



GRUPPO
di PISA

Dibattito aperto sul Diritto
e la Giustizia Costituzionale

La Rivista / Quaderno n° 9

Fascicolo speciale monografico

A cura di

**Marta AURINO, Paolo GAMBATESA,
Maria Chiara GIRARDI, Marco LADU, Luis
Fernando MARTÍNEZ QUEVEDO, Laura RESTUCCIA**

**«Democrazie rappresentative e
forme di partecipazione»**

in memoria di

PAOLO CARROZZA



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Atti del Seminario di diritto comparato – 20 marzo 2024

in memoria di
Paolo Carrozza

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QUINTA EDIZIONE DEL SEMINARIO INTERNAZIONALE DI DIRITTO COMPARATO
«DEMOCRAZIE RAPPRESENTATIVE E FORME DI PARTECIPAZIONE»
IN MEMORIA DEL PROF. PAOLO CARROZZA

ELECTORAL RIGHTS AND MINORITY REPRESENTATION: INSIGHTS FROM
THE EUROPEAN COURT OF HUMAN RIGHTS

EDIN SKREBO

SUMMARY: 1. Electoral rights and minorities: some preliminary considerations. – 2. The right to vote under the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. – 3. Electoral rights and minorities in the jurisprudence of the European Court of Human Rights: some emblematic cases. – 3.1. *Sejdić and Finci v. Bosnia and Herzegovina*. – 3.2. *Podkolzina v. Latvia*. 3.3. *Tănase v. Moldova*. – 4. Concluding considerations.

1. Electoral rights and minorities: some preliminary considerations

The exercise of the right to vote and participation in electoral processes are essential components of a democratic system. Without the possibility for citizens to express their political preferences through voting and to elect their representatives, democracy cannot be realised. Voting and representation are therefore the basic tools that enable citizens to participate actively in political life and influence the decision-making process¹. The right to vote and the regular holding of free and transparent elections are therefore indispensable (and minimal) conditions for the existence of a democracy².

¹ T. E. FROSINI, *Sistemi elettorali e sistemi di partito*, in P. CAROZZA, A. DI GIOVINE, G. F. FERRARI (a cura di), *Diritto costituzionale comparato*, Tomo II, Roma, 2013, 877.

² See T. E. FROSINI, *Forma di governo e partecipazione popolare*, Torino, 2008, 91; G. PASQUINO, *I sistemi elettorali*, Bologna, 2006, 112 ss.; T. E. FROSINI, *Le votazioni*, Roma-Bari, 2002, 67.

These initial considerations find an even stronger echo when the idea of voting is linked to the concept of minority³. On the one hand, the right to vote guarantees for minorities the election of their representatives to higher branches of state power (as well as at local level), thus ensuring their representation⁴. On the other hand, it provides the opportunity to directly influence decisions that affect the entire community. Without this, a minority risks having little influence on political decisions⁵. In this context, it is important to bear in mind that for minority groups, the guarantee of representation and the right to political participation extend beyond the simple desire to influence decision-making processes. These rights are, in fact, essential components of a pluralistic and democratic society, capable of preventing or resolving potential conflicts⁶.

Given this brief overview, it is necessary to clarify certain concepts that will be pivotal in this work. First, there is no generally accepted definition of a minority⁷. However, it is possible to distinguish 'strong' elements of identification (insofar as they are objectively discernible), such as the existence of a common language among the members of the group, or religious or ethnic affiliation. These criteria were particularly prevalent in the last century, when membership of a minority was understood as belonging to a specific group, usually distinguished from the rest of the population by its intrinsic characteristics, such as language, religion, ethnicity, or nationality⁸. Conversely, there are 'weak' identification factors, where minority members are recognized by shared lifestyles, philosophical beliefs, or age. These «new minorities»⁹, which are becoming increasingly relevant today, are closely tied to ongoing social changes and thus require a more extended process of recognition¹⁰.

This difference can be seen in the same attempts to define the concept of minority. In fact, according to Capotorti's qualification from the 1970s, a minority can be identified as a «group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics different from those of the rest of the population and show, if

³ L. MONTANARI, *Minoranze (tutela delle)*, in S. CASSESE, M. CATENACCI (a cura di), *Dizionario di diritto pubblico*, IV, Milano, 2006, 3650-3652.

⁴ A. PIZZORUSSO, *Minoranze e maggioranze*, Torino, 1993, 46-47; A. PIZZORUSSO, *Le minoranze nel diritto pubblico interno*, Milano, 1967, 153.

⁵ F. PALERMO, J. WOELK, *Rappresentanza e partecipazione politica delle minoranze*, in E. PFÖSTL (a cura di), *Valorizzare le diversità. Tutela delle minoranze ed Europa multiculturale*, Roma, 2003, 105 ss.; F. BENOÎT-ROHMER, H. HARDEMAN, *The Representation of Minorities in the Parliaments of Central and Eastern Europe*, in *International Journal on Group Rights*, vol. 2, 2/1994, 91; F. PALERMO, J. WOELK, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Milano, 2021, 123.

⁶ For a critical approach on this point, see L. BUFFONI, *Le minoranze e il pluralismo. Un malinteso*, in *Diritto pubblico*, 2/2018, 275-312.

⁷ F. PALERMO, J. WOELK, *Diritto costituzionale comparato*, cit., 6.

⁸ See O. BAUER, *La questione nazionale*, Roma, 1999, 51-102; C. CASONATO, *Pluralismo etnico e rappresentanza politica*, in *Diritto pubblico comparato ed europeo*, 2/1999, 609.

⁹ E. PALCI DI SUNI PRAT, *Intorno alle minoranze*, Torino, 2002, 191 ss; A. EIDE, *The rights of 'Old' versus 'New' Minorities*, in *European Yearbook of Minorities Issue*, 2/2002, 365 ss; W. KYMLICKA, *La cittadinanza multiculturale*, Bologna, 1995, 28-29.

¹⁰ See L. LORELLO, *Vecchie e nuove minoranze: definizioni e strumenti di tutela. Considerazione introduttive*, in L. DE GRAZIA, L. LORELLO, G. VERDE (a cura di), *Vecchie e nuove minoranze: definizioni e strumenti di tutela*, Atti del convegno di Palermo, 3 dicembre 2015, 10-20.

only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language»¹¹. However, this definition only seems to apply to those minorities that are identified by 'strong' criteria, because they are based on ethnic, linguistic, or religious characteristics that were typical of the last century and regarding which states could consider themselves sovereign in recognising minorities as such, as well as in the exclusive production of the norms that regulate them¹².

The international legal system tends to transcend this traditional concept, which is tied to the state and rigid criteria for distinguishing minorities. Instead, it prefers to establish classification criteria that are not bound by the definitions provided by individual states and is open to accepting new ones. A notable example of this shift is the 2006 report from the European Commission for Democracy through Law (commonly known as the Venice Commission), which stated for the first time that nationality is no longer an essential criterion for determining minority status within a state¹³.

