

# The International Status of the Right to Vote

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## Introduction

The right to vote is a well-established norm of international law. Significant international treaties, including the International Covenant on Civil and Political Rights and regional agreements such as the American Convention on Human Rights, enshrine citizens' claim to universal and equal suffrage. Regional human rights systems in Europe and the Americas have mechanisms to enforce the right to vote that have been applied in a limited fashion.

One hundred and eight out of the 119 electoral democracies surveyed constitutionally guarantee the right of their citizens to elect their political representatives.<sup>2</sup> In the last three decades—a period of time in which we have witnessed an astonishing increase in the number of politically free states—every single new constitution has established a citizen's entitlement to vote. The language of these constitutional directives fall along a broad spectrum—on one end are those that simply establish the right of citizens to vote for constitutionally defined electoral positions, on the other end are those constitutions which not only guarantee universal suffrage, but also stipulate that that this fundamental right exists at every level of government and/or curb the ability of the government to reduce the size of the electorate.

Every democratic state, however, restricts who can vote.<sup>3</sup> Some constitutions delineate those who are deemed ineligible for the franchise (the young, prisoners, the mentally incapable, etc.), while others identify the courts or the legislature as the branch of government responsible for determining citizens' fitness to take part in elections. Thirty nine percent of democratic constitutions which contain a right to vote grant legislatures the power to determine those who are eligible.

Constitutional right to vote articles provide individuals a powerful tool with which to challenge a state action or state inaction that impedes voters. Yet, right to vote provisions are not a cure all. The courts we examined have been careful to articulate that legislatures have the right to constrict the pool of eligible voters and establish rules which may limit the number of people who can vote. At the same time, these cases illustrate the special characteristics of the right to vote. Not only have courts viewed the right to vote as a bulwark against government infringement (e.g., keeping certain groups from voting),

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<sup>2</sup> I have referred to Freedom House's list of electoral democracies to determine which constitutions to examine. Adrian Karatnycky ed., *Freedom in the World 2002-2003* (Freedom House, New York, 2003).

<sup>3</sup> Richard S. Katz, *Democracy and Elections* (New York: Oxford Univ. Press, 1997), p. 216.

they have also seen the right to vote as imposing a positive obligation on the state to ensure that people can vote (e.g., making special efforts).

This paper provides a general overview of the international status of the right to vote. Following this summary, three sections survey the guarantees to universal suffrage included in international treaties and democratic constitutions. These sections also examine the language used to express the right to vote. The fourth section details the types of limitations that are commonly included in right to vote provisions. The fifth, and final section, examines how right to vote provisions have been interpreted by courts in three jurisdictions (two cases each): the South African Constitutional Court, the Supreme Court of Canada, and the European Court of Human Rights.

## Section 1: International Declarations and Covenants

The affirmative obligation of states to protect their citizens' right to vote is recognized in international treaties and declarations adopted by the United Nations and by regional treaty organizations such as the Council of Europe and the Organization of American States.

### *The Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR) is the preeminent global aspirational document on human rights. The declaration was adopted unanimously by the United Nations General Assembly in 1948 and its Article 21 lays out the right of people to participate in government and enjoy universal suffrage:

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.<sup>4</sup>

Because the declaration is non-binding, its provisions are not accepted *in toto* as international law. Some of the provisions of the UDHR are considered to have the status of binding international law by virtue of their becoming components of international customary law—law which “refers to the conduct, or the conscious abstention from certain states that becomes in some measure a part of the international legal order.”<sup>5</sup> Article 21, however, has not been accepted as generally enforceable customary international law.<sup>6</sup>

### *The International Covenant on Civil and Political Rights*

In contrast to the UDHR, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) takes its binding effect from its ratification by a large number of signatories (150 to date). The Human Rights Committee (HRC), a permanent treaty organ, was created by the ICCPR. The practical role of the HRC is not enforcement, nor deterrence, nor dispute-resolution. Rather it monitors, studies, and reports on measures taken to give effect to the Covenant and interprets and clarifies the meaning of the covenant through consideration of “communications” from individuals claiming to be victims of violations of the covenant.<sup>7</sup> Article 25 states:

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<sup>4</sup> Universal Declaration of Human Rights, art 21 GA Res 217 (III), UN GAOR, 3<sup>rd</sup> Sess., Supp. No. 14, UN Doc. A/810 (1948), <http://www.un.org/Overview/rights.html>, 10/27/03.

<sup>5</sup> Henry Steiner and Philip Alston, *International Human Rights in Context* (Oxford: Oxford University Press, 2000), p. 69.

<sup>6</sup> Steiner, p. 658.

<sup>7</sup> Steiner, p. 707,767.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) 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.<sup>8</sup>

The text of this article closely tracks the language of Article 21 of the UDHR. One important distinction, however, bears noting: the covenant specifies that only citizens shall have the right to vote. Though in most cases limiting the electorate to citizens is legitimate, restrictive citizenship rules can be used as a backdoor method of disenfranchising large swaths of adults on the basis of attributes such as ethnicity and first language. In addition, according to the Committee, the covenant not only protects the right of every citizen to vote, but also requires states to take the measures necessary to ensure that citizens have an effective opportunity to enjoy the right—in particular the Committee has emphasized that the right to vote ought to be guaranteed by law.<sup>9</sup>

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<sup>8</sup> International Covenant on Civil and Political Rights, art. 25(b), Dec. 16, 1966, 999 U.N.T.S. 171, [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm), 10/27/03.

<sup>9</sup> “States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.” Human Rights Committee, “The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 12/07/96. CCPR General comment 25. (General Comments).” [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+25.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+25.En?OpenDocument), 10/27/03.

## Section 2: Regional Conventions

### *The European Convention on Human Rights and Fundamental Freedoms*

The European Convention on Human Rights and Fundamental Freedoms—which was established by the members of the Council of Europe in 1950—is distinguished by its active international Court and its effective complaints procedure for the determination of human rights matters. Currently, the Court is the ultimate authority on human rights for the citizens of 41 member states—thus the Court has jurisdiction over 800 million people.<sup>10</sup> Because the Convention has an effective enforcement mechanism, it is the leading human rights—and thus voting rights—statute within the intra-European system.

In terms of the right to vote, the Court enforces Article 3 of Protocol 1 (P3-1) of the European Convention, 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.

It has been claimed that the Article (P3-1) does not give rise to individual rights and freedoms. Through its willingness to accept cases brought by individuals and in its judgments, the Court, however, has underscored that the right to vote is enjoyed by individuals. The Court ruled, in the case of *Mathieu-Mohin and Clerfayt v. Belgium*, that the particular language of P3-1 was not intended to exclude the right of the individual to vote, but:

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.<sup>11</sup>

In practice, the Court takes relatively few cases regarding this article (section two of this paper will discuss two of these cases). Two interrelated factors contribute to the Court’s relative inactivity on matters of suffrage: first, the Court insists that domestic remedies be exhausted before it takes up a case and the Court provides states leeway to resolve issues on their own; second, because a “genuine” democratic system is a prerequisite of membership in the Council, the Court has found comparatively few cases where domestic remedies to suffrage disputes have appeared inadequate.

In addition to the Convention, Europe’s commitment to the right to vote is affirmed by documents and regulations of the Organisation for Security and Cooperation in Europe and the European Union. Not surprisingly, the right to vote and universal suffrage have

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<sup>10</sup> Steiner, p. 799.

