

MAKALAH



Participation in Public Affairs as a Human Right

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Participation in Public Affairs as a Human Right

Article 25

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.

Article 2(1)

[...]distinction of any kind, such as race, colour, sex, language, religion, **political or other opinion**, national or social origin, property, birth or other status.

Pasal 25

Setiap **warga negara** harus mempunyai hak dan kesempatan, tanpa pembedaan apapun sebagaimana yang dimaksud dalam Pasal 2 dan tanpa pembatasan yang **tidak layak**, untuk:

- a) Ikut serta dalam **pelaksanaan urusan pemerintahan**, baik secara langsung ataupun melalui wakilwakil yang dipilih secara bebas;
- b) Memilih dan dipilih pada pemilihan umum berkala yang murni, dan dengan hak pilih yang **universal** dan **sama**, serta dilakukan melalui pemungutan suara secara rahasia untuk menjamin kebebasan menyatakan keinginan dari para pemilih;
- c) Memperoleh **akses pada pelayanan umum di negaranya atas dasar persamaan** dalam arti umum.

Pasal 2(1):

[...] tanpa pembedaan apapun seperti ras, warna kulit, jenis kelamin, bahasa, agama, **politik atau pendapat lain**, asal-usul kebangsaan atau sosial, kekayaan, kelahiran atau status lainnya.

Article 25 enshrines three political rights:

- 1) The right to take part in the conduct in the public affairs
- 2) The right to vote and to be elected
- 3) The right of equal access to public service

1 Historical background

Article 25 contains a political right that is applicable only to citizens. It differs in that respect from civil rights. Among the countries that were sceptical whether Article 25 could be included in the ICCPR were the UK, Netherlands, Belgium and Uruguay. The last one even suggested that political rights be included in a separate treaty. There would thus be three treaties: one on civil rights, one on political rights and one on economic, social and cultural rights. In the end this did not happen. However, the language of the provision had to remain relatively vague.

2 Selected issues of interpretation

2.1 The right to take part in the conduct in the public affairs

Conduct of public affairs

‘Conduct of public affairs’ is a sufficiently wide term that does not impose a specific democratic model. However, there may arise problems in specific cases as to what matters are actually covered. In *Karakurt v Austria* (2000) the HRC held that the term means “participation in the public political life of the nation”. Private matters such as the election of an employee to a private company’s work council are not covered, even when these elections are covered by State legislation.

Directly or through freely chosen representatives (participatory democracy v. representative democracy)

Forms of direct participation include a referendum, that is a vote by the whole of an electorate on a specific question or questions put to it by a government or similar body (this may result in the adoption of a new constitution, a constitutional amendment, a law, or simply a specific government policy). Other forms of direct participation include a citizen’s initiative (a mechanism whereby a petition signed by a certain minimum number of registered voters can force a referendum) and a recall election (a mechanism whereby voters can remove an elected official from office through a direct vote before his or her term has ended).

Examples: Article 72 of the Constitution of Venezuela enables the recall of any elected representative, including the President (2004 attempted recall election of Hugo Chavez).

One cannot directly derive the right to available means of participative democracy from the paragraph a). It follows from the *travaux préparatoires* that the conjunction ‘or’ must be interpreted disjunctively. This means that the absence of the possibility to hold referendums will not automatically constitute a violation of Article 25. However, in case where such right is provided for by the domestic law and the exercise of this possibility is prevented by a mere executive decision, such interference will constitute a breach of Article 25.

The paragraph b) seems to rule out the possibility of adopting a purely participatory democratic system.

2.2 The right to vote and to be elected

Equal suffrage

The principle of equality of suffrage means that each vote carries equal weight. Although clear in the abstract, this principle may not always be easy to apply in specific cases.

Example:

In the case *Mátyus v. Slovakia* the Human Rights Committee faced a case of municipal election in a small Slovak city, Rožňava. For the purpose of elections into municipal parliament, the city was divided into five election districts. The problem was that while one district would get to elect only one representative per 1,400 residents another district would get to elect one representative per 200 residents. When deciding the case, the Committee relied on the earlier determination by the Slovak Constitutional Court that the establishment of the electoral districts in Rožňava violated the democratic principle of proportional representation. The case thus opens up many questions, including whether the Committee would be able to decide the case without referring to the pronouncement of the Slovak Constitutional Court; or whether similar principle would apply to electoral systems based on the principle of majority vote (as in the UK).

