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"Judges preserving democracy through the protection of human rights"

The right to free elections and democracy

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Introduction

Article 3 of Protocol No. 1 to the European Convention on Human Rights guarantees the right to free elections. That Article thus enshrines a basic principle of the genuinely democratic political system on which the Convention is based, as a result of which this provision is of central importance in the Convention system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987). The same is true of the Belgian constitutional system in which the right to vote is described as "the fundamental political right of representative democracy" (Constitutional Court, no. 9/89 of 27 April 1989)[1]. The right to free elections can therefore be seen as *a fundamental element of democracy*.

The European Court of Human Rights and the Belgian Constitutional Court have derived substantive guarantees from this right. Furthermore, supervision of respect for the right has logically obliged those courts to take a stance on *fundamental democratic choices*, whereas the judges who make up those courts are, in any event, not elected. For example, the European Court of Human Rights has had to deal with matters of fundamental political importance for States, such as the independence referendums in Scotland[2] and Catalonia[3] or the restriction of the electoral rights of persons suspected of being members of ETA[4], the Mafia[5] or former members of the KGB[6]. Accordingly, the above-mentioned courts are careful to strike a fine balance between the recognition of substantive guarantees and the margin of appreciation that must be afforded to States. In this paper I will outline the case-law on the right to free elections and show how it contributes to the preservation of democracy. With that in mind, I will first examine the way in which this right is guaranteed in the Convention system (I), and then focus on the Belgian Constitutional Court, which ensures its observance at domestic level (II).

[1] The Constitutional Court has since reiterated that finding in many cases. The dtSearch database shows 22 judgments containing this statement. See in particular judgments nos. 72/2014, 134/2013, 86/2012, 81/2012, 22/2012, 151/2007, 149/2007, 138/2007, 133/2006, 90/2006, 78/2005, 103/2004, 96/2004, 73/2003, 36/2003, 35/2003, 30/2003, 25/2002, 76/94, 26/90, 18/90 and 9/89.
[2] ECHR, *Moohan and Gillon v. the United Kingdom* decision of 13 June 2017.
[3] ECHR, *Forcadell I Lluis and Others v. the United Kingdom* decision of 7 May 2019.
[4] ECHR, *Etxeberria and Others v. the United Kingdom* judgment of 30 June 2009.
[5] ECHR, *Labita v. Italy* judgment [GC] of 6 April 2000.
[6] *Adamsons v. Latvia* judgment of 24 June 2008.

I. Case-law of the European Court of Human Rights

Article 3 of Protocol No. 1 provides that States "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".

The European Court of Human Rights has been at pains to clarify the scope of this provision, in particular the contours of the concept of "elections" – which does not, *in principle*, include referendums (see *Moohan and Gillon v. the United Kingdom*, decision of 13 June 2017) – and the term "legislature", which refers to a national body which, within the constitutional structure of the State concerned, exercises a legislative function. Normally Article 3 does not therefore concern municipal, provincial, regional or presidential elections, except where the relevant elected bodies are vested with such a function, even if only in part (see in particular, concerning provincial elections, the decision in *Repetto Visentini v. Italy* of 9 March 2021 and, concerning presidential elections, the decision in *Boškoski v. the former Yugoslav Republic of Macedonia*, 2 September 2004)[7].

Moreover, the European Court of Human Rights considers that States enjoy "a wide margin of appreciation when it comes to determination of the type of ballot through which the free expression of the opinion of the people in the choice of the legislature is mediated" and that Article 3 of Additional Protocol No. 1 "does not give create any 'obligation to introduce a specific system' such as proportional representation or majority voting with one or two ballots" (*Yumak and Sadak v. Turkey*, § 110, 8 July 2008).

In addition, it must be noted that, on a textual level, Article 3 of Protocol No. 1 differs from the other Convention provisions in that it does not enshrine a right but imposes a formal obligation on the member States. However, the European Court of Human Rights has also attributed a substantive scope to this provision, considering that it entails individual rights: the right to vote, which is the "active" part, and the right to stand for election, which is the "passive" part.

