Avrupa İnsan Hakları Mahkemesi Gereklilik Testinin Geliştirilmesi İhtiyacı ve Metodu
The Need and Method of Improving the Necessity Test of European Court of Human Rights

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Özet

Avrupa İnsan Hakları Mahkemesi'nin yerleşik içtihatlarına göre, Avrupa İnsan Hakları Sözleşmesi tarafından korunan temel haklara yapılan müdahaleler, ancak müdahale ve müdahaleyi gerektiren meşru amaçlar arasında orantılı bir ilişki varsa meşru müdahale olarak kabul edilebilir. Diğer bir deyişle, haklara müdahale, ancak gerçekten "demokratik bir toplumda gerekliyse" kabul edilebilir. Mahkeme, "zorunlu toplumsal bir ihtiyacın" varlığı ve müdahale için "ilgili ve yeterli neden varlığı" gibi standartlar geliştirerek gereklilik testini şekillendirmiştir. Ancak, Mahkemenin müdahalenin meşruluğu için geliştirdiği bu standartlar önemli belirsizlikler içermektedir. Yine Mahkeme'nin "gereklilik" testine ilişkin geliştirdiği içtihadı da açık ve net değildir. Bu nedenle, bu çalışma Mahkeme içtihatlarında da başvurulan daha geleneksel üç aşamalı orantılılık testinin uygulanmasını önermektedir. Çalışma, Mahkeme'nin bu testin iki özel unsuru olan "uygunluk testi" ve "en az kısıtlayıcı araç" testlerini kullanmasının gereklilik testinin belirsizliğini ortadan kaldıracağını önermektedir. Önerilen bu iki test sistematik olarak ve doğru bir şekilde uygulandığında, Mahkeme'nin gerekçesinin açıklığına ve inandırıcılığına da katkıda bulunacağını iddia edilmektedir.

Anahtar Kelimeler: Haklara müdahale, meşru amaçlar, gereklilik testi, uygunluk testi, en az kısıtlayıcı araç testi

Abstract

According to the established case law of the European Court of Human Rights, interferences with fundemantal rights protected by the European Convention on Human Rights can only be legitimised if there is a proportionate relationship between the interference

and its legitimate objectives. In other words, the interference with rights could only be accepted if they are really "necessary in a democratic society." The Court has given shape to this test by developing standards such as that of the existence of a "pressing social need" and of "relevant and sufficient" reasons fort he interference. However, these standards appear to be rather vague, and the Court's case law on the test of "necessity" lacks transparency. Therefore, this study proposes the introduction of the more classical three-step test of proportionality in the Court's case law. The study focuses on the use the Court might make of the two particular elements of this test, that is, the test of suitability and the least-restrictive-means test. If applied correctly, the systematic application of these tests can contribute to the clarity and persuasiveness of the Court's reasoning.

Key Words: **Intervention to rights, necessity test, test of suitability, least restictive medium test**

General Framework

Section I of the Convention, in principle, contains two types of provisions: (1) those which require the State Parties' conformity with standards set out therein; (2) those which formulate the obligation of compatibility of the State Parties' behaviour with the relevant standards.

The very construction of provisions of the second type deserves consideration. Sufficiently precise "core" normative statements of these Articles[1] are circumscribed by the "escape" clause's actual effect which depends, eventually, on whether their application will become a matter of proceedings before the Convention organs. If this is the case, on the outcome of the "negotiation" process between the European organs, set up to ensure the observance of engagements undertaken in the Convention on the one hand, and the High Contracting Party which secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, on the other.[2] This negotiation involves the conflict between the sovereign state's assertions and the European interpretation as regards three key elements of the escape clauses. In the proceedings before them the Strasbourg organs have to agree with, or to reject, the respondent government's submissions. These will be that the particular

[1] Articles 8, 9, 10, 11, Articles 1 and 2 of 1st Protocol of ECHR
[2] Art.1 ECHR

invocation of the escape section of the relevant Article is in accordance with and is prescribed by and provided for, by law; has the requirement of a legitimate aim (national security, territorial integrity, public safety, prevention of disorder or crime), and is "necessary in a democratic society" for the attainment of the legitimate aim.

In exercising their supervisory functions, the Strasbourg organs are faced with the problem of maintaining an adequate level of protection of human rights against the background of relativism, foundin abundance in the social environments of functioning of corresponding norms, and generously accommodated by the legislator in the very text of these norms. In this situation of factual and textual relativism, the supervision may only be performed by elaborating a clear and operative system of precise jurisprudential principles for dealing with the two tasks: a) ascertaining what is required by the Convention as an adequate standard of protection of this particular right in the particular circumstances of the case under review; and b) measuring the factually obtained situation of the case against this clarified standard.

