

Not Back in the USSR: *Georgian Labour Party v. Georgia*
Enforces Free Elections in an Emerging Democracy

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I. OVERVIEW

The Rose Revolution was a culmination of four days of political and electoral unrest in Georgia out of which the noted case arises.¹ On November 20, 2003, the Georgian Central Electoral Commission (CEC) announced the final results of the parliamentary election held earlier that month, according to which seven parties had cleared the seven percent legal threshold to acquire seats in Parliament as required by the Electoral Code.² The National Movement party, led by Mikheil Saakashvili, took third place.³ On account of complaints of ballot fraud, the National Movement refused to accept the election results and, with large-scale public support, stormed into Parliament on November 22, ousting the newly elected members and calling for the President’s resignation.⁴ The President resigned on November 23, 2003.⁵

Two days after the Rose Revolution, the Supreme Court of Georgia annulled the CEC’s November 20 vote tally, and the CEC passed an ordinance establishing repeat parliamentary elections for March 28, 2004.⁶ For purposes of this repeat election, the CEC compelled voters to attend their respective electoral precincts to verify that their names were on the electoral registers and to file a petition for correction if not.⁷ The CEC held a country-wide repeat parliamentary election on March 28, but on April 2, the CEC annulled the election results in the Khulo and Kobuleti electoral districts, two areas in the Ajarian region where close to

1. *Georgian Labour Party v. Georgia*, App. No. 9103/04, paras. 11-13 (Eur. Ct. H.R. July 8, 2008), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink; search “Application Number 9103/04”).

2. *Id.* para. 11.

3. *Id.*

4. *Id.* para. 12.

5. *Id.* para. 13.

6. *Id.* para. 15.

7. *Id.* para. 19.

60,000 registered voters resided.⁸ The CEC gave no explanation or legal provision for this decision but stated that in accordance with article 105(12) of Georgia's Electoral Code, those two regions would have a repeat election on April 18.⁹ However, on the appointed day, the polling stations in Khulo and Kobuleti failed to open, and residents there were unable to cast their votes.¹⁰

The Georgian Labour Party appealed to the Georgian Supreme Court, but the Court found that the failure of the polls to open in the Khulo and Kobuleti districts was justified on account of the political tension in the Ajarian region.¹¹ Therefore, the Georgia-wide repeat election could be considered as having been held because more than one-third of registered voters had taken part in it.¹² Subsequently, the chair of the applicant party (acting as a private individual) brought proceedings before the Georgian Constitutional Court, claiming a violation of the constitutional principle of free and fair elections.¹³ The Constitutional Court declared this claim inadmissible.¹⁴ The applicant party then appealed its case to the European Court of Human Rights, which *held* that the CEC's April 2, 2004, decision to annul the election results in the Khulo and Kobuleti electoral districts violated the Georgian Labour Party's right to stand for election under article 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). *Georgian Labour Party v. Georgia*, App. No. 9103/04, para. 142 (Eur. Ct. H.R. July 8, 2008), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink; search "Application Number 9103/04").

II. BACKGROUND

The Council of Europe promulgated the European Convention on Human Rights in 1950.¹⁵ At the time, the Council of Europe was comprised of ten Western European democracies, each committed to fostering and continuing democratic ideals within their borders.¹⁶ Today,

8. *Id.* paras. 25-26.

9. *Id.* para. 26.

10. *Id.* para. 28.

11. *Id.* para. 39.

12. *Id.*

13. *Id.* para. 40.

14. *Id.* para. 41.

15. Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. 3., Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter European Convention on Human Rights].

16. David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks*, 8 CONN. J. INT'L L. 243, 243-44 (1993).

however, the Council of Europe's membership includes forty-seven states, many of which lack the long-standing tradition of democracy and commitment to human rights that the original ten members possessed. This enlargement to include these new democratic republics, the majority of which are in Central and Eastern Europe, has presented significant challenges for the Council of Europe's judicial arm and emblem of human rights law, the European Court of Human Rights.¹⁷ The question remains whether a human rights system created by and for a comparatively unified group of Western European States can protect human rights outside of that context.¹⁸

