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Pragmatic Adjudication of Election Cases in the European Court of Human Rights

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Abstract

During the past 30 years, the European Court of Human Rights (ECtHR) has been constantly expanding its footprint in the area of democratic rights. However, the Court's approach to election cases has been arguably more cautious compared to its jurisprudence on freedom of speech, association and assembly. Despite a growing body of scholarship on the ECtHR and democratic processes, this caution is yet to be adequately contextualized. This article aims to fill the gap by developing a normative model of how external considerations affect the ECtHR election jurisprudence. American judge-scholar Richard Posner has proposed pragmatic adjudication as a blueprint for incorporating external considerations into political disputes before the courts. I rely on this blueprint to gauge the level of deference to respondent governments in election cases at the ECtHR between 1987 and 2020. I find that, while the Court gives states wide leeway over political competition, it is less deferential when cases concern access to political process. At the same time, the ECtHR increasingly relies on procedural oversight to detect unfair electoral practices without changing the general distribution of competences.

1 Introduction

The European Convention on Human Rights (ECHR) in its preamble refers to 'effective political democracy' as a vehicle for maintaining human rights in the continent. At the same time, Article 3 of the First Protocol obliges state parties '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'. While the preamble can be read as a statement of principle, Article 3 is an operational and

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enforceable norm.[1] In adjudicating election cases, the European Court of Human Rights (ECtHR) operates in the space between the two norms. While it is informed by the democratic ideal stated in the preamble, the Court assesses state conduct by the metric of Article 3 of the First Protocol.[2] The language of the latter provision does not tie the ECtHR to a particular standard of adjudication.[3] Instead, the standard is determined by choices made by judges faced with real-life election-related situations in state parties. The clause has been interpreted to include three principal elements:

(i) the right to elect members of a legislature, understood as a national or supranational parliament,[4] a chamber or both chambers of a bicameral parliament,[5] a parliament of a subnational unit in a federation[6] or a devolved state;[7]
(ii) the right to stand for the office of a legislator and[8]
(iii) the right to hold such office once elected to it.[9]

There is a growing body of excellent literature that explores these choices. In particular, the role of democracy as an underlying ECHR principle has been the subject of intense discussions over the past three decades.[10] Tom Daly has placed the ECtHR democracy jurisprudence in the global context,[11] ECtHR case law concerning Article 3 of the First Protocol has been systemically analysed by, to name a few, Yannick Lécuyer,[12] Michael O'Boyle[13] and Agustín Ruiz Robledo.[14] Rory O'Connell has focused

1 Though it is relied upon by the European Court of Human Rights (ECtHR) in its interpretation of the European Convention on Human Rights' (ECHR) other provisions. See, e.g., ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Appl. no. 19392/92, Judgment of 30 January 1998, para. 45; ECtHR, *Baralija v. Bosnia and Herzegovina*, Appl. no. 30100/18, Judgment of 29 October 2019, para. 57. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

2 '[T]he rights guaranteed by Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy.' ECtHR, *Orlovskaya Iskra v. Russia*, Appl. no. 42911/08, Judgment of 21 February 2017, para. 110.

3 See Y. Lécuyer, *The Right to Free Elections* (2014), at 14 ('it is thanks to the case law of the European Court of Human Rights that Article 3 of Protocol No. 1 has become what it is today').

4 ECtHR, *Matthews v. United Kingdom*, Appl. no. 24833/94, Judgment of 18 February 1999, paras 36–44.

5 ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Appl. nos 27996/06 and 34836/06, Judgment of 22 December 2009, paras 38–41.

6 ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, Appl. no. 9267/81, Judgment of 2 March 1987, para. 53.

7 ECtHR, *McHugh and Others v. United Kingdom*, Appl. nos 51987/08 *et seq*., Judgment of 10 February 2015.

8 ECtHR, *Podkolzina v. Latvia*, Appl. no. 46726/99, Judgment of 9 April 2002, para. 35.

9 ECtHR, *Sadak and Others v. Turkey (no. 2)*, Appl. nos 25144/94 *et seq*., Judgment of 11 June 2002, para. 33.

10 Marks, 'The European Convention on Human Rights and Its "Democratic Society"', 66 *British Yearbook of International Law* (1995) 209; Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights', 25 *European Journal of International Law* (*EJIL*) (2014) 1019; Mowbray, 'Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights', 20 *European Public Law* (2014) 469; Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of 'Democratic Society', 5 *Global Constitutionalism* (2016) 16; Pildes, 'Supranational Courts and The Law of Democracy: The European Court of Human Rights', 9 *Journal of International Dispute Settlement* (*JIDS*) (2018) 154.

11 T. Daly, *The Alchemists, Questioning Our Faith in Courts as Democracy-Builders* (2017).

12 Lécuyer, *supra* note 3.

13 O'Boyle, 'Electoral Disputes and the ECHR: An Overview', Venice Commission no. CDL-UD(2008)010rev-e (2008).

14 Robledo, 'The Construction of the Right to Free Elections by the European Court of Human Rights', 7 *Cambridge International Law Journal* (2018) 225.

on positive obligations engendered by Article 3 of the First Protocol, specifically in the field of political equality.[15] Christopher McCrudden and Brendan O'Leary as well as Stefan Graziadei have explored the effects of the ECtHR elections jurisprudence on power-sharing arrangements.[16] Yet, while there is a wealth of literature on what the Court does in the field of elections, less has been said of what it does not do. However, from an outsider's perspective, it may seem to be the elephant in the room. Indeed, if that outsider was cultured in expectations of an activist ECtHR, she may be perplexed that Strasbourg is not the place to have an election result overturned[17] or a candidate placed on the ballot.[18] Neither will the ECtHR judges tell which electoral system is best for democracy.[19]

Though ECtHR judges have opined on how the Court's election jurisprudence is different from its democracy-enhancing Article 9, 10 and 11 jurisprudence,[20] the Court's case law does not give this difference a sufficient normative clarity.[21] A possible explanation is the incorporation of external considerations into the Court's decision-making. An external consideration is understood here as a determination that a particular issue is either of an 'extra-legal' or a 'politically sensitive' nature.[22] Unfortunately, the hypothesis of the external considerations in election cases is yet to be seriously explored in the ECHR scholarship. Back in 2009, Sergey Golubok noted the potential choices available to the ECtHR in election cases, depending on the vision of the Court's

[15] O'Connell, 'Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy', 61 *Northern Ireland Legal Quarterly* (2010) 263.

[16] McCrudden and O'Leary, 'Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements', 24 *EJIL* (2013) 477; Graziadei, 'Democracy v Human Rights? The Strasbourg Court and the Challenge of Power Sharing', 12 *European Constitutional Law Review* (*ECLR*) (2016) 54.

[17] ECtHR, *Strack and Richter v. Germany*, Appl. nos 28811/12 and 50303/12, Decision of 5 July 2016, paras 36–37; ECtHR, *Babenko v. Ukraine*, Appl. no. 43476/98, Decision of 4 May 1999; *I.Z. v. Greece* (1994), 76-A, 65.

[18] ECtHR, *Yabloko United Russian Democratic Party v. Russia*, Appl. no. 18860/07, Judgment of 8 November 2016, paras 87–90; ECtHR, *Russian Conservative Party of Entrepreneurs and Others v. Russia*, Appl. nos 55066/00 and 55638/00, Judgment of 11 January 2007, paras 74–81.

[19] See, among many authorities, ECtHR, *Saccomanno and Others v. Italy*, Appl. no. 11583/08, Decision of 13 March 2012, paras 62–64; ECtHR, *Bompard v. France*, Appl. no. 44081/02, Decision of 4 April 2006.

[20] Dissenting judges in *Animal Defenders International* have noted that 'a degree of deference to general measures can be observed in the electoral context, where the Convention is clearly less categorical than in the Article 10 context and, consequently, because of the nature of the right at stake, a wider margin of appreciation was to be allowed to contracting States in determining the conditions under which the right to vote was exercised'. See ECtHR, *Animal Defenders International v. United Kingdom*, Appl. no. 48876/08, Judgment of 22 April 2013, para. 6, Joint Dissenting Opinion of Judges Ziemele, Sajo, Kaladjiyeva, Vucinic and De Gaetano. Likewise, in 2008, then ECtHR president Jean-Paul Costa has opined that 'the right to free elections is subject to implied limitation. This is less a matter of weak drafting than making due allowance for the discretion that democracies must be accorded in the design of their system of government'. See Costa, 'The Links between Democracy and Human Rights under the Case-law of the European Court of Human Rights' (2008), available at https://perma.cc/CEX6-2NT9.

[21] Zysset, 'Freedom of Expression, the Right to Vote, and Proportionality at the European Court of Human Rights: An Internal Critique', 17 *International Journal of Constitutional Law* (2019) 230.

[22] Odermatt, 'Patterns of Avoidance: Political Questions before International Courts', 14 *International Journal of Law in Context* (2018) 221, at 223.

role.[23] Stefan Graziadei touched upon the subject, observing that 'prudent approach runs like a common thread through most of its right to vote and elections jurisprudence'.[24] However, the scope of his research question prevented a comprehensive engagement with a normative scope of the identified 'prudent approach'.

