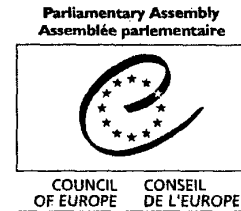


**Parliamentary Assembly**  
**Assemblée parlementaire**



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## **Abolition of restrictions on the right to vote**

Report  
Committee on Legal Affairs and Human Rights  
Rapporteur: Mr Mehdi Eker, Turkey, Group of the European People's Party

### *Summary*

The report takes stock of existing restrictions on the right to vote linked to age, place of residence, citizenship, criminal conviction, status as a member of the military or other vulnerable groups. It concludes that, in view of the importance of the right to vote in a democratic society, the member countries of the Council of Europe should review existing restrictions and abolish all those that are no longer necessary and proportionate in pursuit of a legitimate aim.

The draft resolution and recommendation, in particular, invite member states to enable their citizens living abroad to vote during national elections and to co-operate with one another for this purpose. As all residents are obliged to pay local taxes and their lives are directly affected by the decisions of local authorities, the right to participate in local elections should be granted to all residents regardless of nationality or ethnic origin.

Considering that rehabilitation of prisoners, aimed at their reintegration into society with all rights and duties, is the ultimate purpose of criminal sanctions, the report regrets that in many countries persons convicted of a criminal offence are barred from voting. A more modern approach would be to limit the withdrawal of the right to vote to crimes committed against the democratic process (e.g. election fraud). Finally, the report also stresses the importance of protecting the unmanipulated exercise of voting rights by members of vulnerable groups, such as residents of nursing homes, prison inmates, soldiers and handicapped persons.

## I. Draft resolution

1. The Parliamentary Assembly, in line with its Recommendation 1500 (2001) on the participation of immigrants and foreign residents in political life in the Council of Europe member states, stresses the importance of the right to vote and to stand in elections as a basic pre-condition for preserving other fundamental civil and political rights upheld by the Council of Europe.
2. In accordance with the opinion of the Venice Commission adopted in December 2004, it therefore invites the member and observer states of the Council of Europe to reconsider all existing restrictions of electoral rights and to abolish all those that are no longer necessary and proportionate in pursuit of a legitimate aim.
3. The Assembly considers that, as a rule, priority should be given to granting effective electoral rights, free and equal, to the highest possible number of citizens, without regard to their ethnic origin, place of residence, health, status as members of the military or criminal record.
4. In line with the case law of the European Court of Human Rights, any exceptions from this rule must be prescribed by law, pursue a legitimate aim and not be arbitrary or disproportionate.
5. The Assembly considers that age limits for the right to vote and to be a candidate for elections should not be higher than 18 and 25, respectively.
6. All residents are obliged to pay local taxes and their lives are directly affected by the decisions of local authorities. The right to vote and to stand as candidates in local elections should therefore be granted to all residents regardless of their nationality or ethnic origin.
7. In view of the possible conflict of loyalties between the country of which a person is a national and the country of residence, the right to vote and stand as a candidate in national elections (parliamentary or presidential) should generally be attached to nationality. Persons having several nationalities should be allowed to choose freely in which country they wish to exercise their right to vote.
8. Given the importance of the right to vote in a democratic society, the member countries of the Council of Europe should enable their citizens living abroad to vote during national elections. They should take appropriate measures to facilitate the exercise of such voting rights as much as possible, in particular by allowing absentee (postal) and/or consular voting. Member states should co-operate with one another for this purpose and refrain from placing unnecessary obstacles in the path of the effective exercise of the voting rights of foreign nationals residing on their territories.
9. Considering that rehabilitation of prisoners, aimed at their reintegration into society with all rights and duties, is the ultimate purpose of criminal sanctions, the Assembly regrets that in many countries persons convicted of a criminal offence are barred from voting, in some cases even for some time after their release from prison. A more modern approach would be to limit the withdrawal of the right to vote to crimes committed against the democratic process (e.g. election fraud, illicit pressure on voters or candidates, participation in a military putsch, participation in terrorist activities as established by a court judgment). In any case, in view of the judgment of the European Court of Human Rights in the case of *Hirst v. United Kingdom* (30.6.2004), national parliaments should reconsider existing restrictions and determine whether they still pursue a legitimate aim and are not arbitrary or disproportionate.
10. As stressed by the European Commission for Democracy through Law ("Venice Commission"), the need for democratic control over the military should not be used as an excuse to automatically deprive military servicemen of their voting rights.
11. The Assembly also stresses the importance of protecting the voting rights of vulnerable groups, such as residents of nursing homes, prison inmates, soldiers and handicapped persons. Appropriate measures must be taken to avoid any undue influence by helpers, supervisors or hierarchical superiors, in particular by ensuring the secrecy of the vote.
12. The Assembly therefore invites
  - i. the Council of Europe member and observer states concerned to:

- a. reduce minimum age requirements for active and passive electoral rights to 18 years for the right to vote and 25 years at most for the right to stand as candidates;
  - b. grant electoral rights to all their citizens (nationals), without imposing residency requirements;
  - c. facilitate the exercise of expatriates' electoral rights by providing for absentee voting procedures (postal and/or consular voting) and to co-operate with one another to this end;
  - d. to sign and ratify the 1992 Council of Europe Convention on the participation of foreigners in public life at local level and to grant active and passive electoral rights in local elections to all legal residents;
  - e. to reconsider existing restrictions on electoral rights of prisoners and members of the military, with a view to abolishing all those that are no longer necessary and proportionate in pursuit of a legitimate aim;
  - f. to take appropriate measures protecting the electoral rights of vulnerable groups of voters (in particular, persons living in nursing homes, prisoners, members of the military, nomads), in line with the Venice Commission's Code of Good Practice in Electoral Matters adopted in July 2003.
- ii. the Council of Europe, and in particular the Venice Commission, to develop further its activities aimed at improving the conditions for the effective exercise of electoral rights, putting a special emphasis on co-operation aimed at facilitating the exercise of electoral rights by expatriate citizens.

