the Convention system.

²²² ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* (note 8), para. 52.

movement²²³ are also of significant interest in this connection. The prohibition of inhuman or degrading treatment in Article 3 of the Convention has also relevance here. A few cases that deal with issues that are related to elections and the overall political situation will be mentioned here.

7.2 Related Issues

As long as the rights in Article P1–3 are rights granted to citizens of the Contracting States only, it means that the procedures and requirements for the granting of citizenship will have an impact on the possibility to participate in the public life at the national level as enshrined in Article P1–3. Neither the Court nor the Commission has dealt with cases on the issue, and it cannot be ruled out that the institutions do not consider the mentioned problem to be relevant in relation to Article P1–3. Nevertheless, the practical impact of the issue remains pertinent.

The right to freedom of expression, protected in Article 10 of the Convention, entails the right to receive information. In relation to receive voter information the Commission said in *Bader v. Austria*²²⁴ that it did not find that Article 10 guarantees, in circumstances such as in the present case, an unfettered individual right to be informed by state authorities on issues of general interest in a specific way.

Several cases concerning the dissolution of political parties have been lodged against Turkey.²²⁵ In the first case the Court assessed the dissolution of the United Communist Party to be an interference with the applicants' freedom of association since the dissolution was based on the party's constitution and programme. The applicants complained that, among other things, their right to free elections was violated, since the leaders of the party due to the dissolution were banned from taking part in elections. The Court found that the Turkish authorities had violated the applicants' rights protected by Article 11 of the Convention (the right to freedom of assembly and association), but said that the measure complained of in relation to Article P1–3 was an incidental effect of the

²²³ Hinz and Suksi, 2002, pp. 12–17. See also *Handbook for European Union Election Observation Missions*, 2002, p. 12.

²²⁴ EComHR *Bader v. Austria*, *supra* (note 185).

²²⁵ ECHR *United Communist Party of Turkey and Others v. Turkey*, *supra* (note 67); ECHR *Socialist Party and Others v. Turkey*, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998–III; ECHR *Refah Partisi (the Welfare Party) and Others v. Turkey*, Judgment of 13 February 2003, Reports of Judgments and Decisions 2003–II. See also ECHR *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of 2 October 2001, Reports of Judgments and Decisions 2001–IX.

dissolution, which the Court already held to be a breach of Article 11. Therefore, the Court did not find it necessary to consider that complaint separately.²²⁶ The Court used the same reasoning and came therefore to the same result in the cases of *Socialist Party and Others v. Turkey*²²⁷ and *The Welfare Party and Others v. Turkey*,²²⁸ with the difference that in the latter case the Court did not find that Turkey violated the applicants' right to freedom of association, because the party's programme was seen to be in opposition with the fundamental rules of democracy. This shows that political parties, in case of dissolution by the state authorities, will have to seek protection of their political rights to freedom of association in Article 11 rather than in Article P1-3.²²⁹

The right to freedom of expression also plays an important role in connection with elections, which is shown by the case of *Bowman v. the United Kingdom*.²³⁰ The case concerned a prohibition in the legislation of the United Kingdom of expenditure in excess of GBP 5 by unauthorised persons on publications during the election period. The Court held that such a limitation amounted to an unjustified interference with Mrs Bowman's freedom of expression, even though the measure was imposed in pursuit of the aim of protecting the rights of others, namely candidates for the election and the electorate, since the measure was disproportionate.

The Court has in its case law recognised the very powerful role of the media,²³¹ especially in regard of the formation of opinions in relation to public affairs. It can be argued that the regulation of the media during election campaigns has such an impact on the outcome of the elections that equal access to the media is a prerequisite for free elections. However, the Commission has, in *Purcell and Others v. Ireland*, declared that Article P1-3 does not give a citizen the right to demand that all political parties competing in an election shall be

²²⁶ ECHR *United Communist Party of Turkey and Others v. Turkey*, *supra* (note 67), para. 64.

²²⁷ ECHR *Socialist Party and Others v. Turkey*, *supra* (note 225), para. 57.

²²⁸ ECHR *The Welfare Party and Others v. Turkey*, *supra* (note 225), paras. 135-136.

²²⁹ See also ECHR *Yazar and Others v. Turkey*, Judgment of 9 April 2002, Reports of Judgments and Decisions 2002-II; and ECHR *Dicle for the DEP v. Turkey*, Judgment of 10 December 2002, Application no. 25141/94.

²³⁰ ECHR *Bowman v. the United Kingdom*, Judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I.

