EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Conference 70th anniversary of the European Convention on Human Rights

Fostering a democratic form of governance

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Strasbourg, 18 September 2020

The question whether the Convention has contributed to supporting a democratic form of governance is a fascinating question, particularly in the current political context and the political debates about liberal versus illiberal democracy. One cannot but notice that the populist political wave we live through and the debates it generates are focused quite often on basic individual rights. What do we define as a "basic right", the relevant importance of certain rights *vis-a-vis* other rights, the balance between individual rights and the interests of the the larger community. Self-professed champions of illiberal democracy have tapped into currents of political thought, dating back from the first half of last century, putting forward strong government and communal interests at the forefront and at the same time opposing those interests to individual "basic rights". The European Convention and its enforcement arm, the Court, have suddenly found themselves in the middle of an ideological battle about different visions of democracy.

Thus, the question what is the track record of the Convention on fostering democracy becomes also a question as to what kind of democracy does the Convention define? Does the Convention have a specific vision of democracy? If yes, how is this particular vision of democracy defined? To what extent that definition could be considered to be flexible to accommodate divergent strands or types of democracy and does the Convention leave us some leeway for change in this respect?

Democracy was at the forefront in the thinking of the drafters of the Convention. In the first drafts of the text it was firmly placed on the front row, occupying the number one position as a substantive right, Article 3 at the time, immediately after what was to become the preamble of the Convention.

The shared feeling for the importance of democracy was such that in the Political Declaration from the International Committee of the Movements for European Unity, which was submitted to the Hague Congress in May 1948 we read a proposal that under certain conditions, "the Council [c]ould ask member States to take appropriate action, which might consist of … application of sanctions …[including] a mixed European armed force [that] might be sent to assure conditions in which free elections could be held and so afford the population the possibility of electing a new parliament that would restore their liberties"

Although the idea of a pan-European army intervening to organize parliamentary elections was not followed, the idea that the concept of democracy is central for the future Convention was, and it was reflected, as already mentioned, in the text of the first draft of 1949 of the Convention in its Article 3.

The text included in this first draft was the following:

> "Every State a Party to the Convention undertakes to respect the fundamental principles of political democracy and … to hold at reasonable intervals free elections by universal suffrage and secret ballot, so that governmental action and legislation may accord with the expressed will of the people.

> To take no action which will interfere with the right of political criticism and the right to organize a political opposition."

The democracy thus envisioned was clearly a representative democracy. This was uncontroversial and hardly a surprise. Equally uncontroversial were the concepts of free elections at reasonable intervals and the secret ballot. These core concepts were very clearly expressed in the position of the British representative Lord Layton, who stated that: "I suggest that, in fact, for this major purpose of political bond there are three vital considerations; the right to elect a Parliament by free elections, with the right of criticism and the right to form an opposition." The last two, of course, were reflected in the right to freedom of expression and assembly.

The controversial parts were "the universal suffrage" and the requirement that those elections should "accord the legislator with the expressed will of the people". The concerns expressed at first by the representative of the UK and later joined by other countries to eventually result in blocking the whole provision, being about domestic laws excluding certain categories of individuals from the right to vote, and its possible conflict with the principle of universal suffrage, and the possible objections as to the different electoral systems producing representation diverging from the actual voting patterns. Eventually, these controversial parts were excluded from the text that was adopted a few years later in the First Protocol in 1952.

Thus we come to the text we have at present, which outlines a very limited definition of democratic government. Article 3 of Protocol No. 1 providing only that there should be free elections for the legislature of the country, by secret ballot, and the provision states further that those elections must be held at reasonable intervals. Even if one includes the controversial parts, which were eventually rejected, of universal suffrage and the requirement that the "governmental action and legislation may accord with the expressed will of the people" there are still many things, that would form a part of the definition of democracy, that are missing. Large chunks of the what national Constitutions would include to define the democratic institutions of a country, the formation and competences of the legislature and the executive power, the checks and balances between them, the distribution of power between central, federal and local authorities, all issue defining a modern day democracy, are completely missing from the Convention.

Even though very limited, this definition of democratic government, might still have played an important (outsized) role in the life of the Convention? It could well be, that those guarantees for a democratic form of government proved themselves to be of critical value? To answer that question, one has to look at the decisions of the Court under A3P1, which is what I would do next. Namely, take a bird's eye look at the case law of the Court under Article 3 of Protocol 1. To spoil the suspense, in case there is any, the short answer to that question is that a review of the case law does not strike one as being the kind that would decide the life or death of a democracy. It has played a role in managing some aspects of the electoral systems of the member countries and guaranteed the better health of an electoral process, but hardly something existential.

First, the Court has faithfully stayed within the parameters set by Article 3 of Protocol 1. It has underlined the perceived importance of democratic government, by holding that:

> "according to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by 'an effective political democracy'. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system" (*Mathieu-Mohin and Clerfayt v. Belgium*)

At the same time, it has upheld the limited notion of democracy under Article 3 of Protocol No. 1, which "concerns only the choice of the legislature" and it "does not cover local elections, whether municipal (*Xuereb v. Malta*; *Salleras Llinares v. Spain*) or regional (*Malarde v. France*). The Court has found that the power to make regulations and by-laws, which is conferred on the local authorities in many countries, is to be distinguished from legislative power, which is referred to in Article 3 of

Protocol No. 1, even though legislative power may not be restricted to the national parliament alone (*Mółka v. Poland* (dec.)). And although adding some caveats, it clearly supported this limited approach by holding that "a referendum does not fall within the scope of Article 3 of Protocol No. 1 (*ibid.*, §§ 33 and 38; *Moohan and Gillon v. the United Kingdom* (dec.), § 40;) (not excluding the possibility that in certain systems it might fall under A3P1 par. 42). The same with respect to presidential elections, "as the powers of the Head of State cannot as such be construed as a form of "legislature" within the meaning of Article 3 of Protocol No. 1. (*Boškoski v. the former Yugoslav Republic of Macedonia* (dec.)).