## II. Draft recommendation

1. Referring to its Resolution ... (2005) on the abolition of restrictions on the right to vote, the Parliamentary Assembly calls upon the Committee of Ministers to:

i. appeal to member and observer states to:

a. sign and ratify the 1992 Council of Europe Convention on the participation of foreigners in public life at local level and to grant active and passive electoral rights in local elections to all legal residents; and

b. reconsider existing restrictions on electoral rights of prisoners and members of the military, with a view to abolishing all those that are no longer necessary and proportionate in pursuit of a legitimate aim;

ii. invite the competent services of the Council of Europe, in particular the European Commission for Democracy through Law ("Venice Commission") and its Council for Democratic Elections, to develop their activities aimed at improving the conditions for the effective exercise of election rights by groups facing special difficulties such as expatriates, prison inmates, residents of nursing homes, soldiers or nomadic groups;

iii. review existing instruments with a view to assessing the possible need for a Council of Europe Convention to improve international co-operation with a view to facilitating the exercise of electoral rights of expatriates.

### III. Explanatory Memorandum by Mr Mehdi Eker, Rapporteur

#### A. Introduction

##### 1. Procedure

1. Following the reference of the motion for a recommendation presented by Mrs Hägg (Sweden, SOC) and others (Doc 9906), to the Committee on Legal Affairs and Human Rights for report and to the Committee on Political Affairs for opinion (Reference 2875 of 29 September 2003), the Committee on Legal Affairs and Human Rights, at its meeting on 15 December 2003, appointed Mr Akçam (Turkey/EPP) as Rapporteur. He presented an introductory memorandum dated 7 June 2004 to the Committee, which asked the Venice Commission for an opinion on the questions raised in the memorandum, following Mr Akçam's proposal. The Venice Commission adopted the appended opinions prepared by Professor Matscher (Austria) and Mrs Lazarova Trajkovska ("the former Yugoslav Republic of Macedonia) at its December 2004 session. Following Mr Akçam's departure from the Assembly, the present Rapporteur was appointed at the Committee's meeting on 3 March 2005.

2. The motion suggests that the right to vote should be universally protected under the principle of non-discrimination as laid down in numerous international instruments binding for Council of Europe member states. The supporters of the motion give some examples of factors that can restrain citizens' possibilities to participate in general elections and referenda, and point out that democratic legitimacy requires equal participation of all groups of society in the political process. Differential measures in relation to the right to vote should be circumscribed as narrowly as possible.

3. Some issues raised in the present report, in particular the voting rights of foreign residents in local elections, have also been the subject of earlier texts adopted by the Parliamentary Assembly (cf. Recommendation 1500 (2001) on the participation of immigrants and foreign residents in political life in the Council of Europe member states<sup>1</sup> and Resolution 1035 (1994) on Europeans living abroad<sup>2</sup>. The Assembly stressed in particular that "democratic legitimacy requires equal participation by all groups of society in the political process, and that the contribution of legally resident non-citizens to a country's prosperity further justifies their right to influence political decisions in the country concerned." (Recommendation 1500 (2001), para. 4.), and "urged governments of member states to grant the right to vote and stand in local elections to all migrants legally established for at least three years irrespective of their origin" (ibid., para. 11.iv.a.).

4. The current motion aims at recommending to the Committee of Ministers to urge member states to abolish different types of restrictions on the right to vote in general elections and in referenda.

##### 2. Scope of the report

5. The motion mentions a number of factors used to justify unequal access to the right to vote, and which need to be explored further: age, citizenship or permanent residence, a criminal record, or mental diseases or retardation. All these issues can give rise to serious debates.

6. In the words of Professor Matscher's report adopted by the Venice Commission, "the principles developed on the right to vote and the right to be elected are applicable – *mutatis mutandis* – vice versa." The present report therefore covers issues pertaining both to active and passive voting rights.

#### B. Main issues

##### 1. General principles applicable to restrictions to the right to vote

7. "The right to vote is one of the basic pre-conditions for preserving other fundamental civil and political rights, but at the same time it is one of the most significant characteristics of citizenship and, in that way, is closely linked to the principle of state sovereignty. Both these dimensions are sources of various legitimate or illegitimate restrictions of the right to vote."<sup>3</sup>

<sup>1</sup> <http://assembly.coe.int/documents/adoptedtext/ta01/erec1500.htm>.

<sup>2</sup> <http://assembly.coe.int/documents/adoptedtext/ta94/eres1035.htm>.

<sup>3</sup> Mirjana Lazarova Trajkovska, member of the Venice Commission for "the former Yugoslav Republic of Macedonia", in her report for the Venice Commission (appendix 1, p. 2).

8. As states parties to the Statute of the Council of Europe, countries are required to collaborate seriously and effectively in the realisation of the aims of the Council of Europe as defined in Chapter I of the Statute (Article 3 of the Statute), and they are therefore obliged to respect the principles of parliamentary democracy, of the rule of law, of the protection of human rights and of minorities (Article 3).

9. The legal limits to which Council of Europe member states have subjected themselves regarding restrictions to the right to vote can be found first and foremost in Article 3 Protocol No 1 of the European Convention on Human Rights ("ECHR")<sup>4</sup>. Additional binding rules are found, for the countries that have ratified this instrument, in the 1992 Convention on the participation of foreigners in public life at local level.

10. The European Court of Human Rights constantly emphasises that in the field of Article 3 Protocol No 1 there is room for inherent limitations and that the states enjoy a large margin of appreciation. However, measures of the state must not impair the very essence of the rights protected under Article 3 Protocol No 1, and the measures in question must pursue a legitimate aim and not be arbitrary or disproportionate.<sup>5</sup>

11. The fact that the Court's legal approach has so far been very cautious does not prevent the Parliamentary Assembly, from a political perspective, from going further and recommending to the Council of Europe's member states to extend electoral rights beyond the bare minimum prescribed by Article 3 Protocol No. 1, as interpreted by the Court. It is your Rapporteur's intention to propose taking such a progressive approach on a number of specific issues, in view of the importance of the right to vote for the development of democratic society, the rule of law and human rights, which are the core values upheld by the Council of Europe.

## **2. Restrictions based on age**

As regards voting age, two questions arise:

12. The first is what the age of "political majority" should be, at which young people can be expected to cast their vote in a responsible way. It is clear that the responsible exercise of the right to vote presupposes a high degree of maturity, which usually comes with age. On the other hand, it has been suggested that minimal voting age should be no higher than the age at which young people are conscripted into the army (i.e. 18): persons from whom society is prepared to demand the sacrifice of their own lives in case of a military conflict should arguably also be given a say in who shall decide on war and peace.

13. The Rapporteur considers that the age of 18, which is the legal voting age in most Council of Europe countries, is an acceptable compromise.

