The variable intensity of review in the electoral case law of the European Court of Human Rights

L'intensité variable du contrôle dans la jurisprudence électorale de la Cour européenne des droits de l'homme

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Abstract:

The paper will focus on the electoral case law of the European Court of Human Rights. When they are called upon to verify the conformity of electoral legislation with the European Convention on Human Rights, the Court operates a judicial test whose intensity varies according to the precise electoral law matter that is under review. In other words, there is a clear judicial activism in some areas, while deference remains a strong trend in others.

For instance, the Courts uses strict scrutiny when it comes to determining the boundaries of the electorate. Indeed, it tends to rule out provisions that exclude certain citizens from the right to vote, such as prisoners (ECtHR, *Hirst v. United Kingdom (No. 2)*, 2005), despite the nuances brought by subsequent case law (ECtHR, *Scoppola v. Italy (No. 3)*, 2012), or persons who lack legal capacity because of their mental health (ECtHR, *Alajos Kiss*, 2010).

On the other hand, the ECtHR, remains far more deferent when it reviews rules regulating the voting system. This trend can be seen, for example, in cases regarding the voting method (ECtHR, *Matthews v. United Kingdom*, 1999; *Riza v. Bulgaria*, 2015), the establishment of electoral thresholds (ECtHR, *Yumak and Sadak v. Turkey*, 2008).

Between these two extremes, there are fields of electoral law where the case law seems to be more hesitant. This is particularly the case in the area of post-election litigation. On the one hand, the European Court of Human Rights requires the respect of a certain standard of quality in the organisation and implementation of the procedures for contesting the result of elections (ECtHR, *Davydov v. Russia*, 2017), on the other hand, it also refrains from radically opposing traditional, yet questionable, institutions such as parliamentary self-control (ECtHR, *Mugemangango v. Belgium*, 2020).

From this heterogeneous case law, it appears that the European Court of Human Rights contributes to the consolidation of the right to participate in elections as a voter or as a candidate, but that it interferes less in the control of the electoral "rules of the game", leaving national legislators a considerable margin of appreciation when it comes to choosing or maintaining a certain type of democracy or institutional system, even when it favours the dominant political parties. It is thus genuinely accepted that electoral rules may seek to "channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will" (ECtHR, *Cernea v. Romania*, 2018, § 35).

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The European Court of Human Rights (ECtHR) has consistently held that Article 3 of the First Protocol leaves States a wide margin of appreciation in the electoral field. A detailed reading of the case law, however, reveals some nuances. Depending on the aspect of electoral law which is concerned, it appears that the margin of appreciation available to States is significantly different. This paper aims to study the extent of this variable margin of appreciation.

The reflections offered here are based on a personal database, created from the HUDOC database, where decisions and judgments of the European Commission and Court of Human Rights in which Article 3 of the Protocol is at stake are recorded. This personal database is regularly updated (until 15 November 2022) and currently includes information on the content of over 300 decisions and judgments. For each case, it contains a summary of the facts, the key elements of the reasoning and the conclusion reached by the court. This provides a comprehensive overview of the case law on electoral matters.

In the context of this paper, two categories of decisions and judgments of the ECtHR will be mainly discussed: the key decisions, some of them are long-standing, which laid down the relevant principles in the Court's case law, on the one hand, and the most recent decisions which confirm or nuance the trends arising from these principles, on the other.

I. The principle: a wide margin of appreciation in electoral matters

The relevant case law of the Court is clear on the general principle to be applied in election cases: “the margin in this area is wide”[1]. The Court justifies the choice of this approach by regularly stating that:

> “[t]here are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision”[2].