This article aims to fill the existing gap in scholarship by developing a normative model of the operation of external considerations in ECtHR election jurisprudence. There is ample literature on the subject of international courts taking non-judicial factors into consideration.[25] Yet there is little discussion of whether such factors apply in election cases, especially in the decades since the incorporation of electoral rights into international human rights law.[26] Therefore, I will be drawing upon the discussion in US constitutional law. Taking a cue from the American scholar of law and economics and former sitting federal judge Richard Posner,[27] this article proposes using the term 'pragmatic adjudication' to conceptualize the consideration of external factors in election cases at the ECtHR. Posner has proposed that judges assume an 'antitrust' role in politics by focusing on prioritizing access to the electoral process instead of trying to regulate electoral competition. Importantly, I do not claim that the ECtHR applies the reasoning proposed by Posner. Instead, I seek to establish whether the Strasbourg Court's consideration of external factors in election cases produces outcomes that are similar to Posner's proposed model.

To develop an empirical model of pragmatic adjudication of election cases at the ECtHR, this article primarily relies on legal-doctrinal analysis, with political science scholarship providing additional evidential support. To reach the intended goal, I will trace the extent of deference to respondent states across election cases at the ECtHR from 1987 to 2020. Based on the use of the margin of appreciation by the Court,[28] I will determine:

- whether the ECtHR allocates competencies in line with the proposed model of pragmatic adjudication and
- whether this allocation allows for sufficient normative flexibility in a situation with new challenges to election rights.

This ECtHR election jurisprudence has faced two critical pragmatic challenges. In the post-war decades, being a democracy could not be taken for granted. It set state parties to the ECHR apart from other countries on the continent.[29] The first pragmatic

[23] Golubok, 'Right to Free Elections: Emerging Guarantees or Two Layers of Protection?', 27 *Netherlands Quarterly of Human Rights* (2009) 361, at 390.

[24] Graziadei, *supra* note 16, at 60.

[25] See, e.g., Bianchi, 'Choice and (the Awareness of) Its Consequences: The ICJ's "Structural Bias" Strikes Again in the Marshall Islands Case', 111 *American Journal of International Law* (*AJIL*) (2017) 81; Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy', 22 *European Foreign Affairs Review* (2017) 571; Odermatt, *supra* note 22, at 221–236.

[26] Lécuyer, *supra* note 3, at 10.

[27] R. Posner, *Law, Pragmatism and Democracy* (2003).

[28] Arnardóttir, 'Rethinking the Two Margins of Appreciation', 12 *ECLR* (2016) 27.

[29] As evidenced by inter-state application against Greece in the wake of the 1967 coup and the country's subsequent withdrawal from the Council of Europe.

challenge was for the Court to recognize this symbolic meaning of democracy without judging the concrete ways of channeling political competition.[30] This meant that the responsibility for the regulation of competition had been allocated to contracting parties. In the decades following the momentous events of 1989, practically all the European governments began to claim legitimacy from elections they deemed democratic. The vast majority also became parties to the ECHR. Yet, in practice, their commitment to democracy was often questionable. Here, the Court faced its second pragmatic challenge when it increased its oversight of electoral procedures without involving itself in controversies of political competition. Although the ECtHR jurisprudence regarding election rights was no longer a 'jurisprudential black hole',[31] the Court's approach towards them remained cautious. The allocation of competencies in the ECtHR pragmatic adjudication did not change. The Court still would not assume competence over the regulation of political competition or the substantive resolution of election disputes. However, its procedural oversight encompassed all parts of electoral processes, allowing the Strasbourg Court to pinpoint violations typical for the new types of political regimes that held elections but denied procedural fairness.

The article proceeds in five parts. Part 1 introduces the concept of pragmatic adjudication and applies it to the ECtHR election jurisprudence. Part 2 contours the historical evolution of the ECtHR jurisprudence on electoral rights and grounds it in the current political context. Part 3 argues that pragmatic adjudication allocates competencies between the ECtHR and contracting parties to the ECHR by distinguishing between several categories of election-related regulation with the requisite standard of deference to respondent states. Part 4 discusses how the Court calibrates its general approach by procedural oversight of how the relevant regulation is adopted and applied. Part 5 notes the practical limitations of pragmatic adjudication, especially when faced with non-democratic political regimes.

2 What Is Pragmatic Adjudication and Why Is It Relevant for the ECtHR?

'[The] President would have taken office … with no transition, with greatly impaired authority, perhaps amid unprecedented partisan bickering and bitterness'.[32] This is not a prescient look into the events of January 2021 in the United States. Instead, it is a hypothetical scenario of what might have happened 20 years ago if the Supreme Court of the United States had not intervened to stop the re-count of presidential votes in the state of Florida.[33] Richard Posner uses this example to highlight the external considerations that judges can take into account when deciding

[30] Here, the ECtHR (and, previously, the Commission) relied, *inter alia*, on the strong position of the United Kingdom delegation during the travaux preparatoires of the ECHR. See *X. v. United Kingdom* (1975), D.R. 7, at 95.

[31] O'Connell, *supra* note 15, at 264.

[32] Posner, *supra* note 27, at 331.

[33] *Ibid.*, at 328–331.

election cases.[34] Pragmatic adjudication is the process of applying those considerations.[35] Consequently, it means seeing 'politics as a competition among self-interested politicians, constituting a ruling class, for the support of the people, also assumed to be self-interested'.[36] This vision aligns with Joseph Schumpeter's vision of democratic politics as elite competition, legitimized by the acquiescence of the electorate.[37]

The fitting model for the pragmatic adjudication of election cases, according to Posner, would be 'antitrust law, which polices duopolistic and other imperfectly competitive markets'.[38] Thus, the focus for the judges should be on preventing the entrenchment of incumbent politicians and allowing the entry of new competitors.[39] This has meant, for example, presumption in favour of ballot access for minor candidates, a laissez-faire approach to campaign finance and a 'careful and skeptical judicial review' of statutes regulating the electoral process (with the emphasis on stability and predictability of rules).[40] Judges have had to avoid interfering in electoral outcomes, with electoral law instead favouring 'swift and definite resolution of elections and election controversies'.[41] Election outcomes as such had little intrinsic value beyond providing an orderly transition of power, thus precluding extra efforts into determining the actual election winner in close contests.[42] Corollary to that, the multitude of electoral systems did not allow determining those that best matched the concept of 'majority vote'.[43] Thus, Posner's vision of pragmatic adjudication primarily prioritizes access to political process over the control of outcomes.

Richard Posner is not alone in identifying the application of external considerations to election cases before courts. Perhaps the most radical solution was proposed by Jeremy Waldron, who has argued against the judicial review of electoral arrangements that were not 'pathologically or incorrigibly dysfunctional'.[44] Unlike the model proposed by Posner, this solution relies on the assumption that a given society has 'democratic institutions in reasonably good working order'.[45] Applying this assumption to real-life circumstances, especially in a complex and heterogeneous system such as the one under the ECHR, can be problematic. Declaring an election case admissible would then essentially require prior assessment of the quality of democratic institutions. Any such assessment has the potential to conflict with subjective perceptions in

[34] *Ibid.*, at 331–347.
[35] *Ibid.*, at 58–85.
[36] *Ibid.*, at 144.
[37] *Ibid.*, at 188–194. See also J. Schumpter, *Capitalism, Socialism and Democracy* (2003) at 269–273.
[38] *Ibid.*, at 245–246.
[39] *Ibid.*, at 247.
[40] *Ibid.*, at 241–243.
[41] *Ibid.*, at 237.
[42] *Ibid.*, at 172. This approach notably contrasts with the practice of some domestic courts that throw out elections due to the impossibility of correctly determining the identity of the election winner. See, e.g., Friedrichkeit-Lebmann, 'Austrian Constitutional Court: Presidential Election: Violation of the Principle of Free Elections', 11 *Vienna Journal on International Constitutional Law* (2017) 117.
[43] *Ibid.*, at 153.
[44] Waldron, 'The Core of the Case against Judicial Review', 115 *Yale Law Journal* (2006) 1346, at 1389.
[45] *Ibid.*, at 1360.

the society. In past years, surveys in countries considered to have high-quality democratic institutions have shown 'disaffection with the democratic form of government … accompanied by a wider skepticism toward liberal institutions'.[46] Earlier studies have shown that those affiliated with political actors consistently losing elections have a lower opinion of democratic institutions.[47] These factors can contribute to hostile reactions when domestic judges rely on external considerations in refusing to rule on election cases.[48]

Another alternative avenue for applying external considerations to election cases is to assess the impact of these considerations on political process. Such an approach would be similar to the one proposed by John Hart Ely.[49] Like Posner's model, it is an anti-trust approach that focuses on preventing incumbents from blocking channels of political change and empowering disadvantaged minorities.[50] Specifically, Ely's approach would entail protecting 'core' electoral rights such as the ability to vote, ballot access and exercise of office once elected.[51] While Posner notices similarities in Ely's vision, he rejects the need to specifically protect minorities in a democratic system.[52] Without fully embracing Posner's argument, one has to admit that the identification of disadvantaged minorities can be complicated in a political context.[53] These difficulties can become even more pronounced in a system comprising very different political communities such as the one under the ECHR.

