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**The links between democracy and human rights under the case-law of the European Court of Human Rights**

**by Jean-Paul Costa, President of the European Court of Human Rights**
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1. Introduction

The democratic ideal permeates the Convention in every respect – its historic origins, its spirit, its content and, as I will show in my remarks, the case law of the Court.

Drafted as a matter of priority by the democracies that founded the Council of Europe, the Convention – and the first Protocol – reflected the essential components of political liberty and was intended to protect them. It was a mutual pact between States to collectively safeguard the freedom of their peoples and the foundations of their democratic systems. It made States **accountable**, in the international legal order, to their own citizens – indeed, to all persons within their jurisdiction. It also made them accountable to each other. The power originally conferred on the Committee of Ministers to determine whether or not there had been a violation of the Convention meant that Member States would in effect pass judgment on the internal affairs of a sovereign State. A more direct means was also included – the inter-State complaint procedure (although experience has shown that States are very reluctant to use it).

The Convention is a catalogue of the core civil and political rights that fall into two sub-groups. The first of these guarantees freedom **from** the State (torture, unlawful arrest, injustice, invasion of privacy, deprivation of property, etc.). The second guarantees freedom **to** engage in political activity – in the broad sense of the term – and participate in public life at every level. It is on these rights – mainly Articles 10 and 11 of the Convention, and Article 3 of the First Protocol – that I will focus today.

In comparison to more recent texts, such as national bills of rights or the EU Charter of Fundamental Rights, the Convention can seem narrow and incomplete. Social rights, environmental rights, children's rights and citizens' participation rights, for example, which are part of the acquis of mature democracies, are absent from the Convention. However, it must be recalled that the Convention is not a solitary

instrument, but one element in a broader constellation of conventions and other texts developed by the Council of Europe since the 1950s. True to its progressive mission of working to improve the quality of democracy in its Member States, the Council has built up a comprehensive acquis that provides a composite portrait of a stable, transparent, vigorous and effective democracy. On many occasions, the Court has drawn inspiration from this acquis to interpret the Convention. It would therefore be better to look on the Convention as the skeleton that supports and protects the democratic state. Through its extensive case law, composed of cases from mature democracies as well as emerging democracies, the European Court has put flesh on these bones.

In a democracy, the role of the judge is an important but well-defined one. The phrase "Government of judges" carries very negative connotations – the exercise of power by a professional elite, with no accountability to the people and therefore no legitimacy. Judicial restraint is thus a cardinal virtue in a democracy, along with an appropriate degree of deference to the elected government and legislature. The European Court is sensitive to the boundaries of the domain of the domestic judge, as well as to those of its own competence.

But democracy rests upon the rule of law, and the latter is in the hands of the judge. It is for him or her to ensure that no person or group is excluded from the democratic system, and that the rights of minorities are observed by even the most sweeping of parliamentary majorities. It also falls to the judge to ensure that the procedures that govern and legitimise the exercise of power are fully respected.

I will now develop these points with reference to the Convention case law.

## 2. The right to political activity

### (i) Freedom of expression – watchdogs and whistleblowers

The political rights par excellence of the Convention are Articles 10 and 11 – freedom of expression, and freedom of association and peaceful assembly. The observance of these rights, which may entail positive obligations for the State in certain circumstances, ensures the conditions for an open, vigorous and robust political debate within that country. There is a natural overlap between the two provisions, and the Court has taken the same approach to interpreting and applying them. Where a case concerns political speech and/or political activism, interference by the authorities is subject to the strictest scrutiny.

One thinks straightaway of the particular care with which the Court has defended the freedom of the press. The rights and prerogatives of the fourth estate enjoy a very high level of protection in the Convention system.

In the case Lingens v. Austria, the Court addressed the importance of the function of the press to act as a public watchdog. It stressed that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment". This freedom covers statements and ideas that "offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". A free, critical press is one of the best means for the general

public to form an opinion on those who enter the political arena and wield power and influence in society. The Convention requires such persons to display forbearance and restraint when subject to intense public scrutiny, in the name of the "freedom of political debate [that] is at the very core of the concept of a democratic society which prevails throughout the Convention".

