THE RIGHT TO FREE ELECTIONS

Yannick Lécuyer

COUNCIL OF EUROPE
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Preface

Weaving together the many complex strands of the right to free elections into a fairly short yet highly comprehensive work was no easy task, but it is one that Yannick Lécuyer, in this book produced by the Council of Europe, has performed with aplomb. I wish to thank him for asking me to write the preface and I congratulate him on his achievement.

The right to free elections is integral to democracy. More than just another human right, albeit a fundamental one possessed by men and, of course, women as social beings, the right to free elections is central to the concept of a democratic society that is so much a feature of the European Convention on Human Rights (hereafter "the Convention").

Less clear, however, is what this right encompasses. Does it simply mean the right to have elections held at what may be deemed reasonable intervals? And, in that case, under what circumstances can such elections be considered truly free? Or is it perhaps to be understood as conferring certain entitlements on citizens? The right to be able to vote in elections without restrictions, such as the financial ones that used to apply under the system of suffrage based on property ownership? Or the freedom to stand for election? The fact is that the principle of free elections can vary in scope depending, to a large extent, on national texts, usually at constitutional level, and international instruments, but even more so perhaps on how these texts and instruments are interpreted by the courts. States, moreover, do not always agree on the meaning that should be assigned to the term "free elections": the author reminds us that free elections did not figure in the Convention adopted on 4 November 1950 and that it was not until the Additional Protocol came out over a year later that they received their first mention. He also notes that the 1981 African Charter on Human and Peoples' Rights is very cautious and virtually silent on the subject, in contrast to the European and American instruments.

Mr Lécuyer was well aware of the breadth of the issue encapsulated in the very title of his book, but he has come up with a clear and effective way of dealing with the various components: first he looks at the globalisation of the right to free elections and more specifically its European sources, the Council of Europe and the European Court of Human Rights being central to the subject at hand; next he turns his attention to the scope of the right, on the basis of Article 3 of Protocol No. 1 to the Convention, as interpreted – rather boldly or at any rate open-endedly – by the Court; this is followed by an examination of the legal arrangements governing the right to free elections (main features of and conditions for the exercise of suffrage, choice of electoral system, judicial oversight of interference and restrictions, with due regard for the margin of appreciation left to national authorities, which is always difficult to assess). Lastly, Mr Lécuyer considers the safeguards that must attend electoral operations, their conduct and judicial review, namely the practical conditions for free elections and a properly functioning democracy. Electoral legislation that looks perfect on paper can prove disastrous in practice, as I myself can attest, and the role of observers, intergovernmental and non-governmental organisations is crucial for detecting fraud and vote-rigging (and other forms of intimidation or obstruction).

With his expert knowledge of European human rights law, Mr Lécuyer provides a fairly exhaustive overview of the case law of the Strasbourg Court, from the seminal judgment in *Mathieu-Mohin and Clerfayt v. Belgium* in 1987, which highlighted the individual rights implied by Article 3 of the protocol, to more recent major judgments (Hirst, Ždanoka, Sejdić and Finci, Scoppola, Sidiropoulos, and others). He also shows that this article, while certainly central, is not the only one in play and that freedom of expression (Article 10) and the freedoms referred to in Article 11 (assembly and association) can also be relevant, as can the prohibition of discrimination enshrined in Article 14. He notes that, perhaps rather curiously, Article 6 has ceased to apply since the much-discussed decision in *Pierre-Bloch v. France* in 1997.

The author does not confine his analysis to the case law of the European Court of Human Rights, however. He also underscores the importance of other mechanisms within the Council of Europe's ambit, in particular the Venice Commission (the European Commission for Democracy through Law) whose opinions, conclusions and recommendations are increasingly cited, and heeded, by the Court. More broadly, the "soft law" created by the Council of Europe and its various bodies plays an important role, and the author usefully provides some examples of these.

In short, Yannick Lécuyer's work should be of interest and value not only to academics seeking a better understanding of the right to free elections (with respect to the choice of the legislature, as stated in Article 3 of Protocol No. 1), but also to practitioners, such as lawyers, members of civil society or political parties and human rights campaigners, to name but some. I am confident that, with its wealth of detailed information and clarity of expression, this book will find a wide audience and deservedly so.

Jean-Paul Costa
President of the International Institute of Human Rights, former
President of the European Court of Human Rights (2007-2011)

1. Introduction

Taking up the idea of "genuine democracy" enshrined in the preamble to the Council of Europe Statute adopted in London on 5 May 1949, the 5th Forum for the Future of Democracy which was held in Kyiv from 21 to 23 October 2009 concluded that, in such a system, "the citizen is sovereign and the voter decides".[1] The general rapporteurs stressed that the right to democratic elections was essential for ensuring that "the will of the people is respected in the shaping of the legislature and government at all levels. The process of translating the outcome of elections into political mandates should take place in a fair, impartial and trustworthy manner. Citizens must be sure that their collective will has been respected and, in turn, they will accept the verdict from the ballot box".

