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TITLE	Democracy on Trial: The ECHR's Role in Defending Free Elections
YEAR	2025
DOI	10.17176/20250314-000813-0
VERSION	Publisher's PDF
CITATION	Toni Selkälä & Shorena Nikoleishvili, Democracy on Trial: The ECHR's Role in Defending Free Elections, Völkerrechtsblog, 13.03.2025, doi: 10.17176/20250314-000813-0.

Article

Democracy on Trial

The ECHR's Role in Defending Free Elections

13.03.2025

Regular elections constitute a cornerstone of democratic societies. In most states, elections are timed, organised, and administered in accordance with detailed electoral legislation. The right to cast a vote and to stand as a candidate in elections are human rights recognised by tribunals and monitoring bodies regionally and internationally. When it comes to systemic discrepancies in the realisation of these rights, courts of law have shown a muted interest to interfere with the outcome of elections. But should human rights tribunals interfere if democracy is upheld 'in disregard of the requirements of the rule of law'?

The handful of cases where courts have been instructed to assess systemic discrepancies in election outcomes are instructive of the unique difficulties legal argumentation encounters in assessing popular will. For example, in *Bush v. Gore*, the U.S. Supreme Court was tasked to assess whether there is a right way to recognise valid votes for counting purposes, and in *Raila v. IEBC*, the Kenyan Supreme Court had to assess whether registering votes in the electronic tally was done correctly. There was legislation in place for both courts to rely on, and even though the courts ended with different outcomes, neither was tasked to assess whether the votes cast truly reflected the free choice of voters. Entering this fraught terrain of a voter's *forum internum* has, however, been done by tribunals in two member states of the Council of Europe, raising the prospects of the European Court of Human Rights ('ECtHR') eventually having to answer this question. Should it – or can it – address these concerns?

Of the two, the Romanian Constitutional Court's decision to annul the first round of presidential elections suggests that people can cast 'wrong' votes. Of our interest is the refusal of courts in Georgia to properly hear election complaints concerning ballot secrecy. Violations to electoral secrecy were technical in nature, but they allowed the government to intimidate people into voting in its favour and even demanded it in the case of public servants. What impact should be given to such systemic failures in the technical organisation of elections? Should the cases emerge before the ECtHR, they would provide the Court with a chance to evaluate systemic discrepancies in elections and assess how or if such discrepancies should be remedied.

Parliamentary Elections Before Georgian Courts

The October 2024 elections in Georgia led to a landslide victory of Georgian Dream, a party which has been in power for the past decade. During election day and immediately after the results were published, opposition parties and civil society organisations ('CSOs') highlighted serious irregularities encountered in voting locales around the country. Videos of intimidation, paying for votes, and ballot box stuffing circulated in social media, but the main concern of local and international observers was the electronic voting machines, more specifically, the type of paper used for the ballots entered into those machines. The thin paper revealed a black dot on the back, exposing the electoral list for which the vote had been cast. CSOs had informed the Central Election Commission ('CEC') of this apparent shortcoming before the elections, and the CEC had promised, but failed, to address these concerns. In the final report of the OSCE Election Observation Mission, ballot secrecy was found to be violated in at least every fourth election locale.

These violations to election secrecy were central to domestic challenges. Dozens of cases were heard by district courts, whose decisions were later assessed in two Court of Appeals hearings. In one district court decision – later overturned – violations to ballot secrecy led to the annulment of election results. This reversal from the Courts of Appeals was largely a foregone conclusion in a judiciary captured by the party-in-power. As a last resort, two electoral cases were brought before the country's Constitutional Court, challenging the election outcome based on the whole gamut of perceived violations. The Constitutional Court refused to hear the cases, thus exhausting the last domestic remedies and opening up the possibility for the case to be heard

by the ECtHR. But for an opposition seeking new elections, the European human rights jurisprudence sets imposing hurdles for the applicants, who must establish their right to stand for the entire Georgian polity and seek a remedy that has never been in the arsenal of the Strasbourg court.

