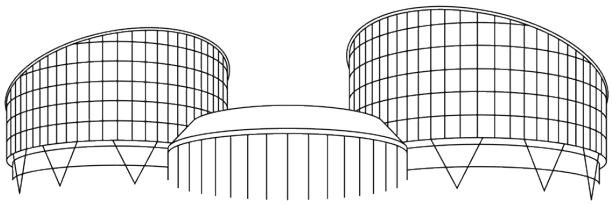

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GROSARU v. ROMANIA

(Application no. 78039/01)

JUDGMENT

This version was amended in accordance with Rule 81 of the Rules of Court on 29 September 2010

STRASBOURG

2 March 2010

FINAL

02/06/2010

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Grosaru v. Romania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,
Elisabet Fura,
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges*,
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 2 February 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 78039/01) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Mircea Grosaru ("the applicant"), on 30 April 2001.

2. The Romanian Government ("the Government") were represented by their Agent, Mr R.-H. Radu, of the Ministry of Foreign Affairs.

3. The applicant claimed to be a victim of a violation of his rights under Article 13 of the Convention and Article 3 of Protocol No. 1 as a result of having been refused a seat as a member of parliament (MP) representing the Italian minority in Romania.

4. By a decision of 25 November 2008, the Court declared the application partly admissible.

5. The Government, but not the applicant, filed additional observations (Rule 59 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1952 and lives in Bucharest.

7. As a member of the Association of Italians of Romania, he stood as a candidate in the parliamentary elections of 26 November 2000 for the Italian Community of Romania, one of the organisations representing the Italian minority in Romania. That organisation submitted a single-candidate

list containing the applicant's name in nineteen of the forty-two constituencies.

8. Once the votes had been counted, the Central Electoral Office decided, on the basis of Article 4 of Law no. 68/1992 on elections to the Chamber of Deputies and to the Senate ("Law no. 68/1992"), to allocate the parliamentary seat belonging to the Italian minority to the Italian Community of Romania, which had secured 21,263 votes at national level.

9. Although at national level the applicant had secured 5,624 votes out of a total of 21,263, the Central Electoral Office allocated the parliamentary seat to another member of the Italian Community of Romania, Ms Ileana Stana Ionescu, who had stood for election on another single-candidate list and had secured only 2,943 votes, but in a single constituency.

10. On 1 December 2000 the applicant challenged the decision allocating the parliamentary seat before the Central Electoral Office. On 2 December 2000 the Office dismissed his challenge by a majority. That decision was signed by six judges and six representatives of political parties.

11. The relevant parts of that decision read:

> "In accordance with Article 4 § 2 of Law no. 68/1992, as amended and supplemented, organisations of citizens belonging to national minorities participating in elections are accorded the same legal status as political parties for the purposes of the electoral process.
>
> With regard to the Italian minority, the votes were centralised and the parliamentary seats were allocated, in accordance with Article 66 of the Law, to the organisation having secured the greatest number of votes and on the basis of the order of candidates appearing on that organisation's winning list, there being no provision in law for individual nomination.
>
> It should be specified that the government's Emergency Ordinance no. 165 of 15 [*sic*] October 2000 granting national minorities the right to submit the same list of candidates for the Chamber of Deputies in more than one constituency does not infringe the principle of parliamentary seats being allocated by constituency, the basis of that regulation being to determine, in such instances, the ethnic minority organisation having the largest number of votes, and not to breach the principle of territorial representation in elections."

12. In a dissenting opinion, a representative of a political party submitted that Article 68 § 1 (g) of Law no. 68/1992 should be interpreted to mean that in the case of a given ethnic minority, the parliamentary seat should be allocated to the first candidate on the organisation's national list having gained the most votes, again at national level.

13. On 2 December 2000 the applicant lodged an appeal with the Central Electoral Office against its decision of the same date. On 3 December 2000 the Office, sitting as a panel composed of six judges and twelve representatives of political parties, declared the appeal inadmissible on the ground that its decisions were final.

14. On 4 December 2000 the applicant submitted his case to the Constitutional Court. By a letter of 11 December 2000, in which reference was made to Article 21 of the Romanian Constitution guaranteeing free access to the courts, the court informed the applicant that it did not have jurisdiction in matters concerning electoral disputes.

15. On 4 December 2000 the applicant lodged an appeal with the Supreme Court of Justice. By a decision of 13 December 2000, that court declared the appeal inadmissible on the ground that the decisions of the Central Electoral Office were final.

16. On 8 December 2000 the applicant repeated his challenge in a submission to the Chamber of Deputies Validation Commission, but was unsuccessful. The transcript of the Chamber of Deputies' session of 15 December 2000, published on the website of that institution, shows that the applicant's challenge was rejected on the same ground as that put forward by the Central Electoral Office.

17. In the parliamentary elections of 2004 and 2008 the applicant was elected MP for the Italian minority in Romania.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law

1. The Romanian Constitution (in force at the material time)

Election of the Chambers
Article 59

"(1) The Chamber of Deputies and the Senate are elected by universal, equal, direct, secret and free suffrage, in accordance with electoral law.

(2) Organisations of citizens belonging to national minorities which fail to obtain the number of votes necessary for representation in Parliament each have the right to one Chamber of Deputies seat, in accordance with the provisions of electoral legislation. Citizens of a national minority can be represented by one organisation only.

..."

2. Law no. 68/1992 of 15 July 1992 on elections to the Chamber of Deputies and to the Senate

18. The relevant Articles of this Law, in force at the material time, provide:

Article 4

"1. Legally constituted organisations of citizens belonging to a single national minority which fail to obtain at least one seat in the Chamber of Deputies or the Senate are entitled, jointly, to one seat in the Chamber of Deputies, in accordance with Article 59 § 2 of the Constitution, provided that their share of the vote is at least 5% of the average number of validly cast votes at national level for the election of a deputy.

2. Organisations of citizens belonging to national minorities participating in elections shall be accorded the same legal status as political parties for the purposes of the electoral process.

3. Organisations of citizens belonging to national minorities having participated in elections on the joint list of the organisations in question shall also be covered by the provisions of paragraph 1; in the event that none of the candidates appearing on the joint list is elected, a seat in the Chamber of Deputies shall be allocated to all the organisations having proposed the list, in compliance with the provisions of paragraph 1.

4. The provisions of paragraph 3 shall not apply to organisations of citizens belonging to national minorities having taken part in elections on a joint list with a political party or another political grouping or which have participated both on the joint lists referred to in paragraph 3 and on their own lists.

5. The seat in the Chamber of Deputies allocated in accordance with paragraphs 1 and 3 shall be allocated in addition to the total number of seats.

..."

Article 24

"1. The Central Electoral Office shall be composed of seven judges of the Supreme Court of Justice and sixteen representatives of the parties, political groupings and coalitions participating in the elections.

2. Within five days of an election date being set, the President of the Supreme Court of Justice shall appoint the seven judges from amongst those serving at the court, in a public session and by the drawing of lots. A record shall be made of the result of the draw which shall be signed by the President of the Supreme Court of Justice and which shall serve as confirmation. The President of the Supreme Court of Justice shall give at least forty-eight hours' notice in the press of the date of the session.

3. Within twenty-four hours of their confirmation, the appointed judges shall select the president of the Central Electoral Office from among their number, by secret ballot. The office thus composed, which is then joined by representatives of the parties, political groupings and coalitions, shall perform all the duties incumbent upon it in accordance with this Law.

4. In the two days following expiry of the time-limit in which to put forward a candidate, the parties, political groupings and coalitions participating in the elections shall inform the Central Electoral Office in writing of the number of lists submitted in

each constituency and the names and surnames of the candidates. Any communications submitted after that time-limit shall not be taken into consideration.

5. Representatives of parties, political groupings or coalitions shall be appointed to the Central Electoral Office in descending order of the number of lists submitted by each party, political grouping or coalition, for the purposes of paragraph 4, in relation to the total number of constituencies nationwide. No party, political grouping or coalition may have more than five representatives.

6. Representatives of parties, political groupings or coalitions appointed to the Central Electoral Office shall be chosen in the order referred to in the communication mentioned in paragraph 4.

7. If more than one party, political grouping or coalition has submitted the same number of lists, their representatives shall be appointed by the President of the Central Electoral Office, by the drawing of lots, in the presence of persons delegated by the parties, political groupings or coalitions concerned ..."

Article 25

"1. The Central Electoral Office shall:

(a) ensure that electoral registers are updated and monitor the application and uniform interpretation of legal provisions relating to elections at national level;

(b) resolve any disputes in relation to is activities or the operations of the constituency electoral offices;

(c) receive reports from the constituency electoral offices indicating the number of votes validly cast for each list of candidates and record which parties, political groupings or coalitions have failed to obtain at least 3% of validly cast votes at national level; communicate to the constituency electoral offices and publish, within the following forty-eight hours, the names of the parties, political groupings or coalitions concerned;

(d) verify and record the result of the elections, count, at national level, the number of unused votes for each party, political grouping or coalition satisfying the criterion referred to in paragraph (c) above and allocate seats centrally by constituency;

(e) confirm the allocation of a parliamentary seat to the organisation of citizens belonging to a national minority having satisfied the criteria set forth in Article 4, and issue the relevant confirmation to the deputy thus appointed;

(f) annul any elections organised in a constituency if the vote or validation of the results has been subject to fraud affecting the arrangements for the allocation of seats, and organise a new ballot;

(g) perform all other duties incumbent upon it in accordance with this Law.

...

4. The decisions of the Central Electoral Office shall be pronounced in public."

Article 66

"1. For the purposes of allocation of seats to candidates on the lists, only parties, political groupings and coalitions having secured at least 3% of the validly cast votes at national level shall be taken into account. Seats in the Chamber of Deputies and the Senate shall be allocated separately.

2. Seats shall be allocated once the Central Electoral Office has notified the names of the parties, political groupings or coalitions having secured at least 3% of the validly cast votes at national level. Seats in the Chamber of Deputies and the Senate shall be allocated separately.

