



Election Law: A Human Rights Perspective

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1. Learning Goals

The purpose of this presentation is to

- Identify the principal election rights under HR law.
- Explain the difference between them.
- Identify the legal basis under HR law and the complications due to the formulation of HR treaties.
- Explain through examples some of the limitations imposed by HR law on voting rights

Election rights in Human Rights law

	UDHR 1948	ICCPR 1966	ECHR 1950	AmCHR 1969	AfrCPHR 1981
Right to vote	Art 21	Art 25	P1-3 (1952)+ Case-law (1987)	Art. 23	(art. 13)
Right to be elected	Art 21	Art 25	P1-3 (1952)+ Case-law (1987)	Art. 23	(art. 13)

Election rights under UDHR 1948

Art. 21 Universal Declaration of Human Rights

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures

Election rights under art. 25 ICCPR 1966

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- To take part in the conduct of public affairs, directly or through freely chosen representatives;
- To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;**
- To have access, on general terms of equality, to public service in his country.

Election rights under P1-3 ECHR

- Article 3 of Additional Protocol 1 to the 1950 European Convention on Human Rights (the protocol was adopted in 1952)

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.

Election Rights under Art. 23 ACHR 1969

Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Election rights under Art. 13 AfrCHR 1981

- Article 13 of the African Charter on Human and Peoples' Rights states:
 - 1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
 - 2. Every citizen shall have the right of equal access to the public service of his country.

Important distinction

- While art. 21 UDHR 1948 and art. 25 ICCPR 1966 explicitly recognized a human right to vote and stand for election to 'Everyone' (UDHR) or 'Every citizen' (ICCPR), art. 3-P1 ECHR provided for a duty of

STATES (High Contracting Parties)

- To hold elections at regular intervals.
- Does that mean no human right to vote and be elected under the ECHR?

Legal basis ECHR 3-P1

- No. *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, GC, para. 50:
“the inter-State colouring of the wording of Article 3 (P1-3) does not reflect any difference of substance from the other substantive clauses in the Convention and Protocols. The reason for it would seem to lie rather in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to “hold” democratic elections.”

Scope of the rights

- Active right: right to vote
- Passive right: the right to be elected (sometimes referred to as the right to stand as a candidate)
- what is **not** included?
- A right to a specific electoral system (Mathieu-Mohin and Clerfayt v Belgium, 1987, para. 54, Human Rights Committee, General Comment no. 25, 12 July 1996, para. 21; Gutman v. Mexico, 2008, para. 165)
- There is no single, uniform standard to regulate how representation is organized; regard must be had to the historical development, political diversity and political thought of each state. (Mohin-Clerfayt, para. 58)

Scope of the rights: voting in a referendum

- Voting in a national referendum does not fall within the scope of the protected rights under the ECHR, unless it concerns ‘the choice of the legislature’
- Moohan and Gillion v. United Kingdom Admissibility Decision 13 June 2017
- Prisoners convicted for murder were denied the right to vote in the Scotland independence referendum
- ECHR: the case does not fall within the scope of application of Art. 3 AP1

Moohan and Gillion v UK (Scope)

41. It is true that, as Lord Kerr and Lord Wilson observed, in the independence referendum the people of Scotland were effectively voting to determine *the type of legislature* that they would have. Consequently, at first glance it might appear anomalous for such a referendum to fall outside the sphere of protection provided by Article 3 of Protocol No. 1, while elections concerning *the choice of the legislature* fall within it. However, such a conclusion is consistent with both the wording of the Article – which is more narrowly drafted than Article 25 ICCPR – and its consistent interpretation by the Convention organs. While they have not, to date, considered a secession referendum, there have been a number of cases concerning referendums on Contracting States' accession to or continued membership of the European Union (...). In each of these cases the people were also voting to determine the type of legislature they would have, but the Convention organs did not consider this factor sufficient to bring the referendums within the ambit of Article 3 of Protocol No. 1.

Moohan (con.)

