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Right to free elections in the case-law of the European Court of Human Rights

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2012 - 2013

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CHAPTER 3: *Margin of appreciation relating to Article 3 of the First Protocol: evolution and trends of the ECHR case-law*

INTRODUCTION

This thesis will deal with the right to free elections in the case-law of the European Court of Human Rights, of primary importance in the framework of democracy and rule of law built by the Council of Europe. Indeed, the foremost purpose pursued by this international organization was the postwar restoration of peaceful democracies upon the common heritage of values and traditions, shared by the European countries' histories and cultures.

A tight and mutual relationship links together democracy and human rights and fundamental freedoms, as the Preamble to the European Convention on Human Rights declares: "*..reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend*[1]".

Human rights can be ensured only within a democratic regime. However, only if the basic human rights are protected, may it be possible to build a democratic regime.

The right to free elections lies at the core of democracy, since only if people are free to choose their own representatives, an actual and effective democracy can be established. Paradoxically, despite its key role, the article enshrining the right to free elections had to overcome numerous obstacles to find its way in the conventional system of the Council of Europe. Indeed, it was not included in the European Convention, but only later inserted as Article 3 in a separate Protocol, namely the First Protocol to the Convention, adopted on 20 March 1952.

[1] Convention for the Protection of Human Rights and Fundamental Freedoms – p. 5 http://www.echr.coe.int/Documents/Convention_ENG.pdf.

The first judgment of the European Court of Human Rights on this article, *Mathieu-Mohin and Clerfayt v. Belgium*[2], dates back to 1987. Since then, the Court had to consider a large amount of cases, related to the alleged violation of Article 3, with regard to its different aspects: the right to vote, the right to run for elections, the right to sit in the Parliament, the withdrawal of political freedom following a specific conduct and the effects of the electoral legislation. In particular, in the last decade, the Court had tried several cases involving the newly-established democratic countries emerged from the collapse of the Union of Soviet Socialist Republics. Within the process of democratization of those countries, Article 3 case-law acquired a significant importance, also because it considerably weighed on the margin of appreciation doctrine evolution.

The dissertation will be divided in three chapters, recalling the most important steps taken in the European Court case-law.

The first chapter will focus on the difficulties the Member States had to overcome to include the political clause within the conventional system of protection. I will examine closely the preparatory work on Article 3 of the First Protocol to the Convention, to understand why this article was excluded from the Convention. Moreover, this analysis can lead us to comprehend the unusual wording that resulted from the final draft of the Protocol. Indeed, the meaning of Article 3 was later completed and specified in the related case-law.

The second part of the dissertation will concentrate on the case-law of the European Court of Human Rights. I will divide the second chapter in three other sections, each of them dealing with one important aspect of Article 3: the right to vote, the right to stand for elections and the electoral systems. For each one of these aspects I will first analyze how they are commonly handled by Member States, then survey the case-law to infer how the Court has interpreted the protection of those rights.

The third chapter will deal with the margin of appreciation given to Member States in fulfilling their obligation under Article 3 and the parallel

[2] ECtHR, App. n° 9267/81, Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987.

supervisory function of the European Court. First, I will consider the origin of the margin of appreciation doctrine within the European Court case-law. Then, I will examine specifically the evolution of the margin of appreciation conceded to the Contracting Parties in holding free elections. Indeed, when it comes to abide by Article 3, the Governments enjoy a wider margin of appreciation compared to the narrower discretionary area they have in implementing other articles. The examination of the judgments of the Court will show us the evolution of its subsidiary power of review over the restrictive measures employed by Member States in complying their commitment. The dissertation will eventually conclude with an overview of the current trend of the Court, through a diversified analysis on the different aspects involved in Article 3 enforcement.

CHAPTER 1

PREPARATORY WORK ON ARTICLE 3 OF THE FIRST PROTOCOL TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1.1 Preparatory work on an article on free elections of the European Convention on Human Rights

"According to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by an effective political democracy. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol 1 (P1-3) is accordingly of prime importance in the Convention system."[3]

Given the importance of democracy in the Council of Europe one may think that an article on free elections would have immediately raised a full consensus among the Member States. How can a "democratic society" stand and survive without the protection of individuals' political rights, such as the right to political participation, the right to build a political opposition and the right to free and periodic elections? In spite of its importance, the preparatory work about such an article show the difficult path the Member States went through in order to include political rights in the conventional system of human rights protection.

The first session of the Consultative Assembly of the Council of Europe opened in August 1949, following the decision to prepare a common declaration of rights and freedoms, taken at the Congress of The Hague by the European Movement in 1948.

In July 1949 the European Movement had already prepared a draft European Convention on Human Rights and Fundamental Freedoms. Among the fundamental personal and civil rights, there was the right to free elections.

[3] ECHR App. N° 9267/81, Case of Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987 – p. 16.

Article 2 of the draft convention stated:

" *Every State a Party to the Convention undertakes faithfully to respect the fundamental principles of political democracy, and, in particular, in its metropolitan territory*:

- *To hold at reasonable intervals free elections by universal suffrage and secret ballot, so that governmental actions and legislation may accord with the expressed will of the people.*
- *To take no action which will interfere with the right of political criticism and the right to organize political opposition.*" [4]

Although in July 1949 the right to free elections was already mentioned in its first form, an intense debate on its expression took the floor since the first session of the Consultative Assembly. At the end of the discussion of 19 august 1949, a Commission on Legal and Administrative Questions was charged to work out a common solution with regard to the article on free elections. The 5th September 1949, the Commission presented a draft report including another article on political freedoms, namely Article 3, which verbalized:

" *The Convention will include un undertaking by member States to respect the fundamental principles of democracy in all good faith, and, in particular, within their metropolitan territory:*

- *To hold at reasonable intervals free elections by universal suffrage, and secret ballot so that governmental action and legislation may accord with the expressed will of the people*
- *To take no action which will interfere with the right of criticism or the right to organize a political opposition."*[5]

Article 3 was adopted during the plenary session of 8 September 1949, as it was considered at the core of the democratic system.

[4] Preparatory work on Article 3 of Protocol n°1 – p.3 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.
[5] Preparatory work on Article 3 of Protocol n°1 – p. 6 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

As to the nature of the right enshrined by this article, the Preparatory Report by the Secretariat General stated that there was no difference in both principle and implementation between the right set forth by Article 3 and those contained in Article 2 of the preparatory works on Article 1 of the Convention[6]. The sole difference lies in the type of freedoms set forth by Article 3 and Article 2. Indeed, the first one proclaims political freedoms, whereas the second establishes individual freedoms. Political freedoms have the hybrid nature of both individual and collective rights, as they are functional for the proper management of democratic institutions. As a consequence, the rights enshrined by Article 3 are "direct functions of Government action[7]", so they have to be actively enforced by the Member States, which may violate them if they do not take the appropriate measures needed. By contrary, since negative individual freedoms do not require any positive intervention by the State, they may be violated by other individuals, but not by the public organs. In this case, if the Member States do not intervene, they are just respecting their obligation to abstain from damaging the individual freedoms.

The hybrid nature of the electoral rights and the positive obligations the Member States are bound to, are some of the reasons for the exclusion of the political clause from the Convention, thus requiring an additional Protocol.

1.2 Objections to the introduction of the article on free elections in the Convention

The introduction of an article on free elections raised diverse criticisms among the member States. Among these, a leading role was played by the United Kingdom. Since the beginning of the preparatory work, the United Kingdom had been strongly reticent to let the Council of Europe overcome its sovereignty regarding the political framework and rights. As a consequence, on the 3rd

[6] Preparatory work on Article 1 of the Convention – p. 17 - http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF.

[7] Preparatory work on Article 3 of Protocol n°1 – p. 8 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

February 1950, Sir Dowson, the representative of the United Kingdom, proposed to erase the obligation of the member States to grant both elections and political opposition, giving three main reasons. First and foremost, it was not possible to find a common definition of the basic democratic principles. Secondly, the Convention could not refer to the "universal suffrage" since in all the Member States the right to vote was necessarily limited. Finally, the universal suffrage and the secret ballot alone could not ensure the concordance between the government and the will of people.

On the contrary, the other Member States were aware of the importance of referring to the universal suffrage, although it could not be automatically equated with democracy by itself. Furthermore, despite the limits imposed to the political rights within each country, the term "universal suffrage" was largely accepted.

During the Conference of Senior Officials of June 1950, the United Kingdom was supported by several other countries, which denied the political rights the status of fundamental freedoms of individuals. Denmark, Greece, Norway, Netherlands, Sweden followed the steps of the United Kingdom. In opposition, France, Italy, Ireland, Luxemburg and Turkey strongly urged to mention the protection of democratic institution, as they were the premise of the recognition and safeguard of the individual rights. They believed that individual human rights would have been trashed if not implemented in a democratic institutional frame. The struggle between these two sides resulted in the elimination of the political clause from the draft Convention, as it did not obtain support by the majority of the Member States.

1.3 Criticisms to the omission of the article on free elections

The removal of the article on free election from the draft Convention raised several criticisms. The Committee strongly opposed to the decision of the Committee of Senior Officials not to give protection to political freedoms. The Committee on Legal and Administrative Questions showed its deception as well.

The omission of the article on free elections opened a crucial debate upon the juisticiability of political litigations. As Lord Layton, representative of United Kingdom, stated, "*It is arguable that these issues about elections and the right to form an opposition are not justiciable, but political decision*."[8] Consequently, as political decisions, they should be submitted to the Committee of Ministers instead of a court jurisdiction. The matter of the justiciability of political disputes and the consequent breadth of control on political rights' enforcement, has pervaded all the preparatory work.