In order to accede to Council of Europe membership, an aspiring state must satisfactorily verify its commitment to democracy by signing a set of conventions and protocols, including the European Convention on Human Rights.¹⁹ However, this standard has become increasingly blurred given that these newly democratic countries have yet to expel completely the illiberal elements of their former political systems.²⁰ When Georgia joined the Council of Europe in April 1999, nearly ten years after the collapse of the Soviet Union, it proved its dedication to both a democratic future and a departure from its tumultuous history under Soviet rule. It is important to note, however, that each post-Soviet State has its own path to democracy; many are still in the midst of democratizing despite already having joined the Council of Europe.²¹ Among these states, a common theme has emerged in the rejection of their communist pasts and in the embracing of Western European democratic ideals—each state has experienced continued undemocratic tendencies and occasional hostility toward preserving basic human rights.²²

Article 3 of Protocol 1 to the European Convention on Human Rights requires that Council of Europe Members “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.”²³ The Council of Europe considers establishment of free and

17. James A. Sweeney, *Divergence and Diversity in Post-Communist European Human Rights Cases*, 21 CONN. J. INT'L L. 1 (2005).

18. Seymour, *supra* note 16, at 244.

19. LAWRENCE PRATCHETT & VIVIEN LOWNDES, DEVELOPING DEMOCRACY IN EUROPE 11-16 (2004).

20. Sweeney, *supra* note 17, at 10.

21. *Id.* at 8-9.

22. *Id.* at 9.

23. European Convention on Human Rights, *supra* note 15, Protocol 1, art. 3.

fair elections to be essential to the process of democratization.²⁴ Therefore, when a post-Soviet State seeks admission into the Council of Europe, it explicitly commits itself to carrying out free elections by signing the European Convention on Human Rights. The Council of Europe places high electoral standards on contracting states to ensure that all citizens of those states attain the rights enumerated in article 3 of Protocol 1.²⁵

Each case brought before the European Court of Human Rights under article 3 of Protocol 1 is evaluated under what some scholars call the "local context."²⁶ The local context refers to the generally accepted idea that circumstances under which a case arises are necessarily interconnected with the country from which those facts originate.²⁷ In cases involving post-Soviet States and emerging democracies, the Court "has a unique responsibility to watch over the transition to democracy undertaken by the states of Central and Eastern Europe."²⁸ This necessarily implies an evaluation of the local context of each state, with regard to the possibility that those states might maintain characteristics from their former Communist regimes.²⁹ Because the communist legal system placed a high value on the citizen's responsibility to the state and promoted an individual's lack of autonomy in order to benefit the collective whole, the Court, and European human rights law in general, attempts to respond to political needs that were overshadowed during Soviet domination.³⁰

The Court also evaluates claims arising under article 3 of Protocol 1 within a framework that recognizes an acceptable level of divergence by former Soviet States regarding their compliance with free and fair elections.³¹ Unlike other articles in the European Convention on Human Rights, article 3 of Protocol 1 does not contain an explicitly denoted "qualified right"; that is, the right enumerated in the article is not qualified by a second paragraph stating that the state may impose

24. See Council of Eur., *Resolution on the Principles of Democracy*, Eur. Parl. Ass. Res. 800, § 6(B) (July 1, 1983), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta83/ERES800.htm>.

25. PRATCHETT & LOWNDES, *supra* note 19, at 57-58.

26. Sweeney, *supra* note 17, at 1.

27. *Id.*

28. *Id.* at 15.

29. *Id.*

30. Jiří Příbáň & Wojciech Sadurski, *The Role of Political Rights in the Democratization of Central and Eastern Europe*, in *POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE* 196, 202 (Wojciech Sadurski ed., 2006).

31. *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 458-59.

restrictions on that right if it meets certain qualifications.³² This article is unique within the European Convention on Human Rights because it does not call for noninterference by government. The article mandates that contracting states undertake to hold free and fair elections, imposing a positive obligation.³³ The European Court of Human Rights interprets article 3 of Protocol 1 as allowing states to impose restrictions on their citizens as long as those restrictions are “necessary in a democratic society”—for example, the promotion of national security or public safety.³⁴

Within this necessity test lies a specifically defined discretion that the Court has granted some contracting states in their implementation of free and fair elections.³⁵ The Court labels this discretion a “margin of appreciation.”³⁶ This term refers to a government’s latitude in evaluating factual situations and in applying the provisions of international human rights treaties to those situations.³⁷ The Court grants contracting states a margin of appreciation through a proportionality test that balances legitimate governmental aims against the imposed restriction.³⁸ Thus, the Court has recognized that the right to free and fair elections is not absolute,³⁹ and has therefore developed a few allowable divergences.

