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## EXCLUSION AND DENIAL OF THE RIGHT TO VOTE IN PRACTICE AND INTERNATIONAL JURISPRUDENCE

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**ABSTRACT:** *The right to vote and its formal recognition in several states by constitution or by law is indicative of the assessment that they give to this right in the hierarchy of sources of domestic law. The history of the right to vote gives us examples when restricting the right to vote was the main key to prevent citizens of all classes in the process of selecting their representatives in the legislature. Thus, in the past, the terms and conditions to enjoy the right to vote and to be elected were connected to the economic, political or socio-cultural development of respective countries. This article aims to present the disclosure of past practices for limiting the right to vote and the progress of international jurisprudence on issues related to the limitation or denial of this right.*

**KEYWORDS:** Exclusion and Denial, Right to Vote, International Jurisprudence

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### INTRODUCTION

The right to vote and its formal recognition in several states by constitution or by law is indicative of the assessment that they give to this right in the hierarchy of sources of domestic law. For example, in some states such as Greece or Australia, it is set in a higher level by making compulsory the voting in their respective constitutional arrangements. However, the right to vote is not absolute and may be subject to reasonable restrictions; these restrictions should not be arbitrary and not inhibit the free expression of the opinion of voters, regardless of the types of elections for the central or local government or referendums. The history of the right to vote gives us examples when restricting the right to vote was the main key to prevent citizens of all classes in the process of selecting their representatives in the legislature (Haxhiu, 2013, p. 28), thus, in the past, the terms and conditions to enjoy the right to vote and to be elected were connected to the economic, political or socio-cultural development of respective countries.

In order to give a general overview on the restrictions and limitations of the right to vote in the international practise and jurisprudence, we propose our paper divided in two issues concerning voters' qualities as forms of exclusion from the right to vote, and denial of the right to vote.

### VOTERS' QUALITIES AS FORMS OF EXCLUSION FROM THE RIGHT TO VOTE

The features of the right to vote have evoluated with the development of the society and states in different periods: in modern times the main features of the right to vote are related to general, equal, personal and secret voting, while in earlier stages of society and state evolution there were certain qualities of the voters as a prerequisite for the right to vote. These prerequisites appeared mostly through forms of exclusion of voters by such qualities as:

- religion,
- race,
- wealth and social class,
- payment of taxes,
- education,
- residence, etc

In the past for several countries and in certain conditions, it was common to violate all civil and political rights, including the right to vote to the citizens who belonged to certain beliefs or religion. Some examples concerning 'religion' – as a condition for exclusion from the right to vote – are in the following: In *England and Ireland*, Roman Catholics were deprived of the right to vote until 1788 and the right to be elected until 1829. The anti-Catholic policy was justified by the argument that the loyalty of Catholics linked to the Pope, not the monarch (MacNaughton, K. F. C., 1947, pp. 40, 46); In *Canada*, various faith groups were stripped of the right to vote during the war by the Electoral Act 1917, mainly because they opposed military service. This deprivation of the right to vote ended with the end of the First World War (Elections Canada homepage – A history of the vote in Canada); In the *Republic of Maldives*, only Muslims were active and passive right to vote (Goodwin-Gill, G.S., 1994, p. 58).

Related to 'wealth, payment of taxes and social class' as prerequisites for the right to vote, until the beginnings of '90-es many Western democracies had set in their electoral laws having a certain property as a condition for exercising the right to vote. For example, only landowners could exercise their right to vote, or the right to vote was recognized depending on the amount of taxes that citizens pay (Ratcliffe, D., 2013, p. 221). 'Social layer' – as a restriction on the right to vote – existed more in the medieval period, during which 'the right' appear as 'a right privilege' and thereby political rights (including the right to vote) appearing as fair only to certain social classes; the lower social classes or the poorest had mostly more duties than rights.

Nowadays such cenze are largely abolished, although the homeless may find it difficult to register because they do not have a fixed address or a well placed level with those persons who frequently change residences. In our interpretation, such restrictions derive because of the property level, which does not guarantee several citizens either temporary or permanent residency. They can also derive because of social organization and cultural traditional of certain ethnic groups, who, even when they have the opportunity, prefer not to have permanent residence. We believe that in such cases the lack of a permanent residence or domicile directly affects the im/possibility of registration into the electoral lists, and therefore constitutes an actual restriction of the right to vote that stems from the property rather than formal restrictions set by normative act. Therefore, it remains an obstacle or limitation due to deferment property and derives indirectly as such.