42. [...]the Court has not excluded the possibility that a democratic process described as a “referendum” by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1 (...). **However, in order to do so the process would need to take place “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”.** It is true that in X v. the United Kingdom, cited above, the Commission referred to the fact that the referendum in issue was purely consultative and there had been no legal obligation to hold it. However, while these factors supported the Commission’s conclusion that the referendum did not fall within the scope of Article 3 of Protocol No. 1, they do not appear to have been decisive; rather, **the decisive factor was that the referendum was not “an election concerning the choice of the legislature”** and, having regard to the case-law of the Commission and the Court, the same must be said of the referendum at issue in the present case.

Election rights - limitations

- States enjoy a wide margin of appreciation – difficult to find two cases identical
- Recent jurisprudence from the ICCPR
- Exclusion of former MPs from local elections due to their capacity as MPs during the previous legislative session by virtue of Circular 71/2014 issued by the Supreme Electoral Court of Bolivia (*Iporre v Bolivia*, *Burgoa v. Bolivia*)
- State sought to justify exclusion on the basis of residency requirements and socioeconomic conditions, as well as the difference in the functions of the offices
- HR Committee underscored that the Electoral Committee's Circular was not provided in the Constitution or domestic legislation. It was introduced for the first time in 2015. It was not based on objective and reasonable criteria and violated art. 25 ICCPR.

Creation of rights and restrictions

- *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, GC, para. 52:
The rights in question 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.[...] [states] have a wide margin of appreciation in this sphere. [The ECHR] 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.

Restrictions: residency requirement (Hilbe v. Liechtenstein)

Applicant tried to register in Liechtenstein's electoral catalogues, while he was living in Switzerland. Refusal to register by local authorities because of a national law residence requirement (ordinary residence in Liechtenstein up to one month before the voting date).

- ECHR: Application inadmissible. The residency requirement is justified because
 1. the assumption that a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them;
 2. the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no influence on the selection of candidates or on the formulation of their electoral programmes;
 3. the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and,
 4. the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country

Hirst v. UK (no. 2)

- Automatic disenfranchisement of prisoners.
- Violation of P1-3 because of the blanket nature of the measure
- “The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision.”
- Disenfranchisement still possible, but only following a judicial decision and in connection to offences e.g. abuse of public position

ICCPR Election rights (HRCttee)

- *Nasheed v Maldives*: Former President was accused of terrorism and convicted by a court composed of judges lacking independence and impartiality. As a result, he was submitted to a 16-year disqualification from running for office.
- Although he was able to run and narrowly lose the presidential elections in November 2013, he did so while subjected to various forms of interruption resulting from the judicial proceedings against him.

ICCPR recent developments (Nasheed v Maldives con.)

- Para. 8.6.: “If a conviction for an offence is a basis for suspending the right to vote or to stand for office, such restriction must be proportionate to the offence and the sentence. The Committee also considers that when this conviction is clearly arbitrary or amounts to a manifest error or a denial of justice or the judicial proceedings resulting in the conviction otherwise violate the right to fair trial, it may render the restriction of the rights under article 25 arbitrary.”
- In this case, the Committee found the criminal proceedings, restrictions on the freedom to travel to other islands and the arrests of the candidate while on campaign taken together were arbitrary and resulted from unfair criminal proceedings. Violation of art. 25 ICCPR

Restrictions: rights sensitive to cultural diversity

- Example: Yatama v. Nicaragua: Exclusion by decision of the Election Commission of candidates for mayors and councilors in municipal elections of members of the indigenous political party (YATAMA)
- Plaintiffs were ethnic communities in Nicaragua's Atlantic Coast, differing from most of the population in language, customs and forms of organization (para. 202).
- The IntAmCtHR found a violation of the political rights and the rights to equality before the law of the candidates

YATAMA v Nicaragua reasoning

- 218. The restriction that they had to participate through a political party imposed on the YATAMA candidates a form of organization alien to their practices, customs and traditions as a requirement to exercise the right to political participation, in violation of domestic laws [...] that oblige the State to respect the forms of organization of the communities of the Atlantic Coast, and affected negatively the electoral participation of these candidates in the 2000 municipal elections. The State has not justified that this restriction obeyed a useful and opportune purpose, which made it necessary so as to satisfy an essential public interest. To the contrary, this restriction implied an impediment to the full exercise of the right to be elected of the members of the indigenous and ethnic communities that form part of YATAMA.”

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QUESTIONS?

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