

Strasbourg Observers

G.K. v. Belgium: Post-electoral Disputes of a Political Nature Once Again in the Spotlight

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On 21 May 2019, the European Court of Human Rights delivered an awaited judgment in G.K. v. Belgium (<http://hudoc.echr.coe.int/eng?i=001-193451>) on the competence of elected assemblies in post-electoral disputes. It found that the Belgian State had violated Article 3 of Additional Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to free elections. The reason was that one of its parliamentary assemblies (the Senate) did not offer, at least in the circumstances of the case, sufficient procedural guarantees against arbitrariness in the context of reviewing the validity of the resignation of one of its members. In that judgment, the Court also ordered Belgium to pay the applicant EUR 5,000 by way of just satisfaction for compensation in respect of the non-pecuniary damage, in addition to EUR 30 000 in costs and expenses. While this judgment is in line with the Court's previous case-law on the right to free elections, it misses the opportunity to increase the pressure on national legal systems which, like Belgium, still confer the competence of post-electoral disputes to parliamentary assemblies. It is nevertheless unsurprising that the Court preferred to just settle the dispute at stake without drawing general conclusions, as it is in the line with its inclination to "judicial minimalism".

Facts of the case

At the beginning of September 2010, the newly elected Flemish senator, K. G., resigned following an alleged involvement in a drug case during a private trip to Thailand. Just a few days after she resigned, she informed the President of the Senate that she finally wanted to continue her mandate, arguing that she was forced to resign. Indeed, her letter of resignation was allegedly signed under the constraint of the President and the group leader of her party. The Senate responded that the matter would be dealt with by the plenary assembly after her substitute's credentials had been verified. The decision would be taken on the basis of a report prepared by the

Bureau, which is the executive body of the Senate composed of a set number of leading senators. In the meantime, the applicant decided to bring an action for interim measures before the Brussels Court of First Instance so that it could rule that the Senate could not validly replace her. However, the president of the court declared himself incompetent to deal with the request, finding that it was for the Senate alone, under its exclusive competence to verify the credentials of its members, to review the senator's resignation. On 12 October, the Senate, in a plenary session, endorsed the Bureau's decision that there was no reason to question the validity of the applicant's former resignation and validated the credentials of the applicant's substitute.

The applicant then decided to bring a claim against the Belgian State before the European Court of Human Rights, alleging that it had violated Articles 3 of Protocol No. 1 (right to free elections) and 13 of the Convention (right to an effective remedy). She put forward three main arguments in support of this allegation: (i) it was not possible to appeal to an independent and impartial tribunal to contest the validity of the resignation, as the Senate alone was competent to do so; (ii) there were no clear and predictable rules on the procedure to be followed in the case where a senator resigns; and (iii) more fundamentally, the applicant argued that the Senate had taken its decision without offering procedural guarantees against arbitrariness.

The Court's judgment

These three main arguments are followed by the Court, which concludes by six votes to one that Article 3 of Protocol No. 1 to the Convention is infringed.

As a preliminary step, the Court unanimously declares in its judgment that the grievances drawn from Articles 3 of Protocol No. 1 and 13 of the Convention are admissible. The government argued that the applicant had not exhausted domestic remedies, since she had not brought any civil liability proceedings before the Belgian courts. This plea of inadmissibility is rejected by the Court because an action for damages in the present case would not have enabled the applicant to obtain an adequate remedy, namely the possibility of continuing her mandate.

On the merits of the case, the Court first recalls the general scope of the rights guaranteed in Article 3 of Protocol No. 1, which includes not only the right to participate in elections, but also the right of elected representatives to exercise their mandate. The Court emphasizes that while these rights are "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law" (§ 49), they are not absolute and the State may use its margin of appreciation to limit their scope. In this case, it is the task of the Court to verify that the rights referred to in Article 3 of the Protocol are not infringed to such an extent as to impair their very essence and deprive them of their effectiveness by the validation of the applicant's resignation by the Senate.

Next, the Court states that the decision-making process relating to electoral disputes must necessarily include a minimum number of guarantees against arbitrariness, in order to comply with Article 3. This must also be the case when a dispute arises regarding the resignation of a Member of Parliament. Ensuing this observation, two conditions must be met: the discretion enjoyed by the competent authority must be circumscribed with sufficient precision by domestic law and the procedure must enable the concerned persons to make their views known.

However, the Court considers that these guarantees have not been met in the present case. Firstly, the Court observes that the autonomous discretion enjoyed by the Senate when it decided to validate the resignation of the applicant was not limited by the provisions of domestic law to a sufficient level of precision. Indeed, there was no legal or regulatory provision governing the procedure in the event of withdrawal of a resignation. The Court adds that the proceedings before the Senate did not offer sufficient guarantees against arbitrariness. It raises several grounds in support of this statement: first, the applicant was not given the opportunity to present her arguments, either orally or in writing, before the Senate office responsible for issuing a report on the case. Moreover, the Bureau did not give any reason to justify the rejection of the applicant's argument. Finally, at the time, the office included in its composition the persons suspected of having forced the applicant to resign. The plenary session failed to address these shortcomings in the procedure before the Bureau. In light of these elements, the Court concludes that the very substance of the rights guaranteed by Article 3 of Protocol No. 1 was undermined by the applicant not benefiting from any procedural guarantees against arbitrariness throughout the Senate's processing and acceptance of her resignation.