There is an inextricable link between the Council of Europe and democracy that is expressed first and foremost through the holding of free elections under conditions that ensure the democratic nature of those elections. Although, in contradistinction to respect for human rights and fundamental freedoms or the rule of law, the existence of democratic institutions is not specifically mentioned in the conditions for accession set out in Articles 3 and 4 of the 1949 Statute, membership necessarily implies compliance with basic democratic standards. Thus it is that some countries, such as Portugal under Antonio de Oliveira Salazar and Spain under Francisco Franco, were for many years unable to join. In 1969, Greece under the Colonels withdrew from the Council of Europe rather than suffer the humiliation of expulsion and, more recently, Belarus, which had special guest status with the Council of Europe from 1992 to 1997, has seen its accession procedure suspended for failing to observe human rights and democratic principles. In a statement on 12 January 2011, the Committee of Ministers declared that it would continue supporting the establishment of closer relations between the Council of Europe and Belarus only on the basis of respect for European values and principles, which meant putting an end to the oppression of the democratic political opposition, the independent media and civil society. The Kyiv Forum broadly concluded that the Council of Europe's objective was to establish a common understanding about all the principles that qualify elections as being "free and fair" in compliance with democratic standards. Those standards must be fully implemented in all elections throughout the Council of Europe space and in those states aspiring to join the Organisation or engage in a privileged relationship with it.

1. *Electoral systems: strengthening democracy in the 21st century*, Strasbourg, Council of Europe, 2010.

In Convention law, Article 3 of Protocol No. 1 provides a narrowly defined guarantee of the right to free elections:

> 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.

Although confined to elections to the legislature, this right, according to the European Court of Human Rights, enshrines a characteristic principle of democracy and is accordingly of prime importance in the Convention system.[2] The Court has ruled that the right to free elections is fundamental to democracy and the rule of law.[3] It paves the way for the emergence and anchoring in European human rights law of a principle according to which governments must possess democratic legitimacy.

That said, while it cannot exist without regular, free and fair elections that allow the expression of the popular will, democracy is about more than simply the right to free elections. Elections may be the culmination of democracy, but they are only one part of it. Democracy is forged at the intersection between political and electoral rights and other rights that are political in nature, specifically freedom of expression, and freedom of peaceful assembly and association, which together create the pluralist, liberal and truly democratic environment of elective politics.

Likewise, simply calling elections free, transparent and fair is not enough to make them so in practice. The right to free elections implies the introduction of electoral systems, procedures and safeguards. It also presupposes access to the courts to combat irregularities and, in the case of the European Court, violations. The law of the European Convention on Human Rights and Council of Europe law therefore offer a political and democratic model in which democracy is not limited solely to rights of participation but works in synergy with the above-mentioned rights of a political nature and, at the same time, they offer a set of electoral standards designed to ensure that democracy prevails throughout the electoral process in the broad sense, from the pre-election period to the evaluation and observation of elections, including the count. This is necessary to prevent fraud and ensure the integrity of the vote and respect for the will of the people.

1.1. GLOBALISATION OF THE RIGHT TO FREE ELECTIONS

Generally, any attempt to tackle and regulate political phenomena through law is fraught with theoretical pitfalls. Added to these is the perpetual conflict between the "rule of the majority" and the "rule of law". The difficulties are compounded if the law in question is international law. At first sight, electoral law and the right to choose one's representatives would appear to fall within the exclusive domain of the state under one of the cardinal rules of public law, often encountered in religion, namely sovereignty. No one seriously imagined that what was essentially a political

2. European Court of Human Rights [hereafter: Strasbourg Court], 2 March 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, paragraph 47.
3. Strasbourg Court, 6 October 2005, *Hirst v. the United Kingdom (No. 2)*, paragraph 36.

relationship between the state and its citizens would one day come to be governed by international law. Yet that is precisely what has happened. The second half of the 20th century saw a gradual shift in the protection of human rights, fundamental freedoms and democratic standards away from the domestic level to the international arena, and globalisation of the human rights to democracy and the right to free elections. In the words of G. S. Goodwin-Gill, "the manner by which the will of the people is translated into representative authority was now indeed a proper subject of international law."[4]

The recognition of a right to free elections in international law has nevertheless encountered considerable resistance from national governments. For it is not so much democratic sovereignty within the state that is challenged by this law as the sovereignty of the state in its choice of political system. The right to free elections is often wrongly portrayed as a limitation on democratic sovereignty when in fact it serves to secure and preserve such sovereignty in law. It is, in fact, a prohibition for states to be governed by any rules other than those of democracy. Recognised as an individual right, it exacerbates the tensions underlying international law, in which states continue to be the primary players and subjects. Many of them have therefore sought to put obstacles in the way, first in terms of recognition, and second in terms of the applicability and effectiveness of the right to free elections. Accordingly, while the right to choose one's government and to participate in the conduct of public affairs through the holding of free and fair elections at regular intervals has become one of the core values of the United Nations and while, too, this organisation is constantly promoting democracy, it is less concerned with the quality of the democracy practised by its members.

