Ždanoka v. *Latvia*

European Court of Human Rights

The boundaries of the right to be elected under Article 3 of the first Protocol to the European Convention on Human Rights. Judgment of 16 March 2006, *Ždanoka* v. *Latvia*, Application No. 58278/00

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Introduction

On March 16, 2006, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its final judgment in the case of Tatjana Ždanoka against the Republic of Latvia. Although not the first decision under Article 3 of the first Protocol, the *Ždanoka* v. *Latvia* case was important, because it allowed the Court to come to a decision on an aspect of Article 3, first Protocol, which in earlier case-law had not extensively been dealt with by the ECtHR: the right to be elected. Moreover, the case allowed the Court to make some statements of principle on another question with which numerous member states of the Council have been dealing throughout the 20th century: how far may a democracy go in protecting itself from (allegedly) undemocratic parties, groups or individuals? In doing so, the ECtHR added an important new element to its ever-growing case-law dealing with the meaning and scope of the concept of political democracy under the Convention. It also enabled the Court again to give concrete substance to its margin of appreciation-test when dealing with political participation rights of citizens of member states *vis-à-vis* their own government.

In this case note, the Court's decision will be principally reviewed in the light of the question of whether judgments under Article 3 of the first Protocol can contribute significantly to the Court's material interpretation of the concept of democracy. Before going into such an analysis, an overview of the facts of the case and the Court's decisions concerning these facts will be given.

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The case

On the 20th of January 2000, Tatjana Ždanoka, a national of the Republic of Latvia, filed an application against Latvia under Article 34 of the Convention.[1] Allegedly, Latvia had violated her Convention rights, more specifically the rights guaranteed in Articles 10 and 11 of the Convention and Article 3 of the first Protocol to the Convention,[2] because she was prohibited under Latvian electoral law from standing as a candidate for election to the *Saeima*, the Latvian Parliament and standing for elections to regional representative bodies, such as the Rīga city council. The application was declared partly admissible by a Chamber of the Court's first section on 6 March 2003 and, on 17 June 2004, a Chamber of the first section ruled (by five votes to two) that there had been a violation of Article 11 and Article 3 of the first Protocol and that there was therefore no need to go into the merits of the alleged breach of Article 10. The Chamber also decided to award compensation for pecuniary damages to the amount of 2.236,50 Lati and non-pecuniary damages and legal cost and expenses of € 20.000. The Latvian government requested a referral of the case to the Grand Chamber of the Court under Article 43 of the Convention.[3] A panel of the Court accepted this request on 10 November 2004. The case was heard before the Grand Chamber on 1 June 2005[4] and the Grand Chamber handed down its judgment on 16 March 2006.

In its judgment, the Grand Chamber of the Court began with a short historical *exposé* of the political history of Latvia from the Molotov-Ribbentrop Pact of 23 August 1939. In this treaty between the German *Reich* and the USSR, the Contracting Parties not only agreed to a policy of mutual non-aggression, but also

[1] 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

[2] 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises' (Article 10 under 1); 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests' (Article 11 under 1); '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' (Article 3, first Protocol).

[3] '1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.'

[4] *Ždanoka* v. *Latvia*, Grand Chamber, nr. 1-10.

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negotiated a secret Protocol dealing with the spheres of influence of both countries in eastern Europe in a future 'territorial and political rearrangement' of the area. Under this secret Protocol, Estonia and Latvia were declared to be part of the Soviet sphere of influence; following a negotiated amendment of 28 September 1939, Lithuania was added to the Soviet sphere of influence. After the German attack on Poland of 1 September 1939 and the Soviet occupation of the eastern parts of that country from 17 September 1939 onward, the Soviet government began to exercise mounting pressure on the governments of the three Baltic republics. Following an ultimatum by the Soviet government, the Red Army invaded Latvia on 16 and 17 June 1940 and completely occupied the country. The government of Latvia under President Ulmanis was dissolved and a new government under the *ægis* of the Communist Party was installed. This new, pro-Russian government 'requested' the accession of Latvia to the Soviet Union, a request that was granted on 21 July 1940. On 3 August 1940, Latvia became an autonomous republic within the USSR.

After the inception of the Gorbachev-era in the mid-1980s, there was pressure in the Baltic republics to regain their pre-1940 independence: after the first more or less free elections in Latvia in March 1990, the Supreme Soviet (*Augstāgā Padome*) of that country declared on 4 May 1990 that the incorporation of Latvia into the Soviet Union in 1940 had been illegal and restored most of the provisions of the 1922 Constitution, the *Satversme*. For a transitional period, however, some provisions of the Constitution of the Latvian SSR were also to remain in force.

