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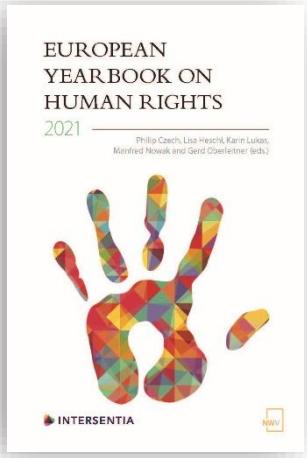

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THE RIGHT TO AN EFFECTIVE (AND JUDICIAL) EXAMINATION OF ELECTION COMPLAINTS

Eirik Holmøyvik

ABSTRACT

In its case law the European Court of Human Rights (ECtHR, the Court) holds the effective examination of election complaints as one of the essential guarantees of free and fair elections. For just over a decade, the Court has adopted an institutional approach to election disputes by interpreting Article 3 of Protocol No. 1 to the European Convention of Human Rights (ECHR) to contain a positive obligation for states to maintain a domestic system for effective examination of individual complaints and appeals concerning electoral rights. This contribution endeavours to provide an overview of the procedural requirements for effective examination as developed in the case law and what it means for existing election dispute resolution systems in the Member States. In particular, this contribution argues that the seminal Grand Chamber decision in *Mugemangango v Belgium* from 2020 will require fundamental changes in all Member States where parliament

is the judge of its own elections. On a more general level, the contribution argues that this decision may herald a shift in the Court's traditionally state deferent approach to Article 3 of Protocol No. 1 in favour of a more substantive approach to democracy.

1. INTRODUCTION

Democracy lies at the heart of the European Convention of Human Rights (ECHR).[1] Its preamble maintains that fundamental freedoms 'are best maintained by an effective political democracy'. In its case law, the European Court of Human Rights (ECtHR) has also underscored that '[d]emocracy is without doubt a fundamental feature of the European public order.'[2] Articles 10 on freedom of expression and 11 on the right to assembly are key prerequisites for a well-functioning democracy, and clauses in other convention rights require interferences to be necessary in a democratic society. Whilst these concepts are well known from the ECtHR's case law, Article 3 of Protocol No. 1 of the ECHR also protects the fundamental element of democracy itself, which underpins the other Convention rights. This is the right to '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'.

As of 2020, the ECtHR and the Commission before it had found violations of Article 3 of Protocol No. 1 in 102 cases, with 54 of them in the last ten years.[3] While violations of Article 3 of Protocol 1 only make up a tiny fraction (0.5%) of the total number of violations found by the ECtHR, the number of complaints is increasing, and a number of important decisions in recent years suggests that the ECtHR has added new emphasis on the right to free elections for the Convention system.[4]

Commentators have previously remarked that Article 3 of Protocol No. 1 is an 'unsatisfactory text, which is the result of a compromise, and which continues to give rise to problems of interpretation.'[5] Unlike the other articles of

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1 On the concept of democracy in the ECHR, see H.-M. Ten Napel, 'The European Court of Human Rights and political rights: the need for more guidance', (2009) 5(3), *E.C.L. Review*, pp. 464–480.

2 ECtHR, *United Communist Party of Turkey v Turkey*, no 19392/92, 30.01.1998, para. 45; ECtHR, *Refah Partisi (The Welfare Party) and Others v Turkey*, nos 41340/98, 41342/98, 41343/98 and 41344/98 [GC] 13.02.2003, para. 86.

3 European Court of Human Rights, 'Overview 1959–2020 ECHR', February 2021, available at https://www.echr.coe.int/Documents/Overview_19592020_ENG.pdf, pp. 8–9, last accessed 02.07.2021.

4 B. Rainey, P. McCormick and C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 8th edition, Oxford University Press, Oxford 2020, p. 611.

5 See B. Rainey, P. McCormick and C. Ovey (2020), *Jacobs, White, and Ovey: The European Convention on Human Rights*, *supra* note 4, p. 610. In a similar vein, see M. O'Boyle, 'Electoral

the ECHR, the text of Article 3 of Protocol No. 1 does not refer to an individual right, nor does it contain explicit limitations to such a right. Both the individual right and its implied limitations inferred by the Commission were confirmed by the ECtHR in the first case where it had to apply Article 3 of Protocol No. 1, *Mathieu-Mohin and Clerfayt v Belgium* in 1987.[6]

One issue that has long been unclear is whether and to what extent the right to free elections in Article 3 of Protocol No. 1 also requires a judicial remedy and procedural guarantees for electoral disputes. The terse text offers little guidance other than the concept of 'free elections' with the aim to 'ensure the free expression of the opinion of the people'. Indeed, since its early case law, the ECtHR has drawn a sharp distinction between, on the one hand, civil rights and obligations and criminal charges, enjoying access to court and the procedural guarantees of a fair trial according to Article 6, and the so-called 'political rights' enshrined in Article 3 of Protocol No. 1, to which Article 6 does not apply.[7] In contrast, General Comment No. 25 to the International Covenant on Civil of Political Rights (ICCPR) makes it clear that the equivalent Article 25 of that instrument also includes an access to judicial review.[8]

However, in recent years the ECtHR has recognised a positive obligation flowing from Article 3 of Protocol No. 1 for the Member States to provide an effective examination of electoral disputes. Such minimum procedural requirements for election dispute resolution have long been recognised by non-binding Council of Europe 'soft law' documents. In the wider Council of Europe system, too, there has been a growing emphasis on election dispute resolution.[9]

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disputes and the ECHR: an overview', in *The Cancellation of Election Results, Science and Technique of Democracy No. 46*, Council of Europe Publishing, Strasbourg 2010, pp. 39–55.

6 ECtHR, *Mathieu-Mohin and Clerfayt v Belgium*, no 9267/81, 02.03.1987, paras. 48–52. From the Commission's case law, see ECtHR, *W., X., Y. et Z. c. Belgique*, nos 6745/74, 6746/74, 30.05.197. On the development, see A. Ruiz Robledo, 'The Construction of the Right to Free Elections by the European Court of Human Rights', (2018) 7(2), *Cambridge International Law Journal*, pp. 225–240; S. Golubok, 'The Right to Free Elections: Emerging Guarantees or Two Layers of Protection?', (2009) 27(3), *Netherlands Quarterly of Human Rights,* pp. 361–390.

7 ECtHR, *Pierre Bloch v France*, no 24194/94, 21.10.1997, paras. 50–51; ECtHR, *Cheminade v France*, no 31599/96, 26.01.1999. This interpretation had previously been made by the Commission, see EComHR, *Priorello v Italy*, no 11068/84, 06.05.1985; EComHR, *I. Z. v Greece*, no 18997/91, 28.02.1994.

8 CCPR General Comment No. 25, para. 20: 'There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.'

9 Election dispute resolution was the topic for the 16th European Conference for Electoral Management Bodies in 2019. In 2020 the Venice Commission published a report on election dispute resolution, containing an extensive overview of national approaches and regulations of key elements of election dispute resolution, such as competent bodies, grounds for complaints, standing, time limits, procedural issues, and decision-making power. See Venice Commission, 'CDL-AD(2020)025, Report on election dispute resolution', 08.10.2020, available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)025-e, last accessed 06.07.2021.

This development culminated in the seminal ECtHR Grand Chamber judgment *Mugemangango v Belgium* on 10 July 2020, which may herald an end to the long-established Western European model of parliament being the judge of its own election.

This development raises the question as to what effective examination of election disputes implies as a positive obligation for Member States. To answer this question, I will perform a legal-dogmatic analysis of the ECtHR's case law leading up to and including *Mugemangango v Belgium*. The aim in section 3 is to provide an overview of the procedural requirements for effective examination flowing from Article 3 of Protocol No. 1 based on the case law. However, since effective examination has long been a requirement in the Venice Commission's Code of Good Practice in Electoral Matters, I will first in section 2 discuss what elements of effective examination can be deduced from this document and the Commission's country-specific opinions on electoral law. The purpose of doing this is two-fold. First, the notion of effective examination in a key Council of Europe standard on electoral law serves as a relevant backdrop and point of reference to the subsequent development of an effective examination requirement by the ECtHR. Second, certain reservations in the Grand Chamber's reasoning in *Mugemangango v Belgium* may bring it at odds with the Venice Commission's understanding of effective examination of election complaints. Indeed, while the Grand Chamber concluded in the specific case that the Belgian model of Parliament being the judge of its own election did not provide sufficient guarantees for an effective examination of election disputes, it is not clear from the decision whether this model is in itself incompatible with Article 3 of Protocol No. 1. In section 4 I therefore discuss whether and how the right to effective examination of election disputes can be considered a structural right that would require Belgium and other Member States where parliament is the judge of its own election to change their election dispute resolution systems.