Like most other rights enshrined in the Convention system, these are not absolute. In its effort to strike a careful balance between the recognition of substantive guarantees and national sovereignty, the Court accepts the existence of implied limitations on these rights (which are themselves implicit). In the absence of a textual basis, the Court does not use the criteria of necessity and pressing social need underlying Articles 8 to 11 of the Convention. In order to determine whether the restriction on the right to vote and to stand for election is admissible, the Court ascertains whether there has been arbitrary treatment, a violation of the principle of proportionality or an interference with the free expression of the people (see the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987). The States therefore have a margin of appreciation in this sphere, depending in particular on the context.

The Court further considers that the passive limb of Article 3 of Protocol No. 1 may be framed more strictly than its active limb. Where an individual is deprived of the right to stand for election, it is above all necessary to verify that the domestic disqualification proceedings were not arbitrary (see the *Ždanoka v. Latvia* [GC] judgment of 16 March 2006, and the *Melnychenko v. Ukraine* judgment of 19 October 2004). It accepts that a concern to protect the democratic order and ensure the proper functioning of public authorities may justify such a measure (see the *Miniscalco v. Italy* judgment of 17 June 2021). Conversely, the Court carries out a particularly careful analysis of cases where a person

[7] The Constitutional Court also held that "Article 3 does not apply to municipal elections, since municipal elections do not concern the 'choice of legislature' within the meaning of that provision" (no. 86/2012, B.8).

has been deprived of the right to vote, which as a rule entails a relatively thorough examination of the proportionality requirement. In the event of placement under guardianship on grounds of disability, in the context of a criminal investigation or even in the case of persons imprisoned following a criminal conviction, it has specified that the disqualification should not be automatic but should rather take into consideration the individual situation of the person concerned, where appropriate through recourse to a court (see, on criminal investigations, the *Labita v. Italy* [GC] judgment of 6 April 2000; on guardianship, the *Alajos Kiss v. Hungary* judgment of 20 May 2010; on prisoners, *Hirst v. the United Kingdom* judgment (no. 2) [GC] of 6 October 2005). The Court also considers that Article 3 of Protocol No. 1 does not allow, in principle, for certain individuals or groups to be deprived of the right to participate in the political life of the country where prevented from being appointed as members of the legislature (see the *Aziz v. Cyprus* judgment of 22 June 2004). Conversely, a disqualification for certain specific offences, for a duration that is adapted to the sentence imposed and with the possibility of regaining the right to vote, appears compatible with Article 3 (see the *Scoppola v. Italy* (no. 3) [GC] judgment of 22 May 2012).

The Court has also had occasion to rule on restrictions of a lesser degree of interference than the outright deprivation of electoral rights. Here too, it seeks to recognise a greater margin of manoeuvre for States as regards the right to stand for election. It has, for example, approved the requirement of a deposit to avoid frivolous candidatures, provided that its amount remains proportionate and does not constitute an obstacle to those who genuinely wish to take part in the elections or to the emergence of new political tendencies (see *Soukhovetski v Ukraine* judgment of 28 March 2006). The Court has also endorsed the use of an electoral threshold of 5% in order to avoid an excessive fragmentation of the political landscape, finding that this percentage was proportionate (see the *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* decision of 29 November 2007). In examining proportionality, it is necessary to take account of the specific context of each State, and this has led the Court, in particular, not to find fault with an electoral threshold of 10%, while finding that it more generally appeared to be incompatible with the requirements of the Council of Europe (see the *Yumak and Sadak v. Turkey* judgment [GC] of 8 July 2008).

Given the importance of Article 3 of Protocol No. 1, measures restricting the right to stand for election must be accompanied by sufficient procedural safeguards and must have a foreseeable legal basis (see the *Adamsons v. Latvia* judgment of 24 June 2008; and the *Etxeberria and Others v. Spain* judgment of 30 June 2009).

As regards restrictions on the right to vote, the Court takes particular account of the difficulties faced by certain vulnerable persons. Thus, it is for the States to take appropriate measures to enable persons with a physical disability to exercise their right to vote effectively and to have access to polling stations (see the *Toplak and Mrak v. Slovenia* judgment of 26 October 2021). On the basis of the margin of appreciation afforded to the States, the Court also allows the right to vote to be conditional upon a residence-related requirement in order to ensure that overseas voters still have a connection with their country of origin (see in particular *Shindler v. the United Kingdom* judgment of 7 May 2013).