On 13 January 1991, following an attempted *coup d'Etat* against the Lithuanian government by Soviet troops, units of the Red Army tried to overthrow the Latvian government as well. The *coup* was joined by factions of the Latvian Communist Party and resulted in five deaths and 34 injured, however, it failed. On 3 March 1991, a referendum was held in Latvia on the question of national independence. On the question 'Do you support a democratic and independent Republic of Latvia?', with a turnout of 87.5%, 73.6% of the voters answered 'yes'.

After the *coup d'Etat* in Moscow on 19 August 1991 by the National State of Emergency Committee, the Central Committee of the Latvian Communist Party declared its support for the *coup* in Moscow and set up a so-called 'operational group' to provide assistance to the Moscow Committee. After the failure of the Moscow *coup d'Etat*, the Latvian Supreme Soviet declared on 21 August 1991 that the transitional period, which had started on 4 May 1990, ended immediately. A Constitutional Act of the same day stated that Latvia regained its immediate and absolute independence from the USSR. Two days later, the Latvian Communist Party (CPL) was declared unconstitutional and, on 24 August 1991, the party's activities were suspended.

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The applicant, Ms. Tatjana Ždanoka, was born in 1950 to Russian-speaking parents. In 1971 she joined the CPL; after graduating from Rīga University in 1972, she worked as a lecturer at that University. She remained a member of the CPL. During the elections of March 1990, Ms. Ždanoka was elected to the *Augstāgā Padome*. In April 1990, she was elected as a member of the CPL's Central Committee for Supervision and Audit. Ms. Ždanoka did not join a group of CPL members, which wanted to break away from Soviet rule, but founded the Independent Communist Party of Latvia; she remained a member of the 'official' CPL, which remained loyal to the CPSU in Moscow. On 4 May 1990, she did not vote on the declaration of the *Augstāgā Padome* that declared illegal the incorporation of Latvia into the USSR.

After the dissolution of the CPL, the applicant became the chairperson for the new 'Movement for Social Justice and Equal Rights in Latvia', which soon became the 'Equal Rights' party. Her term of office in the Latvian Parliament ended with the first elections under the fully restored Constitution of 1922, on 5 and 6 June 1993. The applicant was denied the right to stand for election because the government did not recognize her as a Latvian citizen, since she was of Russian descent. On the same grounds, she was again denied the right to stand for the municipal elections in 1994 and the *Saemia* elections in 1995. In January 1996, following legal action, the courts recognized that the applicant was entitled to Latvian citizenship because she descended from a person holding Latvian citizenship before August 1940. The electoral authorities were therefore instructed to register Ms. Ždanoka and supply her with the appropriate documents pertaining to her status.[5] After obtaining Latvian citizenship, the applicant tried to enlist as a candidate for the municipal elections in Latvia of 9 March 1997. And although Article 9(5) of the Municipal Election Act stated that no one could stand for election who had been a member of the CPSU or the CPL and several of its affiliated organizations after 13 January 1991 and while she herself had been a member of the CPL until August 1991, when the party was officially disbanded, the Rīga Electoral Commission accepted her candidacy for the Equal Rights party. She was elected to the Rīga city council as one of four candidates for her party on 9 March 1997.

For the 1998 *Saemia* elections, the applicant's party formed a coalition with three other parties as the 'Party of National Harmony'. Ms. Ždanoka appeared on the list of candidates of this party. The Central Electoral Committee did not, however, accept her candidacy for the 1998 parliamentary elections on the grounds that she had been a member of the CPL after 13 January 1991, which contravened Article 5(6) of the Latvian Parliamentary Election Act (which is the same as Article 9(5) of the Municipal Election Act). The applicant withdrew her candi-

[5] Ibid., nr. 31.

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dacy after this decision. The Central Electoral Committee then began a procedure to examine whether or not the election of Ms. Ždanoka to the Rīga city council had been in accordance with the electoral regulations, more specifically with Article 9 of the Municipal Election Act. This procedure eventually reached the civil division of the Latvian Supreme Court on 15 December 1999, which judged that the applicant had indeed been an active member of the CPL after 13 January 1991 and that her claim that the provisions in the Latvian election laws prohibiting her candidacy violated international legal obligations (*inter alia*, Article 3, first Protocol, of the Convention) was unfounded. A decision of the Senate of the Supreme Court on 7 February 2000 materially upheld this decision. Following the decision by the civil division, the applicant lost her seat in the Rīga city council.[6]

For the *Saemia* elections of 5 October 2002, Ms. Ždanoka again tried to enlist as a candidate for Parliament, this time for her own party, with just herself as a candidate, under the name of 'Party of National Harmony'. The Central Electoral Committee again refused to accept her candidacy, and she and her party were not allowed to stand for election. In the period leading to full Latvian membership of the European Union, the country enacted a European Parliament Election Act, which does not contain a provision comparable to that of Article 5(6) of the Parliamentary Election Act or Article 9(5) of the Municipal Election Act. Accordingly, the applicant could stand for election and did so. She was elected to the European Parliament on 12 February 2004 and has been a member since.