Borrowing Pizzorusso's evocative words on the subject, minorities can also be divided into «tendentially permanent» or «occasional minorities»¹⁴: the former are defined as such precisely because of the existence of intrinsic characteristics that are difficult to change and that distinguish the group from the rest of the population. Essentially, these are precisely the 'strong' identification criteria mentioned earlier in Capotorti's definition. In the identification of minorities that tend to be permanent, the temporal element also assumes a certain importance, which is often indefinite, to the point of becoming a constant. In conclusion, it can be stated that tendentially permanent minorities represent a sociological concept that describes real situations characterized by specific traits. These traits gain legal significance only when, and if, the legislator assigns rights or obligations to the group¹⁵.

Conversely, «occasional minorities» do not arise from intrinsic or inherent characteristics of a group, but from divisions that arise within a community when decisions are made based on majority rule. A vivid example of an «occasional minority» can be found in the political sphere. In fact, in a parliamentary assembly, during a vote, two fields are necessarily created: on the one hand, the groups that supported a certain choice and obtained the majority of votes, and on the other hand, those who opposed the deliberation and therefore find themselves in a minority on the basis of the choice adopted. In this case, the relationship between majority and opposition can be described

¹¹ F. CAPOTORTI, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, 1977, UN Doc. E/CN.4/Sub.2/384/Rev.1, UNSales Nr. E.78.XIV.1, 5.

¹² F. PALERMO, J. WOELK, *Diritto costituzionale comparato*, cit., 11. The identification of these three criteria (ethnic, linguistic and religious), as potential factors of separation and opposition between majority and minority that tend to be permanent, was chosen not so much because this list is exhaustive, but rather because it appears the most suitable to include the main situations «with reference to which historically the problem has been posed in sufficiently homogeneous terms to constitute the subject of a unitary study», thus in A. PIZZORUSSO, *Minoranze e maggioranze*, cit., 56.

¹³ European Commission for Democracy through Law, *Report on Non-citizens and Minority Rights*, December 2006, CDL-AD (2007)001.

¹⁴ A. PIZZORUSSO, *Minoranze e maggioranze*, cit., 51-52.

¹⁵ *Ivi*, 47.

as a political dialectic¹⁶. However, as can easily be guessed, this is an «occasional» (not structural) minority that could potentially reverse its own previous minority position in the next deliberation of the assembly¹⁷.

In the light of these considerations, there should be an attempt at a minimal definition of the term minority¹⁸. It can be said that it is a social group that becomes such when it enters a relationship with another group that constitutes the majority in terms of certain factors (numerical, economic, political, relational, territorial) and when this relationship takes on legal significance¹⁹.

The purpose of this contribution is to provide an insight into the jurisprudence of the European Court of Human Rights (hereafter ECtHR) regarding the electoral rights of minorities, specifically those that can be defined as «tendentially permanent» or, in other words, characterised by 'strong' criteria of identification (language, religion, ethnicity, nationality). In particular, it draws on a number of judgments of the ECtHR which have had the merit of highlighting how the guarantee of the exercise of the right to vote by minorities is an indispensable element of a truly pluralist society.

2. The right to vote under the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols

Before analysing the judgments, it is worth making some specific observations on the exercise of electoral rights in the light of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter ECHR).

¹⁶ «The identification of the [occasional] minority is the result of the application of a set of rules [...] traceable to the majority principle, to a certain procedure of collective deliberation», in A. PIZZORUSSO, *Minoranze e maggioranze*, cit., 47.

¹⁷ S. SICCARDI, *Maggioranza, minoranze e opposizione nel sistema costituzionale italiano*, Milano, 1984, 270 ss.; G. DE VERGOTTINI, *Opposizione parlamentare*, in *Enciclopedia del diritto*, XXX, Milano, 1980, 532 ss.; R. A. DAHL (a cura di), *Political Opposition in Western Democracy*, New Haven, 1966, 51 *passim*.

¹⁸ In addition, it is possible to identify what is meant by minority through Art. 27 of the International Covenant on Civil and Political Rights – adopted by the United Nations General Assembly in 1966 – which is indicative in this direction, since, by stating the objectives of the protection of minorities, it also implicitly provides a definition, albeit a summary and general one. The article states that «[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language». However, as the UN Rapporteur General on the Prevention of Discrimination and the Protection of Minorities noted in his report, it would be illusory to imagine that it would be possible to reach universal agreement on the definition of minorities. See: C. TOMUSCHAT, *Protection of Minorities under Article 27 of International Covenant on Civil and Political Rights*, in *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit Menschenrechten. Festschrift für Hermann Mosler*, Berlin, 1983, 949 ss.; F. CAPOTORTI, *Il regime delle minoranze nel sistema delle Nazioni unite e secondo l'art. 27 del Patto sui diritti civili e politici*, in *Rivista internazionale dei diritti dell'uomo*, 1992, 107 ss.; G. CONETTI, *La condizione delle minoranze etnico-linguistiche secondo gli accordi internazionali a carattere generale*, in *Nota trimestrale di documentazione europea*, 1982, 4 ss.; T. MODEE, *The International Protection of National Minorities in Europe*, Abo, 1969, 21-112.

¹⁹ F. PALERMO, J. WOELK, *Diritto costituzionale comparato*, cit., 14.

The foundation of the Council of Europe and the subsequent adoption of the ECHR emerged from the traumatic experiences that the European continent suffered not only during the Second World War, but also with the rise of totalitarian regimes in the inter-war period²⁰. It was in the aftermath of this authoritarian experience that the ten founding states dedicated themselves to upholding human rights and representative democracy as the guiding principles of their legal systems. This is clearly stated in the preamble to the ECHR, which declares that respect for fundamental freedoms can only be based on «an effective political democracy»²¹. Moreover, in the same preamble, there is a reference to the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations (on 10 December 1948). This reference also implicitly refers to Article 21 of the Declaration, which asserts that «[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures»²².