In the Castells judgment, the interference complained of was all the more serious. A Spanish Senator, member of the Basque party Herri Batasuna, was prosecuted for an article he wrote in a newspaper alleging that right-wing extremists were responsible for a series of killings in the Basque region, but the authorities had not tried to apprehend those responsible. The Court stated emphasised the special importance of freedom of expression for an elected representative of the people. In view of his role in representing his electorate and defending their interests, interferences with their Article 10 rights called for the closest scrutiny.

It continued: "In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."

The Article 10 case law rights also acknowledges the watchdog role of NGOs. In a case against Latvia[1], decided in 2004, an environmental association (V.A.K.) complained that it had been ordered to pay damages to the chair of a municipal council for critical remarks it made about her in a newspaper article. The Court said that the participation of NGOs is essential to a democratic society. In order for them to perform their functions, they should be able to divulge information of public interest and to comment upon it, thereby contributing to transparency of the activities of public authorities.

This point was developed further in the Steel and Morris case the following year. There the Court stated: …in a democratic society even small and informal campaign groups, … must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment."

Earlier this year, in the case of Guja v. Moldova, the Grand Chamber considered a complaint from an applicant that he had been dismissed from his position as head of the press service of the office of the Prosecutor General. The reason for his dismissal was that he had passed on to the media letters showing that political pressure was being exerted in relation to the investigation into allegations of police brutality. This raised the question of the extent to which whistleblowers in the civil service can claim the protection of Article 10. A number of important considerations are at stake in such circumstances. The task of civil servants is to help and not hinder the democratically elected government, and so the duty of loyalty and reserve is of special significance for them. As against that, a civil servant may gain knowledge of matters of strong public interest, such as illegal conduct or wrongdoing within the administration – in certain circumstances, the divulging of such information will be protected by Article

[1] *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, 27 May 2004

10. One of the elements considered by the Court was the damage caused to public confidence in the Prosecutor's Office by the disclosure. It found that this was outweighed by the public interest in being informed about direct political interference with the administration of justice. The Court "reiterate[d] in this context that open discussion of topics of public concern is essential to democracy and regard must be had to the great importance of not discouraging members of the public from voicing their opinions on such matters"

As these cases show, the right of freedom of expression is an important safeguard of the quality and integrity of a State's democratic system. It ensures the ongoing accountability of national authorities to public opinion, and counter-balances the effects of what used to be called propaganda and is now known as news management (or "spin").

(ii) Freedom of association and assembly

Freedom of association and the right to peaceful assembly, guaranteed by Article 11, are the extension of political speech and public debate protected by Article 10. As I mentioned earlier, the Court's reading of Article 10 colours its interpretation of Article 11, and the principles it has developed under Article 10 are fully transposable to Article 11. As with political speech, the Court submits any restrictions on political association to very intense scrutiny. Restrictions on political parties affect not just their freedom of association, but also democracy in the State concerned.

It is evident that any group which repudiates democratic principles and/or advocates violent means to achieve their political ends is excluded from the protection of Convention, by virtue of Article 17 (e.g. the German Communist Party case in the 1950s). Moreover, the threat that such groups pose to the democratic system and institutions of a State provides the justification for the State to restrict and even completely prohibit their activities.

Of the various cases brought before the Court by political parties complaining of interference in their activities, the outstanding one is surely the Refah case, decided first by a Chamber (2001) and then re-heard by the Grand Chamber, which gave its ruling in 2003. The case is outstanding in several respects. The applicant party was not a marginal or minority participant in Turkish political life, but the largest party in the Grand National Assembly – it had already been in office as part of a coalition, and was anticipated to gain enough seats to govern alone at the subsequent general election. It was therefore at the height of its political power when the Constitutional Court ordered its dissolution on the ground of its incompatibility with the principle of secular government.

The long and detailed reasoning of the Court says much about the concept of democracy upon which the Convention rests. It noted that the use of the phrase "necessary in a democratic society" implied that democracy is the only political model that is compatible with the Convention. Freedom to form political parties ensures the pluralism that is a condition sine qua non of democracy. It matters not that a party promotes controversial, "irksome" ideas, or that it seeks to change the legal and constitutional structures of the State. What matters is that the party be committed to exclusively lawful and democratic means, and that its programme be compatible with fundamental democratic principles. The Court acknowledged the possibility that a totalitarian movement, organised as a political party, might take advantage of the

openness of the democratic system to establish itself and then do away with that system. But it stressed that there must always be **convincing and compelling** reasons to justify restrictions on freedom of association. More serious restrictions, such as dissolving a party, would be justified only in the most serious situations. In addition, the Court referred to the positive obligation on States to impose on political parties the duty to accept and respect human rights and to effectively forbid them to put forward a political programme incompatible with the fundamental principles of democracy.

