RESTRICTIONS ON THE FUNDAMENTAL RIGHTS IN THE STRASBOURG AND TURKISH LEGAL ORDERS

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TÜRK VE STRASBOURG HUKUK DÜZENİNDE TEMEL HAKLARIN SINIRLANDIRILMASI

ÖZET

Kamunun genel yararı temel hakların sınırlandırılmasının meşruiyrtini sağlar. Her bir bireyin hakkını toplumun menfaatlerini göz önünde bulundurarak control etmek ve düzenlemek hakikatte temel hakların kendilerini daha iyi korumayı netice verir. Avrupa İnsan Hakları Sözleşmesine gore taraf Devletler meşru amaçlardan birini taşıması, uygun hukuki prosedür ile yapılmış olması, kamuoyu tarafından ulaşılabilir, anlaşılabilir ve açık olmaları şartı ile temel hak ve hürriyetleri sınırlayıcı önlemler alabilirler. Ancak bu sınırlamalar demokratik toplumda gerekli olmalı ve gerçekleştirmek istedikleri meşru amaç ile orantılı olmalıdır. Bu bağlamda Strasbourg Mahkemesinin önüne bir dava geldiğinde Sözleşmece koruma altına alınan bir temel hakka müdahale olup olmadığı ve bu müdahalenin kanuni bir dayanağının olup olmadığı meselesi kolaylıkla çözülebilmektedir. Dolayısıyla Strasbourg Mahkemesinin temel görevi kanuni dayanağı ve meşru bir amacı olan bu müdahalenin demokratik bir toplumda gerekli olup olmadığını kakarlaştırmaktır.

Starbourg Hukuk düzeni paralelinde Türk Anayasası da kamusal yararın ve diğerlerinin haklarının gerektirdiği durumlarda bireylerin temel haklarının sınırlandırılabileceğini düzenlemektedir. Bir bireyin hakkının diğerlerininki ile çatıştığı durumlarda bu çatışmanın Anayasa, hukuk ve yargılama ile uzlaştırılması gerektiğine inanılır.

Bu makale Avrupa İnsan hakları Sözleşmesi ve Türk Hukuk Sistemi düzenlerinde temel hakların sınırlarının kapsamını incelemektedir. Makale her iki hukuk sistemini eleştirel bir bakış açısı ile karşılaştırarak analiz etmeyi amaçlamaktadır.

ANAHTAR KELİMELER: Temel Haklar, Sınırlamalar, Kısıtlamalar, Avrupa İnsan Hakları Sözleşmesi, Türk Anayasası.

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ABSTRACT

The common good may justify laws restricting the exercise of fundamental rights. Controlling and regulating the rights of each individual in the interests of all, in fact better achieves protection of the rights themselves. According to European Convention on Human Rights, States can create limitations on the exercise of such human rights so long as they are: reasonably based on one of the legitimate grounds; have been created by proper legal procedure; and are accessible, clear, and understandable to the public. The restrictions should be necessary in a democratic society and proportional to the aim they seek. When a case comes before Strasbourg Court the legitimate ground of the interference and whether the interference is prescribed by law is easily established. Therefore the main task of Strasbourg is to assess the interference whether it is necessary in a democratic society.

In line with the Strasbourg legal order, the Turkish Constitution, also regulates the fundamental rights of the individual with restrictions where the common good of the society and the rights of others so require. It is believed that when the use of one's rights and freedoms is in conflict with others' rights and freedoms, the conflict should be compromised via the constitution, law and adjudication.

This article is going to look at the scope of limitations of European Convention on Human Rights system and Fundamental Rights in Turkish Legal Order. The article is going to critically analyse and compare both legal systems.

KEYWORDS: Fundamental Rights, Restrictions, Limitations, European Convention on Human Rights, Turkish Constitution.

A- INTRODUCTION AND GENERAL REMARKS

Human rights and fundamental freedoms are subject to the general rule that no-one has the right to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' recognised elsewhere.[1] To prevent this, where necessary, it is legitimate to restrict the fundamental rights of individuals. In addition, the common good may justify laws restricting the exercise of fundamental rights. The purpose of such restrictions is to protect the moral ethos of society.[2] Controlling and regulating the rights of each individual in the interests of all, in fact better achieves protection of the rights themselves.

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1 http://www.hreoc.gov.au/human_rights/briefs/hr4.1 accessed on 15/05/2004, see also Art.18 ECHR

2 see Costello D, 'Limiting Rights Constitutionally' in O'Reilly J, (ed.) *Human Rights and Constitutional Law*, (The Round Hall Press, 1992)

So in the final analysis, restrictions or limitations on the rights of the individual are designed to secure the liberty of all individuals in a given society. These ideas underlie the limitation and the restriction of rights under the ECHR.[3] In effect, the control of restrictions is respectful of the state's sovereignty, in that it disregards the hierarchy of norms; the pre-eminence of the European norm is indeed tempered by taking into account national interests.[4] As Greer suggests, a cursory reading of the Convention might suggest that what it gives with one hand it takes away with the other, since most of the rights which the High Contracting Parties have agreed to respect and protect are subject to so many broad and often vague exceptions, restrictions and qualifications.[5]

The circumstances in which human rights can be limited are called, within the ECHR, permissible limitations or 'restrictions.' States can create limitations on the exercise of such human rights so long as they are: reasonably based on one of the legitimate grounds; have been created by proper legal procedure; and are accessible, clear, and understandable to the public. The restrictions also should be necessary in a democratic society and proportional to the aim they seek. When a case comes before Strasbourg Court the legitimate ground of the interference and whether the interference is prescribed by law is easily established and generally there is not a problem here. Therefore the main task of Strasbourg is to assess the interference whether it is necessary in a democratic society.

In line with the Strasbourg legal order, the Turkish Constitution, also regulates the fundamental rights of the individual with restrictions where the common good of the society and the rights of others so require. It is believed that when the use of one's rights and freedoms is in conflict with others' rights and freedoms, the conflict should be compromised via the constitution, law and adjudication. This article consists of two subsections. First section is going to look at the scope of limitations on Convention Rights. After a general introduction on the scope and nature of the limitations, the issues of derogable and non-derogable rights, qualified and absolute rights and the inherent limitations will be explored. Then the important limitation grounds that will contribute to the discussion of democratic necessity will be investigated. The

3 Loucaides, L.G, "Restrictions or limitations on the Rights Guaranteed by the European Convention on Human Rights" in (1993) 4 Finnish Yearbook of International Law 334, p.334

4 Delmas-Marty M, *The European Convention for the protection of Human Rights International Protection versus National Restrictions,* (Martinus Nijhoff Publishers, 1992), p.12

5 Greer, S., *Public Interests and Human Rights in the European Convention on Human Rights,* (Strasbourg: Council of Europe Publication, January 1995)

examination of safeguards against the abuse of restrictions will fallow that. The second section will be devoted to explore the rights restriction system of Turkish Constitutional Law which will give us the opportunity to compare and contrast with that of the Strasbourg. The main difference between Strasbourg system and Turkish system is the Turkish Constitution's emphasis on special Turkish type Democracy which confines democracy to that of established in it. This understanding, unlike the Strasbourg system, gives rise to a narrower approach to fundamental rights with the aim of protecting the state vis-à-vis individual.

B- NATURE AND SCOPE OF THE LIMITATIONS ON CONVENTION RIGHTS

According to the Convention, some freedoms, such as freedom from torture and freedom from slavery cannot be restricted by governments in the interests of balancing other competing interests. Governments within defined boundaries, with the aim of protecting competing interests, can restrict other freedoms. They may be defined as 'limitable freedoms.' These restrictions or limitations are themselves constrained by international human rights law. Any restriction must be justifiable by reference to one or more of the legitimate objectives. The first condition for a restriction to be justified is that it should have one of the legitimate aims established by the Convention. These legitimate aims vary according to the right in issue, but typically include the interests of national security or the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; and the protection of the rights and freedoms of others. Whether the measure in question pursues one of the stated legitimate aims, it is usually uncontroversial and the Court has rarely found that a state was not pursuing the aim it asserted. If it could establish that a restriction or interference was not, in truth, in pursuit of one of the legitimate aims, for example where someone was punished for publishing an article, ostensibly to prevent disorder, but in reality with the aim of hindering his trade union activity, there would be a violation of Article 18. However, while the Court may accept that the policy or measure pursued was one of the legitimate aims laid down in the relevant Article, it will not necessarily accept that the specific objective pursued by the policy was 'necessary in a democratic society'. The extent of the interference with a right will obviously be another highly material factor. A measure that reduces or restricts a right, in such a way or to such an extent that the very essence of the right is impaired, will constitute a disproportionate interference.'[6]

[6] Mahoney, P., Judicial Activism and Judicial Self Restraint in the European Court of Human Rights: Two Sides of the Same Coin (1990) HRLJ 57; Lavender, N., The Problem of the Margin of Appreciation (1997) EHRLR 380; see also Macdonald, R. St J., Methods of Interpretation of the Convention, in

In particular circumstances states are allowed to interfere with rights and freedoms guaranteed under the Convention; therefore, the state may inter alia: deprive an individual of his life or liberty in certain circumstances;[7] require the performance of forced or compulsory labour in well-defined cases;[8] exclude the press and the public from all or part of a trial;[9] interfere with the right to respect for a person's private and family life, his home and his correspondence;[10] limit or curtail the freedom to manifest one's religion or beliefs, in worship, teaching, practice and observance;[11] regulate the right to freedom of expression by requiring the licensing of a broadcasting, television or cinema enterprise, or subject such freedom of expression to formalities, conditions, restrictions or penalties;[12] restrict the right to freedom of peaceful assembly and to freedom of association with others, including the right to join trade unions;[13] deprive a person of his possessions;[14] control the use of property, or secure the payment of taxes or other contributions or penalties;[15] impose certain conditions on the rights to vote and to stand for election;[16] and restrict, within its territory or any particular area thereof, the liberty or movement and the freedom to choose a residence.[17]

All of these restrictions are permitted to a Contracting Party in the very article that sets out the right in question. The Convention employs a variety of techniques to limit the scope of its rights and freedoms or to permit restrictions on rights and freedoms in specified circumstances. Some of the articles contain expressive clauses, which indicate that certain activities do not fall within the scope of the article. Secondly, Article 15 allows special restrictions on a number

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MacDonald, Matscher and Petzold (eds) *The European System for the Protection of Human Rights,* (Martinus Nijhoff, 1993).