The model of pragmatic adjudication proposed by Posner is rooted in a particular normative judicial philosophy regarding democracy.[54] At the same time, Posner claims that pragmatism is widespread among American judges, being 'the secret story of our courts'.[55] Indeed, one can argue that certain elements of Posner's model of pragmatic

46 Foa and Mounk, 'The Signs of Deconsolidation', 28 *Journal of Democracy* (2017) 1, at 6.

47 C. Anderson *et al.*, *Losers' Consent: Elections and Democratic Legitimacy* (2005), at 60–65.

48 As exemplified by the reaction of then US President Donald Trump to the decision of the US Supreme Court that found the Texas attorney general lacking standing to challenge the certification of election results in other states. See The Hill, *Trump Slams Supreme Court Decision to Throw Out Election Lawsuit* (2020), available at https://perma.cc/G4MW-9B68.

49 J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

50 *Ibid.*, at 103.

51 *Ibid.*, at 117.

52 Posner, *supra* note 27, at 233.

53 At least as evidenced by the experiences of the US federal judiciary, which is the focus of both Posner and Ely: 'A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls.' *Shaw v. Reno*, 509 U.S. 647 (1993); 'Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve – based on the votes of their supporters – and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.' *Rucho v. Common Cause*, 588 U.S. __ (2019).

54 Posner, *supra* note 27, at 139–144.

55 *Ibid.*, at 57, 332.

adjudication are being adopted as parts of proposals to improve election dispute resolution in the USA. For instance, echoing Posner's argument against protracted investigation into vote count, Edward Foley has argued that errors are inevitable in large-scale elections.[56] Consequently, Joshua Douglas has proposed that election dispute resolution mechanisms should incorporate such external considerations as executive stability and perception of impartiality.[57] Foley has further suggested that if these mechanisms do appear impartial, the federal authorities should refrain from interfering.[58] In this way, the implications of pragmatic adjudication may affect the allocation of competences in a multi-level system, where federal and state courts have distinct competences. Thus, Posner's model appears to be rooted in issues that are germane to the adjudication of election cases in practice.

There are fewer election cases before the ECtHR than there are on the docket of the US federal judges. In American politics, post-election recourse to courts appears to be a common strategy.[59] The situation in the ECHR system is different (although the number of post-election applications from some countries is quite significant). Nonetheless, the scope of election cases before the ECtHR does include most aspects of the electoral process, which, as I suggest, allows one to empirically test if the case law of the Court produces outcomes that are similar to Posner's model.[60] This article argues that the ECtHR has its own (not so) secret story of pragmatic adjudication of election cases.The story is not so secret because the ECtHR judges, on several occasions, have discussed external considerations in election cases. For instance, in *Hirst*, the dissenting judges noted that 'the lack of precision in the wording of that Article (3 of the First Protocol) and the sensitive political assessments involved call for caution'.[61] Likewise, in *Paksas*, the dissenters noted that in 'such a specific and delicate field as electoral law, and in a case involving the complex relations between the different public authorities, subject to the ultimate scrutiny of the electorate, and thus the sovereign people, (they) would advocate restraint'.[62] Tellingly, in both cases, the dissenters' concern seems validated as the Court encountered state resistance in implementing the judgment.

Therefore, the peculiarities in the ECtHR approach towards election cases may not reflect the abandonment of the democracy-enhancing reasoning characteristic of the

[56] Foley, 'The Legitimacy of Imperfect Elections: Optimality, Not Perfection, Should Be the Goal of Election Administration', in A. Rachlin *et al.*, *Making Every Vote Count: Federal Election Legislation in the States* (2006) 97.

[57] Douglas, 'Procedural Fairness in Election Contests', 88 *Indiana Law Journal* (2013) at 45–47, 49–51.

[58] Foley, 'How Fair Can Be Faster: The Lessons of Coleman v. Franken', 10 *Election Law Journal* (2011) at 225.

[59] Hasen, 'Judges as Political Regulators', in G.-U. Charles *et al.* (eds), *Race, Reform, and Regulation of the Electoral Process* (2011) 104.

[60] See ECtHR, *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights* (2020), available at https://perma.cc/NTC4-44B9.

[61] ECtHR, *Hirst v. United Kingdom (No. 2)*, Appl. no. 74025/01, Judgment of 6 October 2005, para. 5, Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens.

[62] ECtHR, *Paksas v. Lithuania*, Appl. no. 34932/04, Judgment of 6 January 2011, para. 6, Partly Dissenting Opinion of Judge Costa, Joined by Judges Tsotsoria and Baka.

cases concerning Article 9–11.[63] Rather, they may be a result of the consideration of external factors. Back in 2008, ECtHR President Jean-Paul Costa explicitly contrasted the jurisprudence in cases concerning Articles 9–11 and election cases. The former cases were deemed to have a 'strict, protective approach, … [that] serves the quality of democratic life in the Member States of the Council of Europe, and makes their systems more transparent and pluralist, and their institutions more accountable'.[64] In the latter cases, in contrast, a 'less rigorous approach is called for when it comes to the design of a State's democratic system – every such system is unique, reflecting the historical experiences of the State, its values, traditions and its aspirations'.[65]

Does this mean that the ECtHR could not find 'a European consensus' for the adoption of some form of the proportional electoral system? Of course, it could. Rather, the external considerations mean that it should not. Democratic systems are unique not because of the differences in electoral laws but, rather, because of the differences in underlying power constellations. Elections rationalize the political process by creating clear winners and losers.[66] Therefore, electoral rules largely reflect the self-interested goals of political actors.[67] This fact can help explain why large-scale election reforms are rare in established democracies.[68] It also explains that a genuine 'European consensus' in favour of some form of proportional electoral system would be problematic. While the Court could rely on the fact that most European countries use such a system for legislative elections, it would then have to explain why it would best fit domestic circumstances.

This explanation brings us to the second factor leading to the consideration of external factors in ECtHR election jurisprudence. Political actors, to a large extent, determine the scope of compliance with the ECtHR's decisions.[69] Given the self-interest of political actors in electoral rules, these rules are likely to be a salient issue. There is evidence that if an issue decided by the ECtHR is politically salient for a government, it is less likely to take it into account.[70] Thus, questioning electoral rules can lead the Court into an entanglement in domestic political disputes. There is evidence from regional and global bodies that such entanglements produce explicit backlash[71] and

63 *Cf.* Zysset, *supra* note 21.

64 Costa, *supra* note 20.

65 *Ibid.*

66 Moe, 'Political Institutions: The Neglected Side of the Story', 6 *Journal of Law, Economics, and Organization* (1990), at 213.

67 Boix, 'Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies', 93 *American Political Science Review* 3 (1999) 609; J. Colomer, *Handbook of Electoral System Choice* (2004). Jeremy Waldron goes further by arguing that any choice of an electoral procedure is at the heart of a pragmatic one. See J. Waldron, *Law and Disagreement* (1999), at 300–301. For Andrew Legg, though, this argument is weak. See A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012), at 77.

68 P. Norris, *Why Electoral Integrity Matters* (2014), at 169–170.

69 Anagnostou and Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25 *EJIL* (2014) 205.

70 See Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* (2014) 1, at 13–14, 24–27.

71 Alter *et al.*, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice', 107 *AJIL* (2013) 737.

non-compliance.[72] The risk from entanglements is further increased by the presence of non-democratic regimes among the ECHR contracting parties. Indeed, when the Court declared admissible an application of the Russian opposition parties against the conduct of the country's legislative election, the president of the Russian Constitutional Court asked if the ECtHR was laying the groundwork for 'a revolution'.[73]

The third factor is that litigation before an international human rights court might not always be the best way of protecting a given right.[74] In the case of electoral rights, an alternative could be capacity building through international election observation.[75] There is evidence that election observation missions actually achieve a meaningful impact on the behaviour of the domestic political actors.[76] These external considerations have led some scholars to normative conclusions. For instance, Andrew Legg argues that democracy is not constituted as a *per se* international human right.[77] Jure Vidmar claims that the ECHR does not endorse a particular vision of democracy as long as it fits the liberal-democratic model.[78] The framework of this article is much more narrow. It will determine how external considerations affect the interpretation of ECHR provisions by the Court in election cases. Then it will assess if the resulting model of pragmatic adjudication is substantially similar to the one proposed by Posner in terms of outcomes.