In dealing with such cases, the Strasbourg organs use a methodology that involves two techniques of analysis. The first technique relates to the general sequence of stages in analysing the features of the restriction, as well as to the general sequence of examining the different elements within one stage. Therefore, once they have established that the measure constitutes an interference with a right guaranteed under the Convention, the Strasbourg organs examine whether the interference complies with the requirements of legality, legitimacy and democratic necessity. This sequence is naturally determined by the need to bring logic to the analysis, and to build a system of standard principles, against which the specific behaviour of national authorities in the specific circumstances of the case can be measured. On the other hand, if they find that there is no interference, they go no further and do not examine the legality, legitimacy and democratic necessity.[3] In this situation they examine the violation on the basis of whether there is interference or not.

The second technique is mainly applied at the "democratic necessity" stage. At this stage the Strasbourg organs see whether the impugned national measure corresponds to the degree of allowed proximity in the context of the particular Article and circumstances of the case.

[3] see *Presidential Party of Mordovia v. Russia*, App. No. 65659/01, Judgment of 5 October 2004 in ch.6

Developing its understanding of "democratic necessity", the Strasbourg organs, in fact, have employed the concept of "quasi-emergency situations" which are seen as definitely of an exceptional character. It is in these "irregular" situations requiring the "correctional" interference of a state, that the latter is deemed to have a legitimate aim in restricting certain rights. Taking this approach, the Convention organs have relied on an analogy with the logic of their reasoning in the cases of the real emergencies[4]of Article 15.[5] The bridge of analogy between the real, and what we may call routine, emergency situations was built by the Commission's decision in the case of *Iversen*, which concerned the compulsory allocation of doctors to the northern regions of Norway. Having recalled the margin of appreciation reasoning in the Article 15 cases, the Commission said that "in the analogous circumstances of the present case… [it] cannot question the judgement of the Norwegian Government and Parliament as to the existence of an emergency as there is evidence before the Commission showing the reasonable grounds for such judgements."[6]

The need for, and the importance of, this analogy stemmed from the fact that the real emergencies revealed certain features of actual restrictive practices of states, which were not that explicit in respect of the routine limitations of Articles 8-11. It is, however, exactly these features that allow the reconciliation of the restrictive practices with the elementary ideas and requirements of democracy (and therefore, to subject these practises to the legal control and regulation). First of all, every restriction of human rights must be nothing other than a direct response to the irregularities, which have evidently occurred in the life of the society organised along the principles of democracy. The only goal of these restrictions must be the restoration of the normal functioning of the society. The restrictions must not overstep, in the scope of their subject-matter, the borders determined by this goal.

It may be argued that the European organs have developed in essence a uniform philosophy as regards the two types of "necessity" referred to in the Convention. They are; that which allows derogations from certain Convention rights, and that which has similar effect as

[4] O'Donnell, T.A., " The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", (1982) 4 HRQ 474 at.477

[5] Art.15 para.1 reads: " In time of war or other public emergency threatening the life of the nation any high Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law"

[6] App. 1468/62, *Iversen v. Norway*, 17 December 1963, (1968) 4 Yearbook 278, at.330

regards restrictions in the name of legitimate aims.[7] The aim of the analysis in both spheres has been basically the same: to develop and apply a clear operative set of principles to "regulate necessity" and measure its particular practical manifestation against the Convention standards, and the proper operation of the necessity principle in a democratic society.

After *Handyside*, the view of the majority of members of the European organs has been that the recognition of the legitimate aim in the Convention text, and in domestic legislation, in itself does not avail the Contracting States of the possibility of lawfully restricting freedoms. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than an international judge to give an opinion on the context of these requirements, as well as on the necessity of a restriction or penalty, intended to meet them.[8] However, Article 10 paragraph 2 does not give the Contracting States an unlimited power of appreciation. As the Court is responsible[9] for ensuring the observance of those states' engagements, it is empowered to give the final ruling on whether a restriction or penalty is reconcilable with freedom of expression, as protected by Article 10. And such supervision concerns both the aim of the measure challenged and its necessity, so it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[10]

The Court then reiterated and clarified this fundamental finding in the *Sunday Times* case.[11] It emphasised that "it is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 paragraph 2 which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general and absolute terms; the Court has to be satisfied that the interference was necessary, having regard to the facts and circumstances prevailing in a specific case before it."[12] Relying on this reasoning, the Court gave adequate weight to the rather brief statement in *Handyside* that the national measure of

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[7] This "necessity" is expressed in Art.15 in the terms of "war or the public emergency" and "strict requirements of the exigencies of the situation". By analogy with Art.8-11, legitimate aim in this case can be held to be "meeting threat to the life of the nation".

[8] *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737, para.48

[9] Before Protocol 11 the Commission also was responsible for this observation with the Court.