3. Seats in the Chamber of Deputies and the Senate shall be distributed and allocated in two stages: at constituency level and at national level.

4. At constituency level, the electoral office shall determine the constituency electoral coefficient, separately for the Chamber of Deputies and for the Senate, by dividing the total number of votes validly cast for all the lists of the parties, political groupings and coalitions satisfying the criterion referred to in paragraph 1 and for independent candidates by the number of deputies or, as applicable, senators, to be elected in that constituency; each list shall be allocated as many seats as the number of validly cast votes for that list divided by the electoral coefficient of the constituency. The constituency electoral office shall allocate seats in the order in which the candidates appear on the list; one seat shall be allocated to each independent candidate having obtained a number of validly cast votes at least equal to the electoral coefficient for deputies or, as applicable, senators. The constituency electoral office shall inform the Central Electoral Office, with a view to their centralised distribution, of the list of remaining votes (unused or fewer than the electoral coefficient) secured by the lists of parties, political groupings and coalitions satisfying the criterion referred to in paragraph 1 and of any seats that have not been allocated.

5. For each party, political grouping or coalition satisfying the criterion referred to in paragraph 1, the Central Electoral Office shall add up, at national level, separately for the Chamber of Deputies and for the Senate, the total number of any unused votes or votes below the constituency electoral coefficient of all constituencies. The number of votes thus obtained by each party, political grouping or coalition shall be divided by 1, 2, 3, 4, etc., in line with the number of unallocated seats at constituency level; the quotients resulting from the division, irrespective of the list from which they come, shall be ranked in descending order up to the number of unallocated seats; the lowest quotient shall constitute the national electoral coefficient for deputies or, as applicable, senators. Each party, political grouping or coalition shall be allocated as many seats in the Chamber of Deputies or the Senate as the total number of validly cast votes, unused and lower than the constituency coefficient that it has obtained at national level divided by the electoral coefficient fixed at national level.

6. The Central Electoral Office shall determine the distribution of seats by constituency. ..."

Article 68

"1. The Central Electoral Office shall resolve any disputes that may arise and issue a separate report for the Chamber of Deputies and for the Senate. The report shall indicate, at national level:

(a) the total number of voters registered on the permanent electoral registers;

(b) the total number of voters;

(c) the total number of validly cast votes;

(d) the total number of invalid votes;

(e) the method by which the constituency electoral offices have applied the provisions of Article 66 § 4;

(f) how seats have been distributed at national level in accordance with Article 66 § 5 and the allocation thereof to the constituencies in accordance with Article 66 § 6;

(g) the organisations of citizens belonging to national minorities which, despite having participated in the elections, have failed to gain a seat in the Chamber of Deputies or the Senate; the total number of votes validly cast for the lists of each of those organisations and for organisations entitled to a seat in the Chamber of Deputies in accordance with Article 4; and the name and surname of the first candidate appearing on the list of the organisation entitled to a seat in the Chamber of Deputies having secured the largest number of votes. In the event of any organisations' lists having obtained the same number of votes, seats shall be allocated by the drawing of lots."

19. Article 91 § 9 of the new Law no. 373 of 24 September 2004 on elections to the Chamber of Deputies and to the Senate states that the parliamentary seat belonging to the national minorities is to be allocated to the constituency in which the list of candidates put forward has obtained the highest number of votes.

3. Emergency Ordinance no. 165/2000 of 13 October 2000 amending Law no. 68/1992

20. This Ordinance added the following paragraph to Article 5 of the above-mentioned Law no. 68/1992:

"8. By way of derogation from the provisions of paragraphs 3, 6 and 7, organisations of citizens belonging to national minorities may submit the same list of candidates to the Chamber of Deputies in more than one constituency."

4. Regulations of the Chamber of Deputies of 24 February 1994, republished on 14 March 1996

21. The relevant parts of the Regulations, in the version in force at the material time, were worded as follows:

Regulation 3

"For the purposes of validating mandates, the Chamber of Deputies shall elect, at its first session, a committee comprising thirty deputies reflecting the political composition of the Chamber, as this results from the constitution of parliamentary groups."

Regulation 6 § 5[1]

"The Validation Commission shall examine any pending disputes and any which have been examined in breach of the procedural provisions."

B. Work of the European Commission for Democracy through Law ("the Venice Commission")

1. The Code of Good Practice in Electoral Matters

22. The Code of Good Practice in Electoral Matters was adopted by the Venice Commission at its 51st plenary session held on 5 and 6 July 2002 and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002. The relevant parts thereof read as follows:

3.3. An effective system of appeal

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

There are two possible solutions:

– appeals may be heard by the ordinary courts, a special court or the Constitutional Court;

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

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

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[1] Corrected on 29 September 2010: the text was as follows: "Regulation 6 § 6".

Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections.

In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time-limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time-limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time-limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

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

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

Disputes relating to the electoral registers, which are the responsibility, for example, of the local administration operating under the supervision of or in cooperation with the electoral commissions, can be dealt with by courts of first instance.