Among those who criticized the expunction of the political clause from the draft Convention, Mr. Teitgen, representative of France, expressed the main disapprovals. He recalled the necessary interconnection between individual freedoms and the political and institutional regime in which they were exercised. Individual rights are condemned to remain abstract without a political framework capable to give them a concrete shape. In particular, Mr. Teitgen underlined how a concrete realization and protection of individual freedoms was only possible through a democratic system. He brought the "People's Democracies" as an example to support his point of view. Even the constitutions of the satellite countries subject to the Soviet Union were filled with individual rights, that remained just a word, since they could be exercised only in conformity with the aims of the "People's Democracies". As Mr. Teitgen wisely stated, "…*it is impossible to reach an understanding upon the meaning and positive content of any freedom which is desired to guarantee, if you do not first make it perfectly clear that you are speaking of a freedom that is being exercised in a democratic regime*".[9] In conclusion, freedoms can only be protected within a democratic system subject to the rule of law, which does not arbitrary curtail individual rights.

[8] Preparatory work on Article 3 of Protocol n°1- p. 19 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.
[9] Preparatory work on Article 3 of Protocol n°1 – p. 22 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

1.4 Conclusion of the preparatory work on the Convention

Disappointed by the incoherent omission, the Consultative Assembly urged the Committee of Ministers to reinsert the political clause in the draft Convention.

Both the Committee on Legal and Administrative Questions and the Consultative Assembly proposed an amendment to the text presented by the Committee of Ministers, so that the article on free elections stated:

"*The High contracting Parties undertake to respect the political liberty of their nationals and in particular, with regard to their home territories, to hold free elections at reasonable intervals by secret ballot under conditions which will ensure that the government and legislature shall represent the opinion of the people.*"[10]

On 25th August 1950 the Consultative Assembly voted in favor of the amendment proposed.

In the meeting of the Representatives of the Ministers for the Foreign Affairs held on 2nd November 1950, after the examination of the Recommendation of the Consultative Assembly for revision of the Convention, not all the amendments were unanimously approved by the governments. Hence, despite the disappointment raised from the necessity to refer the amendments back to a committee of experts, the Member States preferred to have a Convention without the Assembly amendments rather than not having a document at all. The following day, the Committee of Ministers decided to sign the Convention including only those amendments upon which the governments had reached an unanimous agreement; hence, the Member States charged another committee of experts with editing an additional Protocol to the Convention containing the disputed amendments, notably concerning the rights to property, education and free elections. The Convention for the Protection of Human Rights

[10] Preparatory work on Article 3 of Protocol n°1 – p. 29 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

and Fundamental Freedoms was signed on the 4th November 1950, without any hint at the right to free and periodic elections. As a consequence, the Convention was perceived as a defeat: in spite of pursuing the protection of human rights and fundamental freedoms, it did not even mention all the individual rights that should be actually safeguarded. The governments of Member States preferred to have a document showing *"that the Council of Europe had accomplished this real achievement"*[11] rather than to guarantee a real, effective and concrete protection to basic individual rights and freedoms such as the right to property, education and free elections.

1.5 Preparatory work on the article on free elections of Protocol n°1

The disappointment caused by the failure of the Member States to reach an agreement on the proposed amendments spread throughout the Consultative Assembly. Bearing in mind that individual rights *"are best maintained…by an effective political democracy…"*, as set forth by the Preamble to the Convention, the omission of the right to free elections may be considered a paradox. The preparatory work on the additional Protocol was carried out from the 5th November 1950 to 20th March 1952. The preparatory work opened up with the strong accusation of Mr. Teitgen to both the Committee of Ministers and the United Kingdom. In particular, he asserted that if the British government were against the political clause, it could have ratified the Convention with reservation instead of imposing its veto. Instead of prevailing on the individual will of each State within the Committee of Ministers, the will of the majority was overcame by the individual veto.

After blaming one another, the Member States reintroduced the debate on the amendments proposed by the Consultative Assembly. The turning point was the first session of the Committee of experts on human rights, held in Paris on the 21st February 1951. Three texts were submitted to the Committee's examination.

[11] Preparatory work on Article 3 of Protocol n°1 – pp. 38 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

The first one was the text edited by the Consultative Assembly during the preparatory work on the Convention. The second one was presented by the British government, stating as follows:

"Signatory Governments undertake to respect the political liberty of their nationals and, in particular, 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 government and legislation.[12]*"*

By changing the article drafted by the Consultative Assembly into this specific wording, the United Kingdom aimed at avoiding a misunderstanding about the meaning of the political clause: indeed, through the words *"to hold free elections…to ensure that the government and legislature shall represent the opinion of the people"*, contained in the text of Consultative Assembly, one may interpret the article as imposing a specific electoral system, notably the proportional one.

The last text was proposed by Belgium, which suggested to eliminate *"the government and*[13]*"* from the second text.

The Committee of Experts accepted the text promoted by the United Kingdom. Indeed, the text edited by the Assembly was considered not appropriate, for three main reasons. First and foremost, the expression "political liberty" had been erased, since it was too undefined in a legal text and it was related to freedoms already mentioned in the Convention, notably the freedoms of assembly, opinion and association. Secondly, the reference to "home territories" was canceled, as the Protocol could not be enforced overseas. Finally, in fear that the wording of the article may be considered as providing for a proportional electoral system, the Committee embraced the point of view of the British delegation.

[12] Preparatory work on Article 3 of Protocol n° 1- p. 58 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

[13] Preparatory work on Article 3 of Protocol n° 1- p. 58 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

In conclusion, the Committee decided to take the article proposed by the United Kingdom as starting point, just replacing the term "legislation" with the word "legislature".

Nevertheless, several problems continued to emerge, as the delegations of Greece, Sweden and Norway did not want to commit their Governments to the present article. In particular, with regard to the reference to the choice of the government, Greece and Norway thought that the clause may be interpreted as imposing that the government must be directly chosen by the people.

Bearing in mind the different positions of the Member States, it was decided to make it possible to accept just some of the articles of the Protocol instead of the whole "package".

In the seventh session of the Committee of Ministers dating back to March 1951, a Committee of Experts was appointed in order to edit a draft Protocol to be later signed by the Governments. On the 18th April 1951, on the basis of the texts presented in February 1951, the article was formulated as follows:

"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.[14] *"*

The text was examined a month later, during the eight session of the Committee of Ministers. Despite the efforts of finding a common agreement, there were still conflicting points of view. Consequently, the draft Protocol was referred back to the Committee of Experts in order to make it acceptable for all the Member States. The meeting in June resulted in the approval of an article drawn up with the same words used in the text edited in April. After the approval by the Ministers' Advisers, in the ninth session of the Committee of Ministers the draft protocol reached unanimous agreement.

The signature of the draft Protocol had to overcome the last obstacle: the favorable opinion of the Consultative Assembly or its Committee on Legal and

[14] Preparatory work on Article 3 of Protocol n°1 – p. 63 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

Administrative Questions. At first the Committee proposed to amend the text in the following way:

"The High Contracting Parties undertake to hold free elections of the legislature at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the will of the people.[15] *"*

Bearing in mind that some parliaments included non-elective Chambers and feeling obliged to hold elections for both the Chambers of the legislature, the Member States did not accept the wording proposed by the Consultative Assembly. As a consequence, the Committee on Legal and Administrative Questions unanimously adopted without amendments the draft Protocol submitted by the Committee of Ministers.

The meeting of the Committee of Ministers held on 19th March 1952 resulted in the approval of the text of the Protocol, which was signed the following day.

1.6 Final draft of Protocol n°1: the meaning of Article 3

Article 3 of Protocol n°1 is not the first example of political clause in international law.

Article 21 of the Universal Declaration of Human Rights, adopted on 10 December 1948 by the United Nation General Assembly, states that government's authority should be built on the will of the people. It therefore affirms everyone's right to participate in the political activity of the country and the right to periodic and genuine elections, held by universal suffrage and by secret ballot.

In comparison with Article 21, the wording of Article 3 presents several differences, which made its interpretation more difficult and ambiguous. First and foremost, Article 3 imposes a positive obligation on Member States, without expressly recognizing individual political rights. Unlike Article 21 of the

[15] Preparatory work on Article 3 of Protocol n° 1- p. 75 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.

Universal Declaration of Human Rights, which sets forth specific rights for individuals, in the Protocol a specific commitment lies on the contracting States. Secondly, there is no reference to universal suffrage in article 3 of the first Protocol.

1.6.1 Elections at reasonable intervals by secret ballot

Concerning elections' periodicity, Article 3 of Protocol n°1 refers to "reasonable intervals", without specifically defining the lapse between elections. The preparatory work is unclear as well, since it just defines that *"by reasonable intervals is meant intervals which are neither too short not too long"*.[16] The decision of the European Commission of Human Rights *Timke v. Germany*, dating back to 1995, clarifies the meaning of "reasonable intervals". Elections aim at guarantee the correspondence between representatives' ideas and the will of the majority of people. Given this main purpose, the duration of the legislative mandate responds to two opposite exigencies: on the one hand, if the mandate is too long, the government is unlikely to represent and keep update with the changeable will of the majority of the people, lacking of representativeness; on the other hand, if the mandate is too short, the government may not be able to coherently implement the defined policies, lacking of efficiency. As stated by the European Commission, *"a five years interval gives appropriate weight to these considerations and duly reflects the opinion of the people"*.[17] This position is supported by the Venice Commission, which recommends that a legislature must not exceed five years.

However, the European Court has not taken any clear and strong position concerning the duration of legislative mandate: a wide margin of appreciation is conferred to member States, which must face this trade-off between

[16] Preparatory work on Article 3 of Protocol n°1 – p. 10 - http://www.echr.coe.int/Library/digdoc/travaux/ECHRTTravaux-P1-3-Cour(86)36-BIL1221606.pdf.
[17] ECRH, App. n°27311/95, Timke c. Allemagne, 11 September 1995 – p. 3.

representativeness and efficiency, when they have to decide the lapse between the holding of elections.

