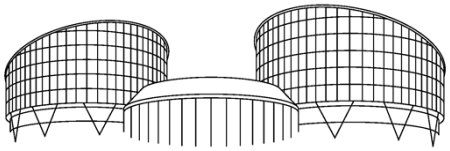

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

# CASE OF MUGEMANGANGO v. BELGIUM

(*Application no. 310/15)*

JUDGMENT

Art 3 P1 • Stand for election • Complaint calling for recount of ballot papers examined by body lacking impartiality, through procedure lacking adequate and sufficient safeguards • Not being ruled out that candidate could have been elected following recount, allegations serious and arguable • Insufficient guarantees of impartiality of a not yet constituted parliament, the decision-making body, including members of parliament whose election could have been called into question • Discretion enjoyed by the decision-making body not circumscribed with sufficient precision by provisions of domestic law • Safeguards afforded on a discretionary basis • Parliamentary autonomy can only be validly exercised in accordance with the rule of law
Article 13 (+ Art 3 P1) • Effective remedy • Failure to provide effective remedy by which to challenge election results and seek a recount

STRASBOURG

10 July 2020

*This judgment is final but it may be subject to editorial revision.*

**In the case of Mugemangango v. Belgium,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Linos-Alexandre Sicilianos, *President*,
Robert Spano,
Jon Fridrik Kjølbro,
Ksenija Turković,
Angelika Nußberger,
Paul Lemmens,
Ganna Yudkivska,
Julia Laffranque,
Helen Keller,
Krzysztof Wojtyczek,
Valeriu Griţco,
Armen Harutyunyan,
Stéphanie Mourou-Vikström,
Jovan Ilievski,
Ivana Jelić,
Arnfinn Bårdsen,
Raffaele Sabato, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 4 December 2019 and 14 May 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

# INTRODUCTION

1. The application concerns a post-election dispute. It relates to the procedure for examining a complaint by the applicant, who had demanded a recount of a number of ballot papers because of alleged irregularities in the election process. In particular, the applicant complained of the lack of safeguards against arbitrariness and the lack of a remedy before an independent and impartial authority. He relied on Article 3 of Protocol No. 1 and Article 13 of the Convention.

# PROCEDURE

2. The case originated in an application (no. 310/15) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian national, Mr Germain Mugemangango ("the applicant"), on 22 December 2014.

3. The applicant was represented by Ms M. Pétré, a lawyer practising in La Louvière, and Mr O. Stein and Mr I. Flachet, lawyers practising in

Brussels. The Belgian Government ("the Government") were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 27 November 2017 the Government were given notice of the application. On 11 June 2019 a Chamber of that Section, composed of Robert Spano, President, Paul Lemmens, Julia Laffranque, Valeriu Griţco, Stéphanie Mourou-Vikström, Ivana Jelić and Arnfinn Bårdsen, judges, and Stanley Naismith, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was decided in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicant and the Government each filed a memorial on the admissibility and merits of the application. The President of the Grand Chamber also invited the European Commission for Democracy through Law ("the Venice Commission") to intervene in the written procedure and granted leave to the Government of Denmark to do likewise (Article 36 § 2 of the Convention and Rule 44 § 3).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 December 2019 (Rule 71 and Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms I. NIEDLISPACHER, Federal Justice Department, *Agent*,
Ms I. LECLERCQ, Office of the Government Agent,
Mr J.-C. MARCOURT, President of the Walloon Parliament,
Mr F. JANSSENS, Registrar of the Walloon Parliament,
Mr G. LAMBISON, Spokesperson of the Walloon Parliament,
Ms S. SALMON, expert at the Walloon Parliament, *Advisers*;

(b) *for the applicant*

Mr G. MUGEMANGANGO, *Applicant*,
Ms M. PÉTRÉ, lawyer,
Mr O. STEIN, lawyer, *Counsel*,
Mr I. FLACHET, lawyer,
Ms J. LAURENT, lawyer,
Ms K. VAN DEN BRANDE, *Advisers*.

The Court heard addresses by Ms Niedlispacher and Ms Leclercq, followed by Ms Pétré and Mr Stein, and also their replies to questions from judges. The applicant, Mr Mugemangango, was then granted leave by the President to make a brief statement on the case.

# THE FACTS

8. The applicant was born in 1973 and lives in Charleroi.

9. At the time of lodging the application, the applicant was chairman of the Hainaut Province branch of the Workers' Party of Belgium (*Parti du travail de Belgique* – "PTB"). He stood in the elections to the Parliament of the Walloon Region ("the Walloon Parliament") on 25 May 2014 as the top candidate on the PTB-GO! list for the Charleroi constituency in Hainaut Province.

10. The PTB-GO! list received 16,554 votes, thus exceeding the threshold of 5% of all votes validly cast in the Charleroi constituency. The applicant explained that in order to qualify for the "related lists" (*apparentement*) system, whereby a list can take over any votes not used by "related lists" for other constituencies in the same province, a list had to obtain 16,567.83 votes in the Charleroi constituency. The PTB-GO! list was therefore fourteen votes short of the total needed to win a seat in the Walloon Parliament under the "related lists" system. In that event, the seat would have gone to the applicant as the top candidate on the list.

11. In addition, 21,385 ballot papers were declared blank, spoiled or disputed in the Charleroi constituency.

12. The day after the elections, the applicant contacted the main electoral board for the Charleroi constituency and the Hainaut Province central electoral board, seeking a recount of the ballot papers declared blank, spoiled or disputed in the Charleroi constituency. The boards in question refused his request on the grounds that they had no jurisdiction to take such action, and referred the applicant to the Walloon Parliament.

13. On 6 June 2014 the applicant lodged a complaint with the Walloon Parliament under section 31 of the Special Law of 8 August 1980 on institutional reform ("the Special Law"), and requested a re-examination of the 21,385 ballot papers declared blank, spoiled or disputed in the Charleroi constituency and a recount of any votes validly cast on ballot papers which had been wrongly declared void. In support of his request he submitted that numerous problems had come to light during the vote-counting operations in the constituency. He explained that the irregularities in question could have affected the distribution of seats among the different electoral lists, and could have resulted in the allocation of one or two seats to the PTB-GO! list, in view of the very small number of votes by which the party had fallen short. In particular, the applicant complained that: witnesses present at some of the counting stations during the vote count had pointed to fatigue as a potential source of errors in the counting operations, some of which had lasted more than twelve hours without a break; the physical conditions in which the counting had taken place had been poor; some mistakes had occurred because counting stations had been set up hurriedly on the actual day of the elections and because the presiding and other officers of polling

and counting stations had had insufficient training; some ballot papers had been found several days after the elections, and it could not be ascertained whether they had been counted or not; some mistakes had been discovered because the ballot papers had been too large in relation to the small size of the boxes that had to be ticked, and the red pencils distributed to voters had not left a clear mark on the pink ballot papers when they had not been pressed down hard enough; and several witnesses had reported that, contrary to the law in force, ballot papers containing marks or symbols which did not identify the voter had been declared spoiled, even though the votes had been validly cast. The applicant submitted various witness accounts and press articles in support of his allegations.

14. The applicant's complaint was examined by the Walloon Parliament's Committee on the Examination of Credentials ("the Credentials Committee"), whose members were chosen by drawing lots pursuant to Rule 7 of the Rules of Procedure of the Walloon Parliament (see paragraph 29 below) on 10, 11 and 12 June 2014.

15. On 10 June 2014 the applicant and his lawyer were heard by the Credentials Committee at a public sitting. The Committee then deliberated in private. The records of the Committee's meetings show that the proposal concerning the applicant's complaint was decided upon by four of the seven members of the Committee, which had been constituted in accordance with Rule 7 § 1 of the Rules of Procedure of the Walloon Parliament. One of the members was unable to attend on 11 and 12 June and was therefore not involved in the full deliberations or the decision. As regards the other two members not involved in the decision on the applicant's complaint, the records do not give any indication of their reason for not taking part in the vote. The Government stated in their observations that those two members had stood in the same constituency as the applicant and had decided on their own initiative not to vote on his complaint. According to the records, they were nevertheless present during the deliberations and the vote on the applicant's complaint.

16. After the deliberations, the Credentials Committee voted on an initial proposal to declare the complaint admissible but ill-founded. There were two votes in favour of and two votes against the proposal, which was therefore rejected. Following fresh deliberations lasting more than two days, the Committee found, by three votes to one, that the applicant's complaint was admissible and well-founded. The Committee proposed that the blank and spoiled ballot papers be checked and classified by the Federal Department of the Interior in the light of the applicable legislation and the relevant circulars, and that all the ballots cast in the Charleroi constituency should then be recounted by the Federal Department of the Interior. Consequently, the Committee proposed that the credentials of the candidates elected in Hainaut Province should not be approved.

17. The six members of the Credentials Committee who were present adopted, by four votes to two, the report on all the complaints brought before it, to be presented at a plenary sitting.

18. The Committee's opinion on the applicant's complaint was accompanied by a note analysing whether recounting the votes could have affected the distribution of seats. The analysis looked at a number of possible scenarios. It concluded that it was clear that both in the most extreme case and in more moderate scenarios, the distribution of seats in the Charleroi constituency was liable to change if the 21,385 blank and spoiled ballots were recounted and ultimately deemed to be valid votes. That change was also likely to affect the distribution of seats in other constituencies in Hainaut Province as a result of the "related lists" system.

19. On 13 June 2014 the Credentials Committee presented its findings at the constituent session of the Walloon Parliament. A debate was held on the Committee's findings. They were rejected by forty-three votes to thirty-two. All the members of the Walloon Parliament, including those who had been elected in the applicant's constituency, took part in the vote.

20. On the same day, all the members of the Walloon Parliament voted on a motion to approve all the elected representatives' credentials. The motion was passed by forty-three votes to twenty-eight, with four abstentions.

21. Following the vote on the applicant's complaint, the Walloon Parliament's decision was recorded in a document setting out the reasons for it. Drawing on the Credentials Committee's findings, the Walloon Parliament observed first of all that the note appended to the Committee's report indicated that the distribution of seats was liable to change if the 21,385 ballot papers declared blank, spoiled or disputed were ultimately deemed to be valid votes, and that that change was also likely to affect the distribution of seats in other constituencies in Hainaut Province as a result of the "related lists" system. However, the number of votes by which the applicant's list would have failed to qualify was different in each scenario considered. It could have been fifteen votes in one scenario and as many as 1,582 in another. In any event, the Walloon Parliament found that most of the grievances raised by the applicant related to inherent features of the electoral system in general, and that it was not its task, in the context of the procedure for examining credentials, to cast doubt on the legal validity of the relevant rules. Some of the grievances had arisen from findings which, however regrettable, could have been made during any elections and in the vast majority of constituencies. Furthermore, the press articles submitted by the applicant did not constitute admissible evidence in the context of an electoral dispute, and the witness statements should have been referred to in the notice of results from the counting stations concerned, rather than being submitted as solemn declarations after the event. The Walloon Parliament further noted that the number of ballots declared blank, spoiled or disputed

had been lower than at the previous elections in June 2009, and was thus unlikely in itself to arouse suspicion. Contrary to what the applicant had maintained, it was accepted, in electoral theory and practice, that any handwritten annotation other than the actual vote constituted an unlawful mark within the meaning of Article 157 of the Electoral Code, thus spoiling the ballot in question. Nevertheless, some members of the Walloon Parliament were alarmed that votes cast using anything other than a red pencil had been deemed spoiled by some but not all counting stations, and consideration was given to the fact that several witnesses had felt that some ballot papers had been wrongly declared spoiled. In any event, the applicant's complaint had not indicated that these potential irregularities had been noted in any official record.

22. The applicant was notified of the reasoned decision of the Walloon Parliament by registered letter dated 24 June 2014.