[10] *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A No.24, (1979-80) 1 EHRR 737, para. 49

[11] *The Sunday Times v.UK*, Judgement of 26 April 1979, 2 EHRR 245,

[12] ibid, para.65

restriction must be a response to "pressing social need." The notion of 'necessity' implies the existence, in the particular circumstances of the case, of such a need.[13] The Court here stressed that its supervision is not limited to ascertaining whether a respondent state exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Courts' control as regards the compatibility of its conduct with the engagements it has undertaken under Convention. The Court pointed out that it did not subscribe to the contrary view, which had been advanced by the government and the majority of the Commission in the *Handyside* Case.[14] The Court later, in the *Norris* case, emphasised that the chosen understanding of the 'necessity' test has no viable alternative for ensuring the effectiveness, and in fact the very reality, of the supervision.[15]

After the judgements in *Handyside* and *Sunday Times*, the concept of the mediated operation of the element of legitimate aim in the necessity test, became the centrepiece of the European Court of Human Right's jurisprudence in assessing the necessity of restrictions. This concept relies on the basic understanding that the task of the effective supervision of the exercise of national discretion can be adequately performed, only if the review includes verification of the reality of the existence of the endangered aim, or social value, behind it. This verifiable factor, of threat resulting from the abuse of the Convention right, is an indispensable medium for inclusion of the legitimate aim element into the concept of democratic necessity.

This understanding has led to the following structure of supervisory analysis. After deciding on the legality and legitimacy of the restriction, the European Human Right's organ proceeds to ascertain that the reasons advanced by the government to justify it, are relevant and sufficient.[16] The first criterion serves to clarify whether the mentioned reasons are appropriate as a matter of the factual circumstances of the case, and, as regards complex aims, what particular elements of the latter are actually applicable.[17] This criterion is, in fact, a transposition of the formal requirement of legitimacy on the factual, specific, situation obtained in the case. The criterion of sufficiency presupposes the test of necessity itself. The

[13] ibid, para.59
[14] ibid
[15] *Norris v. Ireland*, Judgement of 26 October 1988, Series A, No.142; (1991) 13 EHRR 186, para. 75
[16] *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737, para.50
[17] *The Observer and the Guardian v. UK*, Series A No.216, Judgement of 26 November 1991, (1992) 14 EHRR 153, para.62

European organ has to verify, and the respondent government to 'convincingly establish,'[18] that the particular restrictive measure has been a response to the actual threat to the values behind the legitimate aim that is a 'pressing social need.'[19] As stated in the *Oberschlick v. Austria*, the organ of supervision has to satisfy itself that the domestic authorities have applied standards which are in conformity with the requirements of the Convention, and moreover, that in doing so they have based themselves on an acceptable assessment of the relevant facts.[20]

This is followed by the analysis of proportionality of the restriction to the legitimate aim, or more precisely the threat, which the restriction is designed to meet. At the stage of establishing the fact of the existence of the 'pressing social need' the Strasbourg organs, undertake the balancing of the conflicting interests involved in the case, or the restriction. As observed by the Court in the *Sunday Times* case "to assess whether the interference complained of was based on sufficient reasons which rendered it 'necessary in a democratic society' account must be taken of every public interest aspect of the case." The supervisory organ is called upon to weigh the interests involved and to assess their respective force.[21] This balancing is, in essence, a determination of what limitations on the rights and freedoms of individuals may be permitted as 'necessary in a democratic society'. Referring to this process of balancing, the Court stated in *Klass*, that, "some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention… as the Preamble of the Convention states, 'Fundamental freedoms.. are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend…"[22]

Therefore, the concept of 'democratic society' is being further developed and clarified by the Strasbourg organs balancing work, and it stands as a reference scale for performing and measuring the outcome of such balancing. As one writer puts it, 'the Court's supervisory function inevitably has in it a creative, legislative element comparable to that of the judiciary in common law countries; so that in certain cases its exercise might strain the enthusiasm of

[18] *Barthold v. Germany*, Judgement of 23 March 1985, Series A No. 90; (1985) 7 EHRR 383, para.58
[19] *The Sunday Times v.UK*, Judgement of 26 April 1979, 2 EHRR 245, para.67
[20] *Oberschlick v. Austria*, Judgement of 23 May 1991, Series A No.204; (1994) 19 EHRR 389, para.60
[21] *The Sunday Times v. UK*, Judgement of 26 April 1979, 2 EHRR 245, para.65
[22] *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.59

the Member States.'[23] This observation shows that the operation of the 'democratic necessity' clause presupposes, as a matter of fact, simultaneous exercise by the Convention organs of the two balancing processes, that between the domestic and European powers in the field of the implementation of human rights; and that of weighing up the conflicting interests of individuals and interests implied in the responsibilities of the governments in democracy. Within this framework, the European institutions have developed the complex system of rules for clarification of the borders of competence between them, and the national authorities. Only clear vision of this borderline, which is established anew in each particular case under review, makes possible the effective European supervision. This supervision does not allow the Member States to abuse their position as factual holders of power and, at the same time, remains free from arbitrariness. One author states that, "There is a legitimate area of action conferred on the national authorities and a legitimate area of review conferred on the Commission and the Court, in other words a shared responsibility for enforcement, with the Court having the ultimate power of decision."[24]

Convention Rights Fundamental to Democracy

The political theory literature and the Convention and its case law, reveal that freedom of expression, freedom of assembly and association, and free election rights are all hallmarks of democracy. Without these rights there will be no proper, functioning, democracy. Therefore, it will be beneficial to look at those fundamental rights more closely.

The Right to Freedom of Expression

Freedom of expression is protected by Article 10 of the Convention.

"1. 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.

