

DEMOCRACY IS ONE OF THE MAIN FEATURES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Joseph ZAND*
Hayri KESER**

ABSTRACT

The concept of democracy has long fuelled controversy among international legal scholars. In the past quarter of a century, democracy and human rights have become the hegemonic political ideals. The aim of this article is to contribute to the continuing debate on the notion of democracy according to the European Convention on Human Rights. Not only has the Convention been a standard setter in Europe but also a source of inspiration in promotion of democracy and democratic values for other regions of the world. With this in mind, the article considers the appropriate elements of the Convention which directly concerns democratic values. To that end, the article critically examines the relevant Articles of the Convention to the notion of democracy as well as the jurisprudence of the European Court of Human Rights. In recent decades, the Convention has made a telling contribution in regards to transition to peace and democracy in the former communist Eastern European states.

Keywords: European Convention on Human Rights, European Court of Human rights and the Concept of democracy.

DEMOKRASI AVRUPA İNSAN HAKLARI SÖZLEŞMESİNİN TEMEL ÖZELLİKLERİNDEN BİRİSİDİR

ÖZET

Demokrasi kavramı uluslararası hukuk alanında ki bilim adamları arasında uzun zamandır tartışmalara neden olmaktadır. Geçen yüzyılın son çeyreğinde, demokrasi ve insan hakları egemen siyasal idealler haline gelmiştir. Bu makalenin amacı, Avrupa İnsan Hakları Sözleşmesine göre demokrasi kavramı üzerinde devam eden tartışmalara katkıda bulunmaktır. Avrupa İnsan Hakları Sözleşmesi sadece Avrupa'da oluşturulan bir standardı değil, aynı zamanda dünyanın diğer bölgeleri için demokrasi ve demokratik değerlerin geliştirilmesinde esin kaynağıdır. Bu düşüncelerle, makalede sözleşmenin demokratik değerler ile doğrudan ilgili olan unsurları dikkate alınmıştır. Bu amaçla, Makale, eleştirel olarak Avrupa İnsan Hakları Mahkemesi içtihatları ve Sözleşmenin demokrasi kavramı ile ilgili maddelerini araştırmaktadır. Geçtiğimiz on yıllarda, Sözleşme, eski komünist Doğu Avrupa devletlerinin barış ve demokrasiye geçiş sürecine çarpıcı katkıda bulunmuştur.

Anahtar Kelimeler: Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi ve demokrasi kavramı

* Yrd.Doç.,Dr.,Faculty of Law, Inonu University, Malatya, Turkey;Joseph.zand@inonu.edu.tr.

** Yrd.Doç.,Dr., Faculty of Law, Inonu University, Malatya, Turkey; hayri.keser@inonu.edu.tr.

1. INTRODUCTION

In recent decades, the expression of “democracy” has become part and parcel of the contemporary vocabulary of national and international lawyers. Democracy is without doubt one of the fundamental features of the European and international public order¹. Since its enactment, the European Convention on Human Rights (Convention) has been a standard-setting text for transition to peace and democracy in states throughout Europe. This is important in the light of the fact that the Council of Europe is no longer limited to the Western European states and now contains all of the former communist Eastern Bloc states in Europe. Indeed, in the preamble to the European Convention on Human Rights (Convention), a clear link is established between the Convention and liberal democracy by stating that the maintenance and furtherance of human rights and fundamental freedoms can only be safeguarded by an effective liberal democracy as well as a common understanding and observance of human rights². Furthermore, the preamble goes on to assert that European countries have a common heritage of political tradition, ideals, freedom and the rule of law, which are the principles of liberal democracy and the underlying values of the Convention itself³. Hence, it is fair to say that the Convention was designed to maintain and promote the ideals and values of a democratic society⁴.

Since its inception, the European Court of Human Rights (Court) has been called upon to consider the question of rights of anti-democratic actors in liberal democracies. This article will consider relevant Articles of the Convention to the concept of democracy through the case law of the Court and how its jurisprudence has evolved regarding this subject since the 1950s. In so doing, this article will look into the Courts conception of democracy in such areas as the essential requirements of any political system based on liberal democracy.

¹ See generally Franck, T.M., “The Emerging Right to Democratic Governance”, (1992) 86 *American Journal of International Law* 46; see also Cerna, C., “Universal Democracy: An International Legal Right or the Pipe Dream of the West?”, (1995) 27 *New York University Journal of International Law and Politics* 289, p. 295; Wheatley, S., *The Democratic Legitimacy of International Law*, Hart Publishing, 2010.

² *Klass and Others v. Germany*, App. No: 5029/71, Series A-28, para 59.

³ *Soering v. United Kingdom*, App. No: 14038/88, Series A-161, para 88.

⁴ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. Nos.: 5095/71, 5920/72 and 5926/72 Series A-23, p. 27, para. 53.

The European Convention on Human Rights was a direct product of the immediate post-war era to unify Europe⁵. The main reason for the Convention was partly the need to elaborate on the Council of Europe membership obligations and commitments.⁶ For the framers, democracy was given a vivid significance, in contrast to the recent experience of “fascism, hitlerism, and communism”⁷. The Convention was a reaction to the serious human rights abuses that Europe had witnessed in the course of the Second World War. But “it can also be viewed in the context of the much longer struggle to secure respect for personal autonomy, the inherent dignity of persons, and equality of all men and women”⁸.

Indeed, in the preamble to the European Convention on Human Rights (Convention), a clear link is established between the Convention and liberal democracy by stating that the maintenance and furtherance of human rights and fundamental freedoms can only be safeguarded by an effective liberal democracy as well as a common understanding and observance of human rights⁹. Furthermore, the preamble goes on to assert that European countries have a common heritage of political tradition, ideals, freedom and the rule of law, which are the principles of liberal democracy and the underlying values of the Convention itself¹⁰. Hence, it is fair to say that the Convention was designed to maintain and promote the ideals and values of a democratic society¹¹.

⁵ 231 U.N.T.S. 221, C.E.T.S. 5, U.K.T.S. 71 (1953), signed at Rome 4 November 1950; entered into force 3 September 1953, Council of Europe, <www.conventions.coe.int> at 28 October 2013, hereinafter cited as “Convention”.

⁶ See generally Harris, O’Boyle, Warbrick, Law of the European Convention on Human Rights, Butterworth, 2nd ed., 2009, p. 1.

⁷ Under Article 3, Statute of the Council of Europe 1949, 87 UNTS 103; ETS 1, a member state ‘must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.’ The significance of the Convention’s role in giving meaning to these obligations has been highlighted in recent years by the fact that becoming a party to the Convention is now a political obligation of membership of the Council of Europe: Parliamentary Assembly resolution 1031 (1994), On the honouring of commitments entered into by member states when joining the Council of Europe’, Assembly Debate 14 April 1994, para. 9.

⁸ Ovey, C. and White, R.C.A., European Convention on Human Rights, Oxford U.P., 5th ed, 2010, p. 3.

⁹ *Klass and Others v. Germany*, App. No: 5029/71, Series A-28, para 59.

¹⁰ *Soering v. United Kingdom*, App. No: 14038/88, Series A-161, para 88.

¹¹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. Nos.: 5095/71, 5920/72 and 5926/72 Series A-23, p. 27, para. 53.

It is useful to consider the European Convention on Human Rights (Convention) in its historical context¹². The ‘*Travaux Préparatoires*’ of the Convention specifically states that it was to “prevent rebirth of totalitarianism”¹³, to “defend our people from dictatorship”¹⁴, and to “strengthen the resistance in all our countries against insidious attempts to undermine our way of life”¹⁵. However, on a more positive note, addressed to the citizens of the member countries of the Council of Europe, the Convention was to “define and guarantee the political basis of this association of European nations”¹⁶ and to “ensure that member states of the Council of Europe are democratic and remain democratic”¹⁷ as well as providing a “code of law for the democracies”¹⁸. Furthermore, the Convention was to achieve all this by providing a collective guarantee, if not of all applicable rights and freedoms, then at least of those considered “essential for a democratic way of life”¹⁹. From this standpoint Marks argues that:

“The Convention, the additional Protocols and the entire corpus of Strasbourg case law can be seen as articulating the scope of and limits of democracy. If rights and freedoms are to be protected in so far as they safeguard the democratic way of life, then the boundaries of the protection granted will reflect (without necessarily being co-extensive with) the boundaries of democracy”²⁰.

Ever since the collapse of the Soviet Union and the end of The Cold War geographic and cultural influence of the Convention has progressed eastwards and now encompasses all of the former Soviet Eastern Bloc states²¹. In fact, at

¹² Marks, S., “The European Convention on Human Rights and its “Democratic Society” (1995) *British Yearbook of International Law*, 209, p. 210.

¹³ Council of Europe, Collected Edition of the “*Travaux Préparatoires*” of the European Convention of Human Rights (hereafter *Travaux*), vol. 1, p. 192.

¹⁴ *Travaux*, vol. 5, p. 332.

¹⁵ *Travaux*, vol. 1, p. 30.

¹⁶ *Travaux*, vol. 2, p. 50.

¹⁷ *Travaux*, vol. 2, p. 60.

¹⁸ *Travaux*, vol. 2, p. 4.

¹⁹ *Travaux*, vol. 1, pp. 43-4

²⁰ Marks, “The European Convention on Human Rights and its “Democratic Society”, *op. cit.*, p. 211.

²¹ For example, Russia which ratified the Convention in May 1998 and Georgia which only joined the Council of Europe in April 1999 and ratified the Convention in June 1999. Council of Europe, Chart of Signatures and ratifications of the Convention for the protection of Human Rights and Fundamental Freedoms, <www.echr.coe.int> at 28 October 2013. See gener-

present, 47 countries representing 800 million citizens have now recognised the right of their citizens to bring cases against them at the European Court of Human Rights (Court)²².

2. THE CONVENTION AND THE NOTION OF DEMOCRACY

The framers of the Convention gave a prominent role to promotion of pluralism and democracy in Western European states²³. They also incorporated the idea of democracy as a cornerstone to protect the right of the individual in accordance with the needs of the community as a whole²⁴. The Strasbourg organs have stressed the point that “democracy does not simply mean that the views of the majority must always prevail”; in fact, “a balance must be achieved which ensures fair and proper treatment of minorities and avoid abuse of a dominant position”²⁵.

In recent decades the European Court of Human Rights has turned its attention to the fundamental link between the substantive rights guaranteed by the European Convention on Human Rights and the concept and existence of democracy within member states²⁶. It is quite clear that the Court pays special regards to qualities such as pluralism, tolerance, broadmindedness, equality, liberty and encouraging self-fulfilment as important ingredients of any democracy²⁷. The Grand Chamber in its unanimous decision which determined the case of *the United Communist Party of Turkey v. Turkey* elaborated on the concept of democracy and its links with Convention rights and duties:

ally Sweeney, J.A., ‘Divergence and Diversity in Post-Communist European Human Rights Cases’, *Connecticut Journal of International Law* 21 (2005).

²² Council of Europe Official website: <<http://hub.coe.int/>> at 28 October 2013.