14. The second question in this context is whether differences should continue to be made regarding age requirements between active and passive voting rights (i.e. the right to vote, and the right to be a candidate in elections).

15. In the opinion of the Rapporteur, it is acceptable to differentiate between active and passive voting rights, in line with the practice in most countries. In fact, elective mandates carry a high degree of responsibility and their exercise in the public interest requires particular maturity and life experience. It is therefore quite reasonable to set a higher minimum age, for example 21 years or even 25 years or more, depending on the level of responsibility of the elective mandate in question.

## **3. Restrictions based on citizenship or permanent residence**

16. As regards citizenship or permanent residence as factors determining political rights, the following four groups of questions arise:

a. To what extent should foreign nationals be allowed to participate in the political process in their country of residence – locally, or also on the regional or national levels? Should the host country require a minimum period of residence prior to the granting of voting rights? Should differences be made according to the number of foreign residents, in proportion to the number of citizens?

b. Should expatriates be allowed to vote in their countries of origin? If so, should this right be guaranteed indefinitely, or only for a certain number of years after having given up residence in their countries of origin?

<sup>4</sup> Franz Matscher, member of the Venice Commission for Austria, in his report for the Venice Commission (appendix 2) has presented the case law of the European Commission and Court of Human Rights on restrictions to the right to vote.

<sup>5</sup> Matscher, *ibid.*, p. 10, with references to the case-law of the European Court of Human Rights.

c. When expatriates are allowed to vote in their countries of origin, to what extent should the authorities of the host countries be required to cooperate to enable them to exercise their right to vote without creating an undue administrative burden?

d. Should expatriates who are granted the right to vote in their country of residence for certain elections, whilst retaining their voting rights in their home country, be made to choose between the two, or be allowed to cumulate democratic participation rights?

17. As regards (a) above - participation of foreigners in public life at local level - the Council of Europe has opened a Convention<sup>6</sup> for signature in 1992 which entered into force in 1997. Unfortunately, only 7 countries<sup>7</sup> have so far ratified this convention, which foresees progressive participation rights, including the possibility to grant to foreign residents the right to vote in local elections, and to stand for election after five years of lawful and habitual residence in the host country.

18. It is legally acceptable, under ECHR standards and the case-law of the European Court of Human Rights, as presented in the Venice Commission report<sup>8</sup>, that voting rights are granted only to citizens who reside in that country<sup>9</sup>.

19. But in view of the importance of voting rights for the development of democracy, the Rapporteur is of the opinion that from a political point of view, foreign residents ought to be granted the right to vote in local elections to the largest possible extent, in line with the above-mentioned Council of Europe Convention. The problem is particularly acute in countries such as the Baltic states in which large sections of the population of Russian origin, who have not yet acquired the nationality of the country in which they have resided for many years (so-called "non-citizens"), do not have the right to vote in local elections, in contrast to European Union nationals who have only moved there much more recently<sup>10</sup>. Similarly, Turkish nationals reside in cities in Germany and other Western European countries in large numbers; in some local districts, they are close to forming a numerical majority. Local authorities decide on very practical matters that directly concern the lives of all local residents, whether they are nationals or not, and all residents are obliged to pay the local taxes. Local authorities must therefore be accountable, through elections, to all residents. Whilst the taxation argument also applies to the national level, local elections differ from national ones in that there can be no conflict of loyalties with a foreign resident's home country. While such a "conflict of loyalties" may serve as an argument to deny foreign residents a right to vote in national elections, which decide on the composition of national Governments, in charge of foreign policy, defence etc., where conflicts can theoretically arise between the voter's country of residence and his or her home country, this is clearly not the case in local elections.

20. As regards (b) above - voting rights in the home country - it can no longer be said that a person who takes up residence abroad loses contact with the political life at home to the point that he or she should no longer be allowed to vote, immediately or after a certain number of years. Modern communication technologies, satellite television, "democratisation" of travel, expansion of family and business-related contacts ensure that - for example - a Turkish citizen living in Germany can follow political life in his home country in such a way that he or she can make election choices in just the same rational way as a compatriot living in Ankara or Istanbul.

21. Some countries (for example Germany) differentiate the duration of the maintenance of voting rights depending on whether an expatriate has moved to another member country of the Council of Europe, or outside of Europe, or even what kind of job they do in their new country of residence (expatriate diplomats or other civil servants often enjoying certain privileges). Other countries positively encourage their nationals

<sup>6</sup> Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144).

<sup>7</sup> Denmark, Finland, Iceland, Italy, the Netherlands, Norway, Sweden; in addition, Cyprus, the Czech Republic, and the United Kingdom have signed the Convention, without so far having ratified it.

<sup>8</sup> Matscher, *ibid.*, p.10.

<sup>9</sup> It should go without saying that persons being both citizens and residents should have the right to vote. But the case of *Aziz v. Cyprus* (22.6.2004) shows that it does not: the European Court of Human Rights unanimously found a violation of Article 3 Protocol No. 1 and Article 14 (non-discrimination) in a case where the applicant, a member of the Turkish Cypriot community living in the non-occupied part of Cyprus was not registered in the electoral role of the Republic of Cyprus, even though the Constitution recognises citizens of the Republic with different ethnic origins (cf. Matscher, *ibid.* p.8).

<sup>10</sup> cf. statement by the Ministry of Foreign Affairs of the Russian Federation reported in a Ria Novosti bulletin dated 15 March 2005.

abroad to continue participating in the political process at home. Some of them enable their expatriate nationals to vote by correspondence, or in consulates abroad, others (for example Italy) require that they travel home if they wish to vote.

22. The European Court of Human Rights, in the case of *Melnychenko v. Ukraine*<sup>11</sup>, stated that the imposition of a residence requirement for exercising the right to vote was not, *per se*, unreasonable or arbitrary. Concerning the right to stand as a candidate, even more restrictive conditions might be imposed. In the case at hand, in which Mr Melnychenko, who had left Ukraine for fear of political persecution and had been living for five years in the United States, was barred from standing as a candidate for parliament, the Court found a violation of Article 3 Protocol No 1 because there was no evidence that the applicant had the intention of leaving his country forever, and the authorities had not taken his personal situation into account.

23. Your Rapporteur is of the opinion that countries should positively encourage their nationals living abroad to continue participating in the political process at home and make practical arrangements for the exercise of their voting rights as straightforward as possible (for example by way of allowing votes by correspondence or in consulates in the country of residence).