The Grand Chamber's judgment

The Court began its assessment of the case by rejecting the Latvian government's preliminary objection. The government claimed that since the aforementioned European Parliament Election Act does not contain a provision prohibiting former active members of the CPL from standing as a candidate for (European) elections, and the applicant did indeed stand for election and was elected, her political rights were in fact not limited by Latvian law at all. The government based this opinion on the idea that the European Parliament (being a supranational legislature) 'ought to be considered a "higher" legislative body than the Latvian Parliament and that the applicant will be able to exercise her "passive" electoral rights effectively at an even higher level than that foreseen at the outset.'[7] Moreover, the government claimed that the provisions in the Parliamentary Election Act and the Municipal Election Act were of a necessarily temporary character, since they were regularly reviewed by the Latvian Parliament. Therefore, the applicant was, in the view of

[6] Ibid., nr. 37-47.
[7] Ibid., nr. 65.

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the government, no longer an alleged victim of a violation of Articles 10 and 11 of the Convention and Article 3, first Protocol.[8]

The Court rejected this point of view. It stated, *inter alia*:

> In the Court's view, the question posed by the Government's pleadings is whether the applicant has lost status as a 'victim' within the meaning of Article 34 of the Convention. In that connection, the Court refers to its settled case-law to the effect that a decision or measure favourable to an applicant is not in principle sufficient to deprive him or her of victim status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (…).[9] In the present case, the impugned legislative provisions remain in force, and the applicant is still disqualified from standing for the national Parliament (and for municipal councils). In so far as the Government refer(s) to the fact that the applicant was entitled to take part in the European Parliament elections, the Court recognizes that Article 3 of Protocol No. 1 is applicable in this respect (see *Matthews* v. *the United Kingdom* (GC), no. 24833/94 §§ 39-44 and 48-54, ECHR 1999-I). However, the fact that the applicant is entitled to stand for election to the European Parliament cannot suffice to release the State from its obligation to respect the rights guaranteed in Article 3 of Protocol No. 1 with regard to the national Parliament. In sum, the Latvian authorities have neither recognized nor, even less, redressed to this day the violations alleged by the applicant. She remains a 'victim' of those alleged violations. Accordingly, the Government's preliminary objection must be dismissed.[10]

Its rejection of this preliminary objection by the Latvian government allowed the Court to proceed next to the merits of the case itself. After summarizing the decision of the Chamber in first instance,[11] the standpoints of the applicant and the government with regard to the decision of the Chamber were discussed.

[8] Ibid., nr. 66-67.

[9] The Court here refers to a number of its previous decisions on this topic, such as *Labita* v. *Italy* and *Ilaşcu and Others* v. *Moldova and Russia*.

[10] *Ždanoka* v. *Latvia*, Grand Chamber, nr. 69-72.

[11] The Chamber had concluded that in itself the disqualification to be elected is a legitimate aim under the Convention, namely the protection of national security and the State's political independence. The disqualification was not limited in time however, which lead the Chamber to the conclusion that its application to a great number of individuals, disregarding their personal behaviour, was only allowed for a limited amount of time, namely the period directly following the re-establishment of Latvian independence. After this period of transition however, greater emphasis needed to be placed on an appraisal of an individual's personal conduct with regard to national security. Since the Latvian courts had only done so in a very limited way, the Chamber felt the need to do so itself. In doing so, the Chamber noted that the applicant had never been prosecuted or convicted of an offence and that there was no further evidence that she had personally conducted behaviour in 1991 (or since) still justifying her disqualification to stand as a candidate for Parliament. It therefore felt that the applicant's disqualification was disproportionate and therefore violated Article 3 of Protocol 1: ibid., nr. 74-75.

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Ms. Ždanoka's main argument before the Grand Chamber focused on the fact that the constitutional status of Latvia in the years 1990 and 1991 was not clear, but ambiguous. In the words of the Court:

> The applicant considered that the Republic of Latvia's ambiguous constitutional status during the period in question was an important factor to be taken into consideration. In that connection, she noted that the Declaration of Independence of 4 May 1990 had established a transition period so that institutional links with the USSR could be gradually severed. In reality, it had been a period of diarchy, during which Soviet and Latvian constitutional and legislative texts, and even some Soviet and Latvian institutions, coexisted and functioned in parallel throughout the national territory. The applicant acknowledged that the Constitutional Law of 21 August 1991 had ended the transition period; however, it was impossible to declare null and void the very existence of that period. Since the legitimacy of the institutions which were then functioning on the territory of Latvia was not clearly established, it was not correct to speak of a coup d'état in the proper meaning of this expression.[12]

