THE RIGHT TO FREE ELECTIONS AND THE DESIGN OF ELECTORAL SYSTEMS: EXPERIENCES OF ARMENIA, THE CZECH REPUBLIC, ITALY, AND TURKEY

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ABSTRACT

The electoral system is a set of rules, according to which the votes are to be transmitted into the electoral outcome. In this paper I argue that protection of the right to free elections in examination of cases related to the design of the electoral systems requires a wider interpretation of the "free expression of the opinion of the people in the choice of legislature" (ECHR Article 3 of Protocol 1 – 'P01-3' or "the right to free elections") and that this provision should mean that this choice is not manifestly distorted in the name of government stability or similar aims. I use examples from four jurisdictions to explore how judicial review may deal with questionable features of electoral systems.

The research methodology largely relies on black letter law research. It includes the ECtHR jurisprudence as well as comparative study of constitutional court judgments of four chosen jurisdictions: Armenia, the Czech Republic, Italy, and Turkey. Special attention is paid to the Venice Commission's opinions and other sources of Council of Europe's soft law that have to do with electoral rights and electoral standards. Recognizing the institutional differences of the ECtHR, constitutional courts and the Venice Commission, the comparative analysis demonstrates that the ECtHR's interpretation of the right to free elections has not yet extended the protection of electoral rights beyond participation in elections, to the distribution of mandates and resulting composition of the legislature.

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Introduction

An electoral system is understood here as a set of rules, according to which the votes cast in election are to be transmitted into the electoral outcome. The design of electoral systems is an attractive field of research for political scientists, historians, and fertile ground for electoral consultants.[1] Political science literature on the various components of electoral systems is rich and includes links of electoral systems with party systems,[2] historical explanations for the selection of particular systems,[3] relationships between electoral systems and principles of representation,[4] political effect of delineation of electoral constituencies,[5] among other strands. However, electoral systems have not attracted the same attention from legal scholars. High dependence of the chosen models of electoral systems on the national political and historical context, together with political sensitivity of the issue may have created a perception that drawing general legal conclusions on what makes a democratic electoral system is impossible. Attempts to draw legal conclusions on electoral systems are limited to one or few jurisdictions and do not have ambition to present general standards.[6]

The focus of this research is the jurisprudence of the European Court of Human Rights (ECtHR) and constitutional jurisprudence of the chosen Council of Europe (CoE) member

[1] See, e.g., Dalton, R., & Anderson, C., Citizens, Context, And Choice: How Context Shapes Citizens' Electoral Choices, New York: Oxford University Press (2011); Ezrow, L., Linking Citizens And Parties: How Electoral Systems Matter For Political Representation, New York: Oxford University Press (2010); Gallagher, M., & Mitchell, P., The Politics of Electoral Systems, New York: Oxford University Press (2005).
[2] See, e. g., Pappalardo, A., 'Electoral Systems, Party Systems - Lijphart and Beyond', Party Politics, Volume 13, Issue 6, pp. 721-740, (2017).
[3] Emmenegger, P., & Petersen, K., 'Taking History Seriously in Comparative Research: The Case of Electoral System Choice, 1890-1939', Comparative European Politics, 15, 6, pp. 897-918, (2017).
[4] Raabe, J., 'Principles of Representation Throughout the World: Constitutional Provisions and Electoral Systems', International Political Science Review, Volume 36, Issue 5, pp. 578-592, (2015), Popescu, R., 'Distortions Within Representative Democracy - The Influence of the Electoral System on Representation [notes]', Analele Universitatii Din Bucuresti: Seria Drept, 2, p. 214, (2013).
[5] Potter, J.D., 'Constituency Diversity, District Magnitude and Voter Co-ordination', British Journal Of Political Science, 48, 1, pp. 91-113, (2016).
[6] See, for example, Koziubra, M., 'Electoral System of Ukraine in the Context of the Rule of Law Requirements null', *Law Of Ukraine: Legal Journal (Ukrainian)*, 5, p. 86 (2013); Raabe, J., op.cit. fn.9; Giugăl, A., Johnston, R., et al., 'Gerrymandering and Malapportionment, Romanian Style: The 2008 Electoral System', *East European Politics & Societies*, 31, 4, pp. 683-703 (2017).

states on the cases related to the design of electoral systems. The reluctance of the ECtHR to examine electoral cases is reflected in the literature, which focuses mainly on the criticism of ECtHR rulings in high-profile cases. Recent literature is often critical of the ECtHR's approach to the organization of elections in Council of Europe (CoE) member-states.[7] While the overall criticism boils down to "the ECtHR appears to be forgetting a fundamental principle underlying the right to pluralistic democracy",[8] the alternative is unclear. Critics are united in their view that the margin of appreciation can be put into question in political cases (including electoral cases), but there is no clarity on whether the Court may adopt a more active approach to the scrutiny of electoral systems and what could compel the ECtHR to do so.

In this paper I argue that protection of the right to free election in examination of results-related electoral cases requires a wider interpretation of the "free expression of the opinion of the people in the choice of legislature" (ECHR Article 3 of Protocol 1 – 'P01-3' or "the right to free elections") and that this provision should mean that this choice is not manifestly distorted through elements designed to keep away political newcomers and entrench incumbents in power.

The first part of this paper demonstrates that the current criteria used by the ECtHR to examine electoral systems are insufficient: being concerned chiefly with assessing participation in elections, these criteria do not embrace the translation of voting results into a representative body. This paper offers a possible way to enrich the interpretation of the

[7] Ergil, D., '[Electoral issues] Turkey', *Electoral Politics in the Middle East: Issues, Voters and Elites* (pp. 11-38), ed. by Landau, Özbudun & Tachau, London: Croom Helm Index Islamicus; Hale, W. 'The Electoral System and the 2007 Elections: Effects and Debates', *Turkish Studies*, Volume 9, Issue 2, pp. 233-246 (2008); Hoffmeister F., "Podkolzina v.Latvia, App. No46726/99", *American Journal Of International Law*, 97, 3, pp. 664-669, (2003).

[8] Bowring, B., "Negating Pluralist Democracy: the European Court of Human Rights Forgets the Rights of the Electors", *KHRP Legal Review*, Volume 11, pp,67-96, (2007); R. Zimbron, "The Unappreciated Margin: Turkish Electoral Politics Before the European Court of Human Rights", 49 *Harvard International Law Journal Online* 10 (2007).

conventional provision and links the ‘common [political] heritage’ enshrined in the Preamble of the Convention with the ‘European electoral heritage’ developed by the European Commission for Democracy through Law (the Venice Commission).

The second part engages in a comparative study of constitutional court judgments of four jurisdictions in order to identify traces of European electoral heritage in national jurisprudence. It gives a close look to the judicial assessment of three features of electoral systems – electoral thresholds, majority bonuses and second rounds for elections under the system of proportional representation.

Turkey and the Czech Republic have been selected to illustrate that electoral thresholds may impose high limitations on electoral rights. Turkey imposes the highest – 10 per cent - threshold among the CoE member states for a political party to enter the parliament. The Turkish threshold passed the scrutiny of the Turkish Constitutional Court and subsequently successfully went through the ECtHR’s test, keeping the bar for domestic discretion on these matters very high. The Czech Republic establishes the highest, at 20 per cent maximum, threshold for the pre-election coalitions. While both Turkey and the Czech Republic maintain the stability of the government as a legitimate goal for these thresholds, the line between the stable government and the intention to weaken competitors is, at times, blurred.

Italy and Armenia are examples of a complex approach to the design of proportional electoral systems. The Italian Constitutional Court demonstrated a high level of scrutiny in election-related cases, invoking the rights-related argument and popular sovereignty to limit the margin of appreciation of the legislator to the extent that it created an instance of “overturning” an ECtHR decision, finding a gross violation where the ECtHR has not even established its appearance.

The analysis of the judgments of the ECtHR and national constitutional courts in similar matters and the weight given to the margin of appreciation at the domestic and international levels demonstrates that some courts are more prone to speak about electoral systems in human-rights language, while others use the margin of appreciation to refrain from linking electoral rights with electoral results. The current interpretation of the ECHR P01-3 relegates the ECtHR to the latter group, risking to substantially limit the value of electoral rights under the Convention.