²³ The current mandate of the Council of Europe was established at a summit which took place in Warsaw in 2005. Text available at: <www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp> at 28 October 2013.

²⁴ As stressed by the Court in the case of *Bowman v. United Kingdom* (1998) 26 E.H.R.R. 1.

²⁵ *Sorensen v. Denmark* and *Rasmussen v. Denmark*, Apps. 52562/99 and 52620/99, 11 January 2006 [GC], (2008) 46 EHRR 752, para. 58 see also the older case of *Young, James and Webster v. UK*, 13 August 1981, ECHR Series A, No. 44, para. 63.

²⁶ Sweeney, J.A., *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, Routledge, 2012, p. 19.

²⁷ *Oberschlik v. Austria*, No. 11662/85, Series A, No. 204, 23.5.91, para. 58; see also Ovey, and White, *European Convention on Human Rights*, *op. cit.*, p. 326; Merrills, J.G., “The Development of International law by the European Court of Human Rights”, Manchester U.P., 1993, especially chapter 8, ‘Human Rights and Democratic Values’.

“That is apparent, firstly, from the preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights”²⁸.

In a democracy it is assumed that limitations on individual rights and freedoms for the common good or to protect more compelling rights of others would be justified²⁹. Moreover, Articles 8, 9, 10 and 11 of the Convention which according to the Court encapsulate the concept of democracy,³⁰ have common features which may require interference with the use of the rights set out by these articles³¹. These interferences must be evaluated by the benchmark of what is “necessary in a democratic society”³². The only type of necessity to justify interference can only derive from a “democratic society”³³.

Consequently, democracy is the only political model that the Convention aims for and finds compatible with it³⁴. If a restriction on democracy is prescribed by law, the Court then would consider whether the law or rather the way in which it was applied is “necessary in a democratic society” for any of the reasons outlined in the aforementioned Articles³⁵. As a result, the Court has developed the approach that states have a “margin of appreciation” in deciding whether a particular restriction on a right is required in the given circumstance³⁶. In the case of *Handyside* the Court stated:

²⁸ *The United Communist Party of Turkey v. Turkey*, (1998) 26 E.H.R.R. 121.

²⁹ See generally Higgins, R., “Derogations under Human Rights Treaties”, (1978) 48 *British Yearbook of International Law*; Marks, “the European Convention on Human Rights and its “Democratic Society””, *op. cit.*, p. 212.

³⁰ *Zdanoka v Latvia*, Appl. No. 58278/00, 16 March 2006, para. 115.

³¹ See generally Van de Schyff, G., “The Concept of Democracy as an Element of the European Convention” 38 *The Comparative and International Law Journal of Southern Africa* (2005) 355-372.

³² C. Gearty, “Democracy and Human Rights in the European Court of Human Rights: a Critical Appraisal” (2000) 51 *Northern Ireland Legal Quarterly* 381, p. 388.

³³ Fox, G.H., *Democratic Governance and International Law*, Cambridge U.P., 2000, p. 93.

³⁴ O’Connell, R.O., “Towards a Stronger Concept of Democracy in the Strasbourg Convention”, *European Human Rights Law Review* (2006) 281.

³⁵ Loveland, I., *Constitutional Law, Administrative Law, and Human Rights: a Critical Introduction*, Oxford U.P., 6th edition, 2012, p. 593.

³⁶ See generally Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia Publishers, 2002.

“By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirement as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ to meet them”³⁷.

The Court also goes on to say:

“Whilst the adjective ‘necessary’ ...is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessary in this context”³⁸.

3. THE COURT’S CASE LAW: TRADITIONAL APPLICANTS

At this stage it is worth noting that the Court’s case-law regarding anti-democratic actors since its establishment until recent decades was mainly limited to Fascists and Communists applicants³⁹. It is clear that the main idea behind the first proposal for a Convention was to provide human rights guarantees of a very basic and fundamental nature as a reaction to the atrocities committed in the World War II and the subsequent outbreak of the Cold war⁴⁰. Harvey notes that “without question the court’s analysis of these claims has been through a cold war lens”⁴¹. Furthermore, the court has maintained a consistent approach of refusing to consider any applications of fascist and racist group from any member states⁴².

³⁷ *Handyside v United Kingdom*, Judgement of 7 December 1976, Series A, No. 24; (1979-80) 1 EHHR 737, para. 48-49.

³⁸ *Ibid*, para 58.

³⁹ In the early decades of the Convention, the European Commission upheld the banning of the German Communist Party by West Germany, thereby extending the reach of Article 17 to allow a member state to enact measures to preclude democracy’s capacity to surrender to communist rule. *K.D.P v. Germany*, 1 Y.B. Eur. Conv. H.R. 222 (Eur. Comm’n on H.R.), See also *X v. Austria*, 26 Eur. Comm’n H.R. Dec. & Rep. 244 (1982); *Piperno v. Italy*, App. No. 155510/89, 2 Dec 1992 (Commission Report).

⁴⁰ For example see Wildhaber, L., “Changing Ideas about the Tasks of the European Court of Human Rights”, in Wildhaber, L., *The European Court of human Rights 1998-2006: History, Achievements and Reform*, (Kehl, Strasbourg, Arlington: N.P. Engel), 2006, pp. 136-138; See generally Bates, E., *the Evolution of the European Convention of the European Convention of Human rights*, Oxford U.P., 2010, pp. 1-29.

⁴¹ Harvey, P., “Militant democracy and the European Convention on Human Rights”, (2004) *European Law Review*, 29(3), p. 413.

⁴² *Jersild v Denmark*, E.C.H.R., 23 September 1994, Series A, no. 298.

Indeed, all such cases have been refused as inadmissible either as manifestly ill founded or removed from the protection of the Convention on the basis of Article 17, which covers a variety of activities on the far right of political spectrum, such as distributing racist and fascist pamphlets,⁴³ denial of the Holocaust,⁴⁴ organising paramilitary training camps,⁴⁵ denial of the Austrian state by advocating a Pan-Germanic nation,⁴⁶ and attempts to revive the Fascist party in Italy⁴⁷.

However, the only possible exception to the jurisprudence of the court in that period was the case of *Lehideux and Isorni v. France*, which concerned a criminal conviction on the basis of a newspaper article in praise of Marshall Petain (who headed the collaborationist Vichy regime during the Nazi occupation of France), in which the court found a violation of Art.10⁴⁸. It went on to say that Art.17 would remove the use of Art.10 to negate the Holocaust from protection of Art.10 but since the article had not done so, therefore, Art.17 was not applicable⁴⁹. Judge Jambrek in his concurring opinion elaborated on conditions in which Article 17 would be applicable since:

“... The aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation’s democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedom of others”⁵⁰.

He was of the opinion that the best way to oppose the rise of anti-Semitism in Europe was “free critique” in which democracies, unlike dictatorships, can cope with the sharpest controversies⁵¹. In relation to applicability of Article 17 he noted that “on the other hand the requirements of Article 17 also reflect concern for the defence of democratic society and its institution”⁵².

⁴³ *Kuhn v. Germany* (1998) 56 D.R. 205; App. No. 12774/78 & 8406/78, *Glimmerveen and Hagenback v. Netherlands* (1978) 18 D.R. 187.

⁴⁴ *Garaudy v. France* [admissibility], 24.06.03.App. No.65831/01.

⁴⁵ *Schimanek v. Austria*, Dec. 1.2.00. App. No.32307/96.

⁴⁶ *Association A. and H v. Austria* (1984) 36 D.R. 187, App. No.9905/82.

⁴⁷ *X v. Italy* (1975) 5 D.R. 833, App. No.6741/74.

⁴⁸ *Lehideux and Isorni v. France* (2000) 30 E.H.R.R. 665.

⁴⁹ *Ibid.* para 47.

⁵⁰ Concurring opinion of Judge Jambrek at para 2.

⁵¹ *Ibid.* para. 2.

⁵² *Ibid.* para. 3.

In contrast the Court has adopted a much more ambivalent attitude towards political movements on the other side of the political spectrum. The very first case concerning dissolution of a political party was the case of *the Communist Party (KPD) v. Germany*, in which the Commission held that the ultimate aim of the KPD was proletarian dictatorship⁵³. The Commission considered this as undemocratic and contrary to the spirit of the Convention⁵⁴. In the Commission's opinion the fact that KPD directed itself towards its aims through constitutional means did not mean that it had abandoned its main goal of trying to overthrow the political system of the Federal Republic of Germany by force⁵⁵. It was held that the organisation and activities of KPD amounted to an abuse of Convention rights for the purpose of Article 17 and the ban was upheld⁵⁶. In this regard, it has been noted that:

“It appeared therefore that the restrictions on democratic parties did not require to be justified by any threshold of proof; a ban was valid by virtue of the fact that it applied to anti-democratic actors ... governments cannot deprive a political actor of rights merely by labelling it anti-democratic. The effect of this would be a circumvention of review of such restrictions by the Court, itself a violation of Article 17”⁵⁷.

Furthermore, the Court in two other cases reiterated the same approach and endorsed the German constitutional provisions restricting the activities of the KPD⁵⁸ and the far right the Nationalist Party of Germany (NPD)⁵⁹. These cases concerned the requirement that probationary civil servants could only take up their position they were to uphold the free democratic constitutional system, thereby banning members of KPD and NPD from becoming civil servants. The Court refused to tolerate the argument that this was an interference with Art.10; on the contrary it held that this measure was purely as a measure regulating access to civil service⁶⁰.

⁵³ *The Communist Party (KPD) v. Germany*, 20 July 1957 1Y.B. 222, EComHR.

⁵⁴ *Ibid*, para. 86-89.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

⁵⁷ Harvey, “Militant democracy and the European Convention on Human Rights”, *op. cit.*, p. 414.

⁵⁸ *Glaserapp v Germany*, (A/104) (1987) 9 E.H.R.R. 25.

⁵⁹ *Kosiek v. Germany*, app. No. 9704/82, 28 August 1986.

⁶⁰ Anagnostou, D. and Psychogiopoulou, E. (eds.), *The European Court of Human Rights and the Rights of Marginalized Individuals and Minorities in National Context*, Martinus Nijhoff Publishers, 2009, p. 112.

4. A MORE TOLERANT APPROACH BY THE COURT

In an apparent change of approach in the case of *Vogt v Germany*, the Court adopted a more tolerant attitude to this issue, where it narrowly held that, there had been a violation of Art.10 and 11 by Germany in dismissing Ms Vogt a secondary school teacher because of her failure to conform to the duty of loyalty as a civil servant⁶¹. The case was based upon the fact that Ms Vogt had been carrying out activities on behalf of *DKP*, the successor to *KPD*. In a not so convincing manner the Court distinguished *Glaserapp* on the basis of the fact that Ms Vogt had held a permanent position as a civil servant and her dismissal had amounted to an interference Article 10 of the Convention whereas in *Glaserapp*, the case solely related to access to employment to the civil service:

“The Court Considers, like the Commission, that the present case is to be distinguished from the cases of *Glaserapp* and *Kosiek*. In those cases the Court analysed the authorities’ action as a refusal to grant the applicants, access to civil service on the ground that they did not possess one of the necessary qualifications. Access to the civil service had therefore been at the heart of the issue submitted to the Court ...”⁶².