2.3 The right of equal access to public service

Access, on general terms of equality, to public service

As is clear from the wording, the provision does not give ‘the right to occupy a public office’, but only a much weaker ‘right to access public service’. This means that the provision does not give a right to get or retain a certain post within public service to anyone who wants it. In this respect, the provision does, nevertheless, impose positive obligations on the State to ensure adequate procedural guarantees. It is important not to forget, however, that States enjoys a broad discretion when it comes to choosing a specific manner of enforcement of positive obligations. The positive obligations include the obligation to publicly advertise vacant positions; the obligation to ensure that selection from various applicants is made according to objective criteria; and the obligation to provide unsuccessful applicants a certain remedy. The same applies in respect to suspension and dismissal from public service, where civil servants, including judges, have a right to effective judicial protection to contest their dismissal (see also ‘suit at law’ under Art 14(1) and the liberal interpretation of this term in the HRC jurisprudence).

The issue of dismissals is particularly relevant in the context of a regime change, i.e, in transitional justice contexts. In *Kall v. Poland*, the Committee considered a complaint of a policeman who was not reinstated into his job after verification proceedings that were implemented after the fall of the communist regime. In dismissing his complaint, the Committee observed that the verification proceedings were “part of a process of comprehensive reorganization of the ministry of Internal Affairs, with a view to restoring democracy and the rule of law.”

3 Limitations

HRC General Comment on Art 25, para. 4:

The exercise of these rights by citizens may not be suspended or excluded except on grounds which are **established by law** and which are **objective** and **reasonable**. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office

HRC General Comment on Art 25, para.10:

It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.

Examples:

Convicted criminal offenders; felons on parole; those on probation; ex-offenders who have fully served their sentences (in the US over one million; UK faces 2,500 prisoner voting rights cases before the ECHR).

Argument for: excluding voters lacking in virtue ('purity of the ballot box' argument).
Argument against: Deprivation of the right to vote is not an inherent or necessary aspect of criminal punishment nor does it promote the reintegration of offenders into lawful society.
ECHR: <i>Hirst v. the United Kingdom (no. 2)</i> 2005:
UK Government: "disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.
ECHR "... <i>the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion</i> "
ECHR Margin of appreciation is wide but not all-embracing. The Court stated that "The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation" (para 82).
ECHR suggested that "restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations" (para 71).
Side note: this may not necessarily be a good policy in conflict-prone states, e.g., Egypt and the

Muslim Brotherhood – abandoning the fight for power with guns and instead taking the fight to ballots)

4 Positive measures and the right to vote

Voter disfranchisement: passing laws that will keep a particular group from voting.

In Indonesia, the army and the police do not have the right to vote.

Voter suppression “is what you do when you really would like to do that [disenfranchise], but politically, you can't disfranchise, but you can put obstacles in the way, and thus reduce the participation of particular groups.” Alexander Keyssar

The rules of election administration can affect the outcome of the election. Problems can be caused, by laws that focus on, *inter alia*, voter identification, voter registration and absentee voting (photo ID laws; proof of citizenship laws; voter registration laws).

Examples of potential practical problems:

Distance to issuing offices (travel cost) and opening hours; administrative fees; protection of the electoral register, etc.

HRC General Comment on Art 25, para. 11:

“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.”

HRC General Comment on Art 25, para. 12:

“Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.”

5 Special issues

HRC General Comment on Art 25, para. 19:

“Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.”

HRC General Comment on Art 25, para. 20:

“There **should** be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.”

Example: In Norway, for parliamentary elections the Parliament itself is the appeal body for appeals concerning the right to vote. The newly elected parliament validates its own election, which in effect gives it the authority to decide on any aspect of the election.

- Art. 14, General Comment No. 32 (such a tribunal must be independent of the executive and legislative branches of government or enjoy in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature)
- Art. 2(3)(b): Each State Party to the present Covenant undertakes “to develop the possibilities of judicial remedy”.

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Article 25 ICCPR

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UDHR (Art. 21)

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 to 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**.

Art. 2(1) ICCPR

Prohibited distinction of ...

“any kind, such as race, colour, sex, language, religion, **political or other opinion**, national or social origin, property, birth or other status.”

Three political rights

1. The right to take part in the conduct in the public affairs
2. The right to vote and to be elected
3. The right of equal access to public service