# RELEVANT LEGAL FRAMEWORK AND PRACTICE

## I. DOMESTIC LAW

### A. Jurisdiction in post-election disputes

23. Article 48 of the Constitution provides:

> "Each [Federal] House shall examine the credentials of its members and shall adjudicate on any disputes arising in this regard."

24. The relevant parts of section 31 of the Special Law of 8 August 1980 on institutional reform read as follows:

> "(1) Each Parliament [of the federated entities] shall determine the validity of election procedures as regards its members and their substitutes.
>
> If an election is declared void, all the formalities must be recommenced, including the nomination of candidates.
>
> (2) Any complaint concerning an election must, in order to be valid, be made in writing, be signed by one of the candidates standing and mention the complainant's identity and home address.
>
> The complaint must be submitted within ten days from the publication of the results, and in any event before the examination of credentials, to the clerk of the parliament in question, who shall acknowledge receipt.
>
> (3) Each Parliament shall examine the credentials of its members and shall adjudicate on any dispute arising in that regard.
>
> (4) The clerks of the Walloon Parliament and the Flemish Parliament may, for the purposes of the examination of credentials by their respective assemblies, require the administrative authorities to send them, free of charge, any documents they consider necessary.
>
> ..."

25. As regards elections to the European Parliament, in relation to which post-election disputes are mainly governed by the law of each member State of the European Union (Articles 8 and 12 of the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, as amended by Decision 2002/772/EC, Euratom of 25 June and 23 September 2002), the Belgian House of Representatives determines the validity of election procedures that have taken place in Belgium and on any complaints submitted in that regard (section 43 of the Law of 23 March 1989 on the election of the European Parliament).

26. In accordance with the provisions cited above, the Belgian courts have consistently declined jurisdiction to deal with election-related questions submitted to them, whether raised with the Constitutional Court (judgment no. 34 of 19 February 1987, judgment no. 20/2000 of 23 February 2000, judgment no. 81/2000 of 21 June 2000 and judgment no. 152/2009 of 13 October 2009), the Court of Cassation (Cass., 18 October 1995, *Pasicrisie belge* (Pas.), 1995, I, no. 925, and Cass., 11 June 2004, *Chroniques de droit public (CDPK)*, 2004, no. 553) or the *Conseil d'État* (CE no. 13.893 of 13 January 1970, CE no. 15.876 of 15 May 1973, CE no. 17.303 of 25 November 1975, CE no. 22.250 of 12 May 1982, CE no. 24.614 of 12 September 1984, CE no. 27.619 of 4 March 1987, CE no. 49.237 of 23 September 1994, CE nos. 53.170, 53.171 and 53.172 of 8 May 1995, CE no. 53.793 of 16 June 1995, CE no. 54.395 of 6 July 1995, CE no. 55.271 of 22 September 1995, CE, no. 118.570 of 24 April 2003, CE no. 171.527 of 24 May 2007, CE no. 203.980 of 18 May 2010, CE no. 227.344 of 12 May 2014 and CE no. 227.788 of 20 June 2014).

27. The Belgian Constitutional Court has held that the rule that the elected legislative assemblies enjoy the utmost independence in discharging their duties stems from the basic principles of the democratic structure of the State. Such independence finds expression, *inter alia*, in their autonomous scrutiny of their own members as regards both the validity of their mandate and the manner in which the mandate is acquired by means of elections (see judgment no. 20/2000 of 23 February 2000, point B.3). The absence of judicial scrutiny is thus intended to guarantee the independence of the legislative assemblies *vis-à-vis* the other branches of power, and is therefore not manifestly unjustified (ibid., point B.6).

28. As regards municipal elections in the Walloon Region and the Brussels-Capital Region, an appeal lies to the *Conseil d'État* (see Article L4146-15 of the Code of Local Democracy and Decentralisation for the Walloon Region and section 76 *bis* of the Municipal Elections Act for the Brussels-Capital Region respectively). For provincial elections, jurisdiction is vested in the provincial council (Article L4146-18 of the Code of Local Democracy and Decentralisation for the Walloon Region). In

the Flemish Region, complaints concerning municipal and provincial elections may be brought before the Council for Election Disputes (Article 203 of the Decree of 8 July 2011 organising local and provincial elections and amending the Municipal Decree of 15 July 2005, the Provincial Decree of 9 December 2005 and the Decree of 19 December 2008 on the organisation of public social welfare centres). Administrative appeals on points of law may be lodged against decisions of the Council for Election Disputes with the *Conseil d'État* (Article 215 of the aforementioned Decree).

### B. Procedure for examination of credentials in the Walloon Parliament

29. Rule 7 of the Rules of Procedure of the Walloon Parliament, concerning the examination of credentials and the taking up of seats, as in force at the material time, provided:

> "1. At the first plenary session after the renewal of the Walloon Parliament, a seven-member Committee on the Examination of Credentials shall be set up by drawing lots.
>
> The Committee shall appoint one or more of its members to report to the Parliament.
>
> 2. Documentation relating to the elections, and any complaints arising from them, shall be submitted to the Committee.
>
> 3. The Walloon Parliament shall give a decision on the Committee's findings, and the President shall proclaim elected as members and substitute members of the Walloon Parliament those persons whose credentials have been declared valid.
>
> ...
>
> 6. Members of the Walloon Parliament who have been proclaimed elected but who have not yet been sworn in may not participate in debates or voting, save in connection with the validation of elections.
>
> ..."

30. On 28 July 2017 Rule 7 of the Rules of Procedure of the Walloon Parliament was amended. It now provides that when the Parliament's composition is renewed, three credentials committees are formed by drawing of lots from among the members representing constituencies other than the ones concerned. Only members so appointed may attend meetings.

31. Pursuant to the new Rule 7 § 3 of the Rules of Procedure, regulations on the procedure for examining complaints about elections to the Walloon Parliament were adopted on 25 April 2018. The regulations govern the procedure for consideration of complaints by the Credentials Committee and the Walloon Parliament, laying down, in particular, the following aspects: complaints are examined by the Committee at a public sitting, the Committee may be assisted by experts, and the clerk of the Parliament attends the debates and deliberations (Article 6); the complainant is given a hearing (Article 5), and may be assisted by a lawyer in making his or her

submissions (Article 8); members of the Committee may put questions, request documents, interview witnesses and order a recount of ballot papers before formulating their proposal for a decision (Article 9); and reasons are given for the proposed decision, which may be supplemented by a note on the impact of redistribution of votes between lists (Article 10). The plenary session then decides on the credentials committees' findings by means of a separate vote on each complaint (Article 12 §§ 1 and 2). If no majority can be reached at the plenary session, the credentials committees' findings are sent back to them so that they can draw up a fresh proposal after giving the complainants the opportunity to make further submissions (Article 12 §§ 3 and 4). The decision taken at the plenary session is sent to the complainant by registered post (Article 13).

## II. INTERNATIONAL INSTRUMENTS

### A. Work of the European Commission for Democracy through Law (Venice Commission)

#### *1. Code of Good Practice in Electoral Matters*

32. At its 51st and 52nd sessions on 5 and 6 July and 18 and 19 October 2002, the Venice Commission adopted its guidelines on elections and an explanatory report (CDL-AD(2002)023). These two documents together make up the Code of Good Practice in Electoral Matters, which was approved in 2003 by the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe. The relevant parts of the guidelines read as follows:

> "3.3. An effective system of appeal
>
> a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.
>
> b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.
>
> c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.
>
> d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.
>
> e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h. The applicant's right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions."

33. The relevant parts of the explanatory report read as follows:

"**3.3. An effective system of appeal**

92. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

93. There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;

- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experience[d] with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

94. Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

95. Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

96. The procedure must also be simple, and providing voters with special appeal forms helps to make it so. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

97. It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different courts – e.g. the ordinary courts and the constitutional court – are not clearly differentiated.

...

99. Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.

100. The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.

101. The *powers* of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.

102. Where higher-level commissions are appeal bodies, they should be able to rectify or annul *ex officio* the decisions of lower electoral commissions."

*2. Report on Electoral Law and Electoral Administration in Europe*

34. The Report on Electoral Law and Electoral Administration in Europe ("Synthesis study on recurrent challenges and problematic issues") was adopted by the Council for Democratic Elections at its 17th meeting (Venice, 8-9 June 2006) and by the Venice Commission at its 67th plenary session (Venice, 9-10 June 2006). The relevant parts of the report read as follows:

"**XII. Election appeals and accountability for electoral violations**

...

167. Complaint and appeals procedures must be open at least to each voter, candidate, and party. A reasonable quorum may, however, be imposed for appeals by voters on the results of election (CDL-AD(2002)023rev, para. 99). In order to comply with international standards, the complaint and appeals procedures should clearly provide the following rights for voters, candidates, and political parties: The rights to file a complaint, to present evidence in support of the complaint, to a public and fair hearing on the complaint, to an impartial and transparent proceedings on the complaint, to an effective and speedy remedy, as well as to appeal an appellate court

if a remedy is denied (see for example CDL-AD(2004)027, para. 111). In practice, however, these rights are not always respected. At times, even credible complaints are left without any legal redress.

168. Due to different legal and political traditions, a variety of procedures are used in the resolution of election disputes. In many established democracies in Western Europe (like France, Germany, Italy, or the United Kingdom) election appeals are heard by ordinary administrative and judicial bodies operating under special procedures. In contrast, in most emerging and new democracies in Central and Eastern Europe (and in other regions of the world), the responsibility for deciding on election complaints and appeals is shared between independent electoral commissions and ordinary courts. ..."

### B. Reports and recommendations of the Organization for Security and Co-operation in Europe (OSCE)

35. In its October 2003 report entitled "Existing commitments for democratic elections in OSCE participating States", the OSCE Office for Democratic Institutions and Human Rights (ODIHR) stated the following:

"10.3 Election contestants must have the ability to submit complaints concerning all aspects of election operations, to have their complaints heard by the competent administrative or judicial body, and to appeal to the relevant court. Voters shall have the ability to complain and appeal concerning a violation of their suffrage rights, including voter registration."

36. In its report of 19 October 2007 following the observation of the federal parliamentary elections of 10 June 2007 in Belgium, the ODIHR concluded as follows:

"Notwithstanding any possible considerations on the substance of [the cases brought before the credentials committees of the two Houses of Parliament] and their handling by the [Credentials] Committees, the principle according to which it is up [to] the winning parties in an election to act as the ultimate judges on election disputes is unusual and potentially problematic. The system could certainly call into question the impartiality of the adjudicating body and the effectiveness of the remedy available to complainants. In this respect, some interlocutors suggested that the Constitutional Court should be entitled to review the decisions of the [Houses] of Parliament.

The OSCE/ODIHR inventory of commitments and other principles for democratic elections states that election contestants must have the opportunity to submit complaints on all aspects of election operations to a relevant court. ...

*Notwithstanding the established legal basis for the existing complaint procedure, the new Parliament should consider measures to provide for impartial resolution of electoral disputes, including the possibility of an appeal to a court.*"

37. In its needs assessment mission report of 8 April 2014 on the 25 May 2014 federal parliamentary elections in Belgium, the ODIHR stated as follows:

"The decisions and actions of [constituency main election committees] regarding producing the ballots, including use of party logos as well as decisions to declare the candidates elected before election day can also be appealed to the Court of Appeals. Other decisions of election committees cannot be appealed to the courts, including in

> respect of the election results, distribution of seats, and election day complaints. Such practice is not in line with OSCE commitments. Instead, the newly-elected House of Representatives has the final authority in adjudicating election disputes when validating the election results, with no possibility of appeal. The only exception concerns decisions to withdraw a mandate of a newly-elected MP based on campaign finance violations, which can be appealed to the Constitutional Court. The jurisdiction of the House of Representatives to validate the election of their own members, with no possibility of judicial review is contrary to OSCE commitments and international good practice. The OSCE/ODIHR has previously recommended that authorities consider measures to provide for impartial resolution of electoral disputes, including the possibility of an appeal to a court."

