The right to free elections

according to the

European Convention on Human Rights

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July 2003, Åbo, Finland

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1. Introduction

1.1 Presentation of the topic

The Council of Europe and the European Convention on Human Rights[1] came in to existence in the aftermath of the Second World War in an attempt to create a safeguard against the atrocities and mass violations of human rights that millions of people suffered, throughout the world, and particularly in Europe, during the preceding years. The Council of Europe was neither the first nor the only forum of international co-operation that emanated from the realisation that the traditional concept of state sovereignty had to be limited in order to ensure the protection of the physical and mental integrity of human beings, and that close international co-operation was necessary in the process. In 1948 the General Assembly of The United Nations adopted the Universal Declaration on Human Rights[2], and thereafter the Council of Europe drew up the Convention to create an enforceable instrument that would secure regional implementation of the principles of the Universal Declaration.

The Council of Europe has proved to be a significant initiative in relation to the protection of individual human rights in Europe, and has had a strong influence in the struggle for the protection of human rights in other parts of the world. The reasons are multiple, but especially the setting up of the European Commission of Human Rights[3] in 1954 and the European Court of Human Rights[4] in 1959, the possibility of individual petition and the binding nature of the practice deriving from the Strasbourg organs, merit mentioning.

The Preamble of the Convention creates a link between human rights and democracy, by affirming that fundamental freedoms are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend. The Court has also, in its practice, pointed out several times that

[1] (European) Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, adopted in Rome 4 November 1950, entered into force 3 September 1953, as amended by Protocols No. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. Hereinafter: the Convention.
[2] The Universal Declaration on Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, U.N. Doc A/810 at 71 (1948). Hereinafter: the Universal Declaration.
[3] Hereinafter: the Commission.
[4] Hereinafter: the Court.

the Convention was designed to maintain and promote the ideals and values of a democratic society.[5]

During the drafting of the Convention it was pointed out that albeit elections are not an absolute guarantee for democracy, free elections are nevertheless an important part of democracy.[6] Despite the fundamental role that elections play in a democracy, the right to free elections was not included in the Convention, but was amended to it in the First Protocol to the Convention in 1952.[7] The right to free elections as protected by the Convention lead a fairly quiet existence until 1987, where the Court assessed for the first time whether a Contracting State was complying with the requirements of the said right.[8] At approximately the same time, the fall of the Berlin Wall and the dissolution of the Soviet Union resulted in democratisation processes in countries that previously presented the largest ideological obstacle to the preceding initiatives to the recognition of democracy as the only legitimate form of rule. This evolution made it possible for various international organisations to take up the promotion of democracy and free elections, and democratisation initiatives have in the last 15 years played an increasingly larger role in the activities of for example the European Union, The Organisation for Security and Co-operation in Europe and the United Nations.

The right to free elections laid down in article 3 of the First Protocol[9] is a reflection of the general principle expressed by the words introducing the United Nation's Charter: "We the Peoples of the United Nations"[10], recognising that the sovereign authority of the states is rooted in the will of the people, and more specifically in article 21 in the Universal Declaration, where it, in paragraph 3, is stated that "The will of the people shall be the basis of the authority of government". Elections take place to ensure that the government of a State acknowledges that the power it exercises derives from the popular sovereignty inherent in the people, and that the ruled have a say in the appointment of the rulers. As most states have a system of representatives making the general decisions for the whole population, democracy demands that the people affected by the decisions taken, have influence as to the appointment of the decision-makers.

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[5] See for example ECHR *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgment of 7 December 1976, Series A, No. 23, para. 53 and ECHR *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 161, para. 87.
[6] *Travaux préparatoires*, vol. IV, p.24.
[7] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 009, adopted 20 March 1952, entered into force 18 May 1954. Hereinafter: the First Protocol.
[8] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 2 March 1987, Series A, No. 113.
[9] Hereinafter: P1-3.
[10] Charter of the United Nations, adopted in San Francisco 26 June 1945, entered into force 24 October 1945, 1 UNTS 16, the Preamble.

Elections concern us all. In the right to free elections we find the means, together with our fellow human beings, to point in the direction that we want our representatives to guide our society. As mentioned, elections does not guarantee that that the societies we live in function democratically in every respect, but they provide all people with the possibility to effectively show their disagreement with policies enforced by politicians that are not respecting the opinion of the people.

1.2 Research questions

In the 1987-judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court said that article P1-3, ensuring the right to free elections, enshrines a characteristic principle of democracy, and is accordingly of prime importance in the Convention system.[11] The article stipulates that:

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

This paper will focus on the mentioned right to free elections protected by article P1-3 of the Convention. What rights are contained in the right to free elections, that is: what are the state obligations according to article P1-3 and which demands can the people under the jurisdiction of the Contracting States present to their governments? What restrictions can the Contracting States make in these rights protected without violating the right to free elections? Which electoral systems can the Contracting States adopt with the acceptance of the Court? What constitutes "the legislature" within the meaning of article P1-3? And how do the States ensure that the elections reflect "the free expression of the opinion of the people" within the meaning of article P1-3?

[11] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 47.

1.3 Method and materials

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

With the Protocol No.11[12] to the Convention, the Convention's complaint system was reformed. From 1 November 1998 the Court took over the assessment of the admissibility of the complaints, a function that before this date was performed by the Commission. Another result of the reform was the creation of Committees consisting of 3 judges, Chambers with each 7 judges, and the Grand Chamber with 17 judges.[13] When a case is brought before the Court, a Committee makes an evaluation of the case, and it can decide, by unanimous vote, that an individual complaint, according to article 34 of Protocol No. 11 that determines the admissibility criteria for individual complaints, should be declared inadmissible or struck of the list, where such a decision can be taken without further examination. Such a decision is final.[14] If a Committee considers the complaint to pose pertinent questions in relation to the Convention, the complaint is transferred to a Chamber. The Chamber performs a second admissibility assessment, and the Chamber's decision in this respect is final.[15] That means that a complaint that reaches the admissibility assessment in a Chamber, has already been evaluated once in the system, and the complaint has, in the Committee, been considered to pose such questions that a further evaluation by a Chamber is deemed necessary. Therefore, it is relevant to take admissibility decisions into consideration when trying to uncover the content of a

[12] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS 155, adopted the 11 May 1994, entered into force 1 November 1998. Hereinafter: Protocol No. 11.
[13] Protocol No. 11, article 27 (1).
[14] Protocol No. 11, article 28.
[15] Protocol No. 11, article 29.

provision in the Convention, since the admissibility decisions will show which type of problematic is pertinent in relation to the provision in question. With the Committees initial review of the complaint, the practice from the Court can be considered to be clean of questions that the Court would not consider to be relevant in relation to the provision in question.

Furthermore, admissibility decisions give fairly good guidance as in relation to what will be the reasoning of the Court in future judgments and will in this paper also be used as such, to the extent the argumentation is convincing. With the reform of the complaint mechanism, the admissibility decisions can be regarded as having a greater authoritative value than the decisions passed by the Commission, since it today is the Court itself that carries out the evaluation on the admissibility. The analysis will take this into consideration when referring to the admissibility decisions. Accordingly, admissibility decisions will be used to negatively and positively describe the scope of the rights in article P1-3 and thus, when possible, to cautiously give an estimate of the outcome of future disputes before the Court.[16]

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

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

It should be mentioned that the *travaux préparatoires* in relation to international treaties do not have the same interpretative authority as is traditionally the norm in relation to national law. This stems from the fact that not all Contracting Parties have taken part in the drafting and have often not had the possibility to influence the discussions about the content of and the formulations in the treaty. Furthermore, the drafting of the Convention took place over

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

50 years ago and as the Convention has an in-build dynamic nature, it has to be interpreted in the light of the present day condition, in order to respond to the reality of European society at any given time.[17] In addition, the *travaux préparatoires* are not so elaborate that they give the answer to every question as to the content of the Convention. Nevertheless, the t*ravaux préparatoires* can give some guidance as to the ideas behind the Convention and can also explain why certain issues at the outset were handled the way they were, even though the practice from the Strasbourg institutions might have changed over time or even though certain institutions in the Contracting States seem hard to reconcile with a teleological interpretation of the provision, but nevertheless are accepted in practice by the Strasbourg institutions.

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

The Court's case-law reveals that not only issues with a direct connection to elections, are necessary to have in mind when dealing with the right to free elections. Chapter 7 – Free expression of the opinion of the people - points to selected issues that can have an impact on the overall political situation in a State and thereby a possible influence on the outcome of an election.

Election observation is today a central part of democratisation initiatives, most often taking place in cooperation between a given state and international organisations. The methodology used when evaluating the quality of the elections can be divided into 8 election elements, constituting the so-called *electoral cycle*. The methodology is used when the European Union is deploying its Election Missions[18] and provides the persons working in the field of election observation with a useful tool when assessing whether the

[17] ECHR *Tyrer v. United Kingdom*, Judgment of 25 April 1978, Series A, No. 26, para. 31; ECHR *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, No. 31, para. 58 and ECHR *Soering v. United Kingdom*, para. 102.
[18] *Handbook for the European Union Election Observation Missions*, 2002, p.12-15.

election observed reveals any problems in relation to the requirements in international human rights law. The election cycle is described extensively in *Election Elements: On the International Standards of Electoral Participation*[19], and consists of the following elements:

1. Periodic elections
2. Genuine elections
3. Stand for election
4. Universal suffrage
5. Right to vote
6. Equal suffrage
7. Secret vote
8. Free expression of the will of the electors.[20]

The elements can be regarded as describing the phases of an election, but as the elements contains the requirement of periodic elections, these elements constitutes also a cycle, that takes one turn each time an election takes place.

The election cycle is based article 25 of the International Covenant on Civil and Political Rights[21]. Article 25 of the ICCPR finds it's inspiration, as article P1-3, in the Universal Declaration's article 21, and therefore it is pertinent to ask the question whether it is possible to fit the content of article P1-3 into the election cycle as described above. If it is possible to see a direct correlation between the rights contained in article 25 of the ICCPR and the rights in article P1-3 of the Convention, the results from the Court concerning article P1-3 would then be able to give a direct added source of case-law to the election cycle and thereby be helpful in the democratisation work taking place in Europe and possibly also elsewhere in the world. A brief evaluation of this question will take place at the end of relevant chapters.

[19] Hinz and Suksi, 2002.
[20] Hinz and Suksi, 2002, p. 9 and 39.
[21] The International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS. 171.
Hereinafter: the ICCPR.

2. Free elections at reasonable intervals by secret ballot

2.1 Free elections

The term "free elections" relates, in addition to the behaviour of the State authorities on election day, to the overall political arrangements in the Contracting States. The Commission said in *the Greek case* in 1969 that the right to free elections "presupposes the existence of a representative legislature, elected at reasonable intervals as the basis of a democratic society."[22] Thereby, the Commission shows that article P1-3 not only contains the requirement that activities that take place on the day of an election are in compliance with the Convention. It also requires, that the exercise of political power is subject to a freely elected legislature.

Elsewhere in the Convention system, the provisions of the Convention demand that the rights listed in the Convention shall be "protected by law"[23], that certain activities have to be "lawful"[24] and that restrictions in the Convention rights shall be "in accordance with the law"[25] or "prescribed by law"[26]. van Dijk and van Hoof argue that one should assume that there is a connection between article P1-3 and the guarantees incorporated in other substantive provisions in the Convention where restrictions to be imposed on the enjoyment of rights and freedoms have to be "prescribed by law".[27] The Court's interpretation and understanding of the principle of legality and the Convention's requirements as to the existence of a basis in national law will then have an influence on what constitutes the "legislature" within the meaning of article P1-3. If the link between the term "law" and the term "legislature" is a direct link, then the national norm-issuing powers that have the ability to pass legislation that applies generally must as a consequence be responsible to the electorate in accordance with the requirements in article P1-3. Ovey and White argue along the same lines that article P1-3 underpins the whole structure of the Convention in requiring that laws should be made by a legislature responsible to the people.[28]

[22] EComHR *The Greek case*, Report of the European Commission on Human Rights, 5 November 1969, 12 YB 179.
[23] See for example Convention's article 2.
[24] See the Convention's article 5 (1).
[25] See for example the Convention's article 8 (2).
[26] Among others, the Convention's article 9 (2), article 10 (2) and article 11 (2).
[27] van Dijk and van Hoof, 1998, p. 665.
[28] Ovey and White, 2002, p. 331.

Indeed, without prejudging the existence or the exact nature of a link between the term "law" and the term "legislature", it is in any case fair to say that article P1-3 plays a central role in the Convention system. The Convention indeed reflects the principle that with the intervention of article P1-3 the populations, here meaning the persons affected, of the Contracting States have the possibility to influence, which restrictions in the rights protected in the Convention can be imposed by the legislature. However, it will be shown in Chapter 6 – In the choice of the legislature - that the link between the term "law" and the term the "legislature" is not as direct as expressed by Ovey and White.

In the Convention system free elections are regarded as a condition of the "effective political democracy" that is mentioned in the Convention's preamble.[29] Thereby article P1-3 establishes the link between fundamental rights and political democracy that the Preamble brings to mind, and a link can therefore also be drawn between the rights in article P1-3 and the concept of "a democratic society" that runs through the Convention. Accordingly, there is an inter-play between article P1-3 and other substantives rights in the Convention in which restrictions can only be made when such restrictions are "necessary in a democratic society"[30]. In Chapter 4 - Limitations to the rights in article P1-3 - some general observations in relation to restrictions in the rights in the Convention will be made, and different method used by the Court will be looked into.

In the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court held that article P1-3 reflects, by it's wording, that the right to free election rather implies an obligation for the Contracting States to adopt positive measures to "hold" elections, than it implies a right of non-interference, which is the case for the majority of the rights protected by the Convention.[31] Accordingly, article P1-3 contains an obligation for the Contracting States to set up a normative and administrative system that deals with the organisation of elections, the proper completion of the elections, and that ensures that the practical aspects of the elections are in order, for example the printing of ballot paper, the counting of the votes etc. In an admissibility decision from 1994 the Commission assessed a case dealing with the authorities' duty to provide the electors with blank ballot paper at parliamentary elections.[32] The applicant, a voter in the town of Chalkida in Greece, alleged that the omission of the

[29] See also ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 47, where the Court additionally holds that article P1-3 enshrines a characteristic principle of democracy.
[30] The Convention's articles 8 to 11.
[31] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 50.
[32] EComHR *I.Z. v. Greece*, Decision of 28 February 1994, appl.no. 18997/91, 76 DR 65.

electoral committees to provide voters with official blank ballot paper in the absence of pre-printed ballot papers for three independent candidates, had the effect that the election was held under conditions that contravened article P1-3. The Commission noted that the three independent candidates failed to supply the relevant authorities with printed ballot paper for distribution in the town of Chalkida, and that the three independent candidates only secured 9 votes out of 149,229 votes in the whole Euboea constituency, to which the town of Chalkida belonged. Approximately 24.000 persons voted in the election in the town of Chalkida and the quota necessary for securing a seat for a candidate in the constituency was 21,006 votes. The Commission regarded the applicant's allegation that the three independent candidates could have secured the electoral quota of 21,006 votes in the constituency as based on a mere theoretical possibility. Accordingly, the Commission found that the conduct of the authorities was not in contravention of the article and declared the application inadmissible.

That the design of the ballot paper falls within the margin of appreciation of the State in question is hardly surprising, and neither is it that failure to comply with the rules regulating the matter results in non-appearance on the ballot paper for the candidate and parties in question.[33]

The existence and the nature of an election administration have only been examined by the Strasbourg institutions in the 2002 case of *Podkolzina v. Latvia*[34] to a wider extent than expressed in the case of *Mathieu-Mohin and Clerfayt v. Belgium*. However, it should be noted that the Contracting States have widely different systems in this respect, and that it is generally accepted in relation to election observation that the election administration can be created within the judicial system, the executive branch or as an independent organ composed of representatives from the competing political parties.[35] The requirements in relation to EU election observation are that the election administration is independent, impartial, transparent and inclusive.[36] Such criteria cannot be read into article P1-3 on the basis of the case law. In the case of *Podkolzina v. Latvia* the Court said that even though the States have a wide margin of appreciation when establishing rules for eligibility, it is necessary, according to the principle of effective rights, that when candidates' eligibility is assessed, such assessment

[33] EComHR *Ceresa v. Italy*, Decision of 3 December 1997, appl.no. 32189/96. See also ECHR *Samuelewicz v. Poland*, Decision of 7 September 1999, appl.no. 31372/96, where the Court stated that the technical means chooses to employ to secure the proper conduct of the election, is a matter in which the Contracting States enjoy a wide margin of appreciation.
[34] ECHR *Podkolzina v. Latvia*, Judgment of 9 April 2002, appl.no. 46726/99.
[35] See for example *Handbook for European Union Election Observation Missions*, 2002, p. 63, and *OSCE Guidelines for reviewing a legal framework*, 2001, p. 11-12.
[36] *Handbook for European Union Election Observation Missions*, 2002, p.12.

must be carried out in accordance with rules that prevent arbitrary decisions. "In particular, such a finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority."[37]

This shows that the election administration body does not necessarily have to be without any affiliation to State authorities or political parties, as long as it gives the persons whose rights are determined by it the impression that it acts in an impartial manner, and its decisions are fair and objective and its competence and margin of discretion is laid down in national law provisions. The judgment will be further mentioned in Chapter 3 – The nature and the scope of the rights in article P1-3.

