



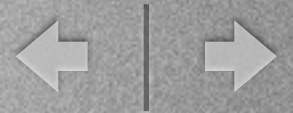
# Inclusiveness in the electoral process. Article 3 of Protocol No. I of the European Convention on Human Rights

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# I. Political democracy - the *only* system of government compatible with the Convention



A. Reason for the creation of the European Convention on Human Rights (the Convention): common *heritage* of European political traditions, ideals, freedom and the rule of law (Preamble).

B. 2 core ingredients for an effective system of human-rights protection:

a) political *democracy*;

b) *common* understanding and observance by the State of its obligations, but:

- subsidiarity;

- margin of appreciation.

*Refah Partisi (the Welfare Party) and Others v. Turkey*, 2003

*Gorzelik and Others v. Poland*, 2004





## 2. Democracy capable of *defending* itself



A. No abuse of rights or protection for those aiming to destroy the rights of others (Article 17).

B. Requirements of *loyalty* to the State may be imposed to limit political activities, subject to a proportionality test, on:

a) teachers (*Vogt v. Germany*, 1995);

b) policemen (*Rekveniy v. Hungary*, 1999);

c) prosecutors (*Guja v. Moldova*, 2008);

d) any public servants but not private-sector workers (*Sidabras and Dziautas v. Lithuania*, 2004);

*but* no requirement of ‘political neutrality’ of politicians (*Zdanoka v. Latvia*, 2006).

C. *Pre-emptive action*, such as a *dissolution* of a party, may be allowed for the State to ‘reasonably forestall the execution of ... a policy incompatible with the Convention provisions before an attempt is made to implement it’ (*Refah Partisi*).



### 3. Election rights - limited scope of application



Only *parliamentary* elections are regulated by Article 3 of Protocol No. I to the Convention (A3/PI) which states: “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*.” Not covered are:

- a) elections to city council or other local authorities (*Cherepkov v. Russia* (dec.), 1999);
- b) elections of a Head of State (*Habsburg-Lothringen v. Austria* (dec.), 1989);
- c) referendums (*Hilbe v. Liechtenstein*, 1999);

*but covered:*

European Parliament (*Matthews v. the U.K.*, 1999) and

*Regional* representative organs in federal systems (*Mathieu-Mohin and Clerfayt v. Belgium*, 1987).





## 4. *Lex specialis* vs *Lex generalis*



Main differences between A3/PI and Articles 8-11 (*Zdanoka*):

- a) A3/PI is phrased in terms of a positive obligation of a State rather than those of an individual right; both 'passive' and 'active' election rights are *implied*, not literal, requirements of the provision;
- b) no specific list of legitimate aims - the State may choose one, its compatibility to be verified;
- c) margin of appreciation is *wider*, allowing for considerations of country-specific historical development, cultural diversity and political thought (*Hirst v. the U.K.*, 2005); allows co-existence of different electoral systems and the calculation of proportional thresholds - no answer, for instance, as to whether blank ballots to be taken into account (*Paschalidis and Others v. Greece*, 2008);
- d) margin of appreciation is *wider still* in matters of *passive* election rights;
- e) restrictions are not subject to the requirement of 'necessity' or 'pressing social need';
- f) *no 'individualisation'* of a restriction of election rights is required, as such, as long as a person falls within a clearly-defined *category* or group under a relevant statute.





## 5. Compliance: a) clarity and foreseeability of the law and the protection from arbitrariness



While there is no separate 'lawfulness' test as in matters of Articles 8-11, the Court verifies under A3/PI whether:

- a) restriction was based on a *clear* and *foreseeable* domestic law (which is examined separately as a 'lawfulness' test under Articles 8-11), and there was no arbitrariness in its application (*Melnychenko v. Ukraine*, 2004; *Podkolzina v. Latvia*, 2002);
- b) but *negative presumptions* or shifting of burden of proof may be applied in procedures restricting election rights (*Zdanoka*);
- c) Electoral Commission lacking independence from the executive does not raise an issue under A3/PI, unless there is evidence of the abuse of power by the Commission on the facts of a particular case (*Georgian Labour Party v. Georgia*, 2008);
- d) the requirement for '*individualisation*', that is the supervision by the domestic courts of the proportionality by taking into account the specific features of the case, is *not a precondition* (*Zdanoka*), but becomes more important when the legislation is too wide (*Adamsons v. Latvia*, 2008).