²³¹ ECHR *Jersild v. Denmark*, Judgment of 23 September 1994, Publications of the European Court of Human Rights, Series A, no. 298, para. 31; ECHR *United Communist Party of Turkey and Others v. Turkey*, *supra* (note 67), in this connection mentioned in section 5 of this study.

granted radio or television coverage or be granted the same amount of such coverage.²³² It can be argued that the decision was very concrete and cannot be regarded as setting the standard in relation to any future complaints regarding media coverage during election campaigns.

It has several times been shown that the Contracting States are relatively free to choose how to create their internal rules governing elections. Nevertheless, it seems surprising that while the Court stresses that the television is a very strong media and emphasises the importance of a pluralistic political debate in a democratic society, the Court seems at the same time ready to accept that certain parties will not be granted coverage. When such an interpretation cannot be read into Article P1-3, it could be argued to follow from Article 10 alone or read together with Article 14. This has to some extent been shown in the 2001 case of *VgT Verein gegen Tierfabriken v. Switzerland* concerning the right to access to media in relation to political commercials.²³³

In relation to the prohibition of inhuman or degrading treatment as protected in Article 3 of the Convention, a case against Poland has been presented to the Court.²³⁴ A Polish citizen was charged with forgery of various documents and placed in detention. During his detention he requested to be allowed to vote in the parliamentary elections in Poland in 1993, as there were voting facilities for detainees in the prison. On the day of the election the applicant was taken to the guards' room and was then told that in order to vote he had to get undressed and undergo a body search. The applicant took off his clothes except his underwear, whereupon the prison guards allegedly ridiculed him, exchanged humiliating remarks about his body and abused him verbally. The applicant was then ordered to strip naked, which he refused, and he was

²³² EComHR *Purcell and Others v. Ireland*, Decision of 6 April 1991, 70 DR 262. Along the same lines, see EComHR *Proyecto Manos Limpas v. Spain*, Decision of 15 September 1997, Application no. 34402/97, where the Commission said that Article P1-3 does not grant the right for parties to obtain "espaces de publicité électorale gratuite".

²³³ ECHR *VgT Verein gegen Tierfabriken v. Switzerland*, Judgment of 28 June 2001, Reports of Judgments and Decisions 2001-VI. The case concerned access to a private broadcasting channel, which was the only Swiss channel with the right granted to broadcast commercials. The argument must also have relevance in relation to access to public or semi-public media conferred with public service obligations by national law. See also Recommendation no. R (99) 15 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns, adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Minister' Deputies. The Recommendation stresses the need for regulations on the coverage of elections to be in accordance with Article 10 of the Convention.

²³⁴ ECHR *Iwanczuk v. Poland*, Judgment of 15 November 2001, Application no. 25196/94.

then taken back to his cell without being allowed to vote. He complained that he was subjected to degrading treatment by the prison guards during that incident. The government argued that a strip search as a precondition for casting a vote in the elections was for the purpose of guaranteeing the security of the election officers. The Court held that the case related to the applicant's basic right, namely the right to vote in parliamentary elections. In addition, the Court considered it doubtful whether the exercise of this right by persons detained should be subject to any special conditions other than those dictated by normal requirements of prison security. In any case, the Court did not find that it was justified that such conditions should include an order to strip naked in front of a group of prison guards.²³⁵ After a further evaluation of the circumstances of the case in relation to Article 3 of the Convention, the Court found that the treatment of the applicant during that incident constituted a breach of the prohibition on inhuman and degrading treatment.²³⁶

As one has to be extremely prudent when transposing remarks made by the Court in one type of cases to other types of cases, these comments cannot be seen as indicating any substantial point of view of the Court in disputes relating directly to the rights protected by Article P1-3. What remains clear from this judgment, however, is that the Court regards electoral rights and voting rights as basic rights, which influences the Court's evaluation of state behaviour.

8. CONCLUSIONS

"[F]undamental freedoms [...] are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend."²³⁷

The right to free elections in Article P1-3 implies the principle of universal suffrage and enshrines thereby the right to vote, the right to stand for elections, the right to take office once elected, certain procedural requirements to the procedure leading to a determination of the rights just mentioned and, in addition, a duty to the holding of free elections owed to the group of citizens of a state as a collective.

²³⁵ ECHR *Iwanczuk v. Poland*, *supra* (note 235), para. 54.

²³⁶ *Ibid.*, para. 60.

²³⁷ The Preamble to the Convention.

The right to free elections also enshrines a characteristic principle of democracy. Thereby, the right to free elections creates the link between the two prerequisites for fundamental freedoms, and provides a means for obtaining justice and peace in the world, as mentioned in the Convention's Preamble.