Despite this emphasis on the democratic element, the ECHR did not initially include political rights in its catalogue of guaranteed rights. The reason for this absence is understandable, given the concerns expressed by some states – notably the United Kingdom – about the possibility of being subject to the control of the European Commission of Human Rights (hereafter the ECHR Commission or the Commission) and the ECtHR in a matter traditionally considered to be the ‘reserved domain’ of the states²³. The initial lack of a provision on political rights was later addressed with the adoption of the First Protocol to the ECHR in 1954, which included Article 3, establishing the right to free elections. However, due to the persistence of some doubts about this right, the text of the provision is characterised by the use of some rather general and vague expressions (such as «reasonable intervals»; «free elections»; «opinion of the people on the choice of the legislative body»²⁴), which led to a broad interpretation. Moreover – and this has had very significant consequences for the application of the rule – the article is characterised by the fact that it is the only one of the substantive clauses of the ECHR and the Protocols that does not expressly provide for individual rights²⁵, as the wording of the provision

²⁰ The Council of Europe has the merit of being the first international organisation to be created on European soil after the Second World War. It was founded on 5 May 1949 by the Treaty of London. Its objectives include the promotion of human rights, democracy, and the rule of law in order to strengthen democratic stability in Europe, the promotion of social rights and the rights of minorities, the development of a European cultural identity, the promotion of intercultural and interreligious dialogue and economic and social progress. Subsequently, on 4 November 1950, the members of the Council of Europe adopted and signed in Rome the ECHR Convention, which is the reference text for the protection of human rights and is characterised by the existence of a permanent judicial mechanism which allows any individual, after having exhausted all national (domestic) remedies, to apply directly to the ECHR Court for the protection of the rights guaranteed by the Charter.

²¹ ECHR Preamble.

²² Universal Declaration of Human Rights, art. 21, para. 3.

²³ See S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve alla Convenzione Europea dei diritti dell'uomo*, Milano, 2012, 832.

²⁴ ECHR, Protocol, art. 3.

²⁵ S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve*, cit., 833.

obliges: «High Contracting Parties»²⁶. The wording of the provision led some legal scholars at the time to conclude that it was binding only on states, meaning it could be invoked in inter-state proceedings before the ECtHR. As a result, individuals were excluded from being able to activate this right through judicial means. It was with the passage of time, and thanks to the jurisprudence of first the ECHR Commission and then the ECtHR, that Article 3 of the First Protocol was recognised as capable of protecting individual rights and, as such, justiciable²⁷.

In the light of the decisions of the Court and those of the Commission in the early years, it is possible to identify four distinct rights deriving from Article 3 of the First Protocol to the ECHR. These are the right to vote, the right to stand as a candidate in parliamentary elections, the right of the person elected to sit in parliament and the institutional right to benefit from legislative elections which meet the standards laid down in Article 3 of the First Protocol²⁸. There is also the dual nature of political rights, which express both an individual and a collective interest. Indeed, in addition to the individual interest in participating in elections as the most important moment in the political life of the community²⁹, there is also a public interest since the exercise of the right to vote ensures the proper functioning of state institutions and gives effect to the principle of

²⁶ ECHR, Protocol, art. 3.

²⁷ If we want to briefly review the most important decisions in this direction, we should certainly start with the 1961 decision in which the European Commission stated that Article 3 of the Additional Protocol to the ECHR does not create a subjective right to vote, but it does identify a right of an institutional nature by which the Contracting States undertake to organise free and periodic elections (European Commission, 18 September 1961, *X v. Belgium*). A few years later, the Commission broadened the interpretation of Article 3. More specifically, it stated that this provision could also establish an individual right to universal suffrage. Thus, in addition to the obligation for Member States ensure free and regular elections, there was now also an obligation to respect the principle of universal suffrage (European Commission, 6 October 1967, *X v. Federal Republic of Germany*). A significant turning point in the interpretation of Article 3 of the Additional Protocol to the Charter occurred in 1975 when the Commission shifted from using literal interpretative arguments to adopting teleological and systematic approaches. Based on this new interpretation, the Commission affirmed for the first time that the basis for a right to political participation in the strict sense was to be found in Article 3 of the First Protocol (European Commission, 30 May 1975, *W., X., Y. and Z. v. Belgium*). This decision was later confirmed by the ECtHR in its first judgment on an appeal concerning Article 3 of the Additional Protocol to the ECHR (ECtHR, 2 March 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, on appeal No. 9267/81). In particular, the Court has reaffirmed the importance of this Article for the whole Convention system, since respect for the fundamental freedoms enshrined in it «is essentially based, as the Preamble to the Convention states, on a genuinely democratic political system» (ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, cit., para. 47). Furthermore, the judges stated that the wording of the provision - which places the obligation to observe elections entirely in the hands of the High Contracting Parties - should not be read as contradicting the conclusion that it guarantees individual rights of political participation. On the grounds that the wording of the provision «could be explained [...], on the one hand, by the desire to give greater solemnity to the commitment undertaken [by the Member States] and, on the other hand, by the essentially positive nature [...] of the obligations imposed on the States by the provision in question» (S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve*, cit., 833), since it is an obligation of «abstention or [of] non-interference, as with most civil and political rights, as well as [an] obligation on the State to take measures for the organisation of democratic elections» (ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, cit., para. 50).

²⁸ See S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve*, cit., 833-834.

²⁹ See ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, cit., para. 43; ECtHR, 18 February 1999, *Mathews v. United Kingdom*, on appeal No. 24833/94, para. 64; ECtHR, 11 January 2005, *Py v. France*, on appeal No. 66289/01, para. 46; ECtHR, 22 June 2004, *Aziz v. Cyprus*, on appeal No. 69949/01, para. 27.

government by the people³⁰. Directly linked to this last consideration is the principle that political rights are essential for the fulfilment of the interest of individuals (and especially groups)³¹ in influencing the composition of the legislative body and, therefore, in determining the political choices of the community³². However, most of the rights derived from Article 3 require the commitment of individual states to be implemented. In other words, political rights – unlike the other ‘first generation’ rights, to which they belong – impose positive obligations on states to be exercised by individuals. In particular, to guarantee the effectiveness of the right, the state must ensure access to the electorate as well as its exercise.

The guarantee of access to the electorate entails the obligation of the state to refrain from excluding any individual or group of individuals from the community of voters without reasonable and objective justification. From this initial guarantee, the Strasbourg Court has concluded that Article 3 enshrines the principle of universal suffrage and recognizes the interest of every individual in accessing the electorate (active and passive), an interest which gives rise to a right that the public authorities should refrain from discriminatory conduct *vis-à-vis* the electoral body³³. However, the Court points out that Article 3 of the Protocol does not automatically confer the right to vote on every person subject to the jurisdiction of a member state. While the principle of universal suffrage must be upheld by states in forming the electoral body, this does not preclude the exclusion of certain individuals or groups from the electorate. In addition to guaranteeing access to the right to vote, there is also trust in the effective exercise of that right. This means that the state is obliged to intervene in such a way as to ensure the effective exercise of the right to vote and to stand as a candidate. A further corollary of the state's obligations follows from this first principle. Specifically, the state must ensure that elections are effectively held³⁴. The effectiveness of the exercise of the right to vote also consists in the state ensuring that elections are held at reasonable intervals between one electoral round and the next, recalling that this is also an obligation expressly laid down in Article 3³⁵. In addition to these ‘positive measures’ that states must take to ensure the exercise

³⁰ ECtHR, 28 March 2006, *Sukhovetsky v. Ukraine*, on Application No. 13716/02, para. 73; ECtHR, 27 April 2010, *Tanase v. Moldova*, on Application No. 7/08, para. 169; ECtHR, 16 March 2006, *Zdanoka v. Latvia*, on appeal No. 58278/00, para. 115. See also the consideration of S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve*, cit., 834.