Free elections do not rule out the possibility for the Contracting States to decide that voting is, in addition to a right, also a duty. Compulsory voting, as for example exists in Belgium, is therefore not in contravention of article P1-3. In the 1972 case of *X v. Austria (22 March 1972)*[38], the Commission said, in connection with a duty to vote subject to pecuniary fine, that such an obligation to vote only has the aim and the effect that the elector turn up at the polling station on election day. It does not oblige the elector to go against his or her conscience and beliefs and chose one of the candidates on the official ballot paper. When the elector has the possibility to cast a blank vote or to spoil his or her vote, such compulsory voting is not in contravention of article P1-3.

2.2 Reasonable intervals

Concerning the periodicity of the elections, the provision states that the elections shall take place "at reasonable intervals". The Court has not pronounced itself on the issue, since only one case concerning the right to free elections has contained a complaint that the periodicity was not respected, and the Commission declared the application inadmissible due to its finding of the complaint manifestly ill-founded. The case was lodged against Germany in 1995 by Mr. Timke, a German citizen. Mr. Timke complained that a change of the

[37] ECHR *Podkolzina v. Latvia*, para. 35.
[38] EComHR *X v. Austria*, Decision of 22 March 1972, appl.no. 4982/71, 15 YB 468.

constitution in the Land Niedersachen prolonged the intervals between the parliamentary elections from 4 to 5 years, and that it constituted a breach of article P1-3. The Commission did not find that the prolongation was a violation of the right to free elections. It noted that the purpose of parliamentary elections is to ”ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people. [The] Parliament must in principle be in a position to develop and execute its legislative intentions - including longer term legislative plans. Too short an interval between elections may impede political planning for the implementation of the will of the electorate; too long an interval can lead to the [petrifaction] of political groupings in Parliament which may no longer bear any resemblance to the prevailing will of the electorate. In the light of these considerations, it cannot be said that a five years interval between elections does not ensure the free expression of the opinion of the people in the choice of the legislature.”[39] Therefore the Commission considered that intervals of five years between elections did not go beyond what can be considered as "reasonable" for the purposes of Article P1-3 in view of an effective political democracy.

The t*ravaux préparatoires* give little guidance as to the accepted length of the intervals, but merely states that the intervals must be neither too short nor too long and must correspond with what is customary in free states.[40]

However, it is clear from the wording of the provision, that elections shall be a reoccurring event and that the right to free elections contains a continuous right to participate in the appointment of the legislature. This is important since “the opinion of the people” is not of a static nature, as mentioned in the case of *Timke v. Germany*. It has the tendency to change over time, and therefore only a continuous obligation for the Contracting States to hold elections will accommodate the requirements of article P1-3. This demand for sequences of elections requires the establishment of proper procedures for calling the elections. Therefore, the *Greek case* can also be regarded as a violation of the requirement of periodicity, since the Greek Government after the *coup d’état* suspended the elections, without it being clear whether or when elections to the legislature would take place.[41]

[39] EComHR *Timke v. Germany*, Decision of 11 September 1995, appl.no. 27311/95, 82 DR 158.
[40] *Travaux préparatoires*, vol. III, p. 264 and vol. IV, p. 22.
[41] *The Greek case*, pp. 179-180.

2.3 Secret ballot

None of the judgments from the Court deal with the issue of secrecy of the vote. In the admissibility decision in the case of *Babenko v. Ukraine*[42] the Court recognised that the secrecy of the vote was not entirely assured, but still declared the application inadmissible. The rationale behind the decision can be seen as the Court having faith in the national court's evaluation of the case before it went to the Court. The national court did not find that a lack of isolated polling booths had an influence on the outcome of the election that would justify an annulment of the election. It emphasised in that connection that the officials in the polling stations lacking isolated polling booths, did not interfere in the process of the voting. Thus a balance was struck on the national level and at the Court between the effect of an annulment of the election and the effect that the inadequate number of polling booths, compared to the number of voters, had had on the outcome of the election.

2.4 The electoral cycle

The term "free elections" corresponds at what Suksi calls "genuine elections", and relates, as mentioned to the overall political environment. However, when Suksi refers to the overall political environment, adjacent "political" rights have to be taken into the consideration of whether the elections are genuine. These adjacent political rights are such as the right to freedom of expression and freedom of assembly and association, and secures that there is a possibility of political contestation, that the election guarantees that there is a real choice and that there is a free political debate. Such approach is not adopted at the Court even though the crucial importance of freedom of expression in relation to the right to free elections is acknowledged by the Court.[43] The case-law from the Commission states that free elections demands that the Contracting States shall have representative legislatures that are elected at reasonable intervals, as the basis of their regime, and the approach adopted by Suksi seems therefore to presuppose a broader understanding of the term than what is expected to be seen from the Court's case-law.

As to the requirements of "reasonable intervals" and "secret ballot", these seem to correspond quite well to the election elements 1) periodic elections and 7) secret vote.

[42] ECHR *Babenko v. Ukraine*, Decision of 4 May 1999, appl.no. 43476/98.
[43] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 54.

3. The nature and the scope of the rights in article P1-3

3.1 Individual and collective rights

The wording of article P1-3 differs from the formulation in many of the other rights in the Convention. While most of the other rights in the Convention say that "[e]veryone has the right to…"[44] or that "[n]o one shall be…"[45], and thus clearly describes individual rights of non-interference from State activities, article P1-3 stipulates that "[t]he High Contracting Parties undertake to hold…". This difference was reflected in the Commission's incorrect assumption that article P1-3 does not contain any individual rights, for example the individual's right to vote or to stand for election, but exclusively an "institutional" right to the holding of free elections.

The approach resulted in the Commission's declaration of inadmissibility in cases concerning individuals' complaints that they had been denied their individual right to vote. One of these cases from 1961 concerned a Belgian national who in 1946 was sentenced to three years of imprisonment for working for the occupying forces during World War II. His sentence entailed automatically the forfeiture of certain civil and political rights, among others the right to vote, the right to stand as a candidate and the right to be elected, for a period of 20 years. Even though the applicant did not explicitly complain about the suspension of these rights, the Commission made an *ex officio* statement concerning the suspension. The Commission noted that article P1-3 "does not guarantee the right to vote, to stand for election or to be elected,[…] but solely the right whereby Contracting States hold 'free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'"[46].

The Commission upheld this point of view until 1967 when the Commission changed its previous practice, allowing individuals to have the claim that their individual right to vote was infringed, assessed by the Strasbourg institutions. The first case concerned a German

[44] Among others article 5, article 8, article 9 and article 10.
[45] Among others article 3, article 4 and article 7.
[46] EComHR *X. v. Belgium*, Decision of 18 September 1961, appl.no. 1038/61, 4 YB 324. See also EComHR *X. et al. v. Belgium*, Decision of 30 May 1961, appl.no. 1065/61, 4 YB 260, concerning Belgian nationals' complaint relating to their forfeiture of the right to vote in Belgium, because of their long term residence in Belgian Congo.

citizen, who was, while detained in prison, prevented from voting in the Land elections of the Saar and in the German Federal elections. He complained that the prevention was in contravention of his individual right to vote and that it constituted a breach of article P1-3. The Commission acknowledged that article P1-3 implies the recognition of universal suffrage, and therefore a complaint concerning the individual right to vote gave rise to an examination by the Commission.[47] The Commission maintained this position when deciding on the admissibility of complaints concerning the nature of the rights contained in article P1-3, and rightly so. In the *travaux préparatoires* it is namely clear that there is no difference of principle or implementation between the rights guaranteed in article P1-3 and the other substantive rights in the Convention, regardless of the difference in the wording. The general opinion was that the difference merely stems from the fact that the rights in article P1-3 require a more solemn and more unequivocal commitment, since they are direct functions of government action.[48]

In the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court evaluated the issue for the first time, and it stated, in accordance with the t*ravaux préparatoires* and the Commission's practice from 1967 and onwards, that "the inter-State colouring of the wording of article 3 (P1-3) does not reflect any difference of substance from other substantive clauses in the Convention and Protocols". The difference in wording is owed to the fact that the primary obligation of article P1-3 is not an obligation of non-interference, but an obligation to adopt positive measures to hold democratic elections. The Court noted that the Commission had changed its interpretation of article P1-3 from the idea of an institutional right to the holding of free elections to the concept of "universal suffrage" and then, as a consequence, to the concept of substantive rights of participation – the "right to vote" and "the right to stand for election to the legislature" and that the Court approved of the approach.[49]

However, the fact that the provision contains individual rights did not prevent the Commission from upholding the opinion that article P1-3 also contains the so-called "institutional" right to the holding of elections. The institutional right can be seen as a right for the people as a group or an entity, given to them as recognition of popular sovereignty as the basis of a democratically governed state. This aspect of article P1-3 has therefore a collective nature and is owed to the population as a whole. As mentioned, The Commission

[47] EComHR *X. v. Federal Republic of Germany*, Decision of 6 October 1967, appl.no. 2728/66, 10 YB 336. The application was declared inadmissible for other reasons, see below in Chapter 4 - Limitations to the rights in article P1-3.
[48] *Travaux préparatoires*, vol. III, p. 16.
[49] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 51.

held in *the Greek case* that article P1-3 "presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society".[50] The Greek Parliament had been dissolved following the *coup d'état* in 1967, and there was therefore no elected legislative body in Greece. The result was that the Greek people were, in the Commission's view, prevented from expressing their political opinions by choosing a legislature in accordance with article P1-3, and therefore the Commission found that the Government of Greece was in violation of article P1-3.

The Committee of Experts announced during the drafting of the Convention, that it had abandoned the idea of granting the European Court competence to deal with cases of violation of article P1-3. Cases of infringement of this article could only be submitted to the Commission.[51] Here may be found a reason why the Commission hesitated to refer the individual cases to the Court until the Commission's change of practice in 1967. However, no reservations or separate declarations were made in the First Protocol, which means that all the clauses in the Convention are to be applied equally in relation to the rights in the First Protocol, also the provisions concerning the Commission's competence to deal with individual cases. Therefore, there were no justifications for the Commission's hesitation or previous practice.

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

3.2 The right to vote and the right to stand for election

As mentioned above, article P1-3 expresses, according to the practice laid down by the Court, the principle of universal suffrage, which implies the individual right to vote and the individual right to stand for election to the legislature.[52]

The principle of universal suffrage implies essentially that everyone should have the right to vote and stand for election in elections to the legislature, and the wording of article P1-3 does not specify any explicit limitation as to the *ratione personae* of the article. However, in the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court stated that "the phrase 'conditions

[50] *The Greek case*, p.179.
[51] *Travaux préparatoires*, vol. IV, p. 24.
[52] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 51.

which will ensure the free expression of the opinion of the people in the choice of the legislature' implies essentially – apart from the freedom of expression (already protected by Article 10 of the Convention) – the principle of equality of treatment of all *citizens* in the exercise of their right to vote and their right to stand for elections."[53] It is therefore clear that the right to free elections is a right given exclusively to citizens of the Contracting States. As article 16 concerning the Contracting States' possibility to limit the political activities of aliens also applies in relation to article P1-3, it seems to be in line with the Convention as a whole to limit the scope of article P1-3 to the nationals of the Contracting States. That only citizens are granted the right to participate in public life in a given state is also explicitly recognised in other human rights instruments, for example in article 25 of the ICCPR.[54] Therefore, it can be argued that it is generally accepted in International Human Rights law that the right to vote and the right to stand for election are rights limited to citizens.

This limitation finds its justification in the fact that when the Convention was drafted most of the Contracting States had election systems that only allowed their own nationals to take part in the elections. However, there seems to be a growing international trend towards a more inclusive democracy with a strong focus on participation by the persons affected by the impact of the political decisions made. Several Contracting States have granted minorities with special rights of participation, for example by reserved seats in the national parliament, in cases where minority groups are so small, that the possibility for the group to elect a representative in the national parliament is non-existing. Such representation has been considered to be of importance in relation to protecting the groups' cultural identity and prevent conflicts between the minority and the majority. The Commission has noted in a case from 1979 that attempts have also been made to create political rights for non-citizens in the country of their habitual origin.[55]

[53] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 54, emphasis added.
[54] As mentioned the ICCPR art. 25 and article P1-3 of the Convention was created after the model of the Universal Declaration's article 21, but while the latter gives the right to "everyone", the two former only grant the rights to "citizens".
[55] EComHR *X v. United Kingdom*, Decision of 28 February 1979, appl.no. 7730/76, 15 DR 137.

Member States of the Nordic Council have granted the citizens of the other Nordic Council countries the right to participate in elections to local authorities.[56] In addition, the Council of Europe has, albeit not within the framework of the Convention, been active in the recognition of the need for participation in public life of groups that traditionally have been barred from expressing their opinions in elections.[57] Furthermore, at least one Member States of the Council of Europe is envisaging in its constitution, the possibility of widening the group of persons with the right to participate in elections beyond the concept of citizens.[58]

It shall be noted, that some of the mentioned initiatives aim at participation on the local level, and that elections to political organs on the local level do not necessarily fall within the scope of article P1-3, as will be shown in Chapter 6 - In the choice of the legislature. However, for example the creation of the Convention on the Participation of Foreigners in Public Life at Local Level indicates that the individual's possibility to participate in the appointment of persons making decisions that affects the daily life of him of her is a pertinent issue within the Council of Europe.

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

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[56] See for example the Danish Electoral Law concerning elections to municipal councils, LBK No. 263 of the 18 April 2001, article 1, where it is stipulated "The right to vote in elections to the municipal councils (…) is granted to everyone, who on election day has reached the age of 18, who is a permanent resident of the municipality and who

1) is a Danish citizen
1) is a European Union citizen
1) is a Citizen of Iceland or Norway or
1) has been a permanent resident of the Kingdom without interruption 3 years prior to election day."

(author's own translation). The right to stand for election to the municipal councils is granted to the same categories in article 3.

[57] See for example the Council of Europe's Convention on the Participation of Foreigners in Public Life at Local Level, ETS 144, opened for signature 5 February 1992, entered into force 1 May 1997. Reflected in the aforementioned Danish Electoral Law concerning elections to municipal councils, article 1 (4).

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

1. Non-residents are less directly and continuously concerned with and less well informed on the day-to-day problems in the country
2. Candidates for the elections have less easy access to non-residents to present the different electoral issues so as to secure a free expression of opinion
3. Non-residents have less influence on the selection of the candidates and the formulation of their electoral programmes and
4. The correlation between the right to vote and the involvement in the acts of the bodies elected is less.

The same argumentation is found in the 1997 cases of *Luksch v. Germany*[59] and *Luksch v. Italy*[60] where the Commission declared inadmissible cases concerning a German citizen's right to vote in parliamentary elections in Italy and in Germany. The reasoning of the Commission was that the applicant was not a resident in Germany where he was a citizen, and not a citizen in Italy where he was a long term resident. Therefore, he was not able to take part in parliamentary elections, neither in Germany nor in Italy.

The reasoning for not letting non-residents vote in elections seems to be that they are not affected by the day-to-day policy- and decision-making in the State they are citizens in. On the other hand, it can be argued that (long term) residents, who are non-citizens are very much affected by the mentioned acts, and that it is in the interest of these categories of persons to take part in elections that will have an impact on many aspects of their everyday life. Nevertheless, as van Dijk and van Hoof point out,[61] it can hardly be expected that the Strasbourg case-law will force a breakthrough on this point. The Convention on the Participation of Foreigners in Public Life at Local Level has a rather low number of ratifications,[62] which indicates that there is a certain unwillingness in the Contracting States to enhance the rights of foreigners to participate in the political life. It also has to be taken into consideration that political rights and elections for the legislature touches upon sensitive issues such as State sovereignty, State security and the peoples right to self-determination, all issues, that are closely connected to the traditional Nation State and to the idea that the citizens constitute the group to which the State owes its obligations. In such matters the Court must be expected to be very reluctant and leave it to the Contracting States to expressly

[59] EComHR *Luksch v. Germany*, Decision of 21 May 1997, appl.no. 35385/97, 89 DR 175.
[60] EComHR *Luksch v. Italy*, Decision of 21 May 1997, appl.no. 27614/95, 89 DR 76.
[61] van Dijk and van Hoof, 1998, p.662.
[62] By 30 June 2003 only 9 Member States of the Council of Europe had signed the mentioned convention, namely Cyprus, the Czech Republic, Denmark, Finland, Italy, the Netherlands, Norway, Sweden and the United Kingdom.

include such obligations in the Convention, even though it would be possible, due to the dynamic nature of the Convention, to include such obligations in article P1-3.