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

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

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

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

2. The Report on electoral law and electoral administration in Europe

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

XII. Election appeals and accountability for electoral violations

"167. Complaint and appeals procedures must be open at least to each voter, candidate, and party. A reasonable quorum may, however, be imposed for appeals by voters on the results of election (CDL-AD(2002)023rev, para. 99). In order to comply with international standards, the complaint and appeals procedures should clearly provide the following rights for voters, candidates, and political parties: the rights to file a complaint, to present evidence in support of the complaint, to a public and fair hearing on the complaint, to an impartial and transparent proceedings on the complaint [*sic*], to an effective and speedy remedy, as well as to appeal an appellate court if a remedy is denied (see for example CDL-AD(2004)027, para. 111). In practice, however, these rights are not always respected. At times, even credible complaints are left without any legal redress.

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

3. The Report on electoral law and national minorities

24. The Report on electoral law and national minorities was adopted by the Venice Commission on 25 January 2000. It concerns the central element of public life – participation in a State's elected bodies, especially the national legislature. Such participation is studied through electoral law and the possibilities it gives members of national minorities of being present in elected bodies.

Rules of electoral law which provide for special representation of minorities are an exception. Of the States which replied to the Commission's questionnaire, only three (Croatia, Romania and Slovenia) provided for the election of deputies intended to represent national minorities. According to the report, Romania is the country where the largest number of minority parties or organisations (treated as political parties for electoral purposes) took part in elections and have deputies and senators in the parliament.

Other systems, while not necessarily guaranteeing the presence of members of national minorities in the elected bodies, facilitate the representation of minority organisations. In Germany and Poland, threshold rules do not apply to such organisations.

The Belgian system is specific. The body of institutions is conceived in such a way as to establish a balance between the different linguistic groups (rather than between minorities in the strict sense). Moreover, in certain areas which are mixed from a linguistic point of view, adjustments have been made so that electors from different linguistic communities are represented in the elected body.

In most cases, however, the representation of minorities in an elected body is achieved through the application of the ordinary rules of electoral law, which treat people belonging to national minorities and others in the same way.

C. Lund recommendations on the effective participation of national minorities in public life

25. The Lund recommendations were adopted in Lund (Sweden) in September 1999 by a group of international experts under the aegis of the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe (OSCE). The relevant parts of those recommendations read as follows:

B. Elections

"(7) Experience in Europe and elsewhere demonstrates the importance of the electoral process for facilitating the participation of minorities in the political sphere. States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including through the rights to vote and stand for office without discrimination.

(8) The regulation of the grouping and activity of political parties shall comply with the international law principle of freedom of association. This principle includes the freedom to establish political parties based on communal identities as well as those not identified exclusively with the interests of a specific community.

(9) The electoral system should facilitate minority representation and influence.

– Where minorities are concentrated territorially, single-member districts may provide sufficient minority representation.

– Proportional representation systems, where a political party's share in the national vote is reflected in its share of the legislative seats, may assist in the representation of minorities.

– Some forms of preference voting, where voters rank candidates in order of choice, may facilitate minority representation and promote inter-communal cooperation.

– Lower numerical thresholds for representation in the legislature may enhance the inclusion of national minorities in governance.

(10) The geographic boundaries of electoral districts should facilitate the equitable representation of national minorities."

The Lund recommendations are set out in the "Guidelines to Assist National Minority Participation in the Electoral Process" published in January 2001 under the aegis of the OSCE.

D. Comparative law concerning post-electoral system of appeals

26. Despite differences in the organisation and characteristics of the electoral administration responsible for declaring results and the distribution of seats (independent electoral commissions, government structures, temporary polling stations, courts), the information available to the Court concerning the legislation of a large number of Council of Europe member States shows a degree of convergence as regards the existence of a post-electoral system of appeals. In certain States it is possible to lodge an appeal with a recognised court or tribunal body, be it an ordinary court, a special electoral court or a Constitutional Court. While certain countries make provision for up to two stages of appeal before the judicial authorities, others envisage only one such appeal, at first instance. The three countries that envisage no judicial remedy beyond validation of powers by the legislative chamber are in western Europe (Belgium, Italy and Luxembourg). The tendency towards investing courts with jurisdiction for post-electoral disputes is in line with the European standards recommended by the Venice Commission, which points out that in all cases there must be a judicial remedy available, since an appeal to the parliamentary validation commission or an electoral commission does not offer sufficient guarantees.

1. Central electoral administration as an appeal body

27. This is the system used by Romania and Albania. In Albania, decisions relating to the declaration of results may be challenged before the central electoral commission itself. However, the losing parties may subsequently appeal against the decision before a court (the electoral chamber of the Tirana Court of Appeal).

2. Political validation: parliamentary validation commissions

28. While such a practice is fairly widespread, three countries (Belgium, Italy and Luxembourg) stand out because the only post-election remedy available is validation by parliament, the decisions of the electoral offices being deemed to be final. That said, those three countries have enjoyed a long tradition of democracy which would tend to dissipate any doubts as to the legitimacy of such a practice. The Venice Commission in general has

reservations as to the effectiveness of this type of remedy, however, as there could be doubts as to the impartiality of such bodies (see paragraph 22 above).