First, the Court has only very recently granted a political party standing to claim victim status independent of its candidates under article 3 of Protocol 1.⁴⁰ In *Russian Conservative Party of Entrepreneurs v. Russia*, two applicants, one a political party and the other a candidate of that party, filed suit against Russia because of the Russian Supreme Court’s ultimate refusal to register any of the applicant party’s candidates because some of the candidates submitted false information to the electoral commission.⁴¹ The applicant party had originally filed its claim against the CEC of the Russian Federation, a body with discretion to

32. See, e.g., European Convention on Human Rights, *supra* note 15, arts. 8-11 (containing two paragraphs each, with the second serving to qualify the first).

33. DONNA GOMIEN, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 139 (3d ed. 2005).

34. See *Rekvenyi v. Hungary*, 1999-III Eur. Ct. H.R. 425, 437; *Tolstoy v. United Kingdom*, 316 Eur. Ct. H.R. (ser. A) at 74-76 (1995).

35. Sweeney, *supra* note 17, at 14.

36. YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 1-2 (2001).

37. *Id.*

38. *Mathieu-Mohin v. Belgium*, 113 Eur. Ct. H.R. (ser. A), 23 (1987).

39. *Id.*; *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 458.

40. *Russian Conservative Party of Entrepreneurs v. Russia*, App. No. 55066/00, paras. 51-67 (Eur. Ct. H.R. Nov. 11, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink; search “Application Number 55066/00”).

41. *Id.* para. 19.

decide which candidates and parties may stand for election based on their compliance with domestic laws.⁴² The CEC of the Russian Federation nullified the rights of the applicant party's entire list of candidates based on evidence of only one candidate's submission of false financial records, a decision that the Civil Division of the Supreme Court overturned and that the Presidium of the Supreme Court later reinstated.⁴³ The European Court of Human Rights considered that the applicant party and the applicant individual had themselves done nothing to violate the electoral laws, and held that the CEC of the Russian Federation had violated article 3 of Protocol 1.⁴⁴ Implicit in this holding was the Court's recognition that an applicant party, independent of and in conjunction with an individual candidate, may claim victim status under the article.⁴⁵

Second, the Court has extended the boundaries of permissible claims under article 3 of Protocol 1 by assessing any domestic electoral legislation in light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another.⁴⁶ In *Podkolzina v. Latvia*, for example, the applicant complained that the Latvian CEC's removal of her name from the list of candidates for a parliamentary election because of her failure to pass a Latvian language requirement test infringed upon her right to stand as a candidate, a right guaranteed by article 3 of Protocol 1.⁴⁷ The applicant appealed her case through the ranks of the Latvian judicial system, each tier of which held that no violation had taken place.⁴⁸ The European Court of Human Rights noted the importance of an individual's right to stand for election, but asserted that the rights under article 3 of Protocol 1 are not absolute.⁴⁹ Because the article recognizes these rights broadly, without expressly enumerating them, the Court acknowledged room for "implied limitations" on the extent of those rights.⁵⁰ Thus, contracting states have a "wide margin of appreciation" when conditioning the rights to vote and to stand for elections on certain prerequisites within their domestic law.⁵¹

42. *Id.* paras. 9-11.

43. *Id.* paras. 11-20.

44. *Id.* paras. 94-96.

45. *Id.* para. 89.

46. *Mathieu-Mohin v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 23-24 (1987).

47. *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 456-58.

48. *Id.* at 451-52.

49. *Id.* at 458.

50. *Id.*

51. *Id.*

For the purposes of article 3 of Protocol 1, this margin of appreciation derives from the political evolution of the country.⁵² In *Podkolzina*, the Court granted Latvia the power to make its own political decisions based on historical considerations without interference; it deferred to Latvia's margin of appreciation in the State's assessment that a working knowledge of the country's language was necessary to stand for elections.⁵³ While the state's margin might be limited by its obligation to respect the fundamental principles of article 3 of Protocol 1, the Court grants wide latitude to the state in interpreting these principles through domestic legislation.⁵⁴ Therefore, the Court held that the language requirement neither impaired the essence of the right to stand for elections nor deprived the article of its effectiveness.⁵⁵