2. EFFECTIVE EXAMINATION ACCORDING TO COUNCIL OF EUROPE 'SOFT LAW' STANDARDS

Within the Council of Europe system, the arguably most important and well established standard for electoral legislation is the Venice Commission's Code of Good Practice in Electoral Matters, adopted in 2002.[10] This document has

[10] Venice Commission, 'CDL-AD(2002)23, Code of Good Practice in Electoral Matters', 30.10.2002, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e, last accessed 02.07.2021.

been the mainstay of the Venice Commission's more than 130 opinions on electoral law in its Member States and more than 60 texts of general character on elections, referendums, and political parties.[11]

Unlike Article 3 of Protocol No. 1 of the ECHR, the Code of Good Practice in Electoral Matters lists an efficient system of appeal as one of several procedural guarantees for implementing the principles considered as Europe's electoral heritage: 'universal, equal, free, secret and direct suffrage.'[12]

> 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.

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11 See P. Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy', (2017) 2, *UC Irvine Journal of International, Transnational, and Comparative Law*, p. 63. On the statistics, see Venice Commission, 'Election and referendums, political parties', 2021, available at https://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums, last accessed 02.07.2021.

12 Venice Commission (2002), 'Code of Good Practice in Electoral Matters', *supra* note 10, Guideline II.3.3.

From this list, five requirements for an effective examination of election complaints can be outlined.

First, an independence and impartiality requirement can be identified. The appeal body should be either an electoral commission or a court, which implies that the appeal body must be independent and impartial.[13] Due to this requirement, the Code does not accept parliament as the final appeal body in parliamentary elections. While the Code requires a final appeal to a 'court', this wording should not be taken literally. The explanatory report to the Code refers to 'a judicial appeal', which implies a functional approach comprising also bodies formally not designated as courts, but which offer the same guarantees of independence and impartiality as well as a judicial procedure.[14] In its 2010 opinion on the electoral law of Norway, the Venice Commission found that the Norwegian model of parliament being the sole and final judge of its own election was incompatible with European standards and that complaints on the election result should be ultimately decided by a 'high judicial body, such as the Supreme Court'.[15] As mentioned above and to be discussed in section 4 below, ten years later the ECtHR arrived at the same conclusion in the case of *Mugemangango v Belgium* concerning the similar Belgian model. However, it is not clear whether the ECtHR shares the Venice Commission's firm position that an appeal to a judicial body must always be possible.

Second, we can identify an access to justice requirement, by demanding simple and effective complaints procedures and standing for all candidates and voters in the constituency. Any violation of electoral law should be considered legitimate for grounds for appeal.[16] In its country-specific opinions, the Venice Commission has criticised excessive costs and opaque formal requirements that result in a high inadmissibility rate.[17]

Third, there is a legality requirement, meaning that the appeal procedure and the powers of the various must be clearly regulated by law.

Fourth, there is an effective remedy requirement. States must ensure that the appeal body has the necessary powers to rectify the whole spectrum of

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13 See Venice Commission (2002), 'Code of Good Practice in Electoral Matters', *supra* note 10, Guideline II.3.1, which requires electoral commissions to be independent and impartial.

14 Venice Commission (2002), 'Code of Good Practice in Electoral Matters', *supra* note 10, para. 94.

15 Venice Commission, 'CDL-AD(2010)046, Joint Opinion on the Electoral Legislation of Norway', 22.12.2010, para. 44, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)046-e, last accessed 06.07.2021.

16 Venice Commission (2002), 'Code of Good Practice in Electoral Matters', *supra* note 10, para. 92. See also more specifically in Venice Commission (2020), 'Report on Election Dispute Resolution', *supra* note 9, paras. 49–52.

17 Venice Commission, 'CDL-AD(2009)001, Joint Opinion on the Election Code of Georgia as revised up to July 2008', 09.01.2009, paras. 109, 115, and 117, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)001-e, last accessed 06.07.2021.

errors, from correcting errors in the voter lists to annulling the elections where irregularities have affected the outcome. Moreover, an effective remedy in the electoral context requires short time limits for lodging and deciding appeals. In electoral procedures, the time element is highly important, which makes violation of rights impossible to rectify after certain deadlines, for example, the exercise of voting rights after election day.

Finally, the Code requires a fair hearing of election complaints. In the explanatory report, the Venice Commission states that the 'appeal procedure should be of a judicial nature'.[18] In its country-specific opinions on electoral legislation, the Venice Commission has interpreted the fair hearing requirement to include the right to present evidence in support of the complaint after it is filed (a contradictory procedure), the right to a fair, public, and transparent hearing of the complaint, and the right to appeal the decision on the complaint to a court.[19]

In *Mungemangango v Belgium*, the Grand Chamber invited the Venice Commission to submit an *amicus curiae* opinion. In that opinion, the Venice Commission summarised the Code's procedural requirements for an effective examination of election complaints as 'similar to those of Article 6 of the ECHR, but account must be taken of the specific context of elections. For example, a balance must be struck between the length and scope of hearings and the need to resolve electoral disputes promptly.'[20]

While the Code of Good Practice in Electoral Matters is not legally binding for the Venice Commission's 62 Member States,[21] it may nonetheless be considered as the Council of Europe's minimum standard for electoral law and has since its adoption in 2002 been the basis of the Commission's country specific recommendations. The Code is also frequently referred to by the ECtHR in cases concerning Article 3 of Protocol No. 1 and appears to have been

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18 Venice Commission (2002), 'Code of Good Practice in Electoral Matters', *supra* note 10, para. 100.

19 See e.g. Venice Commission, 'CDL-AD(2006)013, Joint Recommendations on the Laws on Parliamentary, Presidential and Local Elections, and Electoral Administration in the Republic of Serbia', 23.03.2006, para. 65, available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)013-e, last accessed 06.07.2021.

20 Venice Commission, 'CDL-AD(2019)021, Amicus Curiae Brief for the European Court of Human Rights in the Case of *Mugemangango v Belgium* on Procedural Safeguards which a State Must Ensure in Procedures Challenging the Result of an Election or the Distribution of Seats', 19.12.2019, para. 49, available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)021-e, last accessed 06.07.2021.

21 On the impact of Venice Commission soft law standards, see W. Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact', (2014) 25(2), *The European Journal of International Law*, pp. 579–597, and P. Craig (2017), 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy', *supra* note 11, pp. 80–85.

influential on the interpretation of the ECHR in some cases.[22] As we shall see below, the ECtHR has developed its effective examination requirement largely consistent with that of the Code, yet it does not prove a normative influence of the latter. It might be more correct, as suggested by Hoffmann-Riem, to say that the Code and other Venice Commission standards and opinions serve as sources of information and inspiration to the ECtHR.[23] Notably in *Petkov and Others v Bulgaria* from 2009, explicit reference was made to the Code in what is possibly the first decision where the ECtHR referred to effectiveness as a standard for assessing post-electoral rights, in this case the failure of complying with court decisions allowing candidates to stand for election. Here:

> the Court observes that an effective system of electoral appeals, as described in the Venice Commission's Code of Good Practice in Electoral Matters (see paragraph 52 above), is an important safeguard against arbitrariness in the electoral process. Failure to abide by final decisions given in response to such appeals undoubtedly undermines the effectiveness of such a system.[24]

However, soft law documents are only advisory to the Member States and have never been considered decisive by the ECtHR.[25] Indeed, in *Mugemangango v Belgium*, the Grand Chamber noted that it '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 […]'.[26]