### C. Observations of the United Nations Human Rights Committee

38. Article 25 of the International Covenant on Civil and Political Rights secures to every citizen the right and the opportunity, without any distinction and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors; and to have access, on general terms of equality, to public service in his or her country.

39. In its General Comment no. 25 (57) of 27 August 1996 adopted under Article 40 (4) of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.7), the United Nations (UN) Human Rights Committee stated the following:

> "20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. 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. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees."

## III. COMPARATIVE-LAW MATERIAL

40. The material available to the Court on the legislation in Council of Europe member States, in particular a survey of thirty-eight member States and information supplied by the Venice Commission in relation to a further two States, indicates the following.

41. In five States (Denmark, Iceland, Luxembourg, the Netherlands and Norway), similarly to the system for examining credentials in Belgium, challenges to the validity of elections are determined by Parliament itself, and there is no provision for an appeal to a judicial body.

42. In one State (Italy), there are two separate stages of the procedure. Results are reviewed and decisions on candidates' and parties' complaints are taken by panels formed within the courts of appeal, which carry out their supervision from an administrative perspective. They decide on disputed ballot papers and voting tallies and send the results to the Court of Cassation. The Court of Cassation gives rulings on appeals against decisions by local polling stations and on internal reviews (*revisione in autotutela*). It also proclaims the election results, allocates the seats obtained and informs the relevant house of parliament. After the members have been declared elected by the Court of Cassation, the appropriate committees of the houses of parliament examine any appeals, ensuring that certain safeguards are in place (see paragraph 47 below). However, the final decision is taken by each house at a plenary session.

43. In one State (Sweden), the only appeal body is a collegiate body answerable to Parliament, and no appeal lies to any judicial authority. The members of the body are elected by Parliament, and its chair must be a permanent judge.

44. In the other thirty-three States surveyed, a judicial remedy is available. In fourteen States the judicial remedy is direct, that is to say, the complaints are lodged directly with the appropriate court. In nineteen States the judicial body examines the matter at second instance, generally following an initial complaint to a central electoral commission (particularly in the great majority of central and east European countries), and sometimes following a decision by Parliament (Germany) or the executive (Switzerland).

45. The court with jurisdiction to determine post-election disputes varies from one State to another. It may be the higher courts (for example the Constitutional Court, the Supreme Court, the Supreme Administrative Court or the High Court), a special election tribunal or the ordinary administrative courts.

46. As regards procedural safeguards, where the dispute is determined by a court, domestic law generally affords complainants the same set of procedural rights as are available to litigants in ordinary proceedings (the adversarial principle, the right to submit written and/or oral observations, access to the case file, the right to a reasoned and public decision and the right to seek legal aid). Not all States provide for a public hearing.

47. In States where Parliament is the only body competent to determine a dispute concerning election results or the distribution of seats, complainants are not afforded procedural safeguards in Denmark, Iceland, the Netherlands and Norway. In Denmark, the report drawn up by the

parliamentary committee responsible for examining the complaint is nevertheless made public. In Italy, the debates before the relevant committees of both houses of parliament are adversarial, and a number of procedural safeguards are afforded: a public hearing is held, and complainants can submit observations and documents, be represented by a lawyer, respond to the committee rapporteur's analysis and submit final oral observations in person. The committee's decision is then referred to the relevant house of parliament for examination at a plenary session.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

48. The applicant alleged that the refusal of the Walloon Parliament to recount the ballot papers declared blank, spoiled or disputed in the Charleroi constituency, after it had acted as both judge and party in the examination of his complaint, had infringed his right to stand as a candidate in free elections as guaranteed by Article 3 of Protocol No. 1, which provides:

> "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."

### A. Admissibility

49. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

#### *1. The parties' submissions*

##### (a) The applicant

50. The applicant submitted that under Article 3 of Protocol No. 1, Belgium had a positive obligation to hold free elections. The right to stand for election would only be effective and genuine if appropriate authorities could ensure that it was respected throughout the electoral process and, in particular, if any complaints were dealt with by a competent body capable of performing an effective examination of the complainants' grievances. However, that had not happened in his case, because the Walloon Parliament had not acted impartially in taking its decision.

51. The applicant observed that with fourteen more votes his party would have won at least one additional seat and he himself would have been elected. The shortfall in votes had in fact been due to irregularities during

the electoral process. The fact that the ballot papers had not been recounted had created uncertainty as to the will of the electorate. The Credentials Committee had endorsed the applicant's position by acknowledging that the irregularities complained of had been serious, should have led to a recount and could have changed the outcome of the election. The Walloon Parliament had also confirmed that a recount might have had an effect on whether or not the applicant was elected.

52. The applicant had only been able to raise his complaints with the Credentials Committee, which was solely empowered to issue an opinion. The Walloon Parliament had been the only decision-making body and no judicial remedy had been available. The applicant referred to the recommendations of the Venice Commission, the observations of the UN Human Rights Committee and the Court's conclusions in *Grosaru v. Romania* (no. 78039/01, ECHR 2010), concluding on that basis that there had been a manifest breach of Article 3 of Protocol No. 1.

53. He pointed out that when the Credentials Committee had been called upon to give an opinion to the Walloon Parliament, it had considered his complaint well-founded, but its opinion had not been followed by the Parliament. The decision-making power in his case had rested solely with the Walloon Parliament, that is to say, with members of parliament whose election might have been called into question if the complaint had been declared well-founded and whose interests had been directly opposed to his own, given that they belonged to different political parties. The members of the Walloon Parliament had therefore had a direct and personal interest in the outcome of the case. Accordingly, in the applicant's submission, the only available remedy had been dealt with by a body which had been both judge and party and had provided no guarantees at all of its impartiality.

54. Moreover, the applicant submitted that he had not been afforded any procedural safeguards before the decision-making body: the discretion enjoyed by the Walloon Parliament had not been circumscribed with sufficient precision by the provisions of domestic law; neither the right to a fair and public hearing of his appeal nor the right to a transparent and impartial decision on the appeal by a tribunal had been respected; the Walloon Parliament had taken its decision without giving the applicant a hearing or respecting his right to an adversarial procedure; and he had not had an opportunity to take cognisance of and, as appropriate, reply to the evidence on which the Walloon Parliament's decision had been based. The Court's previous case-law, however, had established the need for judicial review of the application of electoral rules.

55. The applicant contended that it was precisely the fact that Belgium had a long-standing democratic tradition that required it to fine-tune its system in order to ensure that all elections were fully in accordance with that tradition. The separation of powers could not justify the Belgian system for dealing with post-election disputes, because that principle had to be

viewed as requiring the establishment of a genuinely democratic and pluralistic parliament, and thus implying a judicial review of post-election disputes. The applicant referred to legal theory and the fact that leading writers had expressed their belief that the existing system for examining credentials in Belgium was outdated, unsuited to contemporary needs and incompatible with the necessity of preserving the independence of Parliament and safeguarding fundamental rights and democracy.

**(b) The Government**

56. The Government submitted that the mistakes alleged by the applicant had not undermined the reliability of the election results and had not impeded the free expression of the opinion of the people on the choice of the legislature. They observed that a mere mistake or irregularity would not *per se* signify that the elections had been unfair, as long as the general principles of equality, transparency, impartiality and independence in electoral administration had been complied with, as they had in the present case. Indeed, elections were regulated by detailed legislation, the counting of votes and the registration and transmission of the results were open and transparent, and the Electoral Code laid down various measures to ensure the neutrality of polling and counting stations, in accordance with the recommendations of the Venice Commission. The Government emphasised that the alleged errors had not been referred to in the records drawn up by the counting stations, nor had they been mentioned by any political parties other than the PTB.

57. Furthermore, the Walloon Parliament had reached its decision on the applicant's complaint on the basis of an acceptable and proportionate assessment of the relevant facts. Noting the reasons given for the impugned decision, the Government concluded that the alleged errors could not be considered to have been exceptionally widespread or serious. Moreover, as regards the effect of the alleged errors on the outcome of the elections, they referred to the finding by the Walloon Parliament that in one of the possible scenarios, the applicant's list would have fallen 1,582 votes short of being able to qualify. The fact that the applicant's election had been a matter of a small number of votes was not a sufficient reason to recount certain ballot papers. Had such a step been taken, it would have been discriminatory against candidates in other constituencies.

58. The Government contended that the Belgian system for examining credentials had the advantage of being structured around a single, unequivocal remedy, a factor liable to strengthen legal certainty. Moreover, that system was part of the Belgian State's constitutional heritage and was founded on the constitutional principle of the separation of powers. The system was one of a series of mechanisms aimed at ensuring parliamentary independence. The fact that members of parliament could be viewed as both "judge and party" was a drawback offset by the advantages of the system in

terms of the independence of the legislature from the executive and the judiciary. Accordingly, the rules governing post-election disputes did not stem from an insignificant choice but from the application of one of the basic principles of the democratic edifice.

59. Next, the Government submitted that the discretion enjoyed by the various parliaments in Belgium could not be considered excessive: it was, precisely, circumscribed by Article 48 of the Constitution and section 31 of the Special Law of 8 August 1980 on institutional reform. Observing that neither the Special Law nor the Rules of Procedure of the Walloon Parliament laid down a sufficiently precise procedure for challenging the validity of elections, and being aware that the procedure no longer corresponded to the democratic criteria currently recognised by European States, the Walloon Parliament – ruling on a complaint of this kind for the first time – had used its parliamentary autonomy in the applicant's case in ensuring that the procedure for examining the complaint satisfied contemporary criteria by affording a number of procedural safeguards to the applicant.

60. The Government submitted that those procedural safeguards had been appropriate and sufficient against arbitrariness. In the present case the members of parliament from the constituency in which the applicant had stood had not taken part in the debates or the voting within the Credentials Committee, which showed that the Walloon Parliament, exercising its full discretion, had ensured that the Committee provided the utmost guarantees of impartiality. Moreover, the Committee had examined the applicant's complaint at a public sitting, and the applicant had been able to put forward his arguments to the Committee and to be assisted by a lawyer. Furthermore, the Walloon Parliament had replied in detail to the applicant's arguments. Those safeguards had made it possible to protect the applicant from any impression that the members of parliament concerned had had an excessive influence over the decision-making process and to avoid any accusations of abuse on the part of the majority. Lastly, the Government pointed out that the procedural safeguards afforded to the applicant were now laid down in the new Rules of Procedure of the Walloon Parliament.

*2. Third-party comments*

**(a) The Venice Commission**

61. The Venice Commission pointed out that the system of examination of credentials by parliaments themselves had originated in the seventeenth and eighteenth centuries with the 1689 English Bill of Rights and the 1787 Constitution of the United States of America. It had subsequently been introduced in the countries of Europe as they had moved towards parliamentary systems in the course of the nineteenth century. This system, firmly rooted in the constitutional history of various countries, was based on

a particular approach to the separation of powers and on the idea of Parliament as a sovereign body with specific rights that no judicial authority could impinge upon. Nevertheless, incidents and abuses observed in certain countries had pointed to the need to transfer electoral disputes to independent and impartial bodies, and had led several countries to divest their parliaments of responsibility for supervising the election of their members. Twentieth-century European constitutions had generally abolished the power of parliaments to be the judge over elections, at least at last instance, and most European States had now assigned that power to a judicial body, although there was still considerable variety in the remedies available in those States.

62. The Venice Commission submitted that in free elections, the choice of representatives had to comply with precise rules whose application had to be verifiable and to leave no room for uncertainty or arbitrariness. The principle of the rule of law included the principle of legality, which encompassed supremacy of the law and compliance with the law. One of the other principles of the rule of law was that the law had to be the same for all: any doubts in that regard contributed to mistrust and hence the calling in question of the power of anyone who had abused the law or was suspected of being able to do so. Regardless of which authority had the power to deal with electoral disputes, the Venice Commission submitted that those principles could not be observed without ensuring procedural rights such as the existence of an effective remedy and a method of dealing with complaints that was based on the principles of a fair trial.

