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23 March 18:00 – 19:30 Judge Lech Garlicki

Democracy in the European Convention on Human Rights

1. Defining Democracy

- “Democracy” is a complicated notion. The meaning of democracy is unclear and ambiguous, subjecting it to misuse and abuse.
- Karl Popper once observed: “Democracy is the word for something that does not exist.”
- From an axiological perspective, the notion of democracy attracts sympathy: it is better to protect democracy than to attack it.
- Thus democracy is usually enshrined in some form of constitutional/ political documents. However, these documents often take the notion of democracy for granted without attempting to define it.
- In this general perspective democracy functions as a value/ principle/ norm.

2. Democracy in the European Convention on Human Rights and the Council of Europe

- The Preamble of the 1949 Statue of the Council of Europe (“1949 Statue”)¹ provides that member states are “reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of *individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy*”.
- Similarly, the Preamble of the European Convention on Human Rights (“ECHR”)², provides that member states are “reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an *effective political democracy* and on the other by a common understanding and observance of the Human Rights upon which they depend”; thus an effective political democracy is seen as a necessary prerequisite of the protection of human rights.
- It should be noted that the language of both documents are more focused on human rights than democracy. Moreover, the notion of democracy is employed in a general sense as neither document attempts to further develop the notion.

¹ Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>

² Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf

- The 1949 Statue and the ECHR bear not only the virtuous but also the darker side of Europe's common heritage: drafted in the wake of World War II, the documents were very much drafted in memory of the Nazi regime and the Soviet communist regime.
- Therefore neither document should be seen in an abstract manner. Rather, these documents were created in response to these historical incidents and are intended as a tool to protect Europe against retreating back to totalitarianism.
- Furthermore, the drafters of the ECHR are well aware that these totalitarian regimes are not necessarily products of violent resolution; Hitler and the Nazi regime, for instance, emerged out of the democratic German constitution.
- Thus the ECHR's attachment to democracy is not an abstract one. There are procedural as well as substantive limits to what could be achieved in the exercise of individual rights as well as what amounts to the use and abuse of individual rights.
- It was observed by the court in *Ždanoka v Latvia*, no. 58278/00, ECHR 2004 at §79, that a person or a group of persons cannot rely on a right enshrined in the ECHR in order to attempt actions that in practice amounts to actions that would destroy the rights and freedoms protected by the ECHR; any such destruction would put an end to democracy³.
- The substantive dimension of democracy in the ECHR: democracy is not regarded as a specific right. Rather democracy provides a general model for the organisation of the state and society and serves as the background for the proper protection of human rights. It is assumed that democracy contains certain intuitive onus, content and meaning. For example democracy has bearing on the exercise of state power, the expression of majority opinion as well as the protection of the minority and the opposition.
- The procedural dimension of democracy: democracy is also associated with procedures which ensure the will of the people is properly articulated and respected by those in power.

3. Democracy Case Law in the European Court of Human Rights

- It is necessary to formulate specific rules and principles if democracy is to be deployed in the assessment of legal issues and administrative decisions.

³ See also Article 17 of the ECHR: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

- The European Court of Human Rights refers to democracy constantly in their decisions and the case law in this regard is rather developed. The case law is binding on all member states of the Council of Europe.
- The significance of these decisions is that they provide formulations of democracy in a legal nature, for example whether restrictions on a certain right is necessary in a democratic society and whether such restrictions are compatible with other requirements of a democratic society.
- The court has stated that democracy is the only political model contemplated by the ECHR; accordingly it is the only model compatible with the Convention.

4. **Democracy Case Law in the European Court of Human Rights: Pluralism**

- The court has associated democracy with three notions, namely pluralism, change and dialogue.
- Pluralism is the most important and developed notion among the three. It refers to the structure of state and society.
- There are 3 main principles regarding pluralism:
 - 1) There can be no democracy without pluralism
 - 2) The state has particular responsibilities to act as the ultimate ground of the principle of pluralism
 - 3) There are positive obligations on the state to take positive actions. Failure to fulfil these positive obligations violates the ECHR.
- Pluralism is based on the assumption that *uniformisation* of the state is neither plausible nor acceptable. This is because the very essence of a democratic society is the existence of different opinions, beliefs, preferences and ideas; a democratic state should provide mechanisms and procedures for the free expression of these ideas.
- It should be recalled that Europe has been scarred by the emergence of totalitarian regimes which propagated particular ideologies that were regarded as the only correct narrative. Thus, it is clearly intended by the drafters of the ECHR and the court that such vision must be rejected.
- Pluralism is closely related to political rights. Integral to political rights is the ***freedom of expression***, in particular the freedom of political speech and political debate. The margin of appreciation with regards to the freedom of expression is narrow, and the court has been vigorous in defending this right. The freedom of expression also protects speeches that may be offensive to the state and other persons, thus it is in a way the freedom of unpopular expression.
- The ***right of peaceful assembly*** is closely related to the freedom of expression. Similarly the right of assembly protects demonstrations that may annoy persons with opposing opinions. Moreover, this right also imposes a positive duty on the

state to ensure that participants of an assembly must not be subjected to the fear of physical violence due to their beliefs.