It has been suggested that international courts integrate external considerations into their decision-making by either avoiding adjudication entirely or avoiding the politically sensitive parts of the case.[79] One of the primary vehicles for integrating external considerations into the judicial practice of international courts in general, and specifically the ECtHR, is the margin of appreciation, based on the principle of subsidiarity.[80] It has been argued that the margin plays a double role – both systemic and normative.[81] Oddný Mjöll Arnardóttir unpacks this distinction by pointing out that subsidiarity has 'a systemic dimension related to the distribution of competencies and tasks, and a normative dimension that guides or justifies how authority is

[72] A telling example is the refusal of the Brazilian electoral authority to comply with preliminary measures ordered by the United Nations' Human Rights Committee and reinstate former president of the country Luis Inacio Lula da Silva on the ballot for the country's 2018 presidential election.

[73] Zorkin, 'Predel Ustupchivosti', *Rossiyskaya Gazeta* (29 October 2010).

[74] Dennis and Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', 98 *AJIL* (2004) 462.

[75] Organization for Security and Co-operation in Europe *et al., Declaration of Principles for International Election Observation* (2005), available at https://perma.cc/FVM2-PHL4.

[76] Hyde, 'How International Election Observers Detect and Deter Fraud', in M. Alvarez (ed.), *Election Fraud: Detecting and Deterring Electoral Manipulation* (2008) 201, at 203–205.

[77] Legg, *supra* note 53, at 75.

[78] Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives', 23 *Leiden Journal of International Law* (2010) 209.

[79] Odermatt, *supra* note 22, at 227.

[80] Legg, *supra* note 68, at 17–37.

[81] Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *EJIL* (2005) 907; Spielmann, 'Whither the Margin of Appreciation', 67 *Current Legal Problems* (2014) 49.

used, which accounts for the normative elasticity characteristic of the interpretation of international human rights norms'.[82]

This article applies Arnardóttir's concept to construct the conceptual framework of pragmatic adjudication of election cases at the ECtHR, based on two principal components – competence allocation and normative flexibility. Subsequently, I will explore the use of the margin of appreciation in election cases to determine whether the Court allocates competencies similarly to Posner's blueprint. If that is the case, states will receive greater deference in situations when applicants question election outcomes or the organization of an electoral system. In contrast, less deference will be offered in situations when the right to vote or ballot access is in question. I will also determine whether the application of the margin of appreciation provides sufficient flexibility for the Court to decide on reasonable restrictions on the right to vote and ballot access.

3 The Changing Terrain of Electoral Rights under the ECHR

The history of democratic commitments under the ECHR reminds us of the era when 'from Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended across the Continent'.[83] The adoption of the ECHR was meant to show a commitment to a different type of political regime than those behind the Iron Curtain. In the wake of World War II, the Soviet Union committed itself to hold elections in the occupied states of Central and Eastern Europe. Yet election fraud and suppression of any opposition to the Communist rule paved the way for the extension of Soviet totalitarianism in those countries.[84] Therefore, the commitment to free democratic elections and the rights of opposition was important for distinguishing the emerging Western bloc and also explains the need for referring to democracy in the ECHR preamble and the inclusion of what eventually became Article 3 of the First Protocol into the convention. However, the Western bloc was an unwieldy group of states with very different approaches to democracy that were handled by internal political systems.[85] Concerns about the domestic impact of the right to free and fair elections resulted in a convoluted history of the 'political clause'. While the drafters were convinced of the need to safeguard democracy and to provide protections for the political opposition,[86] they were unable to agree on the exact language of this provision. Initial proposals even suggested empowering the Court to investigate the conduct of elections.[87] However, subsequently, it was proposed that the prospective provision should be outside the Court's jurisdiction.[88] Several delegations voiced concerns over the potential impact

[82] Arnardóttir, *supra* note 28, at 41.

[83] W. Churchill, *The Sinews of Peace* (2014), at 71.

[84] Star, 'Elections in Communist Poland', 2 *Midwest Journal of Political Science* (1958) 200.

[85] M. Duranti, *The Conservative Human Rights Revolution* (2017).

[86] *Preparatory Work on Article 3 of Protocol No. 1 to the European Convention on Human Rights*, Information Prepared by the ECtHR Registry (1986), at 3–5, available at https://perma.cc/3J6Z-2R4N.

[87] *Ibid.*, at 2.

[88] *Ibid.*, at 11.

of an electoral clause on the states' ability to determine the scope of the franchise.[89] Consequently, the provision on free elections did not become part of the initial text of the ECHR that was adopted in November 1950. It was only added in March 1952 as Article 3 of the First Protocol. Article 3's language did not grant individually enforceable rights, though this was subsequently clarified through the interpretation by the ECHR's bodies.[90] Yet, beyond that, the Strasbourg jurisprudence was of little practical effect.[91] Prior to 1985, no applications claiming a violation of Article 3 of the First Protocol had made it past the filter of the European Commission, which meant that the Court did not have an opportunity to clarify the article's scope.[92]

In the first decades of the ECHR's existence, commitment to democratic rights under the convention was sometimes contradicted by the politics of the Cold War.[93] These contradictions came to a head with an interstate complaint against Greece and its subsequent withdrawal from the ECHR.[94] Even with several contracting parties committed to the practical safeguarding of the internal democracy of another party, there was no sufficient impetus for change in state behaviour. At the same time, individual applications were still rare and mainly concerned with the organization of electoral systems and the position of marginalized political groups. Consequently, in the period prior to the adoption of Protocol no. 11 and the accession of Central and Eastern European states, electoral rights under the ECHR did not become a focal point for the group of interested lawyers and activists like other provisions did.[95] Therefore, an opportunity for the Court to state its position in an election case only appeared in 1987. One may argue that the timing was inopportune as the ECtHR was still largely influenced by the ECHR's drafting and the restrictive case law of the Commission (see discussion later in this article). However, I would argue that the moment instead allowed for a 'forward-looking' pragmatic adjudication. Subsequent decades have seen cautious approaches towards strengthening the oversight of domestic political processes. The general commentary on Article 25 of the International Covenant on Civil and Political Rights adopted in 1996 specified that 'the Covenant does not impose any particular electoral system'.[96] Subsequently, in June 2008, the Committee of Ministers

[89] *Ibid.*, at 13.

[90] First by the Commission, then the Court. See *W, X, Y and Z v. Belgium* (1975), D.R., 2, at 114; *Mathieu-Mohin*, *supra* note 6, para. 54.

[91] As argued by Tom Daly, '[t]he European Court's democratisation burden was light for the first four decades of operation'. See Daly, *supra* note 11, at 112.

[92] The Commission received a number of applications, challenging the organization of electoral systems, but dismissed them as inadmissible. See, e.g., *Liberal Party, R. and P. v. United Kingdom* (1980), D.R. 21, at 219; *X v. Iceland* (1981), D.R. 27, at 145.

[93] Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash', 79 *Law and Contemporary Problems* (2016) 141.

[94] *Greek Case (Denmark v. Greece; Norway v. Greece; Sweden v. Greece; Netherlands v. Greece)*, Case nos 3321/67 *et seq.*, 5 November 1969.

[95] Madsen, *supra* note 94, at 158.

[96] Human Rights Committee, General Comment 25 (57), General Comments under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at Its 1510th Meeting, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996). International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

of the Council of Europe explicitly rejected a proposal from a Parliamentary Assembly 'to develop a legally binding instrument in the field of democratic elections', preferring instead 'to focus on the implementation of the existing instruments on electoral standards' (neither of which was legally binding).[97]

The fall of the Eastern Bloc and the concurrent 'third wave' of democratization[98] were supposed to make democracy 'the only game in town'.[99] In the European context, the democratic momentum led to the adoption of the Paris Charter for a New Europe[100] and the Copenhagen Document.[101] In these two documents, the members of the two former competing regional blocs agreed, *inter alia*, that everyone had the right to participate in free and fair elections,[102] and they undertook to guarantee this right in practice.[103] Over time, almost all the former Eastern Bloc states and former Soviet republics in Europe have acceded to the ECHR. The commitment to political democracy was further enforced by the conditionality of accession to regional blocs such as the European Union (EU). The Copenhagen Criteria have required prospective EU members to achieve the 'stability of institutions guaranteeing democracy'.[104] These developments have sparked a discussion of a democratic entitlement in international law. Some scholars have argued that state authority was now expected to be acquired through democratic elections with compliance supervised by the international community.[105] This supervision could be exercised through election monitoring.[106] Looking at the subsequent evolution of democratic entitlement, some have argued that an expectation of holding elections has evolved into a customary norm,[107] while election monitoring has indeed produced legal standards for assessing compliance with democratic principles.[108] In the European context, scholars have argued that state parties to the ECHR are under an obligation to introduce and maintain a

[97] See Reply Adopted by the Committee of Ministers on 11 June 2008 at the 1029th Meeting of the Ministers' Deputies, Doc. CM/AS(2008)Rec1791-final (2008). Thus, the Council reinforced the lack of consensus over the content of electoral rights that was characteristic of the ECHR's drafting stage.

[98] S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991).

[99] A. Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (1991).

[100] Charter of Paris for a New Europe (Paris Charter) (21 November 1990), available at https://perma.cc/6L3V-E3KG.

[101] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen Document) (29 June 1990), available at https://perma.cc/6C8S-PY5M.

[102] Paris Charter, *supra* note 101.