Third, the court recognizes that when an applicant challenges an interference with a right under article 3 of Protocol 1, that interference must be assessed with a proportionality test.⁵⁶ Although states enjoy a wide margin of appreciation in the sphere of elections, it is always for the Court to determine as a last resort whether the requirements of the European Convention on Human Rights have been met.⁵⁷ The proportionality test focuses on whether there was arbitrariness or a lack of proportionality between the restriction in question and the legitimate aim pursued by the respondent state.⁵⁸ Given the concept of "implied limitations" under article 3 of Protocol 1, a state may rely on any legitimate aim that it can prove compatible with the article, paying heed to the particular circumstances of each case.⁵⁹ In *Py v. France*, for example, the Court evaluated France's requirement that voters in a special election in New Caledonia, a French territory, be residents of that territory for over ten years.⁶⁰ The Court upheld this restriction because there was a legitimate aim. The residency requirement sought to create an electoral roll of voters that represented only the population "concerned," and not a larger influx of people with limited or inconsequential ties to the territory.⁶¹ Further, the Court held this restriction was proportionately related to the pursued aim of creating a

52. *Id.*

53. *Id.* at 459.

54. *Id.* at 458-59.

55. *Id.* at 460-61.

56. *Ždanoka v. Latvia*, App. No. 58278/00, 45 Eur. H.R. Rep. 478, para. 115 (2006).

57. *Mathieu-Mohin v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 23 (1987).

58. *Id.*

59. *Ždanoka*, 45 Eur. H.R. Rep. para. 115.

60. *Py v. France*, App. No. 66289/01, 42 Eur. H.R. Rep. 548, para. 13 (2005).

61. *Id.* para. 51.

well-informed and permanent resident-based electorate by paying heed to the specific political circumstances of New Caledonia, which was going through a “transitional” phase prior to gaining full sovereignty from France.⁶²

III. THE COURT’S DECISION

In the noted case, the European Court of Human Rights enforced the democratic ideals embodied in article 3 of Protocol 1 by granting the Georgian Government deference and autonomy in implementing free elections, but ultimately refused to extend that deference to the Government’s disenfranchisement of a significant portion of the country’s population.⁶³ As a threshold issue, the Court first held that a political party, independent of its candidates, could claim victim status under article 3 of Protocol 1.⁶⁴ But in noting the wide margin of appreciation granted to governments in implementing the Convention and also Georgia’s recent political turmoil, the Court concluded that the applicant party’s first two claims that the voter registration system was flawed and that the electoral commission had abused its power and committed electoral fraud were insufficient to cause a violation of article 3 of Protocol 1.⁶⁵ However, the Court determined that the applicant party’s right to stand for election was violated on account of the electoral commission’s de facto and unjustified disenfranchisement of voters in two regions.⁶⁶

The Court analyzed each of the applicant party’s three claims systematically. As a threshold issue, the Court determined whether the applicant party could properly claim victim status before the Court.⁶⁷ Only the year before, the Court held that when measures taken by national authorities restrict an individual candidate’s right to stand for election as a member of a party, the relevant party may claim victim status under article 3 of Protocol 1.⁶⁸ In the noted case, the Court stated that the rules of the Georgian Parliament were such that once an individual obtained a seat in Parliament, that seat would remain within the possession of the individual’s party in the event that he ceased

62. *Id.* paras. 61-62.

63. *Georgian Labour Party v. Georgia*, App. No. 9103/04, para. 89 (Eur. Ct. H.R. July 8, 2008), <http://www.echr.coe.int/en/hudoc> (follow “HUDOC database” hyperlink; search “Application number 9103/04”).

64. *Id.* para. 72.

65. *Id.* paras. 80, 92.

66. *Id.* para. 142.

67. *Id.* para. 73.

68. *Id.*

parliamentary activities.⁶⁹ Thus, the Court determined that in light of the enduring relationship of the individual to his party, the relationship between this applicant party and the individual was sufficient to satisfy the requirement set forth in *Russian Conservative Party*.⁷⁰ The Court then moved on to the merits of the case.