³¹ V. D. AMAR, A. E. BROWNSTEIN, *The Hybrid Nature of Political Rights*, in *Stanford Law Review*, vol. 50, 3/1998, 924-926.

³² ECtHR, 1 July 2008, *Calmanovici v. Romania*, on appeal No. 42250/02, para. 153; ECtHR, 6 September 2007, *Sevinger and Eman v. the Netherlands*, on appeal Nos. 17173/07 and 17180/07, para. 51.

³³ S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve*, cit., 835. See ECtHR, 6 October 2005, *Hirst v. United Kingdom*, on appeal No. 74025/01, para. 62.

³⁴ ECtHR, July 2008, *The Georgian Labour Party v. Georgia*, on appeal No. 9103/04, para. 132. The Court states that if serious disturbances prevent polling stations from opening on the scheduled election day, the State is obligated to take all necessary measures to reintegrate voters registered at those polling stations into the electoral process. This may include repeating the election and simultaneously extending the term of the legislative body involved in the election.

³⁵ On this particular point, the question of the actual content of the term «reasonable intervals» remains open. It is recalled that the Committee of Experts on Human Rights of the Council of Europe had stated, perhaps tautologically and even hastily, that «reasonable intervals» should be understood as a term which is neither too long nor too short (Strasbourg session, 15 February 1950, TP, III, 265). Later, at its March

and effectiveness of the right to vote, there are others. In particular, states must not only ensure that electoral registers are established, but also that they are kept up to date, since the timely management of such registers is essential for the establishment of free and fair competition³⁶. Linked to this obligation is the state's duty to organise a census and thus to constantly adjust the electoral districts in relation to the resident electorate, to avoid over- or under-representation. Of paramount importance is the need for fairness in the electoral process, which means that the state must guarantee impartial electoral procedures in terms of access to the franchise and the counting of votes and provide effective means of redress in electoral matters. In addition, the electoral authorities themselves must adhere to a strict principle of impartiality and transparency. In this view, respect for the principle of legality is crucial, so that the decisions and actions of the electoral authorities are based on clear legal provisions or, in the event of ambiguity in the text, are clarified by established case law³⁷.

The pinnacle of these guarantees is undoubtedly the right to an effective remedy against the decisions of the electoral authorities. In this way, the member states undertake to guarantee an effective remedy for candidates and to act as a barrier against the risk of arbitrary decisions by these same bodies, which must strictly observe the principle of the legal reserve³⁸. First and foremost, the appeal body must be independent, as must its members³⁹. Similarly, regarding the composition of the appeal body, the use of an appointment based solely on political elements does not in itself contribute to the effectiveness of the appeal, but at the same time it does not ensure the full impartiality of the body. The effectiveness of the appeal is therefore also ensured by the adversarial principle and the fact that the bodies responsible for resolving electoral disputes are obliged to give adequate reasons for their decisions⁴⁰. Finally, it is interesting to note that the case law of the Strasbourg Court has held that member states are not obliged to provide for judicial review of electoral disputes, but that the guarantee provided by an appeal to an administrative authority is sufficient⁴¹.

session, the Committee referred back to the notion of the «normal practice of liberal States» (Strasbourg session, 6-10 March 1950, TP, IV, 22-25). It was not until 1995 that the Commission returned to this point, arguing that the term «reasonable intervals» should be interpreted in the light of the need to ensure that changes in society and public opinion are reflected in the choices made by the people's representatives, while at the same time allowing the executive time to implement their electoral programmes (ECtHR, 11 September 1995, *Timke v. Germany*, on appeal No. 27311/95). In the light of this latest Commission decision, it can be said that the reasonableness of the interval between one election and the next consists in balancing the need to ensure political change when it is present in civil society with the will of the executives to pursue their electoral agendas.

³⁶ ECtHR, *The Georgian Labour Party v. Georgia*, cit., para. 82.

³⁷ See ECtHR, 10 April 2008, *Paschalidis, Koutmeridis and Zaharakis v. Greece*, on appeal Nos. 27863/05, 28422/05, 28028/05 paras. 29-35. It should be pointed out that the Court has ruled (in ECtHR, 7 February 2008, *Kovach v. Ukraine*, on appeal No. 39424/02, para. 59 and ECtHR, 2 March 2010, *Grosaru v. Romania*, on appeal No. 78039/01, para. 52) that where the interpretation of a provision has not been clarified by previous established case-law, the competent authorities must exercise caution in their interpretation, to which must be added a particularly stringent duty to state reasons.

³⁸ See ECtHR, 8 April 2010, *Namat Aliyev v. Azerbaijan*, on Appeal No. 18705/06, paras. 81-90.

³⁹ See ECtHR, 2 March 2010, *Grosaru v. Romania*, on appeal No. 78039/01, paras. 58-62.

⁴⁰ See ECtHR, 4 January 2012, *Babenko v. Ukraine*, on appeal No. 68726/10.

⁴¹ S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Commentario breve*, cit., 838.

3. Electoral rights and minorities in the jurisprudence of the European Court of Human Rights: some emblematic cases

This section is devoted to a selection of landmark cases of the European Court of Human Rights which can be characterised as particularly noteworthy in relation to the issue of the political rights of minorities. In particular, the proposed rulings highlighted certain issues that may at first sight appear to be closely linked to the historical and social context of particular legal systems, such as ethnic federalism in Bosnia and Herzegovina, the possession of the necessary language skills to vote in Latvia or, again, the issue of dual citizenship of voters in those countries, such as Moldova, where there are national minorities. Nevertheless, each of these cases has raised certain issues which have a general relevance that goes beyond the specific circumstances and the national context in which they originated. For this reason, the following pages propose a brief and summary overview of the individual cases and an analysis of the questions submitted to the Court.

3.1. *Sejdić and Finci v. Bosnia and Herzegovina*

The ruling *Sejdić and Finci v. Bosnia and Herzegovina*⁴² is based on two complaints lodged respectively by Mr. Sejdić, a member of the Roma minority in Bosnia and Herzegovina, and Mr. Finci, who belongs to the Jewish Sephardic community. The two applicants complained that they were prevented from standing for election to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina – the upper chamber of the country's parliamentary system – and to the Presidency of Bosnia and Herzegovina, the highest body of executive power, which consists of three members⁴³. Specifically, the Electoral Commission of Bosnia and Herzegovina rejected the candidacies of Mr. Sejdić and Mr. Finci on the grounds that they had not declared themselves as belonging to one of the three 'constituent peoples' when they registered their candidacies. The country's Constitution provides access to the Presidency and the House of Peoples only for Bosniaks, Serbs, and Croats, who must be equally represented. Consequently, those members of the Bosnian-Herzegovinian population who do not belong to one of these three majority ethnic groups but are part of the recognized minorities, referred to as "Others" in the Constitution, are excluded from exercising their passive right to vote.

