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THE PROTECTION OF POLITICAL PARTIES UNDER THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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THE PROTECTION OF POLITICAL PARTIES UNDER THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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"Tous les pays européens ont été pétris par la civilisation chrétienne (...) Tous ces pays ont vocation de rejoindre la communauté européenne, à condition qu'ils vivent sous un régime authentiquement démocratique".

ROBERT SCHUMAN, speech at the time of the conclusion of the treaty setting up the Council of Europe, London, 1949.

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INTRODUCTION: OBJECT AND PURPOSE OF THIS THESIS

Nowadays political parties are one of the most important actors which contribute to ensure the dynamism of the European pluralist democracy. This is so as they pay a significant contribution to enhance the public discussion of issues considered pertinent in a given society. By reason of the vital role they play in the maintenance of the European public order, political parties are one of the associative groups which require a more complete and extensive protection of the rights they enjoy.

Notwithstanding, there is not a single disposition in the European Convention on Human Rights[1] which explicitly mentions political parties. It is therefore up to the European Court of Human Rights[2], by mean of its dynamic interpretation of the Convention, to grant political parties protection. This thesis focuses on the approach the Strasbourg Court has been following in order to identify the rights and duties political parties enjoy under the auspices of the Convention. An analysis will be done of the reasoning the Court pursues to accord those rights and duties, by means of studying in detail the five major judgements in which the Court was faced with the problematic of political parties dissolution. The Cases of *United Communist Party of Turkey*[3], *Socialist*

[1] The European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by protocol nº 11, adopted under the aegis of the Council of Europe in 1950.Hereafter, the Convention or ECHR.
[2] Hereafter the Court, ECourtHR, the Strasbourg Court.
[3] Case of United Communist Party and Others v Turkey, Judgement of 30 January 1998, application nº 133/1996/752/951, published in Reports –I, 1998.Also available in www.echr.coe.int . Hereafter TBKP.

Party[4], *Freedom and Democracy Party*[5], *Welfare Party*[6] and *People's Labour Party*[7] will be approached in the context of the overall Strasbourg jurisprudence and major legislative guidelines of the Council of Europe[8].

To accomplish this task it will be useful to identify the concept of democracy presupposed in the Court's jurisprudence. That will be done by means of deducting from the Court's case-law the democratic principles presupposed therein. In this way, the use the Court does of the concept of democracy to grant political parties the Convention's protection will be considered. On the one hand, democracy will be identified as a founding principle of the Convention, indeed the only political model compatible with it. On the other hand, democracy will be understood as a criterion the Court uses to assess if the action of the several Convention actors (i.e., individuals, political parties and States) respects the main guidelines setforth therein.

As a criterion, democracy can be said to perform three particular and different functions. The first is the function whereby it is used to help developing the interpretation of the Convention substantive core. It is via this function that the scope of article 11 is extended to political parties and the major guidelines (rights/duties) parties ought to respect are spotted. The second function democracy is called to carry out is the so-called defensive function. By way of the clause "necessary in a democratic society", set out in art 11, nº2, democracy is the device of arbitration between the interests of political parties and the conflicting interests of the State (the traditional vertical relationship); it is employed to impose upon the State a negative obligation, working to defend the rights of political parties against the interests of the State,

[4] Case Socialist Party and others v Turkey, Judgement of 25 May 1998, application nº 20/1997/804/1007, published in Reports-III,1998. Also available in www.echr.coe.int . Hereafter SP.
[5] Case of Freedom and Democracy Party (ÖZDEP) v Turkey, Judgement of 8 December 1999, application nº. 23885/94, published in Reports- VIII, 1999. It can also be found on the Court's internet web site. Hereafter ÖZDEP.
[6] Case of Refah Partisi (Welfare Party) and Others v Turkey, Judgement of 31 July 2001, application nº 41340/98, 41342/98, 41343/98 and 41344/98, obtainable in the web site of the Court of Human Rights. Hereafter REFAH.
[7] Case Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v Turkey, Judgement of 9 April 2002, application nº 22723/93, 22724/93, 22725/93 , accessible in www.echr.coe.int . Hereafter HEP.
[8] Hereafter CoE.

consequently determining the intensity of the Court's review over national restrictive measures. The third one is the regulatory function; the clause "necessary in a democratic society" is used to balance the rights of political parties and the interests of other private actors, or even the interests of society as a whole (horizontal relationship). In this way the State holds the positive obligation to protect the rights of political parties from the abusive interference of other private parties, by means of enacting legislation capable of effectively addressing these problems. It is from this perspective that the delicate problem of disbandment of political parties will then be approached.