7 Article 2 of the Convention. The European Convention for the Protection of Human Rights and Fundamental Freedoms ETS No: 005, opened for signature in Rome on 04 November 1950 and came into force on 03 September 1953

8 Article 4 (2) ECHR

9 Article 6 (1) ECHR

10 Article 8 (2) ECHR

11 Article 9 (2) ECHR

12 Article 10 ECHR

13 Article 11 ECHR

14 Article 1 of the First Protocol

15 ibid

16 Article 3 of the first protocol

17 Article 2(3) and (4) of the Fourth Protocol

of rights and freedoms in time of war or public emergency. Finally, some of the articles setting out specific rights or freedoms make express provision for restrictions that meet certain qualifying conditions.[18] Apart from the article itself that guarantees the right and freedom, general provisions set out in the Articles 15 to 18 authorise the restriction or limitation of rights in various forms.

The restriction system of the Convention is largely based on the restriction principles found in Articles 8-11. Articles 8-11 have some similar features. Each of them has been formulated in an almost identical manner. The first paragraph sets out the basic right. The second paragraph typically expresses the conditions and forms of restriction of the basic right. Articles 8, 9, 10 and 11 deal with the protection of private and family life, freedom of thought and religion, freedom of expression and freedom of association and assembly, respectively.

Although each of the second paragraphs of Articles 8-11 states the system of restriction in the same structure, there are some slight differences between them. To give an example: the economic well-being of the country as a ground of restriction is defined only in Art.8 (2); and protection of the authority of the judiciary in Art.10 (2). Another difference is that while the other three Articles establish the restriction grounds in their second paragraphs, Article 10, in its first paragraph, states that limitations are allowed because the exercise of free expression carries with it certain duties and responsibilities.

There is no a standard setting document within the Council of Europe on the meaning and principles of restriction grounds. Therefore, where necessary, I will refer to the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights[19] prepared by United Nation's Economic and Social Council, UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

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18 Hovius B, " The Limitation Clauses of the European Convention on Human Rights and Freedoms and section 1 of the Canadian Charter of Rights and Freedoms: A Comparative Analysis" in (1986) 6 YEL 1, p. 9

19 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985).

The United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities have prepared Siracusa Principles. They have been formulated with the aim of setting up General Interpretative Principles Relating to the Justification of Limitations and Interpretative Principles Related to Specific Limitation Clauses

Table 1 Limitation Grounds in Articles 8-11

Limitation Grounds	Article 8	Article 9	Article 10	Article 11
Interests of national security	X		X	X
Interests of public safety	X	X	X	X
Prevention of disorder or crime	X		X	X
Protection of public order		X		
Protection of health or morals	X	X	X	X
Protection of the rights and freedoms of others	X	X		X
Interests of Territorial Integrity			X	
Protection of the reputation of others			X	
Protection of the rights of others			X	
Preventing the disclosure of information received in confidence			X	
Maintaining the authority and impartiality of the judiciary			X	
Interests of economic well being of the country	X			

The restrictions under Articles 8-11 can broadly be divided into two groups: the public interest grounds and the private interest grounds.[20] While the public interest restrictions are designed to protect the interests of society as a whole, the private interest restrictions protect individuals from the acts of their peers. In summary, public interest grounds are concerned with the general

[20] See Greer S, *Public Interest and Human Rights in the European Convention on Human Rights,* (Council of Europe, 1995) and Greer S., *Exceptions to Articles 8-11 of European Convention on Human Rights*, (Council of Europe: 1997)

interest of state and society, whilst private interest grounds are capable of benefiting distinct groups or individuals.[21]

I- Derogable Rights and Non-Derogable Rights

The rights guaranteed in the Convention and its Protocols can be split into two broad categories; derogable rights and non-derogable rights. According to Article 15 of the Convention, a State Party to the Convention is permitted to derogate from certain provisions of the Convention in times of public emergency, to the extent strictly required by the exigencies of the situation. On the other hand non-derogable rights cannot be derogated or restricted in any situation even in times of war or public emergency. In this respect Article 3 is an absolute non-derogable right, guaranteed by the Convention. There will be no place to derogate or restrict the right not to be tortured. Another non-derogable right is the right to life guaranteed by Article 2, but Article 15(2) itself makes the exception of deaths caused by lawful acts of war. Furthermore, Articles 4 (1) and 7 set forth non-derogable rights. The Protocol 6 together with Protocol 13 abolishes the death penalty; under Article 3 of Protocol 6 derogation from the sixth Protocol is prohibited. Derogation arises, in certain emergencies so that a state can be free from their obligations under the Convention. However, given the language of Article 15, it does enhance the position taken by the Court that proportionality of derogation measures will ordinarily require a process of supervision to prevent or reduce the possibility of abuse of the derogation.[22]

II- Absolute and Qualified Rights

Rights and freedoms set forth in the Convention can be grouped as either absolute or qualified according to the permissibility of their limitation or restriction. Qualified rights permit the state to interfere with the rights guaranteed, on the condition that the interference is prescribed by law; has a legitimate aim; and is necessary in a democratic society. Articles 8-11, Article 1 of Protocol 1 and Article 2 of the Protocol 1 are defined as qualified rights, because they permit the limitation in their second paragraphs.[23]

The absolute rights set out in the Convention start with Article 2, the right to life. Although the right to life is classified as absolute under Article 2, execution may take place following a court conviction of a crime for which the death penalty is allowed, (it should be borne in mind that this is subject to the

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21 Greer S., Exceptions *to Articles 8-11 of European Convention on Human Rights*, (Council of Europe: 1997), p.18

22 Harris, D.J., O'Boyle, M., *Warbrick, C., Law of the European Convention on Human Rights*, (Butterworth: 1995), p.504

23 Clayton, R., Tomlinson, H., *The Law of Human Rights*, (Oxford Univ. Press: 2000), p. 305

prohibition of the death penalty under Protocol 6 which applies to the states bound by it). In addition to this, Article 2 establishes that deprivation of life is not a breach of the Convention where it results from the use of force which is no more than absolutely necessary in: (a) defence of any person from unlawful violence;(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and (c) in action lawfully taken for the purpose of suppressing a riot or insurrection. The list of absolute rights continues: Article 3, the prohibition of torture and inhuman and degrading treatment; Article 4(1) the prohibition of slavery or servitude; and Article 7 the prohibition of the retrospective effect of criminal law. Protocol 6 concerns the abolition of the death penalty and Article 4 Protocol 7 prohibits criminal trial for an offence for which one has already been acquitted or convicted. Therefore as regarding absolute rights, neither in times of emergency nor in a normal situation any restriction or limitation is not permitted. For the other rights and freedoms provided and guaranteed under the Convention certain restrictions are permitted. These restrictions can be in different forms. In many cases, the nature and scope of the restriction measure is decisive for the question of whether or not a violation has taken place.[24]

III- Inherent Limitations

For some time, the Commission, took the view that in addition to the expressly mentioned restrictions (or in the absence of an express reference), the scope of the rights and freedoms laid down in the Convention would be subject to implied limitations. Unlike the express restrictions, these implied restrictions were inherent in those rights and freedoms themselves, so that, as long as they and their inherent limitations were respected, there would be no breach and the question as to possible limitations did not arise.[25] However, the Court rejected this doctrine, adopting the view that the enumeration given there is exhaustive. It stated that there is no room for inherent limitations.[26] Therefore, it is now established that the only restrictions which are allowed are those which are

24 van Dijk, P. van Hoof G.J.H, *Theory and Pratice of the European Convention on Human Rights*, 3rd ed The Hague, (London: Kluwer Law International, 1998), p. 761

25 Ibid p.763

26 see *Vagrancy* cases *De Wilde, Ooms and Versyp v. Belgium*, Judgement of 18 June 1971 , Series A No.12 (1979-80) 1 EHRR 373, see also *Golder v. United Kingdom*, Judgement of 21 February 1975, Series A No.18; (1979-80) 1 EHRR 524, para. 44

expressly permitted by either the general articles of the Convention, or the limitations contained in individual articles.[27]

C- THE LEGITIMATE AIMS OF LIMITATIONS

Greer has stated that legitimate restrictions and limitations can be grouped according to whether they are private or public interest restrictions.[28] The Commission and the Court have, from time to time, deliberated upon, given decisions and delivered judgements on the interpretation, meaning and effect of some of the qualifying provisions of the restrictive clauses, including such provisions as have those legitimate aims. Here only the important restriction grounds that attract quite number of applications to the Strasbourg Court and those that contribute to the discussions central to the thesis in this article will be explored.

I- National Security

The term "national security" includes two distinct elements, "national" and "security." The word "national" is generally used to refer to that which concerns a country as a whole. The word "security" suggests the protection of territorial integrity and political independence against foreign or internal force, or threats of force. Although the terms national and security can have these meanings, it should be recognised that both terms can be used to refer to different things. The word "nation" can be used to refer to both a cultural, ethnic etc. grouping within a state, (generally with a past history of independence before incorporation into a larger unit), as well as the state itself. As to the term "security," it may be defined as a state of being free from fear, risk of threat etc.; in other words either an absence of threats, or the existence of threats but coupled with adequate safeguards.[29] The principal cases in which the national security defence has been raised indicate that it concerns the security of the state and the democratic constitutional order from threats posed by enemies from both within and outside.[30] Cameron, in this framework, is of the opinion that, in an era of global interdependence, the ordinary meaning of "national security"

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27 Robertson, A.H, Merrills, J.G, *Human Rights in Europe*, 3rd ed. (Manchaster University Press, 1996); Ovey, C., White, R., *Jacobs and White European Convention on Human Rights,* (Oxford: Clarendon Press, 2002), p.198-199

28 See Greer, S., *Public Interests and Human Rights in the European Convention on Human Rights,* (Council of Europe Publication, (Strasbourg, January 1995)

29 Cameron I., *National Security and the European Convention on Human Rights*, (The Hague-London-Boston:Kluwer Law International, 2000), pp.40-41

30 see, Greer, S., *Public Interests and Human Rights in the European Convention on Human Rights,* (Council of Europe Publication, (Strasbourg, January 1995), p.12

cannot be limited to the simple preservation of territorial integrity and political independence from external armed attack, or interference by foreign powers. National security must also logically encompass espionage, (economic or political), and covert action by foreign powers. Moreover, notwithstanding a lack of foreign involvement, purely internal threats to the existing political order by use of force must also be checked. Certainly these are considered by most, if not all, governments as legitimate national security concerns.[31]

Basically, the aim of the national security restriction ground is to protect the existence of the nation or its territorial integrity or political independence against force, or threat of force.[32] National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. It is very important that vague or arbitrary limitations should not be imposed; the restriction may only be invoked when there are adequate safeguards and effective remedies against abuse.[33] The national security concept is as old as the nation state itself but it began to be used generally at the beginning of the cold war. The first example of its statutory usage was apparently the US National Security Act of 1947.[34]

This exception has not often been raised in the case law of the Strasbourg organs. However, where it has been an issue it has been of fundamental importance. It is worth recalling that there is a long tradition of governments dishonourably invoking national security to deal with what are really political embarrassments or disclosures which are harmful to their own partisan interest, rather than some larger "national" interest.[35] Therefore, in particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security. This includes using the exception, for example, to protect a government from the embarrassment of the exposure of

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31 See Cameron I., *National Security and the European Convention on Human Rights*, (The Hague-London-Boston:Kluwer Law International, 2000), p.43

32 see Cameron I., *National Security and the European Convention on Human Rights*, (The Hague-London-Boston:Kluwer Law International, 2000), pp.41-42

33 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985)

34 Cameron I., *National Security and the European Convention on Human Rights*, (The Hague-London-Boston: Kluwer Law International, 2000), p. 39

35 Nicol, A., "National Security Considerations And The Limits Of European Supervision" (1996) EHRLR 1, p.41

wrongdoing, to conceal information about the functioning of its public institutions, to entrench a particular ideology, or to suppress industrial unrest.[36]

The national security defence is available to states in relation to interference with the right to a public trial, (Article 6 para.1); the right to respect for private and family life, home and correspondence, (Article 8 para2); the right to freedom of expression, (Article 10 para.2); the right to peaceful assembly and association, (Article 11 para.2); the right to freedom of movement and freedom to choose residence, (Article 2 para.3 of Protocol 4); and the right of aliens lawfully resident in a territory not to be expelled without a hearing, (Article 1 para.2 of Protocol 7).