[1] ECtHR, judgment *Mathieu-Mohin and Clerfayt*, 2 March 1987, § 52; ECtHR, judgment *Podkolzina v. Latvia*, 9 April 2002, § 33; ECtHR (GC), judgment *Yumak and Sadak*, 8 July 2008, § 109; ECtHR, judgment *Yabloko Russian United Democratic Party and Others v. Russia*, 8 June 2016, § 67

[2] see ECtHR (GC), judgment *Hirst v. the United Kingdom (no. 2)*, 6 October 2005, § 61; ECtHR (GC), judgment *Scoppola v. Italy (no. 3)*, 22 May 2012, § 83; ECtHR, judgment *Yabloko Russian United Democratic Party and Others v. Russia*, 8 June 2016, § 67.

This sentence is repeated in the most recent judgments[3] and was pronounced again in spring 2022[4].

While there is no basis for a frontal challenge to the reality of this trend, the analysis shows that the extent of the margin of appreciation varies depending on the particular element of electoral law that is being discussed before the Court. The *Davydov v. Russia* judgment may offer a first point of reference in this respect. This case concerns electoral disputes and the Court states that the scrutiny of its control over the quality of the management of a litigation by national authorities depends on the nature of the issue at stake.

> "(…) the Court reiterates that the level of its own scrutiny will depend on the particular aspect of the right to free elections. Thus, tighter scrutiny should be reserved for any departures from the principle of universal suffrage (…). A broader margin of appreciation can be afforded to States where the measures prevent candidates from standing for election, but such interference should not be disproportionate (…). A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation. Due regard must be had to the fact that this is a complex process, with many persons involved at several levels. A mere mistake or irregularity at this stage would not, *per se*, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with"[5].

Even if this graduation is expressed in relation to electoral disputes, a more general analysis of the case law shows that it can be generalised, at least to some extent, to all electoral issues that may be dealt with by the Court. As I intend to demonstrate in this paper with the help of numerous examples, the margin of appreciation left to the states in practice increases as we look successively at the following issues:

- the right to vote (section II),
- the right to stand as a candidate (section III) and
- the voting system (section IV).

I will finally come back to the cases that specifically concern electoral disputes at the end of the paper (section V).

II. The right to vote

When the right to vote is at stake, despite the principle of the wide margin of appreciation expressed above, it seems difficult to argue that states really have a broad

[3] ECtHR, judgment *Selygenenko and Others v. Ukraine*, 21 October 2021, § 53; ECtHR, judgment *Mugemangango v. Belgium*, 10 July 2020, § 73.
[4] ECtHR, judgment *Teslenko and Others v. Russia*, 5 April 2022, § 117.
[5] ECtHR, judgment *Davydov v. Russia*, 30 October 2014, §§ 286-287.

range of possibilities to organise the boundaries of the electorate. Indeed, Article 3 of the Protocol is interpreted as a legal source of an obligation for States to ensure universal suffrage. The idea already appeared in a decision of the European Commission of Human Rights in 1967[6].

In the more recent words of the Court:

> "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 (...). Universal suffrage has become the basic principle"[7].

This principle does not, of course, prevent States from imposing general conditions for access to the electorate. The following sentences extracted from the *Hirst* judgment summarises the Court's position on this issue:

> "[T]he imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (...). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1"[8].

Conditions based on nationality[9], residence[10] and age[11] criteria are thus generally accepted without difficulty by the Court. Consequently, citizens who live abroad, when they keep their right to vote for the elections in the State of their nationality, can be treated differently than the citizens who still reside on the State's territory. Expatriate citizens may not have the possibility to vote for independent candidates, whereas this choice is available to other voters[12]. It may also be accepted that their right to vote is limited to a certain period of time after they have left their home country[13].