In this respect, the applicant stated that the fact that the CPL and herself were against Latvian independence, but preferred a Latvia with greater internal autonomy within the framework of a reconstructed USSR, was not an act of treason against Latvia, but was one of many options available to the country in the period of transition. It was, therefore, in fact an exercise of the right to political pluralism, which is inherent in a democratic society.[13]

The government on the other hand stated that the CPL had fully taken part in activities directed against the legitimate government of Latvia: it stated that no constitutional diarchy had existed between 4 May 1990 and 21 August 1991. The applicant had been a member of that party, had been aware of these activities, but had chosen to remain a member of the party. Therefore, she had chosen to remain within an organization that actively sought to restore the former totalitarian regime in Latvia and to prevent the country from becoming independent again. The CPL, thus, was an organization that wanted to destroy the very existence of a State Party to the Convention – and giving access to the supreme legislative body of that State to individuals who had been active members of that organization was a likely threat to national security and the democratic order of the State. Relying, *inter alia*, on the Court's decisions in *Rekvényi* v. *Hungary* and *Vogt* v. *Germany*, the government argued that a democracy capable of defending itself was not in contravention to the Convention and that the fact that the applicant had remained a member of a political organization that was prohibited by law was an important

[12] Ibid., nr. 78.
[13] Ibid., nr. 79.

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factor in the decision to disqualify her to stand for election for the *Saemia* and municipal councils. Moreover, the Chamber had, in the government's opinion, failed to take into consideration that the Latvian courts had in fact based their decisions to uphold Ms. Ždanoka's disqualification to stand for election on an analysis of her personal beliefs and behavior and not just upon the fact of her membership of the CPL. Since the reinstatement of the 1922 Constitution, each successive *Saemia* reviewed the continued necessity of the legal provisions dealing with these disqualifications, which in itself proved the transitory and provisional character of these provisions. This, too, the Chamber had failed to take into due consideration in its decision.[14]

The Court began its assessment of the case with the observation that many historical facts relevant to the case were disputed among the parties. The Court did not consider it to be within its task to research these historical disputes itself.

> (…) in exercising its supervisory jurisdiction, the Court's task is not to take the place of the competent national authorities but rather to review the decisions they delivered pursuant to their power of appreciation. In so doing, it has to satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts and did not reach arbitrary conclusions (...).[15]

On the basis of this test, the Court found no bias or arbitrariness in the way that the Latvian courts or government evaluated either the historical facts of the transitory period of 1990-1992 in Latvia's history, nor of the applicant's role in this period of time. Therefore, the court accepted the interpretation of the national courts of Latvia with respect to the CPL and its activities during this period of time.[16]

Before examining the relevance of these facts under the Convention, the Court proceeded with a long series of general observations concerning the right to stand for elections under Article 3 of the first Protocol. It began by asserting that democracy is one of the fundamental elements of the 'European public order'. This is not only clear from the preamble of the Convention (linking democracy and human rights) but also from the values that underlie the Convention; on numerous occasions the Court has acknowledged these truths by stressing that the only political system compatible with the rights and values of the Convention is a democratic one. The Court referred to, amongst others, *Refah Partişi and Others* v. *Turkey* and *Gorzelik and Others* v. *Poland* to substantiate this idea. That does not mean, however, that the Convention does not take into account that democratic

[14] Ibid., nr. 84-95.
[15] Ibid., nr. 96. The Court refers to its decisions in *Vogt* v. *Germany*, *Socialist Party and Others* v. *Turkey* and *Freedom and Democracy Paryt (ÖZDEP)* v. *Turkey* to make this point.
[16] Ibid., nr. 97.

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means and rights can be used to undermine or eliminate a democratic society. The Court stressed that it was precisely this fear that led the framers of the Convention to include Article 17, which says:

> 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.

Therefore, the Court reasoned in the *Refah Partişi* case that the rights and freedoms of the Convention may never be considered to authorize anyone to weaken or destroy the ideals and values of a democratic society, whereas in *Vogt* v. *Germany*, it held that a 'democracy capable of defending itself' was not in contravention to the Convention.[17] In doing so, however, a State Party must always take into careful consideration the scope and consequences of the measures it wants to impose, in order to maintain a balance between the legitimate security interests of the State and the rights of the afflicted individuals.