[103] Copenhagen Document, *supra* note 102.

[104] Copenhagen European Council, Presidency Conclusions, 21–22 June 1993 (1993), available at https://perma.cc/28UC-JYSV.

[105] Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46.

[106] Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 539.

[107] Pippian, 'International Law, Domestic Political Orders, and the "Democratic Imperative": Has Democracy Finally Emerged as a Global Legal Entitlement?', Jean Monnet Working Paper no. 02/10 (2010).

[108] Boda, 'Judging Elections by Public International Law: A Tentative Framework', 41 *Representation* (2005) 3208; Davis-Roberts, 'Using International Law to Assess Elections', 17(3) *Democratization* (2010) 416.

pluralist political system.[109] It has been further claimed that the convention explicitly obliges state parties to hold multi-party elections.[110]

Yet the optimistic vision of the early 1990s has never quite materialized. Despite the impressive growth in capacity building and expertise, regional election monitoring never assumed the envisaged supervisory function. Instead of putting pressure on regimes deviating from democratic standards, states remained committed to security considerations in their foreign policies.[111] This shift has become more profound against the background of the 'war on terror'.[112] Qualitative and quantitative measures of democratic effectiveness reveal stark contrasts between the state parties to the ECHR. In the recent Freedom House ranking,[113] only the European Free Trade Association and the EU member states with the exception of Hungary qualified as 'free', while Azerbaijan, Russia and Turkey were classified as 'not free'. All other ECHR contracting parties included in the metric were ranked as 'partly free'.[114] Consequently, the Council of Europe is currently a patchwork of very different political regimes. Worse still, since becoming parties to the ECHR, some states have experienced democratic decay. In a dynamic perspective, the Electoral Democracy Index, as measured by Varieties of Democracy, fell from 0.55 to 0.25 in Russia during 1992–2019.[115] In Hungary, it dropped from 0.86 to 0.49 in 2009–2019, while in Turkey it fell from 0.68 to 0.32 during the same period. It has been argued that such 'a mix of mature and new democracies in Europe requires a difficult balancing act' for the Court facing both a respondent state and a community of states.[116]

The evident slowing of the democratization march has produced a variety of scholarly literature. Authors have been creative in finding terms to describe the regimes that are neither openly authoritarian nor liberal democratic.[117] These regimes have legitimated themselves through elections based on universal suffrage yet have provided virtually no guarantees of democratic rights such as freedom of speech and assembly. Put bluntly, the only game in town could have only one winner. Therefore, the practical possibility of a peaceful transfer of power through elections would be out of the question. Yet, unlike the 'popular democracies' or conservative regimes of the Cold War, these regimes would not set themselves apart from the liberal democratic model and maintain membership in regional human rights regimes such as the ECHR.[118] This

[109] Rubinstein and Roznai, 'The Right to a Genuine Electoral Democracy', 27 *Minnesota Journal of International Law* (2018) 143, at 160.

[110] Vidmar, *supra* note 79.

[111] D'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks', 22 *EJIL* (2011) 549.

[112] Marks, 'What Has Become of the Emerging Right to Democratic Governance?', 22 *EJIL* (2011) 507.

[113] Freedom House, *Freedom in the World* (2019), available at https://perma.cc/959B-MV2V.

[114] Except Andorra, Monaco and San Marino.

[115] Varieties of Democracy, *V-Dem Graphing Tools* (2019), available at https://perma.cc/D3CS-GACP. The Index is measured on the scale from the lowest score of 0.0 to the highest score of 1.0.

[116] Daly, *supra* note 11, at 166, 167.

[117] Zakaria, 'The Rise of Illiberal Democracies', 76 *Foreign Affairs* (1997) 22; Diamond, 'Thinking about Hybrid Regimes', 13 *Journal of Democracy* (2002) 21; Wigell, 'Mapping "Hybrid Regimes": Regime Types and Concepts in Comparative Politics', 15 *Democratization* (2008) 230.

[118] Steiner, 'Political Participation as a Human Right', 1 *Harvard Human Rights Yearbook* (1988) 77, at 91.

scenario raises a range of new questions concerning compliance with the right to free and fair elections. With the rise of hybrid regimes, open refusal to hold elections or the denial of the ability to vote are becoming extremely rare. Instead, as Steven Levitsky and Lucan Way argue in their influential book, the defining feature of such regimes, deemed 'competitive authoritarianism', is the systematic denial of a level playing field to opposition politicians.[119]

The democratic backsliding and the emergence of competitive authoritarianism are distinct challenges for the pragmatic adjudication of election cases at the ECtHR. While it is likely to produce an ever-growing number of applications to Strasbourg, they will test the capacity of the Court for flexible interpretation. Further complicating things are the general trends in the ECtHR's jurisprudence. Some scholars argue that, in the years following the 2012 Brighton Declaration, there were changes in the Court's behaviour.[120] Mikael Rask Madsen claims that the ECtHR has moved towards greater subsidiarity.[121] Laurence Helfer and Erik Voeten, on their part, are convinced that the Court may be overturning prior case law in a regressive direction.[122] ECtHR judges themselves do not deny that the Court's behaviour might be changing. Current ECtHR president Roberto Spano has argued that the Court has moved from the 'substantive embedding' phase, where it focused on ensuring the ECHR's reception in domestic systems, to the 'procedural embedding' phase, where it has shifted towards a framework-oriented role.[123] The implication might be that the current ECtHR model of pragmatic adjudication in election cases is here to stay, and there is little potential for further dynamic jurisprudence.

In the seven decades from the ECHR's drafting to today, the terrain for election rights has gone through two major changes. In the 1980s, when the Court got the first opportunity to have its say in an election case, the terrain was still largely impacted by the contested drafting and cautious case law of the Commission. In the decades following the fall of the Berlin Wall, most Central and Eastern European countries have acceded to the ECHR. Many of them later experienced democratic backsliding and the emergence of competitive authoritarianism. This fact can lead to a constant stream of election-related applications to Strasbourg, dramatically expanding its election jurisprudence. However, given the general trends in the post-Brighton ECtHR case law, change in the model of pragmatic adjudication appears unlikely. This means that its

[119] 'Competitive authoritarian regimes are civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents. Such regimes are competitive in that opposition parties use democratic institutions to contest seriously for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents. Competition is thus real but unfair.' S. Levitsky and L. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (2014), at 5.

[120] Brighton Declaration, High Level Conference on the Future of the European Court of Human Rights (2012), available at https://perma.cc/G3XL-U3XF.

[121] Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?', 9 *JIDS* (2018) 199, at 210.

[122] Helfer and Voeten, 'Walking Back Human Rights in Europe?', 31 *EJIL* (2020) 797.

[123] Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law', 18 *Human Rights Law Review* (*HRLR*) (2018) 473.

interpretative flexibility will be tested by claims of violations caused by competitive authoritarians.

4 Competence Distribution in the ECtHR's Pragmatic Adjudication

The *Mathieu-Mohin* judgment was the first opportunity for the ECtHR to have a say on election rights. It recognized that these rights were individually enforceable. Yet the same judgment has effectively made pragmatic adjudication the operative standard for election cases. Explicitly referring to its jurisprudence on property rights, the Court noted that, since Article 3 of the First Protocol recognized electoral rights 'without setting them in express terms, let alone defining them', it left room for 'implied limitations'.[124] This approach meant that respondent governments had 'a wide margin of appreciation in this sphere' that was subject to the general requirements of legality and proportionality.[125] The underlying issue in the case has been the inability of a group of Belgian politicians to represent their constituents due to the organization of the regional parliament. The Court used this opportunity to formulate its general approach towards electoral outcomes, pointing out that the ECHR did not provide candidates with 'equal chances of victory' or give 'all votes equal weight'.[126] Specifically, the ECtHR held that an electoral system could have the promotion of 'the emergence of a sufficiently clear and coherent political will' as a legitimate aim, and then it effectively foreclosed any further proportionality analysis.[127] The *Mathieu-Mohin* judgment followed Posner's blueprint of pragmatic adjudication in two important regards. First, it refused to engage in substantive analysis of electoral systems from the ECHR's standpoint. Second, and in relation to this point, the Court demonstrated scepticism towards outcome-based arguments in election cases.