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[6] ECommHR, decision *X v. Germany*, 6 October 1967.
[7] ECtHR (GC), judgment *Hirst v. the United Kingdom (no. 2)*, 6 October 2005, § 59; see also ECtHR, judgment *Mathieu-Mohin and Clerfayt*, 2 March 1987, § 51,
[8] ECtHR (GC), judgment *Hirst v. the United Kingdom (2)*, 6 October 2005, § 62.
[9] See ECommHR, decision *Luksch v. Italy*, 21 May 1997; ECommHR, decision *Mvakuc v. Slovenia*, 31 May 2007
[10] See, for example, ECtHR, judgment *Hilbe v. Liechtenstein*, 7 September 1999; ECtHR, judgment *Miccio v. Italy*, 15 January 2002; ECtHR (GC), *Siratopoulos and others v. Greece*, 15 March 2012.
[11] As far as I know, there is no decision of the European Court concerning the voting age. The only case on age in electoral matters concerns the right to stand as a candidate (ECommHR, decision *W, X, Y and Z v. Belgium*, 30 May 1975), but there should be no doubt about the conformity to the Convention of a rule which limits access to the electorate to persons of the age of majority.
[12] ECtHR, judgment *Oran v. Turkey*, 15 April 2014.
[13] ECtHR, decision *Doyle v. United Kingdom*, 6 February 2007; ECtHR, *Shindler v. United Kingdom*, 7 May 2013.

However, the Court is very critical about any additional conditions regarding the right to vote, which shows that the margin of appreciation is not particularly wide. For example, measures that exclude prisoners from the right to vote without taking into consideration their particular situations are held as violating Article 3 of the First Protocol to the ECHR[14]. The Court held in *Scoppola v. Italy (3)* that member states could, however, exclude the whole of a category of prisoners, for example those who have been condemned for the more serious offences[15]. It nevertheless also confirmed the incompatibility with Article 3 of the First Protocol of disenfranchisement which "affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or seriousness of their offence and their individual circumstances"[16].

In *Alajos Kiss v. Hungary*, the Court also stated that an individualised decision must be made before excluding someone from the electorate on the grounds of mental incapacity[17]. The principle has been confirmed several times in recent years[18]. However, the margin of appreciation in this area is not so narrow: on the one hand, a wide margin of appreciation should be granted to the national legislature to decide on the procedure for assessing the fitness to vote of mentally disabled persons[19]; on the other hand, in the recent *Strøbye and Roselind v. Denmark* case, the Court held that the disenfranchisement of persons divested of legal capacity affecting only a small group and subject to thorough parliamentary and judicial review was compatible with Article 3 of the First Protocol[20]. The judgment pronounced by the ECtHR in this case regarding mentally disabled persons can be compared to the *Scoppola* judgment in the field of prisoners right to vote: it nuances the narrowness of the margin of appreciation given to the States regarding the right to vote.

III. The right to stand as a candidate

When the European Court of Human Rights is called upon to determine whether the conditions of eligibility are in conformity with Article 3 of the First Protocol, it is observed that it leaves significantly more leeway to national authorities. The following passages from the judgment in *Dikle and Sadak v. Turkey* show that the Court

[14] ECtHR (GC), judgment *Hirst v. the United Kingdom (2)*, 6 October 2005.
[15] ECtHR (GC), judgment *Scoppola v. Italy (3)*, 22 May 2012, § 102 and ff.
[16] ECtHR, judgment *Brânduşe v. Romania (2)*, 27 October 2015, § 45. See also ECtHR, judgment *Calmanovici v. Romania*, 1 July 2008; ECtHR, judgment *Frodl v. Austria*, 8 April 2010; ECtHR, judgment *Anchugov and Gladkov v. Russia*, 4 July 2013; ECtHR, judgment *Söyler v. Romania*, 17 September 2013.
[17] ECtHR, judgment *Alajos Kiss v. Hungary*, 20 May 2010.
[18] ECtHR, judgment *Caamaño Valle v. Spain*, 11 may 2021; ECtHR, judgment *Anatoliy Marinov v. Bulgaria*, 15 February 2022.
[19] ECtHR, judgment *Anatoliy Marinov v. Bulgaria*, 15 February 2022.
[20] ECtHR, judgment *Strøbye and Roselind v. Denmark*, 2 February 2021.

considers quite different arguments here than when assessing the boundaries of the electorate:

> "(...) States enjoy considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification. Though originating from a common concern – to ensure the independence of members of parliament, but also the electorate's freedom of choice – the criteria vary according to the historical and political factors peculiar to each State. The number of situations provided for in the constitutions and electoral legislations of many member States of the Council of Europe shows the diversity of possible choice on the subject. None of these criteria should, however, be considered more valid than any other provided that it guarantees the expression of the will of the people through free, fair and regular elections (...). Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires the finding that this or that candidate has failed to satisfy them to comply with a number of criteria framed to prevent arbitrary decisions"[21].