The Court also held that civil servants had duties under Article 10, not simply rights. The more liberal attitude of the Court is born out of the fact that at the time of the *Glaserapp*’s decision the then West Germany was an “amputated country” and the *KPD* was supported by East Germany as a means to infiltrate and undermine West German democracy⁶³. Whereas, the case of *Vogt* was decided in 1996 when Germany was a united country and the menace of communism no longer existed⁶⁴.

5. THE COURT AND THE RELEVANT ARTICLES OF THE CONVENTION

As noted briefly above, through its case law the Court has identified certain provisions of the Convention, which clearly encapsulate the concept of

⁶¹ *Vogt v Germany*, App. No. 17851/91, 26 September 1995, 21 E.H.R.R. 205, paras. 28, 30, 31.

⁶² *Ibid*, para. 44.

⁶³ Van Dijk, P. and Van Hoof, G.J.H., (eds.), *Theory and Practice of European Convention on Human Rights*, Brill, 3rd Revised Edition, 1998, pp. 563-564.

⁶⁴ *Vogt v Germany*, *op. cit.*, para. 64.

a democratic society⁶⁵. On this point it has been noted that, ‘in relation to the Convention proper, the Court’s conception of democracy is only elucidated incidentally-through consideration of the democratic rights contained in the convention’⁶⁶. The substantive rights that are considered to comprise the concept of democracy are easily identified⁶⁷. Express reference to the concept of democracy may be seen in the second paragraphs of Articles 8-11 of the Convention as well as Articles 2(3) and (4) of the Fourth Protocol⁶⁸.

Each of the Articles 8-11 set out a Convention right in the first paragraph, and set out possible qualifications to the right in their second paragraph as a means of right-restrictive measures⁶⁹. In spite of some “differences of detail in the nature of the limitations arising under each article, there is sufficient commonality of approach to justify a collective consideration of these limitations before examining the substantive rights protected under each of these articles”⁷⁰. The Court has elucidated that “there is undoubtedly a link between all of these provisions, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedom”⁷¹.

Traditionally, in regards to the concept of democracy, the Court considered Articles 10 protecting “Freedom of Expression” and Article 11 “freedom of Assembly and association” as the more relevant articles to the concept of democracy and democratic process⁷². This occurs in four ways, “through judgements on Articles 10 and 11, which guarantee freedom of expression and association respectively, on merits of applications and through Article 17 in decisions on admissibility, also relevant is the rather weaker

⁶⁵ *Austria v Italy* (Pfunders Case) (App 788/60) (1961) 4 *Yearbook* 116 (EComHR), p. 138.

⁶⁶ Harvey, “Militant democracy and the European Convention on Human Rights”, *op. cit.*, p. 412.

⁶⁷ Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, *op. cit.*, p. 151.

⁶⁸ See generally Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, *op. cit.*, especially chapter 8 Articles 8-11: General Considerations, pp. 341-360.

⁶⁹ *Al-Nashif v Bulgaria*, App. No. 50963/99, 20 June 2002.

⁷⁰ Ovey, and White, *European Convention on Human Rights*, *op. cit.*, p. 308; see also Greer, S., “The Exceptions to Articles 8 to 11 of the European Convention on Human Rights”, Council of Europe Publishing, Strasbourg, 1997.

⁷¹ *Zdanoka v Latvia*, Appl. No. 58278/00, 16 March 2006, para. 115.

⁷² *Handyside v United Kingdom*, Judgement of 7 December 1976, Series A, No. 24; (1979-80) 1 EHHR 737, para 49; *Lingens v Austria*, Series A no. 103, 8 July 1986, para 41; *Oberschlik v Austria*, No. 11662/85, Series A, No. 204, 23 May 1991., para. 58.

protection offered by Article 3 of Additional Protocol No.1 (hereinafter Article 3 of Protocol No. 1), which obligates member states to hold free elections”⁷³. Article 17 of the Convention sets out prohibition from the use of Convention rights from implying:

“Any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

Therefore, Article 17 prevents member states from abusing the Convention rights, in order to curtail the rights and freedoms of others, in other words, providing a safety mechanism specifically designed to prohibit totalitarian movements from using human rights as a means of furthering their cause⁷⁴.

Nonetheless, it has been noticed elsewhere that freedom of expression under Article 10 and Article 3 of Protocol No. 1, which provides the guarantee of free elections held at reasonable intervals are the two provisions of the Convention, which in the opinion of the court “embodied the characteristics of a democratic society”⁷⁵. In the case of *DELFI AS v. Estonia*, the court stressed that “eminence of freedom of expression in a democratic society of which it is one of the essential foundations and one of the most basic conditions for its progress and of each individuals” self-fulfilment⁷⁶. In recent decades Articles 8 which protects “Private and Family life, Home and Correspondence”⁷⁷ and Article 9 protecting “Freedom of Religion and Belief” have been considered by the Court in relation to the general concept of democracy too⁷⁸.

⁷³ *Hasan and Chaush v. Bulgaria*, Appl. No. 30985/96, 26 October 2000.

⁷⁴ The Court has observed that “the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention. *Vona v. Hungary*, App. No. 35943/10, 9 July 2013, para. 34; *Communist Party (KPD) v. Germany*, No. 250/57, Commission decision of 20 July 1957, Yearbook 1, p. 222, para. 86-89.

⁷⁵ Mowbray, A., “the Role of the European Court of Human Rights in the Promotion of Democracy”, 1999 *Public Law* 703, p. 704.

⁷⁶ *DELFI AS v. Estonia*, No. 64569/09, 10 October 2013, para. 78.

⁷⁷ *Halford v. United Kingdom*, App. No. 20605/92, 25 June 1997, (1997) 24 EHRR 523, ECHR 1997-III; *Leander v. Sweden*, App. No. 9248/81, 26 March 1987, Series A No. 116, (1987) 9 EHRR 433.

⁷⁸ Evans, M.D., *Religious Liberty and International Law in Europe*, Cambridge U.P., 2008, pp. 282-284.

6.1 Article 8: Right to Respect for Private and Family Life

Article 8 of the Convention protects four connected rights; the right to private and family life and the right to respect for home and correspondence⁷⁹. Each one of these rights is “autonomous” and the Court is not constrained by any national interpretation of them⁸⁰. The Court consistently has refrained from providing a comprehensive definition of private life⁸¹. According to Article 8 of the Convention:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 of the Convention complements Article 8, guaranteeing the right to marry and found a family⁸². In addition, the member states of the Council of Europe have determined to reinforce the equality of spouses in family life and to that end have adopted Article 5 of the Seventh Protocol⁸³.

Article 8 places on states the obligation to respect a wide range of personal interest⁸⁴. Article 8 secures not only negative but also positive aspects of the rights in question⁸⁵. On one hand, the state in question is obliged not to interfere with the domain of private and family life, home or correspondence.

⁷⁹ Regarding Article 8 of the Convention see generally Roagne, I., “Protecting the Right to Respect for Private and Family life under the European Convention on Human Rights”, Council of Europe Human Rights Handbooks, Council of Europe, Strasbourg, 2012; Connelly, A.M.

⁸⁰ Harris, O’Boyle, Warbrick, Law of the European Convention on Human Rights, *op. cit.*, p. 361.

⁸¹ *Niemietz v. Germany*, Appl. No. 13710/88, 16 September 1992, para. 29.

⁸² *Schalk and Kopf v. Austria*, Appl. No. 30141/04, 24 June 2010, para. 49.

⁸³ Article 5 of the Seventh Protocol reads as follows:

“Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage, and in the event of its dissolution. This article shall not prevent states from taking such measures as are necessary in the interest of the children”.

⁸⁴ Harris, O’Boyle, Warbrick, Law of the European Convention on Human Rights, *op. cit.*, p. 361.

⁸⁵ *Marckx v. Belgium*, Judgment of 13 June 1979, A 31, para. 31.

On the other, it is required to take particular measures necessary to realise the effective enjoyment of these rights. The Court has spelt out the dual nature of Article 8 rights:

“Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities’ adopting measures designed to secure respect for private life and home even in the sphere of the relations of individuals between themselves”⁸⁶.

6.1.1 Article 8 and the Issue of Interference with Correspondence

When the Court finds a particular measure to be in “interference” with the rights embodied under the first paragraph of Article 8, it must consider whether such interference may be justified by the conditions laid down in the second paragraph⁸⁷. The standard formula developed in the case-law is common to other personal freedoms set out in Articles 9-11. A violation of Article 8 can only be justified if it is “in accordance with the law”; has a “legitimate aim” and; is “necessary in a democratic society”⁸⁸.

The issue of interference with correspondence by national authorities has presented a new challenge to the Court in recent decades. Correspondence includes postal correspondence, telephone calls, emails and text messages⁸⁹. According to the Court such interferences include opening, reading, censoring or deleting correspondence violates Article 8 of the Convention. The controversial issue of surveillance of communication⁹⁰ and a prisoner’s right to correspondence⁹¹, have recently been under sharp scrutiny⁹².

⁸⁶ *Dees v. Hungary*, Appl. No. 2345/06, 9 November 2010, para. 21.; also see *Airey v. Ireland*, Judgment of 9 October 1979, A 32; *X and Y v. Netherlands*, Judgment of 26 March 1985, A 91, para. 23.

⁸⁷ Ovey, and White, *European Convention on Human Rights*, *op. cit.*, pp. 310-312.

⁸⁸ Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, *op. cit.*, p. 344.

⁸⁹ For interception of telephone calls see *Malone v. United Kingdom*, Appl. No. 8691/79, 2 August 1984; for email, *Halfords v. United Kingdom*, Appl. No. 20605/92, 25 June 1997; and for post, *Golders v United Kingdom*, Appl. No. 4451/70, 21 February 1975.

⁹⁰ *Kennedy v. United Kingdom*, Appl. No. 26839/05, Judgment of 18 May 2010.

⁹¹ *Klamecki v. Poland* (no. 2), Appl. No. 31583/96, Judgment of 3 April 2003, para. 144; *Kucera v. Slovakia*, Appl. No. 48666/99, Judgment of 3 July 2007, para. 127.

⁹² For a review of the relevant case law see Mowbray, A., *European Convention on Human Rights*, Oxford U.P., 3rd ed., 2012, pp. 561-589.

Therefore, in order to curb member state's discretionary powers the Strasbourg organs have required that the law must be accessible and foreseeable⁹³. In particular, "foreseeability test" provides a crucial safeguard for the citizen, requiring the law to be "sufficiently clear" and precise, giving "adequate indication" as to the circumstances in which and conditions on which any secret surveillance or interceptive measures are employed⁹⁴. Another implication of the foreseeability test is the requirement that adequate safeguard against possible abuses must be provided clearly demonstrating the extent of the authorities' discretion and defining the circumstances in which it is to be exercised⁹⁵. In other areas of complaints under Article 8, by contrast, the first standard has rarely been contested, and the Convention bodies have focused their examination on the third standard "necessary in a democratic society."