Another pillar of effective democracy is the necessary veil of secrecy that covers the ballot. In the past, the inhabitants of each village used to vote all together, strengthening the habit of the communal vote. Individual political decisions were considered as a social disease and it was denied any hint of freedom of choice. On the contrary, Article 3 of the First Protocol expressly binds States to hold free elections. Hence, the precondition to free elections is the secret ballot. Only secret ballot can ensure that people are able to freely choose the political party or the political platform they prefer. Each citizen must be protected from physical and psychological threats and violence that may damage voters' freedom of expression of political will. As established by the Venice Commission in the *Code of good practice in electoral matters*[18], secrecy must cover the whole voting procedure, with particular attention to the casting and counting of votes.

1.6.2 The choice of the legislature

The additional Protocol to the European Convention is relevant only with regard to general elections, with the purpose to choose the legislature. There is no reference either to presidential elections or to elections of supranational representative bodies. It has been the European Court case-law to widen the application of Article 3 beyond its wording.

In the 1987 *Mathieu-Mohin and Clerfayt v. Belgium*[19] case, the European Court stated that the concept of legislature did not simply refer to the national parliament: it must be framed in the constitutional context of each country. Indeed, in several countries the legislative powers are shared not only between the High and the Low Chambers that compose the legislature, but also among

[18] European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, 30 October 2002 - http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx

[19] ECtHR, App. n° 9267/81, Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987.

other bodies which hold legislative powers. The qualification of a body as legislature depends on its legal basis, its role within the institutional frame and the nature of the issued laws.

A notable European Court case-law is the *Matthews v. United Kingdom*[20] judgment, of 1999. Since Gibraltar had been excluded from the elections to the European Parliament, the applicant, a British citizen resident in Gibraltar, alleged a violation of P1-3. What is relevant to our consideration, is whether the European Parliament could be classified as a "legislature". Originally the European Commission found there had not been a violation of P1-3, because the European Parliament could not be conceived in the terms of "legislature". Indeed, when the First Protocol was signed, the European Parliament had not been established yet. Hence, considering the European Parliament as legislature was thought to go beyond the scope and the purpose of Article 3. Of a different mind was the Grand Chamber, to which the case was referred after the entry into force of Protocol N°11. Not including the European Parliament elections in the scope of P1-3 could deprive the European community of one of the most important guarantees for the protection of the democratic society. *"It follows that no reason has been made out which could justify excluding the European Parliament from the ambit of the elections referred to in Article 3 of Protocol No. 1 on the ground that it is a supranational, rather than a purely domestic, representative organ."*[21]

In conclusion, although the word of P1-3 expressly refers to "the choice of legislature", a more comprehensive interpretation has been made over the years, broadening the scope of Article 3. Moreover, in the European Court case-law, it is of essential importance to take into account the constitutional and institutional context: this allows to consider the specific country's situation, with a less strict application of the wording of P1-3.

[20] ECtHR, App. n°24833/94, Matthews v. the United Kingdom, 18 February 1999.
[21] ECtHR App. n°24833/94, Matthews v. United Kingdom, 18 February 1999 – p. 15.

1.6.3 Implied rights: universal suffrage and subjective rights

As said before, the wording of Article 3 is different from that of other articles of both the Convention and the first Protocol. Since it says *"The High Contracting parties undertake…"* instead of the usual phrase *"Everyone has the right"*, it was considered not to attribute subjective rights to individuals. Apparently it just identified obligations among States. As a consequence, the right to free elections would have been covered by judiciary protection only with regard to interstate lawsuits.

One more time, it has been the European Court and Commission case-law to gradually specify the rights implied in Article 3: universal suffrage, in particular the right to vote and the right to stand for elections.

Unlike other conventional clauses aiming to guarantee the holding of elections, which require universal suffrage, Article 3 does not mention it. At first the Commission denied that the additional Protocol compelled the Contracting Parties to confer the right to vote to individuals. The first step towards the recognition of the universal suffrage was the *X. against the Federal Republic of Germany* decision, taken by the European Commission. However, despite the explicit reference to universal suffrage as implied right contained in P1-3, the Commission did not go further, stating: *"whereas, however, it does not follow that Article 3 (P1-3) accords the right unreservedly to every single individual to take part in elections"*. [22]

Eight years passed until Article 3 was declared to set forth the right to vote and the right to stand for election. In the *W. , X. , Y. and Z. v. Belgium* decision, the Commission recalled the steps taken in the previous judgments and it established that the rights provided by Article 3 had the nature of individual rights. The Commission further determined the substance of this right: *"…the Commission concludes that Article 3 guarantees, in principle, the right to vote*

[22] ECHR, App. n°2428/65, X. v. the Federal Republic of Germany, 5 October 1967 – p. 1.

and the right to stand for election to the legislature."[23] The right to political participation is therefore qualified by two aspects: the active aspect, notably the right to vote and the passive aspect, that is the right to run for elections.

The arrival point of this path is set out in the *Mathieu-Mohin and Clerfayt v. Belgium* judgment. According to the European Court, the different wording of Article 3 did not imply a substantive difference from the other subjective rights of the Protocol. Being a matter of positive obligation to the contracting parties, the different formulation aimed to give more solemnity to the commitment of Member States. Indeed, Member States are not only compelled to abstain from damaging the individual political right, but must positively act and intervene in order to ensure the citizens can fully enjoy their freedoms. Member States must protect political rights through specific actions and policies, such as emanating the electoral law or establishing electoral bodies and institutions.

As to the right to vote, there are several positive obligations that fall on the member States. First, the obligation to protect the citizens and prevent them from being physically or psychology threatened. Secondly, the state must provide information. It can be information about the electoral system, about how to vote, about the political parties and platforms and about the results of elections. Finally, states may be required to investigate if the citizens are denied the right to vote.

As to the right to run for elections, Member States must mainly provide clear, stable, and certain electoral laws, in order to avoid arbitrary deprivation of this political right.

The political rights guaranteed by P1-3 are not without limits: despite the universal suffrage, there is neither an absolute right to vote nor an absolute right to stand for election. The European Court recognizes a wide margin of appreciation to the member States concerning the limitations imposed to political freedoms. This latitude granted to the countries is the result of the European Court case-law, as it is not mentioned in the Protocol. This margin takes into

[23] ECHR, App. n°6745/74 and n°6746/74, W.,X.,Y. and Z. v. Belgium, 30 May 1975 – p. 1.

consideration the historical evolution of the country as well as its political and social framework. As stated by the Court, "*there are numerous ways of organizing and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision".*[24]

However, even the margin of appreciation is submitted to certain limits, although not clearly specified. Hence, this margin cannot be so much extended that it may prevent the citizens from effectively exercising their rights. Moreover, the limits imposed by the government on individual political freedoms must pursue a legitimate aim and employ proportionate measures. There is not a "package" of legitimate aims specified by the Court; a wide spectrum of purposes may be pursued by limiting political rights. It is up to the European Court to judge case by case if the margin of appreciation is too broad or not.

[24] ECtHR, App. n° 126/05, Scoppola v. Italy, 22 May 2012 – p.13.

CHAPTER 2

EUROPEAN COURT OF HUMAN RIGHTS' CASE-LAW CONCERNING ARTICLE 3 OF THE FIRST PROTOCOL

2.1 Limitations to the right to vote

Despite its denomination, universal suffrage usually provides for several limits to the active electoral right. These limitations imply two aspects: the requirements established in order to exercise the right to vote and the possible deprivation of the right to vote, resulting from a specific behavior.

First and foremost, citizens must meet certain requirements in order take part to the choice of the legislature. In almost all countries, citizens must have reached a minimum age, which usually is the age of majority. Moreover, voters are often asked to be citizens or at least to have lived in the country for a certain period of time. The right to vote is also usually conferred only upon resident citizen, for a number of reasons. First, non-residents are less concerned by the daily problems of the country; secondly, non-residents have less influence in the formulation of political platforms; third, they are less affected by the law enacted by Parliament. According to the Venice Commission's guidelines on elections[25], a required length of residence should not be more than six months and should concern citizens only for local and regional elections.

Secondly, as a result of a specific conduct, citizens may be disenfranchised.

As established by the Venice Commission, this measure should be prescribed by law, imposed by a court and should be proportional to the conditions of the case. Usually the disenfranchisement is applied in cases of mental incapacity or criminal conviction for serious offence.

[25] European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, 30 October 2002 - http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx.

As to the implied limits imposed to the right to vote, the Court heard several cases concerning the residence and national requirements. As already mentioned, it falls within the margin of appreciation of each State to establish administrative criteria to the exercise of the right to vote. In defining the legitimacy of the residence requirements established by the Member States, the Court gives much importance to the historical, social and political context of the State concerned. For instance, in *Py v. France*[26], the Court considered the ten years residence requirement not to be disproportionate, since this limit had played an important role in soothing the conflict in New Caledonia. In a different historical and social framework, the Court may have evaluated a ten years residence requirement as an excessive and disproportionate measure.

Some Member States confer the right to vote upon citizens living abroad. This is a new phenomenon, as proved by the different approach of the Member States, far from uniform. Indeed, the European electoral framework does not recognize the conferral of right to vote to citizens living abroad as an obligation falling on the Member States. However, given the growing mobility inside the continent, some steps towards a broader extension of the right to vote could strengthen democracy in Europe. Currently, thirty-seven Member States provide some arrangements to let nationals living abroad to vote in national elections. Each country establishes its own legislation defining the conditions to exercise the right to vote from abroad and providing the specific tools to do it. Eight countries do not allow citizens voting from abroad.