Indeed, the Court itself explicitly states that it is more deferential to States practices when assessing the eligibility requirements set by national legislations. In this regard, "the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote"[22]. In even more clear words: "stricter requirements may be imposed on eligibility to stand for election to Parliament than is the case for eligibility to vote"[23].

In this context of wider margin of appreciation, the Court held in *Zdanoka* that no violation resulted from the disqualification as a parliamentary candidate of a former leading member of Soviet-era Communist party[24]. However, in a partly similar case (*Adamsons*), the Court found a violation regarding the ineligibility for election of a former member of a military unit affiliated to the KGB[25]. In both cases, national restrictions aimed at protecting the institutions from categories of persons who were presumed to be a threat for the State. Unlike in the first case, the group of excluded persons in the second one was defined in terms which were too general. According to the Court, any restriction on the electoral rights of the members of this group should take a case-by-case approach which would allow their actual conduct to be taken into account. The need for such a case-by-case approach grew greater over the years, as the period when the impugned acts were supposed to have taken place grew more distant in the past[26]. Here we find the idea mentioned in relation to exclusion from the right

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[21] ECtHR, judgment *Dicle and Sadak v. Turkey*, 16 June 2005, §§ 79-80.
[22] ECtHR, judgment *Cernea v. Romania*, 27 February 2018, § 37.
[23] ECtHR (GC), judgment *Yumak and Sadak c. Turkey*, 8 July 2008, § 109.
[24] ECtHR, judgment *Zdanoka v. Latvia*, 16 March 2006.
[25] ECtHR, judgment *Adamsons v. Latvia*, 24 June 2008.
[26] ECtHR, judgment *Adamsons v. Latvia*, 24 June 2008.

to vote, according to which an individualised approach to exclusion should be favoured. The force of this principle is, however, significantly attenuated in the area of the right to stand for election.

The wide margin of appreciation recognised here has not prevented the Court from condemning other rules which it has found to be abusive. The exclusion of those who have – in addition to the nationality of the country – another nationality, was found to be incompatible with Article 3 of the First Protocol. The Court had already ruled in this way in the *Tănase* case in 2008[27]; it did so again in the *Kara-Murza v. Russia* judgment delivered, a few weeks ago, in October 2022[28]. Certain portions of this judgment confirm the case law developed in the *Adamsons* case cited above:

> "The Court has already emphasised the need to 'individualise' the restriction of electoral rights and to take account of the actual conduct of individuals rather than a perceived threat posed by a group of persons (…). Such individualisation may be achieved, for example, by means of sanctions for illegal conduct or conduct that threatens national interests, which are likely to have a preventive effect and enable any particular threat posed by an identified individual to be addressed. Security clearance for access to confidential documents may ensure the protection of confidential and sensitive information. In the present case, measures of that kind, or any other measures concerned with identifying a credible threat to State interests, in particular circumstances based on specific information, rather than operating on a blanket assumption that all multiple nationals pose a threat to national security and independence, would be the Court's preferred approach (…). However, the impugned ban was applied to the applicant automatically"[29].

The margin of appreciation with regard to access to the electoral mandate is already wide, but remains limited, when it comes to the substantive conditions for the presentation of candidatures. The preceding developments demonstrate this. It seems to be wider for the formal conditions that States may lay down to govern the validity of the submission of candidatures.