63. Accordingly, with particular reference to the Code of Good Practice in Electoral Matters (see paragraph 32 above), the Venice Commission emphasised that the Code did not prevent appeals being made in parliaments concerning the election of their own members, but that final appeals to a court had to be possible. Where electoral appeals did not concern political issues, the protection of the right to free elections implied the existence of a judicial remedy. The type of court was of little importance; what mattered was for the decision to be taken by a body that was established by law, was independent of the executive and the legislature or, in specific cases, acted wholly independently and impartially in determining legal matters in proceedings that were judicial in nature, and therefore afforded sufficient institutional and procedural safeguards against arbitrary and political decisions.

64. Nevertheless, even where an appeal to Parliament was provided for at first instance, the composition of the relevant body and the voting rules should leave as little scope as possible for partisan decisions. Thus, direct opponents had to be excluded in all cases and the rules on the majority required for decisions had to ensure fair representation. Furthermore, the Venice Commission recommended that the procedure adopted should be simple, devoid of formalism and adversarial. Time-limits for appealing and

for reaching a decision should be short. The hearing should be public and decisions should be reasoned and made public.

**(b) The Government of Denmark**

65. The Government of Denmark pointed out that the Danish Constitution of 1849 provided for a system for examining the credentials of members of parliament that was similar to the Belgian system at issue in the present case. Having been introduced with the aim of ensuring the independence of Parliament and protecting it from intervention by the monarch, this system was an integral part of the constitutional structure, the separation of powers and the long-established and firmly entrenched democratic traditions in Denmark.

66. The Government of Denmark submitted that neither Article 3 of Protocol No. 1 nor Article 13 of the Convention could require States to abolish long-established electoral systems in which parliaments validated their members' credentials. In their view, where the Court sought to establish whether an electoral system provided sufficient safeguards against arbitrariness, it should conduct an overall assessment of all the relevant factors, including the specific context and the democratic tradition of the State in question. States had a wide margin of appreciation where the right to stand for election was in issue. Access to a judicial remedy was only one of the many factors to be taken into account in determining whether a system of validation of credentials was in conformity with the Convention. The Court should attach significant weight to the discretion enjoyed by Parliament: if clear and accessible rules and procedures regulated the holding of elections and thus limited the scope of Parliament's discretion, this significantly minimised the risk of arbitrary action and politically motivated decisions, and was therefore indicative of a system that ensured the fairness and objectivity required by the Convention. Thus, the absence of access to judicial review of Parliament's decision to validate its members' credentials would not in itself breach Article 3 of Protocol No. 1 taken alone or in conjunction with Article 13 of the Convention.

*3. The Court's assessment*

**(a) Principles established in the Court's case-law on Article 3 of Protocol No. 1**

67. Democracy constitutes a fundamental element of the "European public order". The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law and are accordingly of prime importance in the Convention system (see, among other authorities, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113; *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 98 and 103,

ECHR 2006-IV; *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 63, ECHR 2012; and *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 141, 17 May 2016).

68. Article 3 of Protocol No. 1 does not lay down an obligation of abstention or non-interference, as with the majority of civil and political rights, but one of adoption by the State, as the ultimate guarantor of pluralism, of positive measures to "hold" democratic elections to the legislature (see *Mathieu-Mohin and Clerfayt*, cited above, § 50). As regards the method of appointing the "legislature", Article 3 of Protocol No. 1 provides only for "free" elections "at reasonable intervals", "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people". Subject to that, it does not create any "obligation to introduce a specific system" (ibid., § 54).

69. Article 3 of Protocol No. 1 contains certain positive obligations of a procedural character, in particular requiring the existence of a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights (see *Namat Aliyev v. Azerbaijan*, no. 18705/06, §§ 81 et seq., 8 April 2010, and *Davydov and Others v. Russia*, no. 75947/11, § 274, 30 May 2017). The existence of such a system is one of the essential guarantees of free and fair elections (ibid.) and is an important safeguard against arbitrariness in the electoral process (see *Petkov and Others v. Bulgaria*, nos. 77568/01 and 2 others, § 63, 11 June 2009). Such a system ensures the effective exercise of the rights to vote and to stand for election, maintains general confidence in the State's administration of the electoral process and constitutes an important device at the State's disposal in achieving the fulfilment of its positive duty under Article 3 of Protocol No. 1 to hold democratic elections. Indeed, the State's solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections were not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter (see *Namat Aliyev*, cited above, § 81, and *Davydov and Others*, cited above, § 274).

70. For the examination of appeals to be effective, the decision-making process concerning challenges to election results must be accompanied by adequate and sufficient safeguards ensuring, in particular, that any arbitrariness can be avoided. In particular, the decisions in question must be taken by a body which can provide sufficient guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be excessive; it must be circumscribed with sufficient precision by the provisions of domestic law. Lastly, the procedure must be such as to guarantee a fair, objective and sufficiently reasoned decision (see, among other authorities, *Podkolzina v. Latv*ia, no. 46726/99, § 35, ECHR 2002-II;

*Kovach v. Ukraine*, no. 39424/02, §§ 54-55, ECHR 2008; *Kerimova v. Azerbaijan*, no. 20799/06, §§ 44-45, 30 September 2010; and *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, § 143, 13 October 2015).

71. In accordance with the subsidiarity principle, it is not for the Court to take the place of the national authorities in interpreting domestic law or assessing the facts. In the specific context of electoral disputes, the Court is not required to determine whether the irregularities in the electoral process alleged by the parties amounted to breaches of the relevant domestic law (see *Namat Aliyev*, cited above, § 77). Nor is the Court in a position to assume a fact-finding role by attempting to determine whether the alleged irregularities took place and whether they were capable of influencing the outcome of the elections. Owing to the subsidiary nature of its role, the Court needs to be wary of assuming the function of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *Davydov and Others*, cited above, § 276). On the other hand, it is for the Court to determine whether the requirements of Article 3 of Protocol No. 1 have been observed and to satisfy itself, from a more general standpoint, that the respondent State has complied with its obligation to hold elections under free and fair conditions and has ensured that individual electoral rights were exercised effectively (see *I.Z. v. Greece*, no. 18997/91, Commission decision of 28 February 1994, Decisions and Reports 76-A, p. 65; *Babenko v. Ukraine* (dec.), no. 43476/98, 4 May 1999; *Gahramanli and Others v. Azerbaijan*, no. 36503/11, § 72, 8 October 2015; and *Davydov and Others*, cited above, § 276).

72. A mere mistake or irregularity in the electoral process would not, *per se*, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence in the organisation and management of elections were complied with (see *Davydov and Others*, cited above, § 287). The concept of free elections would be put at risk only if there was evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, and where such complaints received no effective examination at the domestic level (ibid., §§ 283-88).

73. The margin of appreciation in this area is wide (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005-IX, with further references). There 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 (ibid., § 61; see also *Ždanoka*, cited above, § 103, and *Sitaropoulos and Giakoumopoulos*, cited above, § 66). Thus, the Court has held that any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be regarded as unacceptable in the context of one system may be justified in the context of another. It has, however, emphasised that the State's margin of appreciation

in this regard is limited by the obligation to respect the fundamental principle of Article 3 of Protocol No. 1, namely "the free expression of the opinion of the people in the choice of the legislature" (see *Mathieu-Mohin and Clerfayt*, cited above, § 54; *Podkolzina*, cited above, § 33; *Tănase v. Moldova* [GC], no. 7/08, § 157, ECHR 2010; and *Cernea v. Romania*, no. 43609/10, § 40, 27 February 2018).

**(b) Principles established in the Court's case-law concerning parliamentary autonomy**

74. The principles concerning parliamentary autonomy were outlined by the Court in *Karácsony and Others* (cited above, §§ 138-47), a case concerning disciplinary proceedings examined under Article 10 of the Convention. They may be summarised as follows. Parliament is a unique forum for debate in a democratic society, which is of fundamental importance (§ 138). There is a close nexus between an effective political democracy and the effective operation of Parliament (§ 141). The rules concerning the internal operation of Parliament are the exemplification of the well-established principle of the autonomy of Parliament. In accordance with this principle, Parliament is entitled, to the exclusion of other powers and within the limits of the constitutional framework, to regulate its own internal affairs, for example the composition of its bodies. This forms part of "the jurisdictional autonomy of Parliament" (§ 142). In principle, the rules concerning the internal functioning of national parliaments, as an aspect of parliamentary autonomy, fall within the margin of appreciation of the Contracting States (§ 143). Nevertheless, the breadth of the margin of appreciation to be afforded to the State in this sphere depends on a number of factors (§ 144). As regards Article 10 of the Convention, the Court has noted that the discretion enjoyed by the national authorities is not unfettered but should be compatible with the concepts of "effective political democracy" and "the rule of law" to which the Preamble to the Convention refers (§ 147).

**(c) Application of those principles in the present case**

75. The present case concerns the way in which the applicant's complaint was examined by the relevant domestic authorities. The applicant had alleged irregularities in the electoral process in the Charleroi constituency and had called for a recount of a number of ballot papers cast in that constituency. He argued that had those irregularities not occurred, he would have been elected and won a seat in the Walloon Parliament.

76. The Court has held that the allocation of a parliamentary seat is a crucial issue, which has a direct impact on the election results, a factor to which the Court attaches significant weight (see *I.Z. v. Greece*, cited above; *Babenko*, cited above; and *Grosaru*, cited above, § 46). The State's margin of appreciation remains wide in this field too, but cannot preclude the

Court's review of whether a given decision was arbitrary (see *Kovach*, cited above, § 55).

77. It should also be noted that the applicant had called for a re-examination of the ballot papers which had been declared blank, spoilt or disputed and a recount of the votes validly cast in the Charleroi constituency. He had not asked for the election to be declared void and for fresh elections to be held. In this connection, the Court has held that where irregularities in vote counting or in election documents may have affected the outcome of the elections, a fair procedure for recounting votes is an important safeguard as to the fairness and success of the entire election process (see *Kerimova*, cited above, § 49).

78. The Court reiterates, however, that the concept of free elections would be put at risk only if there was evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, and where complaints of such breaches received no effective examination at domestic level (see paragraph 72 above).

79. The Court must therefore ascertain firstly whether the applicant's allegations were sufficiently serious and arguable (*i*), and secondly, whether they received an effective examination (*ii*).

*(i) Whether the applicant's allegations were serious and arguable*

80. In support of his complaint, the applicant submitted that a number of irregularities and mistakes had occurred during the vote counting, which in his view had cast doubt on the election results in the Charleroi constituency. The Government argued that the mistakes noted had not undermined the reliability of the results.

81. As pointed out above (see paragraph 71), it is not for the Court to assume a fact-finding role by attempting to determine whether the irregularities alleged by the applicant took place and whether they were capable of influencing the outcome of the elections. Nevertheless, the Court must satisfy itself that the applicant's allegations were sufficiently serious and arguable (see *Davydov and Others*, cited above, § 289).

82. To that end, the Court notes that, unlike in the cases where the relevant domestic authorities had found that the alleged irregularities had not compromised the outcome of the elections (see *I.Z. v. Greece* and *Babenko*, both cited above), in the present case the Credentials Committee established that in several of the scenarios envisaged, the distribution of seats in the Charleroi constituency was liable to change if the blank, spoiled and disputed ballot papers were ultimately counted as valid votes. That change was also likely to affect the distribution of seats in other constituencies in Hainaut Province (see paragraph 18 above). This was confirmed by the plenary Walloon Parliament, although its decision also outlined scenarios in which the applicant's list would not have been a mere

fourteen votes short of qualifying for the "related lists" (*apparentement*) process, but 1,582 votes (see paragraph 21 above).