This piece of research has not gone into an in-depth political or philosophical analysis of the validity of this statement. Through a legal dogmatic case-law analysis the contents of Article P1-3 have been mapped out. The analysis has shown that Article P1-3 contains substantive political rights of participation, such as the above-mentioned rights. The difference in the formulation of Article P1-3 and the other substantive clauses in the Convention owes its explanation to the fact that elections are activities that the states are obligated to engage in, and thus the provision constitutes a positive obligation for the Contracting States. However, there are also negative aspects to the rights in Article P1-3, for example when the Contracting States are limiting a person's right to vote or his or her right to stand for election.

The rights contained in Article P1-3 are rights limited to *citizens* of the Contracting States, even though this is not explicitly mentioned in the article. This position is generally accepted in international human rights law, and Article 25 of the International Covenant on Civil and Political Rights contains the same, although explicit, limitation. The limitation derives from the tradition from which the Convention stems, and because of the close linkage between the concept of citizenship and self-determination of the peoples, and thereby state security and sovereignty, the Court cannot be expected to construe the group of right-holders to the rights in Article P1-3 to expand further than to the citizens in the Contracting States.

It has been established that the rights in Article P1-3 are not absolute and that the Contracting States can make restrictions in these rights. The Court has proposed a test by which it can be assessed whether the requirements of Article P1-3 are fulfilled. The limitations in the rights in Article P1-3 must:

- not curtail the rights to such an extent as to impair their very essence and deprive them of their effectiveness
- be imposed in pursuit of a legitimate aim
- be proportionate; that is that the means employed to obtain the legitimate aim are not disproportionate.

The overarching consideration to be made is that the limitations must not thwart "the free expression of the opinion of the people".

From the case law it appears that the Court allows for two forms of restrictions in the rights in Article P1-3. One form is the "conditions" that the article expressly mentions. The other form is limitations by implication. The

Court continuously refers to the possibility to restrict the rights in Article P1-3 by implication on grounds that the article does not present the permitted limitations in express words but nevertheless makes it clear that limitations are permitted.

The regrettable effect of the traditional use of the doctrine of implied limitations is that the Convention organs have the possibility to cut off the assessment of the merits at an earlier stage than they usually do in the course of evaluating a case. The cutting off of the assessment of the justification of the limitation in combination with the use of limitations not spelled out expressly in the Convention makes it difficult to foresee the scope of the rights of political participation in the Convention, and thus gives rise to serious problems in relation to legal certainty in the Court's interpretation of the Convention.

When looking at the case law from the Court concerning limitations to the rights in Article P1-3, it is not clear whether the Court actually applies the doctrine of implied limitations or whether the restrictions are considered to be the "conditions" mentioned in the article when the Court looks at the restrictions imposed. The doctrine of implied limitations has traditionally been used in connection with prisoners' rights. Therefore, it can be argued that, by not referring to the doctrine in the many complaints that concern prisoners' right to vote or to stand for election, the Court is not using the doctrine. But at the same time the Court continuously refers to the doctrine in relation to the general principles in Article P1-3. The Court's standpoint on the issue is not easy to decipher. However, what seems relatively clear from the case law is that both types of limitations have to be justified by the Contracting States with the above-mentioned test. However surprising this position is, since the essence of an implied limitation is that it does not have to be justified, this speaks in favour of the Court *de facto* not using the doctrine to block assessment at an earlier stage for certain groups than for other groups of persons. However, when the Court continues to state that there is room for implied limitations in connection with the rights in Article P1-3, the possibility that the Court will actually use the doctrine in a future judgment cannot be non-existent. A clear statement from the Court on the matter would be desirable — especially if it states that it will refrain from applying the doctrine on implied limitations in the future.

The proposed test to establish whether the measure complained of is thwarting "the free expression of the opinion of the people" reveals that the Court does not strictly apply a test that evaluates whether the measure amounts to an interference and subsequently demands a justification from the measure imposed. The assessment seems to be more of a general nature, where the Court strikes a balance between, on the one hand, the measure and its implications and, on the other hand, overall societal considerations. The legitimate aims that the Court has accepted lie in many cases close to what is reasonable, common

and what deserves protection in a democratic society, but neither the Convention nor the Court requires that the Contracting States back up their motivations for imposing the measures with a substantiation that the measure is even somewhat close to what is "necessary in a democratic society". And here, in the test the Court applies when assessing the complaints, lies maybe the main reason as to why Article P1-3 to a large extent can be regarded as a fairly weak protection of individual rights.