In Article 3, first Protocol, of the Convention, the Court saw an important guarantee for the continued existence of free and democratic societies. In its *Mathieu-Mohin and Clerfayt* v. *Belgium* case of 1987, the Court had therefore considered this Article to contain individual rights, including the right to vote and to stand for election. And although it is up to the Court to say what the precise meaning and scope of these rights should be, the Court affirmed that there is a wide margin of appreciation as to how the High Contracting Parties can flesh out these electoral rights:

> 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 in Europe, which it is for each Contracting State to mould into its own democratic vision.[18]

The main test the Court provided to establish whether a State has violated the guarantees of the rights under Article 3, first Protocol, were laid down by the Court in the *Mathieu-Mohin* case and have been affirmed in *Hirst* v. *United Kingdom*: conditions imposed by a State Party on the right to vote and stand for election:

> must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain

[17] Ibid., nr. 99-100.
[18] Ibid., nr. 103-104.

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> the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.[19]

In applying this test, the Court has found that it falls within the margin of appreciation of a State Party to require from its members of parliament (and from candidates for membership) a good knowledge of the official language of the state (*Podkolzina* v. *Latvia*); a state may also in itself require domestic residence for parliamentary candidacy (*Melnychenko* v. *Ukraine*).[20] If the Court finds that a person desiring to stand for election might use his election to threaten the rights or underlying values of the Convention, this is also a reason for upholding state limitations on his or her eligibility: *Glimmerveen and Hagebeek* v. *the Netherlands*.

In the light of these decisions, the Court came to the following conclusion concerning the rights under Article 3, first Protocol, of the Convention:

> The concept of 'implied limitations' under Article 3 of Protocol 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 is not limited by a specific list of 'legitimate aims' such as those enumerated in Articles 8-11, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of the case. (…) In examining compliance with Article 3 of Protocol 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the will of the people. (…) In addition, the Court stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned (…).[21]

Applying these provisions to the case in dispute, the Court found that the restrictions which Latvia imposes on persons desiring to stand for election are compatible with the general objectives of the Convention, namely, the State's independence, democratic order and national security. However, does this make their application proportionate in this specific case? The Court stated that the three Baltic republics find themselves in a unique position, due to their forced annexation to the Soviet Union in 1940. This annexation, (as the Court notes) 'contrary to the generally

[19] Ibid., nr. 104. Among the acceptable limitations on the right to vote are a minimum age requirement (*Hilbe* v. *Liechtenstein*), a residence requirement (*ibidem*) or the removal of voting rights as a sanction for the committing of serious crimes (*M.D.U.* v. *Italy*).

[20] In both cases the Court found, however, that the procedure used to determine the compliance with these requirements lacked impartiality and safeguards against arbitrariness: ibid., nr. 107-108.

[21] *Ždanoka* v. *Latvia*, Grand Chamber, nr. 115.

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recognized principles of international law', was orchestrated under the *ægis* of the CPSU and its Latvian branch, the CPL. The Court accepted the judgment of the Latvian courts that the CPSU and the CPL were actively participating in the attempted *coups* of January and August 1991. The fact that the CPL had officially changed its program was not relevant:

> (…) (T)he intentions of a party must be judged, above all, by the actions of its leaders and members rather than by its official slogans.[22]

In quoting its *Refah Partişi* decision, the Court noted that the actions of (leading) members of a party can be ascribed to the party itself, unless it distances itself from those actions: this being the case, the opposite might also be true: the actions of a party can be ascribed to its (leading) members, unless they distance themselves from its actions. The applicant never distanced herself from the actions of the CPL in 1990 and 1991, making herself vulnerable to the assumption that she supported these actions. The fact that she was never prosecuted for her conduct in the aforementioned period is irrelevant, according to the Court: the measures under Article 5(6) of the 1995 Parliamentary Election Act are of a special public law-nature and fall outside the scope of criminal law:

> As observed above, the Court is of the opinion that the Latvian authorities were entitled, within their margin of appreciation, to presume that a person in the applicant's position had held opinions incompatible with the need to ensure the integrity of the democratic process, and to declare that person ineligible to stand for election. The applicant has not disproved the validity of these appearances before the domestic courts; nor has she done so in the context of the instant proceedings.[23]

The aforementioned Act states clearly that only those former members of the CPL or its affiliated organizations, who 'actively participated' in the activities of the CPL during the years 1990 and 1991, can be restricted in their right to stand for election: the Court concluded from this that the Act is sufficiently flexible and sufficiently precise in its dealing with the members of the former CPL. The Act moreover gives alleged active members of the CPL the right to have their participation in the party scrutinized by the Latvian courts; thus, Latvia fulfilled its obligations under Article 3, first Protocol, of the Convention.[24]

[22] Ibid., nr. 120.
[23] Ibid., nr. 124.
[24] 'In view of the above considerations, the Court considers that the impugned legislation was clear and precise as to the definition of the category of persons affected by it, and it was also sufficiently flexible to allow the domestic courts to examine whether or not a particular person belonged to that category. In the present case, a sufficient degree of individualisation as required by Article 3