First, the Court evaluated the CEC's system of voter registration.⁷¹ The Court recognized that while the proper management of voter registration is a precondition for free and fair elections, it would be an "impracticable burden" to expect a flawless solution to the voter registration problem.⁷² The Court first noted that the complete failure of the November 2003 election was caused by the absence of accurate voter registration information, citing that at times entire apartments and streets were omitted from the registration.⁷³ According to the Court, the Georgian Government's February 2004 decree, which introduced a new "active" system of voter registration that obligated voters to register themselves at polling places, was a valid and acceptable attempt to rectify the problem.⁷⁴ Further, the Court stressed that Georgia should be granted a wide margin of appreciation when evaluating its compliance with its obligation under the Convention to ensure the free expression of the people through voting.⁷⁵ The Court extended this deference to Georgia's active system of voter registration that, while far from perfect, did in fact make the repeat elections fairer.⁷⁶ The fact that several democracies in Western Europe rely on the same system of registration further bolstered the Court's decision to grant the Georgian CEC wide latitude in this new voting system.⁷⁷

At the heart of the Court's reasoning on this issue was that any electoral legislation must be assessed in light of the political evolution and situation of the country, such that aspects that would be unacceptable in one country might pass muster in another.⁷⁸ Accordingly, Georgia's postrevolutionary status and continuing political turmoil prompted the Court's ultimately deferential stance toward Georgia's system of voter registration.⁷⁹

69. *Id.*

70. *Id.* para. 74.

71. *Id.* para. 82.

72. *Id.* paras. 82, 87.

73. *Id.* para. 85.

74. *Id.* para. 86.

75. *Id.* para. 90.

76. *Id.* para. 87.

77. *Id.* para. 91.

78. *Id.* para. 89.

79. *Id.* paras. 89-93.

Second, the Court evaluated whether the composition of the CEC violated the applicant party's right to stand for free elections under article 3 of Protocol 1.⁸⁰ The fact that no uniform system of electoral composition or functioning existed among the contracting states to the European Convention on Human Rights persuaded the Court to grant Georgia a wide margin of appreciation in how it organized its own CEC.⁸¹ The Court agreed to extend this deference to Georgia as long as its electoral commission ensured the free expression of Georgians in choosing their legislature.⁸² While the applicant party contended that seven of the fifteen members of the CEC were either directly or indirectly appointed by the Georgian President and his party, a number the Court recognized as high in comparison to the rest of Europe, the Court ultimately refused to find a violation based solely on conjectures, however plausible, of electoral fraud.⁸³ The Court underscored the CEC's obligation to conduct elections in a "transparent" manner and to maintain impartiality from political exploits.⁸⁴ It also noted that the potential for fraud and exploitation was ripe—with a CEC controlled by the President's party, an inherent conflict of interests could arise when administering elections and resolving disputes.⁸⁵ The Court recognized the lack of sufficient checks and balances against the President's power and the great possibility of outside political pressure on the CEC. However, because the applicant party failed to submit any evidence of misappropriated votes or electoral fraud committed by the CEC during the repeat parliamentary elections, the Court found no violation, based on the applicant's second claim, of article 3 of Protocol 1.⁸⁶

Third, the Court turned to the issue of the disenfranchisement of the Khulo and Kobuleti electoral districts in the repeat parliamentary elections of March 2004.⁸⁷ The Court initially established the standard by which it was to judge the disenfranchisement of these two regions—universal suffrage.⁸⁸ Any "unjustified departure" from universal suffrage risks undermining the validity of the freely elected legislature and its laws.⁸⁹ The Georgian Government conceded disenfranchisement but

80. *Id.* paras. 100-101.

81. *Id.* para. 103.

82. *Id.*

83. *Id.* paras. 106-109.

84. *Id.* para. 101.

85. *Id.* paras. 107-108.

86. *Id.* paras. 109-110.

87. *Id.* para. 119.

88. *Id.*

89. *Id.*

contended that even if the regions were able to vote, those votes would not have given the party the seven percent threshold needed to enter Parliament.⁹⁰ The Court rejected this argument, reasoning that even if past elections in those regions elicited a weak turnout for the applicant party, voters' minds change and the franchise is not static.⁹¹ What is at stake, the Court espoused, is not the possibility of winning the election but the "right to stand freely and effectively for it."⁹²

The right to stand for free and fair elections under article 3 of Protocol 1 is not absolute.⁹³ The Court noted that Georgia may derogate from the article's provisions as long as there is no arbitrariness or lack of proportionality between the disenfranchisement and the legitimate aim pursued by Georgia.⁹⁴ Within the framework of this balancing test, the Court set forth a clear question to answer: "whether, in the present case, the State authorities did everything that could reasonably have been expected of them in order to ensure the inclusion of Khulo and Kobuleti voters in the repeat parliamentary election prior to the final vote tally."⁹⁵