Chapter I. Electoral systems and electoral rights: how strong is the link?

1. Limits of "implied limitations": the ECtHR test in application to electoral systems cases

1.1. ECHR wording and the emergence of electoral rights

Electoral cases are litigated before the European Court of Human Rights under Article 3 of Protocol 1, which reads *"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."*[9] The wording of this article gave rise to difficulties in implementation to the extent that first electoral cases were declared by the Commission manifestly ill-founded.[10] These cases included, for example, complaints on restrictions of voting rights of prisoners, which nowadays would undoubtedly constitute a violation of the Convention. The Commission did not find an "appearance of a violation" and stated that the restriction does not affect "the free expression of the opinion of the people in the choice of the legislature".[11]

It is true that an infringement of "the free expression of the opinion of the people" it not easy to demonstrate when it comes to concrete cases, since Article 3 of Protocol 1 is phrased as a positive obligation of states, not as a right to participate, nor to enjoy a particular outcome of the "free expression of the opinion". The contentious character of the wording is deeply rooted and goes back to the times when the Convention and the Protocol were drafted. First

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art. 3 protocol 1.
[10] See, for example, X v Germany No. 530/59, 3 YB 184 at 190 (1960); X v. Belgium No. 1065/61, 4 YB 260 at 268 (1961).
[11] See the decision of 6 October 1967 on the admissibility of application no. 2728/66, X v. the Federal Republic of Germany, vol. 10, p. 338.

drafts of the article, which included the reference to "the will of people" or to "conditions calculated to ensure that the government and the legislature represent the people", had faced resistance mainly from the United Kingdom, which "feared that its first-past-the-post electoral system and the system of appointing members of the House of Lords would be found to be in breach of the Convention".[12] As a result of negotiations, free elections were linked to the expression of the opinion of the people, framing a complicated task of interpretation of this provision for the ECtHR.

The first electoral judgment was delivered 35 years after adoption of the Protocol 1, in 1987, in the case of *Mathieu-Mohin and Clerfayt v Belgium*. This judgment presented the Court's approach to the interpretation of Article 3 of the Protocol 1 underlining a shift "from the idea of an 'institutional' right to the holding of free elections to the concept of 'universal suffrage'".[13] The Court has read into the right to free and fair elections the subjective rights of participation – the right to vote and the right to stand for election to the legislature.

1.2. Participation v. Results of participation before the ECtHR

Since the very idea of an election is to end up with an elected body, voting as well as standing for elections is just a half way to accomplishing this aim. As accurately noted by one researcher, "elections have two components: what goes into the electoral process and what comes out of it".[14]

What comes out of the electoral process is determined by the electoral system, defined for the purposes of this research as a set of rules, according to which votes are to be transmitted into

[12] Lécuye Y., op.cit., fn.1, p.13.
[13] *Mathieu-Mohin and Clerfayt v Belgium*, Application no. 9267/81, Judgement 02.03.1987, paragraph 51.
[14] Wagner, K., 'Identifying and Enforcing Back-End Electoral Rights in International Human Rights Law [notes]', Michigan Journal Of International Law, 1, p. 165, (2010).

the outcome of the elections. In other words, rules of the electoral system determine how participation of voters and candidates will translate votes into seats in the legislature.

Since 1987, the ECtHR contributed to the participation in elections in terms of promotion of the universal suffrage but the same cannot be said about challenges to the components of electoral systems. For example, the Court proclaimed unconventional the blanket restriction of the right to vote for prisoners in the famous *Hirst v the United Kingdom;*[15] it also overturned the blanket restriction of electoral rights for people with mental disabilities in *Alajos Kiss v Hungary.*[16] The right to stand for elections ("passive" aspect of suffrage), largely in terms of candidacy requirements, has also been under the supervision of the Court. Although the margin of appreciation of the States in imposing requirements for the right to stand is broader, the Court's jurisprudence demonstrates that such grounds for ineligibility as multiple-nationality or ethnicity are not compatible with the Convention.[17]

However, the Court backs off when participation of "new" groups of voters has a chance to "backfire": to influence the electoral results and challenge the existing political balance. For example, in the case of *Sitaropoulos and Giakoumopoulos v. Greece*, the Grand Chamber overruled the Section's decision and did not find a violation in inaction of the Greek Government to provide a regulation for out-of-country voting even given that the Greek Constitution recognized such possibility. Facilitating the right to express political preferences by ballot for one third of citizens could have a significant impact on election results.[18] The Court seemed to be mindful of potential general consequences of its judgment to the point that while deciding an *individual case* it stated that the Court's argument about out-of-

[15] *Hirst v. the United Kingdom,* Application no.40787/98, Judgment 21.07.2001.
[16] *Alajos Kiss v Hungary,* Application no. 38832/06, Judgment 20.05.2010.
[17] *Sejdić and Finci v. Bosnia and Herzegovina,* Applications nos. 27996/06 and 34836/06, Judgment 20.11.2009, [GC]; *Tănase v. Moldova,* Application no. 7/08, Judgment 27.04.2010, [GC].
[18] The Government claimed that "the broadest possible consensus among the political parties was needed in order to prevent political tensions arising out of the de facto increase in the electorate (some 3,700,000 persons live abroad compared with a population of 11,000,000 living in Greece)". See, *Sitaropoulos and Giakoumopoulos v. Greece,* Application no. 42202/07, Judgment 12.03.2012, [GC].

country citizens losing a link with a country of citizenship did not apply *in this particular individual case* but "this is not sufficient to call into question the legal situation in Greece".[19] Governed by the same logic, the court upheld the residence requirement for the right to vote, including the length of residence up to 10 years, legitimizing a number of aims for exclusion of citizens living in a country of their citizenship from "the people", whose opinion should be heeded by the Contracting States.[20]

Challenges to the design of electoral systems may be distinguished from cases involving participation of voters and candidates in elections (active and passive suffrage). For instance, the delineation of constituencies would normally not preclude participation of voters, however it usually has an impact on the distribution of mandates among the electoral constituencies and the number of votes that is required to obtain a mandate in each constituency. An electoral threshold, however high it may be, does not as such prevent parties from standing in elections or voters from casting ballots, but it can dilute the effects of such participation. Other components of electoral system design, such as majority bonuses, come into play even after the political actors who gained seats are known (so the passive and active suffrage have been exercised) but these rules still have a chance to alter an election outcome so that it further deviates from the results of the exercise of electoral rights.

Such components of electoral systems (under which contracting parties are *"to hold free elections"),* that have been challenged before the Court, were hardly ever declared in violation of Article 3 of Protocol 1. The Court accepted the conventionality of the challenged electoral thresholds, including the highest (10 per cent) threshold in Turkey.[21] Moreover, the Court's non-acceptance that "all votes must necessarily have equal weight as regards the

[19] See, *Sitaropoulos and Giakoumopoulos v. Greece*, Application no. 42202/07, Judgment 12.03.2012, [GC], paragraph 79.
[20] See, *Polacco and Garofalo v. Italy*, Application no. 23450/94, Admissibility decision 15.09.1997.
[21] *Yumak & Sadak*, Application no. 10226/03, Judgment 8.7.2008 [GC].

outcome of the election or that all candidates must have equal chances of victory"[22] plays the role of an admissibility criterion for most cases concerning electoral systems. For example, complaints on delineation of electoral constituencies were, as a rule, declared manifestly ill-founded regardless of the gravity of the departure from the equality of the vote, without being given a chance to be examined on the merits. In *Bompard v. France,* an alleged violation of Article 3 of Protocol 1 due to differences of population in constituencies was rejected as inadmissible. Acknowledging again the weight to the wide margin of appreciation given to the states, the Court did not find these electoral conditions "unjustified and disproportionate".[23] The Icelandic electoral system case, *X v Iceland,* where the applicant claimed a violation due to a different weight of the vote in different constituencies, became a textbook example of a case that has no real chances to succeed on the merits.[24] In *Saccomanno v Italy*, the Court declared manifestly ill-founded an application alleging a violation of P01-3 by the provisions of the electoral law that required no threshold for the majority bonuses as well as so called closed party lists.[25]