The debate over the right to free elections in international law began in the inter-war period. It gathered pace after 1945, as declarations of faith in democracy rapidly gave way to full-blown treaties and conventions designed to provide proper protection and enable signatory states to be held to account. Viewed from a theoretical perspective, the shift from domestic to international protection was informed by two observations. First, democracy with the right to free elections that underpins it is a factor for international stability and peace. It is the central contention of democratic peace theory, well known in international relations, that democracies do not go to war with other democracies. Second, democracy provides the framework most compatible with the protection of human rights and the principle of human dignity. And as the preamble to the United Nations Charter forcefully states, there was a determination to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" and to reaffirm nations' faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

From a historical perspective, the two world wars can each be viewed as a clash between different types of political regime. The First World War pitted democracies against monarchies and empires. The Second World War was essentially a war between democratic regimes and totalitarian ones. The new emphasis on democracy and democratic standards can therefore be seen as a pragmatic product of the victors'

4. G.S. Goodwin-Gill, *Free and fair elections*, 2nd edn, 2006, p. vi.

regime. Recognition of the right to free elections later became an issue in the Cold War between the liberal, democratic West and the Communist, totalitarian East. Tensions over the principles of sovereign equality and respect for the rights inherent in sovereignty were to prove a major barrier to progress in terms of political rights.[5]

The Universal Declaration of Human Rights of 10 December 1948 was the first major text to give a prominent place to the right to free elections. Article 21 states that:

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

Being merely a resolution of the General Assembly, the declaration has no binding force or judicial mechanism for monitoring observance of the rights set forth therein. It is of purely symbolic and philosophical significance. Like many other stipulations in the declaration, however, Article 21 was to find practical expression in the International Covenant on Civil and Political Rights, specifically in Article 25, which has a very similar wording:

> 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;
> (c) To have access, on general terms of equality, to public service in his country.

The discrimination mentioned in Article 2 of the Covenant is discrimination relating to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to free elections – and, more specifically, the prohibition of discrimination in the way this right is implemented – was also secured in various sectoral treaties, such as the Convention on the Political Rights of Women of 31 March 1953 (Article 1), the Convention on the Elimination of All Forms of Racial Discrimination adopted on 21 December 1965 (Article 5.*c*), the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (Article 7.*a*), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990 (Article 41) and the Convention on the Rights of Persons with Disabilities of 13 December 2006 (Article 29). Alongside these major instruments, the main UN bodies play an observer role and provide expert opinions on aspects of democratic and electoral life. Since 1993, the General Assembly has

5. Final Act of the Conference on Security and Co-operation in Europe, 1 August 1975.

made it a practice to adopt an annual resolution on the organisation's activities to promote democratisation and, since 1998, another on "enhancing the effectiveness of the principle of periodic and genuine elections". The Human Rights Committee, which monitors civil and political rights, and implementation of the 1966 Covenant, has likewise produced a number of general comments and recommendations in this area, in particular General Comment No. 25 on participation in public affairs and voting rights published in 1996, and Recommendation No. 23 on political and public life, adopted at the 16th session in 1997.

The right to free elections has also received increased attention in regional international law. It can be found across the Atlantic in the Inter-American Convention on Human Rights signed in San José on 22 November 1969, Article 23 of which concerns political rights and reads:

> 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
> *(c)* to have access, under general conditions of equality, to the public service of his country.
> 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

The African Charter on Human and Peoples' Rights, the main instrument for human rights protection in Africa, barely mentions the right to free elections and, as its name suggests, gives far more room to peoples' rights. Article 13 states very briefly that every citizen has the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. By contrast, considerable attention is given in the Charter to the unquestionable and inalienable right of peoples to self-determination and to freely determine their political status (Article 20), which means external free determination rather than internal free determination, and collective, holistic rights rather than individual ones. In electoral matters, the Organisation of African Unity preferred to have a separate instrument, the African Charter on Democracy, Elections and Governance, adopted in Addis Ababa on 30 January 2007, which entered into force on 15 February 2012. This charter, however, contains mainly general principles and objectives: promotion of a system of government that is representative, holding of regular, transparent, free and fair elections, separation of powers, strengthening political pluralism, promotion of gender equality in public and private institutions, effective participation of citizens in democratic and development processes and in governance of public affairs, transparency, and so on.