24. As regards (c) above, in the spirit of democracy and of European cooperation, Council of Europe member states should also be required to facilitate the exercise of expatriates' right to vote in their countries of origin: as host countries, they should cooperate with countries of origin in facilitating the practical exercise of these rights. Unfortunately, practical problems do still exist in a number of cases, such as that of Turkish citizens resident in Germany who are obliged to travel to Turkey in order to exercise their right to vote, in the face of the refusal of the German authorities to allow polling stations to be established in Turkish consulates.

25. Concerning (d) above - the coordination of possible voting rights in several countries - the practice followed for the elections to the European Parliament should serve as a model: EU citizens resident in another EU member country are allowed to choose between voting in their country of residence or in their home country. This solution avoids granting expatriates an exorbitant privilege that could be seen as a violation of the equality of voting rights by granting them more than one vote. At the same time, it empowers the citizen who shall be free to determine, in line with his or her concrete personal situation, where he or she considers to be the focal point of his or her life.

#### **4. Withdrawal of the right to vote of persons convicted of criminal offences**

26. As regards the withdrawal of the right to vote of persons convicted of criminal offences, the situation is very diverse in the Council of Europe's member and observer states.

27. The situation is most extreme in the United States of America, a Council of Europe observer state, where in some jurisdictions fairly minor criminal offences can lead to the "disenfranchisement" of voters for life. The choice of the offences leading to disenfranchisement, and the racially biased intensity of prosecutions has led to hugely different results according to race and gender. According to research published by the Human Rights Watch's "Sentencing Project" at the end of the 1990's, criminal disenfranchisement laws have taken away the right to vote of 2% of all U.S. adults, but of 13% of black men. In certain States, up to 40% of black men have lost their right to vote for life. The percentage of disenfranchised black voters is among the highest in Florida, and given statistically established voting patterns, it is said to be more than likely that Al Gore owes his historic loss to George W. Bush in this State, a loss which determined the outcome of the last Presidential elections in the United States, to the criminal disenfranchisement laws: laws which Al Gore had, ironically, supported himself, as part of his tough stance on the war on drugs.

28. An extensive debate is taking place in the United States on the need to restore felons' voting rights in the interest of democracy and to avoid shutting entire communities out of the political process. Many academics and politicians participating in this debate trace the "criminal disenfranchisement laws" back to medieval Europe (the notion of "civil death").

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<sup>11</sup> 19.10.2004, case discussed by Matscher, *ibid.*, p. 8-9.



29. Fortunately, the legal situation in Europe has greatly progressed since then: in most Council of Europe member and observer states, criminal disenfranchisement is either not foreseen at all<sup>12</sup>, or the suspension of the right to vote is limited to the duration of the actual stay in prison, or to certain crimes directly related to the voting process (for example, ballot stuffing, falsification of a vote count, corruption of voters).<sup>13</sup> Nevertheless, a number of European countries still do not allow prisoners to vote<sup>14</sup>, or even restrict voting rights after a convict's release from prison, sometimes for many years.<sup>15</sup> Interestingly, no clear pattern can be discerned: all categories include mature and young democracies, countries in different geographical zones, and with different traditions.

30. In the view of the Venice Commission, prisoners should be allowed to exercise their right to vote without restrictions unless, imposed as part of the penalty for the offence by the court of law. In pronouncing such sanctions the principle of proportionality and necessity of a such sanction in a democratic society should be respected. Criminal penalty leading to imprisonment should not mean an automatic deprivation of one of the most important political rights - the right to vote.

31. The Venice Commission, in its Code of Good Practice, has made the provisions for depriving individuals of their right to vote conditional on four cumulative conditions: to be provided by law, to respect the principle of proportionality, to be based on mental incapacity or a criminal conviction for a serious offence, and to be imposed by express decision of a court of law.<sup>16</sup>

32. The European Court of Human Rights, in a 2004 judgement in the case of *Hirst v. United Kingdom* has ruled that the British ban on prisoners' voting rights dating back to 1870 breached Article 3 of Protocol No 1 to the ECHR.<sup>17</sup> The Court accepted that a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' voting rights could still be justified in modern times. Observing that there was no evidence that the legislature in the United Kingdom had ever attempted to weigh the competing interests or to assess the proportionality of the ban affecting convicted prisoners, the Court could not accept that an absolute bar on voting by any serving prisoner in any circumstances fell within an acceptable margin of appreciation. The Court therefore found a violation of Article 3 Protocol No 1, by unanimous vote.<sup>18</sup>

33. Your Rapporteur considers that this judgment should oblige those countries which still impose a general ban on prisoners' voting rights, due to unquestioning and passive adherence to a historic tradition, to reconsider their legislation. A more modern approach, which should pass the Court's "proportionality test", would be to link the sanction of the withdrawal of voting rights to the type of criminal offence committed. For example, it would be logical to take away the electoral rights of a person who criminally interfered with democratic processes, for example by falsifying election results, pressuring or bribing voters, or participating in a military putsch, but not from an ordinary thief.

<sup>12</sup> Countries that allow prisoners to vote (without restrictions): Albania, Bosnia and Herzegovina, *Canada*, Croatia, Czech Republic, Denmark, France, Iceland, Ireland, (*Israel*), Finland, Norway, Serbia and Montenegro, Slovenia, Sweden, Switzerland, Ukraine [source, also of the indications in footnotes 13 through 15: "Incarceration and Enfranchisement: International practices, impact and recommendations for reform", Northwestern University (June-July 2003), International Foundation for Election Systems, Washington, DC].

<sup>13</sup> countries that allow prisoners to vote (under certain conditions): Austria (depending on the length of the prison term), Germany (except those convicted of treason, electoral fraud, espionage or membership in a criminal organisation); Greece, Italy, *Japan* (except for certain crimes), Malta, Netherlands (depending on the length of the prison term) "the former Yugoslav Republic of Macedonia" (only those barred from practicing their profession cannot vote), Slovakia (depending on the type of elections), Spain (except for certain offences), Turkey (excepted prisoners serving more than one year, or ones convicted of certain offenses).

<sup>14</sup> Azerbaijan, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Luxembourg, Moldova, Romania, United Kingdom, Portugal, Russian Federation.

<sup>15</sup> Armenia, Belgium, Finland, *United States* (differs among States).

<sup>16</sup> Trajkovska, *ibid.*, p. 7; cf. CDL-AD(2002)023rev "Code of Good Practice in Electoral Matters" adopted by the Venice Commission at its 52<sup>nd</sup> Plenary Session (Venice, 18-19 October 2002), I.1.1.d.v.