[23] Waldock, H.," The Effectiveness of the System set up by the European Convention on Human Rights", (1980) 1 HRLJ 1, p.9

[24] Mahoney, P., " Judicial Activism and judicial Self-Restraint in the European Court of Human Rights: Two Sides of the same Coin", (1990) 11 HRLJ 57, p.81

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The right to freedom of expression is regarded as a fundamental guarantee by all regional and universal human rights instruments. The question is why freedom of expression is considered valuable. One of the answers of this question is that, it is valuable because freedom of expression offers a medium for finding the truth. Judge Holmes stated in the *Abrams* case that the power of ideas is the best test of truth. Because, in this way an idea will enter into a market of ideas, where it will be open to competition.[25] Another reason, which explains the importance of freedom of expression, is the notion of democracy. Democracy requires that ideas should be freely circulated, imported and exported.[26] At the basis of democracy is the idea of consent to, and participation in, government. Freedom of expression which is essential to both participation in and consent to government is one of democracy's preconditions.[27] The freedom of expression is important in the context of effective political democracy, and it plays a central role in the protection of the other rights under the Convention.[28]

[25] Abrams v. United States, 250 U.S. 616 (1919)
[26] Arslan, Z. (ed), ABD Yuksek Mahkemesi Kararlarinda Ifade Ozgurlugu, (Liberal Dusunce Toplulugu, 2003), p.8
[27] Merrills, J.G. *The development of international law by the European Court of Human Rights,* (Manchaster University Press, 1988) p.122
[28] Feldman, D., *Civil Liberties and Human Rights in England and Wales*, (Oxford, 1993), p. 547

The connection between democracy and freedom of expression was recognised by the Court, for the first time, in the *Handyside* case. The Court here stated that:

"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society.' Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.' This means, amongst other things that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aims pursued." [29]

The Court here determines the characteristics of a democratic society as 'pluralism', 'tolerance' and 'broadmindedness.' According to the Court the purpose of freedom of expression is to allow the exchange of information and opinions.

Freedom of expression is subject to restrictions. Article 10(1) provides expressly that states may require the licensing of broadcasting, television or cinema enterprises. Article 10, (like its counterpart Articles 8, 9 and 11), in its second paragraph, provides that states may restrict the right to freedom of expression in pursuit of one of the legitimate aims specified. This is when the restriction is prescribed by law and necessary in a democratic society.

[29] *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737, para. 49

However, these restrictions must be narrowly interpreted and the need for the restriction must be convincingly established.[30] The margin of appreciation, in restricting the freedom of expression, will vary depending on the purpose and nature of the limitation and the subject matter in question.[31] For example, there is a wider margin of appreciation in respect of issues of morality and commercial speech, but a narrower margin of appreciation in respect to political speech.[32] The Court gives a higher level of protection to expressions that contribute towards social and political debate, criticism and information but a lower level of protection to artistic and commercial expression.[33]

The Court considers political debate to be at the core of the concept of a democratic society. Therefore, freedom of expression has a particular importance for elected political representatives. To give an example, the Court found violation of Article 10 when a Basque opposition senator was convicted for writing an article critical of the government.[34] However, on one hand, politicians have a wide protection regarding their freedom of expression; on the other, the limits of acceptable criticism are wider for a politician than for a private individual. This is particularly the case when the criticism appears in the press, as the press is one of the best means by which the public can hear the ideas of political leaders.[35]

In *Oberschlick v. Austria*, the applicant journalist was convicted of defamation when he published criminal information laid against the secretary-general of the Austrian Liberal

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[30] *Ahmet and others v. UK*, Judgment of 2 September 1998, (2000) 29 EHRR 1, para. 55
[31] Ovey, C., White, R.C.A., *Jacobs &White European Convention on Human Rights*, 3rd ed. (Oxford University Press, Oxford, New York, 2002) p.278
[32] Leach, P., *Taking a Case to the European Court of Human Rights*, (Blackstone Press, London, 2001) p.166
[33] Ovey, C., White, R.C.A., *Jacobs &White European Convention on Human Rights*, 3rd ed. (Oxford University Press, Oxford, New York, 2002) p.279
[34] *Castells v. Spain*, Judgment of 23 April 1992, Series A No.236, (1992) 14 EHRR 445
[35] See *Oberschlick v. Austria*, Judgment of 23 May 1991, Series A no.204, (1994) 19 EHRR 389, para. 58

Party. Here the politician had advocated discrimination against immigrant families in relation to family allowances. The Court found that Article 10 had been violated, as the applicant had contributed to a public debate on an important political question, and that a politician who expressed himself in such a way should expect a strong reaction from journalists and the public. The Court stated that a politician 'inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.'[36]

The Court gives a narrow margin of protection to expression which becomes a vehicle for the dissemination of hate-speech and violence, especially in situations of political conflict and tension. In *Zana v. Turkey* the applicant, the former mayor of Diyarbakir, was sentenced for remarks made in an interview with journalists. In the interview he stated that "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake. " The Court, bore in mind that the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the time. Regarding these remarks as giving support to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakir, (the most important city in south-east Turkey), the Court stated that, they had to be regarded as likely to exacerbate an already explosive situation in that region. Therefore The Court found no violation of Article 10.[37]