<sup>11</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, #9/1985/95/143, §48-50.

been also been incorporated into the new draft constitution being negotiated for the European Union.

### *Organization of American States*

With the spread of elected civilian governments during the 1980s, the Organization of American States (OAS) has become increasingly active in promoting representative democracy and the right to vote. Members' efforts to strengthen the OAS's mandate in this area culminated in 2001, when the OAS adopted the Inter-American Democratic Charter. This Charter, a political document adopted by the 34 member states, states that the peoples of the Americas have a "right to democracy" and establishes that a fundamental element of democracy is "the holding of periodic free and fair elections based on secret balloting and universal suffrage."<sup>12</sup> More importantly, the Charter creates a mechanism for a collective response to an unconstitutional interruption of the democratic order of a member state. The Charter empowers the OAS General Assembly to suspend the membership of the member state in question when there has been an "unconstitutional alteration" of the democratic legal order. The Charter also includes provisions for the OAS to observe elections in member states.<sup>13</sup>

In addition to the Charter, OAS member states have created an inter-American human rights system through adoption of the American Convention on Human Rights, which has been ratified by 25 of the 35 members of the OAS.<sup>15</sup> The Convention establishes an Inter-American Court on Human Rights, based in Costa Rica, and an Inter-American Commission on Human Rights, based in Washington. In most respects, the voting rights language of the American Convention tracks with the language of the ICCPR. The American Convention, however, delineates broad categories along which a member state may limit the right to vote. Article 23 of the Convention states that:

1. 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...
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.

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<sup>12</sup> Organization of American States, *Inter-American Democratic Charter* (2001), AG/RES. 1838 (XXXI-O/01), [http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm), 11/05/03.

<sup>13</sup> See for example: The Inter-American Democratic Charter, (Adopted by the General Assembly at its special session held in Lima, Peru, on September 11, 2001): [http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm), 10/28/03 and the 1992 Protocol of Washington <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/legal/legalen.htm>, 10/28/03.

<sup>15</sup> Though they are members of the OAS, neither the United States nor Canada have ratified the Convention.

In addition to the Convention, the member states of the OAS have adopted an aspirational document endorsing the right to vote: The American Declaration of the Rights and Duties of Man (1949). The American Declaration establishes the right to vote, and, in contrast to other prominent human rights documents, it also includes a duty to vote in the country in which one is a citizen.<sup>16</sup>

The lead role in protecting the right to vote in the inter-American system is not played by the Inter-American Human Rights Court—which generally handles cases related to disappearances or murders—but by the Inter-American Commission on Human Rights. This Commission is empowered to accept individual cases and prepare country reports for which it can conduct on-site investigations. In the early 1990's, the Commission authored reports on violations of the right of political participation in Mexican elections and the progress of the Mexican government in addressing these infringements.<sup>17</sup>

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<sup>16</sup> Article 32 of the ADRDM states that: 'It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.' American Declaration of Human Rights and Duties of Man, May 2, 1948, <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>, 10/28/03.

<sup>17</sup> See for example: REPORT N° 8/91, CASE 10.180, MEXICO, 22 February 1991, <http://www.cidh.oas.org/annualrep/90.91eng/Mexico10.180.htm>, 10/28/03.

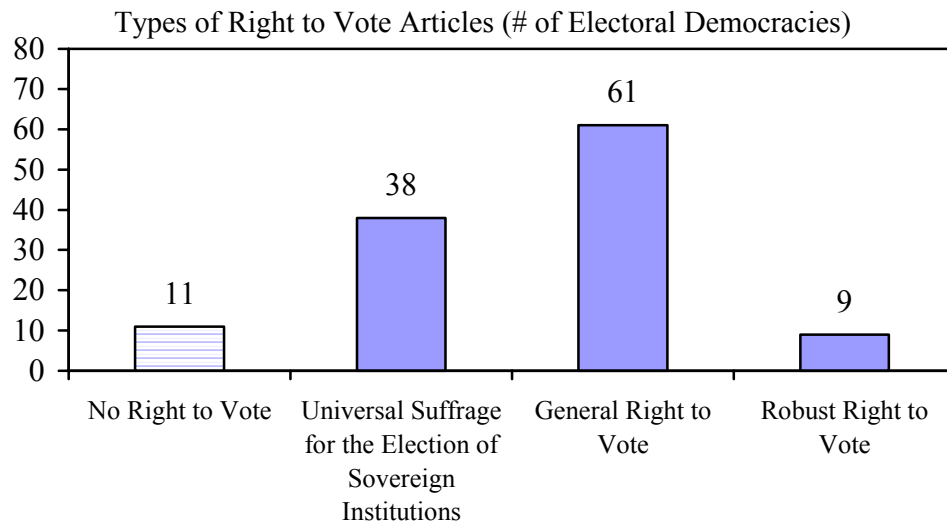
### **Section 3: The Right to Vote in Democratic Constitutions**

The opportunity for citizens to participate in politics is established by a variety of means. Though over 90% of the world's electoral democracies have included the right to vote in their constitutions, it has been articulated in a number of different ways or not at all. For example, there is no constitutional right to vote in two of the world's oldest democracies, the United Kingdom and the United States of America, nor in the world's most populous democracy, India. Yet, as *Bush v. Gore* demonstrated, the existence of a constitutional right to vote and the language used to express it can have significant ramifications on the manner in which the state protects and promotes citizens' right to vote.

Constitutions break into four categories depending on how they treat the right to vote:

1. Those in which there is no affirmative constitutional right to vote or no legislation with similar weight.
2. Those that establish universal suffrage for the election of sovereign bodies—such as a parliament.
3. Those that provide a general and independent right to vote.
4. Those that not only provide for a right to vote, but also specify government obligations to facilitate citizen participation and/or those that limit the kinds of restrictions the state can place on who is eligible to vote.

While this typology is not scientific, the categories are coherent and reflect the ways universal suffrage is constitutionally enshrined. Neither are the categories exclusive—if a country's constitution requires that representatives to parliament should be elected according to universal suffrage, but also provides a general article guaranteeing universal suffrage, then this country's constitution is placed in group 3. In what follows, the paper provides a numerical breakdown along these categories and offers examples of the constitutional language they represent.



*No Right to Vote:*

Eleven democracies have no explicit constitutional right to vote. Until they established their own constitutions, all of these countries but one were ruled by the Parliament of the United Kingdom or were territories of a country that was.<sup>18</sup> The exception is Indonesia. Paradigmatic examples are the United Kingdom where there is no written constitution, and the United States.

*Universal Suffrage for the Election of Sovereign Institutions*

In many constitutions, the right to vote is not expressed as an individual right, but universal suffrage and secret elections are mandated for the fulfillment of positions in sovereign bodies, such as a legislature. The South Korean constitution is representative of these types of constitutions.

Article 41: The National Assembly is composed of members elected by universal, equal, direct, and secret ballot by the citizens.

Article 67: The President is elected by universal, equal, direct, and secret ballot by the people.<sup>19</sup>

For these states, the existence of a right to vote for representatives in institutions other than those specified—for example state or local government—is left to the legal interpretative structure of that country.

<sup>18</sup> Countries with no constitutional right to vote: Australia, the Bahamas, Bangladesh, Barbados, Belize, India, Indonesia, Nauru, Samoa, United States of America and the United Kingdom.

<sup>19</sup> Constitution of South Korea, [http://www.oefre.unibe.ch/law/icl/ks00000\\_.html](http://www.oefre.unibe.ch/law/icl/ks00000_.html), 10/27/03.