The subsequent decades have tested the applicability of the emerging standard of pragmatic adjudication towards the regimes with questionable democratic pedigree. In 2007–2008, the ECtHR heard the application of ethnic Kurdish politicians from Turkey, who argued that a country-wide 10 per cent electoral threshold violated their right to stand for elected office by overriding majorities in their constituencies.[128] The Council of Europe institutions echoed their opinion.[129] Though the ECtHR found the threshold to be 'excessive', the Court declared itself satisfied with the ability of politicians to find shortcuts around it.[130] Therefore, it effectively showcased the reliance on external considerations in election cases. The ECtHR used the strategies employed by politicians as proof of their ability to get elected.[131] This appears in line with Posner's

[124] *Mathieu-Mohin*, *supra* note 6, para. 52.
[125] *Ibid.*
[126] *Ibid.*, para. 54.
[127] *Ibid.*
[128] ECtHR, *Yumak and Sadak v. Turkey*, Appl. no. 10226/03, Judgment of 8 July 2008, paras 76–91.
[129] *Ibid.*, paras 51–60.
[130] *Ibid.*, paras 133–143.
[131] *Ibid.*, para 139.

blueprint that is agnostic to the way electoral systems channel votes. Furthermore, it is hard to imagine an electoral system that prevents strategic adaptation to it. Thus, the Court appears to have gone further than in *Mathieu-Mohin*, effectively allocating the choice of electoral systems to the exclusive competence of state parties. And this action seems to be confirmed with the judgment in *Partei 'Die Friesen'*, where the Court held that accommodation of minority interests does not warrant its intervention into a dispute over the election system.[132]

Another test of pragmatic adjudication in a non-democratic setting came with the application of the Russian opposition parties and personalities (the very application where the decision on admissibility prompted concerns by the president of the country's Constitutional Court). The crux of their complaint rested on the claim that biased coverage in state-dominated media had impeded the opposition's electoral performance.[133] The applicants initially relied on both Article 3 of the First Protocol and Article 10 of the ECHR.[134] However, the ECtHR exercised its discretion to review the case exclusively on the basis of the electoral clause, thus further entrenching its standard of pragmatic adjudication.[135] The Court established that, although the respondent state had only ensured 'some visibility of opposition parties', its compliance with positive obligations in this regard fell within the margin of appreciation.[136] Notably, it viewed television airtime as a finite resource, meaning that a measure of access would be sufficient.[137]

The extensive deference to respondent governments concerning election outcomes also extended to electoral disputes. In the pre-Protocol no. 11 setting, the Commission held that it was 'not required to decide whether an irregularity has actually taken place' under domestic law.[138] Although, in some instances, the Court has deviated from this standard,[139] it has generally avoided assuming a fact-finding role. The ECtHR has underscored that, in cases concerning the conduct of elections, the issue at hand was not the missed opportunity to sit in parliament but, rather, to stand in free elections.[140] Thus, though some *prima facie* evidence of irregularities was required,

[132] ECtHR, *Partei 'Die Friesen' v. Germany*, Appl. no. 65480/10, Judgment of 28 January 2016, paras 41–43.

[133] ECtHR, *Communist Party of Russia and Others v. Russia*, Appl. no. 29400/05, Judgment of 19 June 2012, para. 55.

[134] *Ibid.*, para. 57.

[135] *Ibid.*

[136] *Ibid.*, para. 128.

[137] *Ibid.*, para. 126. Interestingly, in a situation when no formalized access to television airtime was provided to political parties, the ECtHR would review the case under Article 10 with a stricter standard of scrutiny. ECtHR, *TV Vest As & Rogaland Pensjonistparti v. Norway*, Appl. no. 21132/05, Judgment of 12 November 2008. This approach aligns with the general distinction between outcome and access in the Court's electoral rights jurisprudence.

[138] *I.Z.*, *supra* note 17.

[139] ECtHR, *Karimov v. Azerbaijan*, Appl. no. 12535/06, Judgment of 25 September 2014, paras 37–47.

[140] ECtHR, *Namat Aliyev v. Azerbaijan*, Appl. no. 18705/06, Judgment of 8 April 2010, para 75. Therefore, even an obviously losing candidate can claim victim status in case of electoral irregularities. Conversely, the change of election outcome through the judicial resolution of an electoral dispute may not give a victim status. See ECtHR, *Riza and Others v. Bulgaria*, Appl. nos 48555/10 and 48377/10, Judgment of 13 October 2015, Dissenting Opinion of Judge Kaladjiyeva.

the Court would not investigate what the 'correct' outcome of an election was.[141] Therefore, during the substantive embedding phase, the ECtHR applied pragmatic adjudication through deference to respondent states in matters concerning election outcomes and channelling of political competition. The states retain virtually unlimited competence in designing their electoral systems and resolving election disputes under domestic law.

In contrast, early on, the Court applied interpretative flexibility to limit the margin of appreciation afforded to respondent states in matters of access to elections. In *United Communist Party of Turkey and Others*, the respondent government claimed that Article 3 of the First Protocol was the applicable provision, granting it an extended scope of action in regulating political parties.[142] The Court disagreed, pointing out that the parties were essential for the operation of political democracy and thus covered by Article 11 of the ECHR with a narrower margin of appreciation.[143] In its subsequent case law, it has clarified the relationship between the regulation of access and outcomes. In *Republican Party of Russia*, the ECtHR held that electoral legislation that placed barriers for smaller parties narrowed the margin of appreciation available to the states in limiting the number of such parties.[144] Yet, in other situations, the electoral function of political parties can conversely extend the margin of appreciation afforded to the respondent state. For instance, in *Gorzelik*, the ECtHR afforded this extension in an Article 11 case since the association in question could participate in elections with privileged status.[145] Given such a status (an exemption from an electoral threshold),[146] the situation at hand arguably accounted for both access and outcome.

In line with Posner's vision of pragmatic adjudication,[147] the ECtHR, in principle, has accepted the 'reasonable' requirements for ballot access such as monetary deposits and voter signatures to prevent voter confusion.[148] Yet stricter scrutiny would apply to extraordinary requirements to candidates with the potential to deny them ballot access.[149] Restrictions based on ethnicity and (in certain contexts) nationality would not be related to a legitimate aim and thus would violate the ECHR.[150] In such situations as well as in the case of the refusal to hold elections, any politically

[141] ECtHR, *Mugemangango v. Belgium*, Appl. no. 310/15, Judgment of 10 July 2020, paras 80–86.

[142] ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Appl. no. 19392/92, Judgment of 30 January 1998, para. 19.

[143] *Ibid.*, para. 25.

[144] ECtHR, *Republican Party of Russia v. Russia*, Appl. no. 12976/07, Judgment of 12 April 2011, para. 113.

[145] ECtHR, *Gorzelik and Others v. Poland*, Appl. no. 44158/98, Judgment of 17 February 2004, paras 97–103.

[146] *Ibid.*, para. 97.

[147] Posner, *supra* note 27, at 238.

[148] ECtHR, *Sukhovetskyy v. Ukraine*, Appl. no. 13716/02, Judgment of 28 March 2006, para. 67; ECtHR, *Soberanía de la Razón and Others v. Spain*, Appl. no. 30537/12, Decision of 26 May 2015.

[149] ECtHR, *Ždanoka v. Latvia*, Appl. no. 58278/00, Judgment of 16 March 2006, para. 133; *Paksas*, *supra* note 62.

[150] ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Appl. nos 27996/06 and 34836/06, Judgment of 22 December 2009, paras 43–50; ECtHR, *Zornić v. Bosnia and Herzegovina*, Appl. no. 3681/06, Judgment of 15 July 2014, paras 28–33; ECtHR, *Tănase v. Moldova*, Appl. no. 7/08, Judgment of 27 April 2010, paras 164–180.

active person could claim to be a 'victim' under the ECHR.[151] Therefore, generally, the ECtHR's jurisprudence appears to give a 'presumption in favour of ballot access', buttressed by significant normative flexibility. However, this approach does not go beyond the general framework of pragmatic adjudication with its 'antitrust' focus. The competence for defining terms of ballot access largely remains within the purview of domestic authorities.

Posner's vision of pragmatic adjudication envisages extending suffrage to 'everyone' subject to reasonable restrictions.[152] With regulations concerning the right to vote, the ECtHR has gradually stepped up its scrutiny, generally corresponding to that vision. First, it targeted obvious lacunae in the electoral systems, which disenfranchised certain groups of the citizenry.[153] Then, the Court moved to situations where the denial of the right to vote appeared to have no legitimate aim.[154] Finally, it began to question certain 'established' limitations of the right to vote, such as mental capacity[155] and imprisonment.[156] In the latter judgment, the ECtHR specifically stated that, in the current age, 'the presumption in a democratic State must be in favour of inclusion'.[157] While the subsequent events have put the trend towards a dynamic interpretation of the right to vote in question,[158] its position in the competence allocation by the ECtHR has remained out of the question. Indeed, in several instances, the Court has underscored that the right to vote entails the corresponding positive obligation of a state to hold elections.[159]

Following the conclusion of the substantive embedding phase, the ECtHR has pronounced an explicit hierarchy of the areas of electoral regulation by deference to the respondent state. While 'tighter scrutiny should be reserved for any departures from the principle of universal suffrage, … a broader margin of appreciation can be afforded to States where the measures prevent candidates from standing for elections, but such interference should not be disproportionate'.[160] As for vote count and tabulation, 'a still less stringent scrutiny would apply'.[161] Before this clarification, the distinction between approaches to outcomes and access to the political process apparently was not

[151] *Sejdić and Finci*, *supra* note 150, paras 28–29; *Zornić*, *supra* note 150, para. 17; ECtHR, *Baralija v. Bosnia and Herzegovina*, Appl. no. 30100/18, Judgment of 29 October 2019, paras 33–35.

[152] Posner, *supra* note 27, at 236.