[36] ibid

[37] *Zana v. Turkey* (App. 18954/91), Judgment of 25 November 1997, (1999) 27 EHRR 667, paras. 60-62, for other Turkish freedom of expression cases which involves the element of terrorism and violence see, Ceylan v. Turkey, (app.23556/94), *Surek v. Turkey*, (No.1) (App.26682/95), *Surek v. Turkey*, (No.2) (App. 24122/94), *Surek v. Turkey*, (no.4) (24762/94), *Erdogdu and Ince v. Turkey*, (Apps.25067/94 and 25068/94), and *Okcuoglu v. Turkey*, (App.24246/94) Judgments of 8 July 1999 reports 1999-4, (2000) 30 EHRR 73

However, it seems that the Court's judgement in *Surek and Ozdemir v. Turkey*[38] contradicts its finding in *Zana v. Turkey*, which was that expressions which incite violence and hate speech have narrow protection. In *Surek and Ozdemir v. Turkey* the applicants published an interview with a leader of the Kurdistan Workers' Party ("the PKK"), a terrorist organisation. This appeared in a review of which the applicants were owner and editor respectively. The applicants were convicted of publishing the declarations of terrorist organisations and disseminating separatist propaganda through the medium of the review. The published interview contained words and expressions such as: "the war will go on until there is only one single individual left on our side"; "there will be no single step backwards"; "the war will escalate"; and "our combat has reached a certain level. Tactics have to be developed which match that level." The interview also referred to the tactics which the PKK would use to combat the state. Although it is very difficult not to view these sentences as an encouragement to further violence, The Court here found no violation of Article 10.

The Right to Freedom of Assembly and Association

Freedom of peaceful assembly and association with others is guaranteed by the Article 11 of the Convention which reads:

"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.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health

[38]*Surek and Ozdemir v. Turkey*, (Apps. 23927/94), Judgment of 25 November 1997, (1999) 27 EHRR 667

or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

The freedom of assembly and association is one of the pillars of a democratic society. Democracy is concerned with respecting individuals and giving attention to their claims. So, permitting people to express their concerns by demonstrating or forming interest groups are means to a democratic end. In addition, acting with like-minded people in pursuit of goals that are socially acceptable contributes to the self-realisation of the individual.[39] For these reasons the freedom of assembly and association, like freedom of expression, is regarded as a fundamental right for the proper functioning of democracy.[40] One of the prerequisites of the right is that the assembly must be peaceful. Article 11 does not protect assemblies with violent intentions which result in public disorder. However, an assembly that includes a real risk of a violent counter-demonstration, where the violence is outside the control of the organisers, will still be regarded as under the guarantee of Article 11.[41] The right to freedom of assembly and association is connected to the right to freedom of expression and the right to freedom of thought, conscience and religion. The Court in, *Chassagnou and others v. France*, stated that rights under Articles 9 and 10 would be of very limited scope if there were no a guarantee of the right to share beliefs and ideas in community with others, especially through associations of individuals.[42] As it was expressed by the Court, one of the aims of the right to freedom of peaceful assembly and association is the freedom to hold opinions and to receive and impart information and ideas.[43]

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[39] Merrills, J.G. *The development of international law by the European Court of Human Rights,* (Manchaster University Press, 1988) p.125

[40]*United Communist Party of Turkey and others v. Turkey*, Judgement of 30 January 1998, (1998) 26 EHRR 121, para.25

[41] Appl.No.8440/78, *Christians Against racism and Facism v. UK,* Decision of 16 July 1980, para.4

[42]*Chassagnou and others v. France*, Judgment of 29 April 1999; (2000) 29 EHRR 615, para.100

[43]*Ahmet and others v. UK,* Judgment of 2 September 1998, (2000) 29 EHRR 1, para.70

The *Ezelin* case[44] was the first case in which the Court found a breach of the right of peaceful assembly. Here the applicant was a lawyer (avocat) and the chairman of the Guadeloupe Bar. He complained that the French courts had imposed a disciplinary penalty on him by way of reprimand. The sanction was because he had taken part in a demonstration protesting at the use of the Security and Freedom Act. He had not expressed his disapproval of insults uttered by other demonstrators against the judiciary. The Commission here contended that a disciplinary penalty, based on an impression to which Mr Ezelin's behaviour might have given rise, was not compatible with the strict requirement of a 'pressing social need' and so was not regarded as necessary in a democratic society.[45] The Court, agreeing with the Commission, decided that the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act. As Ezelin himself had not committed any such act during the demonstration, the penalty imposed on him could not be considered as necessary in a democratic society.[46]

In *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* the applicant association was founded on 14 April 1990. Its aims, according to its statute and programme, were to "unite all Macedonians in Bulgaria on a regional and cultural basis" and to achieve "the recognition of the Macedonian minority in Bulgaria". According to the applicants' submissions before the Court, the main activity of the applicant association was the organisation of celebrations to commemorate historical events of importance for Macedonians in Bulgaria. Its statute stated that the organisation would not infringe the territorial integrity of Bulgaria and that it "would not use violent, brutal, inhuman or unlawful means."[47] In 1990 Ilinden applied for registration. The Bulgarian courts, after examination of the statute and