### *General Right to Vote*

A stand-alone right to vote is the international standard in democratic constitutions. A majority of the world's democratic constitutions have articles or clauses outlining citizens' entitlement to choose their representatives at all levels of government. Most of these constitutions have sections similar to Article 49 of the constitution of Portugal, which states:

All citizens who are over 18 years of age have the right to vote, except for the incapacities laid down in general law. The exercise of the right to vote is personal and constitutes a civic duty.<sup>20</sup>

Other constitutions within this group specify that the tenets of universal suffrage should be extended to all elected positions. Bulgaria's constitution exemplifies such statutes.

Article 10: All elections and national and local referendums shall be held on the basis of universal, equal, and direct suffrage by secret ballot.

Article 42: Every citizen above the age of 18, with the exception of those placed under judicial interdiction or serving a prison sentence, is free to elect state and local authorities and vote in referendums.<sup>21</sup>

### *Robust Right to Vote Provisions*

Some constitutions go beyond asserting a right to vote by explicitly curbing the state's power to limit those who are eligible to vote. An example of this is Article 32 of the Peruvian Constitution. While the Peruvian constitution allows the suspension of the rights of citizenship—and thus the right to vote—it also constructs additional barriers against the winnowing of those eligible to vote. Article 32 states that:

Citizens enjoying their civil capacity have the right to vote. The vote is personal, equal, free, secret and obligatory until one is seventy years old. It is optional after this age. All acts that limit or prohibit citizens from exercising their rights are null and punishable.<sup>22</sup>

Other constitutions, like that of Suriname, not only attempt to establish tests on the types of restrictions considered constitutional, but also establish the affirmative obligation of the state to promote electoral participation:

Article 54: The State is obliged to register those with voting rights and to convoke them to participate in the elections. The registration of the voters shall serve no other purpose.

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<sup>20</sup> Constitution of Portugal, [http://www.oefre.unibe.ch/law/icl/po00000\\_.html#A049](http://www.oefre.unibe.ch/law/icl/po00000_.html#A049), 10/27/02

<sup>21</sup> Constitution of Bulgaria, [http://www.oefre.unibe.ch/law/icl/bu00000\\_.html](http://www.oefre.unibe.ch/law/icl/bu00000_.html), 10/27/03.

<sup>22</sup> Constitution of Peru, Translated from the Spanish: Tienen derecho al voto los ciudadanos en goce de su capacidad civil. El voto es personal, igual, libre, secreto y obligatorio hasta los setenta años. Es facultativo después de esa edad. Es nulo y punible todo acto que prohíba o limite al ciudadano el ejercicio de sus derechos. <http://www.georgetown.edu/pdba/Constitutions/Peru/per93.html>, 10/28/03.

Those with a right to vote are obliged to cooperate with the registration of the electorate.<sup>23</sup>

### *Constitutions which Incorporate International Human Rights Conventions*

In addition to the type of guarantees just described, a number of Latin American and Eastern European constitutions such as Chile, Ecuador, the Czech Republic and Slovakia, grant ratified international human rights covenants constitutional or greater status in domestic law. As elaborated in the previous sections, the predominant international and regional human rights documents all establish a right to vote. Article 10 of the Czech constitution is indicative of the type of constitutions in which the right to vote is buttressed by a commitment to international norms:

Promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order; should an international agreement make provision contrary to a law, the international agreement shall be applied.<sup>24</sup>

This type of constitutional clause, which is becoming more common, demonstrates the trend towards the acceptance of international standards of human rights—and thus the right to vote—as a standard component of domestic law.

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<sup>23</sup> Constitution of Suriname, <http://www.georgetown.edu/pdba/Constitutions/Suriname/english.html>, 10/17/03.

<sup>24</sup> Constitution of the Czech Republic, <http://www.psp.cz/cgi-bin/eng/docs/laws/constitution.html>, 10/28/03

## Section 4: Limitations on the Right to Vote

The right to vote necessarily entails limitations on who can exercise that right. It is not uncommon for the limits to be embedded in the constitutions of electoral democracies. Beyond the paradigmatic examples of citizenship and age limits, constitutions often explicitly withhold the right to participate in elections from those who are deemed mentally incapable and/or from prisoners. The types of restrictions governments place on the right to vote fall into three general categories:

- 1) Restrictions based on community membership
  - Examples: citizenship, residence, language
- 2) Restrictions based on competence or autonomy
  - Examples: age, mental health
- 3) Restrictions as a form of punishment
  - Examples: imprisonment, voter fraud, treason

All three forms are evident in the constitutions of the world's electoral democracies. For example, Section 110 of the Thai constitution states:

A person under any of the following prohibitions on election-day is disfranchised:

- 1) being of unsound mind or of mental infirmity;
- 2) being a Buddhist priest, novice, monk or clergy;
- 3) being detained by a warrant of the Court;
- 4) being disfranchised by a judgment.<sup>25</sup>

In addition to constitutional restrictions on the right to vote, almost forty percent of the constitutions surveyed allow for restrictions of universal suffrage to be determined through laws approved by the legislature. In general, a restriction established by a legislative act must still meet certain constitutional standards, e.g., be non-discriminatory in intent. Similarly, legislatures working under constitutions that do not explicitly permit them to limit the electorate, generally must follow a common constitutional guideline for regulating the rights established in the constitution. For example, the Canadian Charter of Human Rights and Freedoms stipulates that any of the rights and freedoms it sets out are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>26</sup> Thus, the Canadian parliament must meet this standard to restrict suffrage.

Finally, the court cases examined in the following section illustrate that the electorate is often reduced by electoral regulation, rather than by overt constitutional limitations. As is borne out by the two South African cases, the distinction between whether a law's intent is regulatory or exclusionary can have important ramifications on the level of scrutiny that high courts apply to that law.

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<sup>25</sup> Constitution of Thailand, <http://www.parliament.go.th/files/library/law6e-2.htm>, 11/02/03.

<sup>26</sup> Section 1, Canadian Charter of Rights and Freedoms, [http://www.oefre.unibe.ch/law/icl/ca02000\\_.html](http://www.oefre.unibe.ch/law/icl/ca02000_.html), 11/10/03

## Section 5: Right to Vote Court Cases

The following section examines six rulings of three high courts: the Supreme Court of Canada, the Constitutional Court of South Africa, and the European Court for Human Rights. This brief survey is intended to provide insight into how these courts have interpreted the right to vote. Three broad conclusions stand out from this work:

- The Courts occupied different positions with respect to the deference owed to those responsible for regulating elections.
  - The Canadian Court was the least deferential, and in the two cases examined, it was the most active in protecting and expanding citizens’ right to vote.
  - The South African court was skeptical of an administrative restriction of the right to vote, but gave a broader margin to the legislature to make rules concerning elections.
  - The European Court was the most deferential of the three courts. Its deference is almost certainly a product of the fact that it hears cases concerning a wide variety of dissimilar, but still legitimate electoral systems. This trend may be indicative of how other international courts would interpret a right to vote statute which applies across a number of states.
- A key issue common to most of these cases was where the balance should be struck between regulations that ensure a free and fair election and the right of all citizens’ to vote.
- Unless specified, a right to vote does not necessarily entail that each vote will have equal weight in the determination of electoral outcomes.