Applying these principles to the situation of the Refah party, and assessing carefully its agenda, its behaviour and the means it was ready to take, the Court concluded that the Constitutional Court of Turkey had remained within its restricted margin of appreciation.

One might reformulate the Court's strict approach as follows: when it comes to political parties, the only restrictions that can be accepted as necessary in a democratic society are those which are convincingly shown to be necessary to that society's democratic system.

I would also mention, briefly, the judgment delivered by the Grand Chamber in the case Gorzelik v. Poland (2004). There the Court affirmed the importance of civil society for the proper functioning of democracy. A healthy, vibrant civil society enables greater participation of citizens in the democratic process of their country. This is particularly true for persons belonging to minorities, and the Court cited with evident approval the preamble of the Council of Europe's Framework Convention for the Protection of National Minorities. The ECHR concept of democracy therefore goes beyond crude majoritarianism, and the Court will, as required, exercise a counter-majoritarian function for the sake of pluralism, tolerance and the rights of minorities.

The applicants in Gorzelik complained that the authorities had refused to register their association, which its own statute described as 'organisation of the Silesian national minority'. The reason for the was that by expressly linking itself to a national minority, the association would subsequently be eligible for preferential treatment at elections. In other words, the authorities were seeking to safeguard the integrity of the Polish electoral system against abuse. This was accepted by the Court both as a legitimate aim and as a pressing social need. The protection of "the existing democratic institutions and electoral procedures in Poland" was assimilated to the Convention notions of prevention of disorder and the protection of the rights of others. As for the proportionality of the interference, the Court noted that the applicants were merely being asked to change the legal label of their association – this had no impact on its ability to function.

3. The democratic system

With the context and conditions for democracy secured by Articles 10 and 11, it is the backbone of the democratic system itself that is guaranteed by Article 3 of Protocol No. 1. This provision requires States to hold legislative elections, based on universal suffrage and the secret ballot, at reasonable intervals. Although its phrasing is quite different to that generally used elsewhere in the Convention – where the focus is on the individual – the Court established in its case law that this article implies, for individual citizens, the right to vote and the right to stand for election to the

legislature. Its unique phrasing gives greater solemnity to the States' commitment, and emphasises that they are required to take positive measures (Mathieu-Mohin).

At the same time, the right to free elections is subject to implied limitation. This is less a matter of weak drafting than making due allowance for the discretion that democracies must be accorded in the design of their system of government. As the Court has acknowledged many times in the case law, "there are numerous ways of organising and running electoral systems, and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision" (Hirst, Ždanoka etc.). It is therefore consistent with the Convention's democratic vision that States be granted a wide margin of appreciation. This does not imply a low level of scrutiny by the Court, though. As I shall illustrate in a moment, the Court has been vigilant against arbitrariness, and requires States to prove that any restrictions on active or passive voting rights pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and those ends.

Almost all judgments given to date under this provision concern the holding of elections – applicants have complained of being excluded from the vote, candidates have complained of disqualification, and parliamentarians have complained of being stripped of their seats. One case stands out from this growing crowd, however, in which the applicants' complaints are directed against the entire electoral system of their country – Yumak and Sadak v. Turkey. The essence of the complaint in this case is that the political parties are required to obtain a minimum of 10% of the national vote before they can enter Parliament. The voting results from the last parliamentary elections show that some 45% of voters are not represented in the present legislature. The Government replies that the system is designed to reconcile representativity and stability, both of which are constitutional values, and that the previous system produced a series of unstable and thus ineffective governments. The case was decided by a Chamber last year, which found that the situation did not infringe Article 3. It was subsequently accepted for re-hearing by the Grand Chamber.