[44] *Ezelin v. France*, Judgment of 26 April 1991, series A, No.202; (1992) 14 EHRR 362
[45] ibid. para.50
[46] ibid, para.53
[47] ibid, para.10

programme, refused registration for the reason that the applicant association's aims were directed against the unity of the nation; that it advocated national and ethnic hatred; and that it was dangerous to the territorial integrity of Bulgaria. Therefore, several requests of applicant associations for meetings and assemblies were refused by the authorities for the reason that the applicant association was not a legitimate organisation. Most importantly the applicant association was a separatist group which sought the secession of the region of Pirin from Bulgaria. The applicants submitted that the ban on meetings organised by them in commemoration of certain historical events, and the attitude of the authorities at the relevant time, was aimed at suppressing the free expression of ideas at peaceful gatherings. As such they amounted to an interference with their rights under Article 11 of the Convention. The Court considered that while past findings of national courts, which have screened an association, are undoubtedly relevant in the consideration of the dangers that its gatherings may pose, an automatic reliance on the very fact that an organisation has been considered anti-constitutional – and refused registration – could not justify, under Article 11 paragraph 2 of the Convention, a practice of systematic bans on the holding of peaceful assemblies.[48] The Court reiterated that the fact that a group of persons calls for autonomy, or even requests secession of part of the country's territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security.[49] The Court in conclusion stated that, in circumstances where there was no real foreseeable risk of violent action or of incitement to violence; or any other form of rejection of democratic principles, a ban was in the Court's view not justified under paragraph 2 of Article 11 of the Convention. The Court found that the authorities overstepped their margin of appreciation and that the measures

[48] ibid, para.92
[49] ibid, para.97

banning the applicants from holding commemorative meetings were not necessary in a democratic society, within the meaning of Article 11 of the Convention.[50]

The Strasbourg Court in *Le Campte, van Leuven and De Meyere v. Belgium*[51] ruled that public law associations fall outside the scope of Article 11. The applicants in this case were medical doctors who had been subject to disciplinary punishments by the Belgian *Ordre des medecins* which was a public professional association. The applicants complained that the obligation to join the *ordre* inhibited their freedom of association. The Court, like the Commission, unanimously found no breach of Article 11. The professional associations, established and governed by public law, were part of the regulatory framework and had the duty to ensure the maintenance of professional standards in the public interest.[52] Therefore, the right to freedom of association applies only to private-law organisations.

One of the associations to have been given an important weight and protection by the Convention organs is the political party. The Strasbourg organs in recent times have received quite a number of applications from the political parties of Turkey.

The first of these cases was *United Communist Party of Turkey v. Turkey*.[53] The Court here established the principles which it has applied in subsequent political party cases. The applicant political party was formed in June 1990, and intended to participate in the upcoming general election. It submitted its constitution and programme to the Principal State Council at the Court of Cassation for registration. The Council applied to the Constitutional Court for the dissolution of the applicant party. The grounds relied upon by the Council were that the party

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[50] ibid, paras. 111-112

[51] *Le Campte, van Leuven and De Meyere v. Belgium,* Judgment of 23 June 1981, Series A, No.43 ; (1982) 4 EHRR 1

[52] Ovey, C., White, R.C.A., *Jacobs &White European Convention on Human Rights,* 3rd ed. (Oxford University Press, Oxford, New York, 2002) p.292

[53] *United Communist Party of Turkey and others v. Turkey*, Judgment of 30 January 1998, (1998) 26 EHRR 121, On the political right aspect of Article 11 see, Cullen, H. "Freedom Of Association As a Political Right" (1999) European Law Review 24, pp.30-42

used the word “communist” in its name; that its activities were likely to undermine the territorial integrity and unity of Turkey; and that it was the successor of a previously dissolved party. The particular concern of the Council was the applicant’s advocacy of the rights of the Kurdish population of Turkey, and a solution to the conflict between the Turkish State and the Kurds. Both Convention institutions rejected the respondent state’s contention that Article 11 did not apply to political parties. Turkey's argument was based on the specific mention of trade unions in Article 11.[54] Another issue, which the Commission and the Court both considered, was the relationship between the right to freedom of expression and the right to freedom of assembly and association.[55]

The role of political parties in a democracy was a crucial part of the reasoning by both Commission and Court. Unless a political party can be shown to be in support of undemocratic means for achieving its ends, it must be allowed to exist. As a result of the high priority placed on political pluralism as an element of a democratic society, and the role of political parties in supporting pluralism, the Court decided that restrictions on Article 11 with respect to political parties, are to be subject to strict scrutiny. The margin of appreciation enjoyed by states is therefore reduced in respect of such restrictions.[56] The Court was of the view that, as there was no evidence that the applicant party intended to engage in violent or undemocratic means in pursuing its aims, the ban was not necessary in a democratic society. According to the Court, political pluralism is part of the nature of a democratic society, and the existence of political parties reflecting all the views of the population is necessary to support pluralism, including, in particular, the possibility of opposing officially sanctioned ideas.[57]