In their reasoning, the judges of the Strasbourg Court emphasised first the peculiarities of the constitutional system of Bosnia and Herzegovina⁴⁴. After the signing

⁴² ECtHR, 22 December 2009, *Sejdić and Finci v. Bosnia and Herzegovina*, on appeal Nos. 27996/06 and 34836/06.

⁴³ For an overview of Bosnia and Herzegovina's legal system, see: L. BENEDIZIONE, V. R. SCOTTI (a cura di), *Twenty years after Dayton. The constitutional transition of Bosnia and Herzegovina*, Roma, 2016, *passim*; S. YEE, *The New Constitution of Bosnia and Herzegovina*, in *European Journal of International Law*, 7/1996, 176-192.

⁴⁴ On this point, see: F. PALERMO, J. WOELK, *Diritto costituzionale comparato*, cit., 357-373.

of the Dayton Peace Agreement, which ended the war (1995), a consociational democracy was established in the country⁴⁵. However, the Constitution provides for the division of state institutions between the three main ethnic groups present in the country (Bosniaks, Serbs and Croats), preventing other minorities from gaining access to certain elected institutional positions. The ECtHR judgment stated that this type of consociational democracy does not in itself constitute a violation of the right to vote enshrined by Article 3 of the Protocol to the ECHR⁴⁶. However, such a rigid distinction between 'constituent peoples' and 'Others' could no longer be justified in view of the current situation of stability achieved in the country, since certain aspects that could have justified the maintenance of such a division had disappeared. In this case, the Court found a violation of Article 14 ECHR (prohibition of discrimination), in conjunction with Article 3 of the Protocol, about the election to the House of Peoples. On the other hand, it found a violation of Article 1 of Protocol No. 12 to the ECHR (general prohibition of discrimination) regarding the election of the Presidency⁴⁷.

The importance of this judgment stems from two specific aspects. Firstly, with this ruling, the judges of the Strasbourg Court applied for the first time the general prohibition of discrimination laid down in Article 1 of Protocol No. 12 to the ECHR⁴⁸. In effect, this means that a prohibition of discrimination has been introduced into the Convention which goes far beyond the protection provided by Article 14 of the ECHR, which, however, does not enjoy an autonomous existence since, to be applicable, it has to complement the other normative clauses on the enjoyment of rights and freedoms. Secondly, and perhaps this is what makes this judgment so remarkable, the ECHR declared for the first time that the constitution of a consociational democracy is incompatible with human rights, since it violates the European Convention on Human Rights⁴⁹. In other words, as Judge Bonello pointed out in his dissenting opinion, the Court intervened directly to change the structure and composition of the highest offices of state, even though it was aware that this structure was the result of a delicate balance achieved by the Dayton Peace Agreement, which ended one of the most violent conflicts in European history, without considering the potential destabilizing effects that such changes could have.

As far as the issue of electoral law in general is concerned, it seems that this ruling did not break new ground by declaring the consociational model to be in violation of human rights, since the judges of the Court did not sanction the principles underlying consociational democracy tout court. Rather, they declared incompatible with the right to

⁴⁵ A. LIPHART, *Democracy in plural Societies*, New Haven, 1977, 39.

⁴⁶ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, cit., para. 46.

⁴⁷ ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, cit., para. 55.

⁴⁸ Specifically, the Protocol No. 12, which entered into force in 2005, contains a general prohibition of discrimination in the enjoyment of any right provided for by law. For a more in-depth study on the subject, see C. NARDOCCI, *Il Protocollo n. 12 CEDU alla prova dei fatti: qualcosa di nuovo o, forse, no. In margine a X e altri c. Albania, Terza Sezione, nn. 73548/17, 45521/19, 31.05.2022*, in *Forum di Quaderni Costituzionali*, 3/2022, 64-68; E. CRIVELLI, *Il protocollo n. 12 Cedu: un'occasione (per ora) mancata per incrementare la tutela antidiscriminatoria*, in G. D'ELIA, G. TIBERI, M. VIVIANI SCHLEIN (a cura di), *Scritti in memoria di Alessandro Concaro*, Milano, 2012, 137-154.

⁴⁹ On this point see the consideration of L. BONIFATI, *Molto rumore per nulla? Dieci anni dalla sentenza Sejdić-Finci*, in *Quaderni costituzionali*, 2020, 12.

free elections and the prohibition of discrimination – both of which are enshrined in the Convention – a constitutional system which, like that of Bosnia and Herzegovina, provides for the permanent exclusion of certain persons from passive electoral rights simply because they belong to an ethnic minority. This fact led the judges to consider ethnic discrimination as a form of racial discrimination: for this reason, the unequal treatment could not be justified, as it did not pursue a legitimate aim and no reasonable proportionality could be established.

In conclusion, the Court generally condemns any restriction on the exercise of the right to vote if it is based on ethnic discrimination, which is unacceptable in a democratic system, even if the historical and social circumstances which led to such an arrangement were particularly traumatic⁵⁰.

3.2. *Podkolzina v. Latvia*

In *Podkolzina v. Latvia* ruling⁵¹, the Strasbourg judges assessed the exercise of political rights by the country's Russian-speaking minority⁵².

With the collapse of the Eastern bloc and the achievement of independence from the Soviet Union, the three Baltic states adopted their own languages as official tongues and restricted the use of Russian, which had previously been the official language throughout Soviet territory. This was followed by an increase in the requirements for citizenship⁵³, particularly for those of Russian origin, and significant restrictions on the right to vote for Russian speakers⁵⁴. Some of these states, such as Latvia, had made it mandatory to take a Latvian language test to obtain a certificate attesting to knowledge of the language, which was a prerequisite for standing as a candidate in the National Parliamentary Assembly⁵⁵.

⁵⁰ On the subject of consociational democracy in general, see S. GRAZIADEI, *Democracy v. human rights? The Strasbourg Court and the challenge of power sharing*, in *European Constitutional Law Review*, vol. 12, 1/2016, 54; C. BELL, *Power sharing and human rights*, in *The International Journal of Human Rights*, vol. 17, 2/2013, 204; C. MCCRUDDEN, B. O'LEARY, *Courts and consociations. Human rights v. power sharing*, Oxford, 2013; S. ISSACHAROFF, *Democracy and collective decision making*, in *International Journal of Constitutional Law*, vol. 6, 2/2008, 231; R. PILDES, *Ethnic identity and democratic institutions: a dynamic perspective*, in S. CHOUDHRY (a cura di), *Constitutional design for divided societies*, Oxford, 2008, 173-201; D. WIPPMAN, *Practical and legal constraints on internal power-sharing*, in ID. (a cura di), *International Law and Ethnic Conflict*, Ithaca, 1998, 231-232.