83. Hence in any event, it could not be ruled out that the applicant might have been declared elected following the recount he was seeking. Accordingly, contrary to what the Government argued, it cannot be maintained that the alleged mistakes would not have undermined the reliability of the results.

84. Moreover, the fact that the Credentials Committee concluded that the applicant's complaint was admissible and well-founded would tend to indicate that his allegations of irregularities were not manifestly devoid of any basis.

85. The foregoing considerations suffice for the Court to conclude that the applicant put forward sufficiently serious and arguable allegations that could have led to a change in the distribution of seats.

86. However, this does not necessarily mean that the Walloon Parliament should have upheld his demand for a recount. Although the recounting of votes is an important safeguard as to the fairness of the election process (see paragraph 77 above), it is not for the Court to determine precisely what action the authorities should have taken on the applicant's complaint. On the other hand, it is the Court's task to verify that the applicant's right to stand for election was effective; this would imply that his allegations, which were sufficiently serious and arguable, should have received an effective examination satisfying the requirements set out below.

*(ii) Whether the examination of the applicant's allegations was effective*

87. In order to determine whether the applicant's complaint received an effective examination, the Court must ascertain whether the relevant procedure provided for by domestic law afforded adequate and sufficient safeguards ensuring, in particular, that any arbitrariness could be avoided (see paragraph 70 above). Such safeguards serve to ensure the observance of the rule of law during the procedure for examining electoral disputes, and hence the integrity of the election, so that the legitimacy of Parliament is guaranteed and it can thus operate without the risk of any criticism of its composition. What is at stake is the preservation of the electorate's confidence in Parliament (see, *mutatis mutandis*, *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 99, 20 January 2020). In that respect, these safeguards ensure the proper functioning of an effective political democracy and thus represent a preliminary step for any parliamentary autonomy.

88. Admittedly, the rules concerning the internal functioning of a parliament, including the membership of its bodies, as an aspect of parliamentary autonomy, in principle fall within the margin of appreciation of the Contracting States (see paragraph 74 above). The discretion enjoyed

by the national authorities should nevertheless be compatible with the concepts of "effective political democracy" and "the rule of law" to which the Preamble to the Convention refers (ibid.). It follows that parliamentary autonomy can only be validly exercised in accordance with the rule of law.

89. The present case involves a post-election dispute relating to the result of the elections, that is to say, to the lawfulness and legitimacy of the composition of the newly elected parliament. In that context, the aim is to ensure that "the opinion of the people in the choice of the legislature", in the literal sense of the expression used in Article 3 of Protocol No. 1, is respected.

90. In that regard, the present case differs from disputes that may arise after the valid election of a candidate, that is to say, in respect of a full member of parliament at a time when the composition of the legislature has been approved in accordance with the procedure in force in the national system concerned (see, for example, *Kart v. Turkey* [GC], no. 8917/05, ECHR 2009 (extracts), concerning applications for the lifting of parliamentary immunity; *Podkolzina*, cited above, and *Berlusconi v. Italy* (striking out) (dec.) [GC], no. 58428/13, 27 November 2018, concerning the removal from office of a member of parliament; *G.K. v. Belgium*, no. 58302/10, 21 May 2019, concerning the disputed resignation of a senator; or *Karácsony and Others*, cited above, concerning fines imposed on representatives for their conduct in Parliament).

91. In the present case, however, at the time they examined and gave their decision on the applicant's complaint, both the Credentials Committee and the plenary Walloon Parliament were composed of members of parliament elected in the elections whose validity was being challenged by the applicant. Furthermore, at the time when the Walloon Parliament decided to reject the complaint, its members' credentials had not yet been approved and they had not been sworn in under Rule 7 §§ 1 and 6 of the Rules of Procedure of the Walloon Parliament (see paragraph 29 above). The Parliament had thus yet to be constituted.

92. This factor has to be taken into account in the weight attached by the Court to parliamentary autonomy when reviewing the observance of the rights guaranteed by Article 3 of Protocol No. 1.

93. In accordance with the Court's case-law (see paragraph 70 above), its review will focus in particular on: (α) the guarantees of impartiality provided by the decision-making body; (β) the extent and definition in law of its discretion; and (γ) whether the procedure was such as to guarantee a fair, objective and sufficiently reasoned decision.

(1) Guarantees of the impartiality of the decision-making body

94. First of all, the bodies responsible for examining the applicant's complaint should have provided sufficient guarantees of their impartiality

(see *Podkolzina*, cited above, § 35; *Kovach*, cited above, § 54; and *Riza and Others*, cited above, § 143).

95. In cases examined under Article 6 § 1 of the Convention where the impartiality of the judiciary had been challenged, the Court has held that any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009, and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 149, 6 November 2018). It has pointed out that even appearances may be of a certain importance in this regard (ibid.; see also *Denisov v. Ukraine* [GC], no. 76639/11, § 63, 25 September 2018).

96. The Court reiterates that, as it has consistently held, electoral disputes do not fall within the scope of Article 6 of the Convention since they do not concern the determination of "civil rights and obligations" or a "criminal charge" (see *Pierre-Bloch v. France*, 21 October 1997, §§ 51 and 53-59, *Reports of Judgments and Decisions* 1997-VI; *Cheminade v. France* (dec.), no. 31599/96, ECHR 1999-II; and *Riza and Others*, cited above, § 184). Nevertheless, in view of the fact that Article 3 of Protocol No. 1 seeks to strengthen citizens' confidence in Parliament by guaranteeing its democratic legitimacy (see paragraph 87 above), the Court considers that certain requirements also flow from that Article in terms of the impartiality of the body determining electoral disputes and the importance that appearances may have in this regard.

97. In the context of the right to free elections secured by Article 3 of Protocol No. 1, the requisite guarantees of impartiality are intended to ensure that the decision taken is based solely on factual and legal considerations, and not political ones. The examination of a complaint about election results must not become a forum for political struggle between different parties (see, *mutatis mutandis*, *Georgian Labour Party v. Georgia*, no. 9103/04, § 108, ECHR 2008).

98. In this connection, the Court has held that members of parliament cannot be "politically neutral" by definition (see *Ždanoka*, cited above, § 117). It follows that in a system such as the one in place in Belgium, where Parliament is the sole judge of the election of its members, particular attention must be paid to the guarantees of impartiality laid down in domestic law as regards the procedure for examining challenges to election results.

99. In its assessment, the Court will have regard, where necessary, to the standards developed and the recommendations issued by other European and international bodies, without, however, treating them as decisive (see, to similar effect, *mutatis mutandis*, *Muršić v. Croatia* [GC], no. 7334/13, § 111, 20 October 2016). Thus, in its Code of Good Practice in Electoral Matters, the Venice Commission noted that appeals to Parliament, as the judge of its own elections, could lead to political decisions, and that appeals of that kind were acceptable at first instance where they were long

established, but that in such cases a judicial appeal should then be possible at last instance (see paragraph 32 above). It emphasised that there should be adequate institutional and procedural safeguards against political and partisan decisions (see paragraph 63 above).

100. The Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) has raised the same concerns as the Venice Commission (see paragraphs 35 and 36 above). It has stated on several occasions in its reports on Belgium that the system currently provided for by Belgian law is inconsistent with the undertakings on democratic elections made by the OSCE member States (see paragraph 37 above).

101. The UN Human Rights Committee has likewise stated that in electoral matters, there should be independent scrutiny of the voting and counting process and access to judicial review or another equivalent process so that electors have confidence in the security of the ballot and the counting of the votes (see paragraph 39 above).

102. In the light of the foregoing, the question thus arises as to whether the system set up under Belgian law, as applied in the circumstances of the present case, afforded sufficient guarantees of impartiality.

103. In this connection, the Court observes that the applicant's complaint was initially examined by the Credentials Committee. The Committee had seven members drawn by lot from among all those elected to the Walloon Parliament (see paragraph 29 above). It was exclusively composed of members of parliament, and it was not required by law to be representative of the various political groups in Parliament.

104. The Government submitted that the two members of parliament sitting on the Credentials Committee who had been elected for the same constituency in which the applicant had stood had not taken part in the deliberations or the voting within the Committee; this was not disputed by the applicant. The Court observes, however, that at the material time, there was no provision in the Rules of Procedure of the Walloon Parliament or any other regulatory instrument for the withdrawal of the members of parliament concerned, and that they refrained voluntarily from taking part. Moreover, the conclusions of the Committee's report indicate that the members in question were nevertheless present during the deliberations on the applicant's complaint and voted on the final report to be submitted to the plenary Parliament, which included the opinion on the merits of the applicant's complaint (see paragraph 16 above).

105. In any event, the Credentials Committee's opinion was then submitted to the plenary Walloon Parliament, which did not follow the conclusions of the report. As the applicant rightly pointed out, the Walloon Parliament was the only body with the power under Belgian law to give a decision on his complaint (see paragraphs 24 and 29 above). During the examination of credentials, all the newly elected members of the Walloon

Parliament whose credentials had yet to be approved took part in voting on the applicant's complaint, including those elected in the same constituency in which he had stood.

106. Thus, contrary to the recommendations of the Venice Commission (see paragraphs 32, 33 and 63 above), the members elected in the applicant's constituency, who were his direct opponents, were not excluded from the voting in the plenary Walloon Parliament. The decision was therefore taken by a body that included members of parliament whose election could have been called into question if the applicant's complaint had been declared well-founded and whose interests were directly opposed to his own. However, the Court has previously held that an individual whose appointment as a member of parliament has been rejected has legitimate grounds to fear that the large majority of members of the body that reviewed the lawfulness of the elections, where those members represented other political parties, may have had an interest contrary to his own (see *Grosaru*, cited above, § 54).

107. The Court further reiterates that it must examine with particular care any measure which appears to operate solely, or principally, to the disadvantage of the opposition, especially where the nature of the measure is such that it affects the very prospect of opposition parties gaining power at some point in the future (see *Tănase*, cited above, § 179). In the present case, the risks of political decisions being taken on account of the foregoing considerations (see paragraphs 103-106 above) were not averted by the applicable voting rules. The decision on the applicant's complaint was taken by a simple majority. A voting regulation of that kind allowed the prospective majority to impose its own view, even though there would also be a significant minority. Thus, contrary to the Venice Commission's recommendations (see paragraph 64 above), the rule on voting by simple majority that was applied without any adjustment in this particular case was incapable of protecting the applicant – a candidate from a political party not represented in the Walloon Parliament prior to the elections of 25 May 2014 – from a partisan decision.

108. It follows that the applicant's complaint was examined by a body that did not provide sufficient guarantees of impartiality.

(2) Discretion enjoyed by the decision-making body

109. The Court has held that the discretion enjoyed by the body taking decisions in electoral matters cannot be excessive; it must be circumscribed, with sufficient precision, by the provisions of domestic law (see paragraph 70 above). The applicable rules must be sufficiently certain and precise (see *Ždanoka*, cited above, § 108). Although Article 3 of Protocol No. 1 does not contain an express reference to the "lawfulness" of any measures taken by the State, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Amuur*

*v. France*, 25 June 1996, § 50, *Reports* 1996-III, and *G.K. v. Belgium*, cited above, § 57). This principle entails a duty on the part of the State to put in place a regulatory framework for securing its obligations under the Convention in general and Article 3 of Protocol No. 1 in particular (see *Paunović and Milivojević v. Serbia*, no. 41683/06, § 61, 24 May 2016).

110. In the present case, neither the law nor the Rules of Procedure of the Walloon Parliament provided at the relevant time for a procedure to deal with complaints lodged under section 31 of the Special Law on institutional reform and Rule 7 of the Rules of Procedure of the Walloon Parliament.