In the case of *Matthews v. United Kingdom*[63] the Court stated in para. 64 of the judgment that it had found that the legislation which emanates from the European Community forms part of the legislation in Gibraltar and that the applicant was directly affected by it. Therefore the Court found by denying Mrs. Matthews the right to vote in the election to the European Parliament the United Kingdom infringed the very essence of article P1-3 and was therefore in breach of the provision. This, however, cannot be seen as the Court applying the criteria whether the applicant is affected by the legislation in relation to the applicability of article P1-3. The applicant was a citizen of the United Kingdom, and the Court's reference to her being affected relates to the United Kingdoms responsibility under article 1 of the Convention to secure the rights guaranteed by article P1-3 in Gibraltar, regardless of whether the elections were purely domestic or European, and thus a question of territorial jurisdiction and not whether Mrs. Matthews as a person was entitled to the protection by article P1-3.

Accordingly, the Court will not take into consideration whether a person is affected by the decisions of general application that is passed by the legislature, when determining who shall have the possibility to appoint the members of the legislature. The criteria to comply with, is whether a person is a *citizen* of the State in question.

It shall be noted that the rules concerning the right to vote and the criteria for eligibility to the European Parliament was left to the Member States national provisions governing elections according to the 1976 Act concerning the election of the representatives of the Assembly by direct universal suffrage article 7 (2).[64] So was the Member States' choice of electoral system. In 2000 The Charter of Fundamental Rights in the European Union[65] was adopted in which general rules on elections to the European Parliament are to be found. A uniform electoral code for elections to the European Parliament was adopted in 2002, with a Council Decision amending the 1976 act,[66] which means that there now are common rules for elections to the European Parliament and the Member States cannot use the rules in their provisions regulating their national elections when setting the rules for the elections to the European Parliament as hitherto. The right to participate in the elections to the European Parliaments,

[63] ECHR *Matthews v. United Kingdom*, Judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I.
[64] OJ 1976 L 278, p. 5-11, 08/10/1976.
[65] OJ 2000 C 364/18 p.1, 18/12/2000, See article 39.
[66] OJ 2002 L 283, p. 1-4, 21/10/2002.

however, is limited to citizens of the European Union, and does not give the right to third country citizens to participate in the elections.

Some of the cases presented to the Court and the Commission have, in addition to complaints that article P1-3 was not respected, contained complaints that the State in question violated the applicant's rights as protected by article P1-3 read together with article 14 of the Convention. As mentioned above Court has recognised that article P1-3 entails the principle of *equal treatment* of all citizens in the exercise of their right to vote and their right to stand for elections, and this leaves the impression that article P1-3 in itself contains a prohibition on discrimination. In its case-law the Court has stated that the elements of the case complained of in relation to article 14 read together with article P1-3, had already been assessed under article P1-3 taken in isolation.[67] This supports the suggestion that the protection in article 14, the prohibition on discrimination, is contained in article P1-3 itself, and thus a complaint concerning the rights within the scope of article P1-3 would not need a further evaluation under article 14 of the Convention.

3.3 The right to take office once elected

The formulation "the right to stand for election to the legislature" does not expressly guarantee that a candidate obtaining a sufficiently high number of votes to obtain a seat in the legislature will in reality be able to exercise his or her mandate. It is essential that the Contracting States, to ensure that the rights in the Convention are "not theoretical or illusory, but practical and effective"[68], set up legislation to guarantee that the substantial content of the right to stand for election *de facto* is assured. The effectiveness of democracy and political participation require that an elected candidate is able to exercise the power granted to him or her by the electorate. In the 1983 admissibility decision in the case of *M v. United Kingdom*[69], the applicant complained that he was not able to take his seat in the Northern Irish Assembly because he was already a member of the Irish Parliament. The Commission acknowledged that a candidate must also have the right to sit as a member of the legislature once the candidate has been elected by the people, and "[t]o take the opposite view would render the

[67] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 59 and ECHR *Podkolzina v. Latvia*, para. 42.
[68] The principle of effectiveness is used as a consideration in the Court's interpretation of the Convention. See for example ECHR *Artico v. Italy*, Judgment of 13 May 1980, Series A, No. 37, para. 33; ECHR *The United Communist Party of Turkey et al. v. Turkey*, Judgment of 30 January 1998, Reports and Judgments and Decisions 1998-I, para. 33; ECHR Podkolzina v. Latvia, para. 35.
[69] EComHR *M v. United Kingdom*, Decision of 7 March 1984, appl.no. 10316/83, 37 DR 129.

right to stand for election meaningless." However, the Commission declared the application inadmissible since the candidate's right to take office was not restricted in a way, which was inconsistent with the requirements under article P1-3.[70]

The Commission repeated this point of view in later admissibility decisions, but the Court did not have the opportunity to endorse the position until the case *Sadak et al. v. Turkey* in 2002. The case concerned 13 Turkish citizens complaining about their forfeiture of their mandate in the Turkish Parliament following the dissolution of "the Party for the Democracy" of which they were members. Since the Turkish Constitution stipulated that only such members of the dissolved party whose actions resulted in the dissolution forfeited their seats following a dissolution of the party, the Court found that Turkey violated the applicants' right guaranteed by article P1-3. In reaching the solution the Court recognised that article P1-3 guarantees the right to stand for election and, once elected, to exercise the mandate.[71]

3.4 Procedural guarantees

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

3.4.1 Article 6 (1)

In the admissibility decision in the 1996 case of *Ganchev v. Bulgaria*[72] the Commission held that article P1-3, along with the right to stand for election, contained the right to, once elected, sit as a Member of Parliament. However, the Commission refused to acknowledge that the Convention provides for any procedural rights as such in proceedings determining the eligibility for Parliament.

Ganchev v. Bulgaria concerned a Bulgarian citizen, who spent a number of years in the United States of America, where he became a citizen by naturalisation. The applicant returned to Bulgaria and registered for the first time as a candidate in the parliamentary elections in

[70] See further Chapter 4 – Limitations to the rights in article P1-3.
[71] ECHR *Sadak et al. v. Turkey*, Judgement of 11 June 2002, appl.no. 25144/94 et al.
[72] EComHR *Ganchev v. Bulgaria*, Decision of 25 November 1996, appl.no. 28858/95, 87 DR 130.

1991. The Bulgarian Constitution stipulates that only Bulgarian citizens without a second citizenship can stand for elections. To be able to take seat in the Parliament the applicant gave up his United State citizenship. The dispute concerned the time of his renouncement of the citizenship, because the exclusive Bulgarian citizenship had to be a reality on the date of the candidate's registration on the electoral list. The Constitutional Court of Bulgaria terminated the applicant's term of office as a member of the Parliament, as a consequence of it's finding that the applicant had still been a United States citizen at the time of his registration. The applicant complained that the Bulgarian authorities, when examining whether he had been eligible to stand for election as a member of Parliament, were partial and that the termination of his term of office was politically motivated. The Commission said in accordance with its own practice that article P1-3 does contain a right to take office, once elected. However, the Commission noted, that "the Convention does not provide for procedural guarantees, as such, in proceedings determining the eligibility for Parliament", while referring to the case of *Habsburg-Lothringen v. Austria*.[73]

The 1989 case of *Habsburg-Lothringen v. Austria* concerned, among other things, the fact that no court in Austria had competence to deal with the two applicants' complaint regarding the prohibition on the family of Habsburg-Lothringen to run for the Office of Federal President of Austria. The Commission assessed whether procedural aspects of the disputes concerning rights enshrined in article P1-3 were protected by the Convention, and did so under article 6 (1) of the Convention. Article 6 (1) gives residents in the Contracting States the right to a fair trial and stipulates *inter alia* that

> "In determination of his *civil rights* and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by and independent and impartial tribunal established by law. [….]."[74]

The Commission held that unless the dispute concerned a "civil right", article 6 (1) would not be applicable. In the evaluation whether the right to stand for election is a civil right, the Commission outlined the conditions for article 6 (1) to be applicable. Three grounds have to be satisfied: There must be, at least on arguable grounds, a right in issue; the right in issue must be the object of a "contestation" (dispute); and the right must be civil. The Commission

[73] EComHR *Habsburg-Lothringen v. Austria*, Desicion of 14 December 1989, appl.no. 15344/89, 64 DR 210.
[74] Emphasis added.

did not regard the prohibition to run for the Office of Federal President as a civil right, and therefore came to the conclusion that article 6 (1) is not applicable in relation to rights protected by article P1-3.[75]

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

The Court evaluated the question in its judgment in the 1997 case of *Pierre-Bloch v. France*[76]. The case of *Pierre-Bloch v. France* concerned a French citizen who stood for general elections and was elected Member of the National Assembly in 1993. According to the French Election Code the election campaign expenditure of parliamentary candidates must not exceed a statutory ceiling. The applicant spent a larger amount than permitted and he thus forfeited his right to take office and his right to stand for election for a year. He complained that the proceedings leading to the forfeiture of his rights did not fulfil the criteria laid down in article 6 (1). The Court therefore had to assess whether the rights in question (which fell under the scope of article P1-3) were "civil" or if the forfeiture of the rights amounted to "criminal charges".

Concerning the character of a civil right, the Court observed that the right to take office, once elected, and the right to stand as a candidate are "political rights" and not civil ones within the meaning of article 6 (1), and therefore disputes relating to these rights lie outside the scope of that provision. The Court came to this conclusion despite the fact that also the applicant's pecuniary interests were at stake in the proceeding, since the decision had the effect that he could not get a reimbursement of his campaign expenses. The Court held that such an economic aspect did not make the proceedings concern a "civil" obligation, since proceedings do not become civil merely because they also raise an economic issue.[77]

To the question whether this constituted a "criminal charge" the Court spelled out three criteria to be considered: the legal classification of the offence in national law; the very nature of the offence; and the nature and degree of severity of the penalty. In relation to the latter the

[75] The view was already expressed by the Commission in the partial admissibility decision in the case of EComHR *Desmeules v. France*, Decision of 13 April 1989, appl.no. 12897/87.
[76] ECHR *Pierre-Bloch v. France*, Judgment of 21 October 1997, Reports of Judgments and Decisions 1997-VI.
[77] ECHR *Pierre-Bloch v. France*, para. 49-51.

Court said that a disqualification from standing for election has the purpose of compelling candidates to respect the maximum limit of campaign expenditures. The penalty is thus directly one of the measures designed to ensure the proper conduct of parliamentary elections, so that, by virtue of its purpose, it lies outside the "criminal" sphere.

Concerning the obligation to pay the Treasury a sum equal to the amount of the excess the Court held that this penalty was only regarded as an administrative penalty, and was therefore not criminal in nature. The Court concluded that it also forms part of the measures designed to ensure the proper conduct of parliamentary elections and, in particular, equality of the candidates. Furthermore, no entry is made in the criminal record, the rule that consecutive sentences are not imposed in respect of multiple offences does not apply, and imprisonment is not available to sanction failure to pay. The Court therefore held in conclusion that the disputes that related to rights protected by article P1-3 could neither be civil nor criminal in nature, and accordingly, the proceedings in which determination of the rights protected in article P1-3 take place, does not fall within the ambit of article 6 (1) of the Convention. In addition the Court held that since the dispute did not fall within the ambit of article 6 (1), article 13 of the Convention – the right to an effective remedy – was not applicable either. Again, the Court does not put forward an in-depth explanation as to the reason for the distinction between civil and political rights.

Judge De Meyer says in his dissenting opinion in the *Pierre-Bloch case* that it is very much regretted that the Court should have felt it necessary to withdraw nervously into its cocoon of a strict, fainthearted interpretation of article 6 (1). He argues convincingly that political rights are civil rights par excellence and that these rights should not be kept out of the scope of article 6 (1).[78]

The Convention seeks to protect the individual from arbitrary interferences from state action. Such a protection was, and still is, deemed necessary, since individuals, and in particular those who are in opposition to the rulers, are vulnerable while facing the State apparatus, due to the States superiority of resources of for example financial and military power. Therefore, the rulers have the potential power to prevent the opposition from taking power and this poses a threat to the "free expression of the opinion of the people", since the opinion of the people is likely to change over time and to require the coming to power of a new government that bases its legitimacy on the elected legislature. Representative democracy entails the right to

[78] Dissenting opinion of Judge De Meyer, the case of *Pierre-Bloch v. France.*

free elections and the criteria for eligibility to the elections has to fulfil certain requirements (as will be shown in Chapter 4 – Limitations to the rights in article P1-3). However, if the procedure used when assessing whether these requirements are fulfilled allows for arbitrary decisions that aim to keep the existing government in power, the protection in article P1-3 is jeopardised.

The distinction that the Court draws between civil and political rights does not have a firm basis in the *travaux préparatoires*.[79] It can also be argued that there are considerable political aspects in other of the substantive rights in the Convention. Some of them were even created with the aim of protecting the political debate and political opposition. A closer look at the Convention and at the case-law deriving from the Convention organs, reveals that the political aspects of freedom of expression, the freedom of political debate, are at the very core of the concept of a democratic society,[80] without excluding the holders of these rights from the guarantees in article 6 (1). In the academic literature authors use the term "political rights" for describing multiple rights without speaking of any clear distinction between civil and political rights.[81] Also in the Contracting States national systems, the rights falling within the scope of article P1-3 are sometimes categorised as civil.[82]

The Court has continuously, since its first judgment on the concept of "civil rights and obligations", the case of *Ringeisen v. Austria*[83], adopted a liberal interpretation of the concept, and an increasing number of disputes have to meet the requirements of "a fair trial". Despite this, there is still considerable uncertainty in relation to the scope of article 6 (1). Jacobs and White draw from an analysis of the case-law the conclusion that private disputes between two individuals fall within the scope of article 6 (1), and sometimes also disputes between the State and the individual are categorised as "civil". As to the determination of whether a dispute in the latter category falls within the scope of article 6 (1) Jacob and White state that "[t]he key distinction is *perhaps* that where a decision of an essentially administrative character affects a legal relationship between private individuals, civil rights and obligations

[79] See van Dijk and van Hoof, 1998, pp. 392-393.
[80] See for example ECHR *Oberschlick v. Austria* no. 1, Judgment of 23 May 1991, Series A, No. 204 and EHCR *Schwabe v. Austria*, Judgment of 28 August 1992, Series A, No. 242-B concerning the media. See also ECHR *Incal v. Turkey*, Judgment of 9 June 1998, Reports of Judgments and Decisions 1998 IV, para. 46, where the Court states, that "freedom of expression is particularly important for political parties and their active members."
[81] Hinz and Suksi, 2002, p. 3.
[82] See for example ECHR *Labita v. Italy*, Judgment of 6 April 2000, Reports of Judgments and Decisions 2000-IV, para. 77. Here the term "civil rights" is used in connection with the rights falling within the scope of article P1-3, which seems to stem from the Italian term used in connection with the said rights.
[83] ECHR *Ringeisen v. Austria*, Judgment of 16 July 1971, Series A, No. 13.

are at issue and article 6 (1) will apply."[84] van Dijk and van Hoof propose that the Court, in order to end legal uncertainty and maximise effective legal protection, recognises that article 6 (1) is applicable to all cases in which a determination by a public authority of the legal position of a private party is at stake, regardless of whether the rights involved are of a private character.[85] Also Harris, O'Boyle and Warbrick discuss the desirability of a revision of the Court's approach.[86]

Most of the Contracting States have systems where the determination of whether a person meets the criteria of eligibility or fulfils the requirement for obtaining the right to vote is subject to judicial review. Once the determination of the rights in question is assessed within the judiciary it seems illogical that the proceedings in such cases do not have to meet the requirements of a fair trial within the meaning of article 6 (1). Certainly, the fact that the exercise of political rights can as an end result lead to access to Parliament and the coming into power of groups of candidates that will have a direct influence on the task of administering the sovereignty of the State, plays a significant role for the keeping out of political rights from the scope of article 6 (1). Nevertheless, the importance of independent review of the authorities determining the right protected by the Convention seems crucial in particular in relation to the rights in article P1-3.

Regardless how advantageous van Dijk and van Hoof proposal seems, it is rather clear from the *Pierre-Bloch v. France* judgment that the Court will not adopt such a position. The Court has since the *Pierre-Bloch* judgment confirmed its position in admissibility decisions in the cases of *Cheminade v. France*[87] and *Cherepkov v. Russia*[88].

3.4.2 Article P1-3

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

[84] Jacobs and White, 1996, p. 130. Emphasis added.
[85] Van Dijk and Van Hoof, 1998, p. 406.
[86] Harris, O'Boyle and Warbrick, 1995, pp. 174 - 186.
[87] ECHR *Cheminade v. France*, Decision of 26 January 1999, Reports of Judgments and Decisions 1999-II.
[88] ECHR *Cherepkov v. Russia*, Decision of 25 January 2000, Reports of Judgments and Decisions 2000-I.

In relation to article 8 of the Convention, the right to respect for private and family life, home and correspondence, some procedural rights have been read into the article, in circumstances where certain requirements were not to be found in article 6 (1), for example hearing of the child in cases concerning child custody.[89] The Court has read these procedural rights into article 8, even though cases concerning custody of children fall within the scope of article 6 (1). When widening the scope of article 8, the Court has argued that the importance of the subject matter, namely, the relations between parent and child, was taken into consideration.[90] Since article P1-3 "enshrines a characteristic principle of democracy" and "is accordingly of prime importance in the Convention system"[91] it should be possible to, since such method of widening the scope is possible in cases concerning article 8, read certain procedural rights into article P1-3.