In a number of cases the national security defence has been an issue under the right to respect for private and family life, home and correspondence; the right to freedom of assembly and association[37]; and the right to freedom of expression. In the early cases where the national security exception was raised,

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[36] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 2. U.N. Doc. E/CN.4/1996/39 (1996). These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgements of national courts), and the general principles of law recognised by the community of nations. These principles aim to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interests of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms.

[37] One of the main focuses of this thesis is to explore the issue of dissolution of political parties by the Turkish Constitutional Court with the national security ground and the Strasbourg organs' response to those cases. In later chapters political party cases will be examined in detail. The first time that the Court looked at the question of banning of A Turkish political party was in *United Communist party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, (1998) 26 EHRR 121. the other cases are *Socialist Party v. Turkey*, Judgment of 25 May 1998, (1999) 27 EHRR 51, *The Freedom and Democracy Party (OZDEP) v. Turkey*, Judgement of 8 December 1999; (2001) 31 EHRR 27, *Refah Partisi (Welfare Party) v. Turkey*, (41340/98), (2002) 35 EHRR 3 and *Refah Partisi (Welfare Party) v. Turkey*, (41340/98), Grand Chamber Judgment of 13 February 2003, (2003) 37 EHRR 1

interference with the right to respect for private and family life, home and correspondence was raised in connection with the use of secret surveillance.[38] Although the Strasbourg institutions accepted that secret surveillance constitutes an interference with Article 8,[39] they also decided that this interference could be justified where it is strictly necessary to protect democratic institutions.[40] The Strasbourg Court stated in the well known *Klass* case that technical advances in espionage and the development of European terrorism made secret surveillance particularly necessary.

In July 1999, the Court gave almost identical judgements in a series of Article 10 cases.[41] These related to government actions against a number of newspapers and magazines on the basis that they were provoking division amongst the people of Turkey, and threatening the integrity of the state.[42] The various publications had made what the Court accepted were powerful and acerbic criticisms of the Turkish Government and its politics.[43] In particular, it said that the Convention left little room for the restriction of political speech. Here democracy was on the side of the individual. A democratic government had to be open to criticism and scrutiny, in this case by the media.[44]

The judgements were given in an objective style, and in each case the main focus of the Court was on whether the publication in question had incited violence. Where the publication incited the violence, the Court found that the government had not been in violation of its responsibilities under the

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38 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, *Leander v. Sweden*, Judgement of 26 March 1987, Series A No. 116; (1988) 9 EHRR 433

39 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.41

40 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.42, Appl. No; 8290/78, *A,B, C and D v. Federal Republic of Germany*, (1980) 18 DR p.176

41 See *Ceylan v. Turkey*, (App 23556/94), Judgement of 8 July 1999, Reports 1999-IV, (2000) 30 EHRR 73; *Okcuoglu v. Turkey*, (App 24246/94), Judgement of 8 July 1999: *Surek and Ozdemir v. Turkey*, (Apps 23927/94 and 24277/94), Judgement of 8 July 1999; *Arslan v. Turkey* (App 26432/94), Judgement of 8 July 1999, (2001) 31 EHRR 9; and *Surek nos.1-3 v. Turkey* (Apps 26682/95, 24122/94, 24735/94 respectively), Judgement of 8 July 1999.

42 Under Criminal Code Article 312 (1) and (2)

43 *Ceylan v. Turkey*, (App 23556/94), Judgement of 8 July 1999, Reports 1999-IV, (2000) 30 EHRR 73; case para.33

44 see ibid para.34

Convention in taking action against publishers. In view of the objective assessment of this question, it was odd that the Court described the government as having a greater margin of appreciation in cases where there was an incitement to violence. The language of the margin here is confusing. What the Court really meant was simply that there was no violation in these cases. The use of the incitement of violence criterion appears as an intersection of the essential issues of necessity and proportionality. The Court seemed to suggest that national security and territorial integrity could only be threatened by some act of violence, i.e. actual terrorist activity.[45] In the absence of some such threat, it would not be necessary to restrict publication. Proportionality depended on the same question, where violence was incited it would be proportionate to impose restrictions. The single question of incitement can fulfil both roles, but the two questions remain distinct.

However, while the Court's method does cover the questions of necessity and proportionality, it was criticised by the concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve. They stated that:

"It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive, which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society."

This is certainly a criticism which has some validity to this particular series of cases, given that the Court did apply its test in a rather abstract way, focused on the words of the publication. However, while Judge Palm is right to emphasise the need to place the words in context, the Court must still make the assessment itself, rather than deferring to the state. This series of cases appears to firmly entrench freedom of expression as the dominant force in this area, as well as seeing the effective rejection of the margin of appreciation.

One of the important cases decided by Strasbourg with regard to the justification of the national security limitation is the *Leander v. Sweden*[46]case. It may be accepted that one of the crucial means of protecting a state from any kind of internal threat is the gathering of information through intelligence. In the Leander case the applicant was refused employment in a security sensitive job on the basis of information contained in a police file, which the applicant was not allowed to see. Sweden, not surprisingly, claimed that the interference with the applicants' right to private and family life under Article 8 should be

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45 ibid. para.36. In these cases The Turkish Government did not explain its view on the threat posed in detail rather it relied on the language of the convention.

46 *Leander v. Sweden*, Judgement of 26 March 1987, Series A No. 116; (1988) 9 EHRR 433

considered as justified on the ground of protecting national security. The Court agreed with the state making the important evaluation that protecting national security requires state authorities to have the power to collect and store information on persons in a register which is withheld from the public. On the other hand, the Court stated that it was equally necessary that there should be adequate safeguards to prevent abuse of the system.[47] Safeguards can mitigate the effects of derogation, or as here a limitation. That being the case they should be as extensive as possible in the circumstances. Therefore, in a field where abuse is potentially so easy in individual cases and might have extremely harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.[48]

This general statement of principle, which asserts the essential importance of safeguards in a system for collecting information about individuals, was reaffirmed in another cornerstone case *Klass v. Germany*.[49] In this case the applicants were lawyers. In the past some of them had represented clients who were suspected of engaging in anti-constitutional activities. The applicants claimed that they might be subjected to security service telephone taps.[50] They complained that there was no requirement that anyone subject to surveillance be told of the fact after it had finished, nor was there any means available under German law of preventing such surveillance.[51] The German government claimed that their secret surveillance laws were justified under the second paragraph of Art.8. The Court stated in general that:

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47 ibid para.59, The Commission reached a similar conclusion in *Friedl v. Austria*, Report of 19 May 1994, Series A, No. 305-B, (1996) 21 EHRR 83. The case was concerned to withholding by the police of photographs taken during a demonstration, notwithstanding that there had been no prosecution. This case was settled and the merits has not been reached the Court.

48 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.41, para.56

49 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214,

50 The Commission Report, quoted at para 27 of the Judgement. In this case there was an issue as to whether the applicants could be victims under the direct victim requirement, since they had no clear information about whether their clients had been subject to telephone taps or not. The Court decided that it was unacceptable that an applicant be denied such status on the basis of the secrecy of the very measures about which he complains. Para.36

51 ibid, para.10

"The Court… cannot but take notice of two important facts. The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism with the result that the State must be able, in order to effectively counter such threats, to undertake surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of …secret surveillance over the mail, post and telecommunications is under exceptional circumstances, necessary in a democratic society in the interests of national security and /or for the prevention of disorder or crime."[52]

Indeed, the case turned upon the question of what safeguards were provided, and whether they allowed these particular surveillance powers to be justified under the second paragraph. It should be borne in mind that, as surveillance is redolent of a police state, therefore the exceptions to the right in the second paragraph had to be narrowly interpreted.[53]

Under the German surveillance system the safeguards were extensive. Surveillance could only be used where there was an immediate danger to the constitutional order, where there was no other means available and where there was some factual basis to suspect the person monitored. Furthermore a judicially qualified officer, who passed only required information on to the authorities, supervised this. Perhaps the most important of the safeguards was that there was a parliamentary board (which included members of the opposition), to whom the responsible minister had to report. There was also a commission appointed by the parliamentary board whose main duty was to monitor the use of surveillance power. There was an additional requirement that the person concerned was to be informed, at the point where it was possible to do so without jeopardising the purpose of the surveillance. It had to be noted that, because of the nature of the job, this might well be a very long time after it had started (if it was a large-scale

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52 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.48

53 ibid, para.42 The Court also in Sunday Times v. United Kingdom, Judgement of 26 November 1991, Series A No.217; (1992) 14 EHRR 229 at para.65 stated that the job of the Court was not balancing of two principles, but interpreting limited exceptions to a single basic right. Obviously this is not literally true, the limits are always pursuant to a different principal to the one represented by the substantive right, but it suggests a certain strictness of approach. On this also see Soulier G. "Terrorism" in Delmas-Marty M, *The European Convention for the protection of Human Rights International Protection versus National Restrictions*, (Martinus Nijhoff Publishers, 1992),

operation).[54] Despite the fact that there was such an extensive and complicated safeguard system, its weakness was that there was no possibility of judicial involvement or a legal remedy at any point. The Court argued that this was a serious shortcoming, stating that:

"One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the preamble of the Convention. The rule of law implies, inter-alia, that interference by the executive authorities with an individual's rights should be subjected to an effective control which should normally be assumed by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."[55]