111. Those two provisions confer exclusive jurisdiction on the Walloon Parliament to rule on the validity of electoral processes and on any disputes arising in relation to its members' credentials. They define the composition of the Credentials Committee and provide that any complaints concerning an election must, in order to be valid, be made in writing, be signed by one of the candidates standing, mention the complainant's identity and home address and be submitted within ten days from the publication of the results, and in any event before the examination of credentials, to the clerk of the parliament concerned. They specify that the Credentials Committee is to receive any complaints and documentation relating to elections and to report to the plenary Parliament, which gives the final decision on the Committee's findings.

112. However, the criteria that could be applied by the Walloon Parliament in deciding on complaints such as the one lodged by the applicant were not laid down sufficiently clearly in the applicable provisions of domestic law (see, *mutatis mutandis*, *Riza and Others*, cited above, § 176). Nor did those provisions specify the effects of decisions to uphold a complaint, in this particular instance the circumstances in which a recount should take place or the election should be declared void.

113. In this connection, the Court observes in addition that in their observations, the Government stated that the present case was the first occasion on which the Walloon Parliament had received a complaint under section 31 of the Special Law (see paragraph 59 above). They also accepted that on receiving the applicant's complaint, the Walloon Parliament had been compelled to observe that neither the Special Law nor its own Rules of Procedure laid down a sufficiently precise procedure for challenging the validity of elections (ibid.). For that reason, a procedure had been introduced for the purposes of the present case in order to provide the applicant with procedural safeguards.

114. In those circumstances, the Court considers that the discretion enjoyed by the Walloon Parliament was not circumscribed with sufficient precision by provisions of domestic law.

(3) Guarantees of a fair, objective and reasoned decision

115. The Court has also held that the procedure in the area of electoral disputes must guarantee a fair, objective and sufficiently reasoned decision (see *Podkolzina*, cited above, § 35, and *Davydov and Others*, cited above, § 275).

116. In particular, complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing. In this way, their right to an adversarial procedure is safeguarded. In addition, it must be clear from the public statement of reasons by the relevant decision-making body that the complainants' arguments have been given a proper assessment and an appropriate response (see, to similar effect, *Babenko*, cited above; *Davydov and Others*, cited above, §§ 333-34; and *G.K. v. Belgium*, cited above, §§ 60-61).

117. In the present case, neither the Constitution, nor the law, nor the Rules of Procedure of the Walloon Parliament as applicable at the material time, provided for an obligation to ensure safeguards of this kind during the procedure for examination of credentials (see paragraphs 23-29 above).

118. In practice, however, the applicant did enjoy the benefit of certain procedural safeguards during the examination of his complaint by the Credentials Committee (see paragraph 15 above). He and his lawyer were both heard at a public sitting and the Committee gave reasons for its findings. Furthermore, the Walloon Parliament's decision likewise contained reasons and the applicant was notified of it.

119. The Court considers, however, that the safeguards afforded to the applicant during the procedure were not sufficient. In the absence of a procedure laid down in the applicable regulatory instruments, those safeguards were the result of *ad hoc* discretionary decisions taken by the Credentials Committee and the plenary Walloon Parliament. They were neither accessible nor foreseeable in their application (see, among other authorities, as regards the requirements on quality of the law, which are common to the entire Convention, *De Tommaso v. Italy* [GC], no. 43395/09, §§ 106-09, 23 February 2017). The Court reiterates that the requirements of Article 3 of Protocol No. 1, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, § 83, ECHR 2002-I). That is one of the consequences of the rule of law.

120. Moreover, most of these safeguards were only afforded to the applicant before the Credentials Committee (see paragraph 118 above), which did not have any decision-making powers and whose conclusions were not followed by the Walloon Parliament. Admittedly, the Walloon Parliament did give reasons for its decision (ibid.). However, it did not

explain why it had decided not to follow the Committee's opinion, even though the Committee had expressed the view, on the same grounds as were referred to by the Parliament, that the applicant's complaint was admissible and well-founded and that all the ballot papers from the Charleroi constituency should be recounted by the Federal Department of the Interior (see paragraph 21 above).

121. In this connection, the Court notes that in 2017, long after the events at issue in the present case, the Rules of Procedure of the Walloon Parliament were amended, and that they now provide for three credentials committees, formed by drawing of lots from among the members of parliament representing constituencies other than the ones concerned (see paragraph 30 above). Furthermore, regulations establishing the procedure for examining complaints concerning the election of the Walloon Parliament were adopted on 25 April 2018. The regulations provide for a number of procedural safeguards: complaints are examined by the Credentials Committee at a public sitting; the complainant is given a hearing, and may be assisted by a lawyer in making his or her submissions; members of the Committee may put questions, request documents, interview witnesses and order a recount of ballots before formulating their draft decision; and reasons are given for the draft decision (see paragraph 31 above).

*(iii) Conclusion*

122. It follows from all the foregoing considerations that the applicant's complaint was examined by a body which did not provide the requisite guarantees of its impartiality (see paragraph 108 above) and whose discretion was not circumscribed with sufficient precision by provisions of domestic law (see paragraph 114 above). The safeguards afforded to the applicant during the procedure were likewise insufficient, having been introduced on a discretionary basis (see paragraph 119 above). The Court thus concludes that the applicant's grievances were not dealt with in a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure their effective examination in accordance with the requirements of Article 3 of Protocol No. 1.

123. There has therefore been a violation of that Article.

## II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 3 OF PROTOCOL No. 1

124. The applicant also complained that his appeal to the Walloon Parliament had not constituted an effective remedy within the meaning of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

125. In cases relating to post-election disputes, the Court has made a distinction according to whether the disputes had been examined by a judicial body at domestic level (see, among other authorities, *Riza and Others*, cited above, § 94, and *Paunović and Milivojević*, § 68, with further references). Where the domestic law entrusted the consideration of post-election disputes to a judicial body, the Court has examined the case under Article 3 of Protocol No. 1 alone, finding that there was no need for a separate assessment under Article 13 of the Convention (see, for example, *Podkolzina*, cited above, § 45; *Kerimova*, cited above, §§ 31-32; *Gahramanli and Others*, cited above, § 56; *Davydov and Others*, cited above, § 200; and *Abdalov and Others v. Azerbaijan*, nos. 28508/11 and 33773/18, § 108, 11 July 2019), or that no separate issue arose under that Article (see *Riza and Others*, cited above, § 95).

126. On the other hand, where the post-election dispute had not been examined by a judicial body at domestic level, the Court has conducted a separate assessment of the complaint under Article 13 (see *Grosaru*, cited above, and *Paunović and Milivojević*, cited above). Accordingly, since there was no examination by a judicial body in the present case, the Court will carry out a separate assessment under that Article.

127. The Court further notes that this complaint is intrinsically linked to the complaint it has examined above, and must likewise be declared admissible.

### A. The parties' submissions

128. The applicant submitted that the only available remedy in the present case, that is to say the lodging of a complaint with the Walloon Parliament, could not be regarded as an effective remedy in view of that body's lack of impartiality.

129. The Government contended that the remedy provided by Belgian law of an appeal to the Walloon Parliament made it possible to deal with any election-related complaints by candidates. The fact that such jurisdiction was conferred on a non-judicial body was not *per se* incompatible with Article 13 of the Convention, inasmuch as States enjoyed a wide discretion in that sphere. It was thus generally accepted in Belgium that appeals lodged with Parliament in electoral matters were judicial in nature. The Government gave examples from Belgian parliamentary history where elections had been declared void and votes had been recounted, with the aim of demonstrating that the system was also effective in its implementation. Accordingly, they contended that the applicant had had access to an effective remedy before a body that was competent to deal with

his complaint and whose power had been circumscribed by a law guaranteeing the impartiality of its decision. The specificities of the Belgian institutional system meant that parliamentary autonomy had been and remained the best way for the Walloon Parliament to properly meet the requirements of an effective remedy.

### B. The Court's assessment

#### *1. Principles established in the Court's case-law*

130. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, *mutatis mutandis*, *Chahal v. the United Kingdom*, 15 November 1996, § 152, *Reports* 1996-V; *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 148, ECHR 2014; and *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 240, 13 February 2020).

131. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII; *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 268, 15 December 2016; and *De Tommaso*, cited above, § 179). The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Kudła*, cited above, § 157, and *Khlaifia and Others*, cited above, § 268).

#### *2. Application of those principles in the present case*

132. Since the Court has concluded that there has been a violation of Article 3 of Protocol no. 1 (see paragraph 123 above), it can be inferred that the applicant had an "arguable" complaint, thus requiring that he should have had an effective remedy by which to complain of the breaches of his rights under the Convention and the Protocol and to be granted appropriate relief (see, to similar effect, *De Tommaso*, cited above, § 181).

133. The question arising is whether the remedy available to the applicant for challenging the election results and seeking a recount of

certain ballot papers in his constituency was "effective" in the sense that it could either have prevented the alleged violation or its continuation, or granted him appropriate relief for any violation that had already occurred.

134. In the present case, the applicant had, and made use of, the opportunity to submit a complaint to the Walloon Parliament in order to raise his grievances about the election results. As the system in Belgium currently stands, no other remedy is available following the decision by the Walloon Parliament, whether before a judicial authority or any other body. Indeed, domestic law confers exclusive jurisdiction on the Walloon Parliament to rule on the validity of elections as regards its members (see paragraph 24 above). Pursuant to those provisions, the courts decline jurisdiction to deal with disputes concerning post-election issues (see paragraph 26 above).

135. The Court has concluded, under Article 3 of Protocol No. 1, that the procedure for complaints to the Walloon Parliament did not provide adequate and sufficient safeguards ensuring the effective examination of the applicant's grievances (see paragraph 122 above). Therefore, in the absence of such safeguards, this remedy can likewise not be deemed "effective" within the meaning of Article 13 of the Convention.

136. That finding is sufficient for the Court to conclude that there has been a violation of Article 13 of the Convention in conjunction with Article 3 of Protocol No. 1.

137. The Court has held that the "authority" referred to in Article 13 of the Convention does not necessarily have to be a judicial authority in the strict sense (see *Kudła*, cited above, § 157, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 149). In a case concerning a post-election dispute about the election results and the distribution of seats, it is necessary and sufficient for the competent body to offer sufficient guarantees of its impartiality, for its discretion to be circumscribed with sufficient precision by the provisions of domestic law and for the procedure to afford effective guarantees of a fair, objective and sufficiently reasoned decision (see paragraph 70 above).

138. Having regard to the subsidiarity principle and the diversity of the electoral systems existing in Europe (see paragraphs 40-47 above), it is not for the Court to indicate what type of remedy should be provided in order to satisfy the requirements of the Convention (see, *mutatis mutandis*, *Paunović and Milivojević*, cited above, § 60). This question, closely linked to the principle of the separation of powers, falls within the wide margin of appreciation afforded to Contracting States in organising their electoral system (see *Hirst*, cited above, § 61, and *Ždanoka*, cited above, § 115, with further references).

139. That said, it should be noted that a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, is in principle such as to satisfy the requirements of Article 3 of Protocol No. 1.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

#### *1. Pecuniary damage*

141. The applicant submitted that by losing the chance of election to the Walloon Parliament he had sustained damage requiring redress. Having regard to the circumstances, he estimated the loss of his election prospects at a probability of around 75%. Taking account of all the allowances he would have been paid had he been elected, minus the remuneration received from his professional activities during the relevant parliamentary term, he assessed the pecuniary damage he had sustained at 108,415.16 euros (EUR).

142. The Government submitted that this claim should be rejected in the absence of proof that the applicant would have been elected if there had been a recount.

143. The Court considers that it cannot speculate as to what the outcome of the election process would have been if it had been accompanied by adequate and sufficient safeguards ensuring the effective examination of the applicant's complaint (see, to similar effect, *Grosaru*, cited above, § 67). It therefore rejects the applicant's claim in respect of pecuniary damage.