[153] ECtHR, *Matthews v. United Kingdom*, Appl. no. 24833/94, Judgment of 18 February 1999; ECtHR, *Aziz v. Cyprus*, Appl. no. 69949/01, Judgment of 22 June 2004.

[154] ECtHR, *Albanese v. Italy*, Appl. no. 77924/01, Judgment of 23 March 2006, para. 49.

[155] ECtHR, *Alajos Kiss v. Hungary*, Appl. no. 38832/06, Judgment of 20 May 2010.

[156] *Hirst*, *supra* note 61.

[157] *Ibid.*, para. 59.

[158] Apart from well-known cases on prisoner voting, the Court displayed caution concerning expatriate voting and disenfranchisement of persons under guardianship. ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece*, Appl. no. 42202/07, Judgment of 15 March 2012; ECtHR, *Shindler v. United Kingdom*, Appl. no. 19840/09, Judgment of 7 May 2013; ECtHR, *Strøbye and Rosenlind v. Denmark*, Appl. nos 25802/18 and 27338/18, Judgment of 2 February 2021.

[159] ECtHR, *Georgian Labour Party v. Georgia*, Appl. no. 9103/04, Judgment of 8 July 2008, paras 131–140; *Riza and Others*, *supra* note 140, paras 177–178.

[160] ECtHR, *Davydov and Others v. Russia*, Appl. no. 75947/11, Judgment of 30 May 2017, para 286.

[161] *Ibid.*

clear to all the respondent states. Some of them attempted to rely on concepts applicable to outcomes of the political process (such as 'wasted votes') in cases on ballot access.[162] In spite of this initial lack of clarity, the allocation of competencies in the ECtHR's model of pragmatic adjudication allows the Court (with some exceptions, which will be discussed in Part 5) to avoid entanglements in domestic political disputes. At the same time, rather than collapsing electoral rights into a narrowly defined 'core', the model allows for nuanced interpretation.[163]

Overall, the allocation of competencies in the ECtHR's pragmatic adjudication is largely compatible with Posner's blueprint. Election outcomes are effectively non-justiciable since the Court does not involve itself in determining the genuine winner. In the choice of electoral systems, states are granted very generous deference, all but making the issue non-justiciable too. Thus, the competence for the two domains is allocated to state parties. In contrast, the right to vote and ballot access are subject to the Court's demanding scrutiny. The variable geometry of competence allocation in the ECtHR's pragmatic adjudication has been entrenched in *Davydov and Others*.

5 Flexibility in the ECtHR's Pragmatic Adjudication

Flexibility in the ECtHR's model of pragmatic adjudication is largely provided by the procedural oversight that creates an additional level of control over the competencies allocated to the domestic system. Thus, even when the Court defers to the respondent state, in a particular area of regulation, it still has the ability to establish violations to the ECHR in the manner that the regulation was conceived or applied. The leading case for procedural oversight is *Podkolzina*, where the Court explicitly stated that a wide margin of appreciation afforded to respondent states does not relieve them from the requirement to make those rights effective.[164] The procedural oversight covers parliamentary rule-making, administrative enforcement and the judicial interpretation of rules.

The procedural oversight over parliaments takes into account the overall competence distribution in the ECtHR's model. Therefore, no additional scrutiny will be provided to the rule-making in the organization of electoral systems since it is expected that political actors will be behaving in their self-interest.[165] In contrast, parliaments would be subject to the ECtHR's scrutiny over certain self-interested steps to limit ballot access. In *Tănase*, the Court paid special attention to the fact that the impugned measure was aimed at representatives of the opposition while the ruling party was losing support.[166] In *Ekoglasnost*, it was noted that the change in legislation was introduced shortly before the election campaign to the detriment of certain participants.[167]

[162] ECtHR, *Kovach v. Ukraine*, Appl. no. 39424/02, Judgment of 7 February 2008, para. 47; ECtHR, *Georgian Labour Party v. Georgia*, Appl. no. 9103/04, Judgment of 8 July 2008, para. 115.

[163] Golubok, *supra* note 23, at 390.

[164] *Podkolzina*, *supra* note 8, para. 35.

[165] See, *mutatis mutandis*, *Mugemangango*, *supra* note 141, para. 167.

[166] *Tănase*, *supra* note 150, para. 179.

[167] ECtHR, *Ekoglasnost v. Bulgaria*, Appl. no. 30386/05, Judgment of 6 November 2012, paras 69–72.

In *Danis and Association of Ethnic Turks*, such a change was additionally found to discriminate against a minority association.[168] In Ā*damsons*, the restriction on the ability to stand for elected office for former members of the security apparatus was introduced after they had already had a chance to participate in the political life of the country, rendering the motivation suspicious.[169] Thus, in cases concerning ballot access, the procedural oversight appears to act as an additional layer of antitrust approach, weeding out actions with suspicious motivation towards the would-be competitors. Such flexibility is crucial in situations of democratic backsliding and competitive authoritarianism, where the authorities deny a level playing field to the opposition.

The situation is different with the right to vote. Here, to withstand the challenge in the ECtHR, a parliament has to engage in the proportionality analysis. Famously, the Court found no such analysis in the legislative process to disenfranchise prisoners under review in *Hirst*.[170] In contrast, it referenced the domestic legislative process in the two cases on expatriate voting.[171] Yet, in both cases, procedural control was enmeshed in the proportionality assessment, guided by the Court's earlier jurisprudence on voting rights.[172] For the procedural review of the administrative decisions in the electoral process, the Court in *Podkolzina* has developed a three-prong test. The decision had to be conducted 'by a body which can provide a minimum of guarantees of its impartiality' with its discretion defined with 'sufficient precision' and objective and fair applicable procedures.[173] In practice, it was the first requirement that proved particularly problematic for some of the respondent states. Thus, the ECtHR took issue with the composition of electoral commissions in Azerbaijan that did not provide sufficient participation of opposition parties in the decision-making process.[174] It also detected a structural issue with the organization of election administration in Romania that was dominated by political actors and did not provide an opportunity for the judicial review of its decisions.[175] The same test was also applied to parliaments in their role in the resolution of electoral disputes, which highlights the flexibility afforded by procedural oversight.[176] While strategic behaviour in elections was acceptable in *Yumak and Sadak*, it is not acceptable in the resolution of election disputes.[177]

[168] ECtHR, *Danis and Association of Ethnic Turks*, Appl. no. 16632/09, Judgment of 21 April 2015, paras 46–54.

[169] ECtHR, Ā*damsons v. Latvia*, Appl. no. 3669/03, Judgment of 24 June 2008, paras 121–132.

[170] *Hirst*, *supra* note 61, para. 79; see also Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', 14 *HRLR* (2014) 487, at 499.

[171] *Sitaropoulos and Giakoumopoulos*, *supra* note 158, paras 76–79; *Shindler*, *supra* note 158, para. 117; see also Spano, *supra* note 171, at 497.

[172] *Sitaropoulos and Giakoumopoulos*, *supra* note 158, paras 69, 79; *Shindler*, *supra* note 158, para. 116. See generally Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', 28 *EJIL* (2017) 819, at 836.

[173] *Podkolzina*, *supra* note 8, para. 54.

[174] ECtHR, *Gahramanli and Others v. Azerbaijan*, Appl. no. 36503/11, Judgment of 10 August 2015, paras 77–79.

[175] ECtHR, *Grosaru v. Romania*, Appl. no. 78039/01, Judgment of 3 February 2010, paras 54–57; ECtHR, *Ofensiva tinerilor v. Romania*, Appl. no. 16732/05, Judgment of 15 December 2015, paras 60–62.

[176] *Mugemangango*, *supra* note 141, paras 94–121.

[177] And likewise unacceptable in removing party colleagues from the parliament. *Yumak and Sadak*, *supra* note 128. See ECtHR, *Paunović and Milivojević v. Serbia*, Appl. no. 41683/06, Judgment of 24 May 2016.

Early during the substantive embedding phase, the ECtHR explicitly rejected the application of Article 6 of the ECHR to election disputes due to their 'political' nature.[178] Once again, the reliance on external considerations was displayed. However, the interpretative flexibility of the Court's pragmatic adjudication allowed for a robust oversight over the judicial resolution of electoral disputes. In line with Spano's vision, the ECtHR questioned the fact-finding role of domestic courts for being either insufficiently demanding or, conversely, too demanding.[179] Such an approach further fits into the model of pragmatic adjudication, given that it primarily identifies violations concerning election winners in countries that are classified as being at least partially democratic. In these instances (or rare cases of opposition candidates winning in non-democratic regimes), the Court questioned the proportionality of interferences with election outcomes.[180] In contrast, in situations in countries classified as non-democratic, the ECtHR noted the unwillingness of domestic courts to investigate credible evidence of violations.[181]

Procedural oversight does not deviate from the ECtHR's model of pragmatic adjudication. Rather, in applying normative flexibility, the Court calibrates it to reflect the realities on the ground. Therefore, in situations concerning the right to vote, the procedural analysis appears to widen the margin of appreciation of states acting in good faith. In contrast, it allows for heightened scrutiny of suspicious motivations of political actors and administrators beyond the access-outcome distinction. Thus, the interpretative flexibility provided by procedural oversight allows pinpointing denial of the level playing field, characteristic of democratic backsliding and competitive authoritarianism. Procedural oversight over election disputes allows approaching issues of election irregularities such as suspected fraud without questioning the identity of the election winner. At the same time, when there is no strong *prima facie* evidence of irregularities, it serves to protect election winners from judicial overreach.