- Even if a demonstration is unlawful under domestic law, participants may still enjoy protection by the ECHR. This is particularly so if demonstrators do not engage in acts of violence; it is important for state authorities to show a certain degree of tolerance towards peaceful protests.
- Pluralism mean that the state is under an obligation to provide **free elections**. The ECHR is very specific in this regard, as seen in Article 3 of Protocol No.1 to the ECHR: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. The implications of the right to free elections are as follows:
 - 1. Free election implies that elections must be fair and inclusive to allow different shades of opinions to be manifested and represented. Elections must be conducted in a fair and honest manner and possibly enable full parliamentary representation.
 - 2. Free election encompasses the right to vote and the right to stand for elections. Certainly some regulations on these rights are necessary (e.g. age), but these regulations must respect the principle of equality and non-discrimination. The state cannot impose restrictions on a particular candidate based on her or his political orientation other than proportional to the political reality of society. In other words, these restrictions should not hinder the free expression of people in their choice of representatives in the legislature. The court has been demanding in enforcing electoral rights and the margin of appreciation is rather narrow.
 - 3. The obligation to provide free elections does not create an obligation to introduce a specific electoral system. States are free to choose from different models in light of their political environment, however the chosen model must enable the free expression of the people. The margin of appreciation is wide; for instance, in *Yumak and Sadak v Turkey*, no.10226/03, ECHR 2008, the court ruled that the 10% threshold required to secure seats in the Turkish Parliament did not violate the right to free elections.
 - 4. The provision of free elections does not only guarantee the representativeness but also the effective operation of the legislature. There may be a need to make compromises in the electoral laws for the parliament’s effective operation. Nevertheless the structure of the electoral system must provide a level playing field for the majority and the opposition and the assumption is that today’s opposition must have a fair chance to become tomorrow’s majority.
 - 5. The right to free elections extends to the all branches of the legislature, such as regional parliaments and subsidiary organs of the parliament. However, the right

does not extend to elections with regards to the executive branch, such as the election of state president and prime minister. The court ruled that the right to free election is not applicable to executive elections even if national constitutional provides for universal suffrage.

- The **freedom of political party** is integral to the right to free elections⁴. This is because the plurality of political parties represents different shades of opinions in society and provides people with genuine choices in the constitution of the legislature. The implications of the freedom of political party is as follows:
 - 1. The freedom of political party implies that there is an unlimited possibility to create new political parties. It is a positive obligation of the state to ensure the continued existence of different parties and that the parties may advance their political agendas. Moreover, political parties should enjoy proper access to the mass media and public opinion.
 - 2. No party should enjoy exclusive privileges under the Constitution, domestic laws or political practices at the expense of other parties.
 - 3. Any interference with the freedom of political party should be subjected to strict scrutiny. The margin of appreciation is narrow. However, some restrictions may be necessary in a democratic society.
 - 4. Political parties are expected to remain loyal to the state. This requirement however does not preclude parties from promoting revolution, autonomy or secession so long as it is achieved through peaceful means, viz. convincing the electorate that there is a need for change. But, under exceptional circumstances where the parties' actions amounts to the destruction of the democratic institution of the state, the parties may be dissolved or removed from the parliament and prohibited from participating in future elections. The court has ruled in favour of the dissolution of political parties in, for instance, *Refah Partisi (The Welfare Party) and Others v Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003 (where the party aims at setting up a regime based on sharia); and *Herri Batasuna and Batasuna v Spain*, nos. 25803/04 and 25817/04, ECHR 2009 (where the party has ties with terrorist organization ETA).
- The **freedom of press** is another essential complimentary right to the right to free elections. Press refers to all forms of audio-visual media. The media is of particular importance in ensuring the transparency of the political process. Furthermore, the state has positive obligations to ensure, firstly, there is no media monopoly and that the pluralism of audio-visual media reflects political diversity; secondly, relevant information should be accessible to the media. These positive obligations are particularly weighty with regards to state sponsored broadcasting networks.

⁴ See Article 11 of the ECHR "Freedom of assembly and association".