Despite this finding, the Court came to the conclusion, and notwithstanding that there is need of a narrow interpretation of the exceptions to Article 8, that the German system fell within the government's margin of appreciation.[56] It seems that the Court was significantly influenced by the inclusion on the parliamentary board of members of the opposition, and in the end was convinced that this board, and the commission on surveillance, were sufficiently independent to be an adequate substitute for judicial control.[57] As for the applicants' second complaint; that the information held about them was not available to them, the Court agreed with the Government's submission that it would often defeat the object of the surveillance automatically to require that the subject be informed of the monitoring as soon as it had finished.[58]

In the *Klass* case the Court gave emphasis to the general concept of democracy. The Court ultimately saw the measures as essential to defend democracy, and themselves of a sufficiently democratic character to be within the narrow conception of the second paragraph.[59] The issue of proportionality was another important matter within the general character of this case. However, the question of what limitation to the right was actually needed; what role records relating to men such as the applicants would actually play in the fight against terrorism has not been considered. Since there was no suspicion relating to their activities, there would not, apparently, be any need to retain their records

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54 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, paras.18-21

55 ibid para.55

56 ibid para.49

57 ibid para 56

58 ibid para 58

59 See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights,* (1995) p.408

that would not also justify the maintenance of similar records relating to any member of the public, whether they had ever been subject to an "examination" or not. It is hard to accept that such a necessary reason existed, and would have justified the retention of the information under Article 8(2).[60]

In *Klass v. FRG*[61] the Court accepted that legislation granting powers of secret surveillance over the mail, post and telecommunication was, under exceptional conditions, necessary in a democratic society in the interests of national security and even for the prevention of disorder or crime (subject to the existence of adequate and effective guarantees against abuse).[62] The Court came to the conclusion that where there is adequate control of surveillance, which operates properly, a reasonable balance will have been struck between the rights of the individual and the needs of a democratic society.

In *Vogt* [63] the applicant complained about her dismissal from a civil service post as a secondary school teacher. This was on the alleged ground that her membership in the German Communist Party (DKP) violated the duty of political loyalty owed by civil servants to both the Federal Republic and the Land of Lower Saxony. The interference was defended by the German government under the national security, prevention of disorder, and the protection of the rights of others exceptions to the right to freedom of expression and the right to freedom of association and assembly. The Commission declared the application admissible, and in November of 1993, it issued an opinion finding that there had been a violation by West Germany of both Article 10 and Article 11. The Commission specifically refuted the fundamental basis of *Glasenapp*[64] and *Kosiek*[65], stating that:

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60 see the dissenting opinion of Mr Klecker in *Klass.*

61 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214,

62 ibid, paras. 43, 48 and 59

63 *Vogt v. Germany*, (Appl.17851/91), Judgement of 26 September 1995, (1996) 21 EHRR 205

64 *Glasenapp v. The Federal Republic of Germany*, Judgement of 28 August 1986, Series A No.104; (1987) 9 EHRR 25

65 *Kosiek v. the Federal Republic of Germany*, Judgement of 28 August 1986, Series A No.105;(1987) 9 EHRR 328. In the *Kosiek* and and *Glasenapp* cases the Court was of the opinion that the dismissal of a civil servant because of some opinions made public by the civil servant, were not to be seen as an interference with the exercise of the right to freedom of expression as guaranteed by Art.10. The Court was of the opinion that it was not the issue of freedom of expression, but that of access to the civil service.

"The Commission does not consider that in the present case, concerning the dismissal of a permanent civil servant, "access to civil service lies at the heart of the matter." It finds, with the parties, that the dismissal of the present applicant, on account of her political activities in the DKP, interfered with the exercise of her freedom."[66]

The European Court of Human Rights issued its judgement in the Vogt case on 26 September 1995. It held by ten votes to nine that there had been a violation of Article 10 and by ten votes to nine that there had been a violation of Article 11. It thereby contradicted both the West German courts and - de facto if not de jure - overruled the precedent which it had previously established in *Glasenapp* and *Kosiek*. The Court concluded that, although the reasons put forward by the West German government in order to justify their interference with Mrs. Vogt's rights '…are certainly relevant, they are not sufficient to establish convincingly that it was necessary...' to dismiss her. Even allowing for a certain margin of appreciation, the conclusion must be that to dismiss Mrs. Vogt by way of disciplinary sanction from her post as a secondary-school teacher was disproportionate to the legitimate aim pursued. On the other hand seven of the nine dissenting judges in the case considered that the applicant's dismissal was proportionate. They held that it could be considered necessary in a democratic society with the particular characteristics possessed by the German Federal Republic.

Judge Jambrek, delivered a separate and well-reasoned dissenting opinion. He argued that a number of factors should have been given due weight by the majority. These factors were: first, Germany's historical experience and its unique situation, until the fall of the Berlin wall, as a divided country with a particular vulnerability as the eastern part lay in the Communist Bloc. The second factor was the role of the DKP as a political party of the East German State, which was a declared enemy of the Federal Republic and the west. The third reason was the applicant's increasingly active involvement in the DKP from 1980 onwards. Jambrek stated that the applicant had not been dismissed merely because she was a member of a political party, or for having and expressing a particular point of view. Her dismissal was for the high profile she had chosen to take in a political party whose objectives were incompatible with her oath of loyalty to the constitution of the Federal Republic. He concluded, finally, that the arguments for and against her dismissal were balanced and could only be resolved by the national authorities within the context of a wide margin of appreciation.

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66 *Vogt v. Germany*, (Appl.17851/91), Judgement of 26 September 1995, (1996) 21 EHRR 205, para.46

Looking at the evaluation of the Strasbourg Court in national security cases, a wide margin of appreciation is readily justified, because it is of vital importance to all states. The Court, if remote from a specific context, may be ill equipped to identify genuine threats to a state which is party to the Convention. On the other hand in secret surveillance cases the secrecy involved, by its very nature, increases the risk of abuse. This is why the availability of effective supervision has been emphasised by the Court.

II- Territorial Integrity

Although territorial integrity is a different restriction ground from that of national security, it is often linked with the former. *Zana v. Turkey* is an example of this.[67] In this case the Court linked territorial integrity closely with national security. It seems that this restriction ground requires some threat of violence or disorder before resort can be made to it.[68] The Court rejected the argument of the Turkish government that interference is justified on the ground of territorial integrity, where it relates to the preservation of national unity as an idea.[69] The Court's approach, that the territorial integrity ground is linked with the national security one, is in conformity with the approach taken in the Johannesburg Principles.[70]

In the *Piermont v. France*[71] case the applicant took part in a demonstration in favour of the independence of French Polynesia. In a speech, she expressed support for anti-nuclear demands and for independence. The French authorities ordered her expulsion from French Polynesian territory and banned her from re-entering it. She claimed that this interference breached her

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67 *Zana v. Turkey*, (Appl.18954/910; Judgement of 25 November 1997; (1999) 27 EHRR 667.

68 Ovey, C. White, R.C.A, *Jacobs & White European Convention on Human Rights*, (Oxford Univ.Press, 2002), p.205

69 ibid.

70 See note 67. A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

71 *Pierment v. France*, Judgement of 27 April 1993, Series A No. 314; (1995) 20 EHRR 301

right to freedom of expression under Article 10. The French Government relied on "territorial integrity" to justify the interference. The Court accepted that it was aimed at the prevention of disorder and in the interests of territorial integrity. The Court in its judgement, referred to the importance of free political debate and that the speech was given in an authorised non-violent demonstration without any disorder. It reached the conclusion that the orders of the French Government had not been 'necessary in a democratic society'.

III- Prevention of Disorder or Crime

Even the strongest advocates of individual freedom will concede that restrictions may sometimes be justified in the interests of the protection of public order and prevention of crime.[72] This ground of justification is invoked the most frequently before the Court. It has been successfully pleaded in a number of cases. To give some examples: the secret surveillance of criminal suspects[73]; the regulation of various aspects of prison life[74]; searches for evidence of crime[75]; prohibition on consensual homosexual conduct within the armed forces[76]; the recording of journalists' telephone conversations with a lawyer suspected of involvement in terrorism[77]; the arrest and brief detention of two protesters at a military parade in Vienna.[78] In the context of the ECHR, these two interests in restriction, namely the prevention of disorder and the prevention of crime, may supersede individual freedom only when there really is a pressing social need, and where the means used are proportionate.

This exception is found in the Article 8 para.2, the right to respect for private and family life, home and correspondence; Article 10 para.2, the right to freedom of expression; Article 11 para.2, the right to freedom of peaceful assembly and to freedom of association. The concept of order, as envisaged by this provision, refers not only to public order within the meaning of Articles 6(1)

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72 Barendt E., *Freedom of Speech*, (Clarendon Press, Oxford 1985) p.192

73 Appl. 8170/78, *X v. Austria*, (1979) 22 Yearbook 308

74 Appl. 8231/78, *X v. United Kingdom*, (1982) 28 DR 5, Appl. 1753/63, X v. Austria, (1965) 8 Yearbook 174, Appl. 1860/63, *X v. The Federal Republic of Germany*, (1965) 8 Yearbook 204, Appl. 5442/72, *X v. United Kingdom*, (1975) 1 DR 41, Appl. 5270/72, *X v. United Kingdom*, (1974) 46 CD 54

75 Appl. 5488/72, *X v. Belgium*, ((1974) 17 Yearbook 222,

76 Appl. 9237/81, *B v. United Kingdom*, (1983) 34 DR 68

77 Appl. 8290/78, *A, B, C and D v. The Federal Republic of Germany*, (1980) 18 DR 176

78 *Choherr v. Austria*, Judgement of 25 August 1993, Series A No. 266-B; (1994) 17 EHRR 358

and 9(2) of the Convention; and Article 2(3) of the fourth Protocol. It also covers the order that must prevail within a group where such order can have repercussions on the general order in society.[79] The following have all been accepted as justifiable measures by a state in its attempt to prevent disorder or crime: the recording of telephone conversations[80]; placing a juvenile delinquent accused of a number of offences in a closed institution for observation and drawing up a psychiatric report as part of a juvenile investigation concerning him[81]; and in the case of convicted prisoners, their surveillance and search by prison wardens, their removal from association with other prisoners, the requirement to wear prison uniform, and restrictions on correspondence.[82] This exception has been frequently invoked in respect of cases regarding Article 8. In the *Golder*[83] case the Court held that by denying the applicant (a prisoner), access to a solicitor to discuss a libel action against a prison officer, the State had effectively denied him access to a fair and public hearing. The Court also ruled that his right to respect for correspondence under Article 8 had been breached. Again in relation to a prisoner's correspondence, in the *Silver* case the Court agreed that there was no justification for holding back any prisoner's letters unless they discussed crime or violence.[84]