As the above examples suggest, the substantive safeguards must also be examined in terms of the relevant point in time. In order for the rights derived from Article 3 to be effective, they cannot relate solely to the time of the vote. As regards, in particular, the right to stand as a candidate in elections, the protection of Article 3 covers the period from the election campaign to electoral disputes and right up to the exercise of elected office.

In the period prior to an election, the election campaign certainly provides fertile ground for the intersection between the right to free elections and the freedom of expression enshrined in Article 10 of the Convention. The Court considers that these rights are interdependent and mutually reinforcing, bearing in mind that freedom of expression constitutes one of the conditions ensuring the free expression of the opinion of the people in the choice of the legislature (see the *Bowman v. the United Kingdom* judgment of 18 February 1998). Many disputes relating to election campaigns are therefore dealt with by the Court through the prism of Article 10, particularly in the context of the television advertising by political parties (see the *TV Vest AS & Rogaland Pensjonistparti v. Norway* judgment of 11 December 2008) or insults uttered during televised debates (see the *Vitrenko and Others v. Ukraine* judgment of 16 December 2008). As regards the allocation of broadcasting time in the run-up to an election, the Court has found that, as a rule, Article 10 does not confer a right on political parties to be given a certain amount of airtime in the media (see *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, decision of 29 November 2007).

In the period following an election, the European Court of Human Rights considers that the protection of Article 3 extends to electoral disputes, i.e. disputes concerning the counting of ballot papers and the validation of the result (see in particular the *Kovach v. Ukraine* judgment of 7 February 2008). Certain positive obligations cast on States in this context include the establishment of a system for the effective examination of individual complaints and appeals, thus maintaining public confidence in the authorities responsible for organising the election (see in particular the *Namat Aliyev v. Azerbaijan* judgment of 8 April 2010). This limb of Article 3 of Protocol No. 1 constitutes an important democratic safeguard, since the possibility of an effective remedy by which to challenge the election result relates to a political right and cannot therefore be examined under Article 6 of the Convention (see the *Pierre Bloch v. France* judgment of 21 October 1997). Such disputes therefore fall exclusively within the ambit of Article 3.

II. Case-law of the Belgian Constitutional Court

Although electoral rights are not as such enshrined in Title II of the Belgian Constitution, which deals with fundamental rights, the political rights referred to in Article 8 of the Constitution are considered to be "based on the citizen's right to take part in the exercise of sovereignty" and "concern the right to participate, as a voter or as a candidate, in elections to the deliberative assemblies". Furthermore, Articles 33, 42, 61 and 74 of the Constitution, in Title III, on "Powers", specify the arrangements for elections to the House of Representatives and the Senate and "establish the principle of representative democracy, according to which powers emanate from the Nation and members of both houses represent the Nation and not only those who elected them" (no. 130/2016, B.11.2. and 3).

Formally speaking, the latter provisions are not subject to review by the Constitutional Court, which, in matters of fundamental rights, has jurisdiction only in respect of the rights set out in Title II. Nevertheless, the court has, over time, extended its jurisdiction to electoral rights by combining the provisions under its supervision, and in particular the principle of equality and non-discrimination, with the constitutional provisions from which they are derived, but also with Article 3 of Protocol No. 1. It is now well established that the rights to vote and to stand for election form an integral part of the constitutional corpus.

As regards the admissibility of applications for annulment, the Constitutional Court considers that these rights are of fundamental importance, with the result that the interest requirement for lodging a direct application with the court has been considerably relaxed, to the extent of virtually allowing an *actio popularis* where a violation of such rights is alleged. It has thus consistently held that "every

voter or candidate can demonstrate the interest required to seek the annulment of provisions which may adversely affect his or her vote or candidature"[8].