- Democracy in the ECHR extends beyond individual rights and encompasses other institutions and arrangements of modern society. For instance, democracy provides for the separation of power between state machineries and the political sphere of the government. Examples of such are the independence of the judiciary, the autonomy of local governments and the autonomy of academic institutions.
- The autonomy of academic institutions is of particular importance in safeguarding pluralism. The state has a positive obligation in ensuring **academic freedom** and the freedom of expression. This obligation carries extra weight with regards to public universities.
- However, academic freedom is not absolute, as the state must provide proper instructions on the design of the curriculum and the quality of teaching etc. The **freedom to teach** usually comes into conflict with the state when teachers present materials that counter the official opinion. The ECHR certainly does not offer much protection to statements that are fallacious, such as that the Earth is flat. However, disciplines such as social sciences are often open to interpretation. The interpretation of historical events, for instance, is very flexible, and the court has ruled that the state should not forbid a particular interpretation of historical events so long as the subject matter is genuinely controversial in nature. Yet if the interpretation of historical events is completely devoid of any connection to factual evidence and aim not at discovering/rediscovers truth but promoting hate, the ECHR will not offer any protection. For example, the court has been clear that holocaust denial speech is not under the protection of the ECHR.

5. **Democracy Case Law in the European Court of Human Rights: Change**

- Change means that all political actors must have a fair possibility to exert influence in the political sphere and that there should be periodic alternations of power between the political actors. In other words, today's opposition should be the majority of tomorrow, and today's majority should be the opposition of tomorrow.
- All political parties should be able to promote their own vision and ideologies. Moreover they should be able to criticise the existing system, as political debates are at the very core of the concept of democracy.
- The question is how far such criticisms can go. In other words, can a political group promote departure from the existing system of statehood and government? The case law has been quite elaborated in this regard and the court has observed that political groups may promote radical change that revises the existing constitution, changes the position of minority groups and even dissolves the state so long as two requirements are satisfied:

1. The means deployed to achieve the proposed ends must be legal and moral. Thus the only legitimate way to advance change is to convince the electorate and acquire the necessary majority in the parliament. There is no room for violence.
2. The change proposed must be compatible with the principles of democracy.

6. Democracy Case Law in the European Court of Human Rights: Dialogue

- Lastly, democracy encourages discussion and dialogue. All political actors should be able to express their opinions and exercise tolerance and respect for other opinions.
- Violence, incitement of violence and the promotion of hate is incompatible with democratic principles.

7. When There Is No Democracy: the Right of Rebellion

- The ECHR is drafted on the assumption that all member states are functioning democracies, thus the convention does not provide much insight into instances where there is a lack or dysfunction of democracy.
- However, when principles of democracy is not observed by those in power, citizens may appeal to natural laws: wo/men have a right to rebellion and revolution. It is a natural right to resist totalitarian regimes and remove tyrants.
- All existing democracies have exercised this right at some point of their history: the Glorious Revolution, the French Revolution, the American War of Independence and the recent experiences of post-communist European countries are some examples.
- It is under the most extraordinary circumstances where there is no other alternative that this natural right should be invoked to eliminate undemocratic systems. But exercising this right would also imply the abandonment of treasured values such as the rule of law, non-violence and human rights.
- Moreover, it is possible that the right to rebellion can be exercised in a more civilised manner, for instance, civil disobedience. There are certainly no legal framework for this, and this issue is on the borderline of the ECHR. Nevertheless, courts may still be inclined to offer protection to unlawful activities especially where protestors are exercising rights and values enshrined in the convention.

8. Q&A

1. *What is the rationale behind Article 3 of Protocol 1 in that the ambit of the right to free elections does not extend to the executive branch of government?*