The 2002 case of *Podkolzina v. Latvia*[92] gave the Court the possibility to pronounce itself on the issue. The case concerned a Latvian citizen who was a member of the Russian-speaking minority in Latvia. She was included on the list of candidates in the elections to the Latvian Parliament in 1998 and provided in that connection the Latvian authorities with a certificate stating that she had sufficient knowledge of the official language Latvian. In spite of the certificate, an examiner employed by the State Language Inspectorate came without any previous notice, to the applicant's workplace to examine her orally to assess her knowledge of Latvian. During their conversation the examiner asked about, among other questions, the applicant's reasons for supporting the party that she was a candidate for, rather than other parties. Following this conversation the examiner evaluated that the applicant did not possess sufficient language skills in Latvian to be included on the electoral lists. Twelve other candidates who possessed the same certificate as the applicant were not required to take an examination.

In the judgment the Court recognised that the States have a wide margin of appreciation in relation to their eligibility conditions, and that the language requirements were pursuing a legitimate aim. However, the Court went further and asked the question whether the removal of the applicant from the electoral list was proportionate to the aim pursued. The Court

[89] ECHR *W v. United Kingdom*, Judgment of 8 July 1987, Series A, No. 121; ECHR *Elsholz v. Germany*, Judgment of 13 July 2000, Reports of Judgments and Decisions, 2000-VIII; ECHR *Sahin v. Germany*, Judgment of 11 October 2001, appl.no. 30953/96; ECHR *Sommerfeld v. Germany*, Judgment of 11 October 2001, appl.no. 31871/96.
[90] ECHR *Elsholz v. Germany*, para. 52.
[91] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 47.
[92] Mentioned in Chapter 2 – Free elections at reasonable intervals by secret ballot.

reiterated that the object and purpose of the Convention requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective. The right to stand as a candidate in an election, which is guaranteed by article P1-3 and is inherent in the concept of a truly democratic regime, would only be illusory if one could arbitrarily be deprived of it at any moment. The principle that rights must be effective requires that the decision, in which the authorities find that the candidate does not fulfil the eligibility criteria, complies with a number of conditions framed to prevent arbitrary decisions. In particular, such a decision or finding must be reached by "a body, which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority."[93]

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

Concerning the Riga Regional Court's assessment of the applicants appeal of the result of the examination, the Regional court accepted, as the sole basis for its judgment, the certificate, which was based on the examination that was not complying with the criteria in the code and article P1-3. The Court considered that in admitting as irrefutable evidence the results of an examination, where the procedure had lacked fundamental guarantees of fairness, the

[93] ECHR *Podkolzina v. Latvia*, para. 35.

Regional Court did not provide the applicant with a remedy for the violation committed. This part of the Court's evaluation was also considered within the scope of article P1-3.

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

However, it should be mentioned, that the 1987 case of *W v. United Kingdom* dates back a good 16 years, and since that judgment, the Grand Chamber of the Court has not approved the procedural rights read into neither article 8 nor article P1-3. The case of *Podkolzina v. Latvia* was not appealed to the Grand Chamber and the cases of *Sahin v. Germany* and *Sommerfeld v. Germany* are now pending before the Grand Chamber.[94] Therefore, it could be argued that the final judgments in these cases should be awaited, before anything definitive can be said about the Courts exact position in this matter. However, the Court's argumentation in the mentioned cases is convincing seen in the light of the Convention's object and purpose held together with the principle of effective interpretation, and the results of the cases are a desirable innovation in the Court's case-law.

[94] Information obtained at the website of the European Court of Human Rights, Cases pending before a Grand Chamber, http://www.echr.coe.int/BilingualDocuments/PendCase.htm, visited 5 July 2003, last updated 13 June 2003.

3.5 The electoral cycle

In the present chapter it has been established that the Court has recognised that article P1-3 expresses the principle of universal suffrage and thereby the right to vote and the right to stand for election, and thus the elements 3) the right to stand for election, 4) universal suffrage and 5) the right to vote, in the electoral cycle have been identified. The Court has further stated that article P1-3 entails the right to, once elected take office. In the election element no. 8 – Free expression of the will of the people implies that the seats in the parliament are changed, and this corresponds well to the right to take office once elected.

The electoral cycle also contains the right to equal suffrage, but the Court has not expressed any opinion on the issue so far. However, the Court has said that article P1-3 entails the principle of equal treatment of all citizens in the exercise of their right to vote and their right to stand for elections and thereby a prohibition of discrimination. This issue will be further looked into in Chapter 5 – The electoral system.

4. Limitations to the rights in article P1-3

In article 1 of the Convention it is said that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[95] However, it has already been shown that according to the Court's judgment in the case of *Mathieu-Mohin and Clerfayt v. Belgium* the rights in article P1-3 are not rights guaranteed to every person on the territory of a Contracting State. The protection in article P1-3 is limited to the State's citizens. In the same case the Court also stated that the rights protected by article P1-3 are not absolute and that limitations in the rights in the article are permitted.[96] Therefore, the question is to what extent the Contracting States can limit the rights in article P1-3 without infringing the right to free elections. Before looking further at the limitations to the rights enshrined in article P1-3, some general remarks concerning limitations to the rights in the Convention will be made.

4.1 General observations

Because the Convention is an international treaty, the interpretation of the Convention must follow the international rules of treaty interpretation according to the Vienna Convention on the Law of Treaties[97]. Articles 31 to 33 of the Vienna Convention set out the rules for interpretation of treaties. Article 31 stipulates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The Convention was created to prevent abuses of the individual's fundamental rights. The object and purpose of the Convention have in the Court's case-law been identified as "the protection of individual human rights"[98] and the maintenance and promotion of "the ideals and values of a democratic society."[99] The ideas and values of a democratic society presuppose the recognition of the crucial importance of the Rule of Law in the legal systems of the Contracting States, ensuring legal certainty, and the principle of equal treatment in

[95] As mentioned in Chapter 3 – The nature and the scope of the rights in article P1-3 – article 1 of the Convention also applies to the rights contained in the First Protocol.
[96] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52.
[97] The Vienna Convention on the Law of Treaties, adopted in Vienna 22 May 1969, entered into force 27 January 1980, 1155 UNTS 331. Hereinafter: the Vienna Convention.
[98] ECHR *Soering v. United Kingdom*, para. 87.
[99] ECHR *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, para. 53.

equal situations in the State authorities' application of the general norms setting the rules of society.

The Convention is a law-making treaty and not a contract treaty. Therefore the consideration that has to be made in relation to the interpretation of the Convention is not that it "creates reciprocal engagements between contracting states", but that it imposes "objective obligations" upon the Contracting States for the protection of human rights in Europe.[100] If these obligations are to be foreseeable for the Contracting States and for the individuals who are granted the protection, the Court's application of the Convention has to be in accordance with the above-mentioned principles. Therefore, it can be argued that when applying the Convention, the Court has to construe the possibility for the Contracting States to make restrictions in the individual rights in a narrow or strict fashion, in order to avoid that the Contracting States make the protection, that the Convention seeks to promote, illusory. The objective interpretation of the Convention entails that only insofar as restrictions are imposed in pursuit of an aim expressly spelled out in the Convention the States are permitted to impose them

This poses a problem in relation to article P1-3 since no permitted restrictions are expressly mentioned in the provision, while it at the same time is clear from the wording that the States have the possibility to limit the rights protected in the article. The Court has dealt with the issue of limitations by granting the Contracting States two possibilities to restrict the rights in article P1-3. The first possibility is for the Contracting States to impose the "conditions" expressly mentioned in the article. The other possibility is to restrict the rights by implied limitation. Some general remarks on the doctrine on implied limitations will be made here.[101]

The Court has, in its early case-law, permitted the Contracting States to restrict the rights of specific groups to a larger extent than allowed for by the wording of the Convention, by applying the doctrine on implied limitations. The doctrine on implied limitations entails that specific groups have to tolerate more discomfort imposed by the state than other residents,

[100] ECHR *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, para. 239. See also the *Pfunders case*, EComHR *Austria v. Italy*, Decision of 11 January 1961, appl.no. 788/60, 4 YB 116 (138), where the Commission said that it is clear that "the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute…"

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

due to the special position of the group members. Such groups that have been identified are for example persons in detention[102] and military personnel[103]. In the 1975 case of *Golder v. United Kingdom* concerning a prisoner's right to access to a court protected by article 6, the Court said that "the right to access to a court is not absolute. As this is a right which the Convention sets forth (…) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication."[104] Similarly the Court said in relation to military personnel in the 1976 case of *Engel et al v. Netherlands* concerning rights protected by article 5 and 6, that "when interpreting and applying the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of the individual members of the armed forces",[105] and that a system of military discipline implies by its very nature "the possibility of placing on certain of the rights and freedoms of the members of [the] armed forces limitations incapable of being imposed on civilians."[106]

The cases mentioned concern rights that are contained in provisions that do not expressly define to what extent limitations in the rights are acceptable. But even in cases concerning the articles 8 to 11 of the Convention, where the restrictions permitted are expressly mentioned in paragraph 2 in the articles, the Court has used the doctrine on implied limitations to further limit individual rights in situations where such limitations are seen to be a natural consequence of the specific position of a certain individual. In the 1997 case of *Kalac v. Turkey* the Court allowed the Turkish Government to restrict the applicant's right to freedom of thought, conscience and religion as protected in article 9 of the Convention without it amounting to an interference, since Mr. Kalac, in choosing to pursue a military career, "was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians."[107] This shows that the Court is willing to accept that the Contracting States make further limitations in the rights spelled out in the Convention, without it being clear to what extent such limitations are permitted. The unfortunate effect of the use of the doctrine on implied limitation is that the Court does not arrive at an evaluation of whether the restriction the State in question makes in the rights of

[102] ECHR *Golder v. United Kingdom*. Judgment of 21 February 1975, Series A, No. 18.
[103] ECHR *Engels et al. v. Netherlands*, Judgment of 8 June 1976, Series A, No. 22.
[104] ECHR *Golder v. United Kingdom*, para. 38. The same point of view was recently expressed in the case of ECHR *Papon v. France*, Judgment of 25 July 2002, appl.no. 54210/00, para. 90.
[105] ECHR *Engel et al. v. Netherlands*, para. 54.
[106] ECHR *Engel et al. v. Netherlands*, para. 57
[107] ECHR *Kalac v. Turkey*, Judgment of 23 June 1997, appl.no. 20704/92, Reports of Judgments and Decisions 1997-IV, para. 28.

the person, since the Court will regard that the limitation as implied in the persons situation, and therefore the Court will not demand the State to justify the discomfort suffered by the individual in accordance with the express requirement of the Convention. The implications of such an approach is that legal certainty in the Court is at stake and the approach thus gives rise to serious concerns.

Nevertheless, the Court continuously make reference to the possibility to restrict the rights in article P1-3 by implied limitations, which leaves the content of the rights in article P1-3 foresee.

4.2 Limitations in relation to article P1-3

In relation to limitations to article P1-3, some guidance can be found in the Court's practice, which will be described below. The Commission used in its earlier case-law the test whether the conditions or limitations imposed by the States were arbitrary and whether they interfered with the free expression of the people's opinion.[108] When the Court decided on the matter in the first case, the case of *Mathieu-Mohin and Clerfayt v. Belgium* in 1987, this concept was elaborated.

The case of *Mathieu-Mohin and Clerfayt v. Belgium* in 1987 concerned the effects of a reform in 1980 of the Belgian electoral system. The arrangements concerned were very country specific and can hardly be relevant in relation to other countries, and will therefore not be explained in detail here.[109] The Court found that Belgium did not violate the applicants' right as protected by article P1-3, and the judgment has been criticised for granting the State a too wide margin of appreciation. However, the case is important since the Court took the opportunity to express itself extensively on the general interpretation of the provision.

Concerning the general principles in article P1-3 the Court said that the rights in article P1-3 are not absolute. "Since Article 3 [P1-3] recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. […] In their

[108] See for example EComHR *W, X, Y and Z v. Belgium*, Decision of 30 May 1975, appl.no. 6745/74 and 6746/74, 2 DR 110.
[109] For an elaborate and reader-friendly presentation of the case, see Harris, O'Boyle and Warbrick, 1995, pp.552-553.

internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under […] (P1-3) […]. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate […]. In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature'".[110] The Court has upheld the use of this test when determining whether there has been a violation of article P1-3 in its case-law.[111]

The Court hereby recognises the Contracting States' two possibilities to limit the rights in article P1-3. One possibility is to make use of the doctrine of implied limitations.[112] The other possibility is to make the rights subject to other conditions.[113] Both of these forms of limitations have to fulfil the criteria mentioned in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, namely that the limitations

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

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

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

[110] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52.
[111] ECHR *Matthews v. United Kingdom*, para. 63, see Chapter 3 – The nature and the scope of the rights in article P1-3, ECHR *Labita v. Italy*, para. 201 and ECHR *Podkolzina v. Latvia*, para. 33.
[112] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52, 2nd sentence.
[113] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52, 4th sentence.

4.2.1 The right to vote

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

4.2.1.1 Prisoners

The 1991 case of *Van Wambeke v. Belgium* concerned a Belgian citizen who in 1945 was convicted for carrying weapons against the allied forces during the Second World War, as a member of Waffen SS. He was sentenced to 15 years of imprisonment and forfeiture of his right to vote perpetually. He complained in 1990 that he could not participate in the elections to the European Parliament and the Commission declared the application inadmissible without evaluating whether the European Parliament formed part of the legislature. Instead, the Commission said that "la ratio legis des lois privant les condamnés pour incivisme de certains droits politiques et plus spécialement du droit de vote est d'empêcher certaines catégories de personnes qui ont gravement abusé de leur droit de participer à la vie publique de leur pays de faire à l'avenir mauvais usage de leurs droits politiques, afin d'éviter des atteintes à la sûreté de l'Etat ou aux fondements d'une société démocratique."[114] The Commission did not find that the prevention of the right to vote for a group of people who in the past severely abused their right to participate in public life thwarted the free expression of the opinion of the people in the choice of the legislature, and therefore the application was declared inadmissible.

In the 2000 judgment in the case of *Labita v. Italy*[115] the Court assessed the situation where an Italian citizen forfeited his right to vote following a suspicion of criminal activities. Mr. Labita was suspected of being involved in a mafia-type organisation and was therefore detained without being granted bail for the period of investigation. After Mr. Labita's acquittal for all accusations, certain preventive supervision measures were imposed on him. Among other things, he was struck off the electoral register on the ground that "his civil rights had lapsed following the imposition of the special supervision measure."[116] He complained that his right to vote was violated. The Court said that it had "no doubt that temporarily suspending the voting rights of persons against whom there is evidence of Mafia

[114] EComHR *Van Wambeke v. Belgium*, Decision of 12 April 1991, appl.no. 16692/90.
[115] Mentioned in Chapter 3 – The nature and the scope of the rights in article P1-3.
[116] ECHR *Labita v. Italy*, para. 77.

membership pursues a legitimate aim"[117], but since Mr. Labita's name was removed from the electoral register at a time when there was no concrete evidence on which a suspicion that he belonged to the Mafia could be based, the measure imposed by the Italian government was disproportionate and Mr. Labita's right to vote was therefore violated.

There can be little doubt that Mafia activities pose a threat to a democratic society, and the fact that persons engaging in such activities can forfeit their rights to participate in public life because of their grave abuses of the said rights or their denial of the rights of their fellow human beings is supported by article 17 of the Convention. However, in the present case the measures imposed on Mr. Labita were not imposed until after his acquittal, and therefore already clearly in violation of the principle of *nulla poena sine lege*, no punishment without law. A principle, which is also part of the Convention scheme and which is to be found within article 7 of the Convention.

Also cases concerning the suspension of the right to vote as part of a sentence have been declared inadmissible in connection with crimes that do not present a threat to democratic values. The Commission evaluated in 1983 a case brought against the Netherlands by an anti-militarist serving a sentence of 18 months for conscientiously objecting to military service.[118] While he was serving his sentence, his voting rights were suspended, under national law, for a period of three years exceeding his sentence. The Commission noted that the measure was imposed on all prisoners serving a sentence exceeding one year regardless of the nature of the offence, and further pointed out that a large number of the Contracting States had adopted legislation whereby the right to vote of a prisoner serving a term of imprisonment of a specific duration was suspended. The Commission was therefore of the opinion that such a practice reveals the existence of a generally recognised principle, whereby certain restrictions concerning the right to vote may be imposed on persons sentenced to certain terms of imprisonment and the application was declared manifestly ill-founded.