The best example of this judicial oversight by the court was when it had to preside over a series of cases involving British citizens alleging illegal interception of their correspondence. The Court held that due to the fact that there was no domestic law to regulate such activities there had been a breach of Article 8 by the United Kingdom⁹⁶. These rulings prompted the British government to fill this lacunae by enacting the Regulation of Investigatory Powers Act 2000⁹⁷. As a consequence of this Act, telephone hacking civil cases in the United Kingdom are now brought under Article 8 of the Convention as in the most recent case, brought by a number of British politicians and celebrities against the Metropolitan Police⁹⁸. They successfully argued that there was a breach of Article 8 since the police had failed to inform them about the telephone hacking and had failed in their duty to carry out a thorough investigation as part of its positive duty under Article 8⁹⁹.

⁹³ *Sunday Times v. United Kingdom*, Appl. No. 6538/74, 26 April 1979, para. 56.

⁹⁴ *Kennedy v. United Kingdom*, Appl. No. 26839/05, 18 May 2010, para. 119; see also earlier case of *Klass and Others v. Germany*, Appl. No. 5029/71, 6 September 1978, para. 33.

⁹⁵ *Michaud v. France*, Appl. No. 12323/11, 6 December 2012, para. 88.

⁹⁶ See *Malone v. United Kingdom*, Appl. No. 8691/79, 2 August 1984; for email, *Halfords v. United Kingdom*, Appl. No. 20605/92, 25 June 1997.

⁹⁷ Regulation of Investigatory Powers Act 2000, 28 July 2000, available at: <<http://www.legislation.gov.uk/ukpga/2000/23/introduction>> at 28 October 2013.

⁹⁸ BBC Website, 7 February 2012, "Phone hacking: Met police failed to warn victims." Available at: <<http://www.bbc.co.uk/news/uk-16922305>> at 28 October 2013.

⁹⁹ *R (on the application of Bryant and others) v. Commissioner of the Police of the Metropolis* [2011] EWHC 1314 (admin); in February 2012, the Metropolitan police admitted it had acted unlawfully and the case was settled out of court.

Moreover, it is worth noting that the doctrine of margin of appreciation plays a pivotal role in the development of Article 8 case-law providing states a certain degree of discretion particularly in certain areas where the Court is reluctant to impede the decisions made by states in relation to issues “where a different approach is justified by local conditions”¹⁰⁰. Nonetheless, in this regard, the Court has shown willingness to keep the extent of the margin of appreciation under review through the development of its jurisprudence¹⁰¹.

6.2 Article 9: Freedom of Religion and Belief

In recent years academic discussion of religious freedom in Europe and its relation to the concept of democracy has been dominated by the jurisprudence of the European Court of Human Rights under Article 9 of the Convention¹⁰². Article 9 protects the right to freedom of thought, conscience and religion. According to Article 9 of the European Convention on Human Rights protects the right to freedom of thought, conscience and religion:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in a community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others.

Moreover, Article 14 (prohibition of discrimination) of the Convention may be relevant to freedom of religion cases¹⁰³. Hence the Court has reiterated that Article 9 is not simply “one of the most vital elements that go to make up the identity of believer” but also “a precious asset for atheists, sceptics, and the unconcerned”¹⁰⁴. The right to freedom of thought, conscience and religion is unqualified¹⁰⁵. This includes the right to hold a religion or belief and to

¹⁰⁰ Harris, O’Boyle, Warbrick, Law of the European Convention on Human Rights, *op. cit.*, P. 363.

¹⁰¹ *Valentino Acatrinei v. Romania*, Appl. 18540/04, 25 June 2013, para. 58.

¹⁰² Doe, N., Law and Religion in Europe, Oxford U.P., 2011, P. 40.

¹⁰³ Knight, S., “Freedom of Religion, minorities, and the Law”, Oxford U.P., 2007, p. 56.

¹⁰⁴ *Buscarini and Others*, Appl. No. 24645/94, 18 February 1999, para 34.

¹⁰⁵ Sandberg, R., Law and Religion, Cambridge U.P., 2011, p. 82.

change it¹⁰⁶. For the Article to apply, a belief must “attain a certain a level of cogency, seriousness, cohesion and importance”, and more importantly, by the possible qualifications in Article 9(2)¹⁰⁷. This allows the state to interfere with the right if the three tests in Article 9(2) are met¹⁰⁸. The interference must be “prescribed by law”, have one of the legitimate aims listed in Article 9(2) and be “necessary in a democratic society”¹⁰⁹.

Despite the importance and extent of interests protected by Art 9 some scholars have argued that due to the cautious approach adopted by the Court and the Commission in the early days of the Convention, traditionally, relatively few applications were made alleging violations of Article 9 and only a small proportion of those have given rise to successful claims¹¹⁰. Hence, the case-law related to this right is very recent, with the first judgement finding a violation of this article only delivered in the much referred to *Kokkinakis* case in 1993¹¹¹. However, since then a rich and often controversial jurisprudence has begun to develop, including two judgments on Turkish attempts to ban the wearing of Muslim headscarves in certain higher education establishments,¹¹² the fallout from Publication of cartoons of the Prophet Muhammad in Denmark in 2005,¹¹³ and the Grand Chambers reversal of the judgment backing a challenge to the display of the Christian crucifix in Italian state schools¹¹⁴. There is no doubt that Switzerland’s attempt to ban the construction of new minaret’s will also give rise to some thought-provoking legal arguments¹¹⁵.

¹⁰⁶ Ibid.

¹⁰⁷ *Campbell and Cosans v. United Kingdom*, Appl. 7511/76 and 7743/76, 25 February 1982, Series A No. 48, (1982) 4 EHRR 293, para. 36.

¹⁰⁸ Sandberg, R., *Law and Religion*, *op. cit.*, p. 82.

¹⁰⁹ Ibid.

¹¹⁰ Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, *op. cit.*, p 425.

¹¹¹ *Kokkinakis v Greece*, Appl. no. 14307/88, 25 May 1993, 17 EHRR 379. On the *Kokkinakis* case, see, Evans, *Religious Liberty and International Law in Europe*, *op. cit.*, pp. 282-84, 332-35.

¹¹² *Leyla Şahin v Turkey* (GC), 18 March 2011, Appl. No. 30814/06) and discussed in Altıparmak, K. & Karahanoğulları, O., “after Şahin: the Debate on Headscarves is not Over”, *European Constitutional Law Review* 2 (2006) 268, McGoldrick, D., *Human Rights and Religion: the Islamic Headscarf Debate in Europe*, Oxford: Hart, 2006.

¹¹³ BBC Website, “Special Report, the Muhammad cartoon row”, 7 February 2006, available at: <http://news.bbc.co.uk/2/hi/in_depth/4677976.stm> at 28 October 2013.

¹¹⁴ *Lautsi v. Italy*, (GC), 18 March 2011 (Appl. No. 30814/06).

¹¹⁵ BBC Website, “Swiss Minaret Appeal goes to European Court” (16.12.2009) available at: <<http://news.bbc.co.uk/2/hi/8417076.stm>> at 28 October 2013.

6.2.1 Democracy as a limit on restricting freedom of religion

Proportionality of a restriction on religion or belief and the extent to which it is “necessary in a democratic society” has often been controversial¹¹⁶. As in the case Articles 8, 10 and 11 of the Convention, Article 9 enshrines the rights in their first paragraph, and provide for the possible qualifications to their right in their second paragraph. The qualifications of Article 9 are slightly different to the other personal freedoms since they pertain only the manifestation of religion or belief (the *forum externum*), rather than the act or state of believing itself (the *forum internum*). Interpreting the scope of Article 9 (1) has been rather challenging and the European Commission’s decision in *Arrowsmith v. United Kingdom* that not all actions motivated by religious belief fall within it, has met with some criticism¹¹⁷.

In applying the limitations contained in Article 9 (2) the Court has been rather sensitive to the varied constitutional traditions of the member states, notwithstanding the fact that at times this approach has been criticised by certain scholars¹¹⁸. The main characteristic of Article 9 in relation to this study is the extent to which the Court has recognised a strong link between religion and democratic society. According to the Court, “freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention”¹¹⁹. In this manner, Article 9 needs to be interpreted in light of other Convention rights, such as the Article 11, the right of freedom of assembly and association¹²⁰. Consequently, interference with the rights stipulated in Article 9 may be examined not only as an infringement on the applicant’s own religion or beliefs, but also as an indirect violation on the democratic fabric of society¹²¹.

In order to justify a restriction on Article 9, it must comply with the conditions specified in Article 9(2), which must be prescribed by law and

¹¹⁶ Harris, O’Boyle, Warbrick, Law of the European Convention on Human Rights, *op. cit.*, p. 437.

¹¹⁷ Evans, C., Freedom of Religion under the European Convention on Human Rights, Oxford U.P., 2001, p. 115.

¹¹⁸ Ibid.

¹¹⁹ *Hasan and Chaush v. Bulgaria*, 26 October 2000 *Appl. No. 30985/96) para. 60; *Serif v Greece* (2001) 31 EHRR 20.

¹²⁰ Ibid, para. 62.

¹²¹ Sweeney, J.A., “Freedom of Religion and Democratic Transition”, in Buyse, A. & Hamilton, M. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge U.P., 2011, P. 105.

be necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others¹²². These specific “interests” are more commonly referred to in the European jurisprudence as “legitimate aims”¹²³. It is also important to note that other major international human rights instruments adopt the same approach to the issue of religious belief by strike a balance between the “legitimacy” of restrictions and their “necessity” to limiting freedom of religion¹²⁴.

6.3 Article 10: Freedom of Expression

Article 10 which guarantees freedom of expression has been described as ‘one of the cardinal rights guaranteed under the Convention’¹²⁵. Indeed, the marked importance of this right and the demand for its special protection due to its close linkage to democracy’s political process is an indispensable part of the Convention¹²⁶. According to Article 10 of the Convention:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licencing of broadcasting, television or cinema enterprise.

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

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Freedom of religion is protected in all other major international and regional human rights instruments, including Article 18 of the Universal Declaration of Human Rights (UDHR), Article 18 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the American Declaration of the Rights and Duties of Man (American Declaration), Article 12 of the American Convention on Human Rights (ACHR) and Article 8 of the African Charter on Human People’s Rights (ACHRP).

¹²⁵ See generally Macovei, M., “Freedom of Expression: A to Implementation of Article 10 of the European Convention on Human Rights”, Human Rights Handbooks, No. 2, 2nd edition, 2004.

¹²⁶ Harris, O’Boyle, Warbrick, Law of the European Convention on Human Rights, *op. cit.*, p.443.

of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Court has consistently maintained that states are under obligation that private individuals can effectively exercise their right of communication among themselves¹²⁷. Furthermore, freedom of political debate is at the very core of the concept of democratic society, which prevails throughout the convention¹²⁸. The Court has repeatedly reiterated that “freedom of expression constitutes one of the essential foundations of democratic society, one of the basic conditions for its progress and for each individual’s self-fulfilment”¹²⁹. The convention has underlined the need for transparency and accountability on the part of the high contracting states¹³⁰. In ascertaining whether a positive obligation to act exists in a particular situation, “regard must be had to the fair balance that has to be struck between the general interest of the community and interests of individuals”¹³¹.