29. The French example may be held up in this regard: when the validation commission (which at the time was the only body authorised to hear appeals) excluded twenty-five Poujadist MPs from parliament in 1956, the Constitutional Council created by the 1958 Constitution was tasked with avoiding such pitfalls and the practice of validation purely and simply disappeared from the French parliamentary landscape. It may also be useful to point out that in 2005, Switzerland created the possibility of an appeal to the Federal Court (while previously, the verification of powers by the National Council served as the only appeal process).

30. Nevertheless, that practice remains the norm in certain States. Furthermore, various countries, including Switzerland, continue to use a dual system. Judicial review does not *de facto* prevent validation by parliament, in so far as their objectives remain separate. The purpose of the first is to settle potential disputes through the courts while the purpose of the second is to validate mandates by means of political supervision. This type of validation acknowledges the specific nature and independence of the legislature in relation both to the executive and the judiciary.

3. Appeals to the courts

31. One type of appeal is that lodged with an "ordinary" court. The competent authorities may be administrative courts and courts of appeal, as in the following countries: Andorra, Azerbaijan, Bosnia and Herzegovina, Georgia (Tbilisi Court and Court of Appeal), Hungary, Latvia (Department of Administrative Affairs of the Senate of the Supreme Court), Spain (Administrative Appeals Division of the Supreme Court) and the United Kingdom (Election Court of the High Court and appeal to the Court of Appeal).

32. Many countries confer jurisdiction for post-electoral disputes on the Constitutional Court. However, that court may not necessarily have the same powers of review from one system to another. It may merely review constitutionality (Georgia) or it may verify and approve the results submitted by the electoral commission (Azerbaijan).

33. Certain countries have adopted this type of remedy either at first or last instance: Andorra (second instance), Armenia (first instance), Croatia (first instance), Estonia (first instance, before the Supreme Court as the Constitutional Court), France (first instance), Georgia (only where issues of constitutionality arise), Malta (first instance), Spain (second instance and protection of fundamental rights) and Switzerland (second instance before the Federal Court).

34. Lastly, some systems include courts which deal only with electoral disputes. They are composed of judges who are generally from other

jurisdictions and they have a limited lifespan (the time-limit for an appeal following the publication of the results), but they enjoy exclusive jurisdiction in electoral disputes. Specific bodies of this kind have been set up in the following countries: Albania (electoral chamber of the Tirana Court of Appeal), Greece (Special Supreme Court, specialising in certain types of dispute, including electoral disputes), Sweden (Electoral Review Board) and the United Kingdom (Election Court).

4. Appeal to the executive

35. Only one case is known – that of Switzerland (challenge before the cantonal government). This is the result of the country's history and federal tradition; however, the powers of the cantonal government go hand in hand with validation by the *Conseil national* (Parliament) of its own powers and appeal to the Federal Court since 2005.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1

36. The applicant complained that the authorities had refused to allocate him a seat as an MP representing the Italian minority in the parliamentary elections of 2000. He relied on Article 3 of Protocol No. 1, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

A. The parties' submissions

37. The Government submitted at the outset that according to the Court's case-law, the Contracting States enjoy a wide margin of appreciation in electoral matters. They argued that the conditions laid down by the legislation in force at the material time (the Constitution and Law no. 68/1992 on elections to the Chamber of Deputies and to the Senate – "Law no. 68/1992") for the representation of minorities in Parliament were minimal, that they pursued a legitimate aim and that the means used to attain that aim were not disproportionate.

38. The Government argued that in its decision of 2 December 2000, the Central Electoral Office had correctly interpreted the relevant legislative provisions relating to the election of MPs representing national minorities. Thus, the Office had rightly held that the seat should be allocated to the

Italian organisation having secured the largest number of votes in a single constituency, in the instant case, the Italian Community of Romania. The applicant represented the Association of Italians of Romania.

39. Lastly, the Government pointed out that the representation of minorities in the Romanian Parliament was an important issue. That had also been noted by the Venice Commission in its Report on electoral law and national minorities of 25 January 2000 and in its Opinion on the draft law on the status of national minorities living in Romania of 2005. Accordingly, in the parliamentary elections of 2000, national minorities had been allocated 45 seats out of a total of 341 and, in the municipal elections, hundreds of mayors and departmental and local councillors from national minorities had been elected.

40. The applicant claimed that the Association of Italians of Romania, of which he was a member, and the Italian Community of Romania had signed an alliance agreement validated by the Central Electoral Office, under which the Association of Italians of Romania would take part in the elections using its electoral emblem and the Italian Community of Romania would take part using its name. Therefore, in the parliamentary elections of 2000 he had been a member of the same organisation as Ms Ileana Stana Ionescu, namely, the Italian Community of Romania.