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22 See e.g. ECtHR, *Davydov and Others v Russia*, no 75947/11, 30.05.2017, paras. 283–288; ECtHR, *Riza and Others v Bulgaria*, nos 48555/10 and 48377/10, 13.10.2015, paras. 177–179; *Karimov v Azerbaijan*, no 12535/06, 25.09.2014, para. 39; *Grosaru v Romania*, no 78039/01, 02.03.2010, paras. 56–57; ECtHR, *Petkov and Others v Bulgaria*, nos 77568/01, 178/02, and 505/02, 11.06.2009. An explicit example concerning guidelines for the financing of political parties, see ECtHR, *Parti nationaliste basque – Organisation régionale d'Iparralde v France*, no 71251/01, 07.06.2007, para. 47. On the influence of the Venice Commission on the ECtHR's interpretation of Article 3 of Protocol No. 1, see S. Golubok (2009), 'The Right to Free Elections: Emerging Guarantees or Two Layers of Protection?', *supra* note 6, pp. 386–389 and L. Bode-Kirchhoff, 'Why the Road from Luxembourg to Strasbourg Leads Through Venice', in K. Dzehtsiarou et al. (eds.), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR*, Routledge, London and New York 2014, pp. 55–72, on p. 59. On the interaction between the ECtHR and the Venice Commission in general, see G. Buquicchio and S. Granata-Menghini, 'The interaction between the Venice Commission and the European Court of Human Rights: Anticipation, Consolidation, Coordination of Human Rights Protection in Europe', in L-A. Sicilianos, I. A. Motoc and R. Chenal (eds.), *Regards Croisés sur la Protection Nationale et Internationale des Droits de L'homme / Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi*, Wolf Legal Publishers, Tilburg 2019, pp. 35–50.

23 W. Hoffmann-Riem, 'The Venice Commission of the Council of Europe – Standards and Impact', *supra* note 21, p. 587.

24 ECtHR, *Petkov and Others v Bulgaria, supra* note 22, para. 63.

25 See ECtHR, *Partei die Friesen v Germany*, no 65480/10, 28.01.2016, para. 43; ECtHR, *Muršić v Croatia*, no 7334/13 [GC] 20.10.2016, para. 111.

26 ECtHR, *Mugemangango v Belgium*, no 310/15 [GC] 10.07.2020, para. 99.

This approach to non-binding soft law documents is necessary since the ECHR is legally binding for the Member States. While the ECHR is the 'primary yardstick' in the Venice Commission's work,[27] it would certainly be problematic for the Commission and the legitimacy of its and other Council of Europe standards if the ECtHR without convincing reasons explicitly departed from long-held general principles in the Code of Good Practice in Electoral Matters. In my view, it would be wrong to consider *Mugemangango v Belgium* as a departure from the Venice Commission's requirements for effective examination in the Code of Good Practice in Electoral Matters. Yet, as will be discussed in more detail in section 4 below, the decision can be read as taking a more nuanced approach to the independence and impartiality requirement.

3. EFFECTIVE EXAMINATION ACCORDING TO ARTICLE 3 OF PROTOCOL NO. 1 TO THE ECHR

3.1. A TWO-STEP TEST

In its earlier case law, the ECtHR as well as the Commission before it limited its scrutiny of decisions of election complaint bodies to testing for arbitrariness in the outcome in the specific case.[28] While the ECtHR still assesses arbitrariness in relation to the electoral process including election complaints,[29] the Court has in recent years also adopted a more institutional approach, by interpreting Article 3 of Protocol No. 1 to contain a positive obligation for states to maintain a domestic system for effective examination of individual complaints and appeals concerning electoral rights.

In *Namat Aliyev v Azerbaijan* from 2010, and reiterated in several subsequent decisions, the ECtHR held that such a system 'is one of the essential guarantees of free and fair elections' and 'an important device at the State's disposal in achieving the fulfilment of its positive duty under Article 3 of Protocol No. 1'.[30] The state would therefore have a positive obligation under Article 3 of Protocol No. 1 to establish and maintain a legislative framework that provides effective

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27 See L. Bode-Kirchhoff, 'Why the Road from Luxembourg to Strasbourg Leads Through Venice', *supra* note 22, p. 57–58.

28 See ECtHR, *Babenko v Ukraine*, 43476/98, 04.05.1999, and see EComHR, *I.Z. v Greece*, no 18997/91, 28.02.1994.

29 See e.g. ECtHR, *Kovach v Ukraine*, no 39424/02, 07.02.2008.

30 See ECtHR, *Namat Aliyev v Azerbaijan*, no 18705/06, 08.04.2010, para. 81. See similarly in ECtHR, *Gahramanli and Others v Azerbaijan*, no 36503/11, 08.10.2015, para. 69. Similarly in the 2009 decision *Petkov and Others v Bulgaria*, the ECtHR referring to the Code of Good Practice in Electoral Matters stated that an effective system of electoral appeals was an important safeguard against arbitrariness in the electoral process, see ECtHR, *Petkov and Others v Bulgaria, supra* note 22, para. 63.

examination of election disputes.[31] As a systemic obligation, the effective examination approach is typically applied where there are shortcomings of the electoral complaint system which considered individually may not violate Article 3 of Protocol No. 1, but which taken together risks arbitrariness and thus undermining individual electoral rights, the general confidence in the election administration, and the integrity of the election result. In *Gahramanli and Others v Azerbaijan* from 2015 for example, the ECtHR shied away from concluding that the composition of electoral commissions was in itself incompatible with an impartiality requirement under Article 3 of Protocol No. 1. Instead, the Court noted that 'the method in question was one of the systemic factors contributing to the ineffectiveness of the examination'.[32]

Being a systemic obligation, the effective examination test does not require the applicant to prove or the ECtHR to find specific breaches of the national electoral law that affected the election result. In line with its subsidiary role and similar to its approach to Article 13, the ECtHR applies the effective examination test in two steps.[33] First, the applicant must put forward 'a very serious and arguable claim disclosing an appearance of a failure to hold free and fair elections in his constituency'.[34] In doing so, the ECtHR appears to rely on evidence provided by the applicant as well as election observation reports from international observers. Second, the ECtHR will then consider whether the election complaints system in the state concerned provided an effective examination of the applicant's complaint. While the effective examination test is clearly inspired by the right to an effective remedy in Article 13, the ECtHR has emphasised that it is a distinct positive obligation under Article 3 of Protocol No. 1. As such, it can be regarded as containing procedural requirements specific for election complaints. The ECtHR will only find a separate violation of Article 13 if the electoral complaint has not been subject to review by a domestic court and the examination by other state bodies has not been effective.[35]

3.2. PROCEDURAL REQUIREMENTS FOR EFFECTIVE EXAMINATION

Unlike the Venice Commission, the ECtHR has not detailed the basic requirements for a domestic system of effective examination of electoral

31 See ECtHR, *Paunović and Milivojević v Serbia*, no 41683/06, 24.05.2016, para. 61.

32 ECtHR, *Gahramanli and Others v Azerbaijan*, *supra* note 30, para. 79.

33 See e.g. *Mugemangango v Belgium*, *supra* note 26, para. 79. Compare the approach to Article 13 in ECtHR, *Ilhan v Turkey*, no 22277/93 [GC] 27.06.2000, para. 97.

34 ECtHR, *Namat Aliyev*, *supra* note 30, para. 79; ECtHR, *Davydov and Others v Russia*, *supra* note 22, paras. 289 and 312.

35 See e.g. *Riza and Others v Bulgaria*, *supra* note 22, paras. 94–95; ECtHR, *Grosaru v Romania, supra* note 22, paras. 55–56, and 62.

disputes according to Article 3 of Protocol No. 1 or Article 13. However, the same procedural requirements have been applied in and can be inferred from the case law.

Considering access to justice, the ECtHR, referring to the Venice Commission's Code of Good Practice in Electoral Matters, found in *Namat Aliyev* that a rigid and formalistic approach, which denied the applicants judicial review of election complaints on procedural grounds, was incompatible with Article 3 of Protocol No. 1.[36]

As for effective remedy, the ECtHR has found this to be a positive obligation also under Article 3 of Protocol No. 1. The ECtHR has emphasised the importance of a timely decision of the election dispute bodies to allow the applicants to exercise their rights – for example due to registration deadlines, election day or the finalisation of the election result. For the same reason, short deadlines for launching election complaints are acceptable.[37] In *Gahramanli and Others*, an effective remedy was denied the applicants since the Constitutional Court finalised the election result before the election complaints had been decided in the appeal system.[38] In *Abdalov and Others v Azerbaijan*, the Supreme Court corrected erroneous decisions by lower courts which had prevented the applicants to register as a candidate, but at that time the applicants had irretrievably lost much time for campaigning.[39]

For a domestic system of election complaints to provide an effective remedy under Article 3 of Protocol No. 1, the competent bodies must also have jurisdiction to consider election complaints and the necessary powers to remedy irregularities, for example by annulling the election or by restoring a mandate unlawfully deprived from a candidate. In case the domestic electoral dispute resolution system does not allow for the complaint to be examined by a court and left the complaint to be decided by an administrative or parliamentary body, the ECtHR has found a violation of Article 13 in conjunction with Article 3 of Protocol No. 1. In *Grosaru v Romania* from 2010 and *Mugemangango v Belgium* from 2020, the courts simply didn't have jurisdiction to consider complaints on the decisions of Parliament finalising the election result.[40] In *Paunović and Milivojević v Serbia* from 2016, courts had jurisdiction to consider the applicant's electoral complaint, but due to domestic procedural law, the

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36 See ECtHR, *Namat Aliyev*, *supra* note 30, para. 85.