First, the Court points to the requirement that a limitation must not deprive the rights of their very essence. It is not clear from the case law how much is needed to deprive a right of its very essence, but the wording suggests that it demands quite a lot. Concerning the aim of the limitation, the Court indeed demands that the Contracting States present their legitimate aims before the Court, but the Court has been particularly cautious when determining whether the Contracting States comply with the demands of proportionality. Newer case law indicates that there may be a change in the Court's scrutiny in cases concerning the right to free elections under way, but progress remains necessary.

International human rights law traditionally recognises the states as the prime protectors of individuals' human rights and does not go into detail with how the states shall ensure the protection. Therefore, it is left to the states to find out how and by which means the protection can be ensured, and accordingly the state is left with a right of discretion in this respect. How the states deal with the human rights protection will be susceptible to the historical and political context of the state in question, and therefore differences in *how* the states solve the human rights issues that exist within their jurisdiction does not pose a problem in relation to the Convention, as long as the human rights problems *are solved*.

The Court has stated that Article P1-3 enshrines a characteristic principle of democracy. There seems to be an understanding that there is a correlation between the concept of democracy that runs through the whole Convention system and the rights protected in Article P1-3. This correlation translates into the principle that the people shall have the possibility, at least indirectly, to decide to what extent they accept limitations in the human rights contained in the Convention system. The principle links the discussions on the connections between "law" and "legislature" and between "a characteristic principle of democracy" and "necessary in a democratic society", since the people appoint the legislature and thereby trust the legislature to make no further restrictions in the population's human rights than the people want and can live with.

The discretion that the Court has granted to the Contracting States leads to the result that the Contracting States can restrict the rights in Article P1-3, which are supposed to ensure that the legislature represents the free expression

of the opinion of the people, to a larger extent than some of the rights in which restrictions can only be made when they are "in accordance with law" or "prescribed by law", since some of these will have to meet the requirement of whether the measure is "necessary in a democratic society". It means that there is a risk that the restrictions in Articles 8 to 11 of the Convention go beyond what the persons under the jurisdiction of a Contracting State deem acceptable. It is the "representatives of the people", elected to the legislature, who are drafting the general norms of society. The general norms of society can restrict the human rights of the people under the jurisdiction of the Contracting States. However, these representatives are not elected by *the people under the jurisdiction of the Contracting States*. They are elected by the *citizens* of the Contracting States. As a result, the persons living under the jurisdiction of the Contracting States without citizenship, are dependent on the presence of representatives of the citizens that are willing to speak for them and their interests in the national parliament and in national politics. In states with vibrant and well-organised civil societies this may seem a minor obstacle, but this does not exist in all the Contracting States to the Convention. And in any case, Article P1-3 has the effect that this structural inconsistency in the Contracting States between who elect the representatives and for whom the representatives are making decisions, comes to existence.

As mentioned, the granting of the margin of appreciation to the Contracting States cannot in its entirety be criticised as being in contravention of the purpose of the Convention. But when the margin for the states becomes so wide that the Court does not make an assessment of each of the restrictions imposed or demands a concrete justification for the measures, the protection in Article P1-3 seems far weaker than the protection in other substantive clauses in the Convention. The Court has until 2004 shown blank acceptance of restrictions in prisoners' right to vote. The Court has accepted without reservation that some states exclude sizeable groups of civil servants from the right to stand for election. The Court has accepted that some states demand a significant amount of money in deposit as a prerequisite for standing for election, without even asking the question whether it poses a problem in relation to the "free expression of the opinion of the people" when excluded groups are trying to make their voice heard on the national level. The Court has overall seemed reluctant to go into in-depth scrutiny of the circumstances of a case unless a complaint derives from a clear discrimination or apparent arbitrary conduct by state authorities. And even if the Court's recent case law is what it looks like, namely steps in the right direction, there is still progress to be made. Whereas Article P1-3 is considered to be of prime importance in the Convention system, it is to be noted with dissatisfaction that the Court did not long ago honour the rights enshrined therein by adopting a stricter test and

thereby generally performed a more thorough scrutiny of whether the restrictions in the rights in Article P1–3 can be accepted.

The case law reveals that the Contracting States' choice of electoral system is rather free. The minimum requirement is political pluralism, a multi-party system, but apart from that the Court is willing to accept various characteristics that the Contracting States introduce in their national systems, as long as the features apply equally, or at least do not favour a particular candidate or a particular party.