### Canada

Section 3 of the Canadian Charter of Rights and Freedoms states that “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”<sup>27</sup> In the two cases examined here—*Sauve v. Canada* and *Figueroa v. Canada*—the Supreme Court of Canada explored the government’s ability to limit the right to vote and fleshed out the content of the protection which the right to vote extends to electoral practice. The two cases examined were heard in the recent past—2003 and 2002, respectively. In both cases, the Court subjected the governments’ efforts to regulate the right to vote to vigorous scrutiny and enhanced the protections entailed by the right to vote. In *Sauve*,

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<sup>27</sup> *Sauve v. Canada*, 158 C.C.C. (3d) 449; 2002, § 2.

the Court determined that prisoners' right to vote cannot be bluntly abrogated, and in *Figueroa*—which dealt with the regulation of political parties—the Court concluded that Section 3 of the Charter extends beyond the act of voting and guarantees individuals the right to play a meaningful role in the electoral process.

*Sauve v. Canada (2003)*

In *Sauve*, the Supreme Court struck down Section 51(e) of the Canada Elections Act, which denied the right to vote to all inmates serving sentences of two years or more, as an unconstitutional infringement of the right to vote. The existence of an affirmative right to vote in the Canadian Charter of Rights and Freedom, however, had another striking impact on the course of the case. Rather than the petitioner having sole responsibility to demonstrate the unconstitutionality of the Act, it fell to the government to demonstrate the constitutional validity of its actions.

Before proceeding to the merits of the case, the Court considered whether it should defer to the will of the Parliament. The government and the dissenting opinion argued that debate over the legitimacy of denying the right to vote to penitentiary inmates was a matter of social and political philosophy. In such debates, they asserted, the Court owed deference to the political branch of government. The dissent stated that:

The decision before this Court is therefore not whether Parliament has made a proper policy decision, but whether or not the policy position chosen is an acceptable choice amongst those permitted under the Charter.<sup>28</sup>

To emphasize this position, the dissent noted the variety of policies concerning prisoners' right to vote allowed by foreign courts interpreting their own democratic constitutions and treaties which guaranteed the right to vote. The majority rejected this line of reasoning. It held that the right to vote's status as a "fundamental" or "core democratic" right necessitated that attempts to limit it be met with "careful examination," not with judicial deference.<sup>29</sup> The Court emphasized that:

[I]t is precisely when legislative choices threaten to undermine the foundations of participatory democracy guaranteed by the Charter that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of the system.<sup>30</sup>

Canada's Charter establishes two questions for consideration in cases regarding the rights enshrined within it: first, whether a right has been infringed, and second, whether the limitation was justified. In *Sauve*, the Court focused on whether the limitation was justified and, in particular, whether the restrictions were reasonable.

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<sup>28</sup> *Sauve*, § 98.

<sup>29</sup> *Sauve*, §9.

<sup>30</sup> *Sauve*, § 15.

The Court focused on the reasonableness of the statute because the government conceded that it had impinged on the Charter. To justify this type of limitation the statute had to pass a double pronged test: first, the government had to show that the infringement achieved a constitutionally valid objective, and second, that its chosen means were reasonable. The government argued that it had two broad objectives in restricting a class of prisoners from voting: “(1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or ‘enhance the general purposes of the criminal sanction.’”<sup>31</sup> Though skeptical of the constitutionality of such “[v]ague and symbolic objectives,” the Court concluded that these aims could—in theory—be advanced as suitable objectives for the Government to restrict fundamental rights. Accordingly, the Court moved on to consider the reasonableness of the limitations.

The majority held that the limitations imposed by the government did not advance the government’s stated aims (rational connection test), that the denial went further than reasonably necessary to achieve its objective (the minimal impairment test), and that the overall benefits of the measure did not outweigh its negative impacts (the proportionate effect test).<sup>32</sup> With regard to a rational connection between the means and the aims of the Government, the Court rejected—what it considered to be a premise of the government’s argument—that: “voting is a privilege that the government can suspend.”<sup>33</sup> The Court held:

[t]he right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy and Parliament’s claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizen, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.<sup>34</sup>

Removing the right to vote from prisoners would not augment the value society placed on the vote, or deepen criminal penalties, but would rather further undermine society’s respect for the right to vote and felons’ connection to society. The Court distinguished between youth restrictions (e.g. to vote one must be 18) and restrictions on prisoners. In the first case, Parliament was making a universal distinction based on experience; in the second, “it was making a decision that some people, whatever their abilities, are not morally worthy to vote—that they do not ‘deserve’ to be considered members of the community.”<sup>35</sup> In addition, because the act was neither tailored to the acts, nor the circumstances of the individual offender, the Court held that the law’s retributive and denunciatory effects were arbitrary in effect. Thus, it rejected the government’s case on the basis of its failure to satisfy the rational connection test.

Because the Court held that the punishment was not rationally connected to the aim, it did not follow into great depth either the minimal impairment or proportional effect tests. It

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<sup>31</sup> Sauve, § 21.

<sup>32</sup> Sauve, § 21.

<sup>33</sup> Sauve, § 41.

<sup>34</sup> Sauve § 34.

<sup>35</sup> Sauve, § 37.

did note, however, that because of the arbitrariness of the law, it was likely to fail these tests, as well. Finally, it bears noting that the Court was particularly concerned with the disproportionate impact the law would have on the disadvantaged Aboriginal population, who are overrepresented in the Canadian prison system.<sup>36</sup>

### *Figueroa v. Canada*

The judgment in *Figueroa v. Canada* is of particular interest because the Court held that the laws and policies of the government must meet the explicit standard established in Section 3 and the standard established by its purpose. A significant portion of the judgment in *Figueroa* was devoted to defining the purpose of Section 3—the right to vote section—of the Canadian charter. The purpose was established as “the right of each citizen to play a meaningful role in the electoral process, whatever the process might be.”<sup>37</sup>

At issue in this appeal was the requirement that a political party nominate candidates in at least 50 electoral districts to obtain and then to retain, registered party status. Registered party status entailed both obligations and benefits. In *Figueroa*, the Court only considered: “the right of a political party to issue tax receipts for donations received outside the election period, the right of a candidate to transfer unspent election funds to the party (rather than remitting them to the government), and the right of a party’s candidates to list their party affiliation on the ballot papers.”<sup>38</sup> The majority set itself two tasks in determining whether the 50-candidate threshold violated S.3. : first, to define the purpose of Section 3 and, second, to evaluate whether the 50-candidate threshold abrogated that purpose. The majority found that the threshold did violate the charter. Thus, it also had to determine whether the violation was justified. The Court found that the threshold was not constitutionally justified.

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<sup>36</sup> *Sauve*, § 60.

<sup>37</sup> *Figueroa v. Canada*, 227 D.L.R. (4<sup>th</sup>) 1; 2003, § 37.

<sup>38</sup> *Figueroa*, § 4.

While establishing the purpose of Section 3, the Court noted that as the section is written, it is relatively narrow in granting citizens no more than the “bare right to vote and to run for office in the election of representatives of the federal and provincial legislative assemblies.”<sup>39</sup> But Charter analysis, the Court argued, requires courts look beyond the words of the section to its scope. To determine the scope, “courts must adopt a broad and purposive approach that seeks to ensure that duly enacted legislation is in harmony with the purposes of the Charter”<sup>40</sup> The majority referred to a previous case, *Haig v. Canada* [1993], in which the Court held that:

the purpose of s. 3 of the Charter is not equality of voting power per se, but the right to “effective representation.” Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative.