"…No Chance Whatsoever of Success"

At the heart of every legal challenge to elections lies an inherent tension: a decision to interfere by a court subverts the people's democratic choice – replacing democracy with juristocracy. Any judicial decision, however formulated, is easily perceived as partisan. It is no surprise that European courts have been reluctant to interfere with electoral processes, and the ECtHR has repeatedly underscored the wide margin of appreciation states enjoy in organising, counting, and ascertaining elections. As the registry of the Court noted in a press release concerning the prospects of a referendum, there is 'no chance whatsoever of success' for the people to demand an election, nor will the Court 'speculate as to what the outcome of the election process would have been' if free elections would have been held. What does this mean for a state about to lapse into a state-sanctioned one-party system?

Unlike most provisions of the European Convention on Human Rights ('ECHR'), Article 3 of Protocol No. 1 imposes an obligation on states instead of providing rights to people. While the Court has individualised this provision, the literal meaning of the article prescribes a duty owed by the state to its citizens. Thus, while individual rights have been ineffective to alter the outcome of elections, the matter could arguably be different on a collective level. The Court's practice of embracing individual rights for collective political processes, arguing that the 'finding of a violation alone can constitute sufficient just satisfaction', does not remedy the core of what a right to free elections stands for and why it is of 'prime importance in the Convention system.' Free elections are an intrinsic part of democracy and democratic legitimacy; infringements of this right cannot be corrected by declaring a violation in an individual case concerning ballot secrecy.

The Court's jurisprudence is not designed to address systemic discrepancies in electoral matters and does not serve as an effective bulwark against centralised, wide-spread failure in the administration of free elections, such as those burdening Georgia's October 2024 elections. According to the Venice Commission's Code of Good Practice in Electoral Matters, violations of ballot secrecy by voters 'must be punished by disqualifying any ballot paper whose content has been disclosed.' No individual remedy will correct fundamental failures of a system. But can the Court stall elections if the domestic procedure refuses to do so? Even substantive individual remedies for electoral violations do little to save the object – democracy – of the individual right, as examples from Russia and Belarus indicate.

Traditionally, the Court's jurisprudence has interpreted Article 34 of the ECHR as a constraint for cases brought for public interest. This has limited the Court's jurisprudence, as well as scholarship on the right to free elections and the rights of individuals to vote and stand as candidates. The Court did open a way for public interest claims in *Klimaseniorinnen*, which could alter the landscape of cases regarding the right to free elections. In instances where elections are marred with systemic irregularities, both the literal meaning of the right and the nature of the effective remedies would merit the defence of the right as one belonging to a collective – a public interest, rather than an individual right. An individualised approach where the Court would recognise systemic violations and issue a pilot-judgment could not remedy the lack of free elections, unlike in the case of other administrative practices.

If the Convention is a 'constitutional instrument of European public order', the Court, as its guardian, ought to have a say when a matter of prime importance to that order is violated. The political prudence of non-interference in elections is justifiable when democratic institutions are robust. Such prudence is ill-placed in a backsliding democracy. The Court has highlighted the importance of context in its assessment of what the right to free elections means. In the case of a state no longer believing in its own constitution, it should be Court's prerogative to remind it of this joint liberal order to which it willingly bound itself by acceding to the ECHR. The Court could set an election matter as its highest priority and impose interim measures to ensure that there is no irreparable harm to the most foundational right in democracy. And it should do so.

In the end, the question is not whether the Court could legally interfere on an election matter. It can. We have argued that there is every reason for it to do so as well, for that is the very *raison d'être* of the Court: to protect the European public order. The Court has shown in the past that it can be innovative in its evolving interpretation of human rights. In an era of growing authoritarianism, standing for the human rights created to

counter authoritarianism's corrosive effect would hardly be the most controversial decision. It would, however, be in keeping with 'those fundamental freedoms which are the foundation of justice and peace in the world […] best maintained […] by an effective political democracy.'

Cite as
Toni Selkälä & Shorena Nikoleishvili, Democracy on Trial: The ECHR's Role in Defending Free Elections, *Völkerrechtsblog,* 13.03.2025, doi: 10.17176/20250314-000813-0.