In a case brought against the Federal Republic of Germany from 1967 the applicant, a prisoner in a Saarbrücken prison, complained that, while in detention, he was not able to take part in elections to the Parliament and in Land elections.[119] The Commission stated, without going into depth in its evaluation that restrictions on convicted prisoners' right to vote while

[117] ECHR *Labita v. Italy*, para. 203.
[118] EComHR *H v. the Netherlands*, Decision of 4 July 1983, appl.no. 9914/82, 33 DR 242.
[119] EComHR *X v. Federal Republic of Germany (6 October 1967)*, see Chapter 3 – The nature and the scope of article P1-3.

serving their sentence do not affect the "free expression of the opinion of the people in the choice of the legislature".

These above-mentioned cases show suspension of voting rights in three different situations. The first situation is suspension as part of a sentence following activities that represent a threat to democratic values, namely, *van Wambeke v. Belgium* and *Labita v. Italy*. The second is suspension as part of a sentence following a "regular" crime; that is *H v. Netherlands*. And the last is suspension, not part of the sentence, but due to more practical aspects of incarceration, *X v. Federal Republic of Germany (6 October 1967)*.

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

Recent cases concerning prisoners' right to vote have not changed the Strasbourg institutions' standpoint on the issue. The Commission said in the 1998 case of *Holland v. Ireland*[120] that "the fact that all of the convicted prisoner population cannot vote does not affect the free expression of the opinion of the people in the choice of the legislature". The Court approved

[120] EComHR *Holland v. Ireland*, Decision of 14 April 1998, appl.no. 24827/94, 93 DR 15.

in the 2003 admissibility decision in the case of *M.D.U. v. Italy*[121] the Italian rule that a conviction was supplemented by an accessory punishment of suspension of the right to vote during two years. The Court estimated that the measure pursued a legitimate aim, namely the functioning and the maintenance of a democratic regime, and declared therefore the application inadmissible.

A number of Contracting States today have restrictions on the right to vote following criminal incarceration and previous conviction,[122] and it seems likely when looking at the institutions' case-law, that such restrictions will be accepted in the future.

Albania has in its reservation to article P1-3 declared that the provision will not apply in the period of 2 October 1996 to 2 October 2001 to persons who during the communist rule held high public positions and who conspired to and executed crimes against humanity for political, ideological or religious motives. Considering the previous remarks on the issue, held together with the article 17 of the Convention that contains a prohibition of abuse of rights by any State, group or person, the reservation does not appear to collide with the object and purpose of the Convention.[123]

4.2.1.2 Residency and age requirements

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

In the case of *X v. United Kingdom (28 February 1979)*[124] the Commission declared inadmissible a complaint lodged by a British citizen employed by the European Communities and residing in Brussels. She complained that she was prevented from voting in national elections although she continued having fiscal obligations towards the United Kingdom. The Commission recognised that some of the Contracting States allow nationals residing abroad to

[121] ECHR *M.D.U. v. Italy*, Decision of 28 January 2003, appl.no. 58540/00.
[122] http://epic.at.org/epic/compData$VR03. EPIC Project, joint endeavour of International IDEA, UNDP and IFES. Visited 30 June 2003, last updated 8 April 2002. It should be mentioned that not all Contracting States are represented in the material from the EPIC Project. Therefore, the material will only be used to positively describe the existence of the mentioned restrictions, and not to judge as to the non-existence of the said restrictions in any of the Contracting States.
[123] Albania's Reservation to the First Protocol.
[124] EComHR *X v. United Kingdom (28 February 1979),* see Chapter 3 – the Nature and the scope of article P1-3.

exercise their right to vote in their home country through various means, but it still granted the United Kingdom the possibility to restrict non-residents the right to vote, since the applicant could not claim to be affected by the acts of political bodies to a similar extent as resident citizens. As mentioned above in Chapter 3 – The nature and the scope of the rights in article P1-3 - the Court has not used the criteria whether a person is affected by the decisions in the evaluation of whether a person should be granted the right to vote, since this could easily lead to the claim from long-term resident non-citizens that they should be granted voting rights. The Court is expected to be very reluctant to read such a right into the Convention, without the Contracting States expressly stating that this is an obligation they consider themselves ready to commit to. However, even though the Court has not adopted the mentioned pattern of reasoning, the result obtained is likely to be similar in a Court judgment, with reference to the States' margin of appreciation.

The Commission again pronounced itself on the issue in the case *Luksch v. Germany*[125] from 1997. Mr. Luksch was a German citizen born in Italy and a long-term resident there. He complained that he was not able to vote in federal elections in Germany, because the German laws required that he was a long-term resident in Germany or that he had been living in Germany for at least 3 months prior to the elections. The Commission said that citizenship, residence and age are part of the criteria frequently used by many of the Contracting States, and therefore the Commission considered the criteria not to be arbitrary and thus not in contravention of article P1-3. The Commission said that the applicant was in a different situation than nationals residing in Germany, since the acts of the political bodies in question were not directly aimed at him. Therefore he was not affected to the same extent as residents, and discrimination in relation to voting rights between residents and non-residents was justified, and the application was thus declared inadmissible.

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

[125] See Chapter 3 – The nature and the scope of the rights in article P1-3.

4.2.2 The right to stand for election

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

4.2.2.1 Citizenship

In the case of *M v. United Kingdom*[126] the Commission declared inadmissible a complaint by a citizen of the United Kingdom and of Ireland. The applicant was several times elected member of the Northern Irish Assembly and received in the 1978 United Kingdom Parliamentary elections over 24.000 votes. In 1982 he was nominated a member of the Irish Senate, the upper house of the Irish Parliament. Following this, an electoral court in the United Kingdom held that the applicant was disqualified for membership of the Northern Ireland Assembly on the ground that he was a member of the legislature of the Republic of Ireland, a country or territory outside the Commonwealth. The Commission recognised that the applicant was restricted from taking office, but considered that a condition that one must not be a member of another legislature is a requirement that is reconcilable with article P1-3.

4.2.2.2 Prisoners

Concerning prisoners and their right to stand for election, a case has been lodged against Finland and declared inadmissible in 2002. *Lella v. Finland*[127] deals with a situation where the applicant was convicted for aggravated debtor's dishonesty and a book keeping offence. He requested a postponement of serving his sentence in order for him to participate in the Finnish parliamentary elections in 1999. The authorities denied postponing the enforcement of his sentence, which resulted in Mr. Lella filing a complaint at the Court. The Court said that Mr. Lella's right to stand for election was not infringed, since the refusal to postpone the enforcement, and a later refusal of prison leave on and around the election day "pursued a legitimate aim of ensuring the proper enforcement of prison sentences." Nor did the Court find the refusals to be arbitrary or disproportionate. Even though the refusals did not formally prevent Mr. Lella from standing for election, the Court "would not exclude that his campaign may have been somewhat hampered". However, he was at no stage barred from running for

[126] EComHR *M v. United Kingdom*, see Chapter 3 – The nature and the scope of the rights in article P1-3.
[127] ECHR *Lella v. Finland*, Decision of 15 October 2002, appl.no. 51975/99.

Parliament, and thus, with regard to the wide margin of appreciation granted to the Contracting States, the Court did not find any reason to declare the application admissible.

4.2.2.3 Age requirements

In the 1975 admissibility decision in the case of *W, X, Y and Z v. Belgium*[128] the applicants claimed that the minimum age requirements, 25 years for the House of Representatives and 40 years for the Senate, constituted a breach of article P1-3. The Commission said that the minimum requirement of 25 years for eligibility to the House of Representative could "obviously not be regarded as an unreasonable or arbitrary condition, or one likely to interfere with the free expression of the opinion of the people in the choice of the legislature." As to the requirement of 40 years for eligibility to the Senate the Commission said that, since Belgium has a bicameral system, candidates younger than 40 years were not prevented from entering the Parliament. It was only through the Senate they were prevented, but not through the House of Representatives. Because the Belgian system was a bicameral system the Commission did not consider it arbitrary to arrange the system so that one house is composed of persons having greater political experience by virtue of their age than the other chamber of Parliament. Thus, the Commission found the application manifestly ill-founded and therefore inadmissible. The decision has to been seen in the light of the statements made during the drafting of the Convention, in relation to an electoral system with two chambers, see Chapter 6 – In the choice of the legislature.

4.2.2.4 Disqualifications due to previous or present occupation

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

In the 1997 judgment in the case of *Gitonas et al. v. Greece*[129] the Court came to the result that the Greek Government had not violated the applicants' right to stand for election. Article 56 of the Greek Constitution presented an extensive list of persons not eligible to the legislature due to their previous occupation as civil servants and multiple other functions connected one way or another to public political activities, during a specific period of time before the elections. The applicants claimed that the provision in the Constitution was

[128] EComHR *W, X, Y and Z v. Belgium*, see previously this Chapter.
[129] ECHR *Gitonas et al. v. Greece*, Judgment of 23 June 1997, appl.no. 18747/91 et al., Reports of Judgments and Decisions 1997-IV.

imprecise and incoherent and, to the very least, had to be strictly construed which the applicants alleged did not happen in relation to their disqualifications. The Commission agreed with the applicants, but the Court granted the Greek Government "considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification."[130] The Court considered the disqualification of certain civil servants to serve a dual purpose, namely the ensuring that candidates enjoy equal means of influence and the protection of the electorate from pressure from officials who, because of their position, are called upon to take many and important decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice the candidate might influence.[131] The Court further pointed out, that it is primarily for the national authorities to construe national law, and since the Court did not find that the final national decision taken by a special supreme court suggested that the annulments were contrary to Greek legislation, arbitrary or disproportionate, or thwarted the "free expression of the opinion of the people in the choice of the legislature", the Court could not find a violation in the Greek Government's handling of the applicants' cases.[132]

The other judgment concerning disqualifications is the 1998 case of *Ahmed v. United Kingdom*[133]. The case dealt with restrictions on the involvement of senior local government officials in certain types of political activity, and again the Court found no violation of article P1-3. The Court considered that the restrictions imposed had to be seen in the light of the aim pursued by the legislature by imposing the restrictions, namely to ensure the candidates' political impartiality. Since the restrictions were only operating for as long as the candidates occupied politically restricted posts, the Court did not find the restrictions limiting the very essence of the rights in article P1-3.

In the case of *Brike v. Latvia*[134] the Court did not oppose to the Latvian rule that a candidate in parliamentary elections had to retire from her position as a judge at least 1 month after her registration on the list of candidates.

[130] ECHR *Gitonas et al v. Greece*, para. 39.
[131] Ibid., para. 40.
[132] Ibid., para, 44.
[133] ECHR *Ahmed et al. v. United Kingdom*, Judgment of 2 September 1998, appl.no. 22954/93, Reports of Judgments and Decisions 1998-VI.
[134] ECHR *Brike v. Latvia*, Decision of 29 June 2000, appl.no. 47135/99.

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

4.2.2.5 Language requirements

The Strasbourg organs have assessed several disputes concerning language requirements.

In 1985 the Commission said in the case of *Fryske Nasjonale Partij et al. v. the Netherlands*[135], that neither article P1-3 nor any other provision in the Convention guarantee the right to use a particular language for electoral purposes, a position it upheld in the admissibility decision in the case of *Andecha Astur v. Spain*[136] in 1997. The complaints in the mentioned cases were made by applicants claiming the right to use a language different from the official language in the State in question, while handing in their lists of candidates to the authorities.

The Court's judgment in the case of *Podkolzina v. Latvia*[137] shows that also the Court accepts certain language requirements as part of the eligibility criteria.

The case of *Podkolzina v. Latvia* concerned the requirement that a candidate, in order to enrol on the list of candidates and thus stand for election, had to have a certain knowledge of the official language of the State, namely Latvian. The applicant was a member of the Russian-speaking minority in Latvia and she had to provide the Latvian authorities with a certificate that her knowledge of Latvian was sufficient or to pass an examination to prove it.

The Latvian Government argued that the obligation for a candidate to understand and speak Latvian is necessary to ensure the proper functioning of parliament, in which Latvian is the sole working language. It stated that the aim of this requirement was to enable the

[135] EComHR *Fryske Nasjonale Partij et al. v. the Netherlands*, Decision of 12 December 1985, appl.no. 11100/84, 45 DR 240.
[136] EComHR *Andecha Astur v. Spain*, Decision of 7 July 1997, appl.no. 34184/96, 90 DR 172.
[137] See Chapter 2 – Free elections at reasonable intervals by secret ballot.

Members of Parliament to take an active part in the work of the Parliament and effectively defend their electors' interests. The Court accepted the Government's arguments. It held again that the States enjoy considerable latitude to establish constitutional rules on the status of members of Parliament, including criteria for declaring them eligible. Even though the eligibility criteria have a common origin to ensure the independence of elected representatives and the freedom of electors, the Court is ready to accept that the criteria may vary in accordance with the historical and political factors specific to each state.[138] When the State in question seeks to ensure that its own constitutional system functions normally, such aim is incontestably legitimate. It applies all the more to the national parliament, which is vested with legislative power and plays a primordial role in a democratic state. The Contracting State's choice of working language in the national Parliament falls within the State's margin of appreciation.[139] [140]

4.2.2.6 The margin of appreciation

It shall be noted that the States' margin of appreciation plays an important role in the Court's case-law, also in relation to article P1-3. The margin of appreciation is a disputed notion used by the Strasbourg institutions, and it can be difficult to determine the exact content or implications of the application of the notion. Nevertheless, it is possible to make some rough generalisations on the issue.

Traditionally the application of the margin of appreciation is used in connection with provisions that do not lay down precise or detailed rules, and therefore often a balancing of interests is necessary. The balancing act will for example concern either the interests of an individual and the interests of the society as a whole or the interests of two individuals. Traditionally, the existence of a *European common ground* in the law and practice of the Contracting States may lead to a narrow margin of appreciation and thus a stricter scrutiny by the Strasbourg authorities, but on the other hand, if the law and practice are very different among the Contracting States, the margin of appreciation may be wider.[141]

[138] ECHR *Podkolzina v. Latvia*, para. 33.
[139] Ibid, para. 34.
[140] As mentioned in Chapter 3 – The nature and the scope of the rights in article P1-3 the Court nevertheless found that the Latvian authorities violated the candidate's right to stand for election, because the procedure used when evaluating her language skills was not fair and objective, and therefore the Court estimated that the means employed were disproportionate.
[141] van Dijk and van Hoof, 1998, pp. 82-93.

The Strasbourg institutions have continuously stated that in general the Contracting States enjoy a wide margin of appreciation, though subject to European supervision, in relation to limitations to the rights secured by article P1-3.[142] At times the Court has referred to the widely different systems that exist in the Contracting States.[143] Other times, the existence of the measure complained of in "a good many States", has been the reason for the Court's accepting the national requirements.[144]

In a recent case, however not concerning the rights in article P1-3, the Court has used a different method for narrowing the States' margin of appreciation. In the 2002 case of *Christine Goodwin v. United Kingdom*[145] concerning transsexuals' need for legal recognition of their change of sex, the Court acknowledged that it had noted previously in similar cases that "little common ground existed between States" and laid emphasis on "the lack of common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas" and therefore granted the Contracting States with a wide margin of appreciation. The Court recognised in the *Christine Goodwin-case* that there was still a lack of common European approach, but admitted that "the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal system the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[146]

On the one hand, it can be argued that the *Christine Goodwin-case* only relates to the cases of legal recognition of post-operative transsexuals, which the wording of the judgment

[142] Among others ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52; ECHR *Gitonas et al. v. Greece*, para. 39.
[143] ECHR *Gitonas et al. v. Greece*, para. 39.
[144] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 57; ECHR *Federación Nationalista Canaria v. Spain*, Decision of 7 June 2001, appl.no. 56618/00.
[145] ECHR *Christine Goodwin v. United Kingdom*, Judgment of 11 July 2002, appl.no. 28957/95. See also ECHR *I v. United Kingdom*, Judgment of 11 July 2002, appl.no. 25680/94.
[146] ECHR *Christine Goodwin v. United Kingdom*, para. 85.

surely points towards. On the other hand, the Court has, before the *Christine Goodwin case*, continuously used the lack of common European approach as a reason for granting a wide margin to the Contracting States, and the change seen in the *Christine Goodwin-case* must be regarded as significant. If such a method is to be used in cases concerning the right to free elections, the approach may have an impact on the permitted limitations in the future. The extent of such an influence is difficult to foresee, especially since the preceding on the permitted limitations has proved that the Court is extremely reluctant to set aside the national authorities decisions in cases where the rights protected by article P1-3 is at dispute.