⁵¹ ECtHR, 9 April 2002, *Podkolzina v. Latvia*, on appeal No. 46726/99.

⁵² The presence of a Russian-speaking minority in the three Baltic states (Estonia, Latvia, and Lithuania) can be explained by the significant immigration of Soviet citizens during the period when the three countries were an integral part of the Soviet Union (1918-1991). In addition, especially in Latvia and Estonia, there is a significant historical presence of Russian-speaking subjects, who today make up about twenty per cent of the total population in both countries. See F. PALERMO, J. WOELK, *Diritto costituzionale comparato*, cit., 126-127.

⁵³ See L. PANZERI, *L'accesso alla cittadinanza degli appartenenti a minoranze: il caso della Lettonia, tra istanze nazionalistiche e condizionalità europea*, in *DPCE Online*, vol. 34, 1/2018, 79-106.

⁵⁴ U. RONGA, *La transizione istituzionale della Lettonia nella tornata elettorale europea del 2019*, in *Federalismi.it*, 10/2019, 1-6.

⁵⁵ See R. TONIATTI (a cura di), *La rappresentanza delle minoranze linguistiche*, Trento, 2023.

In the present case, Ms. Podkolzina, a Latvian citizen, and member of the Russian-speaking minority, obtained an official language certificate in January 1997. The document was issued to her by a regional commission of the State Language Centre, composed of five examiners. Based on written and oral exams evaluated according to criteria and levels of competence defined by law, the commission certified that Podkolzina's knowledge of the Latvian language corresponded to the 'third level': this level was not only the highest, but also the one required to run for parliament. However, in the first week of August 1998, shortly after the National Harmony Party had registered Ms. Podkolzina's candidacy for the forthcoming parliamentary elections, a single examiner employed by the Central Inspectorate of the State Language Centre came to Ms. Podkolzina's workplace to conduct a surprise examination. The language inspector stated in his report that Ms. Podkolzina did not have an adequate knowledge of Latvian at 'level three'. Consequently, on 10 August 1998, the State Language Centre informed the Central Electoral Commission that of the nine registered candidates tested, the applicant was the only one who had not demonstrated an adequate understanding of Latvian at the required level: the Electoral Commission then removed Ms. Podkolzina's name from the list of parliamentary candidates.

The applicant complained to the European Court of Human Rights that her right to stand for election had been violated. The Court, while acknowledging that states enjoy a wide margin of appreciation in the implementation of Article 3 of the Protocol to the Convention, reiterated that certain conditions must nevertheless be satisfied: that the conditions for the exercise of those rights do not restrict them to such an extent as to affect their very essence and deprive them of their effectiveness; that the conditions are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate⁵⁶. Applying these criteria, the Court held that the national legislation imposing a language requirement for access to the office of member of Parliament pursued a legitimate aim. Members of Parliament must be able to take an active part in the work of the institution and to effectively defend the interests of their constituents. In this context, the Court emphasised that it was in principle for each state to determine the working language of its national assembly⁵⁷.

However, the judges emphasised that the definition of eligibility conditions in the abstract must be complemented by a fair procedure. In particular, the determination that a candidate does not fulfil the conditions of eligibility must be made by a body able to provide at least minimum guarantees of impartiality. Similarly, the discretionary power must not be overly broad, but must be sufficiently circumscribed by law. Finally, the procedure for declaring a candidate ineligible must guarantee a fair and objective decision, avoiding any abuse of power⁵⁸. According to this criterion, the evaluation of Podkolzina's language skills by a single examiner was excessively discretionary and biased. It was unclear why the applicant and eight other persons had been selected for an additional language test, while twelve other candidates with the same certificates had not

⁵⁶ ECtHR, *Podkolzina v. Latvia*, cit., para. 33.

⁵⁷ *Ivi*, para. 34.

⁵⁸ *Ivi*, para. 35.

been re-examined. Moreover, the inspector from Central Inspectorate of the State Language Centre had been given exorbitant powers and had conducted a dubious type of interview (the Court was 'surprised' that the applicant had been asked mainly about her political orientation), which had led him to reach an assessment of language skills diametrically opposed to that reached by the five-member commission (which had been achieved only a year earlier and after the normal procedure had been followed). In the light of these findings, the Court concluded that «the decision to strike the applicant out of the list of candidates cannot be regarded as proportionate to any legitimate aim pleaded by the Government»⁵⁹. For this reason, the Strasbourg judges found a violation of Article 3 of Protocol No. 1 to the Convention.

Regarding this ruling, it should be emphasised that the Court's judgment did not sanction the existence of linguistic criteria *per se* for access to the exercise of the right to vote. However, it did find that the Latvian electoral law violated the right to free elections enshrined in the Convention, as the exclusion of a candidate can be considered legitimate if it is determined by an independent body that operates within reasonable powers and adheres to a fair procedure established by law. Moreover, this ruling appears even more significant when considered in the political and institutional context of Latvia at the end of the 1990s⁶⁰, since the Court's decision placed the final piece in the mosaic of institutional reforms concerning the country's citizenship. Under external pressure, in particular from the European Union and the Council of Europe, the Latvian Parliament amended the naturalisation act for the first time in 1998. This led to a simplification of the mandatory Latvian history test and a reduction in naturalisation fees. However, as the language requirement remained in place, candidates for Latvian citizenship still had to be able to understand every day and official information, hold a conversation, read with ease, and write an essay on a topic related to everyday life⁶¹. The revision of the Act on Official Language in December 1999 abolished the strict language requirements in the private sector, which had made knowledge of Latvian binding even in private companies and restricted access to certain professions. On the other hand, the most significant changes regarding the language requirements that restricted participation in the democratic process occurred precisely as a result of the aforementioned ruling. In 2002, the Latvian Parliament voted by a large majority to abolish the provisions of the Electoral Code that required citizens standing for national and local elections to pass a language test.

It is worth noting that in this judgment, contrary to the *Sejdić and Finci* ruling, the Court considered the existence of very precise historical circumstances which formed the core of the question raised by the applicant. Indeed, the judges, while affirming at the outset of their reasoning the existence of a wide margin of appreciation on the part of states about the introduction of specific requirements for the exercise of the right to vote, then pointed out that such requirements must be proportionate to the objective pursued. In the present case, however, the legislature's intention was precisely to make access to

⁵⁹ ECtHR, *Podkolzina v. Latvia*, cit., para. 38.

⁶⁰ For commentary on this judgment, see F. HOFFMEISTER, *Podkolzina v. Latvia*. App.No.46726/99, in *The American Journal of International Law*, vol. 97, 3/2003, 664-669.