In *Sitaropoulos and Giakoumopoulos v. Greece*[27], the Court had to consider whether the exclusion from Greece national elections of two Greek officials of the Council of Europe had led to the violation of Article 3. The Chamber found a violation of the right to free elections: indeed, Article 3 did not refer to the right to vote for residents abroad, but the Greek constitution recognized the possibility of enacting legislation defining electoral rights of

[26] ECtHR, App. n° 66289/01, Py v. France, 11 January 2005.
[27] ECtHR, App. n°42202/07, Sitaropoulos an d Giakoumopoulos v. Greece, 15 March 2012.

nationals residing abroad. The Court found a violation of Article 3, since Greece had not enacted any law yet. The case was then referred to the Grand Chamber, which went a different way. Although the Grand Chamber invited the Member states to let nationals abroad vote, it found that there was no obligation to grant citizen residing abroad the right to vote in parliamentary elections. Consequently, Greece had not violated Article 3.

As to disenfranchisement following specific behaviors, the European Court of Human Rights has examined a large amount of cases concerning prisoners' deprivation of the right to vote. It therefore had to verify whether the disenfranchisement of prisoners pursuits a legitimate aim and whether such a punishment is proportionate to the crime committed.

It is not always easy to define if the disenfranchisement of prisoners pursues a legitimate aim, because it concerns both elements of punishment and the electoral system. The imposition upon prisoners of the withdrawal of political rights pursues different aims. For instance, the United Kingdom aims to enhance civic responsibility and the respect of the rule of law, to confer an additional punishment to the offenders and to prevent criminal activities. Similar aims are pursued by Italy: prevention of crime, upholding the rule of law and protecting the democratic regime.

The leading case in this field is *Hirst v. United Kingdom*[28], dating back to 2005. In this dispute, the applicant was convicted to life imprisonment consequent to manslaughter. He was released in 2004, and, despite this, he could not exercise his political rights yet. He claimed that the United Kingdom had violated Article 3 of Protocol n° 1, imposing an automatic and blanket withdrawal of political rights. Furthermore, this was not an isolated case: it was estimated that 48.000 prisoners were similarly affected within the United Kingdom. The Grand Chamber found a violation of Article 3, on the ground that the British law provided an automatic disenfranchisement of convicted people,

[28] ECtHR, App. n° 74025/01, Hirst v. the United Kingdom, 6 October 2005.

without considering neither the length of the detention, nor the circumstances and the gravity of the fact. Consequently, although the Court had recognized the legitimacy of the aim pursued, the measures imposed were disproportionate, clearly overcoming the margin of appreciation and resulting in arbitrary effects. The Court stated there cannot be a general and automatic disenfranchisement of people just because of their status of prisoners; there must be a clear link between the offence, the circumstances of the individual case and the withdrawal of political rights. As the Court stated, "*such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1."* [29]

The *"Hirst"* case is the leading case on the subject not only because it was the "*first time that the Court had occasion to consider a general and automatic disenfranchisement of convicted prisoners"*[30], but also because the Court decided to apply the pilot-judgment procedure. This is a means used by the Court to handle several identical cases that are originated by the same structural problem. In order to avoid congestion, the Court may select just one or few cases and extend the effects of its judgment to other similar cases. This happened towards the United Kingdom, with regard to cases dealing with disenfranchisement after conviction. Bearing in mind that the United Kingdom had not abided by the *Hirst* judgment yet, in the *Greens and M.T. vs. United Kingdom,* dating back to 2010, the Court decided to set a deadline of six months for the United Kingdom to change the electoral law. In 2010 there were other 2.500 similar applications to the Court and almost 70.000 prisoners, possibly affected by the British violation of Article 3. As a consequence, on the ground of the *Hirst* and *Greens* judgments, the Court decided to employ the pilot–judgment procedure: the examination of similar cases was no longer justified, finding that all the comparable cases would have led to the violation of Article 3 by the British government.

[29] ECtHR, App. n° 74025/01, Hirst v. the United Kingdom, 6 October 2005 – p. 17.
[30] ECtHR, App. n° 74025/01, Hirst v. the United Kingdom, 6 October 2005 – p. 21.

The United Kingdom is not the only Member State to provide such limitations to the right to vote. There have been other countries accused of violating Article 3 of the additional Protocol because of their depriving prisoners of the right. In the 2012 *Scoppola v. Italy*[31] case, the applicant, serving a lifetime sentence, claimed to be victim of an automatic withdrawal of political rights deriving from the life sentence. According to Italian law, life imprisonment leads to the lifetime ban from public offices, implying the permanent loss of the right to vote. However, unlike the United Kingdom, the Italian legislative framework details and specifies the forfeiture of the political rights on the ground of the gravity of the offence and the length of the sentence. Consequently, there was not a blanket and arbitrary application of Article 3 and no consequent violation of the political clause of the Protocol.

Disenfranchisement after conviction is not the only kind of withdrawal of political rights. In some countries the deprivation of the right to vote may occur after being charged with bankrupt. This is a common practice in Italy, as showed by the large amount of cases submitted to the Court: among the others, *Bova v. Italy*, *Campagnano v. Italy*, *Vitiello v. Italy*, *Vertucci v. Italy*, *Pantuso v. Italy*[32]. All the cases concerning disenfranchisement after bankruptcy involved Italy and Italian applicants. Indeed, Italian bankrupts are condemned to the forfeiture of electoral rights during the bankruptcy proceedings, within five years following the bankrupt order. Disenfranchisement after bankruptcy originated in the Middle Ages, when the wealth of the whole society was deeply interconnected and overlapped with the richness of the merchants. For this reason, insolvency was followed by strong criminal and civil penalties, among whom the loss of citizenship. Given the ancient roots of this institution, Italian applicants claimed to the Court that it was an outdated and repressive measure aiming to marginalize the bankrupts. The Court found that Italian legislation did not pursue a legitimate

[31] ECtHR, App. n° 126/ 05, Scoppola v. Italy, 22 May 2012.
[32] ECtHR, App. n° 25513/02, Bova v. Italy, 24 May 2006, App. n° 77955/01, Campagnano v. Italy, 23 March 2006, App. n° 77962/01, Vitiello v. Italy, 23 March 2006, App. n° 29871/02, Vertucci v. Italy, 29 June 2006, App. n°21120/02, Pantuso v. Italy, 24 May 2006.

aim, leading to the violation of Article 3. In the *Campagnano v. Italy* judgment, the Court stated that *"the restriction of bankrupts' electoral rights is an essentially punitive measure designed to belittle and punish the persons concerned, demeaning them as individuals for no other reason than their having been the subject of civil bankruptcy proceedings."*. [33]

As recognized by the Venice Commission in the guidelines on electoral practices, some countries may impose restrictions to the right to vote to those individuals suffering from mental incapacity. The finding of mental incapacity may only be imposed by expressed decision of a court of law. Actually, in the European Court case-law there are not a lot of cases concerning the loss of the right to vote deriving from mental incapacity. *Alajos Kiss v. Hungary*[34], 2010, is an example of the withdrawal of the right to vote consequent to "diminished faculties". In this case, the applicant was under partial guardianship after being recognized suffering from maniac depression, with occasional aggressive behavior and irresponsibility with money. According to the Hungarian constitution, people with "diminished faculties" must be deprived of the right to vote. The applicant was therefore unable to take part to the 2006 legislative elections. The Court declared that the measure imposed followed the legitimate purpose to let only people aware of the consequences of their own conduct could exercise their right to vote. However, the Court found the measure lacking of proportionality. Indeed, the law did not make any difference between total and partial guardianship. Moreover, although it was up to the Member States to consider whether an individual is able to exercise his right to vote, Hungary just applied the relevant law, without making any individualized judicial evaluation in order to assess the effective capacities of the applicant. Hence, a blanket and discriminatory ban was imposed, consequent to mental incapacity requiring partial guardianship. Finding the violation of Article 3, the Court claimed also that, given the weakness of people suffering from mental disability, a stricter

[33] ECtHR, App. n° 77995/01, Campagnano v. Italy, 23 March 2006 – p. 13.
[34] ECtHR, App. n° 38832/06, Alajos Kiss v. Hungary, 20 May 2010.

control on their actual abilities was even more necessary than in other cases of disenfranchisement.

2.2 Limitations to the right to stand for elections

Limits to the right to run for elections are usually imposed in each country. The requirements to the right to stand for elections may be stricter than those imposed to the right to vote, since the right to be elected has a more functional role within the public interest of the society. Hence, it is necessary to carry on a more detailed and rigid control over eligibility. Moreover, as asserted by the Venice Commission, the conditions for depriving individuals of the right to stand for elections may be less strict than those provided for the withdrawal of the right to vote, "*as the holding of a public office is at stake and it may be legitimate to debar persons whose activities in such an office would violate a greater public interest*[35]*"*

As well as for the active political rights, there usually are some age requirements to be satisfied. However, the age generally required should not be older than 25 years old. Then, candidates are usually asked to be national. Moreover, there may ineligibilities for those people already holding a public office, in order to avoid conflicts of interests and ensure political neutrality and loyalty.

Over the years, several cases concerning ineligibilities in the right to stand for elections have been submitted to the European Court.

In *Gitonas and others v. Greece*[36] case, the Court considered the annulment of the elections of five civil servants elected in the 1990 general elections. The Special Supreme Court decided to annul those elections in order to avert any conflict of interests originated by the overlapping of both roles of civil servant

[35] European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, 30 October 2002 – p. 15 - http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx.