5. The electoral system

5.1 The requirements in article P1-3

During the drafting of the provision it was clear that article P1-3 was not meant to create the obligation to introduce a specific electoral system.[147] The drafting States had different systems of proportional representation and of majority voting and therefore the provision had to reflect the idea that both a system of proportional representation and a majoritarian system would satisfy the demands of article P1-3. The view was expressed by the Commission in *X v. United Kingdom (3 October 1975)*, where the Commission stressed that "[b]oth these forms of elections may be considered as a part of the common heritage of political traditions to which reference can be found in the Convention's Preamble."[148]

The Court confirmed that the States enjoy a large margin of appreciation in their choice of electoral system in its judgments in the cases of *Mathieu-Mohin and Clerfayt v. Belgium* and *Matthews v. United Kingdom*. In the latter the Court said that "[t]he Court makes it clear at the outset that the choice of electoral system by which the free expression of the opinion of the people in the choice of the legislature is ensured – whether it be based on proportional representation, the "first-past-the-post" system or some other arrangement – is a matter in which the State enjoys a wide margin of appreciation."[149]

The aims of an electoral system are "on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will."[150] These aims tend to be difficult to reconcile, and therefore the Court has interpreted the phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" in relation to the States' choice of electoral system, to imply the principle of equal treatment of all citizens in their right to vote and their right to stand for election along with the right to freedom of

[147] *Travaux préparatoires*, vol. VII, p. 130.
[148] EComHR *X. v. United Kingdom*, Decision of 3 October 1975, appl.no. 7096/75, 3 DR 165. Thus, the Commission has declared inadmissible complaints concerning both proportional representation (EComHR *X. v. Iceland*, Decision of 8 December 1981, appl.no. 8941/80, 27 DR 145) and majority voting (EComHR *The Liberal Party, R and P v. United Kingdom*, 18 December 1980, appl.no. 8765/79, 21 DR 211), by referring to the State's wide margin of appreciation regarding the electoral system.
[149] ECHR *Matthews v. United Kingdom*, para. 64.
[150] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 54.

expression[151]. However, the principle of equal treatment of all citizens in their right to vote and their right to stand as a candidate does not imply that all votes cast should be represented in the "legislature". Article P1-3 does not protect against so-called wasted votes, since no system would be able to avoid it. The citizens have to live with the fact that not all votes have exactly the same weight and that not all candidates have exactly the same chances of victory. When the electoral system does not favour any particular political party at the expense of another or give an individual candidate an advantage at the expense of another candidate, the Court will, due to the wide margin of appreciation that the States enjoy in relation to the choice of their electoral systems, leave it to the State to decide which system best accommodates the particular historical and political context of the State in question.[152]

However, some features of electoral systems would be difficult to reconcile with the principle of equal treatment of the citizens. Drawing up constituency boundaries can pose certain problems in this connection, but the Commission has accepted that the drawing up may result in disparities of votes behind candidates of each constituency, and that this does not infringe the rights in article P1-3.[153] However, the article must be understood to contain a prohibition on gerrymandering.

The Northern Irish system complained of in the *Northern Irish cases*[154] from 1970 also seems problematic in this relation. According to the applicants approximately 30% of the population was disfranchised in the elections. The election law stipulated that no adult of 21 years of age or over could vote unless he or she was a "householder" or the spouse of a householder. Furthermore, the election law gave businessmen six votes in respect of each business they operated. According to the applicants the respondent Government had made it its policy to make public housing units available only to its supporters, and therefore non-supporters of the Government were discriminated against when it came to obtaining status as a "householder". As the case was struck off the list the Commission did not arrive at an assessment of whether the applicants' allegations were substantiated. Regardless, if a system grants different weight of the votes to electors because of their possession of property or their social status, the

[151] As mentioned in Chapter 3 – The nature and the scope of article P1-3 - the latter does not fall within the scope of article P1-3, but is protected by article 10 of the Convention.
[152] EComHR *X v. Iceland*.
[153] EComHR *Lindsay v. United Kingdom*, Decision of 8 March 1979, appl.no. 8364/78, 15 DR 247.
[154] EComHR *The Northern Irish cases, A et al. v. United Kingdom*, Decision of 17 December 1970, appl.no. 3625 et al., 13 YB 340. The cases presented, apart from the issue of equal votes, also problems in relation to the term "legislature", but were struck off of the list for other reasons.

system may very well be regarded as infringing of the principle of equal treatment of all citizens in their right to vote.[155]

The *travaux préparatoires* reflect that the Convention was to a large extent created as a safeguard against totalitarian systems, such as communism and fascism. Therefore, it seems evident that article P1-3 contains a safeguard against one-party systems, since such systems would not be apt to reflect the "free expression of the opinion of the people in their choice of the legislature", in a truly democratic regime as envisaged by the drafting States. In the *Greek case* the Commission also highlighted this aspect of the requirements to a democratic regime. Following the *coup d'état* in 1967 new Greek legislation prohibited the existence of political parties, which, in the Commission's view, constituted a "clear and persistent breach of Article 3 of the Protocol."[156] In *X v. United Kingdom (6 October 1976)*[157] the Commission further held that the term "choice" reflects that different political parties must be ensured a reasonable opportunity to present their candidates at elections, thus presupposing a multi-party system. More recently, the Court held in the case of *United Communist Party v. Turkey*, that the State is the ultimate guarantor of the principle of pluralism and that the "free expression of the opinion of the people" is "inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. By relaying this range of opinion, not only within political institutions but also – with the help of the media – at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society".[158] Since one of the requirements for admission to the Council of Europe is commitment to the rule of law, which is seen to include "democracy" and thereby political party pluralism,[159] cases concerning one-party systems will only be presented to the Court when the Contracting State in question already is in breach of the requirements for membership of the Council of Europe.

The principle of equal treatment of all citizens in their right to vote and their right to stand for election entails that the voters are protected against discrimination.[160] As mentioned, both proportional representation and majority voting are accepted electoral systems in relation to

[155] The same point of view is expressed in Hinz and Suksi, 2002, p. 29.
[156] *The Greek case*, 12 YB 180.
[157] EcomHR *X. v. United Kingdom*, 6 October 1976, appl.no. 7140/75, 7 DR 95.
[158] ECHR *United Communist Part v. Turkey*, para. 44, see Chapter 3 – The nature and the scope of the rights in article P1-3.
[159] Meron and Sloan, 1996, p.143 ff.
[160] See Chapter 3 – The nature and the scope of the rights in article P1-3.

the right to free elections. While proportional representation can create unequal voting influence, which is not in contravention of the prohibition on discrimination contained in article P1-3, majority voting often creates disadvantages for small parties and minority groups.

In *Liberal Party et al. v. United Kingdom*[161] the Commission paid attention to, but left open, the question "whether or not specific features in the voting behaviour could raise an issue under [article P1-3] if religious or ethnic groups could never be represented because there [is] a special voting pattern along these lines in the population." However, a few years later, the Commission stated without any reservation in the admissibility decision in the case of *G. and E. v. Norway*[162], that the Convention does not guarantee any specific rights for minorities. Therefore, the article does not give such groups a right to special representation or positive discrimination in situations where majority voting *de facto* cuts out such groups from any presentation in the legislature. Although, the Court has not expressed this view explicitly in a judgment, it seems to be clear that the Convention does not contain the right to special measures in favour of minority representation in the legislature.

With the adoption of Protocol no. 12[163] there is now a general prohibition on discrimination in the European Human Rights protection system. Protocol no. 12 guarantees the principle of equality of treatment and of non-discrimination as a prerequisite for achieving *de jure* and *de facto* equality. The principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination. On the one hand, Protocol no. 12 does not require the adoption of special measures for certain disadvantaged groups in order to promote equality or to eliminate *de facto* inequalities. On the other hand, Protocol no. 12 does not prohibit these special measures, or positive discrimination, but marginalised groups will not be able to base their claim for such measures on Protocol no. 12.[164] Accordingly, the Convention system does not impose obligations for the Contracting States to introduce special measures for minorities or other disadvantaged groups.

[161] EComHR *Liberal Party v. United Kingdom*, mentioned earlier in this chapter.
[162] EComHR *G. and E. V. Norway*, Decision of 3 October 1983 , appl.no. 9278/81 and 9415/81, 35 DR 30. The position was upheld in EComHR *Magnago and Südtiroler Volkspartei v. Italy*, Decision of 15 April, 1996, appl.no. 25035/94.
[163] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 177, opened for signature 4 November 2000, not entered into force by the 30 June 2003.
[164] See Explanatory Report to Protocol No. 12.

Other features in the Contracting States' electoral systems can have the effect of disfavouring or even excluding representation of specific "weak" groups of society. Having regard to the wide margin of appreciation that the Contracting States are granted, such features will be accepted, unless they aim directly for the exclusion of one specific group, and thus amount to discrimination. The Commission has declared inadmissible several complaints concerning minimum thresholds for the allocation of seats in the national parliaments.[165] In *Federación Nacionalista Canaria v. Spain*[166] the Court noted that "even a system which fixes a relatively high threshold, e.g. as regards the number of signatures required in order to stand for election or, as in the present case, a minimum percentage of votes on the national level, may be regarded as not exceeding the margin of appreciation permitted to States in the matter." The law in question demanded that "the only lists to be taken into account shall be those of the parties or coalitions that have obtained the greatest number of valid votes in each of the constituencies and the other [lists] that have obtained at least 30% of the valid votes cast in a single constituency or, adding together the votes for each constituency, at least 6% of the valid votes cast in the Autonomous Community as a whole." In addition, the Court noted that such measures are to be found in many of the systems in Europe.

Attributes of the electoral system that the Commission clearly regards as compatible with the provision are the requirements of monetary guarantees for inscription on electoral lists or the requirement of a certain number of votes as a prerequisite for refund of expenses during the electoral campaign. In the admissibility decision in *André v. France*[167] the applicant complained that the demand for a deposit of 100.000 FF as a prerequisite for standing as a candidate in the election for the European Parliament amounted to *de facto* refusing the candidates that represented a financial minority, namely the homeless, the long term unemployed, the deaf and the blind, to stand for election. The Commission declared the complaint inadmissible, by referring to the aim of the measure, namely the promotion of the emergence of a sufficiently clear and coherent political will. In this connection it could be argued that the Strasbourg institutions grant the Contracting States a margin of appreciation that goes beyond what is reasonable. At any rate, the present case surely makes one ask the question whether such a sizeable deposit does not pose a problem in relation to the principle of equal treatment of all citizens in their right to vote and their right to stand for election, when, lists are created in order to represent groups that constitute financial minorities.

[165] EComHR *Tete v. France (1)*, Decision of 9 December 1987, appl.no. 11123/84, 54 DR 52; EComHR *Fournier v. France*, Decision of 10 March 1988, appl.no. 11406/85, 55 DR 130.
[166] ECHR *Federación Nacionalista Canaria v. Spain*, see Chapter 4 – Limitations to the rights in article P1-3.
[167] EComHR *André v. France*, Decision of 18 October 1995, appl.no. 27759/95.

Also the requirement of a certain number of signatures of potential voters has been regarded as clearly consistent with article P1-3.[168]

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

5.2 The electoral cycle

The right to equal suffrage could not, as mentioned in Chapter 3 – The nature and the scope f the rights in article P1-3, be found expressed in the Court's judgments. When looking at the requirements to the Contracting States' electoral system the Court has stated that article P1-3 does not contain a right to equal voting influence. Disparities in the weight of the votes cannot be avoided, and to a certain extent the Court will accept such differences. However, article P1-3 contains expresses the principle of equal treatment of all citizens in the exercise of their right to vote and the right to stand for election, and thereby a prohibition of discrimination. In the election cycle element 6) Equal suffrage – can be translated in to "one person, one vote", but is not a strict requirement that does not allow for certain differentiations between the weight of the vote, as long as they derive from the nature of the electoral system as for example thresholds or minor variations in the size of constituencies, and not in clearly discriminatory phenomena such as differentiated votes according to how much property a person owns or gerrymandering.

[168] EComHR *X, Y and Z v. Federal Republic of Germany*, Decision of 18 May 1976, appl.no. 6850/74 and EComHR *Asensio Sequeda v. Spain*, Decision of 9 May 1994, appl.no. 23151/1994.

6. In the choice of the legislature

Since article P1-3 according to the wording only applies to elections to the "legislature", it has to be established what constitutes a legislature within the meaning of P1-3.

In the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court stated that the word legislature does not necessarily mean only the national parliament, but that it has to be interpreted in the light of the constitutional structure of the State in question.[169]

Furthermore, during the drafting of the article, it was stated that the article was carefully drafted to avoid that the article was understood as not permitting the existence of chambers of the legislature that are, either in whole or in part, not elective, as they existed in some of the Contracting States, for example in United Kingdom, where seats in the Upper House are hereditary or in Belgium, where one of the chambers consists of appointed members.[170] Such arrangements should be allowed to exist after the entry into force of the First Protocol. In the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court held that article P1-3 applies only to the election of the "legislature", "or at least of one of its chambers if it has two ore more"[171].

Harris, O´Boyle and Warbrick argue that the test to determine if a body forms part of the "legislature" within the meaning of article P1-3 depends on whether the body has an independent power to issue norms having the force of law.[172] This chapter will show whether this test is still applicable.

[169] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 53.
[170] *Travaux préparatoires*, vol. VIII, p. 50-52.
[171] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 53. In his concurring opinion in the judgment judge Pinheiro Farinha argues that the wording found in the *travaux préparatoires* and supported in the judgment "or at least of one of its chambers if it has two or more", is "inadequate and dangerous". He argues that it would allow for a system that might lead to a corporative, elitist or class system, which does not respect democracy. He suggests that the wording used should be replaced with "or at least of one of its chambers if it has two or more, on the two-fold condition that the majority of the membership of the legislature is elected and that the chamber of chambers whose members are not elected does or do not have greater powers than the chamber that is free elected by secret ballot." The Court, however, did not adopt this formulation.
[172] Harris, O´Boyle and Warbrick, 1995, p. 553.

6.1. Referendums

It seems very clear from the decisions from both the Commission and the Court that referendums do not fall within the scope of article P1-3. The first decision concerned the British referendum on EEC membership, and the Commission said that since the referendum was of purely consultative character and there was no legal obligation to organise such a referendum, the right to participate in the referendum could not be derived from P1-3.[173] In the 1996 case of *Bader v. Austria* concerning a referendum on Austria's accession to the European Union, the Commission did not refer to the nature or status of the referendum, it just stated that the provision does not extend to referendums.[174] The position was confirmed by the Court in 1999 in a case concerning Liechtenstein.[175] The applicant complained that he, as a Swiss citizen, could not take part in referendums in Liechtenstein where he had his domicile. He did not refer to any specific referendum, and since the Court remarked that P1-3 does not extend to referendums, without distinguishing between consultative or mandatory referendums, it must therefore be clear that P1-3 does not apply to any kind of referendum.[176]

6.2 Appointment of the Government and the Head of State

During the drafting of the provision, the appointment of the Government was deliberately omitted from the provision, since there was unanimity that the choice of the Government was not necessarily to be made directly by the people.[177] However, the provision implies that the Government bases its legitimacy on the Parliament elected in accordance with the requirements in article P1-3.

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[173] EComHR *X v. United Kingdom (3 October 1975)*, see Chapter 5 – The electoral system.
[174] EComHR *Bader v. Austria*, Decision of 15 May 1996, appl.no. 26633/95. See also EComHR *Nurminen v. Finland*, Decision of 26 February 1997, appl.no. 27881/95, and EComHR *Castelli et al. v. Italy*, Decision of 14 September 1998, appl.no. 35790/97 et al., 94 DR 102, where the Commission upheld its position.
[175] ECHR *Hilbe v. Liechtenstein*, Decision of 7 September 1999, appl.no 31981/96, Reports of Judgment and Decisions 1999-VI.
[176] Latest confirmed in ECHR *Borghi v. Italy*, Decision of 20 June 2002, appl.no. 54767/00. Critical in this connection, see De Meyer, 1993, p. 556 and Harris, O'Boyle and Warbrick, 1995, p. 554.
[177] *Travaux préparatoires*, vol. VIII, p.52.

The appointment of the Head of State has been in question before the Commission, but not yet before the Court.[178] In the first case, *X v. Austria (22 March 1972)* concerning the election of the Federal President of Austria, the Commission did not comment on whether the President formed part of the legislature, but declared the application inadmissible for other reasons.[179] However, the Commission declared in 1989 in the case of *Habsburg-Lothringen v. Austria* that the provision concerns "the choice of the legislature" and not the appointment of the Head of State, such as the Federal President of Austria. This can be seen as the Commission saying that since the election of the Government does not fall within the scope of article P1-3, the election of the Head of State is also falling outside the scope. However, the Commission did not expressly refer to the Head of State as part of the Government. The view expressed in the 1989 case was followed in 1998 in *Baskauskaite v. Lithuania*, where the Commission pointed to the principle laid down in the case of *Habsburg-Lothringen v. Austria*, but further stressed that there was no indication that the powers of the President of Lithuania could be construed as "legislature" within the meaning of article P1-3. This shows that insofar the Head of State does not possess any inherent law-making power the election of Head of State does not fall under the scope of article P1-3, not considering whether the Head of State is part of the Government. Accordingly, it cannot be ruled out in cases where the Head of State has an independent law-making prerogative that his or her appointment would have to comply with the article P1-3.

6.3 Sub-state entities

The question of the provision's application in cases concerning local authorities was first raised in the *Northern Irish cases*[180]. Here, the Government submitted that it was clear from the *travaux préparatoires* and from the wording of the article that "the choice of the legislature" does not include election to a local authority, which is subordinate to a national or a regional authority and has only limited powers to pass by-laws of purely local application.[181] As the case was struck off the list the Commission did not pronounce itself on the issue. However, the Government's reasoning seems to have been in line with the requirements of article P1-3. The Commission had the opportunity to look into the matter

[178] EComHR *X. v. Austria, (22 March 1972),* see Chapter 2- free elections at reasonable intervals by secret ballot; EComHR *Habsburg-Lothringen v. Austria*, see Chapter 3 – The nature and the scope of the rights in article P1-3; EComHR *Baskauskaite v. Lithuania*, Decision of 21 October 1998, appl.no. 41090/98.
[179] The case concerned compulsory voting, which was not found to be in contravention of article P1-3.
[180] See Chapter 5 – The electoral system.
[181] See EComHR *The Northern Irish cases, A et al. v. United Kingdom,* 13 YB at p. 412.

again in a case in 1976, where a resident in Northern Ireland complained that election to the local government had been suspended since 1969. The Commission then said that insofar these local authorities have a legislative function that is confined to the making of by-laws applicable within their areas and these powers are rigidly limited by statute and there fore the local authorities have no powers to make rules others than in accordance with the powers conferred by the Parliament, the Commission does not consider the local government covered by the term "legislature" within the meaning of P1-3.[182] Therefore, the local government in Northern Ireland was not considered falling within the term of legislature within the meaning of article P1-3. The same has been decided by the Commission concerning the municipal councils in Belgium[183] and the metropolitan councils in the United Kingdom,[184] and confirmed by the Court concerning the municipal councils and the mayors in Russia,[185] local councils in Malta,[186] the French regional councils,[187] Spanish municipal councils,[188] Moldovan municipal councils,[189] and the Italian provincial councils.[190]

Some of the Contracting States are federal states with substantial part of the legislating power vested in the federal units. Germany is such an example, and the German Länder are being regarded as part of the legislature.[191] The same must be the case of the cantons in Switzerland and the federal units of Austria.

As to other regional arrangements, the Commission did in the case of *Polacco and Garofalo v. Italy*[192] not pronounce itself on the nature of the Italian regional councils, since both the applicant and the Government regarded the Regional Council of Trentino-Alto Adige as part of the legislature. The issue was presented to the Court in *Santoro v. Italy*, which in 2003 declared the application admissible concerning the issues relating to elections to the regional council.[193] Since the legislative assemblies of the autonomous communities in Spain are considered by the Court to be a part of the Spanish legislature within the meaning of article

[182] EComHR *X. v. United Kingdom*, Decision of 12 July 1976, appl.no. 5155/71, 6 DR 13.
[183] EComHR *Clerfayt et al. v. Belgium*, Decision of 17 May 1985, appl.no. 10650/83, 42 DR 212.
[184] EComHR *Booth-Clibborn v. United Kingdom*, Decision of 5 July 1985, appl.no. 11391/85, 43 DR 236.
[185] ECHR *Cherepkov v. Russia*, see Chapter 3 – The nature and the scope of the rights in article P1-3.
[186] ECHR *Xuereb v. Malta*, Decision of 15 June 2000, appl.no. 52492/99.
[187] EComHR *Tete v. France (2)*, Decision of 10 March 1988, appl.no. 11802/85, and ECHR *Malarde v. France*, Desicion of 5 September 2000, appl.no. 46813/99.
[188] ECHR *Salleras Llinares v. Spain*, Decision of 12 October 2000, appl.no. 52226/99, Reports of Judgments and Decisions 2001-XI.
[189] ECHR *Gorizdra v. Moldova*, Decision of 2 July 2002, appl.no. 53180/99.
[190] ECHR *Santoro v. Italy*, Decision of 16 January 2003, appl.no. 36681/97.
[191] EComHR *Timke v. Germany*. See Chapter 2 – Free elections at reasonable intervals by secret ballot.
[192] EComHR *Polacco and Garofalo v. Italy*, Decision of 15 September 1997, appl.no. 23459/94.
[193] ECHR *Santoro v. Italy*.

P1-3,[194] it is highly probable that the Italian regional councils will also be considered as part of the legislature within the meaning of article P1-3, since the regional arrangements in these two countries are regarded as having a similar degree of autonomy.[195]

In the case of *Mathieu-Mohin and Clerfayt v. Belgium* the Court agreed with the parties appearing before it, that the Flemish Council, the French Community Council and the Walloon Regional Council were vested with competence and powers wide enough to make them a constituent part of the Belgium legislature in addition to the House of Representatives and the Senate.[196]

6.4 Supra-state entities

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

The Commission decided in 1979 that since the European Parliament did not possess a legislative power *in stricto sensu*, but was rather a consultative body with certain controlling and budgetary powers, the European Parliament did not form part of the legislature within the meaning of article P1-3.[197] In the following cases concerning the same issue the Commission upheld the position. However, it kept at the same time a door open for a change in its standpoint, in case the role of the European Parliament in the legislative process would change.[198] After the entry into force of the Treaty of the European Union 1 November 1993, the Commission regarded the role of the Parliament in the legislative process to have increased to an extent that the Commission had to leave it to the Court to decide.[199] In the following judgement from the Court in 1999, the case of *Matthews v. United Kingdom*[200], the Court came to the conclusion that the European Parliament now constituted a part of the legislature in the European Union Member States,

[194] ECHR *Federación Nacionalista Canaria v. Spain*, see Chapter 4 – Limitations to the rights in article P1-3.
[195] Suksi, 1998, p. 169.
[196] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 53.
[197] EComHR *Alliance des Belges v. Belgium*, Decision of 10 May 1979, 15 DR 259.
[198] EComHR *Tete v. France(1)*; EComHR *Fournier v. France* and EComHR *André v. France.*
[199] EComHR *Matthews v. United Kingdom*, Decision of 16 April 1996, appl.no. 24833/94.
[200] ECHR *Matthews v. United Kingdom*, see Chapter 3 – The nature and the scope of the rights in article P1-3.

and therefore, elections to the Parliaments had to conform to article P1-3. In reaching this conclusion the Court pointed out that the legislative process in the European Community involves the participation of the European Parliament, the Council and the European Commission. For the Court to ensure that "effective political democracy" is properly served in the States, one cannot only look to the strictly legislative powers, which a body has, but also at the body's role in the overall legislative process. Since the Parliament's functions were regarded as being no longer "advisory and supervisory", the European Parliament has moved towards being a body with a decisive role to play in the legislative process of the European Community. The Court noticed that The European Parliament has functions in relation to the appointment and removal of the European Commission, which can ultimately lead to the European Commission having to resign as a body. The Court continued by recognising that even though the European Parliament has "no formal right to initiate legislation, it has the right to request the European Commission to submit proposals on matters on which it considers that a Community act is required." In conclusion the Court therefore found that the European Parliament was "sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty, and […] sufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the 'legislature' of Gibraltar for the purposes of [article P1-3]."[201]

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

These criteria are to a large extent still applicable. However, the Strasbourg organs' approach seems to have shifted from an institutional approach, to more of a functional approach. With the statements in the Court's judgment in *Matthews v. United Kingdom* concerning the European Parliament's role in the legislative process and in the Commission's decision in *Baskauskaite v. Lithuania*, it seems as if the fact that a body or a person has a "decisive role

[201] ECHR *Matthews v. United Kingdom*, para. 54.

to play in the legislative process" has the effect that the appointment of that body or that person has to meet the requirements in article P1-3. In the evaluation the Court once has assessed the body's "role in the overall legislative process". The European Parliament does not have the power to independently pass legislation, and some Heads of States, for example the French President, have at least a position similar to that of the European Parliament in the law-making process. Therefore, a change in the Court's position may be anticipated.

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

The Commission has in an admissibility decision from 1983 concerning professional bodies conferred with legislative powers decided that the Dutch Royal society for the cultivation of flower bulbs could not be regarded as a part of the legislature, since its legislative powers were limited only to the enactment of regulation needed to uphold the interests of firms engaged in the production and sale of flower bulbs.[202] This point of view corresponds well with the Court's statement that insofar as a body does not have inherent law-making powers it will not be considered as part of the legislature within the meaning of article P1-3. But with a functional approach to the determination of whether a body is part of the "legislature" professional bodies would not be excluded from falling within the scope of article P1-3 since they could be regarded as part of the "legislature" as they in some countries can be regarded as "a body with a decisive role to play in the legislative process." This will be illustrated in the following example.

[202] EComHR *X. v. the Netherlands*, Decision of 1 March 1983, appl.no. 9926/82, 32 DR 247.

A recent admissibility decision concerning the requirements to the basis in national law from the Court shows that it is possible that general rules with the force of law that affect the whole population can stem from professional bodies. The 2002 case of *Madsen v. Denmark*[203] concerns the rules regulating the Danish labour market. By tradition the Danish legislature plays a minor role as regards governing wages, salaries and employments conditions and therefore the rules imposed by statute in other countries have in Denmark been obtained by agreements between the labour market partners, namely on the one side the employees and their unions and on the other side the employers and their federations. The dispute under consideration concerned the employer's managerial right or his right to carry out control measures, a principle laid down in the so-called September Agreement of 1899, negotiated between the two labour market partners. An employer's right to manage and control work has been acknowledged in numerous collective agreements, courts of arbitration and the Danish Labour Court, but is not to be found in statutory law. The applicant pointed out in his submission to the Court that the shipping trade, where he was employed, is not covered by any central agreement between an employer's federation on the one side and trade union federations on the other side. The Court held that according to the "Danish Model" the content and scope of the employer's managerial right depend on labour law principles as laid down in agreement between private partners in negotiation in the September Agreement of 1899. The dispute at the domestic authorities between the applicant and his employer was therefore to be solved on the basis of case-law and practices in labour market matters. In these circumstances the Court was satisfied that the measure that Mr. Madsen's employer introduced and which was considered by the national authorities to be legal, was introduced "in accordance with law".

Article P1-3 contains the right to effective political democracy. This means that individuals have a right to elect representatives who will make the general rules of society. It gives individuals the right to control, by means of elections with reasonable intervals, the persons who have the right to pass laws for the people in general to comply with. With the decision of *Madsen v. Denmark* the Court accepts that collective bargaining in relation to the labour market in Denmark has resulted in the issuance of "law" as mentioned in article 8 (2)'s requirement that an interference in the right to respect for private life shall be "in accordance with the law". The Court also stated that professional bodies are not regarded as part of the "legislature" within the meaning of article P1-3 if the body only have legislative powers

[203] ECHR *Madsen v. Denmark*, Decision of 7 November 2002, appl.no. 58341/00.

conferred to it by delegation.[204] The labour market partners in Denmark are not conferred with legislative powers by direct delegation from the Parliament, but rather by the absence of statutory law in the area. To foresee the outcome of a case at the Court concerning a citizen's right to political participation is a difficult, if not impossible, task. van Dijk and van Hoof point out that the "broad interpretation of the word 'legislature' would also seem to follow from the broad interpretation in the case-law of the word 'law'"[205]. Surely, there seems to be a connection between the two terms, but it also appears rather unlikely that the Court will demand that the appointment of members of professional bodies "with a decisive role to play in the legislative process" has to comply with the requirements in article P1-3, however it cannot be ruled out. International Human Rights Law traditionally only regulates disputes between States and persons under their jurisdiction and not the relationship between private parties, even though the outcome of case-law from the Court at times has an effect on the relationship between private persons when disputes between private parties give rise to and depend on the outcome of an international human rights dispute.[206] However, such an effect is secondary, since the Court will only evaluate the *legislation*, adopted by a State, that regulates the relationship between private persons. It can be argued that the existence of the "Danish Model" depends on the absence of statutory law and that legislation *could* be issued by the Parliament at any given time. Therefore, the system exists solely due to acceptance of the system by the legislature, a situation, which could create the link between the "law" and the "legislature". What seems clear, is that the correlation between the "law" and the "legislature" within the meaning of article P1-3 is not a direct link, but rather an indirect one, where, as pointed out by van Dijk and van Hoof, the broad interpretation of the "law" allows for and incites to a broad interpretation of the "legislature".

[204] EComHR *X. v. the Netherlands.*
[205] Van Dijk and van Hoof, 1998, p. 665.
[206] ECHR *Marckx v. Belgium*, see Chapter 1 – Introduction.

7. Free expression of the opinion of the people

7.1 The requirements of article P1-3

As mentioned in Chapter 4 - Limitations to the rights in article P1-3, the Court held in the case of *Mathieu-Mohin and Clerfayt v. Belgium* that the States can make the rights in article P1-3 subject to conditions, as long as these conditions "do not curtail the rights in question to such an extent as to impair them of the very essence and deprive them of their effectiveness", that the conditions are "imposed in pursuit of a legitimate aim" and "that the means employed are not disproportionate. In particular, such conditions must not thwart the 'free expression of the opinion of the people' in the choice of the legislature"[207]

The term "the free expression of the opinion of the people" has a summary nature. This indicates that when the rights enshrined by the article are not restricted in contravention of the requirements mentioned in Chapter 4, then the elections are "free". Certainly they are, within the meaning of article P1-3, which is an important provision in the Convention scheme. Nevertheless, it is also important to acknowledge that other provisions of the Convention and other activities that take place in the society in the Contracting States in general, and not necessarily in the proximity of an election can have crucial influence on the outcome of an election. Access to media was briefly mentioned in the case of the *United Communist Party v. Turkey* in Chapter 5 – The electoral system. Voter education, the granting of citizenship, the possibility of political contestation and what Suksi calls the adjacent political rights, such as the right to freedom of expression, association, assembly and movement[208] are also of significant interest in this connection. The prohibition of inhuman or degrading treatment in article 3 of the Convention has also relevance here. A few cases that deal with issues that are related to elections and the overall political situation will be mentioned here.

[207] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, para. 52.
[208] Hinz and Suksi, 2002, pp. 12-17. See also *Handbook for the European Union Election Observation Missions*, 2002, p. 12.

7.2 Related issues

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

The right to freedom of expression, protected in article 10 of the Convention, entails the right to receive information. In relation to receive voter information the Commission said in *Bader v. Austria*[209] that it did not find that Article 10 guarantees, in circumstances such as in the present case, an unfettered individual right to be informed by State authorities on issues of general interest in a specific way.

Several cases concerning the dissolution of political parties have been lodged against Turkey.[210] In the first case the Court assessed the dissolution of the United Communist Party to be an interference with the applicants' freedom of association since the dissolution was based on the party's constitution and programme. The applicants complained that, among other things, their right to free elections was violated, since the leaders of the party due to the dissolution were banned from taking part in elections. The Court found that the Turkish authorities had violated the applicants' rights protected by article 11 of the Convention, but said that the measure complained of in relation to article P1-3 was an incidental effect of the dissolution, which the Court already held to be a breach of article 11. Therefore, the Court did not find it necessary to consider that complaint separately.[211] The Court used the same reasoning and came therefore to the same result in the cases of *The Socialist Party et al. v. Turkey*[212] and *The Welfare Party et al. v. Turkey*, with the difference that in the latter case the Court did not find that Turkey violated the applicants' right to freedom of association, because the party's programme was seen to be in opposition with the fundamental rules of

[209] See Chapter 6 – In the choice of the legislature.
[210] ECHR *The United Communist Party of Turkey et al. v. Turkey*, see Chapter 3 – The nature and the scope of article P1-3; ECHR *The Socialist Party et al. v. Turkey*, Judgment of 25 May 1998; Reports of Judgments and Decisions 1998-III; ECHR *The Welfare Party et al. v. Turkey*, Judgment of 13 February 2003, appl.no. 41340/98 et al. See also ECHR *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Judgment of 2 October 2001, appl.no. 29221/95 and 29225/95.
[211] ECHR *United Communist Party of Turkey et al. v. Turkey*, para. 64.
[212] ECHR *The Socialist Party et al. v. Turkey*, para. 57.

democracy. This shows that cases concerning political parties, in case of dissolution by the State authorities, will have to seek protection of their political rights to freedom of association in article 11 rather than in article P1-3.[213]

The right to freedom of expression also plays an important role in connection with elections, which is shown by the case of *Bowman v. United Kingdom*[214]. The case concerned a prohibition in the legislation of the United Kingdom of expenditure in excess of GBP 5 by unauthorised persons on publications during the election period. The Court held that such a limitation amounted to an unjustified interference with Mrs. Bowman's freedom of expression, even though the measure was imposed in pursuit of the aim of protecting the rights of others, namely candidates for the election and the electorate, since the measure was disproportionate.

The Court has in its case-law recognised the very powerful role of the media,[215] especially in regard of the formation of opinions in relation to public affairs. It can be argued that the regulation of the media during election campaigns has such an impact on the outcome of the elections, that equal access to the media is a prerequisite for free elections. However, the Commission has in *Purcell et al. v. Ireland* declared that article P1-3 does not give a citizen the right to demand that all political parties competing in an election shall be granted radio or television coverage or be granted the same amount of such coverage.[216] It can be argued that the decision was very concrete and cannot be regarded as setting the standard in relation to any future complaints regarding media coverage during election campaigns.