This is particularly true of measures that require would-be candidates to collect a (sometimes very large) number of signatures from people willing to support them before they can submit a valid candidacy. According to the Court, in its decision *Soberanía de la Razón and others*,

> "[t]he obligation to receive the supporting signatures of at least 0.1% of voters in the constituency avoided the proliferation of political parties without a minimum of support. That limitation also served the optimization of the

[27] ECtHR, judgment *Tănase v. Moldova*, 27 April 2010.
[28] ECtHR, judgment *Kara-Murza v. Russia*, 4 October 2022.
[29] ECtHR, judgment *Kara-Murza v. Russia*, 4 October 2022, § 49

> allocation of public resources to organise the electoral process and avoided the confusion of the electorate by groups that could not assume political responsibility. In this regard, the Courts considers that the obligation to have a minimum of support encourages sufficiently representative currents of thought and makes it easier to reach parliamentary consensus”[30].

In the same spirit, the Court considered, in another case, that the aim of the obligation imposed on independent candidates to submit a number of signatures of support was to make a reasonable selection from among the candidates, in order to ensure their representative character in the European Parliament and to eliminate possible frivolous candidates[31].

A similar observation can be made regarding the deposits (amount of money that must be paid by the candidate) that are required in some States to validate the candidacy[32].

These rules on the forms of candidatures can be considered as lying between the field of the right to stand as a candidate and that of the definition of the voting system. This is probably why the margin of appreciation here tends to be wider, since, as will be shown in the following section, the latitude left to states is particularly wide when it comes to the definition of their voting system.

IV. The voting system

The choice of one voting system, especially of an electoral formula, is a tremendous political option that democratic States are largely free to make. Legislators can opt for any voting system, even for those which tend to keep political minorities out of the parliament. The case law of the ECtHR concerning this question confirms indisputably this affirmation:

> “as regards, in particular, the choice of electoral system, the Court reiterates that the Contracting States enjoy a wide margin of appreciation in this sphere. In that regard, Article 3 of Protocol No. 1 goes no further than prescribing ‘free’ elections held at ‘reasonable intervals’, ‘by secret ballot’ and ‘under conditions which will ensure the free expression of the opinion of the people’. Subject to that reservation, it does not create any ‘obligation to introduce a specific system’ such as proportional representation or majority voting with one or two ballots”[33].

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[30] ECtHR, decision *Soberanía de la Razón and others v. Spain*, 26 May 2015, § 26.
[31] ECtHR, decision *Mihaela Mihai Neagu v. Romania*, 6 March 2014, § 34. See also ECtHR, decision *Brito Da Silva Guerra and Sousa Magno* v. Portugal, 7 June 2008.
[32] ECtHR, *Soukhovetski v. Ukraine*, 28 March 2006, § 73; ECtHR, judgment *Ekoglasnost v. Bulgaria*, 6 Novembre 2012, § 63.
[33] ECtHR (GC), judgment *Sitaropoulos and Giakoumopoulos v. Greece*, 15 March 2012, § 65. See as well: ECommHR, decision *X. v. the United Kingdom*, 6 October 1976; ECommHR, decision *Liberal Party v. the United Kingdom*, 18 December 1980; ECommHR, decision *X v. Island*, 8 December 1981; ECtHR, judgment *Mathieu-Mohin v. Belgium*, 2 March 1987, § 54 and ff.; ECtHR, decision *Federación*

The reasons for the Court's position include historical considerations and the spirit in which the text of Article 3 of the First Protocol was negotiated and drafted in the mid-20th century. Throughout the stages of this negotiation, there was a desire (particularly on the part of the United Kingdom) to neutralize as far as possible the scope of the Convention provision regarding the choice of electoral formula and, more generally, the voting system. It is therefore clear from the preparatory work that Article 3 of the First Protocol to the Convention, which the member States of the Council of Europe gave birth to with great difficulty, cannot be the basis for an obligation to organize elections according to a particular electoral formula, whatever it may be[34].

Consequently, the three decisions of the European Commission of Human Rights, dating from the seventies and eighties, in which it accepted the conformity to the conventional rules of the British voting system, based on the first-past-the-post principle, came as no surprise[35].