## 5. Compliance: b) proportionality test



Having satisfied itself that the restriction was based on a clear and foreseeable legal basis and not arbitrary, the Court carries out an autonomous proportionality test, usually applying *comparative law* as a benchmark but also taking into account the specifics of the system in question (margin of appreciation):

- a) purpose of restriction must not *thwart* the free expression of the will of the people; the electoral process must be aimed at *identifying* that will through *universal* suffrage (*Hirst*);
- b) 'preventive' measure stands a better chance of justification than 'punitive' (*Campagnano v. Italy*, 2006), unless a proper criminal prosecution is involved (*X. v. Belgium*);
- c) a *timely* measure stands a better chance of justification than a *belated* one (*Zdanoka*);
- d) an individualised measure - while not indispensable - is desirable (*Adamsons*);
- e) all 'substantive' elements of the proportionality test - such as, for instance, the question of dangerousness of an organisation or activity of a person or a party to the democratic order - is *factual and objective*; it is thus irrelevant whether the impugned activities or views were legal or illegal at the material time (*Zdanoka*) - the concept of 'degree and intensity rather than nature'.



## 6. Permissible restrictions of 'active' election rights



*Exclusion* of a certain group or individual is allowed, if based on a *clear and precise* law, which may specify:

- a) minimum *age* and *residence* requirements (*Hilbe*);
- b) a voter registration system which is 'active', namely shifting responsibility for the accuracy of electoral rolls from the authorities onto the voters (*Georgian Labour Party*);
- c) persons *convicted* of serious or financial crimes (*Holland v. Ireland*, 1998; *M.D.U. v. Italy* (dec.), 2003), as long as the measure is temporary (lasting as long as the conviction); *but* a *carte blanche* restriction on *all detained convicts* to vote - without sufficient possibility for further individualisation based on the nature or type of the offence - was found to be disproportionate (*Hirst*); the recent *Frodl v. Austria* (2010) case induces some uncertainty, however (see below);
- d) former *nazi* collaborators convicted of 'uncitizen-like conduct' following the WWII - 'persons who had seriously abused, in wartime, their right to participate in the public life, endangering the security of the State or the foundations of a democratic society' - in such cases, even a life-long deprivation of the right to vote is proportionate (*X v. Belgium* (dec.), 1979; *X. v. Netherlands* (dec.), 1974).





## 7. Restrictions of 'active' election rights in breach of A3/PI



Most violations have been found primarily for the lack of *clarity and foreseeability* of the domestic legislation allowing too wide discretion for the electoral authorities to annul election results (*Kovach v. Ukraine*, 2008; *Georgian Labour Party*). Otherwise, violations of A3/PI were found in relation to:

- a) temporary (5 year-long) ban of a bankrupt in civil proceedings (*Campagnano*) - questions remains however as to the consequences of criminal/fraudulent bankruptcy (*M.D.U.; Frodl*);
- b) ban of all *detained convicts* to vote, despite being linked (limited) in time to the detention (*Hirst*);
- c) ban on a murderer convicted to life imprisonment in view of *insufficient individualisation* - 'no possibility for decision taken by a judge to link the offence committed and issues relating to elections and democratic institutions' (*Frodl*);
- d) failure of the State to give election rights to everyone within its *territorial jurisdiction* - remote or factually uncontrollable areas (*Matthews; Aziz v Cyprus*, 2004);
- e) treatment as a single class of those with *intellectual and mental disabilities* - and those under total or partial guardianship - for the purpose of disenfranchisement of an applicant suffering from a manic-depressive disorder (*Alajos Kiss v. Hungary*, 2010).



## 8. Permissible restrictions of 'passive' election rights



*Restriction* on the right to stand as a parliamentary candidate would be compatible with A3/PI, provided the legislation is sufficiently *clear and precise* and its application is not arbitrary, despite the following restrictions :