Several times, it has been shown that the Contracting States are relatively free to choose how to create their internal rules governing elections. Nevertheless, it seems surprising that the Court stresses that the television is a very strong media and emphasises the importance of a pluralistic political debate in a democratic society, but at the same time seems ready to accept that certain parties will not be granted coverage. When such an interpretation cannot be read into article P1-3, it could be argued to follow from article 10 alone or read together with

[213] See also ECHR *Yazar, Karatas, Aksoy and the HEP v. Turkey*, Judgment of 9 April 2002, appl.no. 22723/93 and ECHR *Dicle for the DEP v. Turkey*, Judgment of 10 December 2002, appl.no. 25141/94.
[214] ECHR *Bowman v. United Kingdom*, Judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I.
[215] ECHR *Jersild v. Denmark*, Judgment of 23 September 1994, Series A, No. 298, para. 31; ECHR *United Communist Party v. Turkey*, in this connection mentioned in Chapter 5 – The electoral system.
[216] EComHR *Purcell et al. v. Ireland*, Decision of 6 April 1991, appl.no. 15404/89, 70 DR 262. Along the same lines, see EComHR *Proyecto Manos Limpas v. Spain*, Decision of 15 September 1997, appl.no. 34402/97, where the Commission said that article P1-3 does not grant the right to for parties to obtain "espaces de publicité electorale gratuite."

article 14. This has to an extent been shown in the 2001 case of *VGT v. Switzerland*[217] concerning the right to access to media in relation to political commercials.[218] [219]

In relation to the prohibition of inhuman or degrading treatment as protected in article 3 of the Convention a case against Poland has been presented to the Court.[220] A polish citizen was charged with forgery of various documents and placed in detention. During his detention he requested to be allowed to vote in the parliamentary elections in Poland in 1993, as there were voting facilities for detainees in the prison. On the day of the election the applicant was taken to the guards' room and was then told that in order to vote he had to get undressed and undergo a body search. The applicant took off his clothes except his underwear, whereupon the prison guards allegedly ridiculed him, exchanged humiliating remarks about his body and abused him verbally. The applicant was then ordered to strip naked, which he refused, and he was then taken back to his cell without being allowed to vote. He complained that he was subjected to degrading treatment by the prison guards during that incident. The Government argued that a strip search as a precondition for casting a vote in the elections was for the purpose of guaranteeing the security of the election officers. The Court held that the case related to the applicant's basic right, namely the right to vote in parliamentary elections and the Court considered it doubtful whether the exercise of this right by persons detained should be subject to any special conditions other than those dictated by normal requirements of prison security. In any case, the Court did not find that it was justified that such conditions should include an order to strip naked in front of a group of prison guards.[221] After a further evaluation of the circumstances of the case in relation to article 3 of the Convention, the Court found that the treatment of the applicant during that incident constituted a breach of the prohibition on inhuman and degrading treatment.[222]

It is difficult to say whether this case will have an influence on the outcome of disputes relating to prisoners' right to vote in countries where such facilities are not already established by the authorities. As mentioned earlier in Chapter 4 – Limitations to the rights in

[217] ECHR *VGT Verein Gegen Tierfabriken v. Switzerland*, Jugdment of 28 June 2001, Reports of Judgments and Decisions 2001-VI.
[218] The case concerned access to a private broadcasting channel, but was the only Swiss channel with the right granted to broadcast commercials. The argument must also have relevance in relation to access to public or semi-public media with conferred with public service obligations by national law.
[219] See also Recommandation No. R (99) 15 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns, adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Minister' Deputies. The Recommandation stresses the need for regulations on the coverage of elections to be in accordance with article 10 of the Convention.
[220] ECHR *Iwanczuk v. Poland*, Judgment of 15 November 2001, appl.no. 25196/94.
[221] Ibid., para. 54.
[222] Ibid., para. 60.

article P1-3 - many Contracting States have restrictions on prisoners' right to vote while in detention, and one has to be very prudent in applying remarks concerning one type of cases in the context of other substantial rights in the Convention. However, the Court's remark can be an indication of a direction the Court will find it desirable for the Contracting States to go.

7.3 The electoral cycle

The free expression of the opinion of the people correspond at what Suksi refers to as election element 8) the free expression of the will of the people.

Suksi refers in that connection to more practical aspects of activities that takes place after election day, while the content of the free expression of the opinion of the people within the meaning of article P1-3 seems rather difficult to decode. After reading the case-law one is left with the impression that the free expression of the opinion of the people is rather a turn of phrase used to confirm that the requirements to the limitations in article P1-3 have been complied with.

8. Conclusions

"[F]undamental freedoms […] are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend."[223]

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

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

This research has not gone into an in-depth political or philosophical analysis of the validity of this statement. The present paper has through a legal dogmatic case-law analysis mapped out the content of article P1-3. The analysis has shown that article P1-3 contains substantive political rights of participation, such as the above-mentioned rights. The difference in the formulation of article P1-3 and the other substantive clauses in the Convention owes its explanation to the fact that elections are activities that the States shall engage in, and thus a positive obligation for the Contracting States. However, there are also negative aspects to the rights in article P1-3, for example when the Contracting States are limiting a persons right to vote or his or her right to stand for election.

This paper has also shown, albeit rather briefly, that the rights and principles that constitutes the basis for the electoral cycle, expressed by article 25 of the ICCPR, are also to be found in the right to free elections in article P1-3. However, an in-depth analysis may show that there are differences that are not visible in this concise evaluation.

[223] The Preamble to the Convention.

The rights in article P1-3 are from the outset, however not mentioned expressly in the article, limited to *citizens* of the Contracting State in question. This position is generally accepted in International Human Rights Law, as article 25 of the ICCPR contains the same, all though explicit, limitation. The limitation derives from the tradition from which the Convention stems, and because of the close linkage between the concept of citizens and peoples' self-determination, and thereby State security and Sovereignty, the Court cannot be expected to construe the group of right holders to the rights in article P1-3 to be wider than the Contracting States' citizens.

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

The limitations in the rights in article P1-3 must

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

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

From the case law it appears that the Court allows for two forms of restrictions in the rights in article P1-3. One form is the "conditions" that the article expressly mentions. The other form is limitations by implication. The Court continuously refers to the possibility to restrict the rights in article P1-3 by implication on grounds that the article does not present the permitted limitations in express words but nevertheless makes it clear that limitations are permitted.

As previously mentioned, the regrettable effect of the traditional use of the doctrine on implied limitations is that the Convention organs have the possibility to cut off the assessment of the merits at an earlier stage than they usually do when evaluating a case. When using the implied limitations the Court will be able to, before evaluating whether there has been an

interference with a right protected by the Convention, look into whether the applicant is in a position where he or she simply must tolerate more discomfort imposed by the State than other individuals. If that is the case in the Court's view, the Court will find that the States are not interfering with a right and therefore the State is not forced to justify the discomfort in accordance with legitimate aims that comply with the object and purpose of the Convention, even though the discomfort would have amounted to an interference in relation to other individuals who are not in the same position, and would have to have been justified in pursuit of such an aim. The cutting off of the assessment of the justification of the limitation in combination with the use of limitations not spelled out expressly in the Convention makes it difficult to foresee the scope of the rights in the Convention, and thus gives rise to serious problems in relation to legal certainty in the Court's interpretation of the Convention.

Jacobs and White call the doctrine on implied limitations "dubious", "incorrect and unnecessary", and hold that it is so imprecise that, once adopted, it is hard to see its limits. At the same time they argue that the decisions from the Commission since the *Golder v. United Kingdom* judgment suggest that the Commission abandoned the use of the doctrine.[224] In Ovey and White, it is stated that the notion of implied limitations is of purely historical interest in relation to the articles 8 to 11.[225] Similarly, van Dijk and van Hoof argue that the notion of limitations by implication is not used by the Court in relation to article 8 to 11, but will be applied in relation to articles where restrictions are not expressly mentioned in the provisions. This position can unfortunately not be supported by the present research, as the Court in 1997 restricted the right protected in article 9 of the Convention by implied limitation. van Dijk and van Hoof also express their disapproval of the Court's use of the doctrine by referring to it as "wrong" and stating that the whole system of the Convention appears to be opposed to the notion that rights can be subject to implied limitations.[226]

When looking at the case-law from the Court concerning limitations to the rights in article P1-3, it is not clear whether the Court actually applies the doctrine of implied limitations or whether the restrictions are considered as the "conditions" mentioned in the article, when the Court looks at the restrictions imposed. The doctrine of implied limitations has traditionally been used in connection with prisoners' rights. Therefore, it can be argued that, by not referring to the doctrine in the many complaints that concern prisoners' right to vote or to stand for election, the Court is not using the doctrine. But, at the same time the

[224] Jacobs and White, 1996, pp. 299-301.
[225] Ovey and White, 2002, pp. 198-199.
[226] van Dijk and van Hoof, pp. 763-765.

Court continuously refers to the doctrine in relation to the general principles in article P1-3. The Court's standpoint on the issue is not easy to decipher. However, what is clear from the case law is that both types of limitations have to be justified by the Contracting States with the test to justify the limitation. However surprising this position is, since the essence of an implied limitation is that it does not have to be justified, this speaks in favour of the Court *de facto* not using the doctrine to block assessment at an earlier stage for certain groups than for other groups of persons. However, when the Court continues to state that there is room for implied limitations in connection with the rights in article P1-3, the possibility that the Court actually will use the doctrine in a future judgment cannot be non-existing. A clear statement from the Court on the matter would be desirable – especially if it states that it will refrain from applying the doctrine on implied limitations in the future.

The proposed test to establish whether the measure complained of is thwarting "the free expression of the opinion of the people", reveals that the Court does not strictly apply a test that evaluates whether the measure amounts to an interference and subsequently demands a justification from the measure imposed. The assessment seems to be more of a general nature, where the Court strikes a balance between, on the one hand the measure and its implications and, on the other hand, overall societal considerations. The legitimate aims that the Court have accepted lie in many cases close to what is reasonable, common and what deserves protection in a democratic society, albeit neither the Convention nor the Court require that the Contracting States back up their motivations for imposing the measures with a substantiation that the measure is "necessary in a democratic society". And here, in the test the Court applies when assessing the complaints, lies maybe the main reason as to why article P1-3, to a large extent can be regarded as a fairly weak protection of individual rights.

First, the Court point to the requirement that a limitation must not deprive the rights of their very essence. It is not clear from the case law how much is needed to deprive a right of its very essence, but the wording suggests that it demands quite a lot. Concerning the aim of the limitation, the Court indeed demands that the Contracting States present their legitimate aims before the Court, but the Court is particularly cautious when determining whether the Contracting States comply with the demands of proportionality.

International Human Rights Law traditionally recognizes the States as the prime protector of individuals' human rights, and does not go into detail with how the States shall ensure the protection. Therefore, it is left to the States to find out how and by which means the

protection can be ensured, and accordingly the State is left with a right of discretion in this respect. How the States deal with the human rights protection will be susceptible to the historical and political context of the State in question, and therefore differences in *how* the States solve the human rights issues that exist within their jurisdiction does not pose a problem in relation to the Convention, as long as the human rights problems *are solved*.

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

The discretion that the Court has granted to the Contracting States, leads to the result that the Contracting States can restrict the rights in article P1-3, which are supposed to ensure that the legislature represents the free expression of the opinion of the people, to a larger extent than the rights in which restrictions can only be made when they are "in accordance with law" or "prescribed by law", since these will have to meet the requirement of whether the measure is "necessary in a democratic society". It means that there is a risk that the restrictions in article 8 to 11 of the Convention, goes beyond what the persons under the jurisdiction of a Contracting State deem acceptable.

As mentioned, the granting of the margin of appreciation to the Contracting States cannot in its entirety be criticised as being in contravention of the purpose of the Convention. But when the margin for the States becomes so wide that the Court does not make an assessment of each of the restrictions imposed or demand a concrete justification for the measures, the protection in article P1-3 seems far weaker than the protection in other substantive clauses in the Convention. The Court has shown blank acceptance of restrictions in every prisoners' right to vote. The Court has accepted without reservation that the some States exclude sizeable groups of civil servants from the right to stand for election. The Court has accepted that some States demands a significant amount of money in deposit as a prerequisite for

standing for election, without even asking the question whether it poses a problem in relation to the "free expression of the opinion of the people" when excluded groups are trying to make their voice heard on the national level. The Court seems only to be willing to go into in-depth scrutiny of the circumstances of a case, when a complaint derives from a clear discrimination or apparent arbitrary conduct by State authorities. When article P1-3 is considered to be of prime importance in the Convention system, it is to be noted with dissatisfaction that the Court will not honour the rights enshrined therein by adopting a stricter test and thereby perform a more thorough scrutiny of whether the restrictions in the rights in article P1-3 can be accepted.

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

When determining what constitute the legislature within the meaning of article P1-3 the Court has moved towards a functional approach, that shows that where legislative power is exercised, the persons exercising that power shall be appointed in accordance with the requirements in article P1-3. The practice stemming from the Court is not entirely consistent, and some changes in this respect may be anticipated. However, the legislative power in question shall result in law in the formal sense, in order for the Court to regard article P1-3 as applicable.

The concept of *people* in connection with political rights reveals to be limited, by intervention of article 16 of the Convention, to citizens, even though the term "participation" would suggest, that it is the persons affected by the decisions that should be able to take part in the appointment of the decision-makers. Clearly, the right to participation should require a clear and certain affiliation to the sphere where the decision-making has its effect, but the question is, if (long term) residents should not be able to participate in the public life at the national level on the same footing as citizens, since the rules of general application affects them to the same extent as it affects citizens.

Article P1-3 relates only to the appointment of decision-makers on the national level. Since local authorities are not vested with competence to issue law, but only have such powers by

means of delegation of power from the legislature, the appointment of the members of these authorities are kept out of the scope of article P1-3. At the same time, the European Parliament, that also derives its powers from delegation from the national parliaments, is considered to be part of the legislature. Accordingly, the Court, when construing the article, applies a concept of "law" in the formal sense, and that has the implication that the term "democracy" seems to be related, in the sense of the Convention, only to activities that take place at the national level. Having in mind the historic context of the Convention as being created in opposition to dictatorships and totalitarian systems, the Convention's concept of democracy can hardly be criticised for promising more than it will keep. However, it is important to recognise when discussing the concept of democracy, that participation on the local level, where the implementations of the Government's and the legislature's policies takes place and where such decisions to a large extent affects the residents further than the acts of the European Parliament, does not have to meet the requirements of article P1-3 and is not seen as a part of the effective political democracy within the sense of the Convention. This has also the effect that the part of the society that is spoken of as the private sphere or the civil society falls completely outside the realm of the Convention when democracy is at issue.

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

Some changes to be anticipated in relation to article P1-3 have been mentioned. Of particular interest is the question whether the criteria the Court used in the case of *Christine Goodwin v. United Kingdom* will be setting a new standard for the determination of the extent of the margin of appreciation. The statement from the Court, that a European common standard between 43 (today 44) Contracting States is hardly surprising, is a very valid point. Traditionally, it has been said that the reason why the Court ran the risk of granting the Contracting States the leeway, was that the Court had faith in the Contracting States and their commitment to the protection of individual human rights. The Court has thus relied on the democratic processes in the Contracting States to adequately protect against human rights abuses. When the number of Contracting State today is much higher than previously, and since quite a few of the recently acceded Contracting States are still struggling with the reminiscences of their totalitarian past, there are good reasons for changing use of the margin

of appreciation. It could also be argued that even from the outset the trust in the Contracting States should not have granted them with such a wide margin of appreciation at any rate, since the Convention actually was aiming at protecting the populations in "free States" and not in totalitarian regimes.

However, the question remains whether the criteria used in the case of *Christine Goodwin v. United Kingdom*, if adopted in future disputes in relation to article P1-3, will result in a more lenient or a more strict practice from the Court, and whether "the clear and uncontested evidence of a continuing international trend" gives better guidance as to what the Contracting States have to do to fulfil their obligations in relation to the Convention, and thus, whether this "international trend" will make up for then general legal uncertainty that reigns in relation to article P1-3.

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

ABBREVIATIONS

DR	Decision and Reports of the European Commission of Human Rights
ECHR	European Court of Human Rights
EComHR	European Commission of Human Rights
EPIC	Election Process Information Collection
ETS	European Treaty Series
ICCPR	International Covenant on Civil and Political Rights
IFES	International Foundation for Election Systems
International IDEA	International Institute for Democracy and Electoral Assistance
OJ	Official Journal of the European Communities
UNDP	United Nation's Development Programme
UNTS	United Nation's Treaty Series
YB	Yearbook of the European Convention on Human Rights

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Filename: Mit speciale
Directory: H:
Template: \\pchome1\pchome1\jlindbla\settings\profilestorage\ApplicationData\Microsoft\Templates\Normal.dot
Title: The right to free elections according to the European Convention on Human Rights
Subject:
Author: Janne Lindblad
Keywords:
Comments:
Creation Date: 7/10/2003 9:05 AM
Change Number: 2
Last Saved On: 7/10/2003 9:05 AM
Last Saved By: Janne Lindblad
Total Editing Time: 6 Minutes
Last Printed On: 7/15/2003 11:43 AM
As of Last Complete Printing
Number of Pages: 89
Number of Words: 178,254 (approx.)
Number of Characters: 1,016,048 (approx.)