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[54] ibid, para.132
[55] see ibid. para.147
[56] ibid para.135
[57] ibid,para.136

However, the *Refah Partisi* case saw an interesting outcome from the Strasbourg organs. It is the first political party case in which the Court found no violation of Article 11 since the case of the *German Communist party,* half a century earlier. The *Refah Partisi*, unlike the United Communist Party, was a well established party and indeed in power when the dissolution proceedings started. The decisions of both the Turkish Constitutional and Strasbourg Courts were based on speeches made by the leaders, and some of the members, of the party. The main ground for dissolution was the *Refah's* intention to establish a plurality of legal systems based on differences in religious belief. They wished to establish Islamic Law, a system of law that was seen by the Strasbourg organs as incompatible with democracy. The Court here stated that although political parties are entitled to campaign for changes in legislation or to the legal or constitutional structures of the state, they could only enjoy the protection of Article 11, if the means used to those ends were lawful and democratic, and the proposed changes themselves were compatible with democratic principles.[58]

The Right to Free Elections

The main feature of democracy is the right of people to elect their rulers. In contemporary democracies the medium for electing rulers is the free election. Article 3 of Protocol 1 guarantees the right to free election;

"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 people in the choices of the legislature.'

Article 3 of Protocol 1 requires, therefore, that laws should be made by a legislature responsible to the people. As it is referred to in the Preamble to the Convention, free elections

[58] See Ovey, C., White, R.C.A., *Jacobs &White European Convention on Human Rights*, 3rd ed. (Oxford University Press, Oxford, New York, 2002) p. 294. The detailed analysis of the Refah Partisi case with other Turkish political party cases will be done in chapters 5 and 6.

are a condition of 'effective political democracy.' This may also be found in the concept of a democratic society, which runs through the Convention.[59] The Court established that since Article 3 of Protocol 1 enshrines a characteristic principle of democracy, it is accordingly of prime importance in the Convention system.[60] The Court, in the *Bowman* case, stressed that there is a strong connection between Article 10, which is another benchmark of democracy, and Art.1 of Protocol 1 'free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system.'[61] Unlike the majority of other Convention rights, Article 3 of Protocol 1, by requiring the Member State to hold democratic elections, is primarily concerned with a positive obligation.

The Court looked at the scope and significance of Article 3 P-1 when it first interpreted it in the case of *Mathieu-Mohin and Clefayt*.[62] The applicants were French speaking Belgian parliamentarians who lived in a Flemish district of Brussels. Because of the constitutional arrangements of Belgium they were unable to participate in the decision making of the Flemish Council. They therefore complained that their exclusion from the Flemish Council violated Article 3 P-1. The Court here approved the Commission's finding that the provision included the right of universal suffrage.[63] Therefore, the right contains the right to vote and the right to stand for election.[64] Although the right to participate in government is fundamental to democracy, the Court expressed the view that constitutional arrangements in the Contracting States can make the right to vote and to stand for election subject to various

[59] Ibid, p.331
[60] See ibid and also, Merrills, J.G. *The development of international law by the European Court of Human Rights*, (Manchaster University Press, 1988) p.114. For the cases on this issue see Matthews v. UK (Appl.24833/94), Judgment of 18 February1999, (1999) 28 EHRR 361, para.42; *United Communist Party of Turkey and others v. Turkey* (App.19392/92) Judgment of 30 January 1998, (1998) 26 EHRR 121, para.45
[61] *Bowman v. UK*, Judgment of 19 February 1998, Reports 1998-1; (1998) 26 EHRR 1, para.42
[62] *Mathieu-Mohin and Clefayt v. Belgium*, Judgment of 2 March 1987, Series A, No.113; (1998) 10 EHRR 1
[63] App.2728/66, *X v. Federal Republic of Germany*, Decision of 6 October 1967, (1967) 10 Yearbook 336,
[64] Apps. 6745-46/76, *W,X,Y and Z v. Belgium*, Decision of 30 May 1975, 18 Yearbook 244

conditions. Therefore, the right is not an absolute one.[65] In the case of *Zdanoka v Latvia*,[66] the applicant complained about her disqualification from standing for election to parliament, on the ground that she had actively participated in the CPL, which amounted to a breach of her right to stand for election guaranteed by Article 3 of Protocol No. 1. The government argued that the interference was legitimate. Having failed to obtain a majority on the Supreme Council in the democratic elections of March 1990, the CPL and the other organisations listed in section 5(6) of the Parliamentary Elections Act, had decided to take the unconstitutional route of setting up a Committee of Public Safety, which attempted to usurp power and to dissolve the Supreme Council and the legitimate government, thus abandoning democracy. Referring to its reasoning in *Refah Partisi*, the Court considered that no-one should be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society.[67] However, the Court found a violation of Article 3 of Protocol 1, as the applicant had never been accused of having been secretly active within the CPL after the latter's dissolution. Nor had she sought to re-establish that party in its previous totalitarian form, and had never been investigated for, or convicted of, any offence.[68]