The most protected class of expression has been political expression, since the Court considers such expression as an essential part of any effective pluralist democracy in order to ensure respect for fundamental human rights¹³². The court has emphasised this point forcefully that “in a democratic system, the acts or omissions of the government must be subject to the close scrutiny not only the legislative and judicial authorities but also the press and public opinion”¹³³. This point was reiterated in *the United Communist Party of Turkey* case, in which the court considered pluralism at the heart of

¹²⁷ *Hertel v. Switzerland*, 25 August 1998, 28 EHRR, para. 46, Report of Judgments and Decisions 1998-VI; *Steel and Morris v. United Kingdom*, Appl. no. 68416/01, 15 February 2005, para. 87; and *Animal Defenders International v. United Kingdom* [GC], Appl. No. 48876/08, 22 April 2013, para. 100.

¹²⁸ *Lingens v. Austria*, Series A no. 103, 8 July 1986, para. 41.

¹²⁹ *Thoma v. Luxemburg*, Appl. No. 38432/97, 29 June 2001.

¹³⁰ *OOO IVPRESS and Others v. Russia*, App. No. 33501/04, 38608/04, 35258/05 and 35618/05, 22 January 2013, para. 55; see also Council of Europe, Committee of ministers, “Declaration on freedom of political debate in the Media”, Adopted by the Committee of ministers on 12 February at the 872nd meeting of the Ministers deputies. Available at: <<https://wcd.coe.int/ViewDoc.jsp?id=118995>> at 28 October 2013.

¹³¹ *Ozgur Gundem v. Turkey*, Appl. No. 23144/93, 16 March 2000, para. 43.

¹³² Mowbray, European Convention on Human Rights, *op. cit.*, p. 626.

¹³³ The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence. *Guja v. Moldova*, No. 14277/04, 12 February 2008; see also *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I, and *Radio Twist, a.s. v. Slovakia*, no. 62202/00, ECHR 2006-XV.

its conception of democracy¹³⁴. Moreover, the court firmly puts the onus on the member states as the “ultimate guarantors of the principle of pluralism”, especially in the context of media¹³⁵. As the Court famously held in *Handyside v. United Kingdom*, even opinions which “shock, offend, or disturb” should be tolerated¹³⁶. In line with this the Court in the case of *Vajnai v. Hungary* has reiterated that:

“A Legal system which applies restrictions on human rights in order to satisfy the dictates of public feelings – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in democratic society, since the society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto”¹³⁷.

In the recent case of *Cumhuriyet Vakfı and Others v. Turkey*, the Court reiterated the importance of freedom of expression as “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual self-fulfilment”¹³⁸.

6.3.1 Transition to Democracy and Freedom of Expression

In recent decades, both the Court and the Commission have acknowledged that in a transition to democracy it may be legitimate to curtail forms of speech which are very critical of the state¹³⁹. As one of the judges in the case of *Castells v. Spain* observed:

“In a situation where politically motivated violence poses a constant threat to the lives and security of the population, it is particularly difficult to strike a balance between the requirements of protecting freedom of expression and the imperatives of protecting the democratic state”¹⁴⁰.

Since the collapse of the Soviet Union and accession of all of the former Soviet Bloc states in Europe to the Council of Europe, the Court has been

¹³⁴ *United Communist Party of Turkey, op. cit.*, para 43.

¹³⁵ *Manole and Others v. Moldova*, Appl. No. 13936/02, 17 September 2009, para. 107.

¹³⁶ *Handyside v. United Kingdom*, Appl. No. 5493/72, 7 December 1976, para. 49.

¹³⁷ *Vajnai v. Hungary*, Appl. No. 33629, 8 July 2008, para. 57.

¹³⁸ *Cumhuriyet Vakfı and Others v. Turkey*, Appl. No. 28255/07, 8 October 2013, para. 56.

¹³⁹ Buyse, A., “The Truth, the Past and the Present: Article 10 ECHR and Situations of transition”, in Buyse, A. & Hamilton, M. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge U.P., 2011, P. 132.

¹⁴⁰ Concurring Opinion of Judge Carrillo Salcedo; *Castells v. Spain*, Appl. No. 11798/85, 8 January 1991.

faced with an entirely different challenge of transitional democracies in those states¹⁴¹. Nevertheless, the Convention “to which most central and Eastern European countries acceded in the years immediately following the demise of communist regimes, was a crucial signpost on the road to democracy and the rule of law”¹⁴². It is worth noting that such challenges were not limited to the former Soviet Bloc states and the Court had previously faced similar tasks in the case of Southern European states¹⁴³. Although, the process of transition does not prompt the Court to deviate from its established jurisprudence but the Court’s judgments on the freedom of expression are of particular salience to transitional process¹⁴⁴. Therefore, the Court’s case-law has strongly adopted an approach in which information exchange and pluralities of opinions is of paramount importance in any democratic society, therefore, restoring a balance between the citizens’ fundamental rights and the state – a balance completely void in the era of authoritarian rule in the former communist states of Eastern Europe¹⁴⁵.

6.4 Article 11: Freedom of Assembly and Association

Not only citizens in fledgling democracies of Eastern Europe but also some nationals of the more established democracies in Europe have had to rely on the Court’s jurisprudence in relation to the rights to freedom of assembly and association (Article 11 of Convention) and the obligation upon states to hold free elections (Article 3, of Protocol No. 1 of the Convention).¹⁴⁶ Article

¹⁴¹ Leuprecht, P., “Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?,” 8 *Transnat’l L. & Contemp. Probs.*, 313, (1998) pp. 313-14; also see Fein, E., “Transitional Justice and Democratization in Eastern Europe”, in May, R.A. and Hamilton, A.K. (eds.) (Un) Civil Societies, Lanham: Lexington Books, 2005, pp. 197-223.

¹⁴² Buyse, “The Truth, the Past and the Present: Article 10 ECHR and Situations of transition”, *op. cit.*, p. 148.

¹⁴³ See generally Schmitter, P., “An Introduction to Southern European Transitions from Authoritarian Rule: Italy, Greece, Portugal, Spain and Turkey”, in O’Donnell, G., Schmitter, P. and Whitehead, L. (eds.), *Transitions from Authoritarian Rule: Southern Europe* (Baltimore: Johns Hopkins U.P., 1986).

¹⁴⁴ Buyse, “The Truth, the Past and the Present: Article 10 ECHR and Situations of transition”, *op. cit.*, p. 148.

¹⁴⁵ *Ibid*, p. 149.

¹⁴⁶ “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under condition which will ensure the free expression of the opinion of the people in the choice of the legislature.” Hamilton, M., “Transition, Political Loyalties and the Order of the State”, in Buyse, A. & Hamilton, M. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge U.P., 2011, 151-184, p. 151.

11 protects the two distinct if sometimes connected freedoms of peaceful assembly and association¹⁴⁷. In occasions, states have sought to justify interference with these rights in order to foster democratic values, in turn leading to allegations of excessive rights limitations¹⁴⁸. The right to freedom of association as provided in Article 11 of the Convention reads as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

In recent years the Court has had to deal with the more practical application of the notion of democracy in regards to freedom of assembly and association¹⁴⁹. The eligibility to stand for election to a national parliament was examined in the case of *Zdanoka v Latvia*, which concerned refusal by the Latvian authorities to allow the applicant, Mrs Tatjana Zdanoko,¹⁵⁰ a member of the *Communist Party* of Latvia to be included on the resident's register to stand for the first parliamentary elections in 1993 since Latvia's regaining independence from the Soviet Union in 1991¹⁵¹.

The Chamber and Grand Chamber in this case adopted entirely different approaches to the interpretation of someone's eligibility to stand for election. On the one hand, in its Chamber judgment, the Court held that

¹⁴⁷ Harris, O'Boyle, Warbrick, *Law of the European Convention on Human Rights*, *op. cit.*, p.516.

¹⁴⁸ Hamilton, "Transition, Political Loyalties and the Order of the State", *op. cit.*, p. 151-152.

¹⁴⁹ The general principle enounced in the case-law in this field are summarised in the case of *United communist Party of Turkey and Others v. Turkey*, Appl. No. 133/1996/752/951, Judgment of 30 January 1998, paras. 42-47.

¹⁵⁰ In February 1993 Ms *Zdanoka* became chairperson of the Movement for Social Justice and Equal Rights in Latvia, (*Kustība par sociālo taisnīgumu un līdztiesību Latvijā*), which later became a political party, *Līdztiesība* ("Equal rights").

¹⁵¹ *Zdanoka v Latvia*, Appl. No. 58278/00, 16 March 2006; see also the older Judgment in the case of *Gitonas v Greece*, App. No. 18747/91, Judgment of 1 July 1997, 27 EHRR 417.

the electoral restrictions by the Latvian government in 1995 had violated Mrs Zdanoka's P 1-3 right. The Chamber felt compelled to "adhere to the same criteria" permitted by Articles 8-11, since "the only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to emanate from democratic society." However, the Grand Chamber held that:

"... Where an interference with Article 3 of Protocol No. 1 is in issue the Court should not automatically adhere to the same criteria as those applied with regard to the interference permitted by the second paragraphs of Articles 8 to 11 of the Convention ... Because of the relevance of Article 3 of Protocol No. 1 to the institutional order of the State, this provision is cast in very different terms from Articles 8 to 11 of the Convention ... The standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8 to 11 of the Convention"¹⁵².

Hence, the implied defence to "the institutional order of the state" echoes specific reference to Article 3 of Protocol No. 1's "constitutional and political character" in *travaux préparatoires* of the Convention¹⁵³. By adopting this approach the Grand Chamber established a high supervisory threshold in which case a violation would only take place if procedural deficiencies gave rise to likely arbitrary treatment¹⁵⁴. It is clear that the Grand Chamber was of the opinion that Article 3 of Protocol No. 1 does not exclude the restrictions on electoral rights, since it may be imposed on "an individual who has, for example seriously abused a public position or whose conduct threaten to undermine the rule of law or democratic foundations"¹⁵⁵.

This approach is very much in step with Allen's observation that "there is reluctance to allow the Court to be used as a forum for hearing disputes that have their origin in the pre-transitional era" since "there is a strong (though not universal belief within the European Court that there is little to be gained by investigating the stories of victim"¹⁵⁶. In other words, in such

¹⁵² *Zdanoka v Latvia*, Appl. No. 58278/00, 16 March 2006, para. 115(a).

¹⁵³ Hamilton, "Transition, Political Loyalties and the Order of the State", *op. cit.*, p. 157.

¹⁵⁴ *Ibid*, see also *Zdanoka v Latvia*, *op. cit.*, para. 107-108.

¹⁵⁵ *Ibid*, para. 110, citing *Glimmerveen and Hagenbeek v. the Netherlands* (nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187).