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In view of all this, the Court came to the conclusion that the measures enacted against the applicant were not disproportionate or arbitrary under Article 3 of the first Protocol. The provisions in the Parliamentary Election Act and the Municipal Election Act, although perhaps unacceptable in a sufficiently mature democratic society, are acceptable in Latvia's specific circumstances and its relatively recent regaining of statehood against the background of the disintegration of the totalitarian Soviet system. Thus, the Court accepted that the measures, both possible and taken, fall within the scope of the wide margin of appreciation that Latvia enjoys: the Court moreover accepted that the Latvian legislature and courts are better suited 'to assess the difficulties faced in establishing and safeguarding the democratic order.'[25] But the Court noted that Latvia's own Constitutional Court has stated, in a decision of 30 August 2000, that although it considered the measures under Article 5(6) of the Parliamentary Election Act to be neither arbitrary nor disproportionate, it advised the legislature to establish a time-limit on the restrictions of the Act. The Court then stated that because even Latvia's own Constitutional Court considers these limitations on the right to be elected as necessarily temporary, that is all the more reason for the Strasbourg Court to be vigilant in this respect: the *Saemia* should keep the provisions of the two Acts under constant review, 'with a view to bringing it to an early end'.[26] The Court warned Latvia that failure to do this (a failure even less justified in light of the greater political stability the country enjoys as a member of NATO and the European Union) may result in the Court having to conclude that Latvia would violate Article 3 of Protocol 1 of the Convention.[27]

Having come to the conclusion that no violation of Article 3 could be found, the Court paid much less attention to the other two alleged violations (of Articles 10 and 11 of the Convention) of which the applicant had complained. The Court stated that in this particular case, Article 3 of the first Protocol is to be seen as the *lex specialis* of Article 11 of the Convention: for this reason, a separate examination of the alleged violation of this Article was not necessary. With regard to Article 10, the Court simply stated that it could not 'find any argument that would

of Protocol no. 1 was thus effected by the Latvian Parliament in adopting section 5(6) of the 1995 Act, and thereafter by the domestic courts in establishing that the impugned statutory measure applied to the applicant. There was no obligation under Article 3 of Protocol no. 1 for the Latvian Parliament to delegate more extensive jurisdiction to the Latvian courts to "fully individualise" the applicant's situation so as to enable them to establish as a fact whether or not she has done anything which would justify holding her personally responsible for the CPL's activities at the material time in 1991, or to re-assess the actual danger to the democratic process which might have arisen by allowing her to run for election in view of her past or present conduct', ibid., nr. 128.

[25] Ibid., nr. 134.

[26] Ibid., nr. 135.

[27] Ibid. The Court refers to its *Sheffield and Horsham* v. *the United Kingdom* and *Christine Goodwin* v. *the United Kingdom* cases to substantiate these warnings.

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require a separate examination of the applicant's complaints about her inability to stand for election (…).'[28]

For this reason, the final judgment of the Court is, with thirteen votes to four, that Latvia did not violate Article 3, first Protocol; with thirteen votes to four, that a separate examination of Article 11 was not necessary; and unanimously, that a separate examination of Article 10 was not necessary either.[29]

Some remarks

In the judgment in *Ždanoka* of 16 March 2006, the ECtHR made some interesting contributions to its case-law on democracy in Europe. However, before going into this, it might be wise to point out first what the Court did *not* do. The literature sometimes asserts that the Court has failed to give a clear definition of what it means by the concept of democracy.[30] Moreover, as may be derived from the description of the Court's reasoning in this case: neither, as such, does this *Ždanoka*-judgment. Not only did the Court not give a clear-cut definition of democracy, but the strong emphasis placed on the wide margin of appreciation that the High Contracting Parties enjoyed under this Article at least suggests that the Court did not even believe in the possibility of such a 'one size fits all' definition. That does not mean, however, that we cannot detect some rather interesting aspects of the concept of democracy that the Court seems to believe in. In its analysis of the possibilities of limiting the rights guaranteed in Article 3, first Protocol, the Court stated *expressis verbis* that the very essence of this right and its effectiveness must never be taken away or thwarted by state limitations: and this very essence is described by the Court as 'an electoral process aimed at identifying the will of the people through universal suffrage.'[31]

This is an interesting remark by the Court. First of all, it seems clear that democracy, at least in the sense of Article 3, first Protocol, seems to be bound to universal suffrage. This in itself is not very surprising: since the Court assumes that Article 3, first Protocol, does not only contain an obligation to the State Parties, but also an individual right to be enjoyed by its citizens – and therefore the same kind of right given by the Convention itself – the equality demands of

[28] *Ždanoka* v. *Latvia*, Grand Chamber, nr. 141.

