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Research Report

Free and Fair Elections: The European Minimum Standards

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Free and Fair Elections: The European Minimum Standards

Kriszta Kovács

In 2021, Germany faces important general elections both at the state and the federal level. Holding elections in the middle of a pandemic is challenging. Organizing free and fair elections is even more so. But when is the election free and fair? This piece presents the answers given by the European Convention on Human Rights (Convention) and its authoritative interpreter, the European Court of Human Rights (Court). It devotes special attention to Article 3 Protocol 1 of the Convention, which stipulates that ‘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.’

Article 3 Protocol 1 requires the procedures and institutions of parliamentarism to be necessary features of the member states’ basic democratic structures. First, it encompasses the procedures of parliamentarism: the secret ballot and individual voting rights. The clause confirms the importance of the individuality and secrecy of voting. Second, the provision explicitly requires member states to have an institution called a legislature directly elected by the people. The term ‘legislature’ is not confined to the national parliament ([Timke v. Germany](#)), and the notion ‘people’ opens the possibility of giving the right to vote to those non-citizens who have been residents of the country for a long time. Moreover, the provision explicitly refers to the people’s free expression of opinion, thereby accepting that an informed electorate should choose the legislature.

According to a literal interpretation, the article is framed as an undertaking on the part of the member states to hold free periodic elections. For a long time, the phrase ‘the High Contracting Parties undertake’ was meant that the article solely gives rise to state obligations and not individual rights. However, the Court interpreted it to ensure the right to free elections by stressing that the formulation is due to a ‘desire to give greater solemnity to the commitment undertaken’ ([Mathieu-Mohin and Clerfayt v. Belgium](#), para 49). Since then, European citizens have looked to the Court to guarantee their right to free elections.

The most fundamental condition the right to free elections must meet is that members of the electorate should be treated as free and equal persons by the state and federal authorities. The basic election principles—equal, universal, and free suffrage and the secret ballot—are derived from that fundamental requirement. Under the Convention, parliamentary votes held in the territory of the member states must be held freely and fairly; this applies to the organization of the vote ([Benkaddour v. France](#)), including

introducing electoral thresholds ([Strack and Richter v. Germany](#)), the counting of the votes ([Davydov and Others v. Russia](#)), and the effectiveness of the appeal system ([Mugemangango v. Belgium](#)).

Interestingly, while some election principles—free elections and the secret ballot—are explicitly enshrined in the Convention, others—universal, equal suffrage—can not be found expressis verbis in the text. Still, that does not mean that for instance, universal suffrage is not protected at all on the European level. The Court has interpreted the right to free elections to mean that it encompasses the unenumerated election principles and delivered decisions on the requirement for universal suffrage ([X v. The Federal Republic of Germany](#)). Today, it is one of the benchmark principles ([Hirst v. the UK](#)).

Likewise, the term ‘equal suffrage’ is not present in the Convention, but the Court interprets Article 3 Protocol 1 to include the equal treatment of the citizens in exercising their right to vote ([Mathieu-Mohin and Clerfayt v. Belgium](#)). In the last decades, the Court reviewed several statutory provisions disqualifying persons from the right to vote. The Court accepted that the voting right can be legitimately limited and that, in general, the conditions of citizenship, residence, and age are not arbitrary restrictions ([Luksch v. Germany](#)). Thus, the Court held that the Convention does not oblige member states to grant non-resident migrant people unrestricted access to the franchise ([Shindler v. the UK](#)). It, however, found that the citizens’ disenfranchisement on account of placement under partial guardianship ([Alajos Kiss v. Hungary](#)) and serving a custodial sentence ([Hirst v. the UK](#)) violated Article 3 Protocol 1.

The principle of the equality of voters, however, does not include the equality of the votes, as the Court made clear very early. Thus, the Convention does not require that all votes necessarily carry equal weight regarding the election outcome ([Partija ‘Jaunie Demokrāti’ and Partija ‘Mūsu Zeme’ v. Latvia](#)). Nor does the Convention call for preferential treatment favouring minority parties ([Partei Die Friesen v. Germany](#)).

Finally, when organizing a vote, member states are responsible for ensuring that citizens have a full participative role: i.e., they have access to the relevant information to form an opinion freely without any pressure ([Yumak and Sadak v. Turkey](#)). The Court’s case-law on the importance of having a free circulation of opinions and information of all kinds during a campaign period is relevant when voting in general elections ([Bowman v. the UK](#)). The Court’s view on the member states’ positive obligation is also pertinent: member states must ensure that coverage by public media is ‘balanced and compatible with the spirit of “free elections”’ ([The Communist Party of Russia and Others v. Russia](#)).

Overall, the voting process’s legitimacy in general elections depends on how these basic procedural conditions are observed. If the member state complies with these European minimum standards, the voting procedure and the election outcomes can be accepted as legitimate, both within the country and abroad.

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