In *Figueroa*, “effective representation” was interpreted to mean more than a right to effective representation in a legislative assembly, but also a right to participate. The right to vote, the Court held, had an intrinsic value independent of the outcome of elections. [are those words yours or can they be fairly imputed to the Court?] Effectively the Court expanded the protection of the Constitution to include a right to “effective representation”—which constituted, in effect, the right to play a “meaningful role” in the selection of elected representatives.<sup>41</sup>

The dissent distinguished between the issues at stake in *Sauve*—a case involving a literal prohibition of the Charter—and those at stake in *Figueroa*—a case dealing with legislation that affects the conditions under which the citizens vote or run for an election.<sup>42</sup> The majority held, however, that the only difference was that in considering questions about electoral conditions, the Court had to examine the broader social or political context of the legislation.<sup>43</sup> Further, the Court rejected the argument that the collective interest in the aggregation of political preferences ought to be balanced against the individual right to meaningful political participation. Collective interests advanced by the electoral system did not rise to the level of constitutional status.<sup>44</sup>

Having determined the purpose of Section 3, the Court held that the 50-candidate threshold interfered with the right of citizens to play a meaningful role in the electoral process. To come to this determination the Court answered two questions. First, do the members and supporters of small political parties play a meaningful role in the electoral process? And, if so, do the restrictions contained in the law infringe on their ability to play that role? In terms of the first question the Court ruled that political party’s ability to make a valuable contribution to the electoral process was not limited to its capacity to

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<sup>39</sup> *Figueroa*, § 20.

<sup>40</sup> *Figueroa*, § 20.

<sup>41</sup> *Figueroa*, § 25.

<sup>42</sup> *Figueroa*, § 32.

<sup>43</sup> *Figueroa*, § 33.

<sup>44</sup> *Figueroa*, § 37.

offer a genuine governmental option. Rather, political parties were held to enhance the meaningfulness of individual participation. The Court emphasized that parties were especially important in ensuring that the ideas and opinions of their members and supporters were effectively represented.<sup>45</sup>

As to the second question, the Majority distinguished between restrictions that impacted all political parties—which might withstand constitutional attention—and those that “bestow a benefit upon some political parties, but not others”—which require scrutiny.<sup>46</sup> The Court saw the legislation under consideration falling into the second category and judged it to be unable to withstand constitutional scrutiny. Accordingly, the Court held that each of the three restrictions under consideration restricted the ability of parties to facilitate meaningful participation by individuals.

Finally, as in *Sauve*, the Court had to consider whether the limitation was reasonable and demonstrably justifiable in a free and democratic society. The government offered three goals to defend the limitation of Section 3: first, “to improve the effectiveness of the electoral process;” second, “to protect the integrity of the electoral financing regime;” and, third, “to ensure that the process is able to deliver a viable outcome for our form of responsible government.”<sup>47</sup> The Court was skeptical of all of these claims and ultimately ruled that “[l]egislation that violates Section 3 for [these purposes] does great harm to both individual participants and the integrity of the electoral process...[given the government’s claims] it is impossible to conclude that the legislation is justifiable in a free and democratic society.”<sup>48</sup>

## South Africa

Within the span of two weeks in 1999, the Constitutional Court of South Africa handed down two critical decisions interpreting the meaning of the right to vote in South Africa: *August and Another v. Electoral Commission and Others*; and *New National Party of South Africa v. Government of the RSA and Others*. Both decisions—authored by Justices Sachs and Yacoob, respectively—struggle with the particular challenges posed by the interpretation of a relatively new constitution adopted by a nation with a still-palpable legacy of oppression. Because the cases revolved around a constitutional right to vote, and in the South African system the Constitutional Court is empowered to rule on the constitutionality of legislative acts some of the cases were heard prospectively (i.e. before the elections). The South African constitution grants the Court the authority to judge the constitutionality of Acts of Parliament. Such cases can be directly brought to the Court by the President, or a Member of Parliament, or cases can be referred to the

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<sup>45</sup> Figueroa, § 40.

<sup>46</sup> Figueroa, § 48.

<sup>47</sup> Figueroa, § 64.

<sup>48</sup> Figueroa, § 89.

Court by high courts which have been petitioned by any person.<sup>49</sup> In *August*, the Court's judgment effectively expanded the electorate—the Court ruled that in the absence of legislation excluding imprisoned citizens from the electorate, the Electoral Commission (the commission) had a reasonable obligation to insure that prisoners had the opportunity to vote. The Court stated “the right to vote by its very nature imposed positive obligations upon the legislature and the executive....Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”<sup>50</sup>

In *New National Party*, the Court considered a requirement—established by parliamentary legislation—that voters present a particular form of identification in order to vote. Though the requirement was likely to disenfranchise a significant portion of the eligible population, the Court ruled that it was constitutional. Legislation regulating an election, the majority held, need only be rationally connected to a legitimate governmental purpose to be constitutional.<sup>51</sup> Accordingly, the restrictive, but rational requirement was upheld. Examined together, these two rulings demonstrate that in the case of South Africa, while the right to vote places a substantial onus on government agencies to protect and facilitate citizens voting, the legislature still commands a broad area of authority within which to regulate—and even limit—the electorate.

#### *August and Another v. Electoral Commission and Others*

*August* concerned two applicants: the first, a sentenced prisoner convicted of fraud; the second, a prisoner awaiting trial for fraud. They had approached the commission to ensure that they—and all other prisoners—would be allowed to register as voters on the national voting rolls and to vote in general elections. The chief electoral officer of the commission responded that the commission had made no arrangements to allow prisoners to vote in the forthcoming election.

The 1996 constitution of the Republic of South Africa provides that one of the principles on which the state is founded is “[U]niversal adult suffrage” and “a national common voters roll.” It guarantees that “[e]very adult citizen has the right...to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.”<sup>52</sup> The Constitution contains no explicit provisions allowing for laws which disqualify citizens from voting. Thus, if Parliament seeks to limit the franchise it must meet the tests applied to all prospective changes to the Bill of Rights. Such modifications must be generally applicable and reasonable, and justified in a society based on human dignity,

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<sup>49</sup> South African Constitution, Article 172,

<http://www.polity.org.za/html/govdocs/constitution/saconst08.html?rebookmark=1#167>, 11/10/03.

<sup>50</sup> *August and Another v. Electoral Commission and Others*, CCT8/99, 1999 (4) BCLR 363 (CC), § 16, (1999).

<sup>51</sup> *New National Party of South Africa v. Government of the RSA and Others*, 1999 (5) BCLR (CC), § 24.

<sup>52</sup> Constitution of South Africa, as quoted in *August*: ,§ 3.

equality and freedom.<sup>53</sup> As of 1999, Parliament had not limited the right to vote of prisoners. The 1998 Electoral Act specified that South African citizens needed to apply for registration “only for the voting district in which that person is *ordinarily resident* [my emphasis].” In addition, the Act detailed the special obligations of the commission with regard to persons who find it impossible to appear in person at voting stations. Neither the Constitution, nor the 1998 Electoral Act expressly mentioned the voting status of prisoners.

The petitioners’ case was initially considered by the Transvaal Provincial Division of the High Court. The Transvaal court ruled that under the Constitution prisoners did have the right to vote. The Court held, however, that:

[i]f a person does something which deprives him or her of the opportunity to vote the [commission]...cannot be held responsible. An example is a person who specifically decides not to register because he does not want to vote, also a person who is on vacation and decides not to return to his ordinary place of residence for the purpose of voting. The predicament in which the first and second applicants and all other prisoners, sentenced and unsentenced, find themselves, is of their own making. They have deprived themselves of the opportunity to register and or to vote.