[29] Ibid., final judgment.

[30] A. Logemann, *Grenzen der Menschenrechte in demokratischen Gesellschaften. Die 'demokratische Gesellschaft' als Determinante der Grundrechtsschranken in der Europäischen Menschenrechtskonvention* (Nomos Verlag, Baden-Baden 2004) p. 298-9: 'Als Ergebnis der vorangegangenen Entscheidungsanalyse kann somit zunächst einmal wiederholt werden, dass der EGMR bisher noch keine abschließende Definition des in der Konvention verwendteten Begriffs der "demokratischen Gesellschaft" aufgestellt hat. Den besprochenen Entscheidungen sind zudem auch keinerlei Anzeichen dafür zu entnehmen, dass er überhaupt von einer solchen Möglichkeit ausgeht'.

[31] *Ždanoka* v. *Latvia*, Grand Chamber, nr. 104

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Article 14 are in themselves a sufficient foundation for the obligation on the part of the High Contracting Parties indeed to provide their citizens with something close to universal suffrage. A second element in the phrase quoted is slightly more surprising. For the aim of such a system of elections *cum* universal suffrage is, according to the Court, to identify 'the will of the people'. Democracy, therefore, seems to be something that does not only involve a plurality of voices and opinions, as the Court has so often stated in its case-law under Article 10,[32] but also a system where the will of the people is to be identified through elections – presumably to guide the state in its decision-making, although the Court does not say so *expressis verbis*.

The will of the people is, of course, a rather old idea in European legal thought and in the constitutional systems of the Western states. The American and especially French Revolutions have caused the breakthrough of the notion that the state should not be guided by the will of a King or an aristocratic minority, but by the will of the people itself, expressed either directly or – more common – through elections. In the vast majority of Western states, including the States Party to the Convention, the will of the people is identified with the will of the sovereign: most constitutions declare the people (or the nation) to be the sovereign in and over the state's legal order.[33] Given this almost general common constitutional tradition of the member states,[34] a reference to the will of the people almost necessarily evokes at least the *idea* of popular sovereignty.

In the great majority of Western constitutions, the idea that the will of the people is the sovereign's will, and the idea that this will should be 'found' through elections, is linked to another important idea: the idea of a free mandate, i.e., the notion that an elected representative is not representing his or her electorate or district, but the whole of the nation, and therefore not bound to instructions from or obligations to his or her electors. This idea, first clearly formulated by the French revolutionary thinker and politician Sieyès, has found its way into the constitutional traditions of almost every democratic state in Europe.[35] The unity

[32] Already in its famous *Handyside*-decision of 1976, where the Court stated that freedom of expression is 'one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man', *Handyside* v. *United Kingdom*, nr. 48.

[33] A few examples can be found in Article 20 of the German Basic Law, Article 3 of the French Constitution and Article 35 of the Belgian Constitution.

[34] Among the High Contracting Parties to the ECHR, the only states that do not explicitly recognize the sovereignty of the people or the nation are the Kingdom of Denmark, the Kingdom of the Netherlands, the Kingdom of Norway, the Principality of Monaco and the United Kingdom of Great Britain and Northern Ireland. The Principality of Liechtenstein vests its sovereignty in both the Prince and the people.

[35] For an analysis of the development of Sieyès' ideas and his importance to the European theory on political representation, *see* H.G. Hoogers, *De verbeelding van het souvereine. Een onderzoek naar de grondslagen van politieke representatie* [Imagining the Sovereign. An investigation into the foundations of Political Representation] (Kluwer, Deventer 1999) especially chapters 3, 4 and 6.

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of the sovereign's will and the free mandate of the elected representatives assigned to find and express this will are closely linked: as Sieyès already demonstrated, the will of the people can never be found if the representatives are bound by instructions from their electors.

This shows us an important aspect of European democratic thought. At least in most constitutional systems, the will of the people is envisioned as a unitary concept: it may be that it can only be expressed through the plurality of voices in parliament, but the result of such an exchange of ideas in parliament is the expression of *the* national will. There is one sovereign and this sovereign has an identifiable, unitary will, found through parliamentary procedures by independent representatives and expressed in legislation and other parliamentary decisions.