#### *2. Non-pecuniary damage*

144. The applicant explained that the fact that he had been unable to avail himself of an effective remedy before a genuinely impartial and independent body in connection with such a fundamental aspect of democracies as the electoral process had caused him to feel a deep sense of injustice. On that account he claimed the sum of EUR 2,000.

145. The Government submitted that there was no causal link between the claim and any violations which the Court might find. In their opinion, the possible finding of a violation would in itself constitute just satisfaction for the applicant.

146. The Court considers, in the light of the circumstances of the case, that the proceedings in issue indisputably caused the applicant non-pecuniary damage for which the finding of a violation in this judgment does not afford sufficient redress (see, to similar effect, *G.K. v. Belgium*, cited above, § 73). It therefore awards him the sum claimed, namely EUR 2,000.

### B. Costs and expenses

147. The applicant submitted a breakdown of the fees and expenses billed by his lawyers for representing him. His lawyers had charged an hourly rate of EUR 80. Producing invoices in support of his claim, the applicant sought a total of EUR 12,915.14 in respect of costs and expenses.

148. The Government did not express a view.

149. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum claimed.

### C. Default interest

150. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 3 of Protocol No. 1;

3. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 3 of Protocol No. 1;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 12,915.14 (twelve thousand nine hundred and fifteen euros and fourteen cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Johan Callewaert
Deputy to the Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Turković and Lemmens;
(b) joint concurring opinion of Judges Lemmens and Sabato;
(c) concurring opinion of Judge Wojtyczek.

L.A.S.
J.C.

# JOINT CONCURRING OPINION OF JUDGES TURKOVIĆ AND LEMMENS

*(Translation)*

1. We agree with the findings of a violation of Article 3 of Protocol No. 1 and of Article 13 of the Convention.

In this separate opinion, we would like to focus on one aspect of the reasoning under Article 13 of the Convention, namely the type of remedy required by that Article in order to challenge the results of an election.

2. In relation to Article 13 of the Convention, the judgment concludes that the applicant did not have an "effective remedy" in that the Walloon Parliament, which examined his complaint at first and last instance, did not provide "adequate and sufficient safeguards ensuring the effective examination of the applicant's grievances" (see paragraph 135 of the judgment). For our esteemed colleagues, this conclusion is sufficient to find a violation of Article 13 (see paragraph 136 of the judgment). They proceed no further. They take the view that it falls within the Contracting States' margin of appreciation to organise their own electoral system (see paragraph 138 of the judgment). Nevertheless, they suggest that "a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, is in principle such as to satisfy the requirements of Article 3 of Protocol No. 1" (see paragraph 139 of the judgment).

3. For our part, although we are attached to the principle of the subsidiarity of the Court's review, we would have preferred the Court to take a clear stand and to infer from Article 13 a proper obligation to provide for a judicial or quasi-judicial remedy in respect of decisions taken by a parliament in electoral matters.

Such an interpretation of Article 13 would be fully in accordance with the developments that can be observed in the constitutional systems of the Council of Europe member States. Already in 2010, the Court noted that "several [of these] States have adopted judicial review and only a few States still maintain purely political supervision of elections" (see *Grosaru v. Romania*, no. 78039/01, § 56, ECHR 2010). It can be seen from the overview of existing systems outlined in the present judgment that in the vast majority of States, a judicial remedy is available (see paragraphs 44-45 of the judgment). Indeed, only "a few States", including Belgium, have kept a system in which electoral disputes are resolved by the parliament itself, without any possibility of appealing against its decisions (see paragraphs 41-42 of the judgment).

4. The Venice Commission is likewise of the view that the possibility of a complaint to the parliament alone cannot satisfy the requirements of an effective remedy. While there is nothing to "prevent appeals being made in parliaments concerning their own election", in such cases an appeal to a

court must be possible, so that the court can give the final decision. "Where electoral appeals do not concern political issues outside the supervision of the courts, the protection of the right to free elections ... implies the existence of a judicial remedy" (third-party comments by the Venice Commission; see paragraph 63 of the judgment).

It is perhaps unnecessary to go so far as to require a remedy before a judicial body. A quasi-judicial body may also satisfy the requirements of Article 13 of the Convention provided that it offers sufficient procedural guarantees (see paragraph 137 of the judgment, and the judgments cited therein).

5. What conclusions can be drawn from the present judgment?

While in theory, according to the judgment, States have the choice between a complaint to the parliament and an appeal, at least at final instance, to a judicial or quasi-judicial body, there are sound reasons for believing that in practice, only the latter option is open (see, to similar effect, the concurring opinion of our colleague Judge Wojtyczek, paragraph 9). It is hard to see how a parliament constituted following elections whose results are disputed could be regarded as objectively impartial, whereas impartiality is one of the conditions that the decision-making body must satisfy (see, in relation to Article 3 of Protocol No. 1, paragraphs 70 and 94-108 of the judgment). As the Court has previously held, members of parliament "cannot be 'politically neutral' by definition" (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 117, ECHR 2006-IV, cited in paragraph 98 of the present judgment), especially when they have to take a decision that could have consequences in terms of their own election or the respective influence that the different political parties will have within the parliament.

How then can a complaint to the parliament, with no possibility of appeal, satisfy the requirements of Article 13?

# JOINT CONCURRING OPINION OF JUDGES LEMMENS AND SABATO

*(Translation)*

1. We agree with the findings of a violation of Article 3 of Protocol No. 1 and of Article 13 of the Convention.

In this separate opinion, we would like to focus on one aspect of the reasoning under Article 3 of Protocol No. 1, namely the discretion enjoyed by the decision-making body in electoral matters.

2. In paragraph 70 of the judgment, the Court sets out the three conditions which the decision-making process concerning challenges to election results must satisfy from the standpoint of Article 3 of Protocol No. 1 in order for the examination of appeals to be effective. The second of these conditions is that "the discretion enjoyed by [the competent body] must not be excessive; it must be circumscribed with sufficient precision by the provisions of domestic law". This condition is reiterated in paragraph 109 of the judgment.

The condition in question originated in the *Podkolzina v. Latvia* judgment (no. 46726/99, § 35, ECHR 2002-II). This case concerned a decision to remove the applicant's name from the list of candidates in parliamentary elections on account of her allegedly insufficient knowledge of Latvian. The Court held that States had a wide margin of appreciation when establishing eligibility conditions, but that decisions finding that a particular candidate had failed to satisfy those conditions had to comply with a number of criteria framed to prevent arbitrary decisions, and that the decision-making process accordingly had to satisfy three conditions, namely those referred to in paragraph 70 of the present judgment (see *Podkolzina*, cited above, § 35). In that case, the Court found that the second condition had not been met, since "the full responsibility for assessing the applicant's linguistic knowledge was left to a single civil servant, who had exorbitant power in the matter" (ibid., § 36).

Since the *Podkolzina* case, the "discretion" in question has always been construed as relating to the assessment by the competent body of certain "conditions" laid down in domestic law. These conditions may concern, for example, the eligibility of candidates (see, besides *Podkolzina*, cited above, *Ādamsons v. Latvia*, no. 3669/03, §§ 121 and 125, 24 June 2008, and *Ofensiva tinerilor v. Romania*, no. 16732/05, §§ 56-59, 15 December 2015), the lawfulness of an election and the validity of election results (see *Kovach v. Ukraine*, no. 39424/02, §§ 54 and 57-59, ECHR 2008, and *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, §§ 143 and 172-76, 13 October 2015), the allocation of seats on the basis of election results (see *Grosaru v. Romania*, no. 78039/01, §§ 47 and 49-52, ECHR 2010), or the

validity of an elected representative's resignation (see *G.K. v. Belgium*, no. 58302/10, §§ 57-59, 21 May 2019).

The fact that in the present case there were no clear rules concerning the procedure to be followed by the Credentials Committee and the plenary Walloon Parliament, and that a particular procedural arrangement was adopted for the needs of the applicant's case (see paragraphs 110-11 and 113 of the judgment), has no connection in our view to the condition concerning the extent of the parliament's discretion.

3. In fact, the procedure forms the subject of another condition, the third one laid down in *Podkolzina* (cited above, § 35): "the procedure ... must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority". This condition is reiterated in paragraph 70 of the present judgment, where it is stated that "the procedure must be such as to guarantee a fair, objective and sufficiently reasoned decision"; the observance of this condition is then assessed in paragraphs 115-21 of the judgment, under the heading "Guarantees of a fair, objective and reasoned decision". It is in the context of this examination that the lack of clear procedural rules is (once again) mentioned (see paragraph 117 of the judgment).

In our opinion, this is indeed the context in which this factor is relevant. If there are no clear, predefined procedural rules, the system for post-election disputes will not protect those concerned against potential abuses.

4. We regret that a certain confusion between the two above-mentioned conditions – the one concerning the discretion enjoyed by the decision-making body and the one concerning procedural guarantees – appears to have found its way into the reasoning of the judgment.

# CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I fully subscribe to the operative part of the instant judgment; I would nonetheless like to express certain reservations concerning the reasoning. They pertain, on the one hand, to the general methodology of Convention interpretation and, on the other hand, to certain detailed issues of electoral law.

2. The case raises important issues of treaty interpretation. They are connected with the fact that the power of Parliament to adjudicate on disputes concerning the election of its members belongs to the constitutional traditions of a few Council of Europe member States.

3. The interpretation of the Convention should take into account the guidelines enshrined in its Preamble. Three elements of the Preamble appear to be of particular relevance. Firstly, the Preamble reminds us that "the aim of the Council of Europe is the achievement of greater unity between its members". In case of doubt, the Court should prefer an interpretation which contributes to the achievement of greater unity between the High Contracting Parties and avoid interpretative decisions which may cause divisions among them. The interpretation and application of the Convention should be aimed at devising legal solutions which best reconcile various legal traditions and fit different legal systems. Secondly, the Preamble contains a reference to "a common understanding and observance of the Human Rights". Thirdly, the Preamble further refers to "European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law".

The "common understanding of the Human Rights" and the "common heritage of political traditions, ideals, freedom and the rule of law" set clear limits to the European project of collective human rights protection and co-define the limits of the mandate entrusted to the European Court of Human Rights. The dynamic of the whole system in general and the so-called "evolutive interpretation" in particular should not go beyond the scope of common ideals and principles and should avoid – to the largest possible extent – imposing legal standards which are not accepted as belonging to this common legal heritage (compare: my dissenting opinion appended to the judgment in the case of *Firth and Others v. the United Kingdom*, nos. 47784/09 and 9 others, 12 August 2014, paragraph 3, and the joint dissenting opinion of Judges Pejchal and Wojtyczek appended to the judgment in the case of *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, 14 December 2017, paragraphs 2 and 5). Against this backdrop, the references to the "common understanding of the Human Rights" and to the "common heritage of political traditions, ideals, freedom and the rule of law" also constitute the legal basis for inferring the directive that the Convention should be interpreted in a way which protects national constitutional identities. It should be stressed that these guarantees against

undue international interference extend beyond the scope of national constitutional identities and encompass other elements of national constitutional law which co-define the common constitutional heritage (compare my dissenting opinion appended to the judgment in the case of *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, paragraph 14).

The collective enforcement of human rights referred to in the Preamble to the Convention consists in transforming general and vague common principles and ideals into more specific and precise legal rules defining the common standards of human rights protection. More or less vague common principles and ideals are concretised and transformed, as a first step, into legal provisions of the Convention, which in turn may be – if necessary and within the strict limits set forth by the applicable rules of treaty interpretation – concretised and transformed, as a second step, by the case-law into more precise and judicially enforceable legal rules.