The Transvaal court—noting the logistical difficulty and expense of allowing prisoners to vote—argued that special measures should only be made to accommodate voters whose predicament was not of their own making.<sup>54</sup>

The Constitutional Court overturned this ruling. It based its decision on the fundamental importance of the right to vote. The Court found that prisoners should not be deprived—directly or indirectly—of personal rights which had not been taken away by law. The Court held that:

[u]niversal adult suffrage on a common voter roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South African regardless of race, and for the accomplishment of an all embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.<sup>55</sup>

Whether prisoners retained the right to vote was not in dispute in this case. Whether they could exercise it was disputed. To reach its verdict, the majority relied on ruling on a similar question by the US Supreme Court. In *O’Brien v. Skinner*, the US Supreme Court ruled that prisoners’ votes were of the same weight as others. Special consideration

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<sup>53</sup> August, § 3.

<sup>54</sup> As quoted in August, § 8.

<sup>55</sup> August, § 17.

should be given to them as with any other citizen who finds it impossible to appear in person at voting stations. “Parliament cannot by its silence” the US Court held, “deprive any prisoners of the right to vote. Nor can its silence be interpreted to empower or require the Commission or this Court to decide which categories of prisoner, if any, should be deprived of the vote.”<sup>56</sup> The South African Court rejected the argument that allowing prisoners to vote posed special hardships on the commission. The commission’s intention to make no effort to allow prisoners to vote amounted to an unconstitutional deprivation of their right to vote.

### *New National Party of South Africa v Government of the RSA and Others*

The Constitutional Court’s ruling in *New National Party* explored the tension between reasonable regulation of elections and the sanctity of universal suffrage. Twelve days after ruling on *August*, the Court released its determination on the constitutionality of an electoral regulation—established by Parliament—that appeared likely to disenfranchise up to 10% of eligible voters.<sup>57</sup> Parliament required voters to have an identity card with a bar-coded identification number. The applicant sought for this regulation to be deemed unconstitutional on the grounds that it contravened citizens’ right to vote.

The appellant—the New National Party of South Africa—argued that this requirement was unconstitutional because Parliament had not established an effective mechanism for ensuring that all citizens would be able to vote. At the time of the Court ruling one in members of the electorate did not hold one of these cards. Many of those who had not applied for the card were not aware of the need to have it. A disproportionate number of the disenfranchised hailed from rural areas. Half of these people held other forms of identification—recognized by the state with regard to other matters—but would still not be allowed to vote. Further, the Commission had informed Parliament that the government would be hard pressed to produce enough new identification cards in time for the election.<sup>58</sup>

The majority held that *New National Party* fundamentally differed from *August* because “the alleged disenfranchisement is said to arise from the terms of the statute and not from the acts or omissions of the agency charged with implementing the statute.”<sup>59</sup> Accordingly, the Court ruled that it was Parliament’s responsibility to insure that a measure was a reasonable and it was the Court’s responsibility to determine whether an act was “*rationaly* connected to a legitimate government purpose [my italics].”<sup>60</sup> The act was deemed rational because the regulation of elections gives content to the right to vote. Though some might be disenfranchised, id cards with a barcode served a particular

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<sup>56</sup> O’Brien v. Skinner 414 US 524 (1973), As quoted in *August*, § 21.

<sup>57</sup> *New National Party*, § 133..

<sup>58</sup> *New National Party*, § 133.

<sup>59</sup> *New National Party*, § 23.

<sup>60</sup> *New National Party*, § 24.

rational purpose: they made it easier for election workers to determine who voted and provide a standard mode of identification.

In addition to the rationality of the statute, the majority held that Parliament's legislation must not infringe on fundamental rights enshrined in the constitution. The juridical test determined to be appropriate for this question was to examine whether Parliament had insured that people who would otherwise be eligible to vote were able to do so if they wanted to vote and if they took reasonable steps in pursuit of the right to vote.<sup>61</sup> The Court ruled that Parliament met this test through the provisions it made to make voters aware of requirement and to provide them with id's. As the regulation was not on its face discriminatory—though it arguably was in effect—the Court upheld the regulation.

In her dissenting opinion in *New National Party*, Justice O'Regan applied the logic contained in *August* to determine the constitutionality of Parliament's id requirement. O'Regan argued that the right to vote imposes a positive obligation on the government "to take positive steps to ensure that the right is fulfilled."<sup>62</sup> Accordingly, she argued that the number of citizens without the necessary ID demonstrated that Parliament had not taken adequate steps to facilitate the fulfillment of the right to vote. She further argued that:

Regulation, which falls short of prohibiting voting by a specified class of voters, but which nevertheless has the effect of limiting the number of eligible voters needs to be in a *reasonable* pursuance of an appropriate government purpose.<sup>63</sup> [my emphasis]

While O'Regan recognized the essential value of regulation to a free election, she held that priority ought to be placed on enfranchisement and thus the regulation should have been struck down as unconstitutional. The majority, however, rejected O'Regan's reasonableness test.

## **European Court of Human Rights**

The European Court of Human Rights has jurisdiction over a number of states with a broad variety of legitimate electoral laws and processes. The Court's purview extends over countries with first-past-the-post, proportional, and ethnic systems of representation. In appreciation of the special challenge posed by the diversity of political systems in Europe, the Court has recognized the necessity of granting contracting states "a wide margin of appreciation" when determining whether particular policies are in breach of Article 3 of Protocol No. 1 (P3-1). The article states that:

[t]he 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.

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<sup>61</sup> *New National Party*, § 21.

<sup>62</sup> *New National Party*, § 118.

<sup>63</sup> *New National Party*, § 122.

In the two cases examined here—*Mathieu-Mohin and Clefayt v. Belgium* and *Matthews v. The United Kingdom*—the Court sought to define the kinds of electoral practices and effects that fall within the Court’s purview. In the precedent setting *Mathieu-Mohin*—which was the Court’s first case concerning the right to vote—the majority established the following test:

it is for the court to determine...that 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.’

The test’s vague language—which refers to the “essence” of the right to vote and the free expression of the people—allows for broad conceptions of democratic practice to be considered legal. Consideration of whether statutes are consistent with a broad conception of democratic practice has subsequently been at the heart of the Court’s jurisprudence.

#### *Mathieu-Mohin and Clefayt*

In *Mathieu*, the Court established five parameters to guide its consideration of applications concerning P3-1. First, as mentioned previously, though P3-1 makes no explicit mention of the individual, the protocol does give rise to individual rights and freedoms.<sup>64</sup> Second, the Court noted that the right to vote was not absolute, but that limitations established by states were subject to the test described above.<sup>65</sup> Third, the Court specified that P3-1 applied only to the legislature, or at least one its chambers, and was to be “interpreted in light of the constitutional structure of the State in question.”<sup>66</sup> Fourth, contracting states were under no obligation to introduce specific systems of election or representation and states were due a “wide margin of appreciation” on these matters.<sup>67</sup> Fifth, the “conditions which will ensure the free expression of the people” was interpreted to mean “the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for elections.” Despite this reading, the Court was of the opinion that P3-1 did not mandate that all votes necessarily have the same weight with respect to the outcome of an election or that all candidates were entitled to an equal chance of victory.<sup>68</sup>

The case under the Court’s consideration concerned the legality of the Belgian system of governance. Belgium had established a number of overlapping legislative bodies to accommodate the political demands of its Dutch, French and German speaking populations. The case was brought to the Court by two applicants—both were French-speaking members of the National House of Representatives. They claimed that the Belgian system of governance was in conflict with P3-1. As French-speaking

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<sup>64</sup> *Mathieu-Mohin*, § 48.