While voting systems as such are no longer challenged in the European Court of Human Rights – lawyers familiar with the case law know that this is a waste of time – the Court continues to be called upon to examine the choices made by states regarding various details of their voting systems. This has given to the Court the opportunity to regularly confirm the principle we have just stated. It did so particularly clearly in a 2016 judgment:

> “The Court is not required to adopt a position on the choice between one electoral system and another. That decision, which is determined by historical and political considerations specific to each country, is in principle one which the State alone has the power to make”[36].

This seems to correspond to the widest margin of appreciation that the Court is likely to grant to States. The same idea has been expressed more recently in *Cernea*: Article 3 of the First Protocol “does not create any ‘obligation to introduce a specific system’ such as proportional representation or majority voting with one or two ballots. Here too the Court recognises that the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time”[37]. In addition to the importance of the preparatory work already

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nationalista Canaria v. Spain, 7 June 2001; ECtHR, judgment *Yumak and Sadak v. Turkey*, 30 January, 2007, § 61 ; ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008, § 110. See also ECtHR, *Matthews v. United Kingdom*, 18 February 1999; ECtHR, *Riza and others v. Bulgaria*, 13 October 2015, §§ 137 et s.

[34] *Recueil des Travaux préparatoires de la Convention européenne des droits de l’homme*, volume IV, Nijhoff, The Hague, 1977, pp. 55, 181, 215, 253 and 255 ; volume V, Nijhoff, The Hague, 1979, pp. 225-227, 237, 267-269, 275-279, 287-295, 309-311, 323, 327 and 337 ; volume VI, Nijhoff, The Hague, 1985, p. 65 ; volume VII, Nijhoff, The Hague, 1985, pp. 5-7, 23-25, 43-45 and 293-294.

[35] ECommHR, decision *X. v. United Kingdom*, 6 October 1976; ECommHR, *Lindsay v. United Kingdom*, 8 March 1979; ECommHR, Liberal Party v. United Kingdom, 18 December 1980.

[36] ECtHR, Judgment *Paunović and Milivojević v. Serbia*, 24 May 2016, § 60.

[37] ECtHR, judgment *Cernea v. Romania*, 27 February 2018, § 34.

mentioned, it is obvious that the Court also relies on the diversity of comparative electoral law to assert that it does not have to impose a particular system:

> "the large variety of situations provided for in the electoral legislation of numerous member States of the Council of Europe shows the diversity of the possible options. For the purposes of applying Article 3 of Protocol No. 1, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'"[38].

In this context, where States are free to design their voting system according to the goals they want it to achieve, many electoral rules, which tend to keep smaller parties out of the parliament, are frequently admitted by the European Court of Human Rights, which considers that election law can "channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will"[39]. For example, the electoral thresholds which are in force in many states are – without exception as far as I know – considered to be in conformity with the conventional rules[40]. The ECtHR repeated this again in 2018: "the setting of electoral thresholds [is] a discretionary matter for the national authorities since such thresholds [are] geared to promoting sufficiently representative political views and [help] prevent the excessive fragmentation of Parliament"[41]. It is known that this deferential attitude led the Court to accept an electoral threshold of 10% of the votes cast at the Turkish national level – which is objectively a major obstacle for small and regional parties, even if the latter represent a significant political force in their region[42]. However, the Court's decision in the *Yumak and Sadak* case certainly marks the extreme limit of the margin of appreciation granted to states in this area. This is apparent from the careful conclusion reached by the Court after a detailed analysis of Turkish electoral law:

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[38] ECtHR, Decision *Le Lièvre and others v. UK*, 1 March 2016, § 43. See also, previously, ECtHR (GC), judgment *Yumak and Sadak c. Turkey*, 8 July 2008, §§ 110-112.