When determining what constitutes the legislature within the meaning of Article P1–3 the Court has moved towards a functional approach which shows that where legislative power is exercised, the persons exercising such power shall be appointed in accordance with the requirements in Article P1–3. The practice stemming from the Court is not entirely consistent, and some changes in this respect may be anticipated.

The concept of *people* in Article P1–3 is limited to citizens, even though the term "rights of participation" would suggest that it is the persons affected by the decisions that should be able to take part in the appointment of the decision-makers. It could be argued that the limitation is supported by Article 16 of the Convention, which expresses the view that political rights of aliens are not protected by the Convention, should the states choose to restrict them. Clearly, the right to participation should require a clear and certain affiliation to the sphere where the decision-making has its effect, but the question is why (long-term or permanent) residents should not be able to participate in the public life at the national level on the same footing as citizens, since the rules of general application affect them to the same extent as the rules affect citizens.

Article P1–3 relates only to the appointment of decision-makers on the national level. Since local authorities are not vested with competence to issue law, but only have powers by means of delegation of power from the legislature, the appointment of the members of these authorities is kept out of the scope of Article P1–3. At the same time, the European Parliament, which also derives its powers from delegation from the national parliaments, is considered to be part of the legislature. Accordingly, the Court, when construing the article in this connection, applies a concept of "law" in the formal sense. This again has the implication that the term "democracy" seems to be related, in the sense of the Convention, only to activities that take place at the national level. Having in mind the historic context of the Convention as being created in opposition to dictatorships and totalitarian systems, the Convention's concept of democracy can hardly be criticised for promising more than it will keep. However, it is important to recognise, when discussing the concept of democracy, that participation on the local level, where the implementation of the government's and the legislature's policies takes place

and where such decisions to a large extent affect the residents more than the acts of the European Parliament, does not have to meet the requirements of Article P1-3 and is not seen as a part of the effective political democracy within the meaning of the Convention. This has also the effect that the part of the society, which is referred to as the private sphere or civil society, falls outside the realm of the Convention when democracy is at issue.

Last but not least, a further look at a sample of case law dealing with issues that do not directly fall within the scope of the article, but nevertheless have an impact on the political climate and possibly also the outcome of an election and thereby the free expression of the opinion of the people, reveals that when dealing with the right to free elections Article P1-3 cannot on its own adequately cater for the demands of political participation.

Some changes to be anticipated in relation to Article P1-3 have been mentioned. Of particular interest is the question whether the criteria the Court used in the case of *Christine Goodwin v. the United Kingdom* will be setting a new standard for the determination of the extent of the margin of appreciation. The statement from the Court that it is hardly surprising that a common European standard between 43 (today 45)²³⁸ Contracting States does not exist, is a very valid point. Traditionally, it has been said that the reason why the Court ran the risk of granting the Contracting States the leeway was that the Court had faith in the Contracting States and their commitment to the protection of individual human rights. The Court has thus relied on the democratic processes in the Contracting States to adequately protect against human rights abuses. When the number of Contracting States today is much higher than previously, and since quite a few of the recently acceded Contracting States are still struggling with the reminiscences of their totalitarian past, there are good reasons for changing the use of the margin of appreciation. It could also be argued that even from the outset the trust in the Contracting States should not have granted them with such a wide margin of appreciation at any rate, since the Convention actually was aiming at protecting the populations in "free states" and not in totalitarian regimes.

However, the question remains whether the criteria used in the case of *Christine Goodwin v. the United Kingdom*, if adopted in future disputes in relation to Article P1-3, will result in a more lenient or stricter practice from the Court and whether "the clear and uncontested evidence of a continuing international trend" gives better guidance as to what the Contracting States have to do to fulfil their obligations in relation to the Convention. The question also remains

²³⁸ As of 14 December 2004, 46 states have signed the Convention, and 45 of them have ratified or acceded to the Convention.

whether this “international trend” will make up for the general uncertainty that reigns in relation to the permitted limitations in the rights in Article P1–3.

Article P1–3 protects very important rights. Article P1–3 reflects the idea that the persons representing the people in the conduct of public affairs are responsible to the people whose interests they safeguard. When going into detail with the case law from the Court, one realises that the right to free elections touches upon sensitive issues that at times compel the Court to be so careful in its assessment of the complaints brought before it that it sometimes can be difficult to spot the effective protection of the basic rights the article seeks to guard. The Court has been assessing cases concerning the right to free elections since 1987. With the influence of the increasingly strong focus on elections and democratisation today, the Court may find the means to demand more from the Contracting States than merely a multi-party system and at least one chamber of the parliament subject to direct political contestation.

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