<sup>17</sup> Matscher, *ibid.*, p. 7-8 gives a detailed account of the facts of the case (*Hirst v. United Kingdom*, 30.6.2004) and the Court's reasoning; case still pending before the Grand Chamber.

<sup>18</sup> In another case (*Zadenoka v. Latvia*, 17.6.2004), the Court saw a violation of Article 3 Protocol 1 in the permanent exclusion of the applicant from participating in national elections because of her previous political activities as a leading member of the Communist party.

34. Another topical issue, in this context, is also the extent to which passive electoral rights (eligibility for public office) can be withdrawn as a criminal sanction. The widely publicised case of Alain Juppé, in France, is only one example for the issues arising in this context: the presumption of innocence until the final verdict, the proportionality of the sanction in relation to the offence committed, but also the public interest in the accountability of politicians and high standards of integrity of the political process.

#### 5. Protecting the voting rights of vulnerable groups

35. As regards the right to vote of citizens declared incapable, mentally retarded or having a mental disease, restrictions must be limited to those strictly necessary in order to safeguard the purpose of democratic elections. Procedures must be in place to avoid any abuses resulting in discrimination against particularly vulnerable groups. In particular, the legal basis for any restrictions must be clearly defined by law and the deprivation of the right to vote and to be elected, as a result of mental incapacity, may only be imposed by a decision of a court of law.<sup>19</sup>

36. Other vulnerable groups whose democratic participation rights require special protection include persons without a fixed domicile (in particular, the homeless, or groups such as Roma and travellers pursuing a migratory lifestyle); and the elderly, especially those living in elder-care institutions. Persons who are vulnerable for such different reasons must be enabled, in practical terms, to participate in elections without undue influence by their helpers. Issues such as the secrecy of the ballot, the possibility for these vulnerable categories of voters to be properly informed of candidates and their programmes are of great practical importance for the proper functioning of democratic elections.

37. Another population group that is in several countries subjected to special restrictions regarding their voting rights are members of the military. Armenia and Turkey exclude most military personnel from voting in elections, and Moldova stops them from being candidates.<sup>20</sup> In most other Council of Europe countries, soldiers are considered as "citizens in uniform", who are allowed to participate fully in the political life of the country they are expected to defend. In the terms of Ms Trajkovska's report, approved by the Venice Commission, "*the need for democratic control over the military should not be used as an excuse to deprive automatically persons serving military service of their voting rights. They shall also exercise full citizenship rights. This shall not exclude a possibility for a certain margin of appreciation by States applicable in circumstances clearly defined by law.*"<sup>21</sup>

38. In your Rapporteur's opinion, the point of view advocated by the Venice Commission is the most appropriate. Specific historical experiences with civil-military relations should not give rise to a general suspicion against all members of the military that they cannot be trusted to exercise their electoral rights in a democratic manner. Once soldiers are given the right to vote, appropriate measures need to be taken to guarantee the exercise of this right in all independence and privacy. The confinement of recruits to barracks or far-off bases, and the strong hierarchy existing in the military makes soldiers particularly vulnerable to manipulation and even coercion. Appropriate measures must therefore be taken to ensure that soldiers have unfettered access to election campaign materials and that they cast their vote in private.

#### C. Conclusion

The above considerations have prompted your Rapporteur to propose that the Assembly:

- invites the Council of Europe member and observer states concerned to:
  - a. reduce minimum age requirements for active and passive electoral rights to 18 years for the right to vote and 25 years at most for the right to stand as candidates;
  - b. grant electoral rights to all their citizens (nationals), without imposing residency requirements;
  - c. facilitate the exercise of expatriates' electoral rights by providing for absentee voting procedures (postal and/or consular voting), and to cooperate with one another to this end;

<sup>19</sup> Trajkovska, *ibid.*, p. 8-9, with numerous references to the relevant laws of countries allowing restrictions of the right to vote of mentally ill persons (Albania, Armenia, Belgium, Croatia, Germany, Hungary, Poland, Romania, Russian Federation, Turkey).

<sup>20</sup> Articles 2 and 10 of the Armenian Electoral Code; Article 7 of the Law on Basic Provisions on Elections and Voter Registries of Turkey, and Article 13 of the Electoral Code of Moldova, cited in : Trajkovska, *ibid.*, p. 8.

<sup>21</sup> Trajkovska, *ibid.*

- d. to sign and ratify the 1992 Council of Europe Convention on the participation of foreigners in public life at local level and to grant active and passive electoral rights in local elections to all legal residents;
  - e. to reconsider existing restrictions on electoral rights of prisoners and members of the military, with a view to abolishing all those that are no longer necessary and proportionate in pursuit of a legitimate aim;
  - f. to take appropriate measures protecting the electoral rights of vulnerable groups of voters (in particular, persons living in nursing homes, prisoners, members of the military, nomads), in line with the Venice Commission's Code of Good Practice in Electoral Matters adopted in July 2003.
- invites the Council of Europe, and in particular the Venice Commission, to develop further its activities aimed at improving the conditions for the effective exercise of electoral rights, putting a special emphasis on cooperation aimed at facilitating the exercise of electoral rights by expatriate citizens.
- calls upon the Committee of Ministers to:
- a. appeal to member and observer states to:
    - i. sign and ratify the 1992 Council of Europe Convention on the participation of foreigners in public life at local level and to grant active and passive electoral rights in local elections to all legal residents; and
    - ii. reconsider existing restrictions on electoral rights of prisoners and members of the military, with a view to abolishing all those that are no longer necessary and proportionate in pursuit of a legitimate aim;
  - b. invite the competent services of the Council of Europe, in particular the European Commission for Democracy through Law ("Venice Commission") and its Council for Democratic Elections, to develop their activities aimed at improving the conditions for the effective exercise of elections rights by groups facing special difficulties such as expatriates, prison inmates, residents of nursing homes, soldiers, or nomadic groups;
  - c. review existing instruments with a view to assessing the possible need for a Council of Europe Convention to improve international cooperation with a view to facilitating the exercise of electoral rights of expatriates.