In a number of cases the Court has found opportunities to examine whether religious practices could justifiably be restricted under the issue of disorder in society. Among these is the well known case of *Kokkinakis v. Greece*[85] After becoming a Jehovah's Witness in 1936, Mr Minos Kokkinakis was arrested more than sixty times for proselytising. He was also interned and imprisoned on several occasions. Finding a violation of Article 9, in the case the Court stated that freedom of thought, conscience and religion is one of the

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79 Appl. No. 7050/75, *Arrowsmith v. United Kingdom*, Report of 12 October 1978, (1980) 19 DR 5

80 Appl.No. 8290/78, *A, B, C and D v. FRG*, Decision of 13 December 1979, (1980) 18 DR 176

81 Appl.No. 8500/79, *X v. Switzerland*, Decision of 14 December 1979, (1980)18 DR 238

82 Appl.No. 8317/78, *Mcfeeley et all v. United Kingdom*, Decision of 15 May 1980, (1980) 20 DR 44

83 *Golder v. United Kingdom*, Judgement of 21 February 1975, Series A No.18; (1979-80) 1 EHRR 524

84 *Silver v. United Kingdom*; Judgement of 25 March 1983, Series A No. 61 (1983) 5 EHRR 347 para.101

85 *Kokkinakis v. Greece*, Judgement of 25 May 1993, Series A No.260-A; (1994) 17 EHRR 397

foundations of a "democratic society" within the meaning of the Convention. In its religious dimension, this is one of the most vital elements since it supports the identity of believers and of their conception of life. But it is also a precious asset for atheists, agnostics, sceptics and those who are unconcerned by religion. The pluralism indissoluble from a democratic society, which has been won at great cost over the centuries, depends upon it. It may be understood from the Strasbourg case law that Article 9 provides protection for religious, non-religious, atheist, agnostic, sceptical and also neutral opinion. And this because the Article includes the right not to practise or to be associated with religious activities against one's will. Thus, it necessarily involves the right to change one's belief or religion, as much as it provides the individual with the right to his or her religion or belief.[86]

In the same sense, but with a different dimension, in the *Kalac v. Turkey* case the Court decided that the applicant's dismissal from the army was not an interference with his rights under Article 9. The applicant was a judge advocate in the army but was dismissed from his post for breaching the code of the army by being a member of the religious Suleyman sect. Here the Court decided that there was no interference with the applicant's rights under Article 9, as the applicant had given the sect legal assistance and intervened on a number of occasions in the appointment of servicemen who were members of the sect. The important distinction drawn by the Court in this case was that the dismissal of the applicant was not prompted because of the way he manifested his religion but by his conduct and attitude.[87] It seems that the Court did not see any contradiction in stating that the authorities condemned the applicant's conduct because it infringed the principle of secularism. The court clarified that his dismissal, or compulsory retirement, was not prompted by the way the applicant manifested his religion. As the reasoning seems quite complicated in this case, one should bear in mind that there is sensitivity regarding the secular establishment of the Turkish state and the role that the military plays in Turkish politics to preserve the secular State.

The Court here appears to have been strongly influenced by the evidence that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion (e.g. praying five times a day and performing other religious duties, such as keeping the fast of Ramadan and

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86 see also *Darby v. Sweden,* Judgement of 23 October 1990, Series A No 187; (1991) 13 EHRR 774, and App.No. 10491/83, *Angeleni v. Sweden*, 51 DR 41 p.48

87 see *Kalac v. Turkey*, Judgment of 1 July 1997, Reports 1997- IV; (1999) 27 EHRR 552, paras. 30-31

attending Friday prayers at the mosque). However comparing this outcome with that of in *Kokkinakis v. Greece*, it seems to be a contradiction. Because, the Court noted that religious freedom implies, inter alia, freedom to manifest one's religion in community with others, in public and within the circle of those whose faith one shares, as well as alone and in private.[88] Therefore, it is not clear how the Court came to separate out the applicant's "conduct and attitude" from the forms which manifestation of one's religion or belief may take under Article 9, namely "worship, teaching, practice and observance.' This rather artificial distinction, taken together with a "military life' narrowing of the meaning of the right concerned, was the somewhat dubious basis for a finding of 'no interference' with the first paragraph of Article 9. Accordingly, the Court saved itself the task undertaken by the Commission, namely deciding whether the applicant's enforced retirement from the armed forces constituted a proportionate measure, "prescribed by law", pursuing a pressing social need. It is difficult to see why considerations of military life and the role of the armed forces in pluralist countries cannot properly be part of the determination of what is "necessary in a democratic society' under the provisions of Articles 8(2), 9(2), etc., rather than artificially narrowing what constitutes an interference with the substantive rights in Articles 8(1), 9(1), etc.

One of the more controversial Strasbourg cases regarding freedom of religion and conscious was the *Karaduman*[89]case. In this case, university regulations prohibited the wearing of headscarves[90] in identity photographs attached to the degree certificate of a secular university. The Commission, surprisingly, ruled that this did not constitute interference in the applicant's right to manifest her religious beliefs. The Commission stated its view that universities could restrict the freedom of students to manifest their religion, in order to ensure the harmonious coexistence of students with different religious allegiances. This could stand without complying with the requirements laid down in Article 9(2).[91] The Commission stated that:

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88 See *Kokkinakis v. Greece*

89 App.No: 16278/90, *Karaduman v. Turkey*, 74 DR 93

90 The jurists of classical Islamic Law, basing their opinions on the verses on the Quran, concluded that Muslim women were under a duty to veil themselves. On the other hand it should be expressed that the obligatory character of the veil is not unanimously agreed amongst Muslims and the form of the veil differs among the countries and cultures of the Muslim world. See Gallala, I., "The Islamic Headscarf: An Example of Surmountable Conflict between Sharia and the Fundamental Principles of Europe" (September 2006) 12 European Law Journal No.5, pp593-612

91 ibid at. 108

"[B]y choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practice that religion or those who adhere to another religion. Where secular universities have laid down dress regulations for students, they may ensure that certain fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others."

The present author is of the opinion that the Commission was wrong in this case. The Applicant wore a headscarf in her university as a manifestation of her beliefs. Bearing in mind that such a manifestation is not violent or harmful to other people at all, it should not be considered as a threat to the secular state. The Commission justified its stance by reference to the fact that the applicant had voluntarily chosen to attend a secular university. If the Commission had fully taken into account that alternative universities do not exist in Turkey, its decision might have been different. In the Grand Chamber decision of *Leyla Sahin v. Turkey*,[92] however, the Court missed an opportunity to modify the earlier decision.

In *McVeigh*[93] the applicants had been arrested and detained under the "Prevention of Terrorism" legislation in force in the United Kingdom. Various measures had been taken; such as fingerprinting and photography taken during their detention and of the retention by the authorities of certain records following their release. Two of the applicants, Mr McVeigh and Mr Evans also complained that they were not allowed to join or contact their wives. The applicants alleged breaches of Articles 5, paragraphs 1-5, 8 and 10 of the Convention. The government claimed that it was justified in preventing a suspect from contacting his family, as they might facilitate an act of crime by the destruction of evidence. The claim in this case was that Article 8 had been violated by the failure of the authorities to allow the men to contact their families to inform them about their detention. This aspect of the case is worth noting, because it is based on the previously neglected question of necessity; whether there was any reason shown by the government for preventing contact.

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92 *Leyla Sahin v. Turkey*, App.No. 44774/98, Grand Chamber Judgment of 10 November 2005, for detailed examination of Leyla Sahin case see ch. 6, pp. 245-249

93 *McVeigh, O'Neill and Evans v. UK,* 25 DR 15

It was concluded that there was not.[94] The Commission rejected, in this application, the reason suggested by the government, that a suspect's family would then inform accomplices, who might escape or destroy evidence.[95] Surprisingly, in view of the contemporary case law, the margin of appreciation did not play a prominent role in *McVeigh*. However, it was clear from the Commission's opinion that it was not prepared to scrutinise the decisions of the respondent government closely with a methodology similar to that prompted by the margin doctrine. It is possible that the Commission chose to avoid the language of the margin because its consideration of this element of the case followed on from the more objectively considered Article 5 elements. In *Murray*[96] the applicant was arrested at her home on 26 July 1982 by a member of the armed forces under Section 14 of the Northern Ireland (Emergency Provisions) Act 1978 under suspicion of involvement in the collection of money for the purchase of arms for the IRA in the United States of America, an offence under Section 21 of the 1978 Act and Section 10 of the Prevention of Terrorism (Temporary Provisions) Act 1976. The applicant has complained that her detention was in breach of Article 5 para. 1 of the Convention, in particular subsection (c) of that provision, as allegedly it was not for the purpose of bringing her before a competent legal authority or founded on any reasonable suspicion that she had committed any criminal offence. She, furthermore, complained that the manner in which she was treated both in her home and at the screening centre constituted a violation of Article 8 para. 1 of the Convention. In particular she complained about the entry into and search of her home, the recording of personal details concerning herself and her family and the retention of those records, including a photograph of her which was taken without her consent. She also complained that she was not informed promptly of the reasons for her arrest, contrary to Article 5 para. 2 of the Convention. The claims regarding Article 8 were similar to those in *McVeigh*. Not surprisingly in view of the finding that the arrest of Mrs. Murray did not disclose a violation of Article 5, the Court found that there was no violation of Article 8 in the entry and search of her home, or her subsequent questioning. Nor was it a violation that the information gathered was retained, a decision based on the same reasoning, and displaying just the same limitations, as the Commission decision in *McVeigh.*[97]

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94 ibid. para. 239

95 ibid para. 238

96 *Murray v. United Kingdom*, Judgement of 28 October 1994, Series A No.300-A; (1995) 19 EHRR 193

97 *McVeigh, O'Neill and Evans v. UK,* 25 DR 15

"A certain margin of appreciation in deciding what measures to take both in general and in particular cases should be left to national authorities… The present judgement has already adverted to the responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threat posed by organised terrorism…"[98]

Again, the combination of the margin of appreciation and the moral authority attached to those seen as being on the side of democracy was a powerful combination. In this case, not only was there a neglect of the necessity question, at least in relation to the retention of information about an unsuspected person,[99] but the Court also failed to carry out [any more] than a balancing of the limitation on the applicant's right with the gravity of the situation. It seems that such a balancing would have produced a result in harmony with the decision reached, but, as with necessity, it remains the case that the proportion must be assessed in every decision. Instead, as a substitute for both the questions of what was necessary and what was proportionate, the Court ensured that the activities of the army were based on legitimate considerations and that none of the personal details taken would appear to have been irrelevant to the procedures of arrest and interrogation.[100]

While both *Brind v. UK*[101] and *Purcell v. Ireland*[102] were only admissibility decisions they are both significant cases. Both concerned the banning of broadcasts by members of organisations proscribed by the UK Prevention of Terrorism Acts (but also included the legal Political Party Sinn Fein). The objective was to try and prevent terrorists and their supporters from advocating their cause and gathering support for their activities. Both the respondent governments claimed that the terrorists' appearance on television gave their organisations an air of legitimacy. Therefore the ban would, in the United Kingdom Prime Minister, Margaret Thatcher's phrase, cut off the "oxygen of publicity" from them. In Ireland the ban included all statements made by those covered, while the UK version made exceptions for election campaigns and did not cover members when speaking as private persons, or on a matter entirely unconnected with terrorism. Neither ban prevented what the groups had said from being broadcast as reported speech. In the case of the UK ban, television pictures were even dubbed by an actor reading the statement

98 ibid para. 90

99 ibid para.91

100 ibid paras. 92-93

101 *Brind v. UK*, Decision of the Commission 77-A DR 42 (1994)

102 *Purcell v. Ireland* , Decision of the Commission 70 DR 262 (1989)

word for word. Journalists whose work was affected by the bans brought the applications in both cases.