[39] ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008, § 112. See also: ECtHR, judgment *Mathieu-Mohin v. Belgium*, 2 March 1987, § 54; ECHR, decision *Tête v. France*, 9 December 1987; ECHR, decision *Fournier v. France*, 10 March 1988; ECHR, decision *Tête v. France*, 10 March 1988; ECtHR, decision *Antonopoulos v. Greece*, 29 March 2001; ECtHR, decision, *Federación Nacionalista Canaria v. Spain*, 7 June 2001; ECtHR, decision *Tsimas v. Greece*, 26 September 2002; ECtHR (GC), judgment *Refah Partisi v. Turkey*, 13 February 2003, § 99; ECtHR, decision *Bompard v. France*, 4 April 2006 ; ECtHR, judgment *Yumak and Sadak v. Turkey*, 30 January 2007, § 62; ECtHR, decision *Partija Jaunie Demokrati v. Latvia*, 29 November 2007; ECtHR, *Cernea v. Romania*, 2018, § 35.

[40] ECtHR, decision *Federación nacionalista Canaria v. Spain*, 7 June 2001; ECtHR, judgment *Partei Die Friesen v. Germany*, 28 January 2016; ECtHR, judgment *Strack and Richter v. Germany*, 5 July 2016; ECtHR, decision *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, 29 November 2007; ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008; ECtHR, decision Filini v. Greece, 6 May 2014.

[41] ECtHR, judgment *Cernea v. Romania*, 27 February 2018, § 45.

[42] ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008.

> "the Court considers that in general a 10% electoral threshold appears excessive. (...) In the present case, however, the Court is not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1."[43].

In the very recent *Bakirdzi and E.C.* case, the ECtHR found a violation of Article 14 of the Convention combined with Article 3 of the First Protocol regarding a specific aspect of the Hungarian voting system[44]. With the intention of enhancing the representation of national minorities in Parliament a new system of national minority voting was adopted in 2014. According to it candidates from the national minority lists could gain a seat in Parliament if they reached a preferential threshold (one-quarter of the number of votes required to gain a 'regular seat' in Parliament). Members of the officially recognised thirteen national minorities could register as national minority voters. The applicants who registered as national minority voters for the 2014 parliamentary elections could not vote for the national lists of political parties; instead, they cast a ballot on the closed national minority lists. In the 2014 Parliamentary elections, none of the national minority lists obtained enough votes to win a national minority seat. It appears that the number of minority voters belonging to the same national minority in Hungary was not high enough to reach the preferential electoral threshold even if all voters belonging to that national minority were to cast their vote for the respective minority list. Regarding the absence of prospect for minority voters and candidates of attaining the preferential quota system, the fact that this system excludes minority voters from the possibility to express a free choice as they only can vote for the list of their minority group and the impact of this on the secrecy of vote, the ECtHR exceptionally conclude that these aspects of the voting system were not compatible with conventional rules.

This judgment of 10 November 2022 is remarkable, but it is not inconsistent with the overall trend in case law. Indeed, if the Court challenges certain aspects of the Hungarian voting system, it is not because it reduces the margin of appreciation it leaves to the States in this area. It is only because it finds that certain groups of voters lose all possibility of electoral influence. In a way, it is their right to vote that is affected (even more radically than in the famous *Yumak and Sadak* case mentioned above), and we have seen that the margin of appreciation in this area is not so wide.

V. Electoral disputes

From several of the cases mentioned so far, it appears that the Court takes into account in its electoral case law the particular context and history of the State whose electoral law and practice it is examining. This also applies to a certain extent when the court

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[43] ECtHR (GC), judgment *Yumak and Sadak v. Turkey*, 8 July 2008, § 147.
[44] ECtHR, judgment *Bakirdzi and E.C. v. Hungary*, 10 November 2022.

examines how a state has organised and handled electoral disputes. This is particularly clear in *Grosaru*. In carrying out a comparative law exercise, the Court highlights the following elements that may, at first sight, create a distinction between Romania (directly concerned by the case) and other States that, like Romania, attribute competence to a legislative assembly to decide on electoral disputes:

> "three countries (Belgium, Italy and Luxembourg) stand out because the only post-election remedy available is validation by parliament, the decisions of the electoral offices being deemed to be final. That said, those three countries have enjoyed a long tradition of democracy which would tend to dissipate any doubts as to the legitimacy of such a practice"[45].