As to the content of its decisions, in its role as guardian of electoral rights, the Constitutional Court is logically called upon to rule on important political choices. Like the European Court of Human Rights, it is careful in such cases to take into account the particular context of the Belgian State in the given circumstances and to allow the legislature a wide margin of manoeuvre. Two types of argument are relied upon in this context. *First*, the court has pointed out that certain provisions challenged before it in electoral matters "form part of the general institutional system of the Belgian State, which seeks to achieve a balance between the various communities and regions of the Kingdom" (see in particular judgment no. 36/2003 of 27 March 2003) and that, in this context, it is not for the court to "substitute its own assessment for that of the legislature" and "it does not have control over all the problems with which [the legislature] is confronted in order to maintain peace in the community" (judgment no. 73/2003 of 26 May 2003). *Secondly*, the Court has also pointed out that the legislature's decision to opt for "certain special arrangements" concerning the choice available to voters, or the allocation of seats in parts of Belgium where there are linguistic or community difficulties, in fact originated in or stemmed from the choice of the constitutional assembly itself. However, the court is not competent to rule on a difference in treatment or on the limitation of a fundamental right resulting from a choice made by the constitutional assembly itself (nos. 72/2014, B.14; 81/2015, B.12; 161/2015, B.12).

Although they constitute a fundamental political right of representative democracy and the rule of law and are of crucial importance for establishing and maintaining the foundations of democracy, electoral rights are not absolute and may be subject to restrictions provided that they pursue a legitimate aim and are proportionate to that aim (nos. 169/2015 and 134/2013). The Court has ruled on certain restrictions on the right to vote or to stand for election.

The setting of an electoral threshold has been the subject of a significant number of leading decisions. Relatively consistently, the Constitutional Court has held that "in order to comply with the requirements of Article 3 of Protocol No. 1 ..., elections may be held either under the system of proportional representation or under a majority system. Even if elections are held under a strictly proportional representation system, the phenomenon of 'lost votes' cannot be avoided. Just as Article 3 does not imply that the allocation of seats must be a precise reflection of the number of votes cast, it does not in principle preclude the setting of an electoral threshold in order to limit any fragmentation of the representative body" (see in particular judgment no. 78/2005 of 27 April 2005; judgment no. 73/2003 of 26 May 2003; judgment no. 30/2003 of 26 February 2003). The court seems to afford the legislature some discretion in this area. It takes the view that "an electoral threshold, however high, is merely an arrangement or criterion for modulating the system of proportional representation. An electoral threshold thus helps to address the legitimate concern of avoiding fragmentation of the political landscape by fostering the formation of sufficiently coherent political groups within the representative bodies ... An electoral threshold admittedly makes it more difficult for small parties to obtain a seat. Major parties may possibly obtain a larger number of seats than if there were no electoral threshold. However, such a difference in treatment between small and large parties does not constitute discrimination resulting from the introduction of a statutory electoral threshold, but a consequence of the choice of voters" (judgment no. 96/2004 of 26 May 2004).

[8] See in particular judgments nos. 72/2014, 134/2013, 131/2006, 85/2006, 103/2004, 96/2004, 73/2003, 36/2003, 35/2003, 30/2003 and 76/94.

Another restriction: the right to vote does not mean that there is a right to cast a blank vote. For the purposes of free and democratic elections, it suffices that voters can cast their votes without coercion, so that they can vote as they wish. However, voters are required to observe the voting procedure strictly (see ECHR, 11 January 2007, *Case of Russian Conservative Party of Entrepreneurs and Others v. Russia*, § 73). The nullity of a ballot paper is merely the penalty applicable to an invalid vote (nos. 134/2013, B.12.3 and 4).

In other areas, the Constitutional Court's scrutiny is more thorough and the legislature's freedom narrower. For example, the court declared unconstitutional a provision of the Electoral Code which suspended the right to vote for most criminals sentenced to more than four months' imprisonment. The automatic nature of the suspension, the absence of a specific decision by a court, and the possibility that the duration of the suspension might be much longer than the execution of the sentence, led to the conclusion that the measure was disproportionate and constituted an unjustified interference with the right to elect and be elected under Article 3 of Protocol No. 1 (judgment no. 187/2005 of 14 December 2005). The legislature then reworked its text by replacing the system with a mechanism whereby suspension became optional and the court could, if appropriate, attach such a measure to the conviction. In an action brought against the transitional provision accompanying that reform, the court took account of the findings of the European Court of Human Rights in this area, ultimately validating the law submitted to it (judgment no. 80/2010 of 1 July 2010).