6 The Limits of Pragmatic Adjudication

To an observer who is not immersed in the workings of Strasbourg, election cases may seem a problematic category for the Court. The judgment in *Hirst*, which found a violation to the ECHR in prisoner disenfranchisement, set a rare standoff between the Court and the United Kingdom (UK), which has generally complied with the ECtHR's judgments. It has been claimed in the literature that challenges from states with a high reputation for compliance can be particularly problematic for international

[178] ECtHR, *Pierre-Bloch v. France*, Appl. no. 24194/94, Judgment of 21 October 1997.

[179] Spano, *supra* note 124.

[180] *Kovach*, *supra* note 162, paras 55–60; *Riza and Others*, *supra* note 140, paras 153–179; ECtHR, *Paschalidis, Koutmeridis and Zaharakis v. Greece*, Appl. nos 27863/05, 28422/05 and 28028/05, Judgment of 10 April 2008, paras 31–35; ECtHR, *Kerimli and Abeyli v. Azerbaijan*, Appl. nos 18475/06 and 22444/06, Judgment of 1 October 2012, paras 38–41.

[181] ECtHR, *Kerimova v. Azerbaijan*, Appl. no. 20799/06, Judgment of 30 September 2010, para 52; *Namat Aliyev*, *supra* note 140, para 88; *Davydov and Others*, *supra* note 160, para 332.

courts.[182] The standoff ended only in 2017, with the UK government only marginally modifying its policy on prisoner disenfranchisement. Bosnia and Herzegovina still does not comply with judgments calling on it to dismantle the power-sharing system, despite being subject to a pilot procedure. Likewise, Lithuania is yet to comply with the *Paksas* judgment. These last examples have arguably shown the limits of the ECtHR's model of pragmatic adjudication. The underlying causes of non-compliance and resistance may be located outside of the outcomes of the political process. Thus, pragmatic adjudication does not result in increased compliance with the judgments issued in Strasbourg. At the same time, the non-compliance can serve as evidence that the model is able to identify particularly grave violations of electoral rights. The continued references to the presumption of universal suffrage declared in the *Hirst* judgment are a testament to the fact that the ECtHR did not abandon its priorities in distributing competencies between itself and the contracting parties.[183]

The changeover from the substantive embedding phase to procedural embedding, however, did result in a subtle shift in the Court's reasoning. Assessing the election regulation, the ECtHR switched from an independent aggregation of domestic rules[184] to referring mostly to the recommendations of other international bodies such as the Venice Commission and the Organization for Security and Co-operation in Europe.[185] This finding does not mean, however, that the Court has delegated the standard-setting role to those bodies.[186] Though certain recommendations are integrated into the model of pragmatic adjudication,[187] the approach of the Strasbourg Court in general is more cautious. Recommendations concerning the structure of electoral systems and the organization of election administration do not appear to bind the ECtHR. I would argue, however, that the biggest challenge to the ECtHR's model of pragmatic adjudication is the partial compliance from states with a questionable commitment to democracy. Initially, the Court clearly attempted to utilize the hidden resources of pragmatic adjudication. According to Article 37 of the ECHR, the ECtHR may strike out an application if 'the matter has been resolved'. Precisely such a situation arose in seven cases against Azerbaijan, stemming from claims of misadministration in the country's 2005 legislative election.[188]

In its previous judgments, the Court has already confirmed the violation of Article 3 of the First Protocol in those elections. After the communication of the further seven cases, the respondent government submitted a unilateral declaration. It was ready to pay non-pecuniary damages to the applicants and to undertake legislative reforms of the electoral system under the supervision of the Committee of Ministers. The applicants disagreed with such an offer, pointing to their future inability to seek domestic

[182] S. Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (2016), at 212.

[183] See, e.g., ECtHR, *Abdalov and Others v. Azerbaijan*, Appl. nos 28508/11 *et seq.*, Judgment of 11 July 2019, para. 91.

[184] See, e.g., *Grosaru*, *supra* note 175, paras 26–35.

[185] See, e.g., *Paunović and Milivojević*, *supra* note 177, paras 35–40.

[186] Golubok, *supra* note 23, at 390.

[187] Such as the forseeability of changes in electoral legislation. See *Ekoglasnost*, *supra* note 167.

[188] ECtHR, *Gambar and Others v. Azerbaijan*, Appl. nos 4741/06 *et seq.*, Decision of 12 September 2010.

redress. The Court, however, found those concerns to be irrelevant and struck the cases out under Article 37.[189] In doing so, it underscored the time-limited nature of election outcomes, which prevented the restoration of the *status quo*. Yet the subsequent attempts of the Azerbaijani government in the wake of the next legislative election were rejected by the ECtHR due to a lack of meaningful change since the previous cases were struck out.[190] The authorities of Azerbaijan did implement reforms in the organization of election administration and electoral dispute resolution.[191] However, the Committee of Ministers was not convinced that these measures were efficient to implement the ECtHR's judgments in the 25 election cases from the country. Most recently, in March 2020, the committee expressed 'regret that despite the numerous judgments from the European Court identifying specific shortcomings and the Committee's many previous decisions in this group of cases … the relevant legal framework has not seen any fundamental change'.[192] Azerbaijani opposition was not convinced either. In 2015, it resorted to boycotting the legislative election.[193] Such disenchantment with electoral politics is exactly what electoral rights are meant to prevent. These developments underscore the fact that the ECtHR's pragmatic adjudication works in difficult terrain. While the competence allocation in election cases may favour respondent states, they still fail to comply with measures suggested by the Court as part of procedural control.

7 Conclusion

Back in 2003, American judge and scholar Richard Posner proposed the idea of 'pragmatic adjudication' for election cases. He rejects an active role for courts in determining election rules and outcomes. Instead, Posner argues that judges should apply an antitrust approach that focuses on maintaining access to political process and prevention of incumbent entrenchment. I claim that the ECtHR employs a similar model to the one proposed by Posner. The ECtHR's pragmatic adjudication operates at two levels. At the level of competence allocation, it leaves the outcomes of the political process in the near-exclusive competence of respondent states. On the contrary, access to the political process is subject to stricter oversight by the Strasbourg Court. At the level of interpretative flexibility, it applies procedural oversight with a focus on the prevention of arbitrary conduct by officials during an electoral process. Electoral rights under the ECHR have gone from a political commitment to an individually enforceable right. However, at the same time, the ECtHR has chosen to make the structure

[189] *Ibid.*

[190] ECtHR, *Tahirov v. Azerbaijan*, Appl. no. 31953/11, Judgment of 6 November 2015, paras 38–42; ECtHR, *Annagi Hajibeyli v. Azerbaijan*, Appl. no. 2204/11, Judgment of 22 October 2015, paras 30–40; ECtHR, *Aslan Ismayilov and Others v. Azerbaijan*, Appl. nos 20411/11 *et seq.*, Judgment of 13 April 2017, paras 15–16.

[191] Communication from Azerbaijan Concerning the Case of Namat Aliyev Group against Azerbaijan, Appl. no. 18705/06, Doc. DH-DD(2014)873 (2014).

[192] Decision of the 1369 Meeting of Ministers' Deputies, CM/Notes/1369/H46-4 (March 2020).

[193] Deutsche Welle, *Opposition Boycotts Azerbaijan Election* (2015), available at https://perma.cc/6V7N-DDZ6.

of the political competition the responsibility of the state. In the decades since 1989, while many Central and Eastern European states have accepted the ECtHR's jurisdiction, these countries have often experienced democratic backsliding or have seen the entrenchment of competitive authoritarianism at the same time. These processes have been reflected in the increasing number of election-related applications to the Strasbourg Court. Rather than change the allocation of competencies in election cases, the ECtHR has chosen to maintain it. However, through its procedural oversight, the Court has pinpointed many election issues that are typical in competitive authoritarianism or democratic backsliding. Therefore, the ECtHR's pragmatic adjudication appears to have provided requisite normative flexibility.

The model of pragmatic adjudication used by the ECtHR has not prevented several highly visible instances of state resistance, including the standoff over prisoner disenfranchisement. Yet, ultimately, in my opinion, such instances are less problematic than cases of partial compliance, which have occurred in the judgments on election irregularities in Azerbaijan and Russia. These issues raise concerns that regimes with pronounced authoritarian tendencies will not comply with the ECtHR's judgments on electoral rights despite them having no impact on election outcomes or electoral systems. For a fuller picture of the effects of the ECtHR's pragmatic adjudication of election cases, further research into the reception of its jurisprudence by domestic institutions is needed.