¹⁵⁶ Allen, T., "Restitution and Transitional Justice in the European Court of Human Rights" (2007) 13(1) *Columbia Journal of European Law* 1, 30.

cases, the contracting states are given considerable latitude to establish their constitutional rules regarding the status of parliamentarians which inevitably would include the criteria for disqualification¹⁵⁷. This would include ensuring the independence of members of parliament as well as electorate's freedom of choice¹⁵⁸. The wide margin of appreciation given to states is mainly because each state has historical and political factors unique to them and the criteria would vary accordingly¹⁵⁹. Nonetheless, according to Hamilton:

“One apparent consequence of the more relaxed scrutiny of Article 3 of Protocol 1 is that no assessment need be made of extant transitional risk. This again sharpens the contrast with Articles 10 and 11 of Convention which demand attention to the imminence of an evidenced threat”¹⁶⁰.

However, the Court was unanimous in its decision that there had been no violation of Article 3 of Protocol 1 by Latvia. Indeed, this judgement indicates the court's concern regarding fairness of free elections as well as enabling states to place limitations on the senior holders of public office to gain electoral advantage whilst still connected with the prestige and powers of such offices¹⁶¹.

However, in an apparent U-turn, the Court has found violations of Article 3 of Protocol 1 in the cases of *Adamsons v. Latvia*¹⁶² with similar background. Some scholars have observed that the above two cases indicate a narrowing of the gap between Article 11 and Article 3 of Protocol 1 scrutiny¹⁶³. In *Adamsons*, the Latvian government had disqualified a former low-ranking officer of the KGB border guard from standing the 2002 general election. In a departure from the previous approach, not only did the Court consider the affiliation of this person's involvement with the previous regime but crucially considered his activities in the society since the collapse of the Soviet Union which according to the Court:

¹⁵⁷ *Paksas v. Lithuania*, Appl. No. 34932/04, 6 January 2011, Para. 92.

¹⁵⁸ *Sarukhanyan v. Armenia*, Appl. No. 38978/03, 27 May 2008, para. 39.

¹⁵⁹ *Zdanoka v Latvia* (GC), *op. cit.*, para. 119.

¹⁶⁰ Hamilton, “Transition, Political Loyalties and the Order of the State”, *op. cit.*, p. 157.

¹⁶¹ Mowbray, “the Role of the European Court of Human Rights in the Promotion of Democracy”, *op. cit.*, p. 708.

¹⁶² *Adamsons v. Latvia*, Appl. No. 3669/02, 24 June 2008. French text available only, extract from Press release issued by the Registrar, p. 3. See also Varju, M., “Transition as a Concept of European Human Rights Law”, *European Human Rights Review* 170 (2009).

¹⁶³ Hamilton, “Transition, Political Loyalties and the Order of the State”, *op. cit.*, p. 181.

“The Court considered, in the light of the particular socio-historical background to the applicant’s case, that during the first years after Latvia had regained independence, electoral rights could be substantially restricted without thereby infringing Article 3 of Protocol No. 1. However, with the passing of time, a more general suspicion regarding a group of persons no longer sufficed and the authorities had to provide further arguments and evidence to justify the measure in question”¹⁶⁴.

This approach has since been reiterated by the Court in the case of and *Tanase v Moldova* in which the Court held that prevention of a Moldovan citizen holding dual nationality from standing in for election “some seventeen years after Moldova had gained independence and five years after it had relaxed its laws to allow dual-citizenship” was illegal¹⁶⁵.

6.4.1 The Convention Rights and Political parties

As noted above, political parties are the very cornerstones of European democracy and the Court considers pluralism as an inseparable part of liberal democracy. In order to maintain political debate political parties are the other crucial participants of a pluralistic system of government. The court has opined that:

“Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population. By relaying this range of opinion, not only within political institutions but also with the help of media at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of a democratic society”¹⁶⁶.

In the case of *Socialist Party of Turkey v Turkey*¹⁶⁷, the Court emphasised on the importance of pluralism in a democratic society to the extent that challenging existing national structure was acceptable only through democratic means that “it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a state is currently organised, provided that they do not harm

¹⁶⁴ *Adamsons v. Latvia*, French text available only, extract from Press release issued by the Registrar, p. 3.

¹⁶⁵ *Tanase v Moldova* (GC), Appl. No. 7/08, 27 April 2010, para. 159.

¹⁶⁶ *United Communist Party of Turkey and Others v. Turkey*, Appl. No. 19392/92, 30 January 1998, para 44.

¹⁶⁷ *Socialist Party of Turkey v Turkey*, (1998) 27 E.H.R.R. 51.

democracy itself¹⁶⁸. Hence, constitutional reform even of fundamental nature is a justifiable topic of political debate as long as the advocates are not seeking to undermine the very foundation of the national democratic system¹⁶⁹.

In the early 1990s, one of the challenges for the Court's jurisprudence was presented with a series of cases involving closure of nine political parties in Turkey¹⁷⁰. In the first eight cases the Court's approach was very similar in its reasoning. The reason for dissolution of these political parties was that they were all striving to settle the Kurdish problem democratically and advocating a federal state comprised of a Kurdish and a Turkish nation. The Court was of the opinion that it could not justify a ban and while the states could take measures to protect their institutions, a political party could not be excluded from the protection of the Convention simply because the activities of these political parties are regarded by the national authorities as undermining the constitutional structure of the state¹⁷¹. In the case of *the United Communist party of Turkey and Others*, the Court held that the mere inclusion of the word "Communist" in the name of the party could not justify dissolution of that party¹⁷².

Nonetheless, in contrast to the case of *the German Communist party*, this party posed no threat to Turkish society, as it did not pursue traditional communist aims¹⁷³. The Court was unanimous in their conclusion regarding the aforementioned parties that since they bore no responsibility for Kurdish terrorism, the dissolution violated Article 11¹⁷⁴. However, in contrast to these cases, the seminal exception was the Court's now notorious decision in the

¹⁶⁸ Ibid. para 44.

¹⁶⁹ Contrast with the early German Communist Party case: *KDP v FRG* (1957) No. 250/57 1 YB 222.

¹⁷⁰ *United communist Party of Turkey and Others v. Turkey*, Appl. No. 133/1996/752/951, 30 January 1998; *Socialist Party and Others v. Turkey*, Appl. No. 20/1997/804/1007, 25 May 1998; *Freedom and democracy Party (ÖZDEP) v. Turkey*, Appl. No. 23885/94, 12 August 1999; *Yazar and Others and the People's Labour Party (HEP) v. Turkey*, Appl. No. 22723/93, 9 April 2002; *Dicle on Behalf of the Democracy Party (DEP) v. Turkey*, Appl. No. 25141/94, 10 December 2002; *Socialist Party of Turkey (STP) and Others v. Turkey*, Appl. No. 26482/95, 12 November 2003; *Democracy and Change Party and others v. Turkey*, Appl. No. 39210/98 and 39974/98, 26 April 2005; *Emek Partisi and Şenol v. Turkey*, Appl. No. 39434/98, 31 May 2005.

¹⁷¹ *United Communist Party, op. cit.*, para. 27.

¹⁷² *United communist Party of Turkey and Others v. Turkey*, para. 54.

¹⁷³ Ibid, para. 57.

¹⁷⁴ Anagnostou et al., *The European Court of Human Rights and the Rights of Marginalized Individuals and Minorities in National Context, op. cit.*, p. 176.

case of *Refah Partisi v Turkey*, in which the court upheld the decision of the Turkish Supreme Court to ban an Islamist party¹⁷⁵. The coming to prominence by the *Refah Partisi* in Turkey, very much reflected the rise of an ‘Islamic resurgence’ at the end of the twentieth century¹⁷⁶. In spite of its secular political system Turkey a predominantly Muslim state was not different from other Islamic countries experiencing this sea change¹⁷⁷.

The Court unanimously ruled that there was no violation of article 11, a decision vehemently criticised by some prominent scholars such as McGoldrick¹⁷⁸. This was mainly based on the fact that the leaders of *Refah* had made public speeches advocating imposition of *Sharia* law, which was considered irreconcilable with the notion of liberal democracy, as conceived by the Convention¹⁷⁹. As Harvey puts it, “given that the party had over four million members this amounts to the largest single interference with freedom of association in European jurisprudence”¹⁸⁰.

In *Partidul Comunistilor (Nepeceristi) (PCN) and Ungureanu v. Romania*, the Court found a violation of Article 11 following the refusal of the Bucharest Court of Appeal to register PCN as a political party¹⁸¹. Although PCN openly purported to be a Marxist-Leninist organization, but very much distanced itself from the former Romanian Communist Party that had ruled Romania during the Cold War period. The Bucharest County Court held that

¹⁷⁵ *Refah Partisi v Turkey*, [GC], Appl. No. 41340/98, 13 February 2003.

¹⁷⁶ Esposito & Voll describe the rise of Islamic political movements as one of the “great developments’ at the end of the twentieth century. Esposito, J & Voll, J., *Islam and Democracy*, Oxford U.P., 1996, p. 202.

¹⁷⁷ *Refah Partisi* was established in 1983, and soon experienced success in local and general elections. In the Turkish general election in December 1995, *Refah Partisi* obtained 22 per cent of the vote and was the biggest in the Grand National assembly. On 28 June 1996, it came to power as the senior partner in a coalition government and in January 1997, an opinion poll suggested that it was likely to win 67 per cent of the votes in the following general election to be held four years later. On 16 January 1998, the Constitutional Court of Turkey ordered the dissolution of the party. See generally Findley, C.V., *Turkey, Islam, Nationalism, and Modernity: A History*, Yale, U.P., 2011; see also Zurcher, E.J., *Turkey: A Modern History*, 2004, I.B. Tauris, 3rd Rev. Ed., 2004.

¹⁷⁸ McGoldrick, D., “Accommodating Muslims in Europe: From adopting Sharia Law to religiously Based Opt out from Generally Applicable Laws”, *Human Rights Law Review* 9(4) (2009) 603-612.

¹⁷⁹ *Refah Partisi v Turkey*, [GC], *op. cit.*, para. 34.

¹⁸⁰ Harvey, “Militant Democracy and the European Convention on Human Rights”, *op. cit.*, p. 417.

¹⁸¹ *Partidul Comunistilor (Nepeceristi) (PCN) and Ungureanu v. Romania*, Appl. No. 46626/99, 3 February 2005.

PCN's political programme aimed at "establishing a humane state based on communist doctrine, which would imply that the constitutional and legal order in place since 1989 is inhumane and not founded on genuine democracy"¹⁸². The Court in Strasbourg rejected the Romanian government's argument that it could not permit "the emergence of a new communist party to form the subject of democratic debate", and reiterated the importance of pluralism and political parties which applied to all of the signatories to the Convention¹⁸³. The Court stated that "political parties played an essential role in ensuring pluralism and the proper functioning of democracy"¹⁸⁴ as well as "there can be no democracy without pluralism"¹⁸⁵. Moreover, the Court held that:

"The Court is also prepared to take into account the historical background to cases before it, in this instance Romania's experience of totalitarian communism prior to 1989. However, it observes that that context cannot by itself justify the need for the interference, especially as communist parties adhering to Marxist ideology exist in a number of countries that are signatories to the Convention"¹⁸⁶.