41. The applicant argued that the Central Electoral Office's interpretation of the electoral provisions failed even to recognise the possibility afforded by law to minority representatives to submit a list in more than one constituency, in accordance with the principle of representation at national level. Furthermore, he argued that a parliamentary seat was allocated to minorities having obtained at least 5% of validly cast votes at national level for the election of an MP, in addition to the number of MPs elected according to the rules of representation.

B. The Court's assessment

1. Principles established by the Court's case-law

42. The Court reiterates that Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113, and *Ždanoka v. Latvia* [GC], no. 58278/00, § 102, ECHR 2006-IV).

43. The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, § 52, and, more recently, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005-IX).

44. 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 (see *Mathieu-Mohin and Clerfayt*, loc. cit.). In particular, any conditions imposed must not thwart the free expression of the people in the 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 (see *Hirst*, cited above, § 62, and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109, ECHR 2008. The Court is not required to adopt a position on the choice between one electoral system and another. That decision, which is determined by historical and political considerations specific to each country, is in principle one which the State alone has the power to make (see *Podkolzina*, cited above, § 34).

2. Application of these general principles to the instant case

45. In the instant case, the Court observes at the outset that the documents in the case file show that the applicant did in fact stand as a candidate representing the Italian Community of Romania and not, as submitted by the Government, the Association of Italians of Romania.

46. It notes that this case, unlike the majority of judgments it has delivered on electoral matters to date, does not concern conditions of eligibility but the allocation of a parliamentary seat, that is, a matter of post-electoral rights. This is an equally crucial issue, which, furthermore, has a direct impact on the election results, a factor to which the Court attaches significant weight (see *I.Z. v. Greece*, no. 18997/91, Commission decision

of 28 February 1994, Decisions and Reports 76-A, p. 65, and *Babenko v. Ukraine* (dec.), no. 43476/98, 4 May 1999.

47. In that connection, the Court reiterates that the object and purpose of the Convention, which is an instrument for the protection of human beings, requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective (see, for example, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports of Judgments and Decisions* 1998-I; and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III). The right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would be merely illusory if one could be arbitrarily deprived of it at any moment. Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires the finding that this or that candidate has failed to satisfy them to comply with a number of criteria framed to prevent arbitrary decisions. In particular, such a finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority (see *Podkolzina*, cited above, § 35).

48. The Court notes at the outset that Romania has chosen to ensure special representation for minorities in Parliament and that this is the European country where the largest number of minority parties or organisations have participated in elections and have representatives in Parliament (see the conclusions of the Report on electoral law and national minorities, paragraph 24 above).

49. The Court observes that Law no. 68/1992 does not set out clearly the procedure to be followed in assigning the parliamentary seat set aside for the winning organisation representing a national minority. Thus, the Central Electoral Office, in accordance with Article 68 § 1 (g) of the Law in question must indicate "the name and surname of the first candidate appearing on the list of the organisation entitled to a seat in the Chamber of Deputies having secured the largest number of votes". That text does not specify whether this is the largest number of votes at national level or at constituency level. However, such a detail may prove decisive when determining the winning candidate.

50. Within the Italian Community of Romania, for which the applicant had stood as a candidate, the seat was allocated not to the applicant, who had secured the greatest number of votes at national level, but to another

candidate, who had secured a large number of votes in a single constituency. The Central Electoral Office therefore opted for a method based on territorial representation rather than national representation.

51. The issue arising in the instant case is whether that lack of clarity in the electoral rules could give rise to an arbitrary interpretation upon their application. In that regard, the Court points out that it has already sanctioned a wide, and therefore arbitrary, interpretation of a legal provision relating to elections (see the cases of *Kovach v. Ukraine* (no. 39424/02, §§ 48-62, ECHR 2008), concerning invalidation of the ballot in four constituencies during parliamentary elections, which led to the election of a candidate other than the applicant; *Lykourezos v. Greece* (no. 33554/03, §§ 50-58, ECHR 2006-VIII), concerning the forfeiture of a parliamentary seat as a result of professional incompatibility introduced by a new Law; and *Paschalidis, Koutmeridis and Zaharakis v. Greece* (nos. 27863/05, 28422/05 and 28028/05, §§ 29-35, 10 April 2008), concerning the counting of blank votes when calculating the electoral quotient in a single constituency).

52. In the opinion of the Court, the lack of clarity of the relevant electoral provisions required the national authorities to be prudent in interpreting them, bearing in mind the direct impact that their interpretation would have on the result of the elections (see *Kovach*, cited above, § 59). The Central Electoral Office interpreted the provisions of Law no. 68/1992 to mean that the seat should be allocated to the list of the organisation of citizens belonging to a national minority which had secured the largest number of votes in a single constituency. It did not specify whether that was a first interpretation of that provision or whether there was an established practice in that regard. Neither did it explain why the criterion of territorial representation applied to national minorities while, in other electoral matters, such minorities benefited from specific provisions relating to the criterion of national representation. Lastly, although the Court had requested it, the Government failed to provide additional information on the interpretation by the national authorities or legal authorities of Article 68 § 1 (g) of Law no. 68/1992. The Court therefore considers that the decisive provisions governing the allocation of a parliamentary seat to the organisation representing a national minority did not, at the material time, satisfy the requirements of precision laid down in its case-law (see paragraph 47 above).