What I propose to show is that, from the stance of the Strasbourg Court, political parties' protection and the notion of democracy go in tandem. Not only political parties are acknowledged as one of the most relevant actors for the well functioning of a pluralist democracy, falling under the Convention's protective umbrella, but also it is by way of resorting to the notion of democracy that political parties are accorded the conditions for a full-time exercise of their rights. Moreover, it is by using the notion of democracy that the State is identified as the main responsible for guaranteeing the enjoyment of the right to freedom of political association, by way of the negative and positive obligations it bears under the Convention's aegis. It is this mutual interdependence which ensures that the European democratic society continues to have as its main aim to provide for the self-fulfilment of each European citizen.

CHAPTER 1. APPLICABILITY OF ART 11 TO POLITICAL PARTIES

1.1 ARE POLITICAL PARTIES INCLUDED IN THE SCOPE OF PROTECTION OF ART 11?

Freedom of Association is protected by art. 11, nº1 of the ECHR which states that "everyone has the right to freedom (…)of association with others, including the right to form and to join trade unions for the protection of his interests". It involves "the right of individuals to come together for the protection of their interests by forming a collective entity which represents them"[9]. Created by the voluntary action of a group of individuals, this entity is a juridical person different from its members, aiming at a certain autonomous lifetime[10], in order to pursue its own goals (the common goals of its members). Since art. 11 does not explicitly refer to political parties as associations coming under its aegis, the question of their inclusion arises.

The notion of association has an autonomous Convention meaning.[11] That is to say that even if a substantive coordination of activities of a certain group of individuals is not recognised as an association under national law, it won't impair it from benefiting of the right to freedom of association established in the Convention. The Strasbourg Court considered in its jurisprudence that professional associations established by law and

[9] D.J.HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention of Human Rights*, London/Dublin/Edinburgh, Butterworths, 1995, p.421.
[10] N. VALTICOS, « Article 11 » in *La convention européenne des Droits de L'Homme, Commentaire Article par Article*, L-E Pettiti, E. Decaux, P-H Imbert, Paris, Economica, 1995, p.420.
[11] D.J. HARRIS, M. O'BOYLE, C. WARBRICK, op. cit., p. 421 and F. SUDRE, *Droit International et Européenne des Droits de l'Homme*,Paris, Presses Universitaires de France, 2001, p. 309. The autonomous interpretation of juridical terms can look for some support in art 5 Vienna Convention, since it refers to the importance the rules of an international organisation can have in interpreting a Convention concluded under its aegis (see F. MATSCHER, "Les contraintes de l'interprétation juridictionnelle. Les méthodes d'interprétation de la Convention européenne", in L'interprétation de la CEDH, Droit et Justice, nº21, 1998, p.26).

requiring membership of all practicing professionals do not fall in the scope of art. 11[12], implying therefore that art. 11 does not apply to corporations of public law (associations which have been set up by statute or which fulfil a statutory or common law duty, or form part of a public institution[13]). The aim of this autonomous notion is to avoid States parties to qualify a particular association as public or par-administrative, in order it to escape to the Court's control under art. 11. The voluntary nature of an association is seen as a determinant feature.

Art 11 establishes the fundamental collective support for several individual rights stated in the Convention. Art. 3 of Protocol 1 establishes the Right to Free Elections, a right that to be effective implies the existence of political parties able to stand for elections. Also arts. 9 and 10, while respectively endowing Freedom of Thought, Conscience and Religion and Freedom of Expression, presuppose that citizens can express their political will by forming or joining already established political parties. Looking at the Convention as a whole[14], it becomes clear the importance political parties have for the enjoyment of other protected rights, thus stressing the necessity of them to be included in the scope of protection of art. 11.

Art. 20 of the Universal Declaration of Human Rights of 1948[15], which protects freedom of association in broad and general terms, including therefore political parties, was the inspiration source of art 11 ECHR. In fact, the *travaux préparatoires* of the ECHR[16] indicate that freedom of association should be interpreted according to the established in the Universal Declaration. Hence, if one goes back to the *travaux*

[12] As for example in the Case Le Compte, Van Leuven and De Meyere v. Belgium, Judgement of 12 March 1981, published in series A- 43, available also in www.echr.coe.int .
[13] M. P. GERMAR, "Liberté d'association et democratie politique", in *Freedom of Association- Seminar organised by the Secretariat General of the CoE in cooperation with the Ministry of Justