Contemporary Legal and Economic Issues IV

Editors
Ivana Barković Bojanić and Mira Lulić

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Editors
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SOME ASPECTS OF THE RIGHT TO FREE ELECTIONS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Nives Mazur Kumrić, Ph.D.
Assistant Professor
Josip Juraj Strossmayer University of Osijek
Faculty of Law Osijek
Croatia
E-mail: nives.mazur.kumric@pravos.hr

Vjekoslav Mijić
Graduate Student
Josip Juraj Strossmayer University of Osijek
Faculty of Law Osijek
Croatia
E-mail: vjekoslav.mijic@safu.hr

Abstract

Free elections constitute a basic instrument of democracy and their organization in States with developed political pluralism and freedom of expression never comes under question. The right to free elections as a political right of all citizens entails continuous engagement of the State into organization and monitoring of elections, management of voting lists and catering for impartial settlement of electoral disputes. This article is primarily focused on theoretical analysis of free elections, also having regard to historical circumstances of the development of election law. The latter represents a background for the core topic of the article, namely the case-law of the European Court of Human Rights in relation to the right to free elections. The evolution of the protection of the right to free elections is an unstoppable process that makes a valuable contribution to the protection of human rights in general but also burdens the European Court of Human Rights with an even larger volume of work. In approximately sixty years of its existence, a short, restrictively defined provision of Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms has managed to encourage the creation of abundant jurisprudence and has set high standards of electoral law in forty-seven member States of the Council of Europe.

Key words: *right to free elections, European Court of Human Rights, case-law*

1. INTRODUCTION

Free elections constitute a basic instrument of democracy and their organization in States with developed political pluralism and freedom of expression never comes under question. Donnelly argues that "democracy and human rights share a commitment to the ideal of equal political dignity for all"[1]. The right to free elections can be viewed from two aspects: from the viewpoint of the equal right of all citizens to elect and be elected as members of representative bodies (general and equal active and passive electoral right) and through the prism of the characteristics of the election process (secrecy and directness). Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the First Protocol) grants the right to free elections in the sense of the liability of States to, within a reasonable period of time, organize elections of legislative bodies through a secret voting system and in circumstances ensuring a possibility for all citizens to freely express their opinion. However, even in democratic member States of the Council of Europe it has come to violation of the right to free elections, which has given the European Court of Human Rights (hereinafter: ECHR) a chance to intervene and thus build up its abundant practice.

This article is primarily focused on theoretical analysis of free elections, also having regard to historical circumstances of the development of election law. The latter represents a background for the core topic of the article, namely the case-law of the European Court of Human Rights in relation to the right to free elections. Despite initial resistance, the standpoint that organization of free elections is not only a procedural liability of signatory States to the Protocol but also an instrument for exercise of the individual voting right of every citizen has become rather widely accepted. The right to free elections has often been considered in the context of other Convention rights such as the right to freedom of expression and association[2], the right to an efficient legal remedy and prohibition of discrimination[3]. It falls into the domain of political rights which can be derogated in exceptional cases[4], i.e. countries may take measures derogating from their obligations some political rights "in time of public emergency which

[1] Donnelly, Jack, Universal Human Rights in Theory and Practice, Second Edition, Cornell University Press, Ithaca and London, 2003, p. 191.

[2] The freedom of expression and opinion is linked to a number of other rights and sometimes overlaps with the right to participation in public life, the right to vote, and the right to stand for election. Smith, Rhona K. M., Textbook on International Human Rights, Fourth Edition, Oxford University Press Inc., New York, 2010, p. 291.

[3] See more in: DeFeis, Elizabeth F., Elections – A Global Right?, Wisconsin International Law Journal, No. 3/2000-2001, pp. 321-329.

[4] Andrassy, Juraj et al., Međunarodno pravo 1, 2. izmijenjeno izdanje, Školska knjiga, Zagreb, 2010, pp. 373-374; Mégret, Frédéric, Nature of Obligations, in: Moeckli, Daniel; Shah, Sangeeta; Sivakumaran, Sandesh (eds.), International Human Rights Law, Oxford University Press Inc., New

threatens the life of the nations and the existence of which is officially proclaimed (...), provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"[5].

Today, the ECHR is facing great challenges in terms of broadening of interpretation of this right to some aspects of electoral (voting) systems and to election campaign issues. Strong support to the EHCR is in this context provided by the Parliamentary Assembly of the Council of Europe and the Venice Commission. Besides, the issue of the voting right of prisoners and abroad voting are always deemed burning. On such occasions, the role of the EHCR involves establishment of balance between the right of individuals and groups to free elections on one hand and legitimate goals of national States which represent a ground for restriction of the voting right on the other hand.

2. ON ELECTIONS IN GENERAL

2.1. The concept, features and types of elections

"Elections denote a procedure applied for people's entrustment of political power to a representative body for a certain period of time (four or five years in the principle). In many democratic countries, the president is also provided with such a power. Elections represent the people's sovereign will. Therefore, they are seen as a source of the legitimacy and legality of the entire system of state government. In order to reflect the people's sovereign will, elections have to be free and fair"[6]. These features of elections imply, regarding the election process, respect for fundamental rights and freedoms such as freedom of opinion, expression and association as well as prohibition of discrimination. The right to free and fair elections as well as the right to participate in the elections as a candidate are essential elements of the right to take part in the conduct of public affairs which is closely intertwined with the exercise of the right to self-determination[7] and with the (still contested) right to democracy[8].

York, 2010, pp. 143-144; Degan, Vladimir-Đuro, Međunarodno pravo, Školska knjiga, Zagreb, 2011, pp. 493-494.

[5] Article 4 paragraph 1. Međunarodni pakt o građanskim i političkim pravima, Official Gazette of the Republic of Croatia – International Treaties, No. 12/1993; Offical Gazette of the Socialist Federative Republic of Yugoslavia, No. 7/1971.

[6] Smerdel, Branko; Sokol, Smiljko, Ustavno pravo, Četvrto neizmijenjeno izdanje, Narodne novine d.d., Zagreb, 2009, p. 235. See also: Fox, Gregory H., International Law and the Entitlement to Democracy After War, Global Governance, No. 2/2003, pp. 183, 185.

[7] Vandewoude, Cécile, The Rise of Self-Determination Versus the Rise of Democracy, Göttingen Journal of International Law, No. 3/2010, p. 992.

[8] Eckert, Amy E., Free Determination or the Determination to Be Free? Self-Determination and the Democratic Entitlement, UCLA Journal of International Law and Foreign Affairs, No. 1/1999,

In terms of the Republic of Croatia, the voting right is primarily granted by Article 45 of the Constitution stipulating that "all Croatian citizens who have reached the age of eighteen years (voters) shall be entitled to universal and equal suffrage in elections for the Croatian Parliament, the President of the Republic of Croatia and the European Parliament and in decision-making procedures by national referendum, in compliance with law"[9]. Suffrage shall be exercised in direct elections by secret ballot. As far as free and fair elections are concerned, it is important that all political parties are provided with equal conditions of competition in the sense of an access to media and impartial treatment of the bodies monitoring the elections. These conditions are ensured by Article 29 of the Croatian Act on Election of Representatives to the Croatian Parliament[10] and the Rules of the Croatian Parliament for Electoral Promotion of Croatian National Electronic Media[11]. Equal access to media has often been criticized due to the dilution of political campaign in the context of providing marginal political parties with too much space in media. However, it is the only guarantee for granting equal rights to all candidates at the elections since most of them cannot, in the financial sense, fight the big players who tend to invest certain funds in the electoral promotion beside the official electoral programme. In fact, these equal rights refer only to presentation of candidate lists while the promotion is regulated to the least extent.

One of the basic typology of elections is the division into competitive, noncompetitive and semicompetitive elections. Elections are considered competitive if the choice and freedom of election are granted both formally and virtually[12]. In case either is completely denied, then it comes to noncompetitive elections which are common for totalitarian systems. With respect to authoritarian

pp. 56-67; Burchill, Richard, The Developing International Law of Democracy, Modern Law Review, No. 1/2001, pp. 123-134; Wheatley, Steven, Democracy in International Law: A European Perspective, International and Comparative Law Quarterly, No. 2/2002, pp. 227-228, 235-239; Maogoto, Jackson Nyamuya, Democratic Governance: An Emerging Customary Norm?, University of Notre Dame Australia Law Review, Vol. 5/2003, pp. 69-75.

[9] Ustav Republike Hrvatske, Official Gazette of the Republic of Croatia, Nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2010, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010.

[10] Zakon o izboru zastupnika u Hrvatski sabor, Official Gazette of the Republic of Croatia, Nos. 116/1999, 109/2000, 53/2003, 69/2003, 167/2003, 44/2006, 19/2007, 20/2009, 145/2010, 24/2011, 93/2011, 120/2011.

[11] Pravila o postupanju elektroničkih medija s nacionalnom koncesijom u Republici Hrvatskoj tijekom izborne promidžbe, Official Gazette of the Republic of Croatia, Nos. 165/2003, 105/2007.

[12] Nohlen singles out six principles of the depiction of elections as truly competitive. These are a) freedom of electoral competition under the same conditions, c) existence of real competition among political parties, their programmes and candidates, c) equality of opportunities for running for positions and electoral competition, d) secret voting as a guarantee for freedom of election, e) well-balanced and fair system and f) temporal restriction of the post-election status. See: Nohlen, Dieter, Izborno pravo i stranački sustav, Školska knjiga, Zagreb, 1992, p. 20.

systems, elections are free in the principle but they are restrained in the reality (semicompetitive elections)[13], often in line with the Stalin's admonition "it matters not who votes, but who counts the votes"[14].

2.2. Principles of suffrage in democracies

- Universal suffrage

Throughout history, universal suffrage had been limited by excluding certain ethnic, religious and other groups, as well as by setting property and educational qualifications for voters and electoral candidates. Universal suffrage implies that all citizens regardless of their sex, race, skin colour, religion or ethnicity have the right to vote and to be voted for. Laws may, of course, be used to prescribe certain conditions such as minimum age, citizenship and/or domicile, i.e. habitual residence. Namely, domicile and habitual residence are what electoral rolls are based upon, which in turn serve as suffrage and voters records. They are characterized by continuity (they are constantly updated) and cohesion (they apply to all elections)[15].

The establishment process of universal suffrage varied in different developed post-industrial societies[16]. In general, it started in the mid-19th century, when the right to vote was being given to more and more population groups, which lead to most of the Western world having introduced universal and equal suffrage after World War II.

Universal suffrage, as an essential element of the right of all citizens to vote, is inseparably intertwined with equal suffrage and secret ballot as proclaimed in the 1966 International Covenant on Civil and Political Rights. Namely, the Covenant regulates the right of all citizens to vote at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors[17]. According to Steiner, this is one of the rare statements of a theory of political legitimacy that falls clearly within the liberal tradition[18].

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[13] Kasapović, Mirjana, Izborni leksikon, Politička kultura, Zagreb, 2003, pp. 243-245.

[14] Balian, Hrair, Ten Years of International Election Assistance and Observation, Helsinki Monitor, No. 3/2001, p. 203.

[15] Kasapović, Mirjana, op. cit. (note 13), pp. 283-285.

[16] For instance, France had abrupt and sudden changes in the scope of the electorate, whereas the same process in the United Kingdom evolved at a steady pace. Women in Finland were given voting rights as early as 1906, but in Switzerland this did not happen until 1971. Throughout history, the voting rights had also been limited to military personnel. Nowadays, however, democracies do not limit voting rights to military personnel, as political involvement of the military is merely a relict present only in underdeveloped societies. Nohlen, Dieter, op. cit. (note 12), pp. 27-32; Smerdel, Branko; Sokol, Smiljko, op. cit. (note 6), pp. 236-237.

[17] Article 25. Međunarodni pakt o građanskim i političkim pravima, op. cit. (note 5).

[18] Steiner, Henry J., International Protection of Human Rights, in: Evans, Malcom D. (ed.), International Law, Second Edition, Oxford University Press Inc., New York, 2010, p. 809.

• Equal suffrage

"This principle requires that the weight of votes of all those entitled to vote is equal and not differentiated by property, income, tax, education, religion, race, gender or political stance"[19]. Historically, differentiation was present in the so-called (social) class voting with certain quotas for representatives of particular social classes. Such quotas were often largely disproportionate to the shares in total population, which lead to the nobility and clergy having more representatives than the bourgeoisie, working class or even the several times more numerous peasants. Another form of unequal suffrage was the so-called plural voting system, which allowed landowners to vote in all electoral constituencies they owned real-estate in. Dual voting rights are nowadays applied for the purposes of protecting minority groups (e.g. ethnic groups)[20]. The biggest challenge in the sense of equality of suffrage nowadays is the forming of electoral constituencies which would enable the number of representatives to be as proportionate to the number of voters as possible.

• Secret ballot

This principle is based on the decision of the voter being unknown to others. "This is the opposite of all forms of open (voting by signature) and public voting (voting by raising hands or by acclamation)"[21]. The implementation of this principle is monitored by the bodies which conduct and supervise the elections, such as electoral commissions. It regards the arranging of polling rooms and boots, official ballots which may be covered, sealing of ballot boxes etc.

• Direct universal suffrage

Direct suffrage implies that the voters decide on their representatives directly and without mediation. In indirect elections voters cast their votes for an electoral college, which in turn elects representatives, i.e. mandate holders. It is possible to conduct this voting method in more than two stages. There are two types of indirect elections: indirect by form (in which the electoral college is bound by the voters' decision) and indirect by substance (in which the electoral college elects the mandate holders at their own discretion)[22].

[19] Nohlen, Dieter, op. cit. (note 12), p. 26.

[20] In this sense, Articles 16 – 19 of the Act on Election of Representatives to the Croatian Parliament allow members of ethnic minorities to vote for representatives of minority groups on separate lists along with the existing voting right of all Croatian citizens. Zakon o izboru zastupnika u Hrvatski sabor, loc. cit. (note 10).

[21] Nohlen, Dieter, loc. cit. (note 19).

[22] Ibid.

• Characteristics of passive universal suffrage

Passive suffrage as the reverse and prerequisite of active suffrage is mostly governed by the same principles – it is both universal and equal. However, the minimum age for candidacy is not equal to minimum age to vote in all countries. Aside from differences in minimum age requirements, in some countries and especially the ones with high immigration levels, passive suffrage is not recognized with citizens who have subsequently acquired it by naturalization, or the right to vote can be acquired only after a certain period of time, i.e. after five, ten or more years[23]. Rules on parliamentary incompatibility are also considered justified limitation of voting rights. It concerns the prohibition of simultaneous performing of leadership duties in multiple branches of authority in accordance with the principle of separation of powers. In countries which allow candidacy to holders of functions, such as Constitutional Court judges, there is usually the obligation to suspend the previous function[24].

Even though in most of the multi-party parliamentary democracies every adult citizen may run for office, the actual chance to be elected is usually on the side of the candidates who have been supported by political parties. They may directly be appointed party leaders, may be elected intra-party or the party may choose to feature pre-candidates among which the voters will choose a candidate. As a formal limitation of the passive universal suffrage, a certain number of signatures (as sign of support) which the candidate must collect in an electoral district may be prescribed. In Croatia it is necessary to collect 500 voter signatures for party or independent list candidacy[25] and 10 000 for presidential election candidacy[26].

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[23] Smerdel, Branko; Sokol, Smiljko, op. cit. (note 6), p. 241. However, EU member States guarantee the right to take part in local elections and European Parliament elections to residents of other member States without limitations. This guarantee is based on the European citizenship which is an addition to the citizenship of a member State. National regulations may be used to limit the voting rights of citizens of other member States only if the elections concern national or regional legislative bodies. See: Kochenov, Dimitry, Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: an Ignored Link?, Maastricht Journal of European and Comparative Law, No. 2/2009, pp. 197-223; Yiğit, Dilek, Democracy in the European Union from the Perspective of Representative Democracy, Review of International Law and Politics, No. 23/2010, pp. 130-136; Bauböck, Rainer, Why European Citizenship? Normative Approaches to Supranational Union, Theoretical Inquiries in Law, No. 2/2007, pp. 453-458, 474-480; Schleicher, David, What if Europe Held an Election and No One Cared?, Harvard International Law Journal, Vol. 52/2011, pp. 110-161.

[24] Smerdel, Branko; Sokol, Smiljko, ibid., p. 242.

[25] Zakon o izboru zastupnika u Hrvatski sabor, loc. cit. (note 10).

[26] Zakon o izboru predsjednika Republike Hrvatske, Official Gazette of the Republic of Croatia, Nos. 22/1992, 42/1992, 71/1997, 69/2004, 99/2004, 44/2006, 24/2011.

3. THE RIGHT TO FREE ELECTIONS AND THE COUNCIL OF EUROPE

3.1. Evolution of the provision on the right to free elections

The fundamental document for human rights protection in Europe, as well as the right to free elections is the Convention for the Protection of Human Rights and Fundamental Freedoms (and Additional Protocols) signed within the framework of the Council of Europe[27]. This "comprehensive bill of rights on the Western liberal model"[28] is especially important due to the guarantee of judicial protection of 800 million Europeans in forty-seven signatories. Specifically, each individual or group of individuals who believe that one or more of their rights given to them by the Convention or its protocols have been infringed upon may address the ECHR that has been a full-time court since 1998. Prior to the establishment of the Court, the protection of the implementation of the Convention took place in two stages – in a proceeding before the European Commission of Human Rights and in a proceeding before the Court[29]. It is because of this that decisions of the Commission shall occasionally be mentioned in this paper when it comes to older cases.

The provision regarding the right to free elections is the only so-called "political clause" in the Convention seeing as how it concerns the organization of political systems of signatories. Other than that it is specific also because it prescribes positive duties of countries and not refraining from infringement and preventing violation as it is prescribed for protection of most of the rights in the Convention.

In September 1949 the Advisory Committee of the Council of Europe recommended to the Committee of Ministers to incorporate a provision in the draft of the Convention, which would bind the signatories to respect the fundamental principles of democracies in good faith and especially so in the sense of holding free elections in reasonable intervals, with universal suffrage, direct and secret ballot and that they do not repress criticism of government or obstruct the right to political opposition. The recommendation was not accepted, with the explanation that it would be beyond the scope of the Convention, whose primary goal was to guarantee individual rights without determining the political structure. Sir David Maxwell-Fyfe, the President of the Committee for Legal and Administrative Questions of the Consultative Assembly warned the Committee

[27] Konvencija za zaštitu ljudskih prava i temeljnih sloboda, Official Gazette of the Republic of Croatia – International Treaties, Nos. 18/1997, 6/1999, 8/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010.

[28] Brownlie, Ian, Principles of Public International Law, Seventh Edition, Oxford University Press Inc., New York, 2008, p. 568.

[29] Omejec, Jasna, Vijeće Europe i Europska unija, Novi informator, Zagreb, 2008, p. 241.

of Ministers that the omission of the clause on democratic institutions would weaken the Convention since it would not provide protection of important political rights and freedoms to the individuals. The initiator of another similar recommendation was the French delegate and Judge Pierre-Henri Teitgen. At the Assembly session in August 1950 he warned of the need to prevent totalitarian regimes in Europe and suggested to do so by including the clause on free and democratic elections in the Convention[30].

However, the Convention as signed in Rome on November 4, 1950 did not include the "political clause" – it was decided that discussion on the subject would be held later on and that the decision would be included in the first protocol to the Convention. The provision on the right to free elections was finally included in Article 3 of the First Protocol, thus extending the original scope of the Convention[31]. It was opened for signing in 1952 and entered into force in 1954. The Article emphasises that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"[32]. This was obviously a very cautious and restrictive formulation, which was the result of a compromise, seeing as how the provision on universal suffrage, repression of criticism of government and obstruction of opposition was omitted. Hence, the only obligation that was prescribed was that member States hold free elections at reasonable intervals without interfering into the election systems, mandate calculations and possible justification of suffrage limitations.

3.2. Article 3 of the First Protocol *Rationae Personae* – Evolution Towards Acknowledging Individual Right to Free Elections

Early practice of the European Commission of Human Rights denied that the individual right to vote may be based on Article 3 of the First Protocol[33]. Both the European Commission and the ECHR retained this position during the 1960s. However, the change was brought on by the so-called "Greek case". A military coup was staged in 1967 in Greece, which lead to the dissolution of parliament and suspension of political parties. The same year Denmark, Sweden, Norway and the Netherlands filed a joint application to the Commission of

[30] Golubok, Sergey, Right To Free Elections: Emerging Guarantees Or Two Layers Of Protection, Netherlands Quarterly of Human Rights, No. 3/2009, p. 364-365.

[31] Jennings, Sir Robert; Watts, Sir Arthur (eds.), Oppenheim's Internationa Law, Ninth Edition, Volume 1, Parts 2 to 4, Oxford University Press Inc., New York, 1996, p. 1023.

[32] Zakon o potvrđivanju Konvencije za zaštitu ljudskih prava i temeljnih sloboda i Protokola br. 1, 4, 6, 7, i 11 uz Konvenciju za zaštitu ljudskih prava i temeljnih sloboda, Official Gazette of the Republic of Croatia – International Treaties, No. 18/1997.

[33] *X v. Germany*, Application no. 530/59, Decision of 4 January 1960, Collection 2.

Human Rights against Greece. The Commission decided that in this case Article 3 of the First Protocol was breached. The limitation of the right of citizens to vote was interpreted as a violation of free expression of the (political) opinion of the people, as it is stated in the very Article[34]. Consequently, Greece had to withdraw from the Council of Europe in 1970 and became a member again only after the democratic regime was reinstated in 1974[35].

The Commission finally confirmed in 1975 that Article 3 of the First Protocol protects the individual right to vote, while in later decisions it is stated more precisely that it concerns the right of an individual to elect and be elected in legislative bodies elections. Of particular significance is the judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium* from 1987[36], which next to the guarantee of active and passive universal suffrage set the criteria for the justification of limitation of the right to free elections which the country may impose. This means that the individual right to vote does exist, but is not absolute[37].

The particularity of the passive universal suffrage lies in the fact that its holders may (and mostly are) political parties. The Court had therefore regularly acknowledged active legitimation to parties who considered themselves to have been impaired in the electoral process. In the case of *Russian Conservative Party of Entrepreneurs and Others v. Russia* (2007) the party was allowed to act as the applicant in the name of one of their candidates who was deprived of passive suffrage[38].

3.3. The Material Scope of the "Political Clause"

The provision of Article 3 of the First Protocol to the Convention is quite narrowly defined, which is why the Court faces great challenges upon its interpretation. Namely, the protection does not extend to all types and levels of elections. The material scope of the right to free elections includes only the elections of legislative bodies established by the constitution of the signatory, i.e. the parliament. At the same time it is necessary to make a distinction in relation to the representative bodies of local self-government, in relation to the directly elected executive authorities (which in many systems denotes the president) and in relation to the supranational representative bodies such as the European

[34] *The Greek Case (Government of Denmark v. Government of Greece, Government of Norway v. Government of Greece, Government of Sweden v. Government of Greece and Government of the Netherlands v. Government of Greece)*, Application nos. 3321/67, 3322/67, 3323/67 and 3344/67, Report of the Sub-Commission of 5 November 1969, paras. 319-321.

[35] Omejec, Jasna, op. cit. (note 29), pp. 53-54.

[36] *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, Judgment of 2 March 1987.

[37] Golubok, Sergey, op. cit. (note 30), p. 367.

[38] *Russian Conservative Party of Entrepreneurs and Others v. Russia*, Application nos. 55066/00 and 55638/00, Judgment of 11 January 2007 (final, 11 April 2007).

Parliament. The question of failure to hold European Parliament elections in Gibraltar was discussed in the case of *Matthews v. the United Kingdom*. The Court did not wish to get into the lack of compliance between the Council of the European Communities legal acts and the Convention simply because the Communities were not a contracting party. However, it was established that the United Kingdom with its national regulations was in violation of Article 3 of the First Protocol since it did not allow free expression of will of the people of Gibraltar[39].

In federal countries and countries with strong regional autonomy such as Austria, Germany, Belgium and Spain, the Convention bodies generally recognize regional parliaments as legislative bodies in accordance with Article 3 of the First Protocol. Relevant in this sense is the judgment in the case of *Vito Sante Santoro v. Italy*[40].

In some member States of the Council of Europe, the president of a republic may have considerable authorities, such as the right of promulgation of laws passed by the parliament, veto and the constitutional initiative to assess the constitutionality of the law, and sometimes even the right of legislative initiative. The presidential elections in countries in which the president is elected directly do not fall under the scope of Article 3 of the First Protocol either. This issue was especially emphasized after the presidential elections in Azerbaijan in 2002. In the case of *Gulyiev v. Azerbaijan* it was decided that the President may not be considered a legislative body within the meaning of Article 3 since the President does not have strictly legislative powers, which in the case of Azerbaijan belong to the Parliament since the Azerbaijani Constitution prescribes separation of powers[41]. However, in the same year and in the case of *Boškoski v. the Former Yugoslav Republic of Macedonia* the Court decided to dissociate from its previous rigid stance by allowing the possibility of applying Article 3 to presidential elections in the situation in which the Office of the Head of State would have the power "to initiate and adopt legislation or enjoy wide powers to control the passage of legislation or the power to censure the principal legislation-setting

[39] *Matthews v. The United Kingdom*, Application no. 24833/94, Judgment of 18 February 1999.

[40] In the case the Court decided that Article 3 of the First Protocol is applicable to the regional representative body elections in Italy due to the fact that, according to the Italian Constitution, regional councils have the authority to pass laws on their respective territories in areas such as public healthcare, urban planning, agriculture and education. In order for these bodies to be considered legislative, according to Article 3 of the First Protocol, the authority must be one that possesses own primary (and not delegated) legislative authority, i.e. that the national constitution explicitly defines a body as a legislative one. Hence, in this case, the Court relied on the national interpretation of a legislative body. *Vito Sante Santoro v. Italy*, Application no. 36681/97, Judgment of 1 July 2004 (final, 1 October 2004), paras. 52-53.

[41] *Guliyev v. Azerbaijan*, Application no. 35584/02, Decision of 27 May 2004, para. 5 (The Law).

authorities"[42]. Despite hinting at the possibility, the EHCR regularly dismisses as inadmissible the applications relating to presidential elections due to the lack of jurisdiction under the Convention, thereby following the Guliyev doctrine and not considering the analysis of presidential powers in certain cases[43].

As it was confirmed in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the right to free elections implies both the active and passive universal suffrage of an individual. Regarding the passive universal suffrage, the Court set several important principles:

- Passive universal suffrage was derived from active universal suffrage because the voters must be given the right to choose between alternatives. Therefore, a country may choose to prescribe more strict criteria for electoral candidates than for voters who are electing them (*Melnychenko v. Ukraine*)[44].
- Article 3 of the First Protocol also applies period following election in the sense of the right of candidates to perform the functions to which he or she was elected for. In the case of *Sadak et al. v. Turkey* it was decided that there had been violation of passive universal suffrage of the elected members of the Turkish Parliament who had to resign from their parliamentary mandates since the Constitutional Court had dissolved their party because of their attitudes and statements on the status of the Kurds[45].
- However, the EHCR has stressed on more than one occasion that the right of voters to choose between different political standpoints and platforms does not necessarily guarantee that each voter will be able to find a candidate he or she intended to vote for on his or her ballot. Namely, the electoral law tolerates certain constraints which arise from the very nature of exercising the rights or are imposed by countries for justified reasons.

[42] *Boškoski v. the Former Yugoslav Republic of Macedonia*, Application no. 11676/04, Decision of 2 September 2004, para. 1 (The Law).

[43] Golubok, Sergey, op. cit. (note 30), p. 368.

[44] *Melnychenko v. Ukraine*, Application no. 17707/02, Judgment of 19 October 2004, para. 57.

[45] *Sadak and Others v. Turkey*, Application nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment of 17 July 2001.

4. LIMITATIONS OF THE RIGHT TO FREE ELECTIONS IN INTERPRETATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Similar to interpretation of other rights from the Convention, the EHCR has established that the right to free elections may be limited primarily due to restrictions arising from the right itself so that it can be more efficiently exercised. An example of that would be the age limit for exercising active and passive voting rights, as well as restrictions arising from time and space or even from technical (im)possibilities in the election process. However, every limitation of electoral rights set by a member State in the Council of Europe must have a legitimate goal and must not be disproportionate to the intensity necessary for the achievement of the goal. Proportionality is checked via a so-called proportionality test. These criteria were mentioned for the first time in the judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium*[46], to which the Court has been referring to for the past two and a half decades and defined in even more detail. The judgment in the case of *Aziz v. Cyprus* states that the limitations of right to free elections must not be such as to exclude a person or groups of persons from taking part in the political life of their country and especially in legislative body elections. As regards the prescribing of a registered residence on the territory of the State as a condition for the right to vote, the Court found that such provision does not violate Article 3 of the First Protocol[47]. In the judgment in the case of *Gitonas et al. v. Greece* it was decided that Greece did not violate the right to free elections despite the strict rule according to which representative candidates were not allowed to perform any public service for a period longer than thirty-three months before the elections[48].

The *ratio* of limitation of suffrage must have a democratic stronghold. The Protocol itself does not define the legitimate goals that may justify the limitation, which is why the Court envisages them *ad hoc* in each case. To exemplify, in the case of *Paksas v. Lithuania* the Court accepted the protection of democratic order and the rule of law as a legitimate goal[49]. Aside from legitimate goals and proportionality, the EHCR case-law produced another criterion for evaluation of limitations of the right to free elections – the criterion of non-arbitrariness. Namely, the procedures and conditions for candidacy and supervision of electoral competition must be such as to prevent arbitrary decision making on exercising of passive universal suffrage of individuals and political parties. In the case of *Podkolzina v. Latvia*, the position of the Court was that discretional decisions

[46] *Mathieu-Mohin and Clerfayt v. Belgium*, op. cit. (note 36), para. 52.

[47] *Aziz v. Cyprus*, Application no. 69949/01, Judgment of 22 June 2004, para. 28.

[48] *Gitonas and Others v. Greece*, Application nos. 18747/91, 19376/92, 19379/92, 28208/95, 27755/95, Judgment of 1 July 1997, para. 37.

[49] *Paksas v. Lithuania*, Application no. 34932/04, Judgment of 6 January 2011, para. 101.

must not be made on passive universal suffrage once the candidate has already met the legal criteria for candidacy[50]. Arbitrary and inappropriate were also the actions of the Italian authorities described in the case of *Labita v. Italy*, where a person was disenfranchised from the right to vote on suspicion of being tied to the mafia and on being declared "dangerous to the society"[51]. In post-Soviet countries of Eastern Europe these irregularities are very noticeable primarily due to unjustified disqualifications of candidates and annulment of elections[52].

In cases of receiving an "application package" in regard to the same election activities, i.e. the same violations, since 2004 the Court has had the ability to establish underlying systemic problems and a "pilot judgment". This concerns situations in which the cause of frequent Convention violations lies in the quality of legal standards so that in the country in question it is possible to order change of legislation and that all related cases be dealt with by referring to the decision in the "pilot judgment"[53].

4.1. Margin of appreciation and limitations on the right to vote

When it comes to choosing the type of electoral system, the electoral threshold and other issues which indirectly affect the exercise of right to free elections, the ECHR is much more cautious and does not establish violation of the First Protocol all too easily. This matter is considered an area where the country is at liberty to make arrangements in accordance with its historical, cultural and political heritage, also known as margin of appreciation[54].

There are great differences between the democratic traditions and political systems of Convention signatories and especially between the founding member

[50] The possible subsequent removal from a list of candidates may only be decided upon by an independent higher body and not the body conducting the registration. *Podkolzina v. Latvia*, Application no. 46726/99, Judgment of 9 April 2002, para. 35.

[51] The suspension of the right to vote was not lifted even after all charges were dropped, whereby the grounds for the measure ceased to exist. The Italian authorities did have a legitimate goal, but the limitation was arbitrary and disproportionate, thereby violating Article 3 of the First Protocol. *Labita v. Italy*, Application no. 26772/95, Judgment of 6 April 2000, paras. 198-203.

[52] For example, following the Azerbaijani parliamentary elections in 2005, the Court received a large number of claims from the same country precisely in terms of limitations of the right to free elections. In the case of *Kerimova v. Azerbaijan* the applicant alleged that the invalidation of the parliamentary elections in which she won by a landslide was unjustified and arbitrary. In the case of *Seyidzade v. Azerbaijan*, the applicant was a former clergyman who was denied to stand for elections despite having been relieved of his religious duties. In both cases the Court declared that there was a violation of Article 3 of the First Protocol due to evident denial of electoral rights. *Kerimova v. Azerbaijan*, Application no. 20799/06, Judgment of 30 September 2010 (final, 30 December 2010), para. 55; *Seyidzade v. Azerbaijan*, Application no. 37700/05, Judgment of 3 December 2009 (final, 3 March 2010), para. 40.

[53] See more: Omejec, Jasna, op. cit. (note 29), pp. 250, 254-256.

[54] Gomien, Donna, Europska konvencija o ljudskim pravima, Naklada d.o.o., Zadar, 2007, p. 226.

States of the Council of Europe and newly joined former communist countries of Central and Eastern Europe and the Caucasus. The Grand Chamber of the ECHR decided in the case of *Ždanoka v. Latvia* that the right to free elections of a member of the Soviet Communist Party who was not allowed candidacy in the Latvian parliamentary elections was not violated. The Grand Chamber was of the opinion that Latvia did not overstep its wide margin of appreciation and it pointed out at the same time that what is admissible in one country (e.g. in the transition period) may not be admissible in another country, where democracy is well-established. The rules in this area vary according to the historical and political factors that are characteristic of individual countries[55]. The danger of such an approach may arise from inconsistency and lack of uniformity of case law when deciding on margin of appreciation.

4.2. Linguistic limitations in the context of free elections

In cases when the language becomes a limiting factor of the right to free elections, the EHCR does not have a uniform practice. In the previously mentioned case of *Mathieu-Mohin and Clerfayt v. Belgium*, the underlying issue concerned the provision of the Belgian law, which stipulated that the candidates elected to the Flemish Council must take the parliamentary oath in Dutch, which the applicants – French speaking Belgians – considered to be a limitation. The Court decided "that was not a disproportionate limitation such as would thwart the free expression of the opinion of the people in the choice of the legislature"[56].

In the case of the *Fryske Nasionale Partij and Others v. The Netherlands*, the Court interpreted that the candidates were not directly limited in their electoral right, but that the language requirements upon registration for elections represented an indirect way of limiting the rights from Article 3 of the First Protocol[57].

In the judgment in the case of *Podkozlina v. Latvia* it was emphasised that the State has a wide margin of appreciation when prescribing candidacy conditions for parliamentary elections, including the testing of command of working language of the Parliament. Therefore, in this case the language criterion was not a controversial issue, but the way in which the lack of command with the applicant was established[58].

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[55] *Ždanoka v. Latvia*, Application no. 58278/00, Judgment of 16 March 2006, paras. 121, 124, 135-136.

[56] *Mathieu-Mohin and Clerfayt v. Belgium*, op. cit. (note 36), para. 57.

[57] *Fryske Nasionale Partij and Others v. The Netherlands,* Application no. 11100/84, Decision of 12 December 1985, para. 2 (The Law).

[58] The violation involved an arbitrary deprivation of passive universal suffrage and non-compliance with the guarantee of fair and objective decision-making of an impartial body on the basis of national legislation. *Podkolzina v. Latvia*, op. cit. (note 50), para. 33.

4.3. Limitations in relation to freedom of expression and association

Given that Article 3 of the First Protocol itself refers to the "free expression of the opinion of the people", the exercise of right to free elections implies freedom of promotion of all candidates. However, the freedom of expression of candidates must also mean equal opportunities for all holders of electoral programs so that the media presence of a party or candidate does not cause pressure on the electorate body. Such irregularity was reason for the annulment of presidential elections in Ukraine in 2004[59]. Also, excessive restrictions of freedom of expression in electoral campaigns may jeopardize the right to free elections, even if they are legitimate in the sense of Article 10 of the Convention[60].

Many non-governmental organizations as well as the Parliamentary Assembly of the Council of Europe (PACE) warned in their decisions of denial of access to mass media for political parties running for office in elections in Armenia and Azerbaijan. The Code of Good Practice in Electoral Matters, which was adopted by the Venice Commission, recommends that legal regulations, in terms of media representation and together with a non-discriminatory time period for representation in public radio and television stations, be used to provide all participants in elections with a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising. These recommendations are however a non-binding and *soft-law* instrument which the Court is not obliged to apply[61].

Freedom of assembly and association, as guaranteed by Article 11 to the Convention, is very important for the exercise of right to free elections and especially in terms of political pluralism[62]. Each democratic party may contribute

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[59] Golubok, Sergey, op. cit. (note 30), p. 383.

[60] Article 10 stipulates that "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises;
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". Konvencija za zaštitu ljudskih prava i temeljnih sloboda, loc. cit. (note 27).

[61] Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002). Available at: http://www.venice.coe.int/docs/2002/CDL-EL(2002)005-e.asp.

[62] Article 11 reads as follows: "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests;
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for

to the political development of the society and public debate. In case of violation of party rights, the Court will primarily discuss whether the dissolution of a party or prohibition of candidacy that were imposed on a party are justified and whether they are in violation of Article 11 to the Convention. With regard to Article 3 of the First Protocol, the Court will not consider the application should it determine that there was no violation. However, in accordance with Article 3, a party may be given direct protection in the case that national authority measures prevent individual candidates from standing for elections[63].

5. ON SOME ISSUES PERTAINING TO THE ELECTORAL SYSTEM AND THE ELECTION PROCESS IN THE LIGHT OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

5.1. Implications of Types of Electoral Systems on the Efficient Exercise of Right to Free Elections

European countries have different historical, demographic, political and other reasons for applying a certain type of electoral systems and the ECHR takes them into account upon reviewing applications. It is impossible to prohibit the use of a certain electoral system. What is possible is to monitor whether unjustified limitations of the right to vote and be voted for were imposed during preparation and implementation of elections. "Any electoral system in the sense of Article 3 of Protocol No. 1 must be assessed in light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"[64]. Two cases are worth taking into consideration in this regard. In the admissibility decision in the case of *Lindsay et al. v. the United Kingdom* it was established that Great Britain was not in violation of Article 3 of the First Protocol by applying a different electoral system in Northern Ireland. The European Commission accepted the government's arguments saying that it wanted to protect the minority religious groups in Northern Ireland from underrepresentation as a legitimate goal and justification[65]. Along these lines is the decision in the case of the *Liberal Party,*

the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State". Konvencija za zaštitu ljudskih prava i temeljnih sloboda, loc. cit. (note 27).

[63] Golubok, Sergey, op. cit. (note 30), p. 385.

[64] Moucheboeuf, Alcidia, Minority Rights Jurisprudence Digest, Council of Europe Publishing, Strasbourg Cedex, 2006, p. 268.

[65] *Lindsay and Others v. the United Kingdom*, Application no. 8364/78, Admissibility Decision of 8 March 1979, para. 1 (The Law).

R. and P. v. the United Kingdom. In the application the party pointed out the problem of disproportion between the number of votes and seats won as a result of a simple majority system. The European Commission decided that Article 3 of the First Protocol was not violated, but left open the question of justification of implementing such a system if it prevents religious or ethnic groups from having representation[66].

5.2. Electoral Threshold and the Issue of "Lost" Votes

A high threshold for the winning of seats or mandates may cause great difficulty to smaller parties and individual candidates in the sense of their underrepresentation in the representative body in favor of large parties. The effect of underrepresentation, i.e. votes "lost" to parties that have not passed the threshold, is especially significant when a high election threshold is prescribed at the level of the entire country and not only for individual constituencies. The most vivid example is the Turkish electoral legislation which prescribes an electoral threshold of as much as 10% of the votes necessary to win seats in the Parliament. In the judgment in the case of *Yumak and Sadak v. Turkey* the applicants were candidates of the People's Democratic Party (DEHAP) which won the 2002 parliamentary elections with 46% of votes in the Şırnak province. However, seeing as how it did not win 10% of votes at the level of Turkey, all three seats of the province were given to parties who had a mere 14% and 10% of votes in the constituency. The applicants claimed that the high electoral threshold was at odds with the free expression of the opinion of the people in the choice of the legislature as prescribed by Article 3 of the First Protocol. The Court ruled that there was no violation, stating that the threshold existed in previous elections as well and that the applicants could have predicted such an outcome. Moreover, the electoral threshold was not an arbitrary decision adopted against applicants. However, the Court did not take into account the fact that the constituency was a predominantly Kurdish province and that in cases of underrepresentation of ethnic and religious minorities it left the door for establishing violation of electoral rights caused by the electoral system open. The Court emphasised "that although the threshold was high it did not go beyond a level within the margin of appreciation of the national authorities in the matter, since it could not as such hinder the emergence of political alternatives within society"[67]. This is substantiated by the fact that the smaller parties are not only allowed, but also encouraged to associate in national elections. The Court also noted that the threshold is nevertheless the highest among member States of the

[66] *Liberal Party, R. and P. v. the United Kingdom*, Application no. 8765/79, Decision of 18 December 1980, paras. C, The Law.

[67] *Yumak and Sadak v. Turkey*, Application no. 10226/03, Judgment of 8 July 2008, para. 126.

Council of Europe and that it would be desirable to introduce a lower threshold and/or corrective mechanisms with the aim of better representation[68].

Even prior to the judgment in the *Yumak and Sadak* case the development of above-mentioned practices was characterized by constant refusal to review the threshold as a threat to the right to free elections. In the decision in the case of *Federación Nacionalista Canaria v. Spain*, the Court concluded that even the systems with high electoral threshold or high number of candidacy signatures are not in violation of Article 3 of the First Protocol. Prior to that, the Constitutional Court of Spain decided that the set statutory threshold is justified by the legitimate goal of preventing excessive fragmentation of Parliament, but that it does, to a certain extent, provide protection to smaller political associations. The opinion of the EHCR was that the Spanish electoral legislation had not been arbitrary or disproportionate nor did it threaten the freedom of expression of opinion of the people and that Spain did not cross the line of free evaluation with its relatively high electoral threshold upon application of electoral system[69].

5.3. Violation of the Right to Free Elections in the Implementation and Monitoring of the Electoral Process

Every member of the Council of Europe has an obligation to hold elections and to secure methods for electoral dispute resolution. It is also necessary to ensure independence and impartiality of the electoral authority in supervising of the electoral process, counting votes and declaring the election results. The decisions made by these authorities shall be subject to appeal with an independent and impartial judicial authority. The most significant procedural obligations of the State in this regard are forming of the objective election commissions, ensuring the privacy of the polling place, sealing of the ballot boxes and supervising of the printing and using of the ballot papers. One of the most significant judgments regarding the election commission procedures was in the case of the *Georgian*

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[68] Ibid., paras. 109-148. In 2004, along the lines of the *Yumak and Sadak* case the Parliamentary Assembly of the Council of Europe urged the Turkish authorities to lower the election threshold of 10% by declaring it excessive. In the 2007 Resolution on the state of human rights in Europe it was concluded that in well-established democracies there should be no thresholds higher than 3% during parliamentary elections. These two resolutions are not legally binding, but their importance lies in the professional or political authority of the body which adopts them. Parliamentary Assembly, Honouring of obligations and commitments by Turkey, Resolution 1380 (2004), 22 June 2004, para. 6. Available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1380.htm; Parliamentary Assembly, State of human rights and democracy in Europe, Resolution 1547 (2007), 18 April 2007, para. 58. Available at: http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta07/ERES1547.htm.

[69] *Federación Nacionalista Canaria v. Spain*, Application no. 56618/00, Decision of 7 June 2001, para. 1 (The Law).

Labour Party v. Georgia[70]. After the Rose Revolution in Georgia at the end of 2003, the Supreme Court of Georgia annulled the results of the parliamentary elections. Likewise, in 2004, the Central Electoral Commission of Georgia (CEC) annulled the results of the repeated parliamentary elections in Khulo and Kobuleti electoral districts. Nevertheless, on a day of new vote the polling stations in the Khulo and Kobuleti districts failed to open, but the CEC tallied the votes in the entire country and announced the results of the elections. It stated that the Labour Party received 6,01% of the vote, which was not enough to clear the 7% threshold and thus to obtain seats in Parliament (although, based on the results of the cancelled 2003 Parliamentary elections, Labour Party of Georgia had 20 of 150 mandates in Parliament). In view of the fact that there was a significant number of voters in the Khulo and Kobuleti electoral districts, the Labour Party complained that it had been unlawfully deprived of a genuine chance to obtain seats in Parliament. The applicant party also complained under Article 3 of the First Protocol about the violation of its right to stand for election, arguing that the CEC could not lawfully end a national election without first having held an election in the Khulo and Kobuleti districts. It noted that partial conduct of the CEC was due to the composition of the electoral commissions, since, in every commission at all levels, 8 out of the 15 members were representatives of the presidential and pro-presidential parties. The Government's main argument was that the failure to hold elections in Khulo and Kobuleti districts was the consequence of the escalation of the tensions in the region. Moreover, according to the Government, the Labour Party had failed to substantiate its claim that it could have received sufficient votes from those districts to enable it to overcome the 7% legal threshold. However, the exclusion of those two districts from the general election process had failed to comply with a number of rule of law requisites and resulted in what was effectively a disfranchisement of a significant section of the population (60,000 voters). Consequently, a large part of population did not get its representatives in Parliament. Like in many other post-communist countries, no one wanted to discourage Georgia in its development of democracy. Therefore, as to the composition of the electoral administration itself, the Court stressed that the respondent State should be granted a wide margin of appreciation in this respect. Nevertheless, the Court concluded that there had accordingly been a violation of the applicant party's right to stand for election under Article 3 of the First Protocol on account of the *de facto* disfranchisement of the Khulo and Kobuleti voters[71].

[70] *Georgian Labour Party v. Georgia*, Application no. 9103/04, Judgment of 8 July 2008 (final, 8 October 2008).

[71] Ibid., paras. 11, 15, 26, 28, 32, 35, 90, 113, 114, 116, 142.

5.4. The Right to an Effective Remedy for Violations of Electoral Rights

Respecting the Article 13 of the Convention - right to an effective remedy is an important precondition for the realization of the right to free elections in national legal system. The specificity of the legal protection in cases of violations of the electoral rights is in its urgency (in most legal systems the appeal is resolved within 48 hours of receipt). Also, in addition to the electoral commission as the appellate authority, there must be an independent judicial authority as the court of the second instance for electoral disputes. Decisions of these authorities must not be arbitrary and should be in line with national legislation.

In the case of the *Russian Conservative Party of Entrepreneurs and Others v. Russia* (2007), the ECHR delivered a significant judgement in which it concluded that there was a violation of Article 13 of the Convention as well as Article 3 of the First Protocol. Namely, in September of 1999, the applicant party nominated 151 candidates for the elections to the State Duma and, in October, the Central Electoral Commission (CEC) confirmed receipt of the party's list. In November 1999, the CEC refused registration of the applicant party's list of candidates, having found that certain people on the list, including the candidate listed second, Mr Žukov, had provided inaccurate information about their income and property. The Elections Act provided for disqualification of the entire party's list in the event of "withdrawal" of one of the top three candidates on the list in situations where the candidate's name had been taken off the list of the candidate's own free will or at the request of the candidate's electoral union. Disagreeing with the CEC's interpretation, the applicant party successfully challenged its decision before the domestic courts (the Supreme Court of the Russian Federation) and obtained a final judgment to the effect that "withdrawal" applied only if it had been voluntary. The judgment was immediately enforced, so the CEC registered the applicant party and allowed it to carry on its electoral campaign. Nevertheless, in November 1999 a deputy prosecutor general lodged an application for supervisory review, requesting the Supreme Court to reopen the proceedings and to accept the CEC's original broad interpretation of section 51(11) of the Elections Act which provided for the refusal or cancellation of a party's registration in the event of the withdrawal of one of the top three candidates on the list. The Presidium of the Supreme Court subsequently quashed the earlier judgments by way of supervisory-review proceedings and upheld the CEC's position. Consequently, the CEC annulled its earlier decisions, refused the registration of the applicant party's list and ordered the applicant party's name to be removed from the ballot papers. The applicant party appealed unsuccessfully and in December 1999, the elections to the State Duma took place. The applicant party was not listed in the voting papers. In April 2000, the Constitutional Court of the Russian Federation declared

unconstitutional the part of section 51(11). However, the Constitutional Court also ruled that the finding that section 51(11) was unconstitutional was of no consequence for the State Duma elections of December 1999 and could not be relied upon to seek a review of the election results. All further appeals by the applicant party were unsuccessful, including its application to have its election deposit returned. The applications of Mr Žukov, one of the Russian Conservative Party of Entrepreneurs candidates and an applicant party and Mr Vasilyev as a party supporter were lodged with the ECHR[72].

Pursuant to Article 3 of the First Protocol, the applicants alleged a violation of the Russian Conservative Party of Entrepreneurs' and Mr Žukov's right to stand for election and a violation of Mr Vasilyev's right to vote for the party of his choice. It followed that there had been a violation of Article 3 of the First Protocol in respect of the applicant party and Mr Žukov. Concerning whether the decision to disqualify the applicant party and Mr Žukov from standing in the election was proportionate to the legitimate aims pursued, the Court found that requiring a candidate for election to the national parliament to make his financial situation publicly known pursued a legitimate aim and in that it enabled voters to make an informed choice and promoted the overall fairness of elections. A contrario, concerning Mr Vasilyev's complaint that it had been impossible for him to cast his vote for a party of his choosing – the applicant party – which had been denied registration for the election, the Court did not consider that an allegedly frustrated voting intention could be considered grounds for an arguable claim of a violation of the right to vote. An intention to vote for a specific party was essentially a thought; is existence could not be proved or disproved until and unless it had manifested itself through the act of voting. The Court concluded that the right to vote could not be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he or she had intended to vote for[73]. Pursuant to Article 13 of the Convention, the ECHR found that the Russian Conservative Party of Entrepreneurs and Mr Žukov were denied an effective remedy in respect of the violation of their electoral rights through the use of the supervisory-review procedure on an application by a deputy Prosecutor General, a State official who was not a party to the proceedings. Besides, even if there were an impartial body, the applicants would not have time to apply for a review of the Supreme Court's judgment in the light of newly discovered circumstances. The Government did not point to any circumstances of a substantial and compelling character that could have justified that departure from the principle of legal certainty in the

[72] *Russian Conservative Party of Entrepreneurs and Others v. Russia*, op. cit. (note 38), paras. 9, 10, 11, 13, 15, 17, 18, 19, 21, 25.

[73] Ibid., paras. 43, 44, 62, 76, 79.

present case. Finally, having found, in particular, that the domestic proceedings concerning the applicants were conducted in breach of the principle of legal certainty, the Court held that there had been a violation of Article 1 of the First Protocol in respect of the domestic authorities' refusal to refund the election deposit to the applicant party[74].

The case of *Orujov v. Azerbaijan* concerned the disqualification of a candidate from running for the parliamentary elections on the ground that he had allegedly attempted to influence voters by funding repair works on public facilities. After submitting the appeal to the Azerbaijan court, the applicant had not been afforded much time to examine the material in the case file and to prepare arguments in his defence. Furthermore, the proceedings before that court had not afforded the applicant the necessary procedural safeguards. According to the ECHR, the interference with Mr Orujov's electoral rights had thus fallen short of the standards required by Article 3 of the First Protocol[75].

6. TERRITORIAL CRITERION AND THE ELECTORAL RIGHTS – LEGAL REASONING OF THE EUROPEAN COURT OF HUMAN RIGHTS

6.1. Length of Stay and the Electoral Rights

The modern age is characterized by a great mobility of the population, especially within the European Union. Change of residence is closely related to voting rights of a person who has changed it. It is widely accepted that national States have the right to determine conditions for gaining the voting rights considering the citizenship and the length of stay (in the case of parliamentary elections). The right to vote in a particular country generally derives from citizenship and the use of suffrage rights are often restricted or limited in some ways with length of stay or the residence in general.

In the case of *Py v. France* the Ordinance on the institutional organisation of New Caledonia brought in a ten-year residence requirement for participating in elections to the Congress and provincial assemblies. The reason for bringing in a residence condition was to ensure that the consultations would reflect the will of "interested" persons and that the result would not be altered by a massive vote cast by recent arrivals on the territory who had no solid links with it. Furthermore, the restriction on the right to vote was a direct and necessary consequence of establishing Caledonian citizenship. The Court found that New Caledonia's

[74] Ibid., paras. 84, 89, 96, 101.

[75] *Orujov v. Azerbaijan*, Application no. 4508/06, Judgment of 26 July 2011 (final, 26 October 2011), paras. 7, 55, 59.

current status amounted to a transitional phase prior to the acquisition of full sovereignty and was part of a process of self-determination[76].

6.2. Electoral Rights for Citizens Abroad

Historically, external voting is quite a recent phenomenon. Even in long-established democracies citizens with foreign residency were not granted the right to vote until the 1980s (e.g. Federal Republic of Germany and Great Britain) or 1990s (e.g. Canada and Japan). In the meantime, many emerging or new democracies in Central and Eastern Europe have introduced legal provisions for external voting[77].

A problem arises when a large number of external voters decisively affect the election result (e.g. in Croatia and Hungary). Although the introduction of the right to vote for citizens who live abroad is not required by the principles of the European electoral heritage, the Venice Commission generally suggests that States should adopt a positive approach to this right[78]. National practices regarding the right to vote of citizens living abroad and its exercise are far from uniform in Europe, however, developments in legislation point to a favourable trend in out-of-country voting. Thirty-seven (out of forty-seven) Council of Europe member States have implemented procedures allowing voting from abroad. This right is sometimes recognised for citizens temporarily resident abroad, while in other States expatriates lose the right to vote after a certain period of time (e.g. in the United Kingdom after fifteen and in Germany after twenty-five years). Several countries provide the right to vote abroad only with the consent of the authorities of the country in which the voter resides and in some countries citizens living outside the country are allowed to elect their own representatives to the national parliament in special constituencies set up outside the country (e.g. Croatia, France, Italy and Portugal). In Ireland, for example, the only people allowed to vote abroad are members of the diplomatic corps as well as the police and armed forces. There are also countries where no legal provisions have been enacted to organise voting in parliamentary elections

[76] *Py v. France*, Application no. 66289/01, Judgement of 11 January 2005 (final, 6 June 2006), paras. 3, 12, 23, 24, 61.

[77] Electoral Law, Council of Europe Publishing, Strasbourg, 2008, p. 129.

[78] Sánchez Navarro, Ángel J., Venice Commission›s Opinions and the Issue of Distance Voting: Are Common Standards Possible?, in: European Commission for Democracy Through Law (Venice Comission) in co-operation with the Federal Public Service of Belgium, 5th European Conference on Electoral Management Bodies – Distance Voting, 20-21 November 2008, CDL-EL(2009)017, Strasbourg, 15 September 2009, pp. 55-59. Available at: http//www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2009)017-bil.

for their nationals abroad. These countries include Albania, Andorra, Armenia, Azerbaijan, Cyprus, Malta, Montenegro and San Marino[79].

Voting from abroad is subject to a number of conditions, beginning with those related to registration on the electoral roll. Generally, a prior application is required from the citizen abroad. For example, in Slovenia a prior notification is sent to the National Electoral Commission, while in Denmark, the application must be submitted to the last municipality in which the voter lived. In the case of Estonia, Finland, France, Georgia, Iceland, Italy, Lithuania, Moldova, Norway, Romania, Sweden and Ukraine expatriate voters do not have to complete any formalities as a precondition for registration, as they are registered automatically on the basis of the existing list of voters[80].

One of the important decisions considering the voting abroad was in the case of *Doyle v. The United Kingdom*. As a British citizen who lived in Belgium since 1983, the applicant expressed the wish to exercise his voting right in the United Kingdom in the 2006 parliamentary elections, but his request was rejected. On the basis of the 2002 Representation of the People Act only nationals resident overseas for less than fifteen years could register to vote in United Kingdom general and European elections. Nevertheless, they could be reinstated on the electoral role if they returned to the United Kingdom to register themselves. The applicant complained about his inability to vote in United Kingdom elections stating that he should not be denied his right to vote in national elections of his country of nationality, unless and until he is registered to vote in the elections of his country of residence. The Court noted that over a period of fifteen years, a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them. Therefore, the legitimate concern is to limit the influence of citizens living abroad in elections on issues which primarily affect persons living in the country. Furthermore, the Court emphasised that a period of fifteen years does not appear to be either disproportionate or irreconcilable with the underlying purposes of Article 3 of the First Protocol, because over such a time period, the applicant may reasonably be regarded as having weakened the link between himself and his country of nationality and that he is not affected by the acts of political institutions to the same extent as resident citizens. Furthermore, the applicant had two possibilities of using his right to vote. It was open to the applicant to seek to obtain the vote in the country of residence, if necessary by applying for citizenship. On the other hand, if he returns to live in the United Kingdom, his eligibility to vote as a British citizen will revive. In the circumstances, the Court concluded

[79] *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment of 15 March 2012, paras. 33, 35-39.

[80] Ibid., paras. 40-41, 43.

that the application was manifestly ill founded, so it declared the application inadmissible[81].

In the recent case of *Sitaropoulos and Giakoumopoulos v. Greece* (2010, 2012), both applicants were officials of the Council of Europe, Greek nationals who worked and lived in Strasbourg. They expressed the wish to exercise their voting rights in France in the 2007 Greek elections, but their request was not granted. The Greek Constitution of 1975 generally provides that all Greeks have the universal suffrage and that voting arrangements for Greek nationals outside Greece have to be regulated by a special act adopted by a majority of two thirds of Parliament. However, in April 2009, the Bill entitled "Exercise of the right to vote in parliamentary elections by Greek voters living abroad" was rejected by the Greek Parliament since it failed to secure the majority of two thirds of the total number of members of Parliament required by the Constitution[82].

The applicants argued that they were registered on the electoral roll in Greece, held valid Greek passports, owned immovable property in Greece on which they paid income tax and were still authorised to practise as lawyers in Greece. They emphasised that being unable to vote in the Greek parliamentary elections from their State of residence constituted interference with their voting rights, in breach of both the Greek Constitution and the Convention. In the applicants' view, it was clear from the Council of Europe instruments (e.g. Parliamentary Assembly Resolution 1459 (2005) and Recommendation 1714 (2005) and the Venice Commission's Code of Good Practice in Electoral Matters) that member States were under an obligation to make the right to vote effective. They noted that many member States to the Council of Europe guaranteed in practice the right of expatriates to vote from abroad in parliamentary elections. However, in its judgment, the Chamber held that there had been a violation of Article 3 of the First Protocol. Although the applicants still had the option of travelling to Greece in order to vote, in practice this complicated significantly the exercise of that right, as it entailed expense and disruption to their professional and family lives. The Chamber also held that the failure to enact legislation giving practical effect to voting rights for expatriates was likely to constitute unfair treatment of Greek citizens living abroad – particularly those living at a considerable distance – in comparison with those living in Greece[83].

At the request of the Greek Government, the case was referred to the Grand Chamber. The request was based on the Government's argument that the article of the Constitution concerning voting abroad, far from imposing any obligation

[81] *Doyle v. The United Kingdom*, Application no. 30158/06, Decision of 6 February 2007, A. The Circumstances of the Case, Complaint, The Law.

[82] *Sitaropoulos and Giakoumopoulos v. Greece*, op. cit. (note 79), paras. 1, 3, 11, 14, 16.

[83] Ibid., paras. 23, 28-29, 39, 43-44, 47.

on the legislature, was optional in nature. The Government added that voting arrangements for Greek nationals outside Greece had to be adopted by a majority of two thirds of Parliament; this confirmed the need to secure very broad political consensus on the subject in Greece. Furthermore, the Greek Government had already attempted to pass a law on voting rights for Greek expatriates, a fact which demonstrated the political will to find a solution to the problem. The Government also reiterated the reasons for requiring an enhanced two-thirds majority for enactment of the implementing legislation, namely the need for political consensus in view of the considerable numbers of Greek citizens living abroad - 3,700,000 persons compared with a population of 11,000,000 living in Greece. Blanket recognition of the right of expatriates to vote from their place of residence could give rise to political instability in Greece. The Grand Chamber confirmed this argument as a legitimate aim of the Greek Government which fully justifies limitations on expatriate voting rights. It was further noted that neither the Greek Constitution nor relevant international documents form a basis for concluding that States are under an obligation to enable citizens living abroad to exercise their right to vote. In other words, such a move can be viewed as a possibility, not an obligation. As to the disruption to the applicants' financial, family and professional lives that would have been caused had they had to travel to Greece in order to exercise their right to vote in the parliamentary elections, the Court was not convinced that this would have been disproportionate to the point of impairing the very essence of the voting rights in question. For these reasons, the Court unanimously held that there has been no violation of Article 3 of the First Protocol[84].

Taking into consideration the abovementioned judgments, it can be concluded that the ECHR considers that States have a wide margin of appreciation in determining electoral rules on the right to vote for expatriates, depending on their historical, political and other circumstances.

6.3. The Diaspora Vote in the Croatian Parliamentary Elections

In the past decade, the Croatian diaspora has increasingly become a significant player in the Croatian political arena. Namely, the impact of the political situation in Croatia on citizens living abroad is minimal. Besides, a large number of expatriates may exercise their voting rights due to their double nationality. The electoral legislation in Croatia has been changed in 2010 to give District XI (for Croatian citizens living abroad) three fixed seats in the Croatian parliament[85]. On elections held before the 2010 changes, the number of the representatives

[84] Ibid., paras. 54, 56, 72, 75, 80-81.

[85] Article 4. Zakon o izmjenama i dopunama Zakona o izboru zastupnika u Hrvatski sabor, Official Gazette of the Republic of Croatia, No. 145/2010.

from District XI varied from four to six seats (depending on a number of voters), sometimes in favour of the right-wing political parties. If in the future the ECHR would have to solve a question like this, its decision would probably be based on the cases of *Doyle v. The United Kingdom* and *Sitaropoulos and Giakoumopoulos v. Greece*, giving the Croatian authorities a relatively wide margin of appreciation.

7. SOME SPECIFIC ISSUES OF THE ELECTORAL RIGHT

7.1. Prisoners' Right to Vote

The practice of the Council of Europe member States concerning restrictions imposed on prisoners' voting rights is not uniformed. In the countries where restrictions are provided for loss of voting rights is tailored to specific offences or categories of offences, i.e. depending on the length of the sentence or the gravity of the offence. In its 2005 Recommendation on the abolition of restrictions on the right to vote the Parliamentary Assembly of the Council of Europe calls upon the Committee of Ministers to appeal to member and observer States 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[86].

The ECHR 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. However, the judgment from 2005 showed that 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. In the case of *Hirst v. The United Kingdom.* the applicant was serving a sentence of life imprisonment, but was released from prison on licence after 24 years. The applicant, barred by the 1983 Representation of the People Act from voting in parliamentary or local elections, relied on Article 3 of the First Protocol taken alone and in conjunction with Article 14 of the Convention, and on Article 10 of the Convention. The Court concluded that the United Kingdom's blanket ban was also disproportionate, arbitrary and that it impaired the essence of the right, but also potentially deprived a significant proportion of the population (over 48,000) of a voice or the possibility of challenging, electorally, the penal policy which affected them. The Court also confirmed

[86] Parliamentary Assembly, Recommendation 1714 (2005) – Abolition of restrictions on the right to vote, 24 June 2005 (24th Sitting), http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/EREC1714.htm.

that a general and automatic disenfranchisement of all serving prisoners was incompatible with Article 3 of the First Protocol[87].

In May 2012, in the case of *Scoppola v. Italy* the Grand Chamber of the ECHR issued another important judgment related to restrictions of prisoners' voting rights. The applicant was sentenced to thirty years' imprisonment and a lifetime ban from public office, which in turn led to the permanent forfeiture of his right to vote. In the Italian legal system a ban from public office is an ancillary penalty which entails forfeiture of the right to vote (Presidential Decree no. 223/1967) and for which express provision is made by law in connection with a series of specific offences, irrespective of the duration of the sentence imposed - the consequence of this is that persons sentenced to less than three years in prison continue to enjoy the right to vote. Those sentenced to three to five years forfeit their right to vote for five years, and lastly, persons sentenced to five years or more are deprived of their right to vote for life. The Chamber found that the disenfranchisement of the applicant was of the general, automatic and indiscriminate nature and that there had accordingly been a violation of Article 3 of Protocol No. 1. The Italian government made a request for the case to be referred to the Grand Chamber, in accordance with the breach of the Article 3 the First Protocol, for Italy's legislation have adopted that the disenfranchisement of prisoners depends on the type of offence and/or the length of the custodial sentence. Furthermore, under Italian law it is possible for a convicted person who has been permanently deprived of the right to vote to recover that right. Three years after having finished serving his sentence, he can apply for rehabilitation, which is conditional on a consistent and genuine display of good conduct and extinguishes any outstanding ancillary penalty date on which the principal penalty had been completed. This means that he can apply for rehabilitation and, where applicable, recover the right to vote at an earlier date. Consequently, the impugned measure pursue a legitimate aim, namely enhancing civic responsibility and respect for the rule of law and encouraging citizen-like conduct. However, the Grand Chamber accepted the argument made by the Government that each State has a wide discretion as to how it regulates the ban, both as regards the types of offence that should result in the loss of the vote and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from general application of a law. The Court found that in the circumstances of the case, the restrictions imposed on the applicant's right to vote maintained the integrity and effectiveness of an electoral procedure and that there has been no violation of Article 3 of the First Protocol[88].

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[87] *Hirst v. The United Kingdom*, Application no. 74025/01, Judgment of 6 October 2005, paras. 1, 3, 12, 14, 20, 45, 68.

[88] *Scoppola v. Italy*, Application no. 126/05, Judgment of 22 May 2012, paras. 1-2, 5-6, 14, 21, 76, 87, 92, 97, 109-110.

7.2. Right to Free Elections and the Prohibition of Discrimination

Pursuant to Article 14 of the Convention, everyone enjoys rights and freedoms 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. This is an example of the accessory prohibition of discrimination where discrimination is prohibited only in relation to the other rights enshrined in the Convention. The scope of discrimination as defined in Article 14 is extended by the adoption of Protocol No. 12 which regulates the general prohibition of discrimination, i.e. the prohibition is extended to all rights defined in the law. Restrictions of Article 3 of the First Protocol may in certain circumstances represent the violation of these two norms[89].

One of the most significant judgments regarding the right to free elections in relation to the prohibition of discrimination is one in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. The applicants complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina because the Constitution of Bosnia and Herzegovina makes a distinction between "constituent peoples" (persons who declare affiliation with Bosniacs, Croats and Serbs) and "others". Only persons declaring affiliation with a "constituent people" are entitled to run for the House of Peoples and the Presidency. The Presidency shall comprise one Bosniac and one Croat from the Federation and one Serb from the Republika Srpska and the House of Peoples shall comprise five Croats and five Bosniacs from the Federation and five Serbs from the Republika Srpska. Therefore, the applicants complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish origin respectively. The Court concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of the First Protocol. As regards the Presidency, the Court found that the impugned precondition for eligibility for election constitute a violation of Article 1 of Protocol No. 12. Furthermore, it was assessed that, despite of the historical background and the circumstances in which the Bosnia and Herzegovina Constitution was imposed (as a part of the peace settlement), the respondent State had enough time to adjust its legal system to the relevant provisions of the Convention. Lastly, by becoming a member of the Council of Europe in 2002 and by ratifying the Convention and the Protocols thereto

[89] Thornberry, Patrick; Martín Estébanez, María Amor, Minority Rights in Europe, Council of Europe Publishing, Strasbourg Cedex, 2004, pp. 47-51; Mazur Kumrić, Nives, General Prohibition of Discrimination in International Law – Sejdić and Finci v. Bosnia and Herzegovina, Annals Constantin Brancusi – Juridical Sciences Serie, No. 3/2012, pp. 22-23.

(but also by adopting the Constitution of Bosnia and Herzegovina in 1995), the respondent State has voluntarily agreed to meet the relevant standards of the Convention[90].

The Constitution of Bosnia and Herzegovina is an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Peace Agreement") [91], initialled at Dayton on 21 November 1995. Its main purpose was to end the conflicts between the three ethnical groups (Bosniacs, Croats and Serbs), making peace in Bosnia and Herzegovina possible. The Preamble to the Constitution confirmed that only Bosniacs, Serbs and Croats are "constituent peoples", while the other ethnic groups, which did not take sides in the conflict, were simply set aside. The Bosnian ethnocentric legal system and the concept of "constituent peoples" have permitted legalised discrimination on the basis of ethnic background[92].

According to the European Commission 2011 Progress Report on Bosnia and Herzegovina, the complicated decision-making process in Bosnia and Herzegovina has contributed to delay structural reforms, reduce the country's capacity to make the system compatible with European standards and make the constitutional reform possible only with the consensus of all three ethnic groups[93]. This has also confirmed long-standing practices of exclusion of ethnic minorities from effective participation in political life[94].

8. CONCLUSION

The right to free elections as a political right of all citizens entails continuous engagement of the State into organization and monitoring of elections, management of voting lists and catering for impartial settlement of electoral disputes. Still, this right is not absolute and is subject to many restrictions. These restrictions are permitted only if they refer to a legitimate aim and are not inclined towards deprivation of the essence of the voting right but to generation of a stable political and social framework for efficient exercise of this right.

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[90] *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgment of 22 December 2009, paras. 1-2, 6-7, 9, 41, 46-47, 49-50, 56.

[91] Ustav Bosne i Hercegovine, Izdanja Parlamentarne skupštine BiH, Publikacija br. 66, Sarajevo, 2010, pp. 5-29.

[92] More on Bosnian ethnocentric legislation in: Sarajlić, Eldar, Bosnian Elections and Recurring Ethnonationalisms: The Ghost of the Nation State, Journal of Ethnopolitics and Minority Issues in Europe, No. 2/2010, pp. 66-88; Mazur Kumrić, Nives, op. cit. (note 89), pp. 13-15, 20-50.

[93] European Commission, Bosnia and Herzegovina 2011 Progress Report, SEC(2011) 1206 final, Brussels, 12 October 2011, p. 7. Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ba_rapport_2011_en.pdf.

[94] Goodwin-Gill, Guy, Elections, Democracy, the Rule of Law and International Law, Australian International Law Journal, No. 1/2006, p. 14.

It is the different scope of interpretation of the justifiability of restrictions of the right to free elections that facilitates the parallel development of two levels of the protection of this right in the Council of Europe member States. The first one refers to the ECHR that still acknowledges the broad freedom of States to opt for their electoral systems. This assertion is probably supported by the fact that Article 3 of the First Protocol does not explicitly grant the general and equal voting right in any line but only caters for organization of secret voting in conditions appropriate for free expression of the people's will. The other one, though being an unbinding level of the protection, encompasses activities of the Venice Commission and Parliamentary Assembly of the Council of Europe. These two bodies are much louder when it comes to the criticism of national rules which, under the disguise of political and historical tradition, violate the electoral right of independent candidates and political parties. Despite their counselling function, these bodies can exercise major influence on the practice of the EHCR by virtue of their authority.

The evolution of the protection of the right to free elections is an unstoppable process that makes a valuable contribution to the protection of human rights in general. In approximately sixty years of its existence, a short, restrictively defined provision of Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms stipulating the right to free elections has managed to encourage the creation of abundant jurisprudence and has set high standards of electoral law in forty-seven member States of the Council of Europe.

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