First, the Court concluded that the CEC's decision to annul the repeat parliamentary election results from the two regions in April 2004 was "questionable."⁹⁶ The Court expressed significant hesitation in sanctioning the CEC's cancellation of the electoral district results for the Khulo and Kobuleti regions in their entirety without hearing testimony and without investigation.⁹⁷ The fact that the CEC set aside the results for the electoral districts as a whole without proper legal basis or due process guarantees led the Court to conclude that the CEC's actions were purely arbitrary.⁹⁸ Georgia's Electoral Code, article 105(13), lays out specific procedures to follow in case of disputed elections, but the CEC's flagrant disregard of such procedures and its decision to annul the election results, absent explanation, "smacks of arbitrariness, in the Court's view."⁹⁹

Second, the Court ruled on the issue of the failure to secure the repeat election in the two districts and the vote tally of April 18, 2004.¹⁰⁰ The Court initially noted that Georgia could not be absolved of its

90. *Id.* para. 120.

91. *Id.*

92. *Id.* para. 121.

93. *Id.* para. 124.

94. *Id.*

95. *Id.* para. 125.

96. *Id.* para. 127.

97. *Id.* para. 128.

98. *Id.* para. 130.

99. *Id.*

100. *Id.* para. 131.

responsibilities under article 3 of Protocol 1 to hold free elections in the Khulo and Kobuleti districts.¹⁰¹ Although Georgia noted tensions between central and local authorities, which escalated into an armed clash on election day, this was not enough for the Court to absolve Georgia of liability for failing to hold elections there.¹⁰² Further, although the circumstances of the case indicated hostilities in the region, Georgia did not attempt any additional action aimed at including the Khulo and Kobuleti voters in the country-wide elections after the failure to open polling stations on April 18.¹⁰³ Instead, the Court emphasized Georgia's positive obligations under article 3 of Protocol 1.¹⁰⁴ Given the concept of implied limitations under the article, the Court conceded that it could, in theory, accept Georgia's argument that the finalization of the election results on April 18 served the legitimate interest of securing the maintenance of the normal legislative process.¹⁰⁵ However, the Court rejected this proportionality analysis, taking into account the importance of the principle of universal suffrage.¹⁰⁶ The Court refused to accept the legitimate interest of having a new parliament elected at a "reasonable interval" as a sufficient justification for Georgia's inability or unwillingness to undertake any reasonable measures to secure the close to 60,000 voters who had been disenfranchised in Khulo and Kobuleti.¹⁰⁷ Therefore, the Court ruled that the CEC's April 2, 2004, decision to annul the election results in those two electoral districts was not made in a "transparent and consistent manner" and that the CEC's lack of sufficient reasons for its decision and lack of a legitimate aim resulted in an unjustified disenfranchisement that violated the free elections clause of article 3 of Protocol 1.¹⁰⁸

IV. ANALYSIS

The European Court of Human Rights' decision in the noted case is not surprising. The opinion reflects well-established case law, familiar tests, and recurring controversies regarding free and fair elections under the Convention. While the noted case is not marked for a controversial decision or a revolutionary dispute under the law, it represents a questionable trend in decisions by the European Court of Human Rights

101. *Id.* para. 136.

102. *Id.* para. 133.

103. *Id.* paras. 133, 137.

104. *Id.*

105. *Id.* para. 138.

106. *Id.*

107. *Id.* para. 139.

108. *Id.* para. 141.

concerning the struggle by former Soviet States to conform to the basic tenets of Council of Europe membership.

The Council of Europe itself is not responsible for democracy in Europe; it provides only a forum in which “democratic practices can be debated and developed.”¹⁰⁹ In the noted case, the Court encountered little to debate in finding a violation of article 3 of Protocol 1 due to the de facto disenfranchisement of a substantial portion of the Georgian population; however, the Court’s decision did not develop the concept of democratic processes under the European Convention on Human Rights.¹¹⁰ By using, among other analytic elements, a proportionality test found across the spectrum of its prior decisions, the Court found a violation by using established precedent without any novel reasoning.¹¹¹ However, case law involving article 3 of Protocol 1 is different from other European Convention on Human Rights case law.¹¹² This is due to the way the article is structured and the Court’s subsequent interpretation of that structure, perhaps granting itself more leverage in its holdings.