- a) official *language* proficiency (*Podkolzina*) or *residence* requirements (*Melnychenko*);
- b) requirements to *declare* a candidate's *property*, earnings, sources of *income* (*Russian Conservative Party of Entrepreneurs v. Russia*, 2007), *employment* and *party-membership* information (*Krasnov and Skuratov v. Russia*, 2007); disqualification for a *false* factual declaration unless made in good faith (*ibid.*; *Sarukhanyan v. Armenia*, 2008);
- c) refusal of registration as candidate for failure to pay an *electoral deposit*, even if the person is in an *unprivileged* position physically or socially and the deposit is non-refundable (*Andre v. France* (dec.), 1995); it appears that the ECHR would be ready to approve deposits of *2,500 times the minimum salary* for proportionate systems and *100 times* for majority voting systems - yet the deposit must not amount to an *insurmountable* administrative or financial barrier (*Sukhovetsky v. Ukraine*, 2006).
- d) a former *nazi* collaborator convicted of treason - lifelong exclusion (*Van Wambeke v. Belgium* (dec.), 1991); leaders of a proscribed *organisation* with *racist and xenophobic* tendencies (*Glimmerveen and Hagenbeek v. the Netherlands* (dec.), 1979) - reference to Article 17;



## 8. Permissible restrictions of 'passive' election rights



(continued):

e) disqualification of a former *activist* of a *communist* party in a post-Soviet democracy, despite the restriction being based on past conduct which had been *assumed* to have happened more than 10 years ago - on condition of regular review by the national legislature of the need to maintain the measure only temporarily (*Zdanoka*; but see *Adamsons*);

f) electoral *threshold* in a proportionate system in Turkey amounting to 10% - albeit labelled by the Court as 'excessive' in the reasoning part as the 'common practice' of the States was established at 5%, and despite the fact that 45.3% of the votes cast in a 2002 Turkish election were 'wasted' on unsuccessful candidates - counterbalanced by the ability of candidates to run independently and form coalitions (*Yumak and Sadak v. Turkey*, 2008);

g) *threshold of 5%* coupled with the inability to recover an electoral deposit of EUR 15,000 (*Tete v. France* (dec.), 1987).





## 9. Restrictions of 'passive' election rights in breach of A3/PI



Most violations to date concern *lack of clarity and foreseeability* or *arbitrariness* in applying the rules:

- a) domestic legislation and its application lacking *clarity* and foreseeability of the notions of *language, residence, property* and *party membership* requirements, coupled with unpredictable reversals of burden of proof (*Podkolzina, Melnychenko, Krasnov and Skuratov, Sarukhanyan*); including the discrepancies in the domestic law and jurisprudence (*Paschalidis and Others v. Greece*);
- b) *retroactive application* of a constitutional provision adopted in 2001 to disqualify a person elected in 2000 for being member of parliament and practising lawyer at the same time; question of compatibility of parliamentary and legal professional duties not pursued (*Lykourazos v. Greece, 2006*);
- c) *re-opening of proceedings* regarding an approved electoral list by way of extraordinary review on *points of law* - lack of *res judicata* (*Russian Conservative Party of Entrepreneurs*);
- d) disqualification of the *entire list* of candidates in view of the withdrawal of *one of the top three* candidates for discrepancies in his financial statements (*Russian Conservative Party of Entrepreneurs*);
- e) refusal of the electoral authorities to *comply* with the domestic court orders *reinstating* the applicants' candidatures on the electoral list (*Petkov and Others v. Bulgaria, 2009*)





## 9. Restrictions of 'passive' election rights in breach of A3/PI



(continued): f) disqualification of a *former KGB officer* - applicable legislation not distinguishing between different types of former KGB operatives, with no consistent approach of the domestic courts as to 'individualisation' of the danger presented by different applicants to whom the rules were applied, as well as in view of the belated application of the measure (*Adamsons*);

g) refusal of the registration as a candidate on the basis of an applicant being a 'clergyman' - lack of a precise definition of the notion in the domestic law or whether professional religious activities ought to be suspended or dropped altogether when elected - but the question of compatibility of parliamentary and religious activities, as such, was not pursued (*Seyidzade v. Azerbaijan*, 2009).

Only very few cases to date concerned a '*substantive*' ground for a breach of the passive aspect:

a) legislation banning dual nationals from running as parliamentary candidates *while allowing* dual nationality (*Tanase and Chirtoaca v. Moldova*, 2010);

f) exclusion from eligibility to stand as parliamentary candidates in view of *ethnic* origin - in order to be eligible to stand for election, one had to declare affiliation with a "constituent people" (Bosniacs, Croats and Serbs) which the applicants (of Roma and Jewish origin) could not do; but this was a discrimination issue under Article 14 (*Sejdic and Finci v. Bosnia*, 2009).