A characteristic feature of both the American and the African systems is the existence of a judicial body, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights respectively, whose jurisdiction in any given case is,

among other shortcomings, subject to the prior acceptance of the states involved. The African Court, furthermore, which began operating in 2008, has no jurisdiction to deal with alleged violations of the Charter on Democracy, Elections and Governance.

In Europe, the OSCE has made the right to free elections a core concern. Besides the now famous Copenhagen Document, which establishes an intrinsic link between democracy and the rule of law and lists the main electoral rights and the obligations on participating states, in particular respect for pluralism with regard to political organisations,[6] we can also mention the *Election observation handbook* published by the Office of Democratic Institutions and Human Rights, the fifth edition of which appeared in 2005.[7] Chapter 3 of this handbook begins with a statement to the effect that all OSCE participating states have agreed that "'the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government'. A genuine election is, therefore, a basic human right and a fundamental element of democracy".

The European Union's Charter of Fundamental Rights devotes an entire chapter to citizenship of the Union in which it recognises the right to vote and to stand as a candidate in elections to the European Parliament (Article 39) and in municipal elections (Article 40). Article 39 even specifies the main features of suffrage where electing Euro MPs is concerned, requiring it to be universal, direct, free and secret. Democracy and the political rights that go with it are also very much at the heart of Council of Europe law and the European system of human rights protection. The binding nature of the European Convention on Human Rights and the effectiveness of the protection it affords give special meaning to the right to free elections.

Despite these universal and regional instruments, there is still at times a degree of incomprehension among some legal writers seeking to uphold political rights across the state or against the state. This incomprehension often translates into a readiness to see in the international right to free elections, and more specifically European human rights law, a vision of democracy in which the place assigned to the people is thought to be insufficient or too relative. At the heart of this view is the obsolete idea that there is a near-irrefutable conceptual divide between democracy and the rule of law. This same readiness, furthermore, often masks an antiquated concept of democratic sovereignty that nullifies any attempt from beyond the state to recognise and protect the right to free elections. Council of Europe and Convention law are specifically intended to transcend this outmoded, near-hundred-year-old dichotomy between the rule of the majority and the rule of law in favour of a much more subtle and constructive balance.

1.2. EUROPEAN SOURCES OF THE RIGHT TO FREE ELECTIONS

With the exception of the European Convention on Human Rights, Council of Europe law is not widely known. When it comes to the right to free elections, however, there is a great deal more to this law than just Article 3 of Protocol No. 1 to the Convention

6. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, item 3.
7. *Election observation handbook*, 5th edn, OSCE/ODIHR, Warsaw, 2005.

and the relevant Court decisions. As well as this "soft law" developed by the Council of Europe bodies, there are a number of other conventions which contain one or two rules relating to political rights and/or rights of a political nature.

1.2.1. Law of the European Convention on Human Rights

The right to free elections proper is enshrined in Article 3 of the Additional Protocol to the European Convention on Human Rights. Council of Europe treaty law on elections, however, also draws on other provisions of the Convention.

1.2.1.1. Article 3 of Protocol No. 1

The European Convention on Human Rights, as adopted on 4 November 1950, contained no provisions on the right to free elections. While there was broad agreement on the need to mention democratic principles, opinions were seriously divided over the content and scope of these principles: the right of free criticism for national minorities (Belgium), the opposition's right to nominate candidates in elections (the United Kingdom), the right to free elections, by universal suffrage and secret ballot, to be held at regular intervals, so that governmental action and legislation may accord with the expressed will of the people (France), and so on.

The preliminary draft put forward by the Legal Affairs Committee of the Council of Europe's Consultative Assembly contained two commitments largely inspired by the French proposal taken up by Pierre-Henri Teitgen, Chair of the committee: "to hold free elections at reasonable intervals with universal suffrage and secret ballot, so as to ensure that government action is, in fact, an expression of the will of the people" and "not to hinder, by any means whatsoever, the right of criticism and the right to organise a political opposition".[8] Not satisfied, the Committee of Ministers asked a committee of experts to help it rephrase this article. The new, tighter wording required states to "hold free elections at reasonable intervals, by universal suffrage and secret ballot, under conditions calculated to ensure that the government and the legislature represent the people".[9] In both texts, the scope of the right was invariably confined to the home territory. In the face of continuing resistance, mainly from the UK Government, and so as not to delay the adoption of the Convention, the matter was deferred until a later protocol. The United Kingdom, which had already insisted that the text be revised to remove the reference to "the will of the people", feared that its first-past-the-post electoral system and the system of appointing members of the House of Lords would be found to be in breach of the Convention.

At the sitting held by the Consultative Assembly on 18 November 1950, the UK representative Mr Mitchison said:

> If one takes in that respect the question of free elections, I hope, that I may carry some Representatives, at any rate, with me in saying that there is room

8. *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Dordrecht, Martinus Nijhoff, 2014, vol. 1, p. 208.
9. Ibid., vol. 3, p. 224.