All cases related to the design of electoral systems are result-related cases, since electoral systems *per se* have to do with the transmission of votes into mandates – the process which can happen only after participation of voters (by means of voting) and participation of candidates (as the last stage – by appearing on a ballot paper). These cases have characteristics that do not lend themselves to easy enforcement. Some of these characteristics are mentioned in the literature, such as "a particularly strong challenge to the traditional conceptions of sovereignty and non-intervention", "less associated with the individual and

[22] See *Yumak & Sadak*, Application no. 10226/03, Judgment 8.7.2008 [GC], paragraph 112.
[23] *Bompard v France*, Application no. 44081/02, Decision 04.04.2006, paragraph 8.
[24] X. v. Iceland. In: M. Janis – R. Kay – A. Bradley: European Human Rights Law. 2nd ed., Oxford, 2008, OUP, pp. 38-41.
[25] *Saccomanno v Italy*, Application no. 11583/08.

more with the collective".[26] Another important characteristic, which singles out cases related to electoral system design, is that these cases are always politically-charged in terms of their potential to change the political balance of a country. They belong to the larger group of high-profile cases that have to do with constitutional traditions, where the member-states are covered by the margin of appreciation and reluctant to accept changes.[27]

1.3. The current ECtHR test for electoral cases and the margin of appreciation

The test applied to all electoral cases was developed by the Court in the cases that had to do with restrictions for participations of votes and candidates in the electoral process. One of the key cases, where the Grand Chamber laid down the main principles guiding the current Court's jurisprudence on Article 3 of Protocol 1, is the case of *Hirst v. the United Kingdom*.[28] In this case "[t]he Court reaffirms that the margin in this area [electoral rights] is wide"; and "[t]here are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision".[29] But the Court continued:

> "It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any conditions imposed must not thwart the free expression of the people in the

[26] Wagner, K., 'Identifying and Enforcing Back-End Electoral Rights in International Human Rights Law [notes]', Michigan Journal Of International Law, 1, p. 165, (2010).
[27] Graziadei, S., 'Democracy v Human Rights? The Strasbourg Court and the Challenge of Power Sharing', European Constitutional Law Review, 12, 1, pp. 54-84, (2016).
[28] *Hirst v. the United Kingdom (no.2*), Application no. 74025/01, Judgment 06.10.2005 [GC], paragraph 61.
[29] Ibid, paragraph 62.

> choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage."[30]

One year later the Court's test in electoral cases was summarized in *Zdanoka v Latvia*.[31] It was referred to in the Court's jurisprudence as the concept of "implied limitations" that heavily relies on the aims that Contracting Parties "purpose" to justify not only the direct restrictions of the electoral rights but also features of electoral systems which lead to these restrictions. The States are not bound by "enumerated aims" to justify the restrictions.[32]

> "The concept of "implied limitations" under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 of Protocol No. 1 is not limited by a specific list of "legitimate aims" such as those enumerated in Articles 8 to 11 of the Convention, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case."[33]

The Court thus named two main criteria for examining the electoral cases: (1) "whether there has been arbitrariness or a lack of proportionality", and (2) "whether the restriction has interfered with the free expression of the opinion of the people".[34] The Court maintains that

[30] Ibid, paragraph 62.
[31] *Zdanoka v Latvia*, Application no. 58278/00, Judgment 16.02.2006, [GC].
[32] Ibid.
[33] *Zdanoka v Latvia*, Application no. 58278/00, Judgment 16.02.2006, [GC], paragraph 115b.
[34] Ibid, paragraph 115c.

"[i]n this connection, the wide margin of appreciation enjoyed by the Contracting States has always been underlined."[35]

As the Court emphasizes, the margin of appreciation is the Court's red line for the examination of cases under Article 3 of Protocol 1. Being the leading doctrine of interpretation of the Convention in such cases, the margin of appreciation is a certain discretion given to the national authorities in implementation of the ECHR. "Historical development, cultural diversity and political thought"[36] of the member-states have put the margin of appreciation at the core of Article 3 of Protocol 1, convincing the Court that "features unacceptable in the context of one system may be justified in the context of another".[37]

The margin of appreciation is closely linked with the concept of subsidiarity, which means that the member-states have the primary responsibility for the protection of conventional rights and in the cases of their violation should be first given a chance to correct the damage 'in-house', before the Strasbourg's Court steps in.[38] The subsidiarity arguments are frequently evoked by the member-states when it comes to disputes before the Court. The Court itself turns to the subsidiarity even more often to draw a line between permissible Court's supervision and impermissible intervention into states' 'domestic affairs'.[39]

1.4. Application of the current ECtHR test to electoral systems

[35] Ibid, paragraph 115c.
[36] *Hirst v. the United Kingdom (no.2*), Application no. 74025/01, Judgment 06.10.2005 [GC], paragraph 61.
[37] *Yumak & Sadak,* Application no. 10226/03, Judgment 8.7.2008 [GC], paragraph 111.
[38] FØLLESDAL, A., 'SUBSIDIARITY AND INTERNATIONAL HUMAN-RIGHTS COURTS: RESPECTING SELF-GOVERNANCE AND PROTECTING HUMAN RIGHTS--OR NEITHER?', Law & Contemporary Problems, 79, 2, pp. 147-163, (2016).
[39] Besson, S., 'Subsidiarity in International Human Rights Law--What is Subsidiary about Human Rights?', American Journal Of Jurisprudence, 61, 1, pp. 69-107; Mowbray, A., 'Subsidiarity and the European Convention on Human Rights [article]', Human Rights Law Review, 2, p. 313, (2015).

The Strasbourg test did not appear to be difficult to pass for the electoral systems of the Contracting States. The potential to impact election results works as a hidden criterion for the Court in application of the test under Article 3 of Protocol 1, making the States' margin of appreciation so wide that it becomes effectively unlimited. The upcoming Protocol 15 to the ECHR reconfirms that some states will keep demanding greater national discretion by featuring the inclusion of the margin of appreciation and the principle of subsidiarity into the Preamble.[40]

With regard to the first criterion of the test, the Court's jurisprudence shows that even the lack of proportionality in systems of proportional representation due to high thresholds does not necessarily constitute the lack of proportionality of the restriction of the rights. Moreover, the Court has proved its readiness to accept even the opposite aims for electoral system designs (including rights restricted components) as long as they suit the circumstances of a case:

> "The various [electoral] systems can pursue different, sometimes even antagonistic, political aims. One system might concentrate more on a fair representation of the parties in Parliament, while another one might aim to avoid a fragmentation of the party system and encourage the formation of a governing majority of one party in Parliament. None of these aims can be considered unreasonable in itself."[41]

As for the application of the second criterion, "the free expression of the opinion of the people", the Court explained that "Article 3 of Protocol No. 1 does not imply that all votes must necessarily have equal weight as regards the outcome of the election or that all

[40] Vogiatzis, N., 'When Reform Meets Judicial Restraint Protocol 15 Amending the European Convention on Human Rights null [article]', *Northern Ireland Legal Quarterly*, 2, p. 127, (2015).
[41] *Yumak & Sadak*, Application no. 10226/03, Judgment 8.7.2008 [*GC*], paragraph 131.

candidates must have equal chances of victory."[42] This position does not develop what Article 3 of Protocol 1 implies as regards to the outcome of elections. The Court's approach thus narrows down the full application of its test to participation in elections. Indeed, the interpretation of Article 3 of Protocol 1 limits electoral rights to participation and the requirement of the "free expression of the opinion of the people" is satisfied once people are able to participate to in the elections.[43]

This situation results in a dubious trend in the Court's jurisprudence that accepts distortions of voting results produced by electoral systems, at times without even looking into the merits of claims. Cases related to the design of electoral systems possess important features that make them almost immune them from the European supervision of the Court – they are often high-profile cases concerning constitutional traditions of member-states. A challenge to sovereignty that these cases bring is immediately mediated by the widest margin of appreciation granted to member states in their constitutional architecture.