The approach of the Court in the above case could be construed as quite a departure from previous case-law regarding former Communist Eastern European states. However, it should be pointed out that PCN had made it absolutely clear that it accepted pluralism, multiparty political system and had no affiliation with the former Romanian Communist Party¹⁸⁷. On the part of the Court, in the words of Hamilton "the Court has demonstrated its resolve to foster a robust and inclusive political sphere, underpinned by the values of pluralism and social cohesion"¹⁸⁸.

In this regard, the judgment of *Herri Batasuna and Batasuna v. Spain* is of significance, in which the Court held:

¹⁸² Article 20 of the PCN's constitution stated that the PCN was 'not the successor of the former Romanian Communist Party', *ibid*, para. 10.

¹⁸³ *Partidul Comunistilor (Nepeceristi) (PCN) and Ungureanu v. Romania*, *op. cit.*, para. 58.

¹⁸⁴ *Ibid*, para. 44.

¹⁸⁵ *Ibid*, para. 45.

¹⁸⁶ *Ibid*, para. 58.

¹⁸⁷ The Court could see no calls for violence or anti-democratic statements in the Party's proposed constitution, *ibid*, 54; see also Sweeney, "The European Court of Human Rights in the Post-Cold War Era: Universality in Transition", *op. cit.*, p. 198.

¹⁸⁸ Hamilton, "Transition, Political Loyalties and the Order of the State", *op. cit.*, p. 181.

“[I]t necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds ...”¹⁸⁹.

Moreover, the Court attached a caveat to the above passage by noting that:

“[A] State may “reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime”¹⁹⁰.

In the recent case of *Vona v. Hungary*, the Court was of the opinion that the dissolution of the Hungarian Guard Association (*Magyar Garda*) by domestic court was lawful restriction of the applicant’s rights under Article 11 of the Convention¹⁹¹. The said organization had openly advocated a racist message against the Romani population of Hungary. In the Court’s view:

“[T]he State is entitled to take preventive measures to protect democracy vis-à-vis such non-party entities as well, if a sufficiently imminent prejudice to the rights of others undermines the fundamental values upon which a democratic society rests and functions. One of such values is the cohabitation of members of society without racial segregation, without which a democratic society is inconceivable”¹⁹².

The Court found that the Hungarian authorities were entitled to take preventive measures in order to protect democracy and proscribe the organization due to its racist and divisive views¹⁹³. It is the established case-law of the Strasbourg organs which have consistently maintained that there are positive obligations to secure the effective enjoyment of the rights contained in Article 11¹⁹⁴. In other words, not only everyone regardless of their status or background characteristics (ethnicity, place of origin, religion, disability, etc.)

¹⁸⁹ *Herri Batasuna and Batasuna v. Spain*, Appl. No. 25803/04 and 25817/04, 30 June 2009, para. 79.

¹⁹⁰ *Ibid*, para. 81.

¹⁹¹ *Vona v. Hungary*, Appl. No. 35943/10, 9 July 2013.

¹⁹² *Ibid*, para. 57; see also *Refah Partisi v Turkey*, [GC], *op. cit.*, para. 102.

¹⁹³ *Ibid*, para. 58..

¹⁹⁴ *Christians against Racism and Fascism v. United Kingdom*, Appl. No. 8440/78, 16 July 1980, 21 DR 138.

are entitled to effective enjoyment of these rights but the contracting states are under obligation to prevent and remedy any breach thereof¹⁹⁵.

6. CONCLUSION

There is no question that democracy is without doubt one of the most fundamental features of the European public order. As we have observed the Court has derived its concept of democracy from the components of the contemporary model of democracy in Europe from its origin, preamble and text of the Convention. Indeed the drafters of the European Convention on Human rights adopted the notion of liberal democracy and pluralism as the very corner stone of the Convention. In that regard, the Court considers liberal democracy as the only guarantee for fundamental freedom and human rights. The cases that this paper has analysed certainly reveal the Court's adherence to representative democracy and free elections as well as the importance of transparency and accountability in public and political spheres.

As this article has endeavoured to illustrate in regards to the notion of democracy not only has the Court in recent years concerned itself with Article 10 (freedom of expression) and 11 (freedom of assembly and association), the fundamental characters of a democratic society, but is also of the belief that Articles 8 (right to family life) and 9 (freedom of religion and belief) play a pivotal role in the articulation of the notion of democracy in contemporary Europe. In this regard, in particular the present authors are of the opinion that the right to religion is one of the cornerstones of any truly democratic society. In fact, in recent decades, the Court has singled out Article 9 of the Convention as "one of the foundations of a democratic society within the meaning of the Convention." However, the abovementioned rights are not absolute and are subject to limitations set out in the second part of these articles. The restrictions must be prescribed by law and be necessary in a democratic society in the interest of public safety, for the protection public order, health morals, or for the protection of the rights and freedoms of others. Furthermore, through the doctrine of "margin of appreciation" allows the member states a certain discretion to interfere with or limit human rights in specific instances. This "margin of appreciation", however, is increasingly subject to oversight by the Court in order to ensure objective compliance with the protected rights. This approach is increasingly adopted by the Court in cases concerning transitional democracies in former Communist totalitarian systems.

¹⁹⁵ Van Dijk, P. and Van Hoof, G.J.H., (eds.) Theory and Practice of European Convention on Human Rights, *op. cit.*, p. 589.

This paper has discovered that since the collapse of the Soviet Union and accession of all of the former European communist states to the Council of Europe the Court has faced a huge challenge in upholding and enforcing the values of democracy, since most of these states were new to the notion of liberal democracy. This led to the emergence of new kind of applicant bringing litigation against new states defending those cases. This new challenge has prompted the court to reiterate and articulate a coherent normative conception of democracy even though that conception is bound to be contested.

BIBLIOGRAPHY:

- Allen, T., “Restitution and Transitional Justice in the European Court of Human Rights” (2007) 13(1) *Columbia Journal of European Law* 1, 30.
- Altıparmak, K. & Karahanoğulları, O., “after Şahin: the Debate on Headscarves is not Over”, *European Constitutional Law Review* 2 (2006) 268.
- Anagnostou, D. and Psychogiopoulou, E. (eds.), *The European Court of Human Rights and the Rights of Marginalized Individuals and Minorities in National Context*, Martinus Nijhoff Publishers, 2009.
- Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia Publishers, 2002.
- Bates, E., *The Evolution of the European Convention of the European Convention of Human rights*, Oxford U.P., 2010.
- BBC Website, 7 February 2012, “Phone hacking: Met police failed to warn victims”. Available at: <<http://www.bbc.co.uk/news/uk-16922305>> at 28 October 2013.
- BBC Website, “Swiss Minaret Appeal goes to European Court” (16.12.2009) available at: <<http://news.bbc.co.uk/2/hi/8417076.stm>> at 28 October 2013.
- BBC Website, “Special Report, the Muhammad cartoon row”, 7 February 2006, available at: <http://news.bbc.co.uk/2/hi/in_depth/4677976.stm> at 28 October 2013.
- Buyse, A., “the Truth, the Past and the Present: Article 10 ECHR and Situations of transition”, in Buyse, A. & Hamilton, M. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge U.P., 2011.

- Cerna, C., “Universal Democracy: An International Legal Right or the Pipe Dream of the West?”, (1995) 27 *New York University Journal of International Law and Politics* 289.
- Council of Europe, Committee of ministers, “Declaration on freedom of political debate in the Media”, Adopted by the Committee of ministers on 12 February at the 872nd meeting of the Ministers deputies. Available at: <<https://wcd.coe.int/ViewDoc.jsp?id=118995>> at 28 October 2013.
- Council of Europe, Parliamentary Assembly resolution 1031 (1994), “On the honouring of commitments entered into by member states when joining the Council of Europe”, Assembly Debate 14 April 1994.
- Doe, N., *Law and Religion in Europe: a Comparative Introduction*, Oxford U.P., 2011.
- Esposito, J & Voll, J., *Islam and democracy*, Oxford U.P., 1996.
- Evans, C., *Freedom of religion Under the European Convention on Human Rights*, Oxford U.P., 1st ed. 2001.
- Evans, M.D., *Religious Liberty and International Law in Europe*, Cambridge U.P., 2008.
- Fein, E., “Transitional Justice and Democratization in Eastern Europe”, in May, R.A. and Hamilton, A.K. (eds.) *(Un)Civil Societies*, Lanham: Lexington Books, 2005, pp. 197-223.
- Findley, C.V., *Turkey, Islam, Nationalism, and Modernity: A History*, Yale, U.P., 2011.
- Franck, T.M., “The Emerging Right to Democratic Governance”, (1992) 86 *American Journal of International Law* 46.
- Fox, G.H., *Democratic Governance and International Law*, Cambridge U.P., 2000.
- Gearty, C. “Democracy and Human Rights in the European Court of Human Rights: a Critical Appraisal” (2000) 51 *Northern Ireland Legal Quarterly* 381.
- Greer, S., “The Exceptions to Articles 8 to 11 of the European Convention on Human Rights”, Council of Europe Publishing, Strasbourg, 1997.

- Hamilton, M., "Transition, Political Loyalties and the Order of the State", Buyse, A. & Hamilton, M. (eds.), 'Transitional Jurisprudence and the ECHR: Justice, Politics and Rights', Cambridge U.P., 2011, 151-184.
- Harris, O'Boyle, Warbrick, Law of the European Convention on Human Rights, Butterworth, 2nd ed., 2009.
- Harvey, P., Militant democracy and the European Convention on Human Rights, (2004) *European Law Review*, 29(3), 407-20.
- Higgins, R., "Derogations under Human Rights Treaties", (1978) 48 *British Yearbook of International law*.
- Knight, S., Freedom of Religion, minorities, and the Law, Oxford U.P., 2007.
- Leuprecht, P., "Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?" 8 *Transnat'l L. & Contemp. Probs.*, 313, (1998).
- Loveland, I., Constitutional Law, Administrative Law, and Human Rights: a Critical Introduction, Oxford U.P., 6th edition, 2012.
- Macovei, M., "Freedom of Expression: A to Implementation of Article 10 of the European Convention on Human Rights", Human Rights Handbooks, No. 2, 2nd edition, 2004.
- Marks, S., "The European Convention on Human Rights and its "Democratic Society"" (1995) *British Yearbook of International Law*, 209.
- McGoldrick, D., "Accommodating Muslims in Europe: From adopting Sharia Law to religiously Based Opt out from Generally Applicable Laws", *Human Rights Law Review* 9(4) (2009) 603-612.
- McGoldrick, D., Human Rights and Religion: the Islamic Headscarf Debate in Europe?, Oxford: Hart, 2006.
- Merrills, J.G., The Development of International law by the European Court of Human Rights, Manchester U.P., 1993.
- Mowbray, A., European Convention on Human Rights', Oxford U.P., 3rd ed., 2012.
- Mowbray, A., "The Role of the European Court of Human Rights in the Promotion of Democracy", 1999 *Public Law* 703.
- O'Connell, R.O., "Towards a Stronger Concept of Democracy in the Strasbourg

Democracy is one of the Main Features of the European Convention on...