Whereas, in cases where certain ethnic groups have the economic possibility to have a permanent residence but prefer not to have it because of the traditional or cultural organization, we are still in front of a limitation on the right to vote, that is not because of economic or property reasons, but that certainly brings to the impossibility of registration on the electoral rolls which is transposed in the inability to exercise the right to vote. The age – as prerequisite for the right to vote – exists even today, despite its reduction compared to the

beginnings of the right to vote as a citizens' right. Age limit differs in the cases of the *active* and *passive* right to vote. The *active* right to vote is still different in several countries; usually this age varies from 18 to 21 years. The right to stand for election should preferably be acquired at the same age as the right to vote and in any case not later than the age of 25, except where there are specific qualifying ages for certain offices such as member of the upper house of parliament, Head of State (Code of Good Practice in Electoral Matters, 2002, article 1.1. paragraph a, iii).

However, there has always been difference between age as condition for the right to vote and for the right to be elected. Among the examples, the case of Austria: in 1918 the right to vote was granted to individuals aged over 20 years, and the right to be elected to persons over 29 years. This right underwent some changes in the coming years until 1972, when it was set the minimum age of 25 years for the passive electorate and 19 for the active one (Fischella, 1970, p. 125). Yet, the age was object of changes in the electoral reform of 1992, then later on 2007 when with the constitutional changes were decided the age of 16 years for the *active* right to vote (Austrian Constitution, 1920, revised 2009, article 26 paragraph 1) and 18 years for the *passive* right to vote (Austrian Constitution, 1920, revised 2009, article 26 paragraph 4). According to a comparative study of 2002<sup>nd</sup> of the International Institute for Democracy and Electoral Assistance, the age of 18 is actually the standard of the age of voting; it was adopted by 109 from 150 of the states included in the study (International IDEA, 2002, pp. 39, 46).

Among the exclusions set on the right to vote, many states deprive the voting rights of prisoners. Some countries, even some federated states of USA, deprive the right to vote to persons convicted of serious crimes even after their release from prison. In Albania, the convicted by courts' final decision have the right to vote but not be elected, while the detainees have the *active* and *passive* right to vote as long as there is not yet been issued a final decision. For example, in the general election of 2001 in the Electoral Area no. 9-Fier there was the case of candidacy and election as MP for a person who was detainee until receipt of mandate by the Central Election Commission; in the general election of 2013 there was the case of a candidacy in the multi-name list of the Electoral Zone Shkodra, while being detained by the judiciary.

The rule of law requires that those who are excluded from voting must be aware in advance, in order to give them the possibility of challenge in an administrative way or court under the respective legal provisions (Goodwin-Gill, G.S., 1994, p. 58). Exclusion of individuals from their passive and active right to vote can be done legally through special provisions, but only when occurring all the following conditions (Code of Good Practice in Electoral Matters, 2002, article 1.1. paragraph d):

- Exclusion must be *expressly* provided by law.
- It must respect the principle of proportionality: the conditions for depriving individuals of their right to be elected (passive right to vote) may be less stringent than the requirements for depriving them of the right to vote (active right to vote).
- Exclusion can be applied in cases of disability or conviction by final court decision for a serious offense.
- In addition to all the above conditions, the abolition of political rights or the determination of mental disability can only be applied upon special court decision.

**Denial of the right to vote in the international jurisprudence.**

Referring to international acts and internationally recognized standards for elections, the main indicator that determines whether elections are 'free' is the extent to which they facilitate the full expression of the political will of the people involved in the election. Ultimately, it is this will, according to the UN Universal Declaration (Universal Declaration of Human Rights, Article 21, paragraph 3), that is the real basis of the legitimate authority of government (Center for Human Rights Geneva, 1994, p. 7). The enjoyment of exercise for the right to vote should be guaranteed widely for every citizen's right to vote without exclusion, with the exceptions of reasonable exclusion.

In addition to all the above, we can refer to the *Copenhagen Document of CSCE* (1990), the content of which requires the commitment of participating States to ensure appropriate measures to express and reflect better the will of the people as the basis of governmental authority, and to take all legal and administrative measures (*Copenhagen Document of CSCE*, 1990, paragraphs 9 & 24). General voting implies a universal right to elect and to be elected. However, this right, as we saw above, may be subject to limitations or exceptions. In the following, the international jurisprudence is displayed according to respective problems:

- a. exclusion from the right to vote > Supreme Court of Canada, *Decision Sauve v. Canada* (1993); UN Commission on Human Rights, *Silva and others vs. Uruguay* (1981);
- b. denial of the right to be elected > ECHR: *case Podkolzina v. Latvia* (no. 46726 / 99), ECHR 09.04.2002; ECHR: *case Sadak and others v. Turkey* (started with the requirements (no. 29900/96, 29901/96, 29902/96 and 29903/96), ECHR 17.07.2001; ECHR: *case the Socialist Party and Others v. Turkey* (no. 21237/93), ECHR 25.05.1998; ECHR: *case Kovatch v. Ukraine* (no. 39424/02), ECHR 07.02.2008.