However, the main appeal of margin of appreciation as opposed to the European supervision of the Court is that "[t]he national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions".[44] While this argument keeps the Court away from member-states' delicate affairs concerning their traditions, including political and constitutional traditions, the logic of this argument becomes less convincing with regard to cases related to election results. Neither the Court, nor the Government parties in their pleadings can plausibly maintain the argument that "the national authorities have direct

[42] *Yumak & Sadak*, Application no. 10226/03, Judgment 8.7.2008 [GC], paragraph 112.
[43] Van Duk P. & Van Hoof G.J.H., "Theory and Practice of the European Convention on Human Rights", 478 (2d ed. 1990); Wagner, KA., 'Identifying and Enforcing Back-End Electoral Rights in International Human Rights Law [notes]', Michigan Journal Of International Law, 1, p. 165, (2010).

democratic legitimation and are better placed to evaluate local needs and conditions" when the democratic legitimation of the national legislator is exactly the issue in question in the cases related to electoral systems.

2. Not yet inherited 'European electoral heritage': the Council of Europe's soft-law on electoral systems

2.1. The ECtHR and the Venice Commission: common heritage of political traditions and the European electoral heritage

The Council of Europe's soft law related to design of electoral systems is very developed. The European Commission for Democracy through Law (the Venice Commission) was chosen for this study because its analysis of electoral systems goes further than the position of the ECtHR and represents a less deferential approach towards national electoral legislation.[45]

The basis for the Venice Commission's opinions is the European electoral heritage set out in the Code of Good Practice on Electoral Matters.[46] The reference to the European electoral heritage makes the Venice Commission's opinions authoritative in the eyes of the member states as it is indeed related to institutional realization of the features common to all CoE states.[47] Moreover, "a common heritage of political traditions" is explicitly mentioned in the Preamble of the ECHR.[48] In addition, the Statute of the CoE that was evoked by the Court to

[45] See, for example, Lécuye Y., op.cit., fn.1, pp.61-62.
[46] European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, CDL-AD (2002) (23 rev., 23 May 2003).
[47] The prominence of the Venice Commission's role in constitutional matters has been emphasized in the literature. See, for example, De Visser, M 2015, 'Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform, [article]', *American Journal Of Comparative Law*, 4, p. 963; Gianni Buquicchio & Pierre Garrone, *L'harmonisation du droit constitutionnel europeene: La contribution de la Commission europeenne pour la democratie par le droit*, 3 UNIFORM L. REV. / REVUE DE DROIT UNIFORME 323 (1998).
[48] ECHR, Preamble.

introduce, for example, the notion of the Rule of Law to its jurisprudence,[49] also spells out "common heritage of peoples".[50]

While the notion of "a common heritage of political traditions" might include everything and the opposite of it and on its face may seem vague, the Court elaborated on it:

> "Democracy is without doubt a fundamental feature of the European public order […]. That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights […]. The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention [...]".[51]

At the same time, the European electoral heritage could be regarded as part of heritage of political traditions, and as such it is more precisely defined by the Venice Commission. According to the Code of Good Practice on Electoral Matters:

> "This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second, the principle that truly democratic elections can only be held if certain

[49] See, for instance, *Golder v. the United Kingdom*, Application no.4451/70, Judgment 21.02.1975.
[50] Statute of the Council of Europe, ETS No1, Preamble.
[51] United Communist Party of Turkey and Others v. Turkey, Application no.19392/92, Judgment 30.01.1998, paragraph 45.

basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met."[52]

Some of these principles have already been discovered and applied by the ECtHR in the cases related to participation in elections, albeit without always referencing the European electoral heritage. For example, the *Hirst (N2)* has been criticized for not acknowledging the contribution of the Code of Good Practice in the text of the judgment.[53] It is worth mentioning that the ECtHR sometimes cites the Venice Commission's documents in its judgments but does it in most cases to enrich the background information rather than to contribute to the reasoning of the judgments. Some authors have attempted to demonstrate that the Code of Good Practice on Electoral Matters and the Venice Commission opinions have been integrated in the Court's jurisprudence.[54]

2.2. The stumbling stone of two heritages: equal suffrage and equality of the vote

While the Venice Commission and the Court seem to be on the same page with regard to the general common principles, such as the rule of law and democracy, that constitute both the heritage of political traditions and the electoral heritage, their approaches are different when it comes to the detailed realisation of these principles in the electoral process through designs of electoral systems. This difference is especially evident in the principle of equal suffrage. This principle, which is mentioned alongside universal suffrage in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,[55] is not expressly written in Article 3 of Protocol 1 of the ECHR. However, the Venice Commission

[52] Code of Good Practice in Electoral Matters, Explanatory Report, paragraph 2.
[53] Fasone, C., & Piccirilli, G. 2017, 'Towards a Ius Commune on Elections in Europe? The Role of the Code of Good Practice in Electoral Matters in 'Harmonizing' Electoral Rights', *Election Law Journal*, Volume 16, Issue 2, pp. 247-254, p. 251.
[54] Fasone, C., & Piccirilli, G. 2017, op. cit., p. 251.
[55] Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights.

had no difficulty in recognising European credentials of equal suffrage and declaring it part of the European electoral heritage as follows:

> "2. Equal suffrage. This entails: 2.1. Equal voting rights: each voter has in principle one vote; where the electoral system provides voters with more than one vote, each voter has the same number of votes. 2.2. Equal voting power: seats must be evenly distributed between the constituencies."[56]

When it comes to cases related to the electoral system design, equality of the vote the only manageable standard. Indeed, the other criteria (such as universal, free, secret suffrage) only acquire meaning at the stage of participation in elections, while the equality of the vote accompanies the entire electoral process from the delineation of constituencies to the distribution of mandates. The equality of the vote, so far consistently refused by the Court when examining electoral systems, is at the same time consistently pursued in the Venice Commission's assessments of different components of electoral systems, proportional as well as majoritarian. For example, the Court maintained that "Article 3 of Protocol No. 1 does not imply that all votes must necessarily have equal weight as regards to the outcome of elections or that all candidates must have equal chances of victory" in a case on electoral thresholds.[57] In admissibility decisions dedicated to cases on delineation of electoral constituencies, the equality of the vote is one of the main arguments holding the Court from considering this feature of electoral systems through the prism of suffrage rights:

> "[T]he phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" implies essentially – apart from freedom of expression (already protected under Article 10 of the Convention) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right

[56] Code of Good Practice in Electoral Matters, Guidelines, paragraphs I.2.1. – I.2.2.
[57] *Yumak & Sadak*, (Application no. 10226/03), Judgment 8.7.2008 [GC], paragraph 112.

> to stand for election. It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory."[58]

This reaffirms that the Court's interpretation of Article 3 of Protocol 1 does not go beyond mere participation in the electoral process, leaving electoral rights unprotected during the other "halfway" to the electoral results. In contrast, the Venice Commission makes it clear that the equality of the vote and the equality of chances (distinguished from the equality of the outcome) constitute part of equal suffrage:

> "Equality in electoral matters comprises a variety of aspects. Some concern equality of suffrage, a value shared by the whole continent, while others go beyond this concept and cannot be deemed to reflect any common standard. The principles to be respected in all cases are numerical vote equality, equality in terms of electoral strength and equality of chances. On the other hand, equality of outcome achieved, for instance, by means of proportional representation of the parties or the sexes, cannot be imposed".[59]

While the Court attaches no importance to the equal weight of the vote with regard to the outcome of elections, the Venice Commission clearly states that the principle of equal suffrage is one of the criteria that should circumscribe the margin of appreciation of the Contracting States in their choice of electoral systems:

> "[T]he choice of an electoral system is a sovereign decision of a state, provided the system conforms with principles […], including requirements for transparency,

[58] *Bompard v France,* Application no. 44081/02, Decision 04.04.2006, part 1.
[59] Code of Good Practice in Electoral Matters, Explanatory Report, paragraph 10.

universality and equality of suffrage of voters and non-discrimination among candidates and political parties."[60]

The studies and opinions on different countries reaffirm the Venice Commission's approach, according to which the principle of the equality of the vote is the key element that an electoral system has to possess in order to satisfy the basic democratic standards of elections. For example, the opinion on the Electoral Code of Georgia states that "the Parliament could consider the work of the Venice Commission on selecting an appropriate electoral system with a view to identifying an optimum relationship between genuine representation and stability of government, while respecting the principle of equal suffrage".[61] Notably, this opinion emphasizes that even the need to ensure stability of government should not surpass the principle of equal suffrage.