37 See ECtHR, *Etxeberria and Others v Spain*, nos 35579/03, 35613/03, 35626/03 and 35634/03, 30.06.2009, paras. 78–82.

38 ECtHR, *Gahramanli and Others v Azerbaijan*, *supra* note 30, para. 86. See also ECtHR, *Namat Aliyev*, *supra* note 30, para. 84.

39 See ECtHR, *Abdalov and Others v Azerbaijan*, nos 28508/11, 37602/11 and 43776/11, 11.07.2019, para. 100.

40 See ECtHR, *Grosaru v Romania, supra* note 22, paras. 54–56 and 58–62; ECtHR, *Mugemangango v Belgium, supra* note 26, paras. 135–139. See also ECtHR, *Ofensiva tinerilor v Roumania*, no 16732/05, 15.12.2015, para. 60.

competent courts lacked the powers to restore the applicant's mandate.[41] In *Petkov and Others v Bulgaria* from 2009, the problem was that while courts might have had the necessary powers, domestic rules on standing precluded the applicants from initiating court procedures directly.[42]

However, the positive obligation for the state is not limited to offer judicial review of election complaints if the competent judicial bodies do not engage in an effective examination in the specific case. In *Davydov and Others v Russia* from 2017, the problem was that courts competent to perform an independent and effective review refrained from doing so despite serious and arguable claims of serious irregularities in the counting and tabulation of votes that could impact the election result.[43] The ECtHR accepted that the right of individual voters to appeal against the election result may be subject to reasonable limitations in domestic law. Yet the ECtHR found that the state had failed to set up a system of effective examination, since no court would go into the substance of the allegations of serious irregularities.[44] In a number of cases involving Azerbaijan, the ECtHR has found that the whole election dispute resolution system is failed in the sense that despite formal guarantees, courts and electoral commission has shown no genuine concern for upholding the rule of law and protecting the integrity of the election.[45]

Considering legality, although Article 3 of Protocol No. 1 – unlike other convention rights – does not explicitly contain a legality requirement, it is nonetheless considered an implied limitation of the states' discretion in order to prevent arbitrary interferences in electoral rights.[46] As a result, the ECtHR has found violations when decisions on electoral rights were not based on rules set out clearly and foreseeably in domestic law.[47] Obviously, this also applies to the appeals procedure in deciding election complaints. In *Mugemangango v Belgium*, the ECtHR framed the legality requirement as preventing excessive discretion of the body deciding on the election complaint, which may otherwise

41 ECtHR, *Paunović and Milivojević v Serbia, supra* note 31, paras. 46–48.

42 See ECtHR, *Petkov and Others v Bulgaria, supra* note 22, para. 82. See also ECtHR, *Russian Conservative Party of Entrepreneurs and Others v Russia*, no 55066/00 and 55638/00, 11.01.2007, paras. 88–89.

43 See ECtHR, *Davydov and Others v Russia*, *supra* note 22.

44 See similarly in ECtHR, *Political Party 'Patria' and Others v the Republic of Moldova*, no 5113/15 and 14 others, 04.08.2020.

45 See ECtHR, *Namat Aliyev*, *supra* note 30, para. 90; ECtHR, *Kerimli and Alibeyli v Azerbaijan*, nos 18475/06 and 22444/06, 10.01.2012, para. 41; ECtHR, *Karimov v Azerbaijan*, *supra* note 22, para. 49; ECtHR, *Mammadov v Azerbaijan (No 2)*, no 4641/06, 10.01.2012, paras. 58–59; ECtHR, *Gahramanli and Others v Azerbaijan*, *supra* note 30, para. 87; ECtHR, *Tahirov v Azerbaijan*, no 31953/11, 11.06.2015, para. 70. The systemic problem in Azerbaijan with arbitrary refusals of candidate registration has led the ECtHR to finding a violation in numerous Committee decisions following the *Tahirov* decision, see ECtHR, *Abdalov and Others v Azerbaijan, supra* note 39, para. 98.

46 See ECtHR, *Ždanoka v Latvia*, no 58278/00, 16.03.2006, para. 108.

47 See ECtHR, *Riza and Others v Bulgaria, supra* note 22, para. 176.

lead to arbitrary decisions.[48] In that case, the ECtHR found that the powers of the Walloon Parliament were not circumscribed with sufficient precision, as no established procedural rules existed, and the election complaint was decided according to ad hoc rules.

As for fair hearing, the ECtHR in several cases has addressed procedural guarantees – such as adversarial proceedings, equality of arms and transparency through reasoned proceedings – as elements in an effective examination. In *Namat Aliyev v Azerbaijan*, the ECtHR noted that states might find it hard to abide by strict procedural safeguards and to deliver very detailed decisions within the short time-limits necessary to avoid delaying the electoral process.[49] Yet the Court did not accept that such considerations undermined the effectiveness of the appeal procedure. In that that case, for example, the competent electoral commission had relied exclusively on the statements of election officials, and in the subsequent judicial procedure, the courts did not allow the applicant to submit additional evidence. Likewise, in *Gahramanli and Others v Azerbaijan* and in *G.K. v Belgium*, the applicants were not allowed to defend their interests before the body deciding their complaints, and the decisions lacked reasoning.[50] In *Uspaskich v Lithuania* on the other hand, the ECtHR found no violation and noted that the applicant was represented by a lawyer before both the Central Electoral Commission and the courts, and the applicant's complaints were dismissed in reasoned decisions.[51] Indeed, in its earlier case law, and reiterated in *Mugemangango v Belgium* in 2020, the ECtHR found that a judicial procedure in which the applicant has been allowed to defend his interests in adversarial proceedings and where arguments have been duly considered by a court, would normally satisfy the requirements of Article 3 of Protocol No. 1.[52]

Finally, as for the independence and impartiality requirement, the ECtHR has in general placed significant emphasis on impartiality for election administration bodies.[53] Naturally, the impartiality requirement has also been extended to bodies deciding election complaints. In *Mugemangango v Belgium* from 2020, the Grand Chamber clarified the impartiality requirement in

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48 ECtHR, *Mugemangango v Belgium*, *supra* note 26, paras. 109–114. See however the objections in the concurring opinion of Judges Lemmens and Sabato.

49 ECtHR, *Namat Aliyev v Azerbaijan*, *supra* note 30, para. 90.

50 ECtHR, *Gahramanli and Others v Azerbaijan*, *supra* note 30, paras. 85–87; ECtHR, *G.K. v Belgium*, no 58302/10, 21.05.2019, paras. 60–61.

51 ECtHR, *Uspaskich v Lithuania*, no 14737/08, 20.12.2016, para. 94.

52 See ECtHR, *Babenko v Ukraine*, *supra* note 28; ECtHR, *Mugemangango v Belgium, supra* note 26, para. 139.

53 Article 3 of Protocol No. 1 requires the body 'in charge of electoral administration to function in a transparent manner and to maintain impartiality and independence from political manipulation', see ECtHR, *Georgian Labour Party v Georgia*, no 9103/04, 08.07.2008, para. 101. See also ECtHR, *Podkolzina v Latvia*, no 46726/99, 09.04.2002, para. 35; ECtHR, *Riza and Others v Bulgaria, supra* note 22, para. 143.

Article 3 of Protocol No. 1 by interpreting it in light of the corresponding requirement in Article 6.[54] In doing so, the Grand Chamber at least partly departed from the old maxim that the so-called political rights according to Article 3 of Protocol No. 1 do not fall under and enjoy the procedural guarantees offered by Article 6. Consistent with the case law under Article 6, we should therefore consider impartiality has having both a subjective and objective component also in relation to Article 3 of Protocol No. 1.