- Convention”, *European Human Rights Law Review* (2006) 281.
- Ovey, C. and White, R.C.A., *European Convention on Human Rights*, Oxford U.P., 5th ed, 2010.
- Regulation of Investigatory Powers Act 2000, 28 July 2000, available at: <<http://www.legislation.gov.uk/ukpga/2000/23/introduction>> at 28 October 2013.
- Roagne, I., “Protecting the Right to Respect for Private and Family life under the European Convention on Human Rights”, *Council of Europe Human Rights Handbooks*, Council of Europe, Strasbourg, 2012.
- Sandberg, R., *Law and Religion*, Cambridge U.P., 2011.
- Schmitter, P., “An Introduction to Southern European Transitions from Authoritarian Rule: Italy, Greece, Portugal, Spain and Turkey”, in O’Donnell, G., Schmitter, P. and Whitehead, L. (eds.), *Transitions from Authoritarian Rule: Southern Europe* (Baltimore: Johns Hopkins U.P., 1986).
- Sweeney, J.A., “Divergence and Diversity in Post-Communist European Human Rights Cases”, *Connecticut Journal of International Law* 21 (2005).
- Sweeney, J.A., “Freedom of Religion and Democratic Transition”, in Buyse, A. & Hamilton, M. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge U.P., 2011.
- Sweeney, J.A., *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, Routledge, 2012.
- The current mandate of the Council of Europe was established at a summit which took place in Warsaw in 2005. Text available at: <www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp> at 28 October 2013.
- Van de Schyff, G., “The Concept of Democracy as an Element of the European Convention”, 38 *The Comparative and International Law Journal of Southern Africa* (2005) 355-372.
- Van Dijk, P. and Van Hoof, G.J.H., (eds.) *Theory and Practice of European Convention on Human Rights*, Brill, 3rd Revised Edition, 1998.
- Varju, M., “Transition as a Concept of European Human Rights Law”, *European Human Rights Review* 170 (2009).

Wheatley, S., *The Democratic Legitimacy of International Law*, Hart Publishing, 2010.

Wildhaber, L., “Changing Ideas about the Tasks of the European Court of Human Rights”, in Wildhaber, L., *The European Court of human Rights 1998-2006: History, Achievements and Reform*, (Kehl, Strasbourg, Arlington: N.P. Engel), 2006.

Zurcher, E.J., *Turkey: A Modern History*, 2004, I.B. Tauris, 3rd Rev. Ed., 2004.

CASE-LAW:

Adamsons v. Latvia, Appl. No. 3669/02, 24 June 2008

Airey v. Ireland, Judgment of 9 October 1979, A 32; *X and Y v. Netherlands*, Judgment of 26 March 1985, A 91.

Al-Nashif v Bulgaria, App. No. 50963/99, 20 June 2002.

Animal Defenders International v. United Kingdom [GC], Appl. No. 48876/08, 22 April 2013.

Association A. and H v. Austria (1984) 36 D.R. 187, App. No.9905/82.

Austria v Italy (Pfunders Case) (App 788/60) (1961) 4 *Yearbook* 116 (EComHR).

Bowman v. United Kingdom (1998) 26 E.H.R.R. 1.

Buscarini and Others, Appl. No. 24645/94, 18 February 1999.

Campbell and Cosans v. United Kingdom, Appl. 7511/76 and 7743/76, 25 February 1982, Series A No. 48, (1982) 4 EHRR 293.

Castells v. Spain, Appl. No. 11798/85, 8 January 1991.

Christians against Racism and Fascism v. United Kingdom, Appl. No. 8440/78, 16 July 1980, 21 DR 138.

Communist Party (KPD) v. Germany, No. 250/57, Commission decision of 20 July 1957, *Yearbook* 1.

Cumhuriyet Vakfi and Others v. Turkey, Appl. No. 28255/07, 8 October 2013.

Dees v. Hungary, Appl. No. 2345/06, 9 November 2010.

DELFI AS v. Estonia, No. 64569/09, 10 October 2013.

Democracy is one of the Main Features of the European Convention on...

Democracy and Change Party and others v. Turkey, Appl. No. 39210/98 and 39974/98, 26 April 2005.

Dicle on Behalf of the Democracy Party (DEP) v. Turkey, Appl. No. 25141/94, 10 December 2002.

Emek Partisi and Şenol v. Turkey, Appl. No. 39434/98, 31 May 2005.

Freedom and democracy Party (ÖZDEP) v. Turkey, Appl. No. 23885/94, 12 August 1999.

Fressoz and Roire v. France [GC], no. 29183/95, ECHR 1999-I.

Garaudy v. France [admissibility], 24.06.03.App. No.65831/01.

German Communist Party case: *KDP v FRG* (1957) No. 250/57 1 YB 222.

Gitonas v Greece, App. No. 18747/91, Judgment of 1 July 1997, 27 EHRR 417.

Glimmerveen and Hagenback v. Netherlands (1978) 18 D.R. 187.

Glimmerveen and Hagenbeek v. the Netherlands, Appl. Nos. 8348/78 and 8406/78, 11 October 1979, DR 18, p. 187.

Golders v United Kingdom, Appl. No. 4451/70, 21 February 1975.

Guja v. Moldova, No. 14277/04, 12 February 2008.

Halford v. United Kingdom, App. No. 20605/92, 25 June 1997.

Handyside v United Kingdom, Judgement of 7 December 1976, Series A, No. 24; (1979-80) 1 EHRR 737.

Hasan and Chaush v. Bulgaria, Appl. No. 30985/96, 26 October 2000.

Herri Batasuna and Batasuna v. Spain, Appl. No. 25803/04 and 25817/04, 30 June 2009.

Hertel v. Switzerland, 25 August 1998, 28 EHRR, para. 46, Report of Judgments and Decisions 1998-VI.

Jersild v Denmark, E.C.H.R., 23 September 1994, Series A, no. 298.

K.D.P v. Germany, 1 Y.B. Eur. Conv. H.R. 222, Eur. Comm'n on H.R.

Kennedy v. United Kingdom, Appl. No. 26839/05, 18 May 2010.

Kennedy v. United Kingdom, Appl. No. 26839/05, Judgment of 18 May 2010.

- Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. Nos.: 5095/71, 5920/72 and 5926/72 Series A-23.
- Klamecki v. Poland* (no. 2), Appl. No. 31583/96, Judgment of 3 April 2003.
- Klass and Others v. Germany*, Appl. No. 5029/71, 6 September 1978.
- Kokkinakis v. Greece*, App. No. 14307/88, 25 May 1993, 17 EHHR 379.
- Kucera v. Slovakia*, Appl. No. 48666/99, Judgment of 3 July 2007, para. 127.
- Kuhnen v. Germany* (1998) 56 D.R. 205; App. No. 12774/78 & 8406/78.
- Kuolelis, Bartosevicius and Burokevicius v. Lithuania*, Appl. Nos. 74357/01, 26764/02, 27434/02, 16 February 2008.
- Lautsi v. Italy*, (GC), 18 March 2011 (Appl. No. 30814/06).
- Leander v. Sweden*, App. No. 9248/81, 26 March 1987, Series A No. 116, (1987) 9 EHRR 433.
- Leyla Şahin v. Turkey* (GC), 18 March 2011, Appl. No. 30814/06.
- Lingens v. Austria*, Series A no. 103, 8 July 1986.
- Malone v. United Kingdom*, Appl. No. 8691/79, 2 August 1984
- Manole and Others v. Moldova*, Appl. No. 13936/02, 17 September 2009.
- Marckx v. Belgium*, Judgment of 13 June 1979, A 31.
- Niemietz v. Germany*, Appl. No. 13710/88, 16 September 1992.
- Oberschlik v. Austria*, No. 11662/85, Series A, No. 204, 23 May 1991.
- OOO IVPRESS and Others v. Russia*, App. No. 33501/04, 38608/04, 35258/05 and 35618/05, 22 January 2013.
- Ozgur Gundem v. Turkey*, Appl. No. 23144/93, 16 March 2000.
- Paksas v. Lithuania*, Appl. No. 34932/04, 6 January 2011.
- Partidul Comunistilor (Nepeceristi) (PCN) and Ungureanu v. Romania*, Appl. No. 46626/99, 3 February 2005.
- Piperno v. Italy*, App. No. 155510/89, 2 Dec 1992 (Commission Report).
- Radio Twist, a.s. v. Slovakia*, no. 62202/00, ECHR 2006-XV.
- Refah Partisi v. Turkey*, Appl. No. 41340/98, 13 February 2003.
- R (on the application of Bryant and others) v. Commissioner of the Police of the Metropolis* [2011] EWHC 1314.

Democracy is one of the Main Features of the European Convention on...

- Sarukhanyan v. Armenia*, Appl. No. 38978/03, 27 May 2008.
- Schalk and Kopf v. Austria*, Appl. No. 30141/04, 24 June 2010.
- Schimanek v. Austria*, Dec. 1.2.00. App. No.32307/96.
- Serif v Greece* (2001) 31 EHRR 20.
- Socialist Party and Others v. Turkey*, Appl. No. 20/1997/804/1007, 25 May 1998.
- Socialist Party of Turkey (STP) and Others v. Turkey*, Appl. No. 26482/95, 12 November 2003.
- Soering v. the United kingdom*, App. No: 14038/88, Series A-161, para 88.
- Sorensen v. Denmark and Rasmussen v. Denmark*, Apps. 52562/99 and 52620/99, 11January 2006 [GC], (2008) 46 EHRR 752.
- Steel and Morris v. the United Kingdom*, Appl. no. 68416/01, 15 February 2005.
- Sunday Times v. United Kingdom*, Appl. No. 6538/74, 26 April 1979.
- Tanase v Moldova* (GC), Appl. No. 7/08, 27 April 2010.
- Thoma v. Luxemburg*, Appl. No. 38432/97, 29 June 2001.
- United communist Party of Turkey and Others v. Turkey*, Appl. No. 133/1996/752/951, 30 January 1998.
- Vajnai v. Hungary*, Appl. No. 33629, 8 July 2008.
- Valentino Acatrinei v. Romania*, Appl. 18540/04, 25 June 2013,
- Vogt v Germany*, App. No. 17851/91, 26 September 1995, 21 E.H.R.R. 205.
- Vona v. Hungary*, App. No. 35943/10, 9 July 2013.
- X v. Austria*, 26 Eur. Comm'n H.R. Dec. & Rep. 244 (1982).
- X v. Italy* (1975) 5 D.R. 833, App. No.6741/74.
- Yazar and Others and the People's Labour Party (HEP) v. Turkey*, Appl. No. 22723/93, 9 April 2002.
- Young, James and Webster v. UK*, 13 August 1981, ECHR Series A, No. 44.
- Zdanoka v Latvia*, Appl. No. 58278/00, 16 March 2006.