<sup>65</sup> *Mathieu-Mohin*, § 51-2.

<sup>66</sup> *Mathieu-Mohin*, § 53.

<sup>67</sup> *Mathieu-Mohin*, § 54.

<sup>68</sup> *Mathieu-Mohin*, § 54.

representatives they could sit on the French Community Council with no authority over the ethnically mixed districts which they represented, but could not sit on, nor had standing with, the Flemish regional council with partial authority over their districts.<sup>69</sup>

The Court rejected the applicants' appeal. First, it determined that the system in question served a legitimate aim. The system was "designed to achieve an equilibrium between the Kingdom's various regions and cultural communities by means of a complex pattern of checks and balances. The aim [was] to defuse the language disputes in the country."<sup>70</sup> The purpose was considered to be legitimate, reasonable with regard to its intention by the Court, and well accepted in the country. The Court further held that though linguistic minorities must vote for candidates willing and able to use the dominant language within their region, this situation did not necessarily threaten the well-being of minorities. This was more likely to be true in a system such as the one implemented in Belgium, where a variety of safeguards exists to prevent inopportune or arbitrary legislation. One example of this type of safeguard was the 'alarm bell' which allowed a reasoned motion—signed by at least three-quarters of the legislative members of one of the language groups—to suspend consideration of legislation and to force a comment by the Cabinet.<sup>71</sup> Finally, the majority held that French-speaking electors in these special districts enjoyed the same right to vote and election as Dutch-speaking electors. The measures imposed were not a "disproportionate limitation such as would thwart the free expression of the opinion of the people in the choice of the legislature."<sup>72</sup>

### *Matthews v. United Kingdom*

In *Matthews* the Court examined two types of questions with respect to P3-1: first, could the institutional components of the European Community—especially the European Parliament—be subject to the same human rights standards as the national systems of the Contracting States; second, how should the Court interpret the status of territories of the Contracting States with respect to the election of the European Parliament?

On April 12, 1994, Matthews—a resident of Gibraltar—applied to the Electoral Registration Officer for Gibraltar to be registered as a voter at the elections to the European Parliament. The Registrar rejected this request on the grounds that the Act which had established direct elections to the European Parliament had limited the franchise to the United Kingdom.

The island is a dependent territory of the United Kingdom, but not part of the United Kingdom. A local House of Assembly functions as the domestic legislature. Locally elected officials do not manage external or defense affairs.

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<sup>69</sup> Representatives from special mixed districts near the Capitol of Brussels chose their language affiliation according to whether they took their oaths of office in Dutch or French. Mathieu-Mohin, § 54.

<sup>70</sup> Mathieu-Mohin, § 57..

<sup>71</sup> Mathieu-Mohin, § 17.

<sup>72</sup> Mathieu-Mohin, § 57.

Gibraltar has a complicated relationship with the institutions of the European Community. Though its inhabitants are not citizens of the United Kingdom, they are considered to be British nationals with respect to the Community. Some laws and institutions which govern the European Community apply to Gibraltar, others do not. For instance, Gibraltar is excluded from the common market, but subject to European Community legislation on matters such as free movement of persons, services and capital, health, the environment and consumer protections.<sup>73</sup>

The United Kingdom raised three reasons why P3-1 was not applicable in this case or that there had been no violation. First, the government argued that the UK could not be held responsible under the Convention for the lack of elections to the European Parliament in Gibraltar. The government argued that once it had signed the treaty, the UK had no effective control over the statute. The UK also argued that rules which established the European Parliament were not subject to consideration under the Convention because the EC was not a contracting party. The Court rejected both arguments in considering whether the UK was responsible for securing the right to vote for the European Parliament. It emphasized that the Convention's guarantees were "not theoretical or illusory, but practical and effective." Since legislation emanating from the EC affects the community of Gibraltar in the same ways as domestic laws, the Court held:

there is no difference between European and domestic legislation, no reason why the United Kingdom should not be required to "secure" the rights in Article 3 of Protocol No. 1 in respect of European legislation....the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1.<sup>74</sup>

The second government argument against the applicant's claim was that P3-1 was not applicable to an organ such as the European Parliament. The government argued that the protocol applied to Gibraltar's House of Assembly, not to the European Parliament. Further, the European Parliament did not exist at the time of the Convention. Again, the Court rejected the government's claim—the Convention was a "living instrument which must be interpreted in the light of present-day conditions." It applied to bodies which were not envisioned by the drafters of the Convention and also pertained to constitutional or parliamentary structures commonly agreed to by the convening states.<sup>75</sup>

Thirdly, the government argued that the European Parliament did not have the characteristics of a "legislature" with respect to Gibraltar. The UK argued that the European Parliament did not have the fundamental attributes of a legislature—the power to initiate legislation and adopt it.<sup>76</sup> The Court, however, held that although the European Parliament does not have many of the attributes of a domestic legislature, it did have effective power within the European Community. More importantly, the Court

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<sup>73</sup> *Matthews v The United Kingdom*, 248333/94, February 18, 1999, § 12.

<sup>74</sup> *Matthews*, § 34.

<sup>75</sup> *Matthews*, § 39.

<sup>76</sup> *Matthews*, § 45.

established that “the European Parliament represents the principal form of democratic accountability in the Community system.”<sup>77</sup> Allowing for the fact that Gibraltar was excluded from some areas of Community activity, the Court held that important matters in Gibraltar were overseen by the Community. Given the Parliament’s democratic role within the Community, the Court found that the Parliament did constitute a legislature with respect to Gibraltar.

Finally, the state argued that even if P3-1 did apply to the European Parliament, the absence of elections in Gibraltar should fall within the state’s margin of appreciation. Acknowledging the wide margin of appreciation granted states when considering the type of electoral system they use, the Court ruled that “in the present case the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament.” As the “very essence of the applicant’s right to vote, as guaranteed by Article 3 of Protocol No. 1, was denied” the Court ruled in favor the applicant.<sup>78</sup>

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<sup>77</sup> Matthews, § 52.

<sup>78</sup> Matthews, § 64.

## Questions Requiring Further Analysis

The vast majority of the states surveyed in this paper enshrined the right to vote in their constitutions. Further, most states are signatories of an international treaty, such as the International Covenant on Civil and Political Rights, which also guarantees the right to vote. Given the widespread acceptance of right to vote provisions by electoral democracies, much of the challenge in understanding the international status of the right to vote lies in determining the impact of such provisions and how these provisions are most effectively implemented. Questions for further study include:

- How applicable are international law and precedents to US case law?
  - How is this changing?
- What are the remaining obstacles to ratification of the International Covenant on Civil and Political Rights and the American Convention on Human Rights by the United States?
  - To what extent are these obstacles political and/or legal?
- Have the courts in federal systems with decentralized voting methods held that vote counting disparities—like those observed in the United States in 2000—are a issue concerning the right to vote?
- Are there any states, besides the United States, that withhold the right to vote from inhabitants of their capitals?
- What have courts seen as the proper relationship between electoral regulation and the right to vote?
  - What types of limitations have they considered to be legitimate?
  - Have courts generally been concerned with intent or have they also examined the effect of electoral laws?
- What are generally considered states' positive obligation to guarantee free and fair elections and the right to vote?