The onle aspect of the right to free elections, with respect to which the Court has taken a somewhat expansive approach, is the requirement of universal suffrage. Although expressly rejected in the process of the drafting of the Convention, the Court has moved away from a strict approach of reading the *travaux preparatorire* and has held that "universal suffrage … is now the benchmark principle" under the Convention (*X. v. Germany*, Commission decision; *Hirst v. the United Kingdom (no. 2)* [GC], §§ 59 and 62; *Mathieu-Mohin and Clerfayt v. Belgium*, § 51). This, however, was more a statement of fact, rather than an imposition of a new rule. And even though the Court has, under the principle of universal suffrage, broadened the active right to vote, expanding it to certain groups of people, most notably, to prisoners, this has hardly been a democracy defining development. Even if the right of prisoners to vote has created some significant discussions and controversies, it is hardly the type of development, which would define a system as democratic or not, the way it was imagined by the drafters of the Convention. In the context of Europe of the late 20th century and early 21st, it is difficult to argue that a small extension of the principle of universal suffrage did or could have had a profound effect on a system of democratic government.

I do not want to create the impression that I am denying the importance of the case law of the Court under A3P1. The Court has served as a reasonable safeguard in matters of the organization of elections, and the effectiveness of procedural safeguards. With respect to processing of election results the Court found that these post-election phases must be surrounded by precise procedural safeguards; the process must be transparent and open, and observers from all parties must be allowed to participate, including opposition representatives. The Court has found a violation in one case, where the applicants have presented, both to the domestic authorities and to the Court, an arguable claim that the fairness of the elections had been seriously compromised by the procedure in which the votes had been recounted , but their complaints about the recount process were not effectively examined by the domestic authorities (*Davydov and Others v. Russia).* In another case, a violation was found because of the invalidation of election results without good reason (quote ….). On a more systemic issue, in the case of *Aziz v. Cyprus*, the Court ruled on the inability for members of the Turkish-Cypriot community to vote in legislative elections. It took the view that the very essence of the applicant's right to vote was impaired on account of the situation existing in Cyprus since 1963 and the legislative vacuum, where the applicant, as a member of the Turkish-Cypriot community living in the Republic of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives. Again, while such case law is undoubtedly important, it is hardly the type of precedent that would explain the central presence of individual rights in today's political discussion about democracy.

Nor does such explanation come from the case law of the Court on the other principle rejected by the drafters, the suggestion that Article 3 of Protocol No. 1guarantees that all votes must necessarily carry equal weight as regards the outcome of the election. The Court has taken the view that even if it includes the principle of equality of treatment of all citizens in the exercise of their right to vote, no electoral system can eliminate "wasted votes" (*ibid.*, § 54; *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.)). Such threshold criteria have also been accepted by the Court in connection with the allocation of seats according to the results of the elections. Article 3 of Protocol No. 1 "does not imply that all votes must necessarily have equal weight as regards the outcome of the

election or that all candidates must have equal chances of winning, and no electoral system can eliminate "wasted votes" (*Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.)).

The probably one case, where the Court has touched upon a key feature of the democratic system of representation, the case where the Court had come close to the heart of an electoral system producing the democratic government was *Yumak and Sadak v. Turkey* [GC]. The Court found that, in general, a 10% electoral threshold appeared excessive, and concurred with the organs of the Council of Europe, which had recommended a lower threshold, as it compelled political parties to make use of stratagems, which did not contribute to the transparency of the electoral process. However, despite this criticism the Court refused to take the step of finding a violation, assessing the system in the light of the specific political context of the elections in question, and the possibility of forming an electoral coalition with other political parties or the role of the Constitutional Court – which had limited its effects in practice. In conclusion, the 10% threshold had not had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1.

If the provision guaranteeing the free democratic election of a legislature did not play a major role in guaranteeing democratic governance under the Convention, what is then the explanation of the central place Convention rights takes in the current political debate about democracy. The answer to that question, I think, lies not in any single right under the Convention, but in the whole vast body of case law developed over the last 70 years. The definition of democracy the Convention implicitly provides is through the whole system of principles developed over its seventy years of existence. And, key among them is the necessity and proportionality analysis of any limitation of basic rights. To quote it:

> This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...." Mouvement raëlien suisse v. Switzerland ([GC])

This requirement for a necessity and proportionality analysis, and the gradually expanding application of the Convention through national courts and Parliaments, has created a form of governance, which I would call "deliberative" democracy. It requires and it expects a decision making process in exercising government powers, which has to be specifically targeted and rationally justified. One that fosters restraint and accountability. It is the precise counter thesis of democratic governance to the one urged by the current populist wave of intuitive decision-making and unlimited discretionary power. If we look at it from this perspective, there should be little surprise that the Convention found itself in the cross hairs of the self-professed proponents of illiberal democracy.

This development of the Convention as a whole block of guarantees for a democratic form of governance, embedded in the institutional set up, would hardly be a surprise for the drafters of the Convention. The Belgian representative at the Consultative Assembly, Mr. Fayat , while discussing the importance of having a democratic legislature underlined " the necessity of having a magistrature independent of political majorities and of the executive power." And the Italian representative saw the basic threat against the democratic governance, on the basis of the experience in Italy, in the risk of a "totalitarian regime, [that would] acquire a character and appearance of legality" through fear and intimidation. The remedy against that risk in his eyes was to prevent abuses, violations and restrictions by simply applying the Convention.

This is indeed what happened in the next 70 years. A fact worth celebrating.