*Canadian Charter of Rights and Freedoms* (1982), Section 3 guarantees all citizens the right to vote, while Section 5 establishes equality before the law. Despite the constitutional guarantee of the right to a universal voting, the Canadian Elections Act excluded certain categories from voting: federal judges, persons with mental disabilities and prisoners (homepage of Canadian Electoral Commission, on May 2014). The Supreme Court of Canada, in 1993, in the *case Sauve v. Canada* ruled that the exclusion of prisoners from their right to vote was a very wide restriction, which is not in accordance with the requirements that punishment should constitute the minimum damage to the rights enshrined in the Charter of Rights, and therefore the negative effects to a right must be proportionate to the benefits (ibid.): *Denying the right to vote is not in accordance with the requirement that ... punishment should not be arbitrary and must serve to the good purposes of criminal law. The lack of arbitrariness means (requires) that the punishment fits the actions and conditions of the individual criminal offender* (Supreme Court of Canada, *case Sauve v. Canada*, 1993). Later on, in 1997 the Federal Court of Appeal reversed *Sauve* (1995), ruling that Bill C-114's voting disqualification for inmates serving two years or more did meet the minimum impairment and proportionality tests (homepage of Canadian Electoral Commission, on May 2014). However the Canadian Chief Electoral Officer through his decisions of 2002 gave all the prisoners the right to vote for the elections of 2004 and 2006.

Some countries also disqualify military personnel from voting; this practice is especially common in Latin American countries: Brazil, Colombia, Dominican Republic, etc. (Goodwin-Gill, G.S., 1994, p. 60). Such restrictions, if they have reasonable grounds, should remain proportionate and must not be used as a means to deprive of the right to vote

considerable part of population. However, it remains a responsibility and assessment of the state. Discriminatory deprivation of voting rights violates the general principles of international law. United Nations Commission on Human Rights of the (here in after CHR) had into consideration the principles of equity and non-discrimination when it comes to access to public services according to Article 25 of the International Covenant on Civil and Political Rights of 1996.

In the case *Silva and others vs. Uruguay (1981)* applicants claimed violation of their rights under Article 25 of the International Covenant on Civil and Political Rights, where they were deprived by law of the right to engage in political activities, including the right to vote for 15 years, since they were previously run by certain groups which were later declared illegal. Although the government argued that it had derogated important articles, it did not provide adequate information about the existence of a state of emergency.

CHR found no justification for such a general denial of rights, and therefore ordered *the enabling of Landinelli Jorge Silva, Luis E. Echave Zas, Omar Patron Zeballos, Niuska Sala Fernandez and Rafael Ferro Guarga to participate in the political life of the country* (University of Minnesota, Human Rights online Library, 2014). In order to give effect onto the right to be elected, the procedure for registration of candidates must be non-discriminatory, as well fair. The reasons in base of a refusal to register the application should have objective criteria clearly spelled out in law. Thus, monetary deposits may be in sufficient quantities to discourage frivolous / unserious candidacies, but should not be so high as to prevent political parties or independent candidates from having access to voting (OSCE / ODIHR, 2003, p. 63). Because of the importance that represents the right to vote for the political pluralism and democratic elections, the ECHR has developed jurisprudence regarding restrictions that may be imposed on the right, without violating the international principles of human rights.

In *Podkolzina v. Latvia case* (no. 46726 / 99, ECHR 09.04.2002) the court addresses the problem of lack of procedural and substantive legal guarantees to protect a person's right to be a candidate (OSCE / ODIHR, 2003, p. 64). The applicant, Ingrida Podkolzina, was a candidate on the list of National Harmony Party for the parliamentary elections of 3<sup>rd</sup> October 1998 in Latvia. She belonged to the Russian linguistic minority in Latvia. The list of candidates was delivered on time to the Commission, together with all required documentation, including a copy of the official certificate, which confirmed that she knew Latvian official language. In the following week based on a new assessment provided by an official of the State Language Centre, the Central Election Commission removed her name from the list of candidates with the reason that she had insufficient knowledge of the state language – Latvian.