Of the many cases taken by individuals complaining of restrictions on their voting rights, the most prominent is the case Hirst v. UK (No. 2), decided by the Grand Chamber in 2005. The law of the United Kingdom denied the right to vote in general and local elections to persons convicted of a criminal offence who were incarcerated at the date of polling. The Grand Chamber stressed that the right to vote is not a privilege – in a democratic State, the presumption must be in favour of inclusion. At the same time, the margin of appreciation for the State is a wide one. But it does not allow the State to impair the very essence of the right to vote, or deprive of it of its effectiveness. Any conditions "must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage". Regarding prisoners, the judgment recalls that the mere fact of imprisonment does not exclude the prisoner from other Convention rights. While a State may impose restrictions to protect its democratic institutions, disenfranchisement is a severe measure and must be used proportionately, i.e. there should be a sufficient and discernible link between this sanction and the conduct and circumstances of the person. The Grand Chamber accepted that the aims of the restriction were both to punish the offender for their conduct and give them an incentive to behave in a lawful manner. On the question of proportionality, though, the Grand Chamber was divided. For the majority, automatic disenfranchisement was a blunt instrument that took no account of the seriousness of the offence or any other

element apart from the fact that the prisoner was incarcerated on voting day. They noted that the criminal courts in Britain do not expressly include disenfranchisement in the sentence (as is done in some countries), and that during the domestic proceedings taken by the applicant, the High Court had considered the matter to be within the competence of Parliament. As for parliamentary scrutiny of the justification for the restriction, the majority considered that "it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote." They concluded that the automatic and indiscriminate nature of the restriction took it beyond any acceptable margin of appreciation.

If I say a few words about the opinion of the minority (of which I was part) it is not because I wish to re-open the deliberation, but because the disagreement went directly to the issue of the deference that an international court owes to the decisions taken by a democratically-elected parliament concerning the very system from which it derives its legitimacy. The minority considered that it was "obviously compatible with the guarantee of the right to vote to let the legislature decide [on the disenfranchisement of prisoners] in the abstract." Referring to the well-known practice of the Court to take a dynamic and evolutive approach to the Convention, they cautioned against crossing the line between adjudication and assuming legislative functions. They also disagreed with the clear reproach to the British Parliament for giving insufficient consideration to the issue, stating that "it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions. It must be assumed that [the legal situation] reflects political, social and cultural values in the United Kingdom."

Let me give one final example from the case law of Article 3 of Protocol No. 1, in which the Court found that a restriction was indeed within the margin of appreciation of the State concerned. In the case of Ždanoka v. Latvia (2006), the applicant complained that she had been disqualified from running in parliamentary elections because of her continued active membership of the communist party after Latvia declared its independence from the Soviet Union. The Grand Chamber underlined that the case law on the right to stand for election – the so-called passive aspect – was even more cautious than the case-law on the right to vote. Restrictions on the passive right need only pursue a legitimate aim and avoid arbitrariness in the relevant procedures. In other words, the scope of the Court's review in such cases is comparatively limited, and its scrutiny is of moderate intensity only. The Grand Chamber did, however, check the proportionality of the restriction on the applicant's right to stand for election. Having regard to the particular historico-political context of Latvia, and to the fact that the ban was narrowly drawn, it concluded that the State had remained within its wide margin of appreciation.

The judgment concludes with a very significant passage in which the Court states that the legislative and judicial authorities of Latvia are better placed to assess the difficulties faced in establishing and safeguarding democracy. It notes that the restriction has been subject to regular review by Parliament, and validated by the Constitutional Court. It concludes, however, with a rare (unprecedented[2]?) message addressed directly to the Latvian legislature, urging it to keep the situation under constant review as the country's democratic system continues to mature, and warning

[2] In *Sheffield and Horsham*, the warning is addressed to the "Contracting States".

that a situation considered acceptable today might be viewed as a violation of human rights in future.

## 4. Conclusion

There is a profound consistency in the substance and spirit of the Convention - in its substantive provisions, its preamble, its drafting history and its jurisprudence - regarding the centrality of democratic principles to human rights.

The Court's strict, protective approach to the essential political rights of freedom of expression, freedom of assembly and association, serves the quality of democratic life in the Member States of the Council of Europe, and makes their systems more transparent and pluralist, and their institutions more accountable.

A less rigorous approach is called for when it comes to the design of a State's democratic system – every such system is unique, reflecting the historical experiences of the State, its values, traditions and its aspirations. The role of an international human rights court cannot be to second-guess the choices made by the electorate or their representatives. Instead, it is to serve the interests of each State's democratic system by maintaining its openness, integrity and effectiveness.

Thank you.