53. However, the Court takes note of the legislative amendment made to the scope of the provision at issue in the new parliamentary election Law (see Relevant domestic law above, paragraph 19). The fact remains, however, that that legislative amendment was introduced long after the events which were the subject of the applicant's complaints and cannot therefore remedy his situation.

54. Moreover, the Court notes that the Central Electoral Office and the Chamber of Deputies Validation Commission examined the applicant's challenge and rejected it as being ill-founded. In the Court's opinion, however, an individual whose appointment as an MP has been rejected has legitimate grounds to fear that the large majority of members of the body having examined the lawfulness of the elections, more specifically the members representing the other political parties of the Central Electoral Office, may have an interest contrary to his own. The rules of composition of that body, made up of a large number of members representing political parties, do not therefore appear to be such as to provide a sufficient guarantee of impartiality. The same conclusion holds good *a fortiori* for the Chamber of Deputies Validation Commission.

55. Furthermore, the Court notes that no national court ruled on the interpretation of the legal provision at issue. Thus, the Supreme Court of Justice rejected the applicant's challenge as being inadmissible, considering that the decisions of the Central Electoral Office were final. Subsequently, the Constitutional Court informed the applicant that it had no jurisdiction in electoral matters. In that connection, the Court points out that in *Babenko* (cited above), it had ruled that the fact that the applicant's allegations had been examined in the context of judicial proceedings was significant.

56. That approach has, moreover, been confirmed by the Venice Commission in its Code of Good Practice in Electoral Matters, which recommends judicial review of the application of electoral rules, possibly in addition to appeals to the electoral commissions or before parliament (see paragraph 22 above). The comparative-law materials also show that several Council of Europe member States have adopted judicial review and only a few States still maintain purely political supervision of elections (see paragraph 28 above).

57. In those circumstances, the Court considers that the lack of clarity of the electoral law as regards national minorities and the lack of sufficient guarantees as to the impartiality of the bodies responsible for examining the applicant's challenges impaired the very essence of the rights guaranteed by Article 3 of Protocol No. 1.

There has therefore been a violation of that Article.

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

58. Relying in substance on Article 13 of the Convention taken in conjunction with Article 3 of Protocol No. 1, the applicant complained that he had had no effective remedy by which to challenge the authorities' refusal to allocate him the parliamentary seat for the Italian minority and, as a result, that there had been a violation of the freedom of expression of the

opinion of the people as to the choice of legislative body. Article 13 of the Convention provides:

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

59. The Government submitted that an effective domestic remedy within the meaning of Article 13 of the Convention had been available to the applicant, namely, challenging the decision before the Central Electoral Office, a body meeting the requirements laid down in the Court's case-law. They pointed out in that connection that, under Article 24 of Law no. 68/1992, the Central Electoral Office was composed of seven judges of the Supreme Court of Justice and sixteen representatives of the political parties, that the judges were selected randomly, by the drawing of lots, that the decisions of the office were reasoned, and that the members thereof were able to formulate dissenting opinions.

60. Lastly, the Government argued that the Contracting States had a wide margin of appreciation as regards Article 13 of the Convention (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 75, ECHR 1999-VII) and that the legislative provisions of other States provided for the same domestic remedy in that regard (see the case of Hungary).

61. The applicant submitted that the Central Electoral Office's decision of 2 December 2000 did not constitute an effective remedy. He argued that that body was not impartial. In particular, he criticised it for being composed of judges of the Supreme Court of Justice, which had thus subsequently been influenced when refusing to examine his challenge. Lastly, he submitted that the Government's reference to supposedly similar electoral legislation was irrelevant in the instant case, given the specific status enjoyed by national minorities in Romania.

62. For the reasons set out in paragraphs 55 and 56 above, the Court considers that there has also been a violation of Article 13 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. Article 41 of the Convention provides:

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

A. Damage

64. The applicant claimed 200,000 euros (EUR) in respect of pecuniary damage, corresponding to the salary and allowances to which he would have been entitled as an MP for the period 2002 to 2004. He sought EUR 1,500,000, in respect of non-pecuniary damage, for the injury he claimed to have incurred as a result of it being impossible for him to carry out his duties as an MP and the attacks and injustices to which he claimed he and his family had been exposed.

65. The Government submitted that the amount claimed by the applicant in respect of pecuniary damage was excessive and purely speculative. They pointed out that the claim was not accompanied by any supporting documentation. Furthermore, they referred to the Court's case-law concerning Article 3 of Protocol No. 1, according to which the Court does not award amounts in respect of pecuniary damage in this domain (see *Podkolzina v. Latvia*, no. 46726/99, § 49, ECHR 2002-II; *Aziz v. Cyprus*, no. 69949/01, § 43, ECHR 2004-V; *Melnychenko v. Ukraine*, no. 17707/02, § 75, ECHR 2004-X; and *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 94, ECHR 2005-IX).