At the same time, it is clear that the common legal heritage at the foundation of the Convention and its interpretation cannot be equated with a mere juxtaposition of legal rules common to all member States. It is necessary to distinguish between a common core of fundamental principles on the one hand and, on the other hand, elements of legal systems which are of secondary importance and which reflect a great variety of legal views and national approaches in law. The enforcement of fundamental common principles may occasionally collide with detailed rules of national legal systems and exceptionally may even collide with some legal rules of constitutional rank. More specifically, blind spots in the system of rule-of-law guarantees do not belong to the core of the common constitutional heritage, even if they are deeply rooted in a national constitutional tradition.

4. The empowerment of the houses of Parliament to adjudicate on disputes concerning the election of their members was initially a measure ensuring the autonomy of those houses *vis-à-vis* the monarch and, more generally, the executive branch of the government. This solution was adopted in eighteenth and nineteenth-century constitutionalism, during a period when the judicial branch had not yet won the trust it enjoys today. A. Esmein has explained the logic of this system, in the context of the French constitutional regime, in the following terms:

> "« Chacune des Chambres est juge de l'éligibilité de ses membres et de la régularité de leur élection » 1. L. const. 16 juillet 1875, art. 10. C'est une prérogative qui a surtout une importance politique; c'est avant tout une arme défensive aux mains des assemblées contre le pouvoir exécutif. ... Si ce droit ne lui appartenait pas, en cas de contestation, il faudrait soumettre le litige aux tribunaux. On peut craindre encore de leur part une complaisance pour le pouvoir exécutif ou la formation de jurisprudences contraires ou changeantes, enfin, peut-être aussi des sentences légales mais inutilement rigoureuses. La Constitution fait de chaque Assemblée l'unique et souverain juge de ces questions, malgré les inconvénients qui peuvent résulter de ce système et dont il sera bientôt parlé. Le souci de leur indépendance prime toute autre considération." (A. Esmein, *Éléments de droit constitutionnel français et comparé*, Librairie de la société du Recueil Sirey, Paris, 1914, 6th ed., pp. 928-29)[1]

Given that in numerous countries the system of parliamentary adjudication of disputes entailed political abuses, it was gradually replaced by judicial review.

Although parliamentary autonomy belongs to the core of the common European constitutional heritage, the power to adjudicate on disputes concerning the election of members of parliament is certainly not an element of this core. Moreover, looking from the perspective of the national legal system of the respondent State, the power of the parliament to examine electoral appeals does not appear to be an important element of the national constitutional regime, let alone a constitutive element of the Belgian constitutional identity.

As rightly assumed in the reasoning of the judgment, parliamentary autonomy begins in principle once the parliament is constituted (see paragraphs 89-92). The empowerment of the parliament to adjudicate on electoral appeals is a constitutional remnant of the early stage of constitutionalism. It does not reflect any fundamental axiological or political choice. It has nothing to do with fundamental societal issues. It does not serve any specific and accepted legal purpose which could be justified, for instance, by the idea of non-justiciability of certain issues or the necessity to keep judges out of "the political thicket". There are neither strong axiological nor political reasons to uphold such a system. Its abandonment would serve much better the fundamental principles of the rule of law and effective political democracy.

5. The general underlying assumption of the approach developed in the judgment is the "proceduralisation" of Article 3 of Protocol No. 1, consisting in focusing on the existence of formal guarantees of fair elections and trying to avoid considering the substantive standards of fair elections. I note in this context that not all irregularities in the electoral process may be reduced to the question "whether the examination of an applicant's allegations was effective". Electoral appeals may be well-founded but nonetheless prove unsuccessful, even if the State complies with all the procedural guarantees imposed by Article 3 of Protocol No. 1. In such cases, it may be necessary to look at the gist of the alleged irregularities from the viewpoint of the substantive standards of fair elections.

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[1] "'Each of the Houses shall be the judge of the eligibility of its members and the lawfulness of their election' (Constitution of 16 July 1875, Article 10). This is a prerogative whose importance is above all political; it is above all a defensive weapon in the hands of the assemblies against the executive. ... If it did not enjoy that right, any disputes would have to be brought before the courts. It may still be feared that they would show deference to the executive or would adopt contradictory or changing positions, and indeed maybe also lawful but needlessly rigorous decisions. The Constitution makes each assembly the sole and sovereign judge over these matters, despite the disadvantages that may result from this system, which will be discussed shortly. The concern for their independence prevails over all other considerations."

6. Concerning the detailed issues of electoral law, I would like to note first that the reasoning stresses the following in paragraph 71:

> "In the specific context of electoral disputes, the Court is not required to determine whether the irregularities in the electoral process alleged by the parties amounted to breaches of the relevant domestic law (see *Namat Aliyev*, cited above, § 77)."

I am not persuaded that such an approach is tenable. Firstly, national electoral law determines the rules of political competition and is at the foundation of certain legitimate expectations of the competitors. Certain practices become serious irregularities in the electoral process only because they violate the rules of the game enshrined in the domestic law. In the instant case, the irregularities alleged by the applicant in the counting of the votes and the distribution of the seats consisted in violations of the rules of national law. The applicant has not alleged that the respondent State, in counting the votes and distributing parliamentary seats among the candidates, violated the general European standards of free elections as such. Secondly, the instant case shows that the Court has to determine whether an applicant had at least an arguable claim that the domestic law had been violated. For this purpose, it is necessary to look at the rules of domestic law. Thirdly, as stated above, at least in some cases it will be necessary to examine the observance of the substantive standards of free elections (see, for instance, *Communist Party of Russia and Others v. Russia*, no. 29400/05, §§ 123-28, 19 June 2012) and, moreover, to do so in the light of domestic law (see, for instance, *Yumak and Sadak v. Turkey* [GC], no. 10226/03, §§ 116-48, ECHR 2008; *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, §§ 76-81, ECHR 2012; *Oran v. Turkey*, nos. 28881/07 and 37920/07, §§ 55-68, 15 April 2014; and *Mihaela Mihai Neagu v. Romania* (dec.), no. 66345/09, §§ 34-42, 6 March 2014).

7. Paragraphs 109 to 114 of the judgment are placed under the subheading "Discretion enjoyed by the decision-making body". I note that despite the wording of the subheading (referring to substantive law issues), this part of the reasoning addresses not only substantive but also procedural issues. The latter belong rather under the subsequent subheading, "Guarantees of a fair, objective and reasoned decision".

The reasoning states the following:

> "112. However, the criteria that could be applied by the Walloon Parliament in deciding on complaints such as the one lodged by the applicant were not laid down sufficiently clearly in the applicable provisions of domestic law (see, *mutatis mutandis*, *Riza and Others*, cited above, § 176). Nor did those provisions specify the effects of decisions to uphold a complaint, in this particular instance the circumstances in which a recount should take place or the election should be declared void.
>
> ...

> 114. ... [T]he discretion enjoyed by the Walloon Parliament was not circumscribed with sufficient precision **by the provisions of domestic law**."

In my view, this issue has not been properly considered. Firstly, legal rules should not be equated with provisions of law. Without entering into extensive legal theoretical considerations, it suffices to note here very briefly, in particular, that in numerous legal systems there are valid legal rules which do not have a textual basis in legal *provisions*. Secondly, the reasoning looks only at specific provisions of domestic law without trying to establish the totality of the applicable relevant legal rules and principles of law. In particular, it fails to consider whether the general principle of proportionality is applicable and circumscribes the discretion of the parliament. One also has to note here that certain principles guiding the bodies adjudicating in electoral matters have been developed in the Court's case-law (see, for instance, *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, §§ 153-79, 13 October 2015; *Davydov and Others v. Russia*, no. 75947/11, §§ 335-38, 30 May 2017; and *Kovach v. Ukraine*, no. 39424/02, §§ 54-62, ECHR 2008). These principles circumscribe the powers of the Walloon Parliament. Thirdly, it does not appear necessary to adopt very specific legal rules if general legal principles would offer sufficient guidance to the decision-making body. In any event, the main guiding principle should be that of adequacy: the reaction of the body competent to examine electoral appeals should be adequate to the nature of the irregularities established and should especially take into account their impact upon the outcome of the elections.

8. The reasoning states the following (see paragraph 107 of the judgment):

> "The Court further reiterates that it must examine with particular care any measure which appears to operate solely, or principally, to the disadvantage of the opposition, especially where the nature of the measure is such that it affects the very prospect of opposition parties gaining power at some point in the future (see *Tănase*, cited above, § 179). In the present case, the risks of political decisions being taken on account of the foregoing considerations (see paragraphs 103-106 above) were not averted by the applicable voting rules. The decision on the applicant's complaint was taken by a simple majority. A voting regulation of that kind allowed the prospective majority to impose its own view, even though there would also be a significant minority. Thus, contrary to the Venice Commission's recommendations (see paragraph 64 above), the rule on voting by simple majority that was applied without any adjustment in this particular case was incapable of protecting the applicant – a candidate from a political party not represented in the Walloon Parliament prior to the elections of 25 May 2014 – from a partisan decision."

The reasoning also refers to the submissions of the Venice Commission. The Venice Commission has expressed the following view on this point (see paragraph 32 of its third-party comments submitted in the present case):

> "Obviously, it is not only at first instance that the 'judges' must be impartial, including in the case of political assemblies or non-judicial bodies such as electoral

> commissions. The composition of the relevant body and the voting rules must leave as little scope as possible for partisan decisions, in keeping with the requirement for objective impartiality that applies in judicial proceedings [footnote omitted]. Direct opponents must be excluded in each case. The rules on majorities required for decisions must ensure fair representation. Clearly, it is within this set of rules that the greatest risk of lack of objectivity in purely parliamentary systems lies. The issue is not, however, that much different from that of partisan electoral commissions (whose members are appointed by political parties), which are very often appeal bodies. It is therefore possible to draw on the recommendation in the Code of Good Practice in Electoral Matters, which considers it at least 'desirable that electoral commissions take decisions by a qualified majority or by consensus' [footnote omitted]."

The reasoning quoted above from paragraph 107 of the judgment unequivocally criticises the simple majority rule and recommends that this rule should have been applied in the Walloon Parliament with "adjustments", suggesting a qualified majority. This part of the reasoning does not appear to reflect the Venice Commission's recommendations accurately. The Venice Commission does not recommend that a parliament should decide upon electoral appeals by a qualified majority.

The above-mentioned paragraph 107 also triggers more fundamental objections. Replacing the simple majority rule by a qualified majority does not appear to be a good solution because it enables the parliamentary minority to block any decision. There is a serious risk of denial of justice and a strong incitement to negotiate a political arrangement within the parliament rather than to render a decision based on the law. The solution recommended in the above-mentioned paragraph is therefore dysfunctional.

9. The reasoning rightly states the following (see paragraph 98 of the judgment):

> "In this connection, the Court has held that members of parliament cannot be 'politically neutral' by definition (see *Ždanoka*, cited above, § 117)."

It also expresses the following view (see paragraph 137):

> "The Court has held that the 'authority' referred to in Article 13 of the Convention does not necessarily have to be a judicial authority in the strict sense (see *Kudła*, cited above, § 157, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 149). In a case concerning a post-election dispute about the election results and the distribution of seats, it is necessary and sufficient for the competent body to offer sufficient guarantees of its impartiality, for its discretion to be circumscribed with sufficient precision by the provisions of domestic law and for the procedure to afford effective guarantees of a fair, objective and sufficiently reasoned decision (see paragraph 70 above)."

The only possible conclusion is that an electoral appeal should be examined at least at final instance by an independent and extra-parliamentary body. Only such a body can offer sufficient guarantees of its impartiality. A body consisting of members of parliament will necessarily have the fundamental flaws pointed out in the reasoning.

10. The judgment engages in a laudable endeavour to accommodate the legal traditions of certain States of the Council of Europe where appeals

against irregularities in parliamentary elections are examined by the parliaments. However, it may be criticised because of the failure to develop a structured approach to the European constitutional heritage and also because of the reluctance to clearly draw the – only possible – conclusion that the empowerment of the parliament to examine electoral appeals at final instance cannot be reconciled with the standards set out in the reasoning.