The European Convention on Human Rights protects the right to free elections in a different manner than it protects other rights.¹¹³ The right to free and fair elections is loosely structured and does not contain the qualifying paragraph or language of other articles.¹¹⁴ Therefore, the Court’s acknowledgement of “implied limitations” under article 3 of Protocol 1 allows it to develop various sub-principles within the right to free elections, while recognizing that the right is not absolute.¹¹⁵ The proportionality test utilized by the Court in the noted case demonstrates that the question about legitimacy is not whether the restrictive measure—annulling the election results and failing to open the polls—pursues an aim that is specified in the European Convention on Human Rights, but rather whether the objective in itself is legitimate.

The Court is challenged to find a balance between applying the deferential analysis of the proportionality test articulated above, while still scrutinizing and reforming the new democracies of Central and Eastern Europe.¹¹⁶ In the noted case, the Court extended very little deference on the question of proportionality—the disenfranchisement

109. PRATCHETT & LOWNDES, *supra* note 19, at 8.

110. *See generally Georgian Labour Party*, App. No. 9103/04, paras. 72-138.

111. *Id.* para. 138.

112. Sweeney, *supra* note 17, at 30-31.

113. *Id.*

114. *Id.*

115. *Mathieu-Mohin v. Belgium*, 113 Eur. Ct. H.R. (ser. A.) 22, 23 (1987); *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 458.

116. Sweeney, *supra* note 17, at 30.

was not proportionate to the aim sought by Georgia, which the Court incidentally found illegitimate.¹¹⁷ However, it appears that the balance the Court strikes between granting deference to the state and promoting democracy by still criticizing the state can be found in the remaining sections of the opinion. While the Court disavows the ultimate result of the CEC's decisions regarding the parliamentary elections, it promotes blatant violations of Western European democratic election law. The Court applied immunity to Georgia based on its status as a post-Soviet State, sanctioning questionable election activities as part and parcel of the struggles that an emerging democratic state must endure.¹¹⁸ The deference in favor of Georgia that the Court extended in the first two holdings effectively shielded that State from liability. This trend is traceable to the Court's jurisprudential tendency to grant substantial deference to new democracies' implementation of free and fair elections.

This jurisprudence should be questioned. The Court repeatedly holds that features of an electoral system that are unacceptable in the context of one system may be justified in another.¹¹⁹ This recurrent holding is likely an outgrowth of the Council of Europe's philosophy that democracy is not a "tangible outcome" for Member States to achieve but is rather a developing concept that emerging democracies must strive to attain.¹²⁰ Such a philosophy only bolsters, if not inspires, the Court's persistent decisions not to become involved in the question of how these new democracies should run their elections. It is therefore necessary to ask at what point the Council of Europe and the Court shall cease to grant these countries "new democracy" status and begin subjecting them to the same level of scrutiny that the rest of Europe receives.

V. CONCLUSION

Ultimately, the Court's decision in the noted case is one of necessity and careful calculation. The Court tried, and succeeded, to extend a deliberate level of deference to Georgia in not finding it liable for the first two allegations brought against it. At the same time, the Court attached a condition to that deference—the proportionality test. The Court made clear to Georgia and all other post-Soviet States, that their

117. *Georgian Labour Party v. Georgia*, App. No. 9103/04, para. 138 (Eur. Ct. H.R. July 8, 2008), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink; search "Application Number 9103/04").

118. *Id.* paras. 93, 110.

119. *See Mathieu-Mohin*, 113 Eur. Ct. H.R. (ser. A.) at 22-26; *Py v. France*, App. No. 66289/01, 42 Eur. H.R. Rep. 548, 564-67 (2005).

120. PRATCHETT & LOWNDES, *supra* note 19, at 8-9.

compliance with the European Convention on Human Rights was indeed required. However, absent egregious violations, the implied limitations which the Court has read into the free and fair elections clause would have sheltered Georgia from liability—all in an attempt to strengthen a fledgling democracy. The fact that the Court applied the proportionality test ultimately to hold Georgia liable for its disenfranchisement of the people in Khulo and Kobuleti indicates that the Court's deference itself has implied limitations. Holding Georgia liable on one, but not all, counts represents the Court's calculated attempt to regulate Georgia's behavior while still fostering the democratic government it seeks to attain.

Melissa D. Marsh*

* © 2009 Melissa D. Marsh. J.D. candidate 2010, Tulane University School of Law; B.A. 2006, University of California at Berkeley. The author would like to thank her family and friends who have supported her throughout this endeavor.