Article 3 of Protocol No. 1 is not, however, the sole benchmark for the Constitutional Court in this area. Three scenarios can be mentioned.

First scenario: The Constitutional Court sometimes finds Article 3 of Protocol No. 1 inapplicable, especially in the context of local elections – that is, local and provincial elections in Belgium – since such elections do not concern the "choice of the legislature" within the meaning of Protocol No. 1 (see in particular judgment no. 149/2007 of 5 December 2007; judgment no. 22/2012 of 16 February 2012). In such cases, the court may nevertheless examine the proportionality of the measure from the standpoint of the principle of equality and non-discrimination (judgment no. 138/2007 of 14 November 2007; judgment no. 35/2003 of 25 March 2003). On that basis, the court annulled a statutory provision governing local elections (judgment no. 149/2007 of 5 December 2007), thus showing, by way of a fundamental democratic guarantee, that it is possible to go further than the confines of the Article 3 wording. Conversely, it may also happen that the court does not go so far and discontinues its review after finding Article 3 inapplicable, without examining the complaint solely from the standpoint of equality and non-discrimination (judgment no. 86/2012 of 28 June 2012; judgment no. 22/2012 of 16 February 2012).

Second scenario: irrespective of the applicability of Article 3, the rights to elect and to be elected must in any event, under Article 14 of the European Convention on Human Rights and Articles 10 and 11 of the Constitution, be guaranteed without discrimination. Thus, the Constitutional Court has twice examined under this principle the distribution of seats among constituencies in the context of the Belgian proportional representation system (no. 149/2007 of 5 December 2007; no. 169/2015 of 26 November 2015). After noting that each setting of constituency boundaries led to differences in the natural electoral threshold, the level of which was inversely proportional to the number of seats to be filled and therefore also to the population of the constituency, the court emphasised that such differences had to remain within reasonable limits. While it could be accepted that a constituency with four seats was compatible with the system of proportional representation, this was not the case for constituencies with only two or three seats and where the electoral threshold was, for this reason, unreasonably high.

Third scenario: the Constitutional Court examines certain issues directly related to the right to free elections by relying not on Article 3 of Protocol No. 1 but rather on other fundamental rights. It thus annulled a legislative provision prohibiting all forms of advertising by political parties in the media organised by the French Community, on the ground that the prohibition was absolute in scope and did not allow for exceptions during election campaigns, thus entailing a violation of the freedom of expression enshrined in Article 19 of the Belgian Constitution and Article 10 of the Convention (judgment no. 161/2010 of 22 December 2010). Another topic discussed was the thorny issue of liberticidal parties. The Court found that a legislative provision allowing a political party to be deprived of public funds in the event of hostility to rights and freedoms did not infringe the principles of equality and non-discrimination or that of freedom of expression, by relying, *inter alia*, on Article 17 of the Convention, which allows abuses of freedom of expression by individuals and groups to be excluded from the sphere of Convention protection (judgment no. 10/2001 of 7 February 2001).

Conclusion

It can be seen from the foregoing analysis that the Belgian Constitutional Court has been keen to incorporate the guarantees of Article 3 of Protocol No. 1 into its own case-law. There is, however, one obstacle to such incorporation: in the *Mugemangango v. Belgium* [GC] judgment of 10 July 2020, the European Court of Human Rights held that the Belgian system for verifying credentials following parliamentary elections, which was entrusted to the legislative assemblies themselves, infringed Article 3, on the ground that that procedure did not provide sufficient procedural safeguards against arbitrariness, while specifying that parliamentary autonomy could only be validly exercised in compliance with the rule of law. The procedure for verifying the credentials of members of legislative assemblies is undoubtedly a shortcoming of the Belgian electoral system in the light of the Convention guarantees. The difficulty at the domestic level lies in the fact that this mechanism is enshrined in the Constitution itself as regards election to the legislative houses. Since it is not for the Constitutional Court to review constitutional provisions, its contribution to the democratic system on this point under the Convention appears limited. Several proposals to amend the Constitution have nevertheless been tabled with a view to establishing independent judicial review of the validity of elections. One of the solutions envisaged would be to entrust this particular competence to the Constitutional Court (see in particular *Doc. parl.*, Chamber, 2021-2022, no. 55-2708/01).