This assessment did not prevent the Court from condemning Belgium in the case *Mugemangango* on precisely this point ten years later. With regard to a system in which the parliamentary assembly is empowered to decide electoral disputes as a last instance body and according to procedures that are not well defined by the applicable regulations, the Court found violations of Article 3 of the First Protocol and of Article 13 of the Convention: the complaint of the applicant calling for recount of ballot papers has been examined by a body lacking impartiality and through a procedure lacking adequate and sufficient safeguards[46].

Even if the requirements of efficiency and impartiality of the procedure constitute limits to the margin of appreciation of the States in this area, they are left with considerable latitude to choose how to manage electoral disputes. Indeed, in the above-mentioned *Mugemangango* case, the principle of entrusting electoral disputes to independent judicial bodies is only recommended to States and it is not definitely excluded that they may empower a parliamentary assembly for this task, as long as guarantees of impartiality are provided and applied (which seems difficult to achieve perfectly in practice).

In terms of the institutional architecture for dealing with electoral disputes, the margin of appreciation for states seems to be only slightly less wide than for the setting of their voting systems. As for the intensity of the control that national bodies exercise when deciding electoral disputes, we have to go back to the *Davydov* case mentioned at the beginning of this paper[47]. It appears from this that the intensity of scrutiny may vary depending on the precise subject matter of the electoral law that is being discussed in the context of a dispute. It seems possible to confirm our initial assertion: the scrutiny of the national bodies (and if necessary of the ECtHR) will have to be stricter when the right to vote is at stake (relatively narrow margin of appreciation), than when the right to stand as a candidate is at stake (wider margin of appreciation) or when questions relating to the voting system are at stake (widest margin of appreciation).

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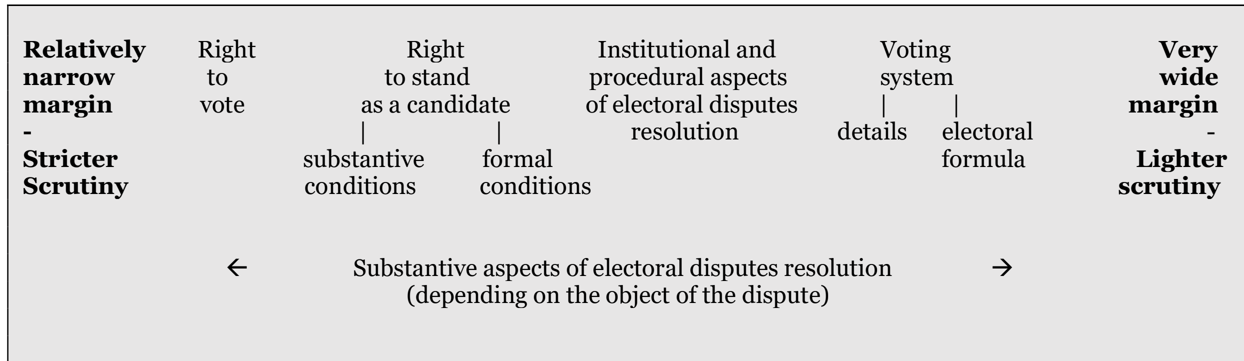
[45] ECtHR, judgment *Grosaru v. Romania*, 2 March 2010, § 28.
[46] ECtHR, judgment *Mugemangando v. Belgium*, 10 July 2020.
[47] ECtHR, Davydov v. Russia, 30 October 2014, §§ 286-287.

Conclusion

The analysis of the case law that we have carried out makes it possible to clarify how the margin of appreciation left to States in the electoral field is graduated according to the particular aspect that is at stake.

The following figure provides a summary of the findings.



From this heterogeneous electoral case law, it appears that the European Court of Human Rights contributes to the consolidation of the right to participate in elections as a voter or as a candidate, but that it interferes less in the control of the electoral "rules of the game", leaving national legislators a considerable margin of appreciation when it comes to choosing or maintaining a certain type of democracy or institutional system, even when it favours the dominant political parties.