The question in *Brind* and *Purcell,* was whether such an infringement of Article 10 could be permitted in order to protect national security and prevent crime or disorder. Despite a number of issues being raised, the relatively short answer of the Commission in both cases was 'yes'. In *Purcell* the Commission pointed to the difficulty of establishing a balance between the protection of the state and freedom of information. In the end, it concluded, the importance of fighting terrorism outweighed the "inconvenience" the ban caused to the applicants.[103] The arguments of the applicants were, it may be said, rather glossed over, and the emphasis of Article 10 was shifted from their rights under the first paragraph, to the duties and obligations mentioned at the start of the second. Although it was only an admissibility decision, and there is a limit to how much analysis it should bear, *Purcell* shows the Commission seemingly making very little assessment of. It did little more than stamp its approval on the arguments of the Irish Government and the decision appears to depend very substantially on the margin of appreciation. Certainly there was no attempt to make any critical assessment of whether the measures could be said to be necessary.

The *Brind* case was similar, although slightly more considered. Here the Commission took on board more fully the arguments of the applicants. In particular, in the context of whether the ban was necessary, the Commission said that it:

"…appreciates that the logic of the continuation of the directions is not readily apparent when they appear to have very little real impact on the information available to the public. The very absence of such impact is, however, a matter the Commission must bear in mind in determining the proportionality of the interference to the aim pursued."[104]

The Commission thus observed that in that respect at least the ban was not necessary, in that it had little real effect.[105] However, despite going on to decide in the government's favour, it did not propose or support any alternative reason why the ban was needed. Where the interference under the second paragraph does not appear to fulfil a legitimate purpose, it constitutes a violation of the Convention. The fact that it is quite a small interference, and thus in proportion to the threat, should not enter into the picture. The Commission, in allowing the continued imposition of a limitation which is not needed, however

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103 ibid. p.279

104 *Brind v. UK*, Decision of the Commission 77-A DR 42 (1994), pp.42-54

105 See also *Guardian and Observer v. UK,* Series A No.216, para 69.

small it appears to be, can only undermine respect for the Convention. Here, instead of the strong stance it could have taken, the Commission stated:

"[the interference] can be regarded as one aspect of a very important area of domestic policy…and the Commission has no doubt as to the difficulties involved in striking a fair balance between the requirements of protecting freedom of information… and the need to protect the state and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights."[106]

Here again the emphasis on democratic discretion is well to the fore. The demands of protecting the democratic order allowed the states in these cases a great deal of freedom to the extent that the applications were manifestly ill-founded.

IV- The Protection of the Rights, Freedoms and Reputations of Others

This restriction ground is sometimes linked with the protection of health and morals and the prevention of disorder and crime grounds. It is also a broad and diverse category. As it covers a wide range of matters it is frequently invoked in the Strasbourg Jurisprudence.[107]

Within the UN system there is a principle that when a conflict exists between rights protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context a special weight should be afforded to rights not subject to limitations in the Covenant.[108]

This limitation ground was used in the *Otto-Preminger Institute* case.[109] This case concerned the screening of an allegedly offensive film, which was considered to breach the right to respect for religious feelings when the rights in Articles 9 and 10 were read together.[110]

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106 *Darby v. Sweden,* Judgement of 23 October 1990, series A No 187; (1991) 13 EHRR 774, paras.42-54

107 Ovey, C. White, R.C.A, *Jacobs & White European Convention on Human Rights*, (Oxford Univ.Press, 2002), p.207

108 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985).

109 *Otto-Preminger Institute v. Germany*, Judgement of 20 September 1994, Series A No. 295-A; (1995) 19 EHRR 34

110 ibid paras. 46-48

In *Oberschlick* the Court decided that the conviction of the applicants for defaming certain Austrian criminal court judges was justified under the protection of the reputation or rights of others clause of Article 10, para.2. The Court decided that discussion of judicial decisions was legitimate in a democratic society. However, it also held that it is necessary to protect public confidence in the judicial process against destructive attacks that are essentially unfounded. This was especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to critics.[111]

V- Assessment

First of all, although it is nowhere stated in the Convention, but it is presupposed by the whole system of the Convention; only the restrictions expressly authorised by the Convention are allowed. As it enables the Court to control the alleged interference by reference to those express provisions, the requirement that restrictions must, in every case, be justified by an express provision of the Convention which requires legitimate restriction grounds is very great. Having found that the interference is prescribed by law, The Strasbourg Court then looks whether the aim of the limitation fits one of the legitimate restriction grounds in the particular ground. The essence of each of the restrictions seems to be that the interest of society as a whole overrides the interests of the individual. In its assessment, the Court permits only the minimum interference with the right which secures the legitimate aim. The Strasbourg organs have held that restrictions on fundamental rights invoke different levels of the margin of appreciation depending on which of the aims, enshrined in the subject Article they are designed to promote. On the other hand, in matters of national security, the Contracting States enjoy a wide margin of appreciation in determining the scope of the interference. Also, where the Strasbourg organs have decided that there is no widespread standard moral ethos between Member States it gives a wide margin to national authorities.

D- THE SAFEGUARDS AGAINST ABUSE OF RESTRICTIONS

I- Prescribed by Law

The "prescribed by law" criterion raises several important and interesting points. This expression has been interpreted as meaning that at least two requirements flow therefrom. First of all, the law must be adequately accessible: this means that the citizen must be able to have an indication of the legal rules applicable to a given case, which is adequate in the circumstances. Secondly, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able

111 *Oberschlick v. Austria*, Judgement of 23 May 1991, Series A No.204; (1994) 19 EHRR 389, para.35

– if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This also supports the view that the word law refers not only to the state's statute law, but also to its unwritten law: it also includes subordinate legislation and a royal decree.[112] Whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms, which, to a greater or lesser extent are vague and whose interpretation and application are questions of practice.'[113] Although terms are used in the different provisions in different forms of words, ("provided by law", "prescribed by law", "in conformity with law", "in accordance with law"), the meaning of each is the same. This wording reads in the French text of the Convention 'prevue(s) par la loi' in all cases.[114] This established rule was reiterated and applied in other cases both by the Commission and the Court. It should be borne in mind that the phrase 'in accordance with the law' does not merely relate to the quality of the law, requiring it to be compatible with the rule of law. As the Court emphasised in the *Malone* case, this rule implies that there must be a measure of protection in domestic law against arbitrary interference by authorities with the rights safeguarded by the convention.[115]

II- Necessary in a Democratic Society

This notion found in Article 29 of the Universal Declaration of Human Rights plays a paramount role in the European Convention on Human Rights. The notion of necessity implies the existence of a pressing social need.[116] This may include the 'clear and present danger' test which was developed by the United States Supreme Court. It must also be assessed in the light of the circumstances of a given case, and it is for the national authorities to make an initial assessment of the reality of the necessity in this context.[117] From the

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112 *De Wilde, Ooms and Versyp v. Belgium*, Judgement of 18 June 1971 , Series A No.12 (1979-80) 1 EHRR 373 para.93

113 supra *Handyside v. UK*, para.49

114 supra,White, R.C. and Ovey, C., p.201

115 *Malone v. United Kingdom*, Judgement of 2 August 1984, Series A No.82 ; (1985) 7 EHRR 14 para.67

116 *Observer and Guardian v. The United Kingdom*, Judgement of 26 November 1991 Series A No. 216 (1992) 14 EHRR 153 para.59

117 supra, *Handyside v. United Kingdom*, although the national authorities have a certain discretion while assessing the existence of pressing social need, it has been established by the Convention organs that the Contracting States' margin of appreciation in assessing whether such a need exists, goes hand in hand with

Sunday Times v. United Kingdom[118] case one could conclude that, in order to assess whether interference was based on sufficiently pressing reasons to render it "necessary in a democratic society," account must be taken of any public interest aspect of the particular case. It is not enough that the interference involved belongs to the class of the exceptions listed in the appropriate article of the Convention which has been invoked. Neither is it enough that the interference was imposed because the subject matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms. The court has to be satisfied, and the offending state must justify, that the interference was "necessary" having regard to the facts and circumstances prevailing in the specific case before it. Thus, in the *Sunday Times* case the thalidomide tragedy was a matter of undisputed public concern. The court determined that the interference by the national courts in preventing the press from publishing certain information did not correspond to a sufficiently pressing social need, (namely, maintaining the authority of the judiciary), to outweigh the public interest in freedom of expression. Accordingly that restraint was not necessary in a democratic society.

In *Handyside v. United Kingdom*[119] the court attempted to determine one of the essential foundations or elements of a democratic society, freedom of expression. It found that pluralism, tolerance and broadmindedness are essential elements of the concept. A democratic society must be pluralistic, tolerant and open, which inevitably entails the achievement of a delicate balance between the wishes of the individual and the utilitarian greater good of the majority. But this must begin from the standpoint of the importance of the individual, and the undesirability of restricting individual rights and freedoms. Thus, although the hallmarks of a democratic society are as stated herein and individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of minorities and individuals and avoids any abuse of a dominant position.[120]

III- Prohibition of Abuse of Rights and Restrictions

A person, or a group of persons, cannot rely on the rights enshrined in the Convention, or its Protocols, to justify conduct which amounts in practice to

a European supervision, embracing both the law and the decisions applying it, even those given by independent courts.

118 Supra, *Sunday Times v. United Kingdom*

119 Supra, *Handyside v. United Kingdom*

120 *Young, James and Webster v. United Kingdom*, Judgement of 13 August 1981, Series A No.44 (1989) 11 EHRR 439, para.63

an activity intended to destroy the rights or freedoms set forth in the Convention. Any such destructive activity would, in practice, put an end to democracy. It was precisely this concern which led the authors of the Convention to introduce Article 17[121], which provides:

"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."