While the ECtHR has not as a general rule dismissed that bodies composed of politicians can be considered impartial, a collegial body in which a majority are politicians is clearly problematic. The ECtHR has previously held that members of parliament cannot be considered neutral in an electoral context.[55] In *Grosaru v Romania* from 2010, the ECtHR found guarantees for impartiality lacking, since the applicant's complaint on the election result was decided first by the Central Election Office and then in the final instance by the chamber of deputies in Parliament. The latter – being a solely political body – was clearly not impartial, but the ECtHR also found that the Central Election Office could not be considered impartial despite the fact that seven of its members were judges, since a majority of 16 members were representatives of the political parties.[56] In line with this reasoning, the Grand Chamber found a violation in *Mugemangango v Belgium*, where only parliament itself was competent to pronounce on election complaints. Here, the Grand Chamber noted that the plenary in the Walloon Parliament deciding the election complaint included all newly elected members, including those that had yet to have their credentials approved, as well as the members elected from the applicant's constituency, and who were his direct opponents.[57] Following this reasoning, a guiding principle for assessing the impartiality of a body deciding election disputes, should be whether or not the majority of its members represent political parties.

However, in *Mugemangango v Belgium*, the Grand Chamber refrained from explicitly requiring appeals on the election result to be decided by a judicial body. Recall here the position of the Venice Commission in the Code of Good Practice in Electoral Matters, which requires such decision to be made by a judicial body. On the face of it, it appears that the Grand Chamber has taken a more nuanced position, as it does not rule out that parliament may be the judge of its own election provided sufficient procedural safeguards and guarantees for impartiality. This position brings the scope of the Grand Chamber decision into

54 ECtHR, *Mugemangango v Belgium*, *supra* note 26, para. 96.

55 In general terms, the ECtHR has held that '[t]he criterion of "political neutrality" cannot be applied to members of parliament in the same way as it pertains to other State officials, given that the former cannot be "politically neutral" by definition', see ECtHR, *Ždanoka v Latvia*, *supra* note 46, para. 117.

56 ECtHR, *Grosaru v Romania, supra* note 22, paras. 54 and 34. See also ECtHR, *Ofensiva tinerilor v Roumania, supra* note 40, para. 60.

57 ECtHR, *Mugemangango v Belgium*, *supra* note 26, paras. 105–106.

question, and I will therefore discuss that decision and its consequences in more detail in the following.

4. CAN PARLIAMENT OFFER AN EFFECTIVE EXAMINATION OF COMPLAINTS ON ITS OWN ELECTION?

4.1. CONTEXT

The issue the Grand Chamber was invited to consider in *Mugemangango v Belgium* was the election dispute resolution model where parliament is the judge of its own election. According to this model, courts have no jurisdiction in deciding complaints on the election result. By 'election result', I mean the transfer of votes into mandates, and thus disputes concerning which candidates won a specific mandate. Formally, the election result is decided by the newly elected Parliament when validating the credentials of its members. This decision is final and not appealable to a court.

Historically, the model of parliament being the judge of its own election was considered as a safeguard for the separation of powers and parliament's autonomy vis-à-vis the executive. As a result, the model was found in the English constitution following the 1689 Glorious Revolution, the US Constitution of 1787 and the French Constitution of 1791, as well as in many 19th-century monarchical constitutions in Europe with elected legislative assemblies. However, following several cases of corruption in parliament's validation of the election result, the United Kingdom in 1868 abolished the model of parliament being the judge of its own election. With the aptly named Election Petitions and Corrupt Practices Act 1868, complaints on the election result could be brought before the courts.[58] In the 20th century, the model of parliament being the judge of its own elections was steadily abolished in European constitutions in favour of judicial review either in the ordinary courts or special courts. An early example of a special election court is the Wahlprüfungsgericht of the 1919 Weimar Constitution, composed of three members appointed by parliament and two Supreme Court judges appointed by the president.[59] In 1920, the new Austrian Constitution assigned election disputes to a specialised constitutional court, which today is common in countries with constitutional courts.[60]

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58 See C. Morris, *Parliamentary Elections, Representation and the Law*, Hart Publishing, Oxford 2012, pp. 83–85.

59 See the Constitution of Germany 1919, Article 31. A special election court was also set up in Czechoslovakia in 1920, see the Constitution of the Czechoslovak Republic 1920, Article 19.

60 See the Constitution of Austria 1920, Article 141.

Throughout the 20th century and up to today, we can observe a clear trend among European states to consider disputes on the election result as legal disputes to be adjudicated by a judicial body. According to a recent comparative overview by the Venice Commission, 31 of its Member States confer the adjudication of disputes on the election result to the highest court or a specialised election court, while nine states confer that power to a lower court.[61] Only nine Member States allow Parliament to validate its own election, and two of those states allow for judicial review of that decision. This leaves seven states in Europe where Parliament is still the judge of its own election without the possibility of appeal to a judicial body. In addition to Belgium these are Denmark, Iceland, Italy, Luxembourg, Norway, and the Netherlands.[62] All of them, save for Italy, have constitutions with roots in the 19th century, and all of them are frequently ranked highly in democracy indexes.[63]

The fact that seven European states maintain the model of parliament being its own election adds to the significance of the Grand Chamber's decision in *Mugemangango v Belgium*. Yet does this decision require those states to introduce a judicial appeal for parliament's decision to validate the election?

4.2. THE GRAND CHAMBER'S REASONING IN *MUGEMANGANGO v BELGIUM*

The case originated from the 2015 elections to the Walloon Parliament in Belgium, where the applicant stood but failed to win a seat by a mere 14 votes. Since more than 20,000 ballot papers were declared blank, void or disputed in his constituency, the applicant demanded a recount. When his request was denied by the election authorities, the applicant lodged a formal complaint to the Walloon Parliament, which is the only and final authority on election complaints. The Credentials Committee hearing the case recommended that

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61 See Venice Commission (2020), 'Report on election dispute resolution', *supra* note 9, para. 45. The comparative overview is based on the 62 Member States of the Venice Commission, some of which are non-European and not members of the Council of Europe.

62 Access to judicial review may vary in other electoral disputes such as voting rights. In Denmark, disputes on the requirements for the right to vote can be appealed to a court, but not Parliament's validation of the election result, cf. Articles 30 and 33 in the Constitution of Denmark. See J.P. Christensen, J. Albæk Jensen and M. Hansen Jensen, *Dansk statsret,* 3rd edition, Jurist og Økonomiforbundets forlag, København 2020, p. 112. By contrast in Norway, Parliament has exclusive jurisdiction in all electoral disputes, including voting rights, cf. Articles 55 and 64 in the Constitution of Norway. See E. Holmøyvik, 'Den norske klageordninga ved stortingsval og europeisk rett', in I. Nguyen Duy et al. (eds.), *Uten sammenligning. Festskrift til Eivind Smith 70 år*, Universitetsforlaget, Bergen 2020, pp. 307–321.

63 See e.g., V-dem, 'Democracy Report 2021', March 2021, pp. 32–35, available at https://www.v-dem.net/media/filer_public/c9/3f/c93f8e74-a3fd-4bac-adfd-ee2cfbc0a375/dr_2021.pdf, last accessed 02.07.2021.

the ballots in the applicant's constituency be recounted. However, the plenary, which included the newly elected members from the applicant's constituency, voted to approve the credentials of all the elected representatives, and thus dismissed the applicant's demand for a recount.

Before the Grand Chamber of the ECtHR, the case was more or less framed as a matter of principle: can parliament be the judge of its own elections without any recourse to a court or another judicial body? The applicant argued that the Walloon Parliament had acted as both judge and party in the examination of his complaint, and that this had infringed on his right according to Article 3 of Protocol No. 1 to stand as candidate in free elections. The Belgian government, on the other hand, argued that the Walloon Parliament's decision to deny a recount was correct, and that the Belgian system of parliament being the judge of its own election was part of the country's constitutional heritage, in which parliamentary autonomy was rooted in the principle of separation of powers.