In examining the case ECHR held that “*in the absence of any objective guarantees, the procedure followed in the applicant’s case was not in compliance with the requirements for equality and legal security to determine ability to stand as candidates in elections. For this reason, the Court ruled unanimously that there had been a violation of Article 3 of Protocol 1 of the Convention*” (ECHR: *case Podkolzina v. Latvia*, paragraph 8). In *Sadak and others v. Turkey* (ECHR: *Sadak and others v. Turkey case*), although ECHR decided that there were no violation of Article 3 of Protocol 1 of the Convention, it argued that “*...considering the ‘preparatory work’ drafting of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court decided that Article 3 of Protocol no. 1 guarantees individual rights, including the right to vote and the right to be*



*elector*”. The origins of this case arise from the appeal of two Turkish nationals, Mr Mehmet Yumak and Mr. Rasool Sadak, who claimed the electoral threshold of 10% – set on national level for the parliamentary elections in Turkey – violates the free expression of opinion of the people choice of legislature. They relied on Article 3 of Protocol No. 1, after their parliamentary mandates were interrupted by a Turkish court decision according to which their political party was dissolved, based on the attitude of the head of the party and not as a result of the political activities of the applicants as individuals (OSCE / ODIHR, 2003, p. 65).

Another issue of interest to the jurisprudence of the ECHR is the case of dissolution of a party (Socialist Party – SP) by the Turkish Court, with the reasoning that the objectives of the party were unacceptable, thus the founders and leaders of the party were banned in holding similar positions in another body. At the recourse to the ECHR no. 21237/93, the complainant claimed that the dissolution of the party and the ban set on its leaders had violated their right to freedom of association under Article 11 of the Convention. The Court in its comments on the case argued that the protection of opinions and freedom of expression constitute one of the objectives of freedom of assembly and organization under section 11, which applies to political parties (OSCE / ODIHR, 2003, p. 66).

Among the arguments of the Turkish Government on this matter, it was mentioned that SP, through its activities, aimed at breaking the fundamental constitutional principles of the Turkish state, which was evident from the statements of SP that it considered Kurdish-originate citizens as having the status of ‘nation’ and ‘people’, as well as their right ‘to create a separate state’; thus, calling for the creation of a federation. *“In its judgment in the case of United Communist Party of Turkey and Others v. Turkey, the Court held that political parties are a form of association essential to the proper functioning of democracy and that in view of the importance of democracy in the Convention system, there can be no doubt that political parties come within the scope of Article 11. The Court noted on the other hand that an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions.”* (ECHR: case the Socialist Party and Others v. Turkey).

The basic rules related to the exercise of electoral rights focus on:

- non-discrimination,
- access to polling stations and voting action with equal, general and confidential vote,
- and guarantee that the results of the vote will reflect the free expression of the will of voters.

Regarding the jurisprudence of the ECHR on the above, the first time that the Court found violations of the restrictions placed on the right to vote was the *Kovatch v. Ukraine case* (Wagner, 2010, p. 191), starting with the application no. 39424/02, Decision 07.02.2008. In this case the complainant, a candidate for deputy in One-Name-Zone No. 72, defends the idea that he has accumulated more votes than his opponent, but that he was deprived from the place in parliament through an unfair procedure of vote-counting which was left entirely in the hands of Local Election Commission. This Commission had invalidated the results of the voting-count at 4 polling stations in which the complainant had won 2,488 votes, while ZG (the declared winner) 1.269 votes.

When analyzing the case, the court makes reference to the application of the principles of proportionality and non-discrimination: assessment of the phenomenon known as ‘lost or wasted votes’ in the total results of election where it were announced invalid result, if *all ballots have equal weight in terms of outcome and that every candidate has equal chances of winning*. In paragraph 61 of the Decision The Court stated that there had been a violation of Article 3 of Protocol No. 1 and that the “*decision to invalidate the vote in the four electoral branches should be regarded as arbitrary and disproportionate compared to any legitimate governmental purpose*”.

This article contributes to the expansion of the horizon of students and practitioners working in the field of law and the disclosure of past practices for limiting the right to vote and the progress of international jurisprudence on issues related to the limitation or denial of the right the vote.

## CONCLUSIONS

- Exclusion of individuals from their passive and active right to vote can be done legally through special provisions, but only when occurring all the following conditions: it must be *expressly* provided by law and respect the principle of proportionality; it can only be applied upon special court decision.
- The judicial international practice is consolidated with the basic rules related to the exercise of electoral rights focus on: non-discrimination, access to polling stations and voting action with equal, general and confidential vote, and guarantee that the results of the vote will reflect the free expression of the will of voters.

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