Following the same line of reasoning, the Court considers 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.[122] On the other hand, the Member States cannot use the restriction grounds arbitrarily as a requirement of Article 18, which provides that; "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

E- THE RESTRICTION OF FUNDAMENTAL RIGHTS IN TURKISH CONSTITUTIONAL LAW

I- Overview

The restriction of fundamental rights is regulated in chapter one of the Constituion's second part. In Turkish Constitutional Law, there are basically two grounds for justifying the restriction of fundamental rights:

1/ Protection of the public interest and the protection of the state itself

2/ Protection of the rights and freedoms of others

Here with exception of the interest of the state itself the main underlying principles of restrictions are compatible with those of the Convention namely the common good of the community and the rights of others.

Throughout the Constitution there exist two fundamental principles which affect the restriction of rights too: the principle of the indivisibility of the existence of Turkey with its state and territory and principles, reforms and modernism of Atatürk. The preamble states that no protection should be given to the activities that are in conflict with these principles.[123] Article 68 of the Constitution provides that programmes and constitutions of political parties can

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121 See Collected Edition of the "*Travaux Préparatoires*": Official Report of the Consultative Assembly, 1949, pp. 1235-1239

122 *Refah Partisi (Welfare Party) v. Turkey*, (41340/98), Grand Chamber Judgment of 13 February 2003, (2003) 37 EHRR 1, para.99

123 Article 176 makes The Preamble, which states the basic views and principles underlying the Constitution, an integral part of the Constitution.

not be contrary to the indivisible integrity of state as a territory and nation. The first outcome of this strict constitutional notion is territorial integrity: The separation and transferability of any land of the country is out of the question. Article 68 forbids any kind of separatist movement to be organised as a political party. It seems that, because of the demands of Kurdish separatist terrorist movements, the constitution makers have been sensitive to reassure the indivisibility principle. The second outcome of the indivisibility principle is the impossibility of federalism. As the structure of a federal state is based on federal and federate sovereignty, the principle of unity makes impossible the existence of more than one sovereign in one state's structure. It also prevents the state from becoming one of a number of federated states in the federal structure.[124] Therefore, no political party can even suggest the change of unitary form of the state. This is clearly in conflict with the case law of the Convention which rightly determines one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome.[125] Another inconsistency of the Turkish type democracy with western liberal democracy is that Turkish sate sees itself as guardian of Kemalist ideology in its almost all regulations. The Law on Political Parties 1983 requires every political party to declare that they are faithful to the principles of Ataturk in their programmes and constitutions. However, it is an abstract principal requirement of liberal democracy that the state must not have any official ideology.[126] Therefore, as Kemalism is not equivalent to democracy, this situation surely can not be reconciled with liberal democratic principles.

It is believed that when the use of one's rights and freedoms is in conflict with others' rights and freedoms, the conflict should be resolved via the constitution, law and adjudication.[127] In Turkish constitutional law there are four forms of restriction upon fundamental rights and freedoms: 1/ restriction by the constitution; 2/ restriction by the legislature; 3/ restriction by the executive; and 4/ restriction by adjudication.

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124 Soysal, M., *100 Soruda Anayasanin Anlami*,(Istanbul: Gercek yayinlari, 1986), p.182

125 See *United Communist Party of Turkey and others v. Turkey*, Judgment of 30 January 1998, (1998) 26 EHRR 121, para.57

126 see Turhan, M., "Anayasamiz ve Demokratik Toplum Duzeninin Gerekleri", (1991) Anayasa Yargisi Duran, L., "Anayasa Mahkemesine Gore Turkiyenin Hukuk Duzeni" (1986) 13 Ankara Idare Dergisi 2

127 See Kanadoglu, K., *Turk ve Alman Anayasa yargisinda Anayasal degerlerin catismasi ve uyumlastirilmasi*, (Istanbul: Beta Yayinlari, 2000)

The European Convention on Human Rights is incorporated into Turkish internal Law by Article 90. According to this Article international agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. However, Turkish courts have been so far very reluctant to refer to the Convention. To further strengthen the role of the Convention, an amendment was made to Article 90 on 7th May 2004. The amendment provides that in the case of a contradiction between international agreements regarding fundamental rights and freedoms, which approved through proper procedure and domestic laws, if different provisions on the same issue arise, the provisions of international agreements shall be considered pre-eminent.

II- The Forms of Restriction of Fundamental Rights and Freedoms

1- Restriction by Constitution

In some situations the constitution itself restricts fundamental rights and freedoms. Generally these restrictions take place in the very articles in which the rights and freedoms are set out. These articles contain prohibitions which may take either abstract or concrete forms. Where the prohibitions are in abstract form, the constitution awards the legislature a duty to concretise the restrictions. Some examples of the abstract form of the restrictions are that:

According to the fifth paragraph of the preface to the Constitution, activity cannot be protected where it is against the Turkish national interest; the indivisibility of the Turkish State; the historic and moral values of Turkishness; the principles of nationalism and revolutions of Ataturk. The principles set forth by Mustafa Kemal Ataturk (Commonly referred to as 'Kemalism') during the Turkish Revolution; advocate the ideas of republicanism, secularism, populism, statism, nationalism and revolution as the basis of the Turkish State. However, the basic principles of European nations – democracy, liberalism and recognition of civil rights – are noticeably missing in Kemalist ideology.[128] Furthermore, Kemalist Revolution in Turkey established an explicitly secularist politics limiting public expressions of religious faith.[129]

Due to Ataturk's notion of 'populism,' which means that all Turks are one, Turkish political parties cannot be founded on the basis of class, religion, ethnic group or region. If a group is perceived to go too far towards one of these leanings, it can be banned and its members may be imprisoned. This notion,

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128 Kubicek, Paul, "Turkish-European Relations: at a New Crossroads?" *Middle East Policy*, vol. 6, no. 4 (1999), pp. 157-173.

129 Mellon, J., "Islamism, Kemalism and the future of Turkey" (March 2006) 7 Totalitarian Movements and Political Religions 1

which can not be accepted as compatible with the European democracies, flies in the face of the liberalism that characterizes most Western democracies. In addition, it is a requirement of secularism that religious sentiment may not interfere with politics and state government. Authors and publishers of news material and other texts which jeopardise the security of the state should be punished.[130] Another example of an abstract restriction which is set out in the Constitution is that the right to strike and lockout cannot be used to the public detriment. There are some clear and concrete prohibitions in the Constitution regarding rights and freedoms. For example, political parties cannot engage in commercial activities.[131] Political strikes and lockouts, as well as general strikes and lockouts are prohibited.[132]

2- Restriction by legislature

Before the 2001 changes were made the Constitution gave huge authority to the legislature regarding the restriction of fundamental rights and freedoms. The key article was Article 13. This was a general restriction decree. According to the Article, fundamental rights and freedoms could have been restricted depending on either general restriction grounds which were set out in Article 13, or specific restriction grounds which were set out in each article which regulates the fundamental right and freedom. The general restriction grounds in Article 13 were: the indivisibility of the State; national sovereignty; republic; national security; public order; public interest; general morality; and public health.

Relying on Article 13 as the general restriction article, the legislature had a very broad authority to make laws that restricted fundamental rights and freedoms. Along with some other fundamental changes in the Constitution Article 13 was changed on 3rd October 2001. The new Article 13 has ended the two tiered general and specific restriction system of the Constitution. The new Article states that fundamental rights and freedoms can only be restricted by relying on the grounds set out in each related article. These changes brought the Turkish restriction system closer to the Convention's one. Indeed, one of the main reasons of these changes was the effect of ECHR's decisions on the

130 Article 28/5 of the Constitution

131 Article 69/2

132 Article 54/7

Turkish cases.[133] So, with this change the role of the legislature in the area of restrictions has been weakened.

3- Restriction by the Executive

Another way of interfering with rights and freedoms is through authority given to the executive by the Constitution and legislature. The executive, especially the security forces, may frequently interfere with rights and freedoms. There are some Constitution articles which directly authorise the executive to do this, or make it possible for the legislature to give such authority. Article 17 authorises the security forces to use weapons and if strictly necessary to kill the suspect(s), while performing the duty to arrest. Article 19 authorises the security forces to arrest individuals and take them into custody.

4- Restriction by Adjudication

In general, the restriction of fundamental rights and freedoms in concrete and individual situations is carried out by an adjudication decision. Examples of restrictions that require an adjudication decision can be provided here, such as: the precautions and punishments that restrict liberty, (Art.19); interference with private and family life, (Art.20); interference with freedom of communication, (Art.22); interference with freedom to travel abroad (Art.23); interference with the activities of associations, (Art.33); and the dissolution of political parties, (Art. 69).

III- The Limits of Restrictions

According to Article 13 of the Constitution, (as amended in 2001), the fundamental freedoms can only be restricted by law, and also on the grounds set out in the related Constitution Articles. The restrictions cannot harm the essence of the fundamental rights. Furthermore, the restrictions can neither be in conflict with the wording and spirit of the Constitution; nor the requirements of the democratic social order and the republic; nor the principle of proportionality.

1- Restriction by law

This requirement is found in the European Convention on Human Rights too. The regulation of fundamental rights should be carried out by the democratic representative organ of the nation so that every citizen could easily access it. Briefly, the law should be clear, understandable and accessible by everybody. Restriction by principle of law basically means that the restriction of

[133] Fendoglu, H.T., "2001 Anayasa degisikligi baglaminda Temel Hak ve Ozgurluklerin Sinirlanmasi (AY. Md.13)" (2002) Anayasa Yargisi 19, pp.111-149

rights and freedoms cannot be done in an executive process.[134] Fundamental rights are protected properly only if the restriction grounds set out by law are obvious and clear, and more concrete than those in the Constitution. It should be borne in mind that, as the main law of the State, the Constitution regulates them in a very general framework.

2- Conformity with the Wording and Spirit of the Constitution

The wording of the Constitution means the concrete decrees and additional guarantees of fundamental rights. The prohibition of torture and the degrading of the integrity of the individual, and the prohibition of censorship are examples of the constitutional wording. On the other hand, we should bear in mind that the Constitution itself restricts some fundamental rights and freedoms.

It is possible to say that, if restrictions and prohibitions (prohibitions on political parties) were not authorised in the Constitution, the laws that restrict rights improperly might have been ruled void by the Constitutional Court.[135] It seems that the spirit of the Constitution is not helpful to a liberal interpretation of freedom. There are a number of Constitutional Court and Court of Cassation's decisions which interpret the Constitution as being in favour of authority in the freedom and authority balance.[136] The Constitutional Court has gone even further and stated that the democratic society context is limited to the one shown in the Constitution.[137] The problem here is that it is not possible to identify the spirit of the Constitution in a concrete way.