- The situation of the executive branch is rather complicated because many European States are monarchies, thus the introduction of democratic elections in the executive would put the monarchies in doubt.
 - It is however possible to rely on other provisions of the ECHR to enforce the right to free elections in the context of executive elections. For instance, in *Sejdic and Finci v Bosnia and Herzegovina*, no. 27996/06 and 34836/06, ECHR 2009, two applicants relied on non-discrimination provisions in the convention (viz. Article 14 and Article 1 of Protocol 12) to argue against ethnic restrictions on the persons eligible to stand for state presidency. The court ruled that the applicant's ineligibility to stand for elections violates the convention's non-discrimination provisions taken in conjunction with Article 3 of Protocol 1 (right to free election).
2. *Are there instances where the concept of change – for instance, that there should be alternation in political power, that political actors are allowed to advance change that may restructure the exiting government etc. - came up in the European Court of Human Rights?*
- There are no cases where the applicants directly alleged that a political group is dominating the political sphere hence hindering change.
 - *Communist party of Russia and Others v Russia*, no. 29400/05, ECHR 2012, concerns change in terms of the alteration of political power. The applicants were candidates from several opposition parties contesting an election for the lower chamber of the Russian federal parliament. They alleged that there was unfair media coverage during the election, namely that media coverage was bias towards the ruling party. The crux of the applicant's argument was that the elections had not been "free" due to the biased coverage, hence there had been a violation of Article 3 of Protocol 1 to the ECHR (right to free elections). The court ruled that there was no violation because: (1) the applicants failed to demonstrate that there was political manipulation of the government; (2) the state had taken steps to ensure the visibility of the opposition parties.
 - *United Communist Party of Turkey and Others v Turkey*, no. 133/1996/752/951, ECHR 1998, demonstrated how political actors may advance change with non-violent and democratic means. The applicants were the United Communist Party of Turkey and its associates ("TBKP"). TBKP was dissolved by the Turkish constitutional court on the grounds that the TBKP undermines territorial integrity and national unity by advancing a sectarian identity, namely the Kurdish nation. TBKP alleged that there was a violation of Article 11 of the ECHR (freedom of assembly and association). The court ruled in favor of TBKP. Upon referring to TBKP's programme titled "Towards a peaceful, democratic and fair solution to the Kurdish problem", the court observed, at §57: "one of the principal characteristics of democracy... [is] the possibility it offers

of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression".

3. *What are the criteria deployed by the court in assessing whether a demonstration/movement by the opposition is a threat to national security/ existence of the state?*
 - There are no cases where the court accepted that a demonstration created danger to the existence of the state or national security.
 - The ECHR only offers protection to peaceful demonstrations, as specified by Article 11(1) of the ECHR: "Everyone has the right to freedom of peaceful assembly". Once a demonstration escalated into violence and riot, the court will not offer any protection. However, individual acts of violence are not sufficient to invalidate the protection. It has to be shown that the organisers of the demonstration intended to incite violence or that they allow and accept violent behavior of the protestors.
 - Nevertheless, the response of the state must adhere to principles of proportionality. In a Turkish case the participants organised daily demonstrations at a public park; the demonstration was unlawful but peaceful. The participants were later prosecuted. The court ruled that criminal punishment was disproportionate because the demonstration was peaceful, of small scale and not disruptive to public order.

4. *Recent decisions of the European Court of Human Rights regarding the United Kingdom resulted in negative reactions from the UK government and the media. As a former judge of the court, where do you think the line should be drawn between subject matters that fall within the jurisdiction of the court and those that should be handled by democratically elected administrations?*
 - This is a question concerning the margin of appreciation.
 - The court would often take domestic legislation and practices into consideration when deciding cases.
 - Generally speaking, the court adopts a comparative approach in deciding the margin of appreciation i.e. to see if there is a common approach taken by other European countries. If there is no common approach, the court will usually accept a wider margin of appreciation and decide the matter according to the particularities of the state. However if there is a common European approach to the subject matter, the court will be left with a narrower margin of appreciation.
 - The negative reactions from the UK are unfortunately very good example of what should not take place within the system of the convention, as the issues could have been solved easily by the UK legislature.

5. *According to the formulation of the court, the content of human rights overlaps with democracy but it does not exhaust democracy. Thus there will be instances where principles of democratic governance are being violated in the absence of human rights violation. Under such instances the court is not in the position to intervene. Do you think that there should be an autonomous right to democratic governance? Or should existing rights be expanded in scope to cover the grey areas?*
- The essence of the question is whether the court should intervene in every situation which the court disproves of.
 - If the court is given such power to intervene, then the court will have to formulate relatively rigid standards for the sake of predictability and clarity. But it is difficult to formulate a universally applicable principle of democracy. For one thing, the constitutions of the member states are vastly different. To impose a universal standard of democratic governance that is accepted by all nations is difficult.
 - Instead, so long as each constitution adheres to the general principles of democracy and can adapt to changes such as those imposed by case law this is suffice.
6. *Suppose a case was brought before the court alleging that the National People's Congress Standing Committee's 31 August decision was incompatible with principles of democracy under the ECHR. How will you decide?*
- The answer is very simple: no jurisdiction. The court has no authority to intervene with political matters.
 - However, if a similar restrictive system is introduced in Europe, there may be other ways to address the matter. For instance the Parliamentary Assembly of the Council of Europe has the power to investigate, recommend and advise on political matters of member states such as the compliance with democratic principles.
 - As far as the European Court of Human Rights is concerned, it is the clear intention of the ECHR that political matters of the state should not be included within the jurisdiction of the court. The general principle remains that no single political party should dominate the political sphere for a prolonged period of time and that the composition of the government should be sufficiently diverse to actualise pluralism.