In a democracy, the realisation of the right to free elections may only be achieved with the participation of political parties. However, the question of individuals forming a political party complaining of violation of the right to free elections when the party was dissolved was determined by the Court under Article 11, rather than the free election article. The Court avoided addressing the question of whether the right to form and maintain a political party falls within the scope of Article 3 of Protocol 1.[69] According to the Court, states are not

[65]*Mathieu-Mohin and Clefayt v. Belgium*, Judgment of 2 March 1987, Series A, No.113; (1998) 10 EHRR 1, para.52
[66] Zdanoka v Latvia, App. No 58278/00, Judgement of 17 June 2004
[67] Ibid. para. 79
[68] Ibid. para. 98
[69] See Ovey, C., White, R.C.A., *Jacobs &White European Convention on Human Rights*, 3rd ed. (Oxford University Press, Oxford, New York, 2002) p.338 and also the further detailed discussion of Turkish political party cases in Ch.5

obliged to introduce a specific system of elections, so they enjoy a wide margin of appreciation in the choice of voting system. On the interpretation of the word 'legislation,' the Court stated that it does not necessarily mean only the national parliament; it has to be interpreted in the light of the constitutional structure of the state in question.[70] Here the Court found that a regional council had sufficient competence and powers to make it a constituent part of the Belgian legislature. This was an important finding as it enabled the Court to bring the regional council within the scope of the Article 3 P-1. The status of the European parliament was looked at in the *Matthews* case.[71] The UK government here argued that the European parliament should be excluded from the scope of Article 3 on the ground that it is a supranational, rather than a national, representative organ. Analysing the power of the European Parliament the Court rejected the government's argument, concluding that the European Parliament is part of legislature of Gibraltar and under the scope of Article 3 of Protocol 1. On the question of the method of appointing the legislature the Convention supplies only general guidance. It simply provides that the elections shall be 'free,' 'at reasonable intervals,' by 'secret ballot,' and under conditions that will ensure the free expression of opinion of the people.

Conclusion

The preamble of the Convention and its structure clearly show that the only compatible political regime with the Convention is democracy. The review of political theory literature, on the other hand, reveals that 'democracy' has a very broad content in terms of time, culture and background and there is no agreement on the best way of delimiting this, because of the variety of democratic systems. Neither in the Convention, nor in the case law, is there an expression of which democratic system is required. The only expression is

[70]*Mathieu-Mohin and Clefayt v. Belgium*, Judgment of 2 March 1987, Series A, No.113; (1998) 10 EHRR 1, para.53
[71]*Matthews v. UK* (App.24833/94) Judgment of 18 February 1999; (1999) 28 EHRR 361

'political democracy' set out in the Preamble and referred to in the case law. However, when we compare the findings of the case law regarding the features of democracy and political theory's classifications of democracy, one can say that 'liberal democracy' is the system that best suits the Convention.[72]

The European Convention on Human Rights, by its "democratic necessity" clauses, guarantees the Members States with certain discretion in the field of implementation of the corresponding obligations. By allowing this discretion, the Convention recognises the fact that the realisation of some human rights and freedoms involves the complex process of balancing the conflicting interests of an individual, and his fellow citizens, with that of society as a whole. The Convention leaves the striking of this balance to the Contracting States themselves. However, when the claim is advanced by an individual petitioner, or by another state as an interstate application, it will give the Convention organs a duty to review the claimed abuse of this basic competence to balance requirement. In this situation, the Strasbourg organs both analyse the rightness of the national balancing act, and the outcome of this process, and they perform their own balancing, assessing the national measures and building their own enquiry according to the Convention's standards.

Thus, 'democratic necessity' allows for a national margin of appreciation but also makes possible an effective European Supervision. The process and outcome of this supervision depend, eventually, on the limits the European organs set out for their discretion. These are discerned in three basic sources: (a) the Convention's text; (b) the general concept of a 'democratic society'; and (c) the common practices of the Member States. Although these limits are case-specific, their determination is governed by certain general principles. The

Strasbourg organs have developed the basic principles about restriction as (1) pressing social need; (2) tolerance; (3) broadmindedness; and (4) proportionality of the measure with the legitimate aim it seeks.

The examination of the concept of democracy in political theory, particularly liberal democracy, and the findings of the Strasbourg organs in their case law, show that liberal democracy could not be achieved without political parties. Parties are a most important element of democracy. Political parties in newly established democracies also play an essential role. In libera1 democracies, founded on basic rights and civil liberties such as the equal right to vote, freedom of expression, and freedom of association, rights and freedoms can be exercised effectively only with the existence of political parties.

In line with political theory, the Strasbourg organs consider political parties as fundamental elements of a properly functioning democracy.[73] The right to freedom of expression, right to assembly and association and the right to free elections have been regarded by the Strasbourg organs as fundamental components of democracy. Therefore they have been given the utmost protection, leaving the Member States with the lowest possible discretion.

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