As mentioned above, and in line with the reasoning in *Grosaru v Romania* from 2010, the Grand Chamber found a violation of both Article 3 of Protocol No. 1 and Article 13 ECHR for not providing an effective examination of the election complaint. In its reasoning, the Grand Chamber noted that the Walloon Parliament adjudicating in its own election could not be considered impartial, did not have its powers circumscribed with sufficient precision in the law, and did not offer procedural guarantees against an arbitrary decision.

As for the consequences of the Grand Chamber's decision, the crucial point is the impartiality requirement. While laws can be written more precisely and procedural safeguards can be introduced in the proceedings before parliamentary bodies, it is much harder if not impossible to fundamentally alter the composition of parliament to make it impartial. Considering the potential for a decision on principle, the Grand Chamber's decision was disappointing since important parts of the reasoning were quite narrow and did not as a matter of principle rule out that Parliament could be impartial in deciding complaints on the election result.

As the basis for its conclusion, the Grand Chamber carefully noted that the members elected in the applicant's constituency, and who were his direct opponents, participated in voting on the applicant's complaint in the plenary. In its conclusion on the impartiality requirement, the Grand Chamber further noted that the risks of political decisions were not averted in the present case 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.[64]

From this reasoning, the Grand Chamber appears to suggest that if voting rules in parliament can prevent partisan decisions on the election result, then the effective examination principle does not bar parliament from being the judge of its own election. Whilst there is a certain functional logic in this reasoning, it does not pass a reality test.

Given that parliaments are usually organised according to political parties voting according to political lines, it is very hard to see how voting rules can prevent partisan decisions. Even if parliamentary voting rules exclude those directly affected by the vote, in this case the members elected from the disputed constituency, their party colleagues would on behalf of the political parties have a direct interest in the outcome of the vote. Nor would a qualified majority requirement eliminate the risk of partisan decisions, either. While a qualified majority requirement might mitigate the risk of partisan decisions, that safeguard will only extend to candidates representing the parties forming a qualified majority. Candidates representing smaller parties whose members are not required to form a qualified majority would find themselves defenceless against partisan decisions by the qualified majority. A qualified majority requirement would therefore be particularly disadvantageous for candidates representing smaller parties, minorities or holding unpopular views.

I will add, as did Judge Wojtyczek in a concurring opinion, that the Grand Chamber is incorrect in referring to the Venice Commission and implying that it recommended and thus approved of a model where the Walloon Parliament decided complaints on the election result by a qualified majority.[65] In fact, the Venice Commission in its *amicus curiae* before the Grand Chamber reiterated its position in the Code of Good Conduct in Electoral Matters that parliament's validation of the election result must be subject to a judicial appeal.[66] Its recommendations on voting rules related more generally to electoral commissions, which often have a political composition, and were therefore cited out of context by the Grand Chamber.

The Grand Chamber's reasoning on impartiality in *Mugemangango v Belgium* does not sit well with its own long-held doctrine of considering impartiality as an objective criterion.[67] Democratic elections are fragile processes where even appearances of political influence on the election result can undermine

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64 ECtHR, *Mugemangango v Belgium*, *supra* note 26, para. 107.

65 ECtHR, *Mugemangango v Belgium*, *supra* note 26, concurring opinion of Judge Wojtyczek, para. 8.

66 See Venice Commission, 'Amicus Curiae Brief for the European Court of Human Rights in the Case of Mugemangango v Belgium', *supra* note 20, paras. 30 and 32.

67 See e.g. ECtHR, *Micallef v Malta*, no 17056/06 [GC] 15.10.2009, paras. 93–97.

public confidence in the electoral system.[68] As mentioned above, the ECtHR has previously stressed the importance of impartiality and independence of electoral administration bodies. Therefore, it is all the more surprising that the Grand Chamber leaves the door open for a political body to make a final decision on the election result, which is the very essence of the right to free elections enshrined in Article 3 of Protocol No. 1. It should be recalled that in *Ždanoka v Latvia* from 2006, the Grand Chamber held that '[t]he criterion of "political neutrality" cannot be applied to members of parliament in the same way as it pertains to other State officials, given that the former cannot be "politically neutral"'.[69] In my view, the Grand Chamber's reasoning on impartiality in *Mugemangango v Belgium* is therefore flawed both in relation to the facts and its own case law. However, the fact that three judges wrote concurring opinions arguing in vain that parliament should never be considered impartial in disputes on the election result, suggests that the Grand Chamber's failure to do so was no failure from its part.[70]

4.3. THE RIGHT TO EFFECTIVE EXAMINATION AS A STRUCTURAL RIGHT

While the Grand Chamber in *Mugemangango v Belgium* did not rule out that parliament can in principle adjudicate in its own election, and thus took a more nuanced position than the Venice Commission, it did not accept the Belgian model either. Accordingly, the similar model for the validation of the election result by parliament found in Denmark, Iceland, Italy, Luxembourg,

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68 There is a wealth of social science scholarship on perceptions of electoral integrity for which independent and impartial institutions is an important element, see e.g. J. Elklit and A. Reynolds, 'Analysing the impact of election administration on democratic politics', (2001) 38(1), *Representation,* pp. 3–10, who on p. 5 state: 'Perceptions about EMB independence are in any case almost as important as the actual, but indiscernible, level of independence, for perceptions might also be the basis for actions and counteractions of political actors at all levels.'; See also F.E. Lehoucq, 'Can parties police themselves? Electoral governance and democratization', (2002) 23(1), *International Political Science Review*, pp. 29–46, and P. Norris, 'Do perceptions of electoral malpractice undermine democratic satisfaction? The US in comparative perspective', (2019) 40(1), *International Political Science Review*, pp. 5–22, in particular on p. 19. See also with further references to scholarship S. Birch, 'Electoral institutions and popular confidence in electoral processes: A cross-national analysis', 2008 27(2), *Electoral Studies*, pp. 305–320, who fails to find a correlation between formal independence and public confidence but suggests that the yardstick should be the institutions' real independence.

69 In general terms, the ECtHR has held that '[t]he criterion of "political neutrality" cannot be applied to members of parliament in the same way as it pertains to other State officials, given that the former cannot be "politically neutral" by definition', ECtHR, *Ždanoka v Latvia*, *supra* note 46, para. 117.

70 The Judges Turković and Lemmens, and Wojtyczek.

the Netherlands and Norway, is most likely not compatible with Article 3 of Protocol No. 1, either.

The decision should also have consequences for Sweden and other countries where the body validating the election result has a majority of politicians. In Sweden, complaints on parliamentary elections are decided by an Election Review Board appointed by parliament for each ordinary election.[71] The decisions of the Election Review Board are final and cannot be appealed to a court. The Election Review Board is composed of seven members, of which the chair must be a permanent judge and is elected separately. The remaining six members are elected by parliament and all current members are members of parliament, although this is not a legal requirement. Whilst the Swedish Election Review Board may fulfil the procedural requirements for an effective examination even with a majority being lay members, it is hard to see how it can be considered impartial unless guarantees against political members are introduced in the law.

The wide-ranging consequences of the Grand Chamber's decision in *Mugemangango v Belgium* are due to the fact that the ECtHR has since *Namat Aliyev v Azerbaijan* in 2010 framed effective examination as a positive obligation incumbent on all Member States. Flowing from this case law is what recent scholarship has coined a structural human right inherent in Article 3 of Protocol No. 1 and which requires changes to a state's governmental structure or institutions.[72]

The structural element of the effective examination principle is accentuated by the Grand Chamber's rejection of the subsidiarity arguments advanced by Belgium and Denmark. Both states argued that the model of parliament being the judge of its own election was an integral part of their 'constitutional heritage and was founded on the constitutional principle of the separation of powers.'[73] Denmark in particular explicitly argued 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'.[74] Moreover, both states called on the Grand Chamber to take into account 'the specific context and the democratic tradition of the State in question'.[75]

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71 See the Swedish Instrument of Government, Chapter 3, Article 12, and the Swedish Election Act 2005, Chapter 15.

72 M. Leloup, 'The Concept of Structural Human Rights in the European Convention on Human Rights', (2020) 20(3), *Human Rights Law Review*, pp. 480–501, on p. 493 in relation to Articles 13 and on 496 in relation to Article 3 of Protocol No. 1. On the concept of structural rights in general, see O. Varol, 'Structural Rights', (2017) 105(4), *Georgetown Law Journal*, pp. 1001–1054.