⁶¹ See S. ARNSWALD, *EU enlargement and the Baltic States*, Helsinki, 2000, 172.

Latvian citizenship more difficult and, at the same time, to introduce a further restriction on citizens by imposing a language test, thus demonstrating a clear intention to place that part of the Russian-speaking population, which constitutes approximately one fifth of the national population, in a disadvantageous position in order to restrict its access to the electorate.

3.3. *Tănase v. Moldova*

In the *Tănase* case⁶², the European Court of Human Rights was confronted with the question of access to the exercise of the right to vote for persons with dual or multiple nationality. This situation arose historically in the case of Moldova⁶³. Indeed, after the collapse of the Soviet Union and Moldova's independence (1991), the country redefined the criteria for obtaining citizenship. According to the new Law on Moldovan citizenship (1991), the persons who had lived on the territory of the former Soviet Socialist Republic of Moldova before the Soviet annexation automatically became Moldovan citizens. On the ground of these new criteria, the applicant, Mr. Tănase, who later became a well-known Moldovan politician and Vice-President of the Liberal Democratic Party, as well as a member of the Chişinău City Council, was thus granted Moldovan citizenship. At the same time, in 1991, the Romanian Parliament adopted a new law on citizenship, which allowed former Romanian citizens and their descendants who had lost their nationality before 1989 to regain the status of Romanian citizens.

Since the restriction on dual citizenship in Moldova was lifted in 2003, Mr. Tănase applied for and obtained Romanian citizenship, in addition to the Moldovan one he already held. However, in 2008, the Moldovan Parliament reformed the electoral legislation in a restrictive sense: it introduced a ban on persons with dual or multiple nationality from holding the office of a member of the Parliamentary Assembly (Law No. 273)⁶⁴. In addition to the reintroduction of these nationality requirements – which, let us recall, had disappeared in 2003 – even more restrictive amendments were introduced regarding electoral freedoms. In particular, the electoral threshold was raised and the possibility of forming coalition lists was severely restricted. These amendments came into force in May 2008, and parliamentary elections were held in the spring of 2009. To gain access to the parliamentary seat, the applicant sent a letter to the Romanian Embassy in Chişinău announcing that he was forced to renounce his Romanian citizenship. Meanwhile, in 2009, the Moldovan Constitutional Court ruled on the constitutionality of Electoral Law No. 273, finding no aspects of the new law that violated the Constitution⁶⁵.

⁶² ECtHR, 27 April 2010, *Tănase v. Moldova*, on appeal No. 7/08.

⁶³ In brief, the Principality of Moldavia was founded in the mid-14th century and, as it lay between present-day Ukraine and Romania, was constantly subject to the expansionist aims of both the Ottoman Empire and Russia, until it was united with Wallachia in the mid-19th century to form the territory of Romania. At the end of the Second World War, however, Moldova became a republic of the Soviet Union and lost its links with Romania.

⁶⁴ V. GASCA, *Country Report: Moldova. EUDO Citizenship Observatory*, 2010, 4-14.

⁶⁵ ECtHR, *Tănase v. Moldova*, cit., paras. 54-58.

Having exhausted all domestic remedies, Mr. Tănase turned to the European Court of Human Rights, complaining that the Moldovan Electoral Code violated Article 3 of the Protocol by making access to passive suffrage conditional on the renunciation of non-Moldovan citizenship.

The Court first assessed the Moldovan government's claim that Law 273 was justified by the need to ensure loyalty to the state. In this context, the ECtHR judges differentiated between loyalty to the state and loyalty to the government. They concluded that while the necessity of maintaining loyalty to the state could serve as a valid reason for imposing restrictions on the right to vote, loyalty to the government does not carry the same justification. The judges argued that in a democratic state, the primary function of parliamentarians – especially those in opposition parties – is to represent the electorate by holding the current government accountable and assessing its policies⁶⁶. Moreover, the pursuit of different and sometimes diametrically opposed objectives was not only acceptable but necessary to promote pluralism and offer voters choices that reflected their political views⁶⁷.

In principle, the loyalty required of parliamentarians to the state included respect for the Constitution, laws, institutions, independence, and territorial integrity. Any desire to change these aspects had to be pursued in accordance with the laws of the state. Any other position would have undermined the ability of parliamentarians to represent the views of their voters, especially minority groups⁶⁸. The fact that Moldovan representatives with dual nationality might wish to pursue a political agenda which some might consider incompatible with the current principles and structures of the state does not make it incompatible with the rules of democracy. Against this background, the Court examined whether the measure in the present case was genuinely intended to ensure loyalty to the state and concluded by expressing its perplexity on this point⁶⁹.

However, regarding the proportionality of the measure adopted, an examination by the Court of the practice in the Council of Europe member states reveals a consensus that, where multiple nationality is allowed, the possession of more than one nationality should not be a ground for disqualification as a member of Parliament, even where the population is ethnically heterogeneous and the number of citizens with multiple nationalities can be high. However, the Court noted in its decision that, despite this consensus, a different approach might be justified if historical or political considerations required a more restrictive practice. The judges thus recalled the situation of Moldova, which had a potentially high proportion of dual nationals and had only recently become independent. In the light of the country's history at the time of the declaration of independence in 1991, the prohibition of persons with multiple nationality from sitting as members of Parliament could have been justified. However, the restriction was introduced some seventeen years after Moldova's independence and five years after an initial liberalisation of the law on

⁶⁶ ECtHR, *Tănase v. Moldova*, cit., para. 166.

⁶⁷ *Ivi*, para. 167.

⁶⁸ *Ivi*, para. 168.

⁶⁹ *Ivi*, para. 170.

dual citizenship⁷⁰. As to the reasons for such a late decision, the government had not explained why concerns about the loyalty of dual citizens had recently arisen and why such concerns were not present when the law was amended to allow dual citizenship in 2003. The Court recognised that the number of members of parliament with dual nationality is significant, reflecting a large proportion of citizens who hold dual nationality and who are entitled to be represented by parliamentarians who reflect their political concerns and views.

In the current case law, the judges argue that there are alternative methods available for safeguarding the laws, institutions, and national security of the Republic of Moldova. These include imposing sanctions for illegal conduct that threatens national interests and requiring individuals to obtain a security clearance to access confidential documents⁷¹. Finally, the Court reiterated that any restriction on the right to vote should not be of such a nature as to exclude certain persons or groups of persons from participating in the political life of the country⁷², since such restrictions end up undermining the essence of the rights guaranteed by Article 3 of Protocol to such an extent as to deprive them of their effectiveness⁷³. The introduction of the ban in the present case shortly before the elections, at a time when the ruling party's share of the vote was falling, also called into question the proportionality of the measure⁷⁴. Based on these arguments, the Strasbourg judges thus found a violation of the right to free elections enshrined in the Convention, in that the electoral law prevented access to the electorate for that part of the population which, in the present case, was known to belong to a national minority with dual citizenship (Moldovan and Romanian)⁷⁵.