While distinguishing between majoritarian and proportional systems, the Venice Commission is firm that the principle of the equal voting power should not be compromised in any of the chosen systems. In the opinion on Romanian electoral legislation the Commission stated that "the principle of proportional representation is one of the specifications of the principle of equal suffrage (equal voting power)".[62] However, the Commission never rejects the importance of the equality of suffrage in majoritarian systems. For example, for the majoritarian system in Georgia the Commission noted that "different sizes of single-mandate electoral districts fail to guarantee the equality the vote".[63] Analyzing Ukrainian electoral legislation, the Commission noted that "a significant increase of the number of voters in one

[60] Venice Commission and OSCE/ODIHR, Joint opinion on amendments to the Election Code of Georgia as amended through March 2010, CDL-AD(2010)013, paragraph 16.
[61] Ibid.
[62] Venice Commission, Opinion on the Law for the Election of Local Public Administration Authorities in Romania, 300/2004, paragraph 39.
[63] Venice Commission and OSCE/ODIHR, Joint opinion on amendments to the Election Code of Georgia as of 8 January 2016, CDL-AD(2016)003, paragraph 17.

of the single mandate districts might violate the principle of equal representation".[64] Sometimes the differences in the weight of the vote, noticed by the Venice Commission, is striking. For instance, in Bulgaria the electoral system was designed in a way that allowed gaining a mandate with 1,800 votes in one electoral district but could require as many as 70,000 votes in another electoral district.[65]

While both the Court and the Venice Commission reaffirm that European standards do not impose a particular electoral system, the Venice Commission uses the principle "one person – one vote" as a yardstick to assess systems of representation. The denial of the equality of the vote argument by the ECtHR left it without manageable standards for examination, giving the participating states an effective *carte blanche* in departing from the principle of equality after the votes have been cast.

2.3. The Venice Commission's potential to enrich the ECtHR jurisprudence

Different factors related to the institutional set up of these two institutions may explain the likelihood of stricter scrutiny of electoral system design by the Venice Commission in comparison to the ECtHR. Firstly, in this regard, the Venice Commission might be better positioned and has all the necessary means for the assessment of electoral systems. Its opinions do not risk to enter the realm of "high profile" cases and do not imply that elections which already took place contradict democratic standards. In addition, the implementation of its recommendations is not aimed to remedy rights violations; they are supposed to prevent non-compliance of electoral systems with standards on democratic elections. However, even this does not explain the Court's reluctance to include the principle of equal suffrage, which makes a part of the European electoral heritage, in its test related to election results.

[64] Venice Commission and OSCE/ODIHR, Joint Opinion on the draft laws on election of peoples deputies of Ukraine and on Central Election Commission, CDL(2013)019, paragraph 32.
[65] Venice Commission and OSCE/ODIHR, Joint opinion on amendments to the electoral code, CDL-AD(2017)016.

At the same time, the possibility to look at the components of electoral systems through a wider prism is accompanied by the non-binding nature of the Venice Commission's opinions and reports, which are to be taken into consideration but not necessarily implemented by the member-states. The non-binding nature of the Venice Commission's law is a two-way street: it allows the Commission not to give too much weight to the doctrine of margin of appreciation and come up with "the best advice" based on the principles common for the member-states. It is also important to note that the Commission is not bound by the wording of the conventional provision envisaged by member states to keep their electoral systems as they are.

On the one hand, the assessment of an electoral system is a highly delicate exercise and in absence of clear criteria applicable to electoral systems it risks to politicize the Court. However, the total *carte blanche* given to the national legislators risks a wide open door to the emergence of questionable electoral systems. Through the prism of the Preamble of the ECHR spelling out the common political heritage, the possibility for the Court to turn to these standards in interpretation of the Convention is not illusory. The Court has not so far used this link and never invoked a common political heritage argument to give weight to the Venice Commission's opinions or even to give more legitimization to its interpretation of Article 3 of Protocol 1. However, the precedents of invoking the Preamble set up in other domains of the case-law give the hope that the court may yet discover this aspect of the European electoral heritage.

Chapter II. Judicial approaches to the design of electoral system in comparative perspective: experiences of Armenia, the Czech Republic, Italy and Turkey.

1. Electoral thresholds in the Turkish and Czech systems

1.1. The choice of jurisdictions: thresholds' rules in Turkey and the Czech Republic and their impact on electoral rights

This subchapter narrows the analysis of the design of electoral systems to one of their most common components – an electoral threshold. An electoral threshold is defined as "a minimum level of support which a party needs in order to gain representation".[66] Among the components of electoral systems that have a potential to alter voting outcomes, an electoral threshold that legislation establishes at the national level is the least contentious issue in terms of measuring.[67] Firstly, the application of threshold rules is simple and clear, and does not require specific knowledge and complex calculations, unlike sophisticated rules on some other components such as methods of seat distribution, rules on delineation of electoral constituencies, majority bonuses, etc. Secondly, the use of thresholds is widely known among the countries that had opted for a system of proportional representation to mitigate a potential negative consequence, namely - the dispersion of votes that might result in a large number of small parties in parliament, unable to form a stable functional government. Unlike countries with the first-past-the post (majoritarian) system, states with proportional systems "are by default more prone to fragmented party systems".[68]

[66] Lijphart, A, & Aitkin, D n.d., Electoral Systems And Party Systems: A Study Of Twenty-Seven Democracies, 1945-1990, n.p.: Oxford: Oxford University Press, (1994).
[67] Gallagher, M, & Mitchell, P., Introduction to Electoral Systems, n.p.: Oxford University Press, Oxford Scholarship Online, (2005).
[68] Baskaran, T, & Lopes da Fonseca, M., 'Electoral thresholds and political representation', *Public Choice*, 169, 1/2, pp. 117-136, (2016).

The ECtHR acknowledged that "there are different kinds [of electoral thresholds] which vary according to the type of election and the context within which they are used".[69] While the idea of having electoral thresholds serves an important goal to ensure the stability of the governments, does this mean that any threshold, no matter how high, can be justified? An electoral threshold is a tool against parliamentary fragmentation, but this tool is composed of valid votes to be sacrificed for the sake of governability. Therefore, any threshold twists transformation of the opinion of the people into the electoral outcome. Although the essence of the idea of electoral threshold can hardly be questioned, the problem arises in the attempts to assess thresholds. With regard to the Convention, this may be put in the following terms: can a threshold be so high that it fails to meet the standard of being one of the "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"?[70]

Among the CoE members applying electoral thresholds, two jurisdictions, the Republic of Turkey and the Czech Republic, have been chosen for this analysis for the uniqueness of their threshold rules. At 10 per cent, Turkey has the highest threshold among the CoE member-states.[71] While the Turkish threshold applies equally to political parties and pre-election coalitions regardless of the number of parties in coalitions, the Czech Republic's electoral legislation lifts up its five per cent threshold by additional five per cent for each political party in the coalition.[72] The highest threshold that the legislation permits is 20 per cent, which constitutes the highest threshold for electoral coalitions among CoE members.

[69] *Yumak & Sadak,* Application no. 10226/03, Judgment 8.7.2008 [GC], paragraph 129.
[70] ECHR, art. 3 protocol 1.
[71] Alkin, S., 'Underrepresentative Democracy: Why Turkey Should Abandon Europe's Highest Electoral Threshold [notes]', Washington University Global Studies Law Review, 2, p. 347, (2011).
[72] Lebeda, T., "Le system electoral en Republoque Tcheque et ses consequences politiques", *Revue D'études Comparatives Est-Ouest,* 40, 1, pp. 45-70, (2009).