**APPENDIX I**



Strasbourg, 4 April 2005

CDL-AD(2005)011

Study no. 306 / 2004

Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT**

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

by

**Mrs Mirjana LAZAROVA TRAJKOVSKA**  
**(Member, "The Former Yugoslav Republic of Macedonia")**

**Endorsed by the Venice Commission  
at its 61<sup>st</sup> Plenary Session  
(Venice, 3-4 December 2004)**

## I. Introduction

1. A motion for a resolution on "Abolition of restrictions on the right to vote in general elections" was submitted to the Parliamentary Assembly of the Council of Europe by Mr Frunda and others on 12 September 2003. On 7 June 2004, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly asked the Venice Commission to prepare a report on the legal framework and practice in different Council of Europe Member States concerning restrictions to the right to vote in general elections with a special focus on the situation of national minorities that do not have full citizenship status. The Venice Commission appointed Mrs Mirjana Lazarova Trajkovska ("The Former Yugoslav Republic of Macedonia") and Mr Franz Matscher (Austria) as rapporteurs.

2. The present report was endorsed by the Commission at its 61<sup>st</sup> Plenary Session (Venice, 3 - 4 December 2004).

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

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

5. The acceptance of the principles of universality, equality, freedom and secret and direct elections as building blocks of the European electoral heritage goes in parallel with the recognition that the right to vote is, nonetheless, connected to certain requirements. Some individuals living in a given country or territory do not meet with these requirements. As a result, the right to vote is subject to certain restrictions imposed by the states. On such grounds, restrictions based on age, citizenship and residence, criminal record and mental incapacity are commonly found in most, if not all, democratic countries. Restrictions are introduced to both dimensions of the electoral rights: the active dimension (the right to vote) and the passive dimension (the right to be elected). Yet, the national practice in this field is quite diverse.

6. In this respect, the present report, drafted on the request of the Parliamentary Assembly, addresses questions with regard to the restrictions of the right to vote on the basis of age, citizenship or permanent residence, criminal record and mental illnesses. Yet, some of these questions are not easy to deal with from a purely legalistic point of view. They require previous sociological, philosophical and cultural debate as well.

## II. Age restrictions to the electoral rights

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

8. As to the first question, all countries seem to accept the idea that there should be a certain age of "political majority" at which young people can be expected to cast their vote. The answer to this question is based on the definition of the maturity (political maturity) that might differ on cultural grounds. Yet, the proposition that this minimum age shall not be higher than the age at which young people are conscripted into the army (18) has strong arguments in favour, political as well as legal. The international human rights instruments clearly provide that a person obtains political rights at age of 18. The UN Convention on the Rights of the Child<sup>22</sup> in its Part I, Article 1 prescribes that "for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

<sup>22</sup>

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

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

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

11. In this regard, we are of an opinion that the Venice Commission has already made clear its position that *"the right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25, except where there are specific qualifying ages for certain offices (e.g. member of the upper house of parliament, Head of State)."*<sup>23</sup>

### III. Citizenship and residency requirement

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

13. Resolution A/RES/46/137 of the General Assembly (1991)<sup>24</sup> prescribes that *"... the right to participate in a political system based on common and equal citizenship and universal franchise is essential for the exercise of the principle of periodic and genuine elections ..."*

14. At the level of the EU, the Maastricht Treaty (Article 8) established European citizenship for all citizens of the Union: On that basis Article 8.b provides that *"every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State"*. As a result, all citizens of the Union are entitled to vote and to stand for election for the European Parliament and in local elections in any of the Member States. The Directive 94/80/EC for the rights related to local elections grants all citizens of the Union a right to elect and to stand for election in municipal elections in the Member States where they reside, without this right being connected to the residence in the state of their origin.

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

16. In addition to this, a number of other international documents are enacted with the idea of establishing participation of foreign residents in public life.<sup>25</sup> Recommendation 115 (2002)<sup>26</sup> on the participation of foreign residents in local public life: consultative bodies is of particular interest for our study here. In item 8 of this Recommendation it is stipulated that *"... foreign residents who are lastingly and legally settled in the territory of a state should be granted rights, including political rights, in return for their acceptance of duties toward the host community."* In item 20, the Resolution *"invites the EU to follow the non-discriminatory approach recommended by the Council of Europe and its conventions, and accordingly to re-examine its current policies on the participation of foreign residents in public life at local level so as to secure residence-based citizenship for all foreigners whatever their country of origin and grant them the same political rights on the basis of common criteria of residence."*

<sup>23</sup> Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52<sup>nd</sup> Plenary Session, CDL-AD(2002)023rev, para. I 1.1.a.iii.

<sup>24</sup> United Nations General Assembly 17 December 1991 A/RES/46/137.

<sup>25</sup> Resolution 92(2000) adopted by CLRAE, the city of Strasbourg and its Consultative Council for Foreigners on 5 and 6 November 1999; Recommendation 1500 (2001) on participation of immigrants and foreign residents in political life of the Council of Europe member states, adopted by the Parliamentary Assembly and Recommendation Rec (2001) 19 of the Committee of the Ministers to member states on the participation of citizens in local public life.

<sup>26</sup> Approved by the Chamber of Local Authorities on 5 June 2002 and adopted by the Standing Committee of the CLRAE on 6 June 2002.

17. The Code of Good Practice in Electoral matters, adopted by the Venice Commission provides in its point I.1.1.b.ii that "... it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence."<sup>27</sup>

18. A strong argument in giving a possibility to the long-term non-national residents to vote, at least in local elections, could be the fact that they pay taxes in their place of residence and, therefore, contribute to the development of their community of residence. In this respect the right to participate in the public life through electoral process for such tax-payers seems to be fully justified and can be considered as a matter of fairness.

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

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

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

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

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

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

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

#### **V. Citizenship and residency as requirement for the right to be elected.**

25. In most of the Council of Europe member states, citizenship is a condition for running for office (passive electoral right). This approach is quite understandable bearing in mind the competencies of local self-government. The residents of the municipality cannot be represented by a person who is not familiar with the

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<sup>27</sup> See footnote 2.

community life. Therefore, electoral legislation, especially on local elections, quite justifiably prescribes citizenship as a prior condition for exercising the right to be voted. This practice is in accordance with the Convention on the Participation of Foreigners in Public Life at Local Level.