The Court does not say that it shares these ideas: but the strong emphasis that it places on the importance of elections for finding the will of the people, combined with the fact that this is the common constitutional tradition of the great majority of the member states to the Convention, at least suggests that the Court, in fact, has the same sort of opinion on this important democratic feature.[36] If this is actually the case, it shows that the Court realized the inherent tensions of every democracy: the unifying tendencies brought about by the idea of the sovereignty of the people acting as one and speaking with one voice, pronouncing one will, that articulates itself primarily in the constitution[37] and, after the coming into force of the constitution, in the laws that Parliament promulgates[38] on the one hand, and the necessity for plurality of opinions, moderate and extreme, as articulated in (amongst others) Article 10 of the Convention on the other. Or, put differently: every democracy has to find an *optimum* between the unity of the sovereign people and the diversity of all the citizens that together form that sovereign people.

That the Court realized this is also shown in its defense of the notion of a 'democracy, capable of defending itself' (presumably the Court's translation of the famous definition of the German Federal Republic under the Basic Law by the *Bundesverfassungsgericht* as a *streitbare Demokratie*) which it primarily anchors in Article 17: in nr. 110, the Court explicitly stated that Article 3 of Protocol 1:

[36] *See*, for instance, *Matthews* v. *United Kingdom*, nr. 63.

[37] Cf. for instance the classical remarks made by Chief Justice Marshall in the *Marbury* v. *Madison* decision (1 Cranch 137; 1803) of the US Supreme Court: 'This original and supreme will (being the will of the people – HGH) organizes the government and assigns to different departments their respective powers.'

[38] Cf. Article 6 of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789: 'La Loi est l'expression de la volonté générale. Tous les Citoyens ont droit de concourir personnellement, ou par leurs Représentants, à sa formation. Elle doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse. Tous les Citoyens étant égaux à ses yeux sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents.'

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> which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.

In other words: although the Court has accepted, in many decisions, that various opinions can be held in a democratic society, including opinions unpopular with a majority of the people, and that various courses of action may be undertaken by individuals or organizations to realize their aims in such a society, not all opinions and not all actions are legal or acceptable – and the Court leaves a wide margin of appreciation to the member states as to what exactly constitutes an unacceptable opinion or action, at least under Article 3 of Protocol 1. In all this, it is not quite clear whether the Court realizes that the tension mentioned above also exists in its own decisions under Article 10 on the one hand (where the Court in many instances has left little room to the states party, as is shown for instance in the *Dichand and others* v. *Austria* decision of 2002) and those under Article 3 of Protocol 1 on the other. It seems, at least, that opinions or behavior which as such cannot be prohibited by a state under Article 10 might under Article 3, first Protocol, entitle that state to withdraw electoral rights from persons expressing those opinions. Therefore, it is to be deplored that the Court has not used the opportunity provided in this case to explore more fundamentally the relationship between Article 10 and Article 3, first Protocol. On the other hand: the fact that the Court has not done so (or maybe felt itself unable to do so) illustrates that, indeed, a paradox lies at the heart of every democratic political order, to wit: that the will of a free people can only be expressed by and through free individuals, but that the unity of a people and the plurality of its members do not necessarily run parallel.

The wide margin of appreciation that the Court has decided to leave to Latvia therefore leads to the conclusion that the partial withdrawal of the applicant's electoral rights was indeed allowed under the Convention, although not for an unlimited amount of time. The opinions that the applicant held in the early '90s and the way in which she expressed and acted upon them constitute enough grounds to deny her participation in the Latvian political process. Although the elections in which she did take part show that there is a significant backing for her ideals among the Latvian population, these ideals are not to play a part in the expression and enactment of the will of the Latvian people. The Court's decision in this does not differ that much from those by the ordinary Latvian courts and the Latvian Supreme Court in this and similar cases. In this respect, there is little that the Court has added to Latvia's national case-law. However, the case has allowed the Court to refine its own case-law under Article 3 of Protocol 1, especially when it

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comes to passive electoral rights and the *streitbare Demokratie*, two aspects that so far have had rather limited attention from the Court.

Does an analysis of case-law under Article 3, first Protocol, provide additional information on the Court's opinion of democracy compared to Articles 8, 10 and 11 of the Convention? This decision shows that, although the results are limited, it holds at least some truth. For although the Court stressed that there are almost as many ways to define democracy as there are member states to the Convention, the analysis has shown (as was already stated above) that the Court is indeed of the opinion that the will of the people lies at the heart of a democratic legal and political order, thereby linking the concept of democracy of the Convention to the classic European concept of the supremacy of the sovereign will of the nation in and over the state's legal order. And in doing so, it has enlarged its opinion of democracy from a rather narrow human rights-approach. In the years to come, the main challenge facing the Court's case-law on democracy will perhaps be to conciliate these two elements of democracy, unity and plurality, into a single vision that is, on the one hand, broad enough to allow the member states to the Convention enough space to further their own views and opinions and, on the other hand, narrow enough to remain legally meaningful. The case of *Ždanoka* v. *Latvia* shows that the Court, whilst realizing these inherent difficulties, is at least willing to make the effort.

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