In the judgment in question, a particular aspect that deserves to be highlighted is the fact that the judges, in their decision, once again placed special emphasis on the historical context in which the contested legislation was applied⁷⁶. This is evidenced by the fact that the decision begins with precisely four paragraphs devoted (in particular the first two) to a brief description of Moldovan history and (the remaining two) to the evolution of local election legislation. In fact, the judges referred to the *Code of Good Practice in Electoral Matters* of the Venice Commission⁷⁷ – which not only affirms the existence of a common electoral heritage, but also defines its content – the judges stated that these principles may be limited in view of the complexity of historical experience and the settlement movements that European states are still undergoing today⁷⁸. It can

⁷⁰ *Ivi*, para. 174.

⁷¹ ECtHR, *Tănase v. Moldova*, cit., para. 175.

⁷² *Ivi*, para. 178.

⁷³ *Ivi*, para. 180.

⁷⁴ *Ivi*, para. 179.

⁷⁵ *Ibidem*.

⁷⁶ V. GASCA, *Country Report*, cit., 17.

⁷⁷ European Commission for Democracy through Law (Venice Commission), *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report*, Opinion No. 190/2002, CDL-AD(2002). In particular, the Venice Commission document shows that the common electoral heritage consists of certain fundamental principles, such as universal, equal, free, secret and direct suffrage.

⁷⁸ F. DAU, *La Corte Europea dei Diritto dell'Uomo e il diritto a elezioni libere in merito alle pronunce Tanase c. Moldavia e Namat Aliyev c. Azerbaijan*, in *Federalismi.it*, 21/2012, 8.

therefore be concluded that the Court sought to strike a careful balance between the interest in loyalty to the state, on the one hand, and the interest in exercising the right to vote, on the other, and that, in this case, it saw the predominance of the interest of citizens in exercising a freedom that is a cornerstone of any system that aspires to be defined as democratic. Specifically, the Strasbourg judges considered, in addition to the historical datum, the existence of national minorities, which remains strategic in the redefinition of the form of the state in former Soviet systems⁷⁹. In this regard, the limitation or, worse still, the denial of access to representation (active or passive) can favour the re-emergence of historical tensions which can sometimes lead to the implosion of the political community itself⁸⁰.

In a particularly interesting way, the *Tănase* judgement raises the question of the boundaries of the political community in the face of the demolition of walls and borders⁸¹. Indeed, with the dissolution of the last multinational states of the 20th century, the question of the identity of the political community has once again become a highly topical issue, especially in those contexts – as the Moldovan case shows – where the redefinition of state borders during the last century has divided populations. With this ruling, the Court seems to have wished to ‘mitigate’ those elements of possible instability that could have resulted from the application of an electoral law that restricts the electoral rights of minorities, as if to remind us that diversity and pluralism are also fundamental principles of the common electoral heritage.

4. Concluding considerations

The protection of minorities is increasingly becoming a fundamental aspect of the operational principles of contemporary parliamentary democracies, as shown by the cases analysed above⁸². In particular, the granting of special rights of representation to minorities has evolved from a mere instrument of protection and integration of minority groups to a fundamental element for the proper democratic functioning of the state system⁸³. However, as in the case of *Podkolzina v. Latvia*, this cannot be translated into an obligation for states to introduce correctives or derogations to free political competition, but rather into the creation of mechanisms such as those that guarantee equal access to the electoral field for minorities. In other words, the Strasbourg judges did not establish a subjective right for minorities to be represented. Instead, what must be guaranteed at the national level – especially where there are historical and demographic reasons (*Sejdić and Finci v. Bosnia and Herzegovina* and *Tănase v. Moldova*), for which the need for minority representation is even more felt – is the effectiveness of

⁷⁹ *Ibidem*.

⁸⁰ F. DAU, *La Corte Europea*, cit., 8.

⁸¹ *Ivi*, 7.

⁸² U. HAIDER-QUERCIA, *La rappresentanza elettorale delle minoranze nazionali in Europa*, Padova, 2013, XVII.

⁸³ *Ibidem*.

participation in public life on an equal level with the rest of the population. Indeed, in each of the judgments proposed in this text, the European Court of Human Rights has found a violation of the right to free elections, in conjunction with Article 14, which enshrines the prohibition of discrimination, by state systems in so far as they place in a disadvantageous situation a section of the population which, by virtue of its intrinsic characteristics, is clearly distinguishable from the rest of the population and which, by reason of the number of its members, is itself placed in a disadvantageous situation as regards the exercise of the right to vote. In other words, the judges of the European Court of Human Rights did not condemn the existence of electoral restrictions *per se*, but they found that the right to free elections was violated in those systems which, without any real justification, disadvantaged a segment of the population simply because it was a minority.

Two issues emerge from these considerations and remain open to date. Firstly, the question of minority representation offers an extremely varied picture⁸⁴, which leads to a similar number of answers at state level. Hence, the careful balancing act that the judges of the European Court of Human Rights have undertaken in the pronouncements proposed here. In this case, it has become clear that the Court has given weight to the historical and social circumstances out of which the question arose, and for this reason both the granting of special electoral rights to minorities and the definition of minorities remains within the sphere of the internal sovereignty of states. Regarding the definition of minority status, it should be noted that the Court seems increasingly inclined to establish criteria that are more in line with contemporary social realities. Secondly, the original tension between the attribution of special protection to minorities and the principle of equality seems to be increasingly reconciled in the very structures of contemporary societies, since their plural nature almost inevitably obliges national legislators to give an answer to the issue of the inclusion of minorities: this matter is becoming more and more pressing, especially as the concept of minority rights itself seems to be shifting towards a right of difference⁸⁵.

In conclusion, the technical and procedural elements of electoral systems – from being technical instruments that influence the political game and modify the form of government – fully enter the panorama of the protection of fundamental rights, assuming a constitutional and conventional relevance that legitimises the intervention of the judge and the provision of a judicial remedy⁸⁶. However, it should also be noted that among electoral rights, the importance of guarantees for the political participation of minorities is becoming increasingly significant, especially today, when societies are more challenging to fit into pre-established structures and definitions based on outdated concepts.

For this reason, today more than ever, the question of how to reconcile the regulation of electoral systems with respect for minorities remains not only a fundamental issue in an increasingly pluralistic society, but also a problem to which it has become imperative to find an answer.

⁸⁴ U. HAIDER-QUERCIA, *La rappresentanza elettorale*, cit., 247.

⁸⁵ F. PALERMO, J. WOELK, *Diritto costituzionale comparato*, cit., 6.

⁸⁶ F. DAU, *La Corte Europea*, cit., 7.