Comments

National systems of post-electoral disputes based on the exclusive intervention of parliamentary bodies have for a long time been subject to harsh criticism. While they are the legacy of an absolute conception of the principle of parliamentary autonomy aimed at protecting the independence of Parliaments, it no longer seems acceptable in today's vision of the separation of powers. The most fundamental principles of the judicial function must also be respected, including the right to an effective remedy before an independent body. Certainly, the European Court of Human Rights has for several years increased the pressure on the few European states that continue to entrust their elected assemblies with the task of ruling on disputes concerning the regularity of their elections (including Italy, Luxembourg, Romania, Denmark, the Netherlands and Belgium). It was in the famous *Grosaru v. Romania* ([https://hudoc.echr.coe.int/fre#{"itemid":\["001-97617"\]}](https://hudoc.echr.coe.int/fre#{))) judgment of 2 March 2010 that the Court first considered that such an arrangement was incompatible with the procedural requirements arising from Article 3 of Protocol No. 1. This decision was, in particular, the consequence of "the lack of sufficient guarantees as to the impartiality of the bodies responsible for examining the applicant's challenges" (§ 57).

The *G. K.* judgment was the subject of much anticipation as it was the first ECtHR judgment concerning post-electoral disputes in Belgium. The final result is a mixed bag. Admittedly, it remains in line with the Court's precedent, as the Court applies the principles laid down in the *Grosaru's* case to the disputes concerning the regularity of the resignation of an elected official. Here too, it was the lack of a clear normative framework and the lack of procedural safeguards against arbitrariness that underpinned the finding of a violation of Article 3.

Moreover, the judgment provides some necessary clarifications on the *Grosaru v. Romania* judgment. The Court had left some ambiguity in this previous case as to the scope of the judgment on the purely parliamentary post-election remedies privileged in Belgium, Italy and Luxembourg, since it had specified that those States "have enjoyed a long tradition of democracy which would tend to dissipate any doubts as to the legitimacy of such a practice". In the *G. K.* case, the Belgian government used this assertion as an argument to validate the purely parliamentary handling of

the dispute. No such conclusion can be found in the Court's judgment. In order to comply with the procedural requirements inherent in the right to free elections, all States are on a level playing field as they are required to provide procedural guarantees against arbitrariness in their post-electoral disputes. It now seems clear that no distinction can be made between States according to the length of their democratic tradition.

Nevertheless, the *G. K.* judgment does not go as far as one might have wished. Unlike what was decided in the *Grosaru* judgment, the Court considers irrelevant to analyze separately the lack of an effective remedy from the point of view of Article 13 of the Convention. In this respect, it is a return to the methodology of reasoning followed in the *Podkolzina v. Latvia* ([https://hudoc.echr.coe.int/eng#{"appno":\["46726/99"\],"documentcollectionid2":\["CHAMBER"\],"languageisocode":\["ENG"\],"display":\["0"\]}](https://hudoc.echr.coe.int/eng#{)), judgment (in which the Court had concluded that the decision to strike a candidate out of the list for parliamentary elections was breaching the requirements of procedural fairness and legal certainty to be satisfied in relation to candidate's eligibility), when the Court had deduced for the first time procedural requirements from Article 3 of Protocol No. 1. By considering only the functioning of remedies in the respect of the right to free elections (Article 3), the Court avoids developing what is required for a remedy to be effective under Article 13 of the Convention. This is regrettable.

Furthermore, one could have indeed expected the explicit conclusion that the Belgian system of verification of credentials enshrined in Article 48 of the Constitution is in itself contrary to Article 3 of Protocol No. 1. Yet, instead of condemning the very principle of giving the assemblies jurisdiction over electoral disputes, the Court merely identifies specific defects in the senatorial procedure at stake ("having regard to all the circumstances of the case", see § 64 and § 69), such as the fact that those suspected of having forced the applicant to resign could take part in the decision of the Senate. Thus, it appears that the Court misses the main issue at stake in the case, which is the reviewing of the whole national system. As a result of this cautious reasoning based on "judicial minimalism", the Court merely finds the violation of Article 3 of Protocol 1, without attempting to specify in a more general and pedagogical way the content of the procedural guarantees which should exist in post-electoral disputes. The Court does not even recall the importance to entrust all electoral disputes to an independent and impartial body, an observation that was underlined in *Grosaru*.

That being said, a series of other Belgian applications denouncing the lack of an effective remedy to challenge the electoral results are currently pending before the Court (*Verzin and others v. Belgium* ([https://hudoc.echr.coe.int/eng#{"itemid":\["001-179675"\]}](https://hudoc.echr.coe.int/eng#{)); *Van de Cauter v. Belgium* ([https://hudoc.echr.coe.int/eng#{"itemid":\["001-179674"\]}](https://hudoc.echr.coe.int/eng#{))). They will probably lead to further judgments sentencing the Belgian system. It is to be hoped that this time, the Court will expressly condemn *in abstracto* credentials procedure enshrined in Article 48 of the Constitution and will call for a "jurisdictionalization" of the procedure. Since the *Grosaru* case, it is indeed quite undeniable that the systems which, like in Belgium, reserve the exclusive competence to settle electoral disputes within political bodies do not provide a sufficient guarantee of impartiality. Furthermore, the *Grosaru* case highlights the point that judicial review is the most adequate post-electoral remedy to prevent arbitrary solutions.

Be this as it may, these kind of judgments will probably have no effect on the current system in force. Indeed, Article 48 of the Constitution is not included in the May 2019 revision declaration (http://www.ejustice.just.fgov.be/doc/rech_f.htm) adopted by the three branches of the pre-constituent power (the King, the House of representatives and the Senate), determining which constitutional provisions may be revised by the newly elected constituent power. Therefore, it would be necessary to wait at least another five years (unless early elections are held) before getting a constitutional revision in this direction. Unless the Belgian courts and tribunals, drawing their own conclusions from Strasbourg jurisprudence, dare to trump the orthodox reading of Article 48 of the Constitution and thereby recognize their own jurisdiction in the field of post-electoral litigation, the Belgian situation will remain to appear as temporarily inextricable.

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