66. As regards non-pecuniary damage, the Government argued that no causal link had been established between any damage and the alleged violation of the Convention. Furthermore, they pointed out that in several cases in which it had found a violation of Article 3 of Protocol No. 1, the Court had considered that the finding of a violation in itself provided sufficient just satisfaction in respect of the non-pecuniary damage incurred by the applicants. In any event, the amount sought was exorbitant given the amounts normally awarded by the Court under this head (see *Podkolzina*, cited above, § 52, and *Melnychenko*, cited above, § 78).

67. As regards pecuniary damage, the Court cannot speculate as to what the outcome of the elections would have been had there been a clear provision interpreted by a body adequately meeting the requirements of impartiality. Furthermore, the applicant had failed to mention the professional activities in which he had been engaged between 2000 and 2004 and had not proved that the amount of any fees or salaries he had received had been lower than the amount of any parliamentary allowances forfeited during the period under consideration. The Court therefore rejects the claims made in respect of pecuniary damage (see *Kovach v. Ukraine*, no. 39424/02, § 66, ECHR 2008).

68. The Court acknowledges, however, that the applicant did incur non-pecuniary damage as a result of the violation found. Accordingly, ruling on an equitable basis and having regard to all the circumstances of the case, it awards him EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

69. The applicant also claimed EUR 2,300 for the costs and expenses incurred in the proceedings before the national courts and before the Court.

70. The Government pointed out that the applicant had produced no documentation in support of his claim.

71. According to the Court's case-law, an applicant may only obtain reimbursement of his costs and expenses in so far as they were actually incurred, were necessarily incurred and were reasonable as to quantum. In the instant case, the Court notes that the applicant failed to detail his claims or provide any documentation in support of his estimates. Accordingly, the Court is not able to award any amount under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage plus any tax that may be chargeable, to be converted into the respondent State's national currency at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in French, and notified in writing on 2 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Ziemele is annexed to this judgment.

J.C.M.
S.Q.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I voted with the majority in finding that there has been a violation of Article 13 taken in conjunction with Article 3 of Protocol No. 1. I think that it is important that the Court should further develop its case-law concerning Article 13 (see my dissenting opinion in *Zavoloka v. Latvia*, no. 58447/00, 7 July 2009).

2. In the current case, however, the Court in its reasoning under Article 13 simply referred back to the findings under Article 3 of Protocol No. 1 and therefore missed the opportunity to clarify the scope of the obligations that derive from Article 13 of the Convention in circumstances where human rights problems arise in the context of national elections. The Court found that the election law was not sufficiently clear as concerns the provisions on national minorities, that the authorities entrusted to deal with election disputes were not sufficiently impartial and that no court had ruled on the interpretation of the law or indeed the very dispute. This led the Court to find a violation of Article 3. As for the violation of Article 13, the Court noted its findings concerning the absence of judicial review (see paragraph 62 of the judgment).

3. It should be noted that until this judgment the Court had considered the functioning of remedies in respect of alleged election problems under Article 3 of Protocol No. 1 (see *Podkolzina v. Latvia*, no. 46726/99, § 37, ECHR 2002-II). In the above-mentioned *Podkolzina* case the Court considered that it was not necessary to examine separately the lack of an effective remedy from the point of view of Article 13 (ibid., § 45). The present case marks a change in the Court's approach, which I can indeed endorse.

4. The question, however, is what are the nature and scope of the obligations that derive from Article 13, as this may be relevant in the circumstances of the case at issue? In other words, what effective remedies should be in place where violations of the right to free elections are alleged? In its case-law so far the Court has developed several elements that clarify the notion of effective remedy under Article 13. The Court has thus accepted that for a remedy to be effective it need not always be a judicial remedy or a single remedy. The Court has accepted the possibility of an aggregate of remedies. Furthermore, the notion of effectiveness is construed as ensuring either the prevention of the alleged violation, or the provision of adequate redress, including compensation, for the victim of a violation (see *Kudła v. Poland* [GC], no. 30210/96, § 158, ECHR 2000-XI).

5. In the present case, under Article 13 the applicant alleged that there was no remedy capable of restoring his seat in Parliament, whereas the Government argued that the composition of the Central Electoral Office complied with the requirement of being an effective remedy. Since the Court referred back to its finding regarding the absence of judicial review, it

did not elaborate either on the submissions of the parties or on its own understanding of the notion of effectiveness of a remedy for the purposes of the applicant's claim. I note in this regard that the 2002 Code of Good Practice in Electoral Matters of the Council of Europe's Venice Commission accepts that an effective appeal can exist where such appeals are heard not only by courts but also by electoral commissions (see under Chapter 3.3 of the Code, cited in paragraph 22 of the judgment). I believe that the Court's reference to the fact that no judicial appeal was available in general, and to the applicant in particular, is not sufficient to answer the question that Article 13 poses, namely whether there was a meaningful system of institutions and procedures that enabled the applicant to challenge in substance the fact that he was allegedly deprived of his mandate and to seek appropriate redress.