## Appendix

### *Countries with Robust Right to Vote Provisions*

- 1) Andorra
- 2) Argentina
- 3) Bolivia
- 4) Brazil
- 5) Honduras
- 6) Italy
- 7) Paraguay
- 8) Peru
- 9) Suriname

### Examples

Country	Section	Language
Italy <sup>79</sup>	Article 46	<ol style="list-style-type: none"><li>1) All citizens, men or women, who have attained their majority are entitled to vote.</li><li>2) Voting is personal, equal, free, and secret. Its exercise is a civic duty.</li><li>3) The law defines the conditions under which the citizens residing abroad effectively exercise their electoral right. To this end, a constituency of Italians abroad is established for the election of the Chambers, to which a fixed number of seats is assigned by constitutional law in accordance with criteria determined by law.</li><li>4) The right to vote may not be limited except for incapacity, as a consequence of an irrevocable criminal sentence, or in cases of moral unworthiness established by law.</li></ol>
Argentina <sup>80</sup>	Section 37	<ol style="list-style-type: none"><li>1) This Constitution guarantees the full exercise of political rights, in accordance with the principle of popular sovereignty and with the laws derived therefrom.</li><li>2) Suffrage shall be universal, equal, secret and compulsory.</li><li>3) Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system.</li></ol>

<sup>79</sup> Italian Constitution, [http://www.oefre.unibe.ch/law/icl/it00000\\_.html](http://www.oefre.unibe.ch/law/icl/it00000_.html), 10/27/03.

<sup>80</sup> Argentine Constitution, <http://www.senado.gov.ar/web/constitucion/english.html>, 10/23/03.

*Countries with a General Right to Vote*

- 1) Albania
- 2) Benin
- 3) Bulgaria
- 4) Canada
- 5) Cape Verde
- 6) Chile
- 7) Colombia
- 8) Costa Rica
- 9) Croatia
- 10) Cyprus, Republic of
- 11) Czech Republic
- 12) Dominican Republic
- 13) East Timor
- 14) Ecuador
- 15) El Salvador
- 16) Estonia
- 17) Fiji Islands
- 18) Finland
- 19) France
- 20) Ghana
- 21) Guatemala
- 22) Guyana
- 23) Hungary
- 24) Japan
- 25) Lesotho
- 26) Liechtenstein
- 27) Lithuania
- 28) Luxembourg
- 29) Macedonia
- 30) Madagascar
- 31) Malawi
- 32) Mali
- 33) Mauritania
- 34) Mexico
- 35) Micronesia
- 36) Moldova
- 37) Mozambique
- 38) Netherlands
- 39) Nicaragua
- 40) Niger
- 41) Norway
- 42) Palau
- 43) Panama

- 44) Papua New Guinea
- 45) Philippines
- 46) Poland
- 47) Portugal
- 48) Romania
- 49) Seychelles
- 50) Slovakia
- 51) Slovenia
- 52) South Africa
- 53) Switzerland
- 54) Taiwan
- 55) Thailand
- 56) Turkey
- 57) Ukraine
- 58) Uruguay
- 59) Vanuatu
- 60) Venezuela
- 61) Yugoslavia

Examples

Country	Section	Language
Finland <sup>81</sup>	Section 14	<ol style="list-style-type: none"> <li>1) Every Finnish citizen who has reached eighteen years of age has the right to vote in national elections and referendums. Specific provisions in this Constitution shall govern the eligibility to stand for office in national elections.</li> <li>2) Every Finnish citizen and every foreigner permanently resident in Finland, having attained eighteen years of age, has the right to vote in municipal elections and municipal referendums, as provided by an Act. Provisions on the right to otherwise participate in municipal government are laid down by an Act.</li> <li>3) The public authorities shall promote the opportunities for the individual to participate in societal activity and to influence the decisions that concern him or her.</li> </ol>
Estonia <sup>82</sup>	Article 8	1) Every child with one parent who is an Estonian citizen shall have the right, by birth, to Estonian citizenship.
	Article 57	<ol style="list-style-type: none"> <li>1) The right to vote shall belong to every Estonian citizen who has attained the age of eighteen.</li> <li>2) An Estonian citizen who has been declared mentally incompetent by a court of law shall not have the right to vote.</li> </ol>
	Article 58	1) The participation in elections of Estonian citizens who have been convicted by a court of law and who are serving a sentence in a place of detention may be restricted by law.

<sup>81</sup> Finnish Constitution, <http://www.om.fi/constitution/3340.htm>, 10/23/03.

<sup>82</sup> Estonian Constitution, <http://www.senado.gov.ar/web/constitucion/english.html>, 10/23/03.

*Countries with Universal Suffrage for the Election of Sovereign Institutions*

- 1) Antigua
- 2) Armenia
- 3) Austria
- 4) Belgium
- 5) Denmark
- 6) Dominica
- 7) Georgia
- 8) Germany
- 9) Greece
- 10) Grenada
- 11) Iceland
- 12) Ireland
- 13) Israel
- 14) Jamaica
- 15) Kenya
- 16) Kiribati
- 17) Korea, South
- 18) Latvia
- 19) Malta
- 20) Marshall Islands
- 21) Mauritius
- 22) Monaco
- 23) Mongolia
- 24) Namibia
- 25) New Zealand
- 26) Nigeria
- 27) Russia
- 28) Sao Tome and Principe
- 29) Senegal
- 30) Solomon Islands
- 31) Spain
- 32) Sri Lanka
- 33) St. Kitts and Nevis
- 34) St. Lucia
- 35) St. Vincent and the Grenadines
- 36) Sweden
- 37) Trinidad and Tobago
- 38) Tuvalu

### Examples

Country	Section	Language
Spain <sup>83</sup>	Article 68	1) The House of Representatives is composed of a minimum of 300 and a maximum of 400 Deputies elected by universal, free, equal, direct, and secret suffrage under the terms established by law.
	Article 69	1) In each province, four senators will be elected by universal, free, equal, direct, and secret suffrage by the voters of each of them under the terms established by an organic law.
Iceland <sup>84</sup>	Article 33	<p>1) All persons who, on the date of an election, are 18 years of age or older and have Icelandic nationality have the right to vote in elections to Althingi. Permanent domicile in Iceland, on the date of an election, is also a requirement for voting, unless exceptions from this rule are stipulated in the law on elections to Althingi</p> <p>2) Further provisions regarding elections to Althingi shall be laid down in the law on elections.</p>

#### *Countries with No Constitutional Right to Vote*

- 1) Australia
- 2) Bahamas
- 3) Bangladesh
- 4) Barbados
- 5) Belize
- 6) India
- 7) Indonesia
- 8) Nauru
- 9) Samoa
- 10) United Kingdom
- 11) United States of America

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<sup>83</sup> Spain Constitution, [http://www.oefre.unibe.ch/law/icl/sp00000\\_.html](http://www.oefre.unibe.ch/law/icl/sp00000_.html), 10/27/03.

<sup>84</sup> Icelandic Constitution, [http://www.raduneyti.is/interpro/stjr/stjr.nsf/pages/icelandic\\_constitution.html](http://www.raduneyti.is/interpro/stjr/stjr.nsf/pages/icelandic_constitution.html), 11/03/03.