1.2.Concurring jurisprudence: the ECtHR and constitutional courts on threshold rules for political parties

In both Czech Republic and Turkey the threshold rules were unsuccessfully challenged before the constitutional courts. The Turkish threshold also survived the Strasbourg's scrutiny, fluttering scholars' hopes that the ECtHR would take the opportunity "to establish the key precedent" and reduce the margin of appreciation given to the member-states in this area.[73]

Applying the test of "implied limitations" described in Chapter 1 of this paper, the ECtHR largely relied on the legitimate aim. It focused on the objectives that electoral systems pursue and stated that "it should not be forgotten that electoral systems seek to fulfill objectives which are sometimes scarcely compatible with each other: on the one hand to reflect fairly faithfully the opinions of the people, and, on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will".[74] The Court used a comparative study of CoE member states' electoral legislations to support this position.[75] While it contributes to the acceptance that there is a legitimate aim for introducing an electoral threshold, the comparative study does not answer the question whether there is a legitimate aim for *the 10 per cent* threshold, which was the key question of the complaint. In absence of manageable standards, the Court had nothing but to compare the rules which differ: the 10 per cent threshold with "relatively high" four and five per cent thresholds:

> "[W]ith regard to the level fixed by electoral thresholds, it should be noted that in *Magnago and Südtiroler Volkspartei v. Italy*, in which the facts most closely

[73] Zimbron R., "The Unappreciated Margin: Turkish Electoral Politics Before the European Court of Human Rights", 49 Harvard International Law Journal Online 10 (2007).
[74] *Yumak & Sadak,* Application no. 10226/03, Judgment 8.7.2008 [GC], paragraph 112.
[75] *Yumak & Sadak,* Application no. 10226/03, Judgment 8.7.2008 [GC], paragraphs 61-64.

> resemble the circumstances of the present case, the Commission expressed the opinion that "the 4% threshold required for the election […]" and even "a system which fixe[d] a relatively high threshold" fell within the wide margin of appreciation left to States in the matter."[76]

One would expect the Court to come back to the 10 per cent issue in the second part of its test dedicated to the questions (1) "whether there has been arbitrariness or a lack of proportionality, and (2) whether the restriction has interfered with the free expression of the opinion of the people". [77] It would require a practical analysis of the threshold's implementation and how it changes the results of participation. However, the Court refrained from doing so. Instead, it went to the practical analysis of safeguards *"*as means to attenuate the threshold's negative effects". [78] The analysis of two possibilities, to stand as an independent candidate or to form pre-election coalitions, were regarded by the Court as sufficient to sustain the general 10 per cent rule. At the same time, the Court acknowledged that individual candidates are subjected to unfavorable restrictions and the law imposes some restrictions for creation of coalitions. Moreover, the Court did note that "such strategies also run counter to one of the threshold's declared aims, which is to avoid parliamentary fragmentation".[79]

In sum, the Court suggested that the 10 per cent rule is justified by the legitimate aim of the government stability as long as the law provides for strategies which run counter to the aim of the government stability. Indeed, the possibility to stand independently or under an umbrella of another political party can barely work as a safeguard against abusing the aim of government stability. The dissenters pointed out evident shortcomings in the Court's logic:

[76] Ibid, paragraph 113.
[77] *Zdanoka v Latvia,* Application no. 58278/00, Judgment 16.02.2006, [GC], paragraph 115b.
[78] *Yumak & Sadak,* Application no. 10226/03, Judgment 8.7.2008 [GC], paragraph 143.
[79] Ibid.

"[t]hus the purpose of the law can no longer be considered to be the exclusion of smaller parties or groups from Parliament, as the only remaining effect seems to be that it weakens within the election process the chances of all smaller parties which are not sure to pass the threshold".[80] This argument would rather work to support the assertion that as long as it anyway can be avoided (and the highness creates an additional incentive to avoid it), the 10 per cent threshold is not an effective means to achieve the goal of a stable government.

Indeed, practice demonstrates that the threshold has not always been an effective tool against fragmentation in Turkey itself. For example, in the 1995 and 1999 elections five political parties entered the parliament, each scoring between 10 and 21 per cent. By contrast, in 2002 only two parties surpassed the 10 per cent threshold. The price of this lesser fragmentation, however, was over 46 per cent of "wasted votes", which have been cast for unsuccessful parties.[81]

This example also demonstrates the importance of the historical context, which is always mentioned but rarely used by the ECtHR. This could probably explain the fact that "the [Turkish] Constitutional Court's case-law on the compatibility of electoral thresholds with the principle of a democratic State has been contradictory".[82] The first judgment, that upheld the national 10 per cent threshold, was delivered in 1995 – a rare "extreme" case of elections with almost no "wasted votes". In that judgment the Constitutional Court ruled:

> "Thresholds which result from the nature of the systems and [are expressed] in percentages, and [which] at national level restrict the right to vote and to be elected, are applicable [and] acceptable ... provided that they do not exceed normal limits ...

[80] Dissenting opinion of Judges Tulkens, Vajic, Jaeger and Sikuta to *the Yumak & Sadak*, Application no. 10226/03, Judgment 8.7.2008 [GC].
[81] 'The electoral system and the 2007 elections: Effects and debates' n.d., Turkish Studies, 9, 2, pp. 233-246.
[82] *Yumak & Sadak*, Application no. 10226/03, Judgment 8.7.2008 [GC], paragraph 39.

> The [threshold] of 10% is compatible with the principles of governmental stability and fair representation ...".[83]

When the ECtHR pronounced itself about the crucial role of the Constitutional Courts, it disregarded important features (history and the situation). Indeed, practice did not suggest that there were any major problems with fair representation. However, the situation had changed when the threshold was under the review of the ECtHR, which was noted by the dissenters who pointed out:

> "Admittedly, since 45.3% of the votes in the elections of 3 November 2002 (about 14,500,000) were cast for unsuccessful candidates […]. As the Chamber pointed out, the fact that such a large part of the electorate was not ultimately represented in Parliament was hardly consistent with the crucial role played in a representative democracy by Parliament, which is the main instrument of democratic control and political responsibility, and must reflect as faithfully as possible the desire for a truly democratic political regime".[84]

1.3. The Czech constitutional jurisprudence on threshold's rules for pre-election coalitions

Whereas in the Turkish electoral contest the creation of a pre-electoral coalition is, at least in theory, seen as the way to make it to the parliament for smaller parties, the Czech Republic opted for the application of an electoral threshold for the opposite purpose. To qualify for the distribution of seats, political parties have to pass a five per cent nationwide electoral threshold, while in case of a pre-election coalition it is raised by five per cent for each additional party in the coalition, up to the maximum threshold of 20 per cent.

[83] 'The electoral system and the 2007 elections: Effects and debates' n.d., *Turkish Studies*, 9, 2, pp. 233-246.
[84] Dissenting opinion of Judges Tulkens, Vajic, Jaeger and Sikuta to the *Yumak & Sadak*, (Application no. 10226/03), Judgment 08.07.2008 [*GC*], paragraph 140.

In 1996, the provision on electoral thresholds was a subject of the Czech Constitutional Court's review. Interestingly, the argument to have a higher threshold for pre-election coalitions in the Czech Republic is the same – government stability. According to the petitioners, each electoral candidate list should have the same position in accordance with the principle of equality, whether it is presenting one big political party, a political party together with independent candidates or several political parties.