26. The Convention in its Chapter C - Right to vote in local authority elections, in Article 6 stipulates that *"each Party undertakes, subject to the provisions of Article 9, paragraph 1, to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections. However, a Contracting State may declare, when depositing its instrument of ratification, acceptance, approval or accession that it intends to confine the application of paragraph 1 to the right to vote only."*

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

#### **VI. Expatriates and right to vote in their home countries**

28. Most of the citizens in European countries who are temporarily working or staying abroad are registered in the Voters' List in their country of origin. Those persons are mainly registered according to their last place of residence prior to the departure abroad. This clearly indicates the determination of the legislators to use residence as a basis for allocation of the citizens (who have a right to vote) in the Voters' List. In most countries, persons who have an active suffrage can exercise it, if they have or had a last residence on the territory of their home country prior to their departure abroad, regardless of their place of residence. The method of registration of the new residence and the cancellation of the old residence or temporary residence, as well as the registration of the change of the address, is regulated on the basis of different legislation, which varies from country to country.

29. For example, in Article 121 paragraph 2 of the Constitution of the Portuguese Republic prescribes that *"the law shall regulate the exercise of the right to vote held by Portuguese citizens resident abroad, taking into account their "effective links" with the national community."*

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

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

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

#### **VII. Persons convicted of criminal offences or sentenced to prison**

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



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

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

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

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

38. The Romanian Constitution in Article 34 paragraph 2 states that *"... as well as persons disenfranchised by a final decision of the court cannot vote."*<sup>28</sup>

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

40. Article 6 of the Electoral Code of Belgium excludes from the electorate and does not allow to vote those who have been convicted on a criminal offence.

41. In the view of the Venice Commission, prisoners should be allowed to exercise their right to vote without restrictions unless imposed as part of the penalty for the offence by the court of law. In pronouncing such sanctions the principle of proportionality and necessity of a such sanction in a democratic society should be respected. Criminal penalty leading to imprisonment should not mean an automatic deprivation of one of the most important political rights - the right to vote.

42. The Venice Commission in its Code of Good Practice has made the provisions for depriving individuals from their right to vote conditional on four cumulative conditions: to be provided by law, to respect the principle of proportionality, to be based on mental incapacity or a criminal conviction for a serious offence, and to be imposed by express decision of a court of law.<sup>29</sup>

### **VIII. Persons serving military service**

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

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

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

<sup>28</sup> Similar conditions are prescribed in the legislations of Azerbaijan, Bulgaria, Cyprus, Georgia, Luxembourg, Moldova, UK and the Russian Federation.

<sup>29</sup> See footnote 2, para. I.1.1.d.v.

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

47. The argumentation behind such exclusion and restrictions is based on the specific historical experiences with the civil-military relations. Yet, the need for democratic control over the military should not be used as an excuse to deprive automatically persons serving military service of their voting rights. They shall also exercise full citizenship rights. This shall not exclude a possibility for a certain margin of appreciation by States applicable in circumstances clearly defined by law.

#### **IX. Persons with mental incapacity**

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

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

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

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

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

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

54. Similar but somewhat specific regulations are found in other countries. The Federal Electoral Law of Germany in Article 13 paragraph 3 introduces such restrictions on citizens who are *"accommodated in a psychiatric hospital under an order pursuant to Article 63 of the Penal Code in conjunction with Article 20 of the Penal Code."* The Hungarian Constitution in Article 70 paragraph 3 regulates that *"the right to vote shall not be granted to persons who are under guardianship limiting or excluding their capacity, to persons who are subject to a final legal judgement forbidding them to participate in public affairs, nor to persons who are incarcerated on the basis of a final legal judgment or who are under compulsory institutional care on the basis of a final legal judgment rendered in criminal proceedings."* In Belgium the Article 7 of the Electoral law restricts the right to vote of individuals who have been declared mentally incapable or placed in Government's custody in application of the law. The Law on Basic Provisions on Elections and Voter Registers of Turkey, in Article 8 prescribes that persons who have been placed under the care of a guardian and who are barred from public service shall not be entitled to vote.

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

#### **X. National minorities and persons with dual nationality**

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

57. The affirmative action in the sphere of electoral rules is one of the ways to establish effective participation of persons belonging to national minorities. The Venice Commission Code of Good Practice in Electoral Matters provides some basic principles for developing electoral affirmative action rules in accordance with European electoral heritage, such as: Parties representing national minorities, guaranteed reserved seats for members of nationals, electoral thresholds should not affect the chances of national minorities to be represented, electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes.<sup>30</sup>

58. Also, the possession of dual or multiple nationality should be no obstacle for exercising voting rights in both countries.<sup>31</sup> This approach is completely consistent with Article 17, para. 1 of the European Convention on Nationality, which stipulates that those citizens enjoy the same rights and duties on the territory of the country where they live as the other citizens in that country.

## XI. Conclusions

59. In most of the counties examined the minimum age requirement is established at the age of 18, while minimum age requirement for the right to be voted varies. With regard to this, we emphasise the Venice Commission recommendation that *"the right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25..."*<sup>32</sup>

60. There is a trend in the counties compared that residency prevails over nationality as a precondition for the right to vote. The countries of the Council of Europe could follow this approach at least for local elections, and under the condition of a certain minimum period of residence. With regard to the right to be elected, the same approach could be applicable with a requirement of a longer period of minimum residence.

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

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

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

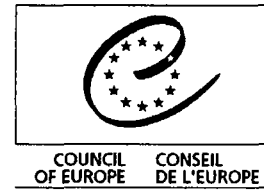
64. In general, the analysis of the questioned restrictions on the voting rights in the member states of the Council of Europe shows that the restrictions are most often not in contradiction with the principles of human rights and the practices of citizenship. The voting rights are not absolute citizenship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

<sup>30</sup> See footnote 2, point I.2.4.

<sup>31</sup> Election Law of Bosnia and Herzegovina in its Article 1.5 states that "a citizen of Bosnia and Herzegovina who holds dual citizenship pursuant to Article 1(7)(d) of the Constitution, shall have the right to register and to vote, only if Bosnia and Herzegovina is the country of his or her permanent residence."

<sup>32</sup> See footnote 2, para. I.1.1.a.iii.

**APPENDIX II**



Strasbourg, 4 April 2005

**Study no. 306 / 2004**

**CDL-AD(2005)012**

Or. Engl.