73 ECtHR, *Mugemangango v Belgium*, *supra* note 26, paras. 58 (Belgium) and 65 (Denmark).

74 ECtHR, *Mugemangango v Belgium*, *supra* note 26, para. 66.

75 ECtHR, *Mugemangango v Belgium*, *supra* note 26, paras. 66 (Denmark) and 58 (Belgium, 'the application of one of the basic principles of the democratic edifice').

The Belgian and Danish arguments played on the political evolution doctrine adopted by the ECtHR in the first case on Article 3 of Protocol No. 1, *Mathieu-Mohin and Clerfayt v Belgium*. Here, the Court held:

> For the purposes of Article 3 of Protocol No. 1 (P1-3), any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'.[76]

In light of this traditional deference to the Member States' organisation of their electoral systems and institutions, it is therefore significant that the Grand Chamber rejected Belgium and Denmark's argument that their well-entrenched democratic tradition provided a certain safeguard for the right to free elections. The ECtHR has within the context of Article 3 of Protocol No. 1 accepted that historical considerations and the specific political context of a state can for a certain time justify restrictions intended to protect the integrity of the democratic process.[77] Not so in *Mugemengango v Belgium*. Moreover, the Grand Chamber also dismissed Belgium's argument based on parliamentary autonomy, encompassing the validation of its members, being a well-established constitutional principle in Europe and therefore requiring a wide margin of appreciation for the Member States. The principle of parliamentary autonomy was recognised in the Grand Chamber decision *Karácsony and Others v Hungary* from 2016 concerning Article 10.[78] However, with reference to that decision, the Grand Chamber in *Mugemangango v Belgium* noted that parliamentary autonomy is not absolute and that '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.'[79]

In my view, this apparent departure from the political evolution doctrine in favour of a more substantive approach to democracy through the effective examination principle is well founded and timely. The historical context and democratic traditions in a state should not be relevant where restrictions may

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76 ECtHR, *Mathieu-Mohin and Clerfayt v Belgium*, *supra* note 6, para. 54. From the Commission's case law, see ECtHR, *W., X., Y. et Z. c. Belgique*, *supra* note 6.

77 See ECtHR, *Yumak and Sadak v Turkey*, no 10226/03 [GC] 08.07.2008; see ECtHR, *Ždanoka v Latvia*, supra note 46, paras. 119–135; ECtHR, *Tănase v Moldova*, no 7/08, 27.04.2010, para. 159; *Ādamsons v Latvia*, no 3669/03, 24.06.2008, paras. 123–128.

78 See ECtHR, *Karácsony and Others v Hungary*, nos 42461/13 and 44357/13 [GC] 17.05.2016, paras. 142–147.

79 ECtHR, *Mugemangango v Belgium*, *supra* note 26, para. 88.

threaten the fundamental aim of the democratic process, as in the case of a parliament deciding on its own election. Member states may indeed have a wide margin of appreciation as to the choice of electoral system and how they organise it, but the margin of appreciation should be narrower when the output of that electoral system is concerned.[80] The ECtHR has repeatedly reiterated that states must 'maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage'.[81] For the election result to reflect the will of the people, which is the very core of the right in Article 3 of Protocol No. 1, there must be in place a system for effective examination of election complaints.

Indeed, the importance of the ECtHR to enforce the core of the right to free elections was noted by Judge Wojtyczek in his concurring opinion: '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.'[82] Such a 'core-periphery approach' to the states' margin of appreciation would bring the application of Article 3 of Protocol No. 1 more in line with the case law on other rights aimed at ensuring an effective political democracy, namely freedom of expression and freedom of assembly.[83] In recent scholarship this dis-analogy between the ECtHR's democracy-enhancing approach to Article 10 and its traditional state deferent approach to Article 3 of Protocol No. 1 has been emphasised in particular by Zysset, who makes a convincing argument for a more coherent approach to the concept of democracy in the ECHR.[84] Recall here the link between free elections and freedom of expression made by the ECtHR in *Bowman v The United Kingdom*:

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system […] The two rights are

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80 This approach would correspond to what Letsas has coined a common value-based interpretation of the ECHR compared to the consensualist interpretation applied by the ECtHR in *Mathieu-Mohin and Clerfayt v Belgium* and predominant in older case law, see notably G. Letsas, *A Theory of Interpretation of the European Convention of Human Rights,* Oxford University Press, Oxford 2007, pp. 80–98, and G. Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in A. Føllesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, Cambridge 2013, pp. 106–141.

81 See e.g. ECtHR, *Hirst v United Kingdom (No. 2)*, no 74025/01 [GC] 06.10.2005, para. 62.

82 ECtHR, *Mugemangango v Belgium*, *supra* note 26, concurring opinion of Judge Wojtyczek, para. 3.

83 See e.g. ECtHR, *Lingens v Austria* [Plenary], no 9815/82, 08.07.1986, para. 42; ECtHR, *Sørensen and Rasmussen v Denmark*, nos 52562/99 and 52620/99 [GC] 11.01.2006, para 58; ECtHR, *Animal Defenders International v The United Kingdom*, no 48876/08 [GC] 22.04.2013, para. 102. On the 'core-periphery approach' to the margin of appreciation and further references to ECtHR case law, see J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', (2010) 17(1), *European Law Journal*, pp. 80–120, on p. 112.

84 See A. Zysset, 'Freedom of expression, the right to vote, and proportionality at the European Court of Human Rights: An internal critique', (2019) 17(1), *International*

> inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the 'conditions' necessary to 'ensure the free expression of the opinion of the people in the choice of the legislature'.[85]

The more substantive approach to 'effective political democracy' in *Mugemengango v Belgium*, which mirrors that in *Karácsony and Others v Hungary* concerning Article 10, may signal a more coherent approach from the ECtHR. In my view, it would be consistent with the fundamental aim of the ECHR 'to promote and maintain the ideals and values of a democratic society'[86] for the ECtHR to narrow the states' margin of appreciation in cases concerning the core of the right to free elections in Article 3 of Protocol No. 1.

It is true that the ECtHR in *Davydov v Russia* stated that it would perform an even less stringent scrutiny on what it called the more technical stage of vote counting and tabulation.[87] Yet it is important to recall that the wide margin of appreciation in the post-electoral stage was conditioned by the ECtHR 'if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with.'[88] Considering that the ECtHR in *Namat Aliyev v Azerbaijan*, cited in section 3.1 above and reiterated in several subsequent decisions, views the effective examination of election disputes as 'one of the essential guarantees of free and fair elections', states should not be afforded a wide margin appreciation in this specific part of the post-electoral stage.

In conclusion, as to the positive obligation of effective examination of election complaints, which forms a structural part of Article 3 of Protocol No. 1, national models rooted in tradition and history but not complying with the minimum requirements for effective examination, must yield to a European convergence of electoral law.

Journal of Constitutional Law, pp. 230–251. Zysset's argument draws on the case law on disenfranchisement of voting rights, but his observation on the dis-analogy of the ECtHR's interpretative approach to Article 10 and Article 3 of Protocol No. 1 and his argument for a more teleological approach to the interpretation of the latter, is equally persuasive for the electoral process. See also M. O'Boyle, 'Electoral disputes and the ECHR: an overview', *supra* note 5, 53.

85 ECtHR, *Bowman v The United Kingdom*, no 24839/94 [GC] 19.02.1998, para. 42.

86 The aim of maintaining a democratic society is invoked by the ECtHR both in relation to Article 11 and Article 3 of Protocol No. 1, see e.g. ECtHR, *Russian Conservative Party of Entrepreneurs, supra* note 42, para. 47; ECtHR, *Bączkowski and Others v Poland*, no 1543/06, 03.05.2007, para. 61 with references to further case law.

87 Such a threshold test, requiring that the breach of law relates to a fundamental rule for the values the law is to guarantee and not technical rules for which a breach do not have such an effect, has been established also in other areas, see in relation to 'tribunal established by law' in Article 6; see ECtHR, *Guðmundur Andri Ástráðsson v Iceland*, no 26374/18 [GC] 01.12.2020, para. 246.