3- The Requirement of Democratic Social Order

This is similar to the 'necessary in a democratic society' requirement of the European Convention on Human Rights. Indeed, it is enshrined in the Constitution, as it has been seen, in line with international human rights documents. However, the problem regarding this requirement in the Turkish Constitution is which type of democracy is meant? Is it the universal standard liberal and pluralist democracy, or the democracy identified in the Turkish Constitution, which is sometimes in conflict with the universal understanding of democracy? The 3rd paragraph of Constitution's preamble, which according to the Article 176 is part of Constitution's text, was stating that "recognition of the

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134 Tanor, B. and Yuzbasioglu, N., *Turk Anayasa Hukuku*, (Istanbul: Yapi Kredi yayinlari, 2002) p.146

135 Tanor, B. and Yuzbasioglu, N., *Turk Anayasa Hukuku*, (Istanbul: Yapi Kredi yayinlari, 2002) p.147

136 E.1984/14, K.1985/7, KT. 13.6.1985, AYMKD, sayi.21, s.173, Yargitay Hukuk Genel Kurulu, E.1980/4, K.1983/803, KT. 14.9.1983, AYMKD, sayi.11,

137 E.1985/2, K.1986/23, KT. 6.10.1986, AYMKD, sayi.22, s.224

absolute supremacy of the will of the nation, and of the fact that sovereignty is vested fully and unconditionally in the Turkish Nation and that no individual or body empowered to exercise it on behalf of the nation shall deviate from democracy based on freedom, *as set forth in the Constitution* and the rule of law instituted according to its requirements"(emphasis added). Therefore, this expression confines democracy understanding of the Constitution to a special national democracy different from universal one. Although the last sentence was changed in 2001 by eliminating the expression of *as set forth in the Constitution,* which is welcomed, however, the specific Turkish type Democracy understanding is still alive throughout the constitution. Turkey, in its application to the European Commission on Human Rights that it recognises the right to individual application to European Commission on Human Rights, claimed that the 'democratic society' concept of the European Convention on Human Rights should be understood as the within the precincts of existing framework of the Turkish Constitution. Naturally, this restraint was not accepted by the Commission.[138] On the other hand, in some recent Constitutional Court decisions there has been a positive development in departing from the concept of the specific Turkish type of democracy. In its decision on the law of police authority and duties especially, it came close to the universal liberal understanding of democracy.[139]

4- The Requirements of Secular Republic

According to the second paragraph of Article 13 of the Constitution the restrictions to the fundamental rights and freedoms can not be incompatible with the "requirements of the secular republic". This criterion is not found in the European Convention on Human Rights. Making 'the requirements of Secular Republic' as a limit of restrictions is a sign of the importance given by the Constitution maker to the principle of secularism. The Constitutional Court is of the view that having the constitutional privilege, principle of secularism should be taken into account while assessing all the fundamental rights and freedoms.[140] It even further states that the freedoms that are incompatible with principle of secularism can not be protected.[141] However, it is not obvious how to interpret the requirements of secular republic. There is not a uniform and agreed understanding of the principle. The requirements of Secular Republic change

138 Teblig RG 21.4.1987, No. 19438, see also Toluner, S. "Turkiyenin bireysel basvuru hakkini tanima beyaninin milletlerarasi hukuk acisindan degerlendirilmesi", (1988) Milletlerarasi Hukuk Bulteni, sayi.2, s.247

139 E.1985/8, K.1986/27, KT. 26.10.1986, AYMKD sayi,22, pp. 365-387

140 E.1989/1, K.1989/12, KT 7.3.1989, AMKD 25, p.150

141 ibid, p.152

over the time. It is possible to see this change with Constitutional Courts decisions regarding Political parties. According to the Article 89 of Law on Political Parties, no political party can claim the partition of Directorate of Religious Affairs from State's general administration. In 1993 this claim was one of the grounds of the dissolution of Freedom and Democracy Party.[142] However, in 1997, The Constitutional Court, in the present author's view rightly, departed from this stand. It rejected the dissolution of Democratic and Change Party who claimed that the status of Directorate of Religious Affair s as a state institution should be ended.[143] On the other hand, The Constitutional Court in one of its decisions decided that giving the right to supervise and control the religious issues to the state can not be regarded as a restriction incompatible with the freedom of religion and conscious and the requirements of democratic social order.[144]

The author is of the opinion that as there is not a unified and agreed upon understanding of the principle of secularism, the criterion of requirements of Secular Republic results in a narrow interpretation of fundamental rights. It is also incompatible with the restriction system of the European Convention. In practice it gives way to unnecessary restriction of fundamental rights.[145]

5- The Essence Test

The Constitutional Court has developed the criterion of 'harming the essence of a right' to provide an irreducible sphere, which cannot be compromised in favour of other interests.[146] Inspired by German constitutional law, the founding fathers of the Republic's second Constitution (the 1961 Constitution) enacted the notion of the essential essence under 11/1 of the 1961 Constitution. This test also can not be found in the European Convention system. The Constitutional Court still continues to implement this test reviewing it under the requirements of democratic society (art. 13), after the 1982 Constitution came into force. Now, with the changes made in the Constitution's wording in 2001, the Constitution declares the doctrine once again as the limit to legitimate restrictions, together with the requirements of the democratic order of society. The essence in that respect describes an irreducible or non-derogable part of a right, whereas proportionality concerns striking the right balance between loss and gain. The importance of the essence analysis in the assessment

142 E.1993/1 (Siyasi Parti Kapatma) K.1993/2, KT 23.11.1993, AMKD 30/2, p. 927

143 E.1996/3 (Siyasi Parti Kapatma), K.1997/3, KT 22.5.1997, AMKD 36/2, P.1027

144 E.1997/1 Siyasi Parti Kapatma), K 1997/3, KT 16.1.1998, AMKD 34/2, p.1029

145 for example unnecessary head scarf ban in universities. See Leyla Sahin case, pp.245-249

146 E. 1986/17, K: 1987/11, KT. 22.05.1987, 1989 AYMKD sayi.23, at 222.

of proportionality is that it marks the border at which the proper balance is to be struck.

Although the Constitutional Court uses the essence notion explicitly for balancing purposes,[147] it does not formulate an explicit single measuring test. The Constitutional Court judges generally refrain from giving a definition of the essence of a specific right or naming the duties generated by the right. Instead, they opt to look at different factors such as rules which make the exercise of a right very difficult, or impossible; the creation of conditions that make it impotent; the taking away of a right's efficiency; and the removal of the guarantees given by a right in the first place. All of these factors test the degree of fulfilment of the multiple duties generated by a right. If a rule not only necessitates trading-off one specific duty in the case of conflict against another specific duty generated by a conflicting right, or interest, but also prevents fulfilment of any major duty generated by the given right corresponding to the central value protected by this right, then this rule will be found to be an encroachment on the essence of the right.

6- The Proportionality Test

Article 13 sets forth the proportionality test as a general principle to be applied while restricting basic rights. Article 12 of the Constitution also prepares a background to this principle by stressing that "fundamental rights and freedoms also include the duties and responsibilities of the individual towards society, his family, and other individuals." Individual rights and the public interest generate duties and responsibilities and often require balancing and weighing against each other in order to form a consistent system. This general provision of the Constitution hints that the legislative and judicial organs, as well as the executive authorities, will weigh interests and rights by balancing the duties generated by them. The Constitutional Court's explanation of the principle follows this understanding. One of the elements of the principle of proportionality is measuring the degree of interference against the degree of gain by the restriction.[148] This criterion requires a proportionate government response to an existing legitimate and rational need to interfere with a right. It aims at a fair balance between a given restriction and its service to the protected value.

F- CONCLUSION

The European Convention on Human Rights contains fundamental guarantees of the human rights of individuals. However, the reasonable need of

147 Yargitay Ceza Genel Kurulu, E.1998/9-70, K.1998/156, KT. 5.5.1998, 1998 YKD sayi 24, no.6 1998, (905). At 910

148 E. 1988/50, K. 1989/I7,KT.23.06.1989, 1991 AYMKD sayi. 25 (301) at 311-313.

a Contracting Party to fulfil its public duties and obligations for the aggregate common good and welfare necessitates restrictions on the stated rights. On the other hand, it is vital that there should be a fair balance between the rights and freedoms exercisable and enjoyed by the individual, and the needs of the community when imposing such restrictions. A careful examination of the Convention reveals that it has established such a balance in its restriction and limitation system. The rights and freedoms exercisable and enjoyed by the individual and the state respectively are subject to different regimes of suspension, supervision and control. On the one hand there are those limitations and restrictions imposed by the state in the case of the individual, and by the Convention organs in the exercise of their review and supervisory powers in the case of the state. On the other hand the state, in the exercise of its right and duty to limit and restrict the rights and freedoms of the individual, guaranteed under the Convention, may do so only in strict conformity with the express provisions of the Convention. Such provisions are interpreted and applied by the Court, authorising and permitting such interference.

The Strasbourg organs concentrate not on whether limitations on the rights are legal or pursue a legitimate interest, but on whether limitations can be legitimately justified, that is to say, whether they are necessary in a democratic society. When determining the necessity of a limitation in a democratic society, the margin of appreciation is at the heart of the Court's review of the decisions made by states. The Strasbourg organs refer to the demands of pluralism, tolerance, and broadmindedness as the hallmarks of a democratic society. They have set several criteria for determining the meaning of the words 'necessary in a democratic society.' The Strasbourg organs have ruled that the term 'necessary in a democratic society' implies that any restriction on the fundamental freedoms should be relevant and sufficient to its aim and should be imposed in a situation of pressing social need. Nonetheless, the Strasbourg organs themselves have not applied these criteria in every case.

Like the European Convention on Human Rights, the Turkish Constitution guarantees the fundamental human rights determined by international human rights law. It also, in line with international law, provides restrictions on the rights where the common good of society and the rights and freedoms of others so require. According to the amended Article 13, the limits have to be imposed by law, and should be in conformity with the wording and spirit of the Constitution. They should also meet the requirements of a democratic social order and secular republic. The restrictions should not damage the essence of the rights and freedoms and the restrictions should be proportionate. The requirement of democratic social order is similar to the 'necessary in a democratic society' clause of the Convention. Indeed, this was put into the Constitution in 2001 to bring it into line with the Convention.

Before this amendment, Article 13, unlike the Convention, was a general restriction article containing restriction grounds which could be invoked in the restriction of all fundamental rights. Although the wording of the Turkish Constitution seems to be in line with the Convention, the problems in restrictions of the fundamental rights arise because of the understanding that Turkey has special circumstances and a special democracy as identified in the Turkish Constitution: A conception which is sometimes in conflict with the universal understanding of democracy.

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