The Constitutional Court of the Czech Republic reasoned that the purpose of forming pre-election coalitions is not to decrease the threshold for the individual parties in the coalition. This led the court to accept constitutionality of increased thresholds.[85] This tight reasoning, however, leaves more questions than answers. Establishing that the legislator did not pursue the purpose to make electoral coalitions an easier way to enter the parliament, the Czech Constitutional Court, however, avoids the discussion on whether the purpose of the legislator was to complicate the way to the parliament for pre-election coalitions. It also left without consideration the applicant's argument about limitations to freedom of association. As a result, the possibility to form a pre-election coalition in most cases makes sense only if each political party in the coalition can count on its electorate to support the coalition. There is no possibility for the court to analyze the real practical effect of these rules at play, because as a result of this strict rule pre-election coalitions are not popular in the Czech Republic. However, the absence of pre-election coalitions is already and by itself an effect. The OSCE/ODIHR in its report dedicated to the latest (2017) parliamentary elections in the Czech Republic noted that "the high thresholds discouraged the formation of political coalitions in the elections".[86]

[85] Judgment of the Constitutional Court of the Czech Republic no.42/2000. Available at http://kraken.slv.cz/Pl.US42/2000 .

[86] See, OSCE/ODIHR Final Report on parliamentary elections in the Czech Republic (2017). Available at https://www.osce.org/odihr/elections/czech-republic .

The Czech Republic is not unique in increasing thresholds for pre-election coalitions. The minimal difference between the thresholds for parties and coalitions does not attract too much attention, as long as coalitions are still standing for elections. The Venice Commission again goes further in this regard, questioning the very idea of application of different thresholds to political parties and to their coalitions. Even a small difference in the thresholds (two per cent) is regarded as a deviation from the proportional system. For example, according to the Electoral Code of Armenia, a party needs to gain at least five per cent of the national vote, and an alliance needs at least seven per cent. In its assessment of these rules, the Venice Commission stated that "it is not obvious that there should be a higher threshold for pre-election alliances, as alliances might provide more cooperation and stable government".[87] Electoral practitioners also tend to question such differences in thresholds.[88]

In all cases described above there are missing links: (1) whether the professed legitimate goal is achieved in practice and (2) whether this goal was not substituted by the intention to disadvantage certain electoral contestants. Government stability is a legitimate aim which, however, should not be taken for granted. There is a fine line between the intention to have a functional parliament and the intention to weaken smaller parties by creating additional obstacles for their appearance in the parliament. While the Venice Commission has the means to see the theoretical dimension of this, the judiciary, ruling on concrete cases, has the means to see the real effect of the systems on representation and on the electoral rights after election day.

[87] See, for instance, Joint Opinions of the OSCE/ODIHR and Venice Commission related to Armenian electoral legislation.
[88] Vollan, K., 'International Election Observation and Standards for Systems of Representation: A Critical View', *Nordic Journal of Human Rights*, Vol. 35, Issue 4: International Election Observation, pp. 341-359, (2017).

2. Majority bonuses and run-offs in Italy and Armenia

2.1. Italy and Armenia: transfer of unconstitutional traditions

While electoral thresholds are typical features to mitigate the negative effect of systems of proportional representation and are regarded acceptable in principle (but could be questioned from the perspective of their size), there are other characteristics of electoral systems that raise questions with respect to the idea of proportionality. Majority bonuses and run-offs for proportional electoral systems are less usual features than electoral thresholds.[89] They seem odd to the naked eye: it is clear that they represent a departure from the proportionality principle, but the sophisticated manner of this departure makes it complicated to keep track of how valid votes become mandates.

The complexity of such systems and their significant deviation from the declared proportional system prompted some criticism even from the electorate. The OSCE/ODIHR in its Final Report on observation of parliamentary elections in Armenia noted this criticism as well as the concern "that there was a lack of efforts to raise public awareness as to how votes would transfer into seats."[90]

This subchapter is dedicated to the examples of such unusual systems and the judicial scrutiny of their components. The new Armenian electoral system and its ancestor, the former Italian electoral system *(Italicum),* represent an atypical approach to the design of a proportional electoral system. Italy was the first among CoE members to adopt the so-called two-round proportional system assuring majority bonuses in 2015. While the Italian Constitutional Court struck down some components of this system, it appeared to be very attractive for Armenia, which copied its most contentious elements in the 2015 Electoral

[89] Bochsler, D., & Bernauer, J., "Strategic incentives in unconventional electoral systems: Introduction to the special issue", Representation, 50, 1, pp. 1-12, (2014).
[90] See OSCE/ODIHR Final Report on parliamentary elections in Armenia (2017), available at https://www.osce.org/odihr/elections/armenia.

Code, supplementing them with their own deviations from representation and proportionality, such as reserved seats for members of selected national minorities.

2.2. Diverging jurisprudence: the ECtHR and the Italian Constitutional Court on the majority bonuses

The Italian Constitutional Court has been praised by some scholars for its ability to "re-read the election rules from a human rights perspective" [91] and for the intensive usage of constitutional jurisprudence of its sister courts (mainly of the Federal Constitutional Court of Germany) for this purpose. A year and a half before the *Italicum* judgment, the Italian Constitutional Court invalidated, among others, the provision of electoral law which provided for seat bonuses for the electoral list that obtains a plurality of the valid votes. The Constitutional Court acknowledged that "the formation of an adequate parliamentary majority, with the purpose of guaranteeing stable government for the country and streamlining the decision making process" is a legitimate constitutional objective.[92] However, in the absence of any threshold for obtaining the majority prize these provisions are capable of transforming a group that achieved even a very low percentage of votes into an absolute majority. The Court ruled:

> "It is therefore clear that they [the rules] thereby permit *an unlimited impairment of the representative status* of the parliamentary assembly, which is incompatible with the constitutional principles, according to which the Houses of Parliament are the exclusive locus for "national political representation", that they are formed *on the basis of elections and hence on popular sovereignty"* [emphasis added]. [93]

[91] Longo, E, & Pin, A., 'Judicial Review, Election Law, and Proportionality null [article]', *Notre Dame Journal Of International & Comparative Law*, p. 101, (2016).
[92] Judgment of the Constitutional Court of Italy no. 1/2014. Available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments.
[93] Ibid, p. 11.

The parallel with the jurisprudence of the German Federal Constitutional Court and comparison of the core structural elements of two electoral systems explicitly made in the judgment give reasons to hope that there are key principles that should not be overturned by the country's uniqueness.[94] This contributes to the idea that the universal language of individual rights is capable of remedying also structural constitutional problems.[95]

In this regard, the Italian Constitutional Court diverged from the ECtHR, creating a rare situation where the same provision has been outlawed by a Constitutional Court but has not even passed the admissibility stage of the ECtHR review. In *Saccomanno and others v. Italy,* the ECtHR declared the complaint alleging violation of Article 3 of Protocol 1 of the Convention, in particular, by the system of closed lists and the majority bonuses described above, manifestly ill-founded. In this admissibility decision the ECtHR largely relied on the margin of appreciation and the principles of previous jurisprudence. The Court looked at the magnitude of the bonuses in the Italian electoral system in light of the *Yamak and Sadak* case, namely looking at the majority bonuses as at the threshold for "correction of the negative effect of proportional systems and ensure more government stability".[96] This led the Court to decide that the bonuses "would not seem likely to affect the balance between the principles of fair representation and government stability" and that there is "no appearance of an infringement of 'the free expression of the opinion of the people in the choice of the legislature'.[97] The Court correctly pointed out that the majority bonuses correct the effect of proportional system and ensure a more stable government but it did not answer the question: at what price?

[94] E. Longo, A. Pin, Don't Waste Your Vote (Again!). The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny, cit., 21.
[95] Dawood, Y., 'Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review', University Of Toronto Law Journal, 62, 4, pp. 499-561, (2012).
[96] *Saccomanno and others v. Italy*, Application no. 11583/08, paragraph 71.
[97] Ibid, paragraphs 74-75.

It is clear that it was not the substantive analysis of the merits but rather the interpretation of Article 1 Protocol 3 borrowed from the *Yumak and Sadak* case that led the ECtHR to the conclusion that the majority bonuses "would not seem likely to affect the balance between the principles of fair representation and government stability".[98] While it was so for the ECtHR, the Italian Constitutional Court saw the same majority bonuses as *"an unlimited impairment of the representative status of the parliamentary assembly".*[99] Taking the same principles as starting points, two courts came to the opposite conclusions. Should the margin of appreciation be blamed for leading the ECtHR to the opposite conclusion on the same matter and principles?

