

U.N. Covenant on Civil and Political Rights

CCPR Commentary

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AP to the ECHR, Art. 23 of the ACHR and Art. 13 of the ACHPR, particularly worthy of mention in this context are two specialized conventions: the so-called Bogotá Convention of 1948 on the Granting of Political Rights to Women,¹⁸ and the UN Convention on the Political Rights of Women of 1952.¹⁹ Finally, reference is made to a 1961 UN study on discrimination in the matter of political rights, prepared by the Chilean expert Hernán Santa Cruz at the request of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.²⁰ This gives clear expression to the key role played by political rights in battling all forms of discrimination.

II. Subjective Right and Opportunity to Exercise It

As mentioned above, the question whether political rights, like civil rights, were to be formulated as subjective claims of the individual or as mere obligations on the States Parties was controversial. The Soviet drafts had simply placed the States under a duty to guarantee an "opportunity" to take part in the government of the State; some Western delegates questioned the sense of such a human right to democratic participation. In spite of this, the Yugoslavian-French proposal prevailed, formulating political rights, just as most of the other rights of the Covenant, as a *subjective right of the individual* – in this case, however, not of the human being but rather of the *citizen*. With the exception of Art. 3 of the 1st AP to the ECHR, this view was set forth in other conventions as well. This means that a violation of political rights may, as with all other rights of the Covenant, be attacked by an effective domestic remedy pursuant to Art. 2(3)(a) and then by an individual communication under the first OP, so long as the State Party concerned has ratified it. 8

Citizens have not only the right but also the "opportunity" ("la possibilité") to take part in the conduct of public affairs. This sets up a duty on States Parties to guarantee with *positive measures* that all formally eligible persons have the actual opportunity to exercise their political rights. For instance, it is not enough to extend formal voting eligibility to all citizens, including the aged, the sick, prisoners and pre-trial detainees, persons abroad, etc., when it is not simultaneously ensured that these citizens are truly able to make use of their right to vote. As with all positive duties to ensure rights, this 9

18 Adopted on 29 April 1948 at the 9th OAS Conference in Bogotá on the basis of preliminary work going far back to the period between the Wars. For the text, see Lillich, *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* 430.1 (1983) (Buffalo).

19 GA Res. 640 (VII) of 20 December 1952.

20 E/CN.4/Sub.2/213, UN Sales No. 63.XIV.2.

procedural guarantee is also relative, such that its specific enforcement is subject to quite broad discretion by the States Parties. They are free to decide whether to make possible the exercise of the right to vote by way of ballots, the establishment of special electoral districts or of voting boxes in hospitals and closed facilities, by absentee balloting or some other technique consistent with the voting principles.²¹ Mere passivity on the part of the State would, however, violate the opportunity to exercise political rights expressly guaranteed in Art. 25. This dualism between a formal legal claim and its practical exercise, which is characteristic of political rights, was also recognized in Art. 23 of the ACHR.

- 10 The *Committee* expressly recognized the protection of the *de facto* opportunity to exercise political rights in, e.g., the *Mauritian Women* case, even though it did not find a violation of Art. 25.²² The dualism between the right to vote and its actual exercise was relevant in the case of three *Canadian Prisoners* who were granted the right to vote under Quebec's Election Act, but the specific exercise of which was made subject to agreements between the Director General of Elections and the prison wardens. A Canadian Federal Court took the view that the denial by the Solicitor General to conclude the necessary agreement did not affect the prisoners' right to vote *per se* but rather its actual exercise during detention.²³ The question whether this amounted to a violation of the *opportunity to vote* was left undecided, since the Committee ultimately declared the communication inadmissible, although without convincing arguments,²⁴ for failure to exhaust domestic remedies. The distinction between the right and the opportunity to exercise it in the argumentation of the Canadian court is to be rejected, as are earlier holdings of the Austrian Constitutional Court that the State is not obligated to facilitate the exercise of pre-trial detainees' right to vote with positive measures.²⁵

III. Right to Take Part in the Conduct of Public Affairs (para. a)

- 11 As in Art. 21(1) of the UDHR, Art. 5(c) of the CERD, Art. 7(b) of the CEDAW, Art. 23(1)(a) of the ACHR and Art. 13(1) of the ACHPR, Art. 25(a) of the Covenant contains a general right to take part in the conduct of public affairs. Whereas in conformity with Art. 21 of the UDHR,

21 Cf. NOWAK, GRUNDRECHTE 185 ff., 376 ff.

22 No. 37/1978, § 9.2(c) 1: "... a *de facto* possibility of exercising this right".

23 No. 113/1981, § 3.4.

24 Cf. Nowak, 1986 HRLJ 300 f.

25 Cf. NOWAK, GRUNDRECHTE 380 f.

〔甲第3号証訳文〕

〔表紙〕

国連の市民的及び政治的権利に関する国際規約

CCPR注釈

マンフレッド・ノバック

〔439頁〕

II. 主観的権利及びこれを行行使する機会

〔略〕

市民は、公務に携わる権利だけでなく、『機会』を有している。これにより、締約国は、正式の有資格者に対して、彼らの政治的権利が行使できる現実の機会を有するような積極的措置を保障しなければならない義務を負っている。たとえば、高齢者、病人、囚人、公判前被拘禁者、海外居住者などを含むすべての市民に対して正式な選挙権を認めたとしても、同時に、これらの者が現実に選挙権を行行使できることが保障されていなければ、不十分である。〔以下略〕

上記正訳しました。

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