[36] ECtHR, App. n° 18747/91, App. n° 19376/92, App. n° 19379/92, App. n° 28208/95, App. n° 27755/95, Gitonas and others v. Greece, 1 July 1997.

and politician. The European Court recognized that most of the Member States adopted similar disqualifications, pursuing two aims. First, to guarantee equivalent conditions to the candidates to elections and to avoid privileges for civil servants because of their status and resources. Second, to protect the voters from any pressure imposed by the officials who may try to influence their electoral choice. Consequently, the European Court found no violation of Article 3 by Greece, which pursued a legitimate aim and employed proportionate measures in establishing and applying those ineligibilities. However, in another case, *Lykourezos v. Greece*[37], the Court found there a violation of the political clause. In this case, the applicant was a lawyer at the time he was elected in the 2000 parliamentary elections. The following year, a constitutional revision declared the ineligibility for all professional activity, subject to certain exceptions that were to be established by law. However, no further legislation was issued, so the constitutional provision entered into force in 2003 without any exception. As a result, the applicant was deprived of his parliamentary seat. The Court charged Greece with the breach of the principle of legitimate expectation, by arbitrarily depriving the electors of the elected candidates, and consequently found a violation of Article 3. In order to be legitimate, the incompatibility should have been clearly defined and enacted before the parliamentary elections.

Other cases of ineligibility derive from past political experiences of the candidates, such as the holding of a previous office or the membership in a political party, regarded as incompatible with the parliamentary seat later obtained. In 2006 and 2008 the European Court tried respectively the *Zdanoka v. Latvia*[38] and *Adamsons v. Latvia*[39] cases. In the first one, the applicant was prevented to run for general elections because of her previous leading role in the Communist Party of Latvia, affiliate to the Communist Party of the Soviet Union. In 1990 the Parliament voted in favor of independence from the URSS, fully

[37] ECtHR, App. n° 33554/03, Lykourezos v. Greece, 15 June 2006.
[38] ECtHR, App. n° 58278/00, Zdanoka v. Latvia, 16 March 2006.
[39] ECtHR, App. n° 3669/03, Adamsons v. Latvia, 24 June 2008.

acquired on the 21st of August 1991. Meanwhile, in January 1991, the Communist Party of Latvia had taken part in an unsuccessful coup d'état. As a consequence, the Communist Party of Latvia was proclaimed unlawful and it was dissolved. In 1998 Zdanoka presented her candidature for the parliamentary elections, but the Central Electoral Commission denied it by virtue of those legislative provisions. Hence, from 1999 she could not stand for any elective office. The Court declared that Latvia pursued the legitimate aim of ensuring democracy, independence and national security. As for the proportionality of the measures employed, the Court considered the specific historical and political context of the country. Indeed, the Court claimed that the legislative provisions that limited the applicant's electoral rights may be considered disproportionate if employed in a firm-based and enduring democratic regime; nevertheless, with regard to the recently established democracy and the fragile democratic institutions of the country, such measures were proportionate, aiming to avoid the resurgence of anti-democratic stances. Moreover, in 2000 Latvian constitutional court established that the legislative provisions were neither arbitrary nor disproportionate, but it declared it was necessary to keep them under control.

In *Adamsons v. Latvia*[40], the applicant could not stand for elections because he had joined the Border Guard Forces of the Soviet Union, under the KGB control. After Latvian independence, in 1992 he joined Latvian army and became Commander of the Latvian Border Guard Forces. After the military career, he was elected and he was member of the Parliament until 2002. Other members of the Parliament had tried to deprive him of his office on the ground of the Parliamentary Elections Act, which set forth the disqualification of previous officers of public security and espionage organs of the Soviet Union. Although the parliamentary commission had claimed there was a difference between "KGB officer" and "KGB Border Guard Forces officer", in 2002 the applicant was struck off the list of his political party. In spite of the legitimate aim pursued by the law, the Court considered the measures as disproportionate. The Court

[40] ECtHR, App. n° 3669/03, Adamsons v. Latvia, 24 June 2008.

claimed it was necessary a case-by-case control on the disenfranchisement of people accused of belonging to the KGB. Indeed, in the present case, the Court considered that the applicant had not opposed the democratization of Latvia after the fall of the Soviet Union; moreover, from that moment until his disenfranchisement in 2002, he had held important offices both military and political, proving his loyalty to democratic institutions. For these reasons, the Court found a violation of Article 3.

As for the right to vote, the right to run for elections is submitted to certain nationality requirements. The *Sejdic and Finci v. Bosnia and Herzegovina*[41] judgment is an important case at this regard. The Court had to consider whether the exclusion from the highest political offices of two citizens of Bosnia and Herzegovina, respectively a Roma and a Jew officers, constituted a violation of Article 3. The Constitution of Bosnia and Herzegovina recognized the right to be elected in both the House of Peoples and the State Presidency only to the "constituent peoples", namely Bosniacs, Croats and Serbs. The applicants claimed they had been prevented from holding a political office just because of their ethnic origin. As to the purpose of the constitutional provision defining the "constituent peoples", the Court found it pursued a legitimate aim, that was to ensure and protect peace after the genocide and the ethnic conflict. Nevertheless, the Court stated that discrimination based only to the ethnic origin was not consistent with a democratic regime. Moreover, the measure imposed was not proportionate, because of its lack of objectivity and reasonable justification.

Tanase v. Moldova[42] is another relevant case, concerning the nationality requirement. In this case the applicants claimed a violation of article 3, because of a reform of the electoral law depriving people with dual nationality of the possibility to be elected in Parliament. This provision was in breach of the European Convention on Nationality, ratified by Moldova in 1999. Moreover, between 2002 and 2003 the Parliament had enacted a law allowing Moldovan to

[41] ECtHR, Apps. n° 27996/06, App n°34836/06, Sejdic and Finci v. Bosnia and Herzegovina, 22 December 2009.
[42] ECtHR, App. n° 7/08, Tanase v. Moldova, 27 April 2010.

have dual nationality, without specifying that this would have led to the restriction of their electoral rights. As a result, given that a large amount of Moldovans had acquired the Russian or the Romanian nationality by the end of 2003, a great number of people was affected by the reform of the electoral law. As to the court judgment, it firstly considered that Moldavia was the only Member State to let citizens hold dual nationality and prevent the same citizens from the chance to be elected in Parliament. Then, it analyzed the purpose of the new provision, which was to ensure the loyalty of Parliament to the nation. Leaving open the question whether the measure followed a legitimate aim, the Court found that other tools could have been used to guarantee the loyalty to the nation. Therefore, the measures imposed to reach this aim were not proportionate, leading to the violation of the Article on free elections. Moreover, Moldavia had reformed the electoral law just one year before the holding of general elections, increasing the general electoral instability.

2.3 Electoral systems

The *Code of good practice in electoral matters* by the Venice Commission sets forth the vital importance of the stability of the law defining the electoral system, the composition of the electoral commissions and the drawing of constituency boundaries. Only if stable, can the law guarantee the credibility and the fairness of the electoral process. For this reason, the electoral law should not be changed frequently and specifically not within the year before the elections. Furthermore, the electoral law should be defined in the Constitution or at a level higher than ordinary law, in order to avoid arbitrary changes and manipulation.[43]

Consistently with the opinions expressed during the preparatory works to the First Protocol, Article 3 does not mention any specific electoral system. As stated by Article 3, free elections must be held in conditions which ensure free

[43] European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters,* 30 October 2002 - p. 26 - http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx.

expression of the opinion of the people in the choice of the legislature. This means that citizens must be equally treated in the exercise of their political rights. They must have equal opportunity to express their political preference and have the same chance to influence the electoral results. However, this does not imply that each vote weights on the outcome of the elections in the same way. With no further hint relating to electoral systems in the First Protocol, the choice of the electoral system is ascribed to the wide margin of appreciation of each country. Article 3 does not obligate Member States to introduce a specific system, such as proportional representation or majority vote with one or two ballots. The two electoral systems pursue different political aims. On the one hand, the proportionate system can "photograph" the political spectrum and thereby ensure a major representativeness, at the expenses of efficiency; on the other hand, the majority vote can guarantee efficiency in policy making, but can scarcely represent all the political factions and stances of the society. Hence, as stated by the Court in *Mathieu-Mohin and Clerfayt v. Belgium*, "*any electoral system must be assessed in the 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"*. [44]

The European Court of Human has examined several cases concerning the electoral systems. Some of them concern the stability of the electoral law, in particular the alteration of the electoral legislative provisions shortly before the elections.

In the *Ekoglasnost v. Bulgaria*[45] judgment, the political party Ekoglasnost complained that it could not be registered for the elections held on the 25th June 2005 because of the recent amendments to the electoral law. Indeed, the requirement to submit three new documents in order to be registered for the

[44] ECtHR, App. n° 9267/81, Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987- p. 19.
[45] ECtHR, App. n°, 30386/05, Ekoglasnost v. Bulgaria, 6 November 2012.

general elections was introduced in April 2005 and it prevented ten parties and coalitions from participating in the elections. Consequently, the European Court found there had been a breach of the political clause.

In *Pektov and others v. Bulgaria*[46], the applicants run for the parliamentary elections held in 2001. The electoral law was submitted to change two and a half months before the elections. On the ground of the new provision, the candidates who had allegedly taken part in the former State security agencies could be struck out the electoral lists. This happened to the applicants ten days before the elections. Although the Supreme Administrative Court had declared this decision to be null and void, their names remained off the lists and the applicants could not take part in the elections. Hence, not only the conditions to take part in the elections were changed shortly before the poll, but also the authorities did not comply with judgment of the Supreme Administrative Court, arbitrarily depriving the procedural guarantees of the citizens of their effect. It followed a violation of Article 3 of the first Protocol.

The *Grosaru v. Romania*[47] case in 2010 showed the importance of a detailed and clear electoral law on the electoral process. The plaintiff run for the seat allocated to the Italian minority in Romania in the 2000 elections. Following the electoral law, the Central Electoral Bureau assigned the parliamentary seat to the organization of the applicant. However, the seat was won by another candidate of the same organization, who had obtained the majority of the ballot in a single constituency, at the expenses of the applicant, who had gathered the most votes nationally. The major issue in this case was the undefined and unclear provision of the electoral law, which did not establish how to distribute the seats within the winning organization representing a national minority. The electoral law did not specify if the seat was to be allocated to the candidate obtaining the most of the votes cast nationwide or in a single constituency. The lack of precision of the electoral law opened up a broad margin of discretion of the Central Election

[46] ECtHR, App. n° 77568/01, App. n° 178/02, App. n° 505/02, Petkov and others v. Bulgaria, 11 June 2009.

[47] ECtHR, App. n° 78039/01, Grosaru v. Romania, 2 March 2012.

Bureau, which preferred using a local representation method rather than a national representation approach. Furthermore, the Court found the lack of impartiality of the Central Electoral Bureau and of the validation commission of the House of Representatives, which rejected the complaints of the applicant. Given those elements, the European Court unanimously found a violation of Article 3.

Beyond the cases on the stability of the electoral law and process, the Court tried several cases concerning the electoral system.

In *Yumak and Sadak v. Turkey*[48], the Court had to judge the legitimacy of a threshold of 10% in order to be elected in the Parliament. The applicants, members of the Democratic People's Party, run for elections in a constituency covering a province. Their party obtained 45.95% of the ballot in that province, but only 6.5% of the vote nationwide. Since the electoral law had established that only the parties which overcame the national threshold of 10% could be elected in the Parliament, the applicants were not admitted to the legislative assembly. Therefore, they stated that such a high threshold impaired their political rights. The Court found that the electoral law followed the legitimate aim of avoiding fragmentation and providing political stability. Nevertheless, a comparative analysis showed that the threshold used by the Turkish electoral law was one of the highest of the Member States in the Council of Europe, which usually stood around 5%. Moreover, the high threshold encouraged the political parties to associate and use several stratagems that lowered the transparency of the electoral process. Despite this analysis, the Court found out that the low level of representation was due not only to electoral thresholds, but also to a context of both social and economic crisis that increased the rate of abstention. Furthermore, the Court noted that the Turkish Constitutional Court regularly controlled the effects of the electoral thresholds, in order to avoid them to thwart the exercise of political freedoms. For these reason, although the Council of

[48] ECtHR, App. n°10226/03, Yumak and Sadak v. Turkey, 8 July 2008.

Europe had recommended lowering the electoral threshold, the Court found Turkey had not violated Article 3 of the first Protocol in the case.

Another leading case was the *Mathieu-Mohin and Clerfayt v. Belgium*[49] judgment, dating back to 1987. The partition of the country in four language regions (Dutch, French, German-speaking communities and the bilingual region of Brussels-Capital) and in three "political" regions (Flemish, Walloon and Brussels-Capital regions) resulted into a complex and articulate electoral system. The language communities differ from the political regions as they lack powers and institutions. The national Parliament is composed by two houses, the Senate and the House of Representatives. The members of the Parliament are divided into a French and a Dutch language group. The first one includes the members elected in the constituencies of the French-speaking regions, while the members elected in the constituencies of the Dutch-speaking regions belong to the second group. The members elected in the district of Brussels may join either the first group or the second, depending on the language in which they take the oath. The 1980 Special Act defined the composition of the regional legislative bodies. Consequently, the members of the Dutch language group of the Parliament belonged to the Flemish Council, the members of the French language group belonged to the French Community Council and the Walloon Regional Council was made up of the members of the French language group directly elected in the provinces of Hainaut, Liège, Luxembourg, Namur and Nivelles.

Mrs. Mathieu-Mohin and Mr. Clerfayt were two French-speaking Belgian citizens, resident in the administrative district of Halle-Vilvoorde, within the Flemish Region, and elected in the electoral district of Brussels in the national Parliament, respectively in the Senate and in the House of Representatives. Since they had taken the oath in French, they could be members only of the French Community Council, but neither of the Flemish Council nor of the Walloon Regional Council. The applicants complained of a breach of Article 3, as the French-speaking voters in Halle-Vilvoorde could not appoint French-speaking

[49] ECtHR, App. n° 9267/81, Mathieu-Mohin and Clerfayt, 2 March 1987.

representatives in the Flemish Council, whereas Dutch-speaking voters were able to elect Dutch-speaking representatives in the Flemish Council. The European Court stated that such an electoral provision pursued the legitimate aim to soothe the language conflicts within the country. Hence, the Court found that the measures employed met the proportionality requirements. Indeed, the members of the Parliament resident in Halle-Vilvoorde and elected in the district of Brussels were free to take the oath either in French or in Dutch, consequently joining the French Community Council or the Flemish Council. On the same basis, the French-speaking voters of Halle-Vilvoorde had the same right to express their political preference as the Dutch-speaking electors did. Therefore, the Court established that the Belgian electoral process was consistent with article 3 of the first Protocol.

CHAPTER 3

MARGIN OF APPRECIATION RELATING TO ARTICLE 3 OF THE FIRST PROTOCOL: EVOLUTION AND TRENDS OF THE ECHR CASE-LAW

3.1 Margin of appreciation doctrine

3.1.1 Origins and development

The margin of appreciation may be described as " *the room of manoeuvre that the European Court of Human Rights is prepared to accord to national authorities in fulfilling their obligations under the European Convention on Human Rights"*[50]. Hence, Member States are vested with a certain degree of autonomy in the choice of the measures that can best ensure the respect of the rights of the Convention. The area of discretion is given both to the legislative and the judicial bodies, as the first has to prescribe the measures to employ, whereas the second has to interpret and apply the law thus established.

The margin of appreciation doctrine is mentioned neither in the Convention nor in the preparatory work, as it originated and developed over the years in the European Court's case-law.

The roots of the margin of appreciation doctrine are to be found in the case-law relating to Article 15 of the Convention, which sets forth the opportunity for a Member State to derogate from its obligations in case of war or other public emergency. Indeed, the margin of appreciation doctrine was originally drawn up specifically for this provision, as the Court recognized a certain autonomy to the State with regard to two aspects: verifying the existence

[50] D. Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, CELS Working Paper Series, February 2012 - p. 2- http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf.

of the state of war or other public emergency and choosing the measures derogating from its obligations.

The first time the Commission referred to the existence of a margin of appreciation related to Article 15 was on the occasion of the Greek appeal against the United Kingdom in 1956. Although the Court maintained its power of review and examination over the decisions of Member State in derogating from the Convention, it recognized that "*it was a matter of fact that the Government was in a better position than the Commission to know all relevant facts and to weigh in each case the different possible lines of action for the purpose of countering an existing threat to the life of the nation*." Consequently, "*the Commission was of the opinion that a certain margin of appreciation must be conceded to the Government*.[51]"

In its first judgment, *Lawless v. Ireland*[52], the majority of the Commission recognized to Ireland a certain degree of freedom in assessing the existence of a public emergency requiring special measures. Therefore, it was not necessary for the Court to verify in detail the effective existence of public emergency, as the sole presence of the IRA within the Irish territory was a threat the nation. The *Ireland v. the United Kingdom* [53] judgment confirmed the trend of the Commission in allowing a certain power of discretion to Member States. However, the Court declared that this power was not unlimited, but it had to be subject to the European supervision.

Although the margin of appreciation doctrine had originated in the "rather special matter"[54] consisting in the state of emergency set forth by Article 15, it then extended to other provisions of the Convention. By broadening the national power of discretion with regard to the fulfillment of obligation relating to other articles, the nature and the purpose of margin of appreciation doctrine changed.

[51] ECHR, App. n° 176/56, Greece v. the United Kingdom, 2 June 1956 – p. 326.
[52] ECtHR, App. n° 332/57, Lawless v. Ireland, 14 November 1960.
[53] ECtHR, App. n°5210/71, Ireland v. the United Kingdom, 18 January 1978.
[54] R. Sapienza, R. Sapienza, *Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo*, Rivista di diritto internazionale, 1991 – p. 585.

In the case "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*[55], 1967, the Court stated that there were different kinds of provision within the European Convention. On the one hand, there were such provisions clearly and specifically defining the obligations falling on Member States; on the other hand, there were some provisions that could not be univocally and generally interpreted. Consequently, in the first case it was possible for the Court to ascertain an eventual violation by verifying if the behavior of the State had been objectively consistent with the convention. By contrary, in the second case, the Court had to consider the margin of appreciation of the Member State and its power of review was limited to assess if the measures adopted fell inside that margin[56].

The *Handyside v. the United Kingdom*[57] case introduced another relevant aspect in the margin of appreciation doctrine. The problems concerning a univocal interpretation of the Convention did not originate only from the indefinite wording of some clauses, but also from the differences of legal systems and cultural backgrounds of Member States. As a consequence, the width of the margin of appreciation depended on the degree of consensus existing among Member States with regards to the interpretation of the clauses and to the measures needed to fulfill the obligations under the Convention. If there was an agreement among the Contracting Parties, it followed a common European definition. On the contrary, if the positions of Member States differed, a larger margin of appreciation had to be recognized.

Eventually, the case-law concerning Articles 8 (right to respect private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly and association) of the Convention had a great impact on the development of the margin of appreciation. Indeed, those

[55] ECtHR, App. n°1474/62, App. n°1677/62, App. n° 1691/62, App. n° 1769/63, App. n° 1994/63, App. n° 2126/64, Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, 9 February 1967.
[56] R. Sapienza, *Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo*, Rivista di diritto internazionale, 1991 – p. 587.
[57] ECtHR, App. n° 5493/72, Handyside v. the United Kingdom, 7 December 1976.

articles present the same structure: the first part verbalizes the right, whereas the second one states that the right itself may be limited by some measures imposed by law, necessary in a democratic society and pursuing one of the legitimate aims established by the article. Therefore, it is the structure of the article itself that recognizes a certain margin of discretion to Contracting Parties. Moreover, the Court used the second paragraph of those articles to identify the requirements of any restrictive measure imposed by Member States, thus defining the principles of the margin of appreciation doctrine.

3.1.2 Principles

Three principles define the margin of appreciation doctrine.

First and foremost, the margin of appreciation is subject to the principle of effective protection, which imposes a significant limit to the national discretionary area. Indeed, "*since the overriding function of the Convention is the effective protection of human rights rather than the enforcement of mutual obligations between States, its provisions should not be interpreted restrictively in deference to national sovereignty*"[58].

Secondly, the margin of appreciation is built upon the principle of subsidiarity and review. As the Court stated, "*the machinery of protection established by the Convention is subsidiary to the national systems safeguarding the human rights. The Convention leaves to the Contracting States, in the first place, the task of securing the rights and liberties it enshrine*"[59]. Indeed, since each state operates at the most immediate level, closest to the citizens, it is thought to be best informed about what measures should be enforced to guarantee the rights set forth by the Convention. For this reason, the principle of subsidiarity can be regarded as the core of the national margin of appreciation.

[58] S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights*, Human Rights files N° 17, 2000 - p. 15.
[59] ECtHR, App. n° 5493/72, Handyside v. the United Kingdom, 7 December 1976.

Consistently with the principle of subsidiarity, it is possible to resort to the Court only if all the domestic remedies have been exhausted.

If Member States can partially decide how to fulfill their obligations, it follows that the power of review of the Court is confined in verifying if the measures employed by the contracting Parties are consistent with the conditions of legitimacy, which set a limit to the margin of appreciation. Far from being a final court of appeal, the European Court has a supervisory function, as "*the domestic margin of appreciation goes hand in hand with a European supervision*."[60]

The third principle defining the margin of appreciation doctrine consists in the requirements of the measures interfering with the rights of the Convention. Indeed, not all interferences are allowed, as they have to abide by three conditions of legitimacy. They have to be prescribed by law, they must pursue a legitimate aim and they must be proportionate to the aim followed.[61]

As to the first condition, any measure limiting the rights of the Convention must be provided by law. The principle of legality "*holds that state action should be subject to effective formal legal constraints against the exercise of arbitrary executive or administrative powers*"[62]. This involves that those provisions limiting the human rights must include a control over the public authorities in charge of implementing the law, in order to prevent them from acting arbitrarily. Secondly, any individual subject to those provisions must have access to them, consistently with the principle of accessibility. Eventually, in line with the requirement of certainty, the law must be certain and precise, in order to allow citizens to adjust their behavior.

As to the second condition, the legal provisions establishing a limit to individuals' rights must pursue a legitimate aim. As Article 18 of the Convention

[60] ECtHR, App. n° 5493/72, Handyside v. the United Kingdom, 7 December 1976.
[61] De Sena, Bartole, Zagrebelsky, *Commentario Breve alla Convenzione Europea dei Diritti dell'Uomo*, CEDAM, 2012 – p. 32.
[62] S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights*, Human Rights files N° 17, 2000 - p. 15.

verbalizes, "*the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been proscribed*"[63]. In particular, Articles 8-11 list some aims which may be pursued in limiting those rights: public safety, protection of public order, health or morals, protection of the rights and freedoms of others and prevention of crime. As to the articles which do not prescribe any specific aim, it falls within the power of review of the Court to establish whether the measure in question pursues a legitimate aim or not.

The third condition to the national margin of appreciation is the proportionality of the measures adopted to the legitimate aim established by the law. It follows that a reasonable relation must exist between the goal and the nature of the restrictions. This requirement is not mentioned in the text of the Convention. Indeed, Articles 8 – 11 prescribe that a restrictive measure must be necessary in democratic societies. According to Rosario Sapienza, this requirement involves two steps. First, the measures concerned must be necessary; secondly, they must be acceptable in a democratic society. This criterion has then been interpreted by the Court in terms of a reasonable relation of proportionality between the aim pursued and the means used.[64]

3.2 Margin of appreciation relating to Article 3:development and current trends

The latitude of the margin of appreciation conceded to Member States depends on a case-by-case control including numerous factors. Indeed, when controlling if the measures used fall within the margin of appreciation, the Court has to bear in mind the specific right concerned, the nature of the measure and its effects, the existence of a certain agreement over both the right and the measures used to fulfill the obligations, the national legal framework and the political, historical and social background.

[63] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 18 - http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[64] R. Sapienza, *Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo*, Rivista di diritto internazionale, 1991 – p. 591-592.

Beyond the case-by-case control, the margin of appreciation depends also on the wording of the Articles. According to R. Sapienza[65], the sole verbalization of Article 3 of the First Protocol provides the Contracting Parties with a wide margin of appreciation because, unlike Articles 8-11, it does not expressly confer any individual right. Hence, the large margin of appreciation in the case-law of Article 3 relies on the lack of an explicit individual right to a specific electoral process.

The margin of appreciation of Contracting Parties lies in adopting measures that may limit the electoral rights both as they set forth specific requirements to their exercise and as they deprive someone of those rights following specific behaviors

In order to explain the unusual latitude of the margin of appreciation granted to the Member States in holding free elections, it may be useful firstly to compare Article 3 to Articles 8-11.

First of all, as to Article 3, the margin of appreciation does not concern the exercise of the right and its modalities, but the ownership of the right, namely those who are entitled to exercise their political rights and those who are not. It follows that the control over the proportionality of the restrictive measures aims at defining whether the distinction between those entitled to the political rights and those deprived of them is reasonably grounded. The limiting measures must not be arbitrary and discriminatory.

Secondly, the broad margin of appreciation depends also on the specific nature of Article 3, different from Articles 8-11. Indeed, this political clause has an hybrid nature, as it is both an individual and collective right. It does not only prescribe the individual right to vote and to stand for elections, but it also satisfies the public interest of the whole society, as it makes it possible to create a certain institutional and political framework. Unlike Articles 8-11, which are the typical negative freedoms of the Western liberalism, Article 3 imposes positive

[65] R. Sapienza, *Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo*, Rivista di diritto internazionale, 1991 – p. 597.

obligations on Member States in order to hold free elections. Since they do not just have to abstain, they have a wider margin of appreciation to decide how to comply with their obligations under Article 3 of the First Protocol. It follows that there is a less strict control over the margin of appreciation in Article 3 than in Articles 8-11 of the Convention.

Known that Article 3 implies a wide margin of appreciation, how broad it should be? In its first case, *Mathieu- Mohin and Clerfayt v. Belgium*, the Court stated that the measures adopted in the margin of appreciation *must not thwart "the free expression of the opinion of the people in the choice of the legislature".* In particular, they must not "*curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness*; they must "*imposed in pursuit of a legitimate aim*" and the *means employed are not disproportionate"* [66].

Although the principles defining the margin of appreciation in the scope of the electoral rights have the same nature as those firstly originated in the case-law of Articles 8-11 of the Convention, they are less strict. Hence, it is necessary to analyze how they have been specifically adjusted and applied in Article 3 case-law.

The preliminary step in the Court's assessment consists in controlling whether the limiting measures meet the principle of lawfulness. Consequently, they must be prescribed by legal provisions, showing the requisites of accessibility and predictability. On these conditions, citizens can model their conduct and decide how to behavior, in order to avoid any breach of the law.

Then, the Court must check whether the deprivation of certain categories of citizens of the right to vote or of the right to stand for elections pursues a legitimate aim. Unlike Articles 8-11 of the Convention, Article 3 does not include any legitimate aim. Consequently, a wide spectrum of legitimate aims can be chosen by Member States to justify the restrictive measures imposed. The Court has hardly ever found that the measures employed did not meet the

[66] ECtHR, App. n° 9267/81, Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987.

principle of legitimate aim. A recurring exception consists in the judgments concerning Italian applicants disenfranchised after bankruptcy. In these cases, the Court did not control the proportionality of the limiting measures because they did not follow a legitimate aim. The Court found that the deprivation of political rights after being charged of bankruptcy had "*no other purpose than to belittle persons who have been declared bankrupt, reprimanding them simply for having being declared insolvent, irrespective of whether they have committed an offence*"[67].

The case-law related to Article 3 shows that the trend of the Court in supervising the legitimate aims of the restrictive measures has not changed over the years. From the beginning onwards, almost all aims pursued in limiting in the forfeiture of the electoral rights have been considered consistent with the principle of legitimate aim.

Given that almost all purposes can fit the principle of legitimate aim, the major control of the European Court has been exercised with regard to the proportionality of the limiting measures adopted. Unlike Articles 8-11 of the Convention, this requisite is less severe than the condition of being necessary in a democratic society. In the case-law related to Article 3 it has to be understood more in terms of "not arbitrary". As explained by Bartole, De Sena and Zagrebelsky [68], the European control on proportionality should take in consideration three aspects. The first one is the suitability, namely whether the measure employed is suitable for the aims pursued. The second one is the necessity, namely whether there are other efficient measures that may be less restrictive and that can less weigh on the individual rights. The third one is strict proportionality, that is a balance between the opposed positions in conflict, for instance between the individual right and the public interest. Although the control over proportionality should consider these three aspects, the Court

[67] ECtHR, App. n° 77955/01, Campagnano v. Italy, 3 July 2006.
[68] De Sena, Bartole, Zagrebelsky, *Commentario Breve alla Convenzione Europea dei Diritti dell'Uomo*, CEDAM, 2012 – p. 845.

usually verifies solely if the limiting measures are suitable, without assessing neither the necessity nor the strict proportionality.

In order to understand if the Court is inclined to confer a margin of appreciation wider or narrower to Member States in holding free elections, it is necessary to focus on its control over the proportionality of the measures restricting the electoral rights. The width of the margin of appreciation depends on which aspect of the electoral rights is affected. First, it changes if the limiting measures are imposed on the right to vote rather than on the right to stand for elections. Moreover, a large amount of cases concerns the electoral systems, where the discretionary power of the Member States is very broad.

Up to now, Member States have had a wider autonomy in imposing restrictive requirements on the right to stand for elections than in limiting the right to vote, as the first one is more related to the collective and functional aspect of the hybrid nature of the political rights. Indeed, those individuals who run for elections are supposed to sit in the Parliament and represent the whole nation: it is therefore justifiable to establish more rigid requirements to the exercise of such a crucial function for the public interest of the whole society. Thus, "*while the test relating to the active aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provision disqualifying a person or a certain group of persons from the right to vote, the Court's test in relation to the passive aspect of the above provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate*"[69].

The requirements to exercise the electoral rights must not be considered proportionate or not in themselves, as they have to be contextualized in the political background and the historical development of each country. Although these requirements are quite similar from one country to another, there are not criteria valid in absolute.

[69] ECtHR, App. n° 58278/00, Zdanoka v. Latvia, 16 March 2006.

As said, the assessment of the Court over the proportionality of the requirements imposed on the exercise of the political rights is generally mild, getting stricter towards the requisites imposed on the right to vote. However, there are some cases in which the control on proportionality overcomes the sole suitability of the restrictive measures and it turns into a rigid assessment over strict proportionality. The case-law related to Article 3 shows that the Court tends to resort to a more rigid control when it has to judge cases concerning disenfranchisement and the forfeiture of the right to stand for elections because of a certain behavior. Indeed, the European Court has considered a large amount of cases concerning the deprivation of the political freedoms following criminal conviction for serious offence, bankruptcy and mental incapacity. In those judgments, a moderate control over the suitability of those measures is not sufficient. In order to justify such extreme measures, the Court has to resort to a case-by-case analysis over the nature and the seriousness of the behavior leading to the forfeiture of political freedoms. The measures withdrawing the electoral rights are provided by law, which categorizes those who may incur in the loss of political rights. However, individuals cannot lose their political freedoms just because they fit into the categories established by the law. Member States are supposed to consider the specific individual situation and the seriousness of the behavior of those who may be affected by the legal provision. In parallel, when it comes to judge such cases, the Court should not just control if the applicant fits the category provided by law and the suitability of the measure. Instead, it verifies the existence of a strict proportionality, that is to check if the measures adopted are proportionate to the particular circumstance. For instance, in the "*Hirst*[70]" case, the Court rejected a blanket withdrawal of political rights on the ground of the sole status of prisoner, without considering neither the seriousness of the offence nor the length of detention.

From the analysis of the European Court case-law it results that the margin of appreciation conceded to the Member States gets broader in two

[70] ECtHR, App. n° 74025/01, Hirst v. the United Kingdom, 6 October 2005.

circumstances, namely the choice of the electoral system and the measures adopted in the process of democratization and peace restoration in a post-war period.

As to the electoral system, Member States probably enjoy the widest margin of appreciation the Court can grant. As mentioned before, one of the factors weighing on the latitude of the margin of appreciation is the degree of consensus among Member States on the measures to employ to fulfill their commitment to the Convention. The electoral legislation of the Contracting Parties deeply differs one from the other, depending on the specific historical and political factors. Hence, since there is not a uniform and univocally accepted practice in this scope among the Member States, it follows that they are given a large discretionary power. The Court has often reminded that Article 3 of the First Protocol does not imply any specific electoral system, thus leaving Member States free to choose it, provided that it ensures the free expression of the opinion of the people. For instance, in *Yumak and Sadak v. Turkey*[71], although the threshold provided by the Turkish electoral law was one of the highest within the Council of Europe, the Court found no violation had occurred, as in that specific political context it did not prevent citizens from enjoying their rights and from electing their representatives. The function of the Court consists therefore in assessing if the electoral legislation is discriminatory, thus leading to an arbitrary exclusion of some categories of people from the exercise of their political rights or favoring a candidate or some political parties in the electoral competition.

Eventually, Member States, whose political and institutional framework results from a recent process of democratization and peace-rebuilding, enjoy a wide margin of appreciation. Usually in these cases, whilst considered as violating Article 3 in other countries, some features of the political and the electoral system are regarded as legitimate, because they are contextualized in a process that may need more rigid requirements to the electoral rights and other stricter limiting measures. Hence, the Court claimed that "*historical*

[71] ECtHR, App. n° 10226/03, Yumak and Sadak v. Turkey, 8 July 2008.

considerations could provide justification for restrictions on the rights intended to protect the integrity of the democratic process by, in that case, excluding individuals who had actively participated in attempts to overthrow the newly-established democratic regime[72]". However, as time goes by and the democratic regime has become stabile, the restrictive measures may be no more justifiable. Consequently, limiting measures can no more affect individuals solely because they belong to the categories of people considered dangerous for democracy and pluralism, thus deprived of their political rights. Hence, just like the limiting measures following specific conducts require a control over strict proportionality, a detailed case-by-case assessment is needed in order to control if the individual behavior has been actually dangerous for democracy through concrete actions. As an example, in *Zdanoka v. Latvia*[73], the applicant was disqualified from elective office because of her previous participation to the Communist Party of Latvia, declared unlawful and dissolved after being involved in a coup d'état. In this case the applicant had lost her right to be elected because she belonged to the category defined by the legislature, without considering her personal situation. However, the Court found there had not been a violation of Article 3, because those measures were necessary to strengthen the fragile and recent democratic regime. However, as the time passes, an individualized application of the limiting measures is needed: from a formal and general control over the belonging of an individual to the category affected by the law to a substantial and detailed assessment over the concrete conduct of the individual. Hence, in the 2008 *Adamsons v. Latvia*[74] case, occurred two years later than the *Zdanoka* judgment, the Court found Latvia had violated Article 3, because it had not considered the specific behavior of the applicant when applying the law, thus failing to provide sufficient reasons to justify the loss of the right to be elected.

Within this scope, the Court has to supervise the process of democratization and peace-rebuilding of those countries coming out of a period of war. It has to

[72] ECtHR, App. n° 7/08, Tanase v. Moldova, 27 April 2010.
[73] ECtHR, App. n° 58278/00, Zdanoka v. Latvia, 16 March 2006.
[74] ECtHR, App. n° 3669/03, Adamsons v. Latvia, 24 June 2008.

determine whether stricter measures are effectively required for the safeguard of the new-established democratic institutions or they fall outside the process of renewal, thus leading to anti-democratic effects.

CONCLUSIONS

The period after the Second World War was deeply marked by the need for democracy and the protection of human rights. The adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms emerged in this historical background, alongside the Universal Declaration of human Rights, adopted by the United Nations General Assembly on 10 December 1948.

It is a common opinion that an efficient and solid democratic regime can be ensured only if human rights are protected. Among those, a particular attention should be given to the political freedoms, which are at the core of democracy. However, we have seen how difficult it has been to reach a common agreement on the nature of the political clause. Indeed, unlike the traditional freedoms of Western liberalism, the obligation to hold free elections requires more than the refraining of the Member States from limiting individual rights. As said before, due to the hybrid nature of Article 3 of the First Protocol, the Contracting Parties are supposed to actively intervene, fulfilling those positive obligations necessary to ensure the holding of free elections.

Moreover, the Contracting Parties were afraid that such commitment could lead to an interference in their political and institutional sphere, at the heart of their *domestic jurisdiction*. By contrast, from the analysis of the case-law of the European Court since 1987, it emerges that such a risk of intrusion has been overestimated, as proved by the wide margin of appreciation enjoyed by Member States. The wording itself of Article 3 is not specific, thus providing Member States with a great freedom of interpretation. Furthermore, with regard to the jurisprudential system, the Court has always carried out a detailed case-by-case assessment, thus adjusting the conventional provision to the specific historical, political and social framework of the Member State under examination. As seen, the electoral rights are not absolute, as they meet implicit limitations, established by each Member State in order to ensure both the enjoyment of the individual

rights and the proper functioning of the institutional and political system. Hence, a large variety of national situations and systems has been considered consistent with the wording of Article 3.

However, the large margin of appreciation allowed to Member States does not invalidate the supervisory function of the Court, which plays a key role in spreading the value of democracy among Member States, especially through the protection of the right to free elections. Even though the margin of appreciation has sometimes been regarded as a tool used by the European Court to abdicate its functions, it seems not to have self-restricted itself and its function of assessment. On the contrary, the Court has always exercised the "European supervision", varying the width of the margin of appreciation conferred to Member States on the ground of the specific case under examination.

From the study of the European Court case-law, it results that the trend of the Court in giving a wider or narrower margin of appreciation is far from being uniform. Within the general trend of conferring a wide margin of appreciation, its latitude depends on which aspect of the electoral rights is affected by the limiting measures. As to the requisites for the exercise of the political rights, they are submitted to a mild control on their suitability to the aims followed. In particular, Member States are provided with a wider margin of appreciation concerning the right to stand for elections than the right to vote. As to other limiting measures, Member States enjoy a narrower margin of appreciation in depriving individuals of their political rights, as they must carry on an individualized application of legal provisions, meeting the requirement of strict proportionality between the aim pursued and the measure employed. Instead, when it comes to determine which electoral system best fits the society, the Contracting Parties are given the greatest freedom, just like the measures adopted during a process of democratization. In the latter, some measures may be stricter than those commonly accepted, as they are necessary to strengthen and protect the democratic institutions.

Despite the different width of the margin of appreciation granted to the Contracting Parties, a general limit is imposed to their discretionary power. Indeed, Member States cannot adopt restricting measures which would prevent people from enjoying their rights and from choosing their representatives. This is the very foundation of an efficient and pluralistic democratic regime, achieving the aim for which the Council of Europe was originally established in 1949.

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