Overall, the test applied in Italy to the electoral system resembles the ECtHR test of "implied limitations". The Italian Constitutional Court "[c]iting broad legislative discretion in this area, limited its scrutiny to the test of reasonableness and proportionality and to verifying the compatibility of the challenged provisions with the right to vote and the right to proportional representation of the citizenry".[100] The Italian test of reasonableness and proportionality, including the assessment of the aim, corresponds to the first criterion of the ECtHR test (1) "whether there has been arbitrariness or a lack of proportionality".[101] The second criterion is more complex. While the ECtHR, bound by the language of the Convention, looks whether the restriction has interfered with "the free expression of the opinion of the people", the Italian Constitutional Court focuses on the right to vote and the representative nature of the parliament. This suggests that as long as the first stages of the tests are similar and both courts accept the stability of the government as a legitimate aim, the core issue is in the second step. While the ECtHR seeks to establish "whether the restriction has interfered with

[98] Ibid, paragraph 75.
[99] Judgment of the Constitutional Court of Italy no.1/2014, op. cit.
[100] Judgment of the Constitutional Court of Italy no.1/2014, op. cit.
[101] See, *Zhdanoka v Latvia*, Application no. 58278/00, Judgment 16.02.2006, [GC].

the free expression of the opinion of the people",[102] it presumes that as long as the as "the free expression of the opinion of the people" has already been performed through the casting of ballots, there cannot be even an appearance of its violation.

2.3. Weight of the vote v. government stability: from 'Italicum' to 'Armenicum'

The 2014 judgment of the Italian Constitutional Court prompted the debate on new electoral legislation in Italy that resulted in the adoption of electoral law known as the *Italicum.*[103] The basis for the *Italicum* system is a proportional formula. This formula is complemented by a majority bonus adjusted with a threshold: the electoral list that wins 40 per cent of the votes is to be awarded 340 mandates out of the 630 total mandates. The run-off is to be held between two top parties, if there is no list which obtained 40 percent of the votes.[104] The *Italicum* inspired *Armenicum*. The Armenian Electoral Code took the *Italicum* as a basis and the legislator went further with modifications. The political party that received the absolute majority is to be given bonuses to attain "the stable majority" defined by the law as 54 per cent of the total number of mandates. The run-off is to be held in case no political party attained the stable majority as a result of elections, nor by forming a governing coalition within 6 days after the election. The adoption of the electoral system similar to the Italian one has been criticized by the Venice Commission and the OSCE/ODIHR, which stated in their joint opinion:

> "A proportional system assuring a majority bonus has recently been adopted in Italy. [T]his system has been adopted after a rather long period of instability and with the aim of finding a better balance between governability and representation. This system is the fruit of a long experience. It is not necessarily transferrable to a country which

[102] *Zdanoka v Latvia,* Application no. 58278/00, Judgment 16.02.2006, [GC], paragraph 115b.
[103] Italian Electoral Law of 2015, LEGGE 6 maggio 2015, no. 52, published (GU Serie Generale n.105 del 08-05-2015), available at http://www.gazzettaufficiale.it/
[104] Fusaro, C., 'La Nueva Ley Electoral Italiana de 2015, Un Reto Para El Parlamentarismo Debil', Teoria Y Realidad Constitucional, 38, pp. 547-574, (2016).

is making the choice of a parliamentary system and will experiment it for the first time."[105]

While Armenia has, nevertheless, successfully transferred the Italian system into national electoral legislation, the Italian Constitutional Court has been tasked to review the constitutionality of several provisions of the *Italicum* law, some of which did not survive its scrutiny. The Italian Constitutional Court held that the system of majority bonuses assigned to the list that wins 40 per cent of the votes is not contrary to the Constitution, although it departs from the pure proportion. However, the run-off between top two parties was declared unconstitutional, the Court ruling that "pursuing the goal of creating a governing political majority within the representative assembly, intended to assure (not merely favor) government stability, comes at the cost of a deeply unequal evaluation of the weight of votes for the purposes of making the final assignment of seats in the Chamber of Deputies".[106]

The examples above show that in the current interpretation of Article 3 Protocol 1 of the European Convention, culminating in *Yumak and Sadak*, the margin of appreciation is effectively unlimited. Therefore, new modifications of electoral systems risk to be left without European supervision. The lack of standards and the reluctance of the ECtHR to depart from the margin of appreciation to the common grounds such as European electoral heritage will likely raise more and more questions.

The examples above also reveal the lack of standards for the scrutiny of components of electoral systems. At the ECtHR level they suggest that the Court refrains from the analysis of the transfer of votes into mandates even when this transfer impairs the representative nature of the legislature. According to the current interpretation, therefore, as long as

[105] See, Joint Opinions of the OSCE/ODIHR and Venice Commission related to Armenian electoral legislation.
[106] Judgment of the Constitutional Court of Italy no.35/2017. Available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments

participation is guaranteed, any features of the electoral system fall outside of the purview of the Convention.

Conclusion

The key argument of this paper is that protection of the right to free elections by the ECtHR in examination of election results-related cases requires a wider interpretation of the "free expression of the opinion of the people in the choice of the legislature". The first part of the paper demonstrates that the test applied by the ECtHR to electoral systems cases is not sufficient. Considering "free expression of the opinion of the people in the choice of the legislature" mainly as the possibility to cast a ballot for active suffrage and the possibility to appear on a ballot for passive suffrage, the ECtHR delinks electoral rights from electoral systems, which have to do with the translation of votes into mandates. Components of electoral systems are viewed through the margin of appreciation that in some cases even prevents the ECtHR from judging on these cases, declaring them inadmissible. In the rare cases which pass the admissibility stage, the same margin of appreciation detracts the Court's attention from the core values that electoral systems are bound to possess.

The Venice Commission of the Council of Europe is active in shaping the European electoral heritage. However, the analysis of its opinions demonstrates that many member-states are far from inheriting it and introducing the requisite changes into their domestic electoral structures. Regrettably, the ECtHR does not utilise the full potential of the work of the Venice Commission.

The comparative analysis of specific features in selected electoral systems in the second chapter shows that due attention shall be paid to the question of the legitimate aim. The stability of government is the most pronounced goal and the one which is readily considered legitimate by constitutional courts and the ECtHR. However, courts should check whether this legitimate aim is not substituted by the mere desire to keep away political newcomers and entrench incumbents in power. Strikingly high thresholds in Turkey or thresholds that

dramatically increase for pre-election coalitions in the Czech Republic raise concern that the legislators attempted to make the parliaments overly stable by effectively limiting the political competition.

Meanwhile, the second chapter also illustrates that electoral systems become more and more sophisticated, borrowing from each other the more contentious elements. Some constitutional courts pronounce themselves strongly on the violation of the core of electoral rights by electoral system designs. However, even being outlawed in the "countries of origin", the same questionable components may show up and become a good law elsewhere. The examples of Italy and Armenia clearly demonstrate this point. In essence, the vital issue boils down to the question whether the passive and active electoral rights mean anything more than mere participation in elections. The wording of the European Convention speaks about elections and the people's choice of the legislature. The transmission of votes into results and the elements of systems that alter it should have the same importance for the election as the possibility to cast a ballot.

If the impairment of popular sovereignty by the elements of the electoral system design found by the Italian Constitutional Court was covered by the margin of appreciation at the ECtHR, what is the purpose of the margin of appreciation? The subsidiarity argument and the margin of appreciation presume that the national authorities are better positioned to deal with the case than the Court as a result of direct legitimization of national authorities. However, when the legitimacy of the parliament or one of its chambers is questioned by questioning the electoral system design vis-à-vis electoral rights, an overly wide margin of appreciation given to the legislator risks not only to distort "the people's choice" but to diminish the protection of electoral rights by the Strasbourg Court and, in most cases, by national constitutional courts that also apply the concept of the margin of appreciation. The protection of electoral

rights that stops halfway jeopardizes their effectiveness, leaving much room for electoral system design to deprive electoral rights from the effectiveness.

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