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT**

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

**by**

**Mr Franz MATSCHER (Member, Austria)**

**Endorsed by the Venice Commission  
at its 61<sup>st</sup> Plenary Session  
(Venice, 3-4 December 2004)**

## I. Introduction

1. A motion for a resolution on "Abolition of restrictions on the right to vote in general elections" was submitted to the Parliamentary Assembly of the Council of Europe by Mr Frunda and others on 12 September 2003. On 7 June 2004 the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly asked the Venice Commission to prepare a report on the legal framework and practice in different Council of Europe Member States concerning restrictions to the right to vote in general elections with a special focus on the situation of national minorities that do not have full citizenship status. The Venice Commission appointed Mrs Mirjana Lazarova Trajkovska ("The Former Yugoslav Republic of Macedonia") and Mr Franz Matscher (Austria) as rapporteurs.

2. The present report was endorsed by the Commission at its 61<sup>st</sup> Plenary Session (Venice, 3 - 4 December 2004).

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

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

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

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

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

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

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

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

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

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

### Right to free elections

**The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.**

12. Article 14 of the Convention may also play a role.

Prohibition of discrimination

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

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

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

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

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

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

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

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

B. Ahmet Sadik/GR 15.11.1996 Rep 1996, 1639

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

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

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

C. Gitonas and others/GR 1.7.1997 Rep 1997, 1217

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

23. The Court stated (in summary):

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

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

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

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

D. Pierre Bloch/F 21.10.1997 Rep 1997, 2206

28. The applicant was elected as a member of parliament in 1993. After a revision of the campaign accounts, the French authorities found that the maximum permitted amounts of election expenditures had been exceeded and they imposed on him as "penalties" the forfeiture of his seat in parliament, his disqualification from standing for (further) elections for a period of one year, an obligation to pay the Treasury a sum equal to the amount of the excess and the imposition of a fine.

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

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

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

E. Ahmed and others/GB 2.9.1998 Rep 1998, 2356

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

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

34. The Court found no violation.

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

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

F. Matthews/GB 18.2.1999, Rep 1999, 252

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

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

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

G. Labita/I 6.4.2000, Rep 2000

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

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

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

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

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

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

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

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

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

I. Zadenoka/LV 17.6.2004 Rep 2004 Vol V

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

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

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

J. Podkolzina/LV 9.4.2002 Rep 2002

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

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

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

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

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

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



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

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

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

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

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

61. In general, regarding the proportionality test, the Court noted that restrictions as applied in the United Kingdom did distinguish between different reasons for detention and varying types of crime and might be regarded as less draconian than the regime applying in certain other jurisdictions. The restrictions affected only those convicted of crimes sufficiently serious to warrant an immediate custodial sentence and did not apply to prisoners on remand, those imprisoned for failure to pay fines or those detained for contempt of Court. Furthermore, the incapacity was removed as soon as the prisoner ceased to be detained.

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

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

L. Aziz/CYP 22.6.2004

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

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

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

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

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

M. Melnychenko/UA 19.10.2004

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

70. The Court stated that the imposition of a residence requirement for exercising the right to vote was not, per se, unreasonable or arbitrary. As far as the right to be a candidate for elections was concerned, even more restrictive conditions might be imposed, but, until then, the Court had never examined that requirement.

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

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

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

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

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

- The de facto deprivation of the right to vote imposed on a prisoner (convicted of serious offences and sentenced to ten years of imprisonment) does not affect his rights under Article 3 Protocol No. 1 (Holland/IRL 14.4.1998, DR 93-A, 15).
- Article 3 Protocol No. 1 is not affected by the requirement that candidates for elections register in a particular language (the official language of the state; the candidate may add a translation in that language).  
(Frjske Nasjonale Partis and others/NL 12.12.1985, DR 45, 240).

### III. Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* Doc 9906, Reference No 2875 of 29 September 2003

*Draft resolution and draft recommendation* unanimously adopted by the Committee on 26 April 2005

*Members of the Committee :* Mr Serhiy **Holovaty** (Chairperson), Mr Jerzy **Jaskiernia**, Mr Erik **Jurgens**, Mr Eduard Lintner (Vice-Chairpersons), Mrs Birgitta Almqvist (alternate: Mrs Carina **Hägg**), Mr Athanasios **Aletras**, Mr Gulamhuseyn **Alibeyli**, Mr Rafis Aliti (alternate: Mr Zoran **Krstevski**), Mr Alexander Arabadjiev, Mr Miguel Arias, Mr Giorgi Arveladzé, Mr Abdülkadir Ateş, Mrs Maria Eduarda Azevedo, Mr Jaime Bartumeu Cassany, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Vidéc**, Mr Sali Berisha, Mr Rudolf Bindig, Mr Malcolm Bruce, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mr Boriss **Cilevičs**, Mr András Csáky, Mr Marcello Dell'Utri, Mr Mehdi **Eker**, Mr Martin Engeset, Mrs Lydie Err, Mr Jan **Ertsborn**, Mr Václav **Exner**, Mr Valeriy **Fedorov**, Mr Robert Fico, Mr György Frunda, Mr Jean-Charles Gardetto, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Ms Gultakin Hajiyeva (alternate: Mr Rafael **Huseynov**), Mrs Karin Hakl, Mr Michel Hunault, Mr Sergei **Ivanov**, Mr Tomáš **Jirsa**, Mr Antti **Kaikkonen**, Mr Hans Kaufmann, Mr Ulrich Kelber, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mrs Darja **Lavtižar-Bebler**, Mr Andrzej **Lepper**, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Tony Lloyd (alternate: Mr Syd **Rapson**), Mr Andrea Manzella, Mr Alberto Martins, Mr Dick Marty, Mr Tito Masi, Mr Kevin **McNamara**, Mr Philippe Monfils, Mr Philippe Nachbar, Mr Tomislav Nikolić, Ms Ann **Ormonde**, Ms Agnieszka Pasternak, Mr Ivan **Pavlov**, Mr Piero Pellicini, Mrs Sólveig Pétursdóttir, Mr Rino Piscitello, Mr Petro Poroshenko, Mrs Maria Postoico (alternate: Mr Vlad **Cubreacov**), Mr Christos Pourgourides, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine (alternate: Mr Michel **Dreyfus-Schmidt**), Mr Armen **Rustamyan**, Mr Adrian **Severin**, Mr Michael **Spindelegger**, Mrs Rodica Mihaela Stănoiu, Mr Petro Symonenko, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis (alternate: Mr Nikolaos **Dendias**), Mr John Wilkinson, Mrs Renate **Wohlwend**, Mr Vladimir Zhirinovskiy, Mr Zoran Žižić, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

*Secretariat of the Committee:* Mr Drzemczewski, Mr Schirmer, Mrs Clamer, Mr Milner