88 See ECtHR, *Davydov and Others v Russia*, *supra* note 22, para. 287.

4.4. WHAT ELECTION COMPLAINT RESOLUTION SYSTEM?

A loyal implementation of the Grand Chamber's decision in *Mugemangango v Belgium* should lead to changes in the election complaint resolution system not only in Belgium, but also in Denmark, Iceland, Italy, Luxembourg, the Netherlands, Norway and possibly Sweden. Since such rules are often entrenched in the constitution and parliament's autonomy over its election is deeply rooted in history, change may not come easy. The Danish intervention before the Grand Chamber can be explained by the fact that amending the Danish constitution is politically very complicated. According to Article 88 of the Danish constitution, a constitutional amendment requires both the dissolution of parliament and a referendum in which a majority and at least 40% of the total electorate votes in favour of the amendment. Whether compliance with *Mugemangango v Belgium* can be achieved through interpretation and legislation is uncertain. Article 33 of the Danish constitution provides parliament with an exclusive competence to 'itself determine the validity of the election of any Member'. The Danish Supreme Court has so far declared complaints on the validity of parliamentary elections as inadmissible.[89] The same view is taken in Danish legal doctrine, though it argued that the courts may admit complaints on the election result in exceptional cases where there is evidence of abuse of power by the parliamentary majority.[90] Not surprisingly, the Grand Chamber's decision has raised considerable political concerns in Denmark.[91]

It falls within the states' margin of appreciation to decide on how to organise their election dispute resolution system as long as it fulfils the criteria for an effective examination. The Grand Chamber stated in *Mugemangango v Belgium* 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'.[92] States are therefore not required to place disputes on the election result within the jurisdiction of ordinary courts or a constitutional court. A permanent or ad hoc election court or even a tribunal formally part of the election administration would be acceptable, so long as its powers, procedure, and composition fulfil the criteria for an effective examination of election disputes.

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89 See the Danish Supreme Court's decision in U 1933.373 Ø concerning the parliamentary elections in 1932.

90 See J. P. Christensen, J. Albæk Hansen and M. Hansen Jensen. *Dansk Statsret,* 3rd edition, Jurist og Økonomiforbundets forlag, København 2020, p. 112; P. Germer. *Statsforfatningsret*, 3rd edition, Jurist og Økonomiforbundets forlag, København 2007, pp. 67–68.

91 See M. Skærbæk, 'Eksperter: Ny menneskeretsdom udfordrer grundloven', *Politiken*, 21.08.2020, available at https://politiken.dk/indland/art7890162/Eksperter-Ny-menneskeretsdom-udfordrer-grundloven, last accessed at 02.07.2021.

92 ECtHR, *Mugemangango v Belgium*, *supra* note 26, para. 139.

In two countries, change was already underway before the Grand Chamber's decision in *Mugemangango v Belgium*. In Luxembourg, the 2019 proposal for a new constitution introduces the possibility to appeal the Parliament's verification of credentials to the Constitutional Court.[93]

In Norway, a mixed judicial-parliamentary model of election dispute resolution was proposed in 2020 by a joint expert and political commission drafting a new electoral law.[94] The new Norwegian model may be considered a compromise between formal parliamentary autonomy and judicial review of election disputes. A new judicial body, the National Electoral Committee (*Riksvalgstyret*), will be established to decide on all election disputes. This body is formally an independent tribunal outside the ordinary court system. However, the tribunal is judicial in the sense that it offers full procedural guarantees and has full powers to remedy errors of electoral law and criminal law violations relevant to the electoral process. The tribunal can restore voting rights, order corrections to the electoral process and order a new election if the errors are likely to have influenced the election result. The five members are appointed by parliament for four years, but crucially a majority of three members including the leader will be selected from permanent judges. The remaining two are lay members, but cannot be elected representatives at any level, members of the government or political advisors to the government or parliamentary factions.

After the National Electoral Committee has decided all individual election complaints, parliament will proceed to verify the credentials of its newly elected members. In other words, the formal validation of the election result will still be done by parliament, which will still have the power to invalidate the election of its members. It is expected that since all election disputes are expected to have been settled by the National Electoral Committee before parliament's verification of the credentials, its validation will be purely formal. However, to prevent any possibility of political abuse of the verification power, the draft law allows parties and candidates running for election to appeal parliament's decision to the Supreme Court sitting in the plenary. The proposed Norwegian election dispute resolution system will effectively transfer the final decision on the election result from the parliament to the Supreme Court but maintains parliament's formal and public role in validating the credentials of its members.

If reverence of tradition is important, it may also be possible to maintain parliament as a purely formal and final validator of the election result. For this to be in accordance with the effective examination principle, I would argue that parliament's powers must be circumscribed so narrowly in the law that no

93 See Venice Commission, 'CDL-AD(2019)003, Luxembourg, Avis sur la proposition de revision de la constitution', 18.03.2019, para. 82.

94 Official Norwegian Reports, 'NOU 2020: 6, Frie og hemmelige valg', available at https://www.regjeringen.no/contentassets/0516829ddd434b86880c80e9ceec0281/no/pdfs/nou202020200006000dddpdfs.pdf, last accessed 02.07.2021.

discretion is left that could be abused for political gains. The ECtHR accepted a similar approach in terms of limiting prisoners' voting rights in *Scoppola v Italy (No. 3)*.[95] However, like proposed in Norway, this approach would require a proper judicial remedy before the formal validation by parliament. This is because the effective examination of an election complaint would require at some stage the application of discretion in the interpretation of the law and the weighing of evidence.

5. CONCLUSIONS

Just over ten years after the ECtHR in *Namat Aliyev v Azerbaijan* introduced effective examination of election disputes as a distinct positive obligation flowing from Article 3 of Protocol No. 1, the case law of the ECtHR provides an increasingly nuanced set of procedural requirements for the Member States' election dispute resolution systems. While the case law is piecemeal, the analysis above shows that effective examination of election disputes according to Article 3 of Protocol No. 1 requires minimum safeguards for the independence and impartiality as well as the legality concerning the election dispute resolution bodies, and access to justice, effective remedy, and fair hearing for the voters or candidates involved.

Today, I would argue that the essential elements of effective examination according to the Venice Commission's Code of Good Practice in Electoral Matters have been interpreted by the ECtHR to follow from Article 3 of Protocol No. 1 and thus being binding legal obligations for the Member States. For the Venice Commission the developments in ECtHR case law on election dispute resolution would be welcome as analogies to this case law will bolster its advisory opinions on electoral law reforms in the Member States.

In 2009, Ten Napel argued that the different wording of Article 3 of Protocol No. 1 could be used, more than in the past, to emphasise the positive obligations of the Member States.[96] Such a positive application of Article 3 of Protocol No. 1 would recognise it as a structural human right which requires a certain degree of convergence of national electoral systems. More than a decade later, and culminating with *Mugemangango v Belgium* in 2020, it appears that the ECtHR has let go of the deference to the states' unique political evolution leading to different electoral systems which dominated the early case law. By defining effective examination of election disputes as an essential guarantee for free and fair elections, and letting this fundamental aim prevail over the

95 ECtHR, *Scoppola v Italy (No. 3)*, no 126/05 [GC] 22.05.2012, paras. 105–109.

96 H.-M. Ten Napel (2009), 'The European Court of Human Rights and political rights: the need for more guidance', *supra* note 1, p. 479.

affected states' specific historical and democratic context, the ECtHR may have shed its traditional state deference in relation to Article 3 of Protocol No. 1 in favour of a more substantive approach to democracy comparable to that of Articles 10 and 11. According to one of the standard reference works on the ECHR, 'there has been considerable narrowing of the wide margin of appreciation referred to in the earlier cases now that the Court seems to be adopting a more robust test for interferences which States impose.'[97] Time will tell if the ECtHR continues this approach in future cases.

In my view, the shift in the ECtHR's approach to Article 3 of Protocol No. 1 is significant and timely. Elections are inherently legal in the meaning that every step of the electoral cycle is governed by law. It is therefore wrong to consider the application of electoral law and electoral rights as belonging to the political domain and thus not subject to equal safeguards for a fair examination as civil rights and obligations. The effective examination principle is a significant development in the ECtHR case law, because it effectively does away with the old distinction between the so-called political rights in Article 3 of Protocol No. 1 and other civil rights and obligations according to Article 6. This development is timely in a Europe where democracy is under increasing pressure, even within the European Union. By requiring some of the most well developed democracies in the world to introduce additional formal safeguards to prevent political manipulation of the election result, the ECtHR is sending a clear message that democracy and human rights cannot be separated.

97 See B. Rainey, P. McCormick and C. Ovey (2020), *Jacobs, White, and Ovey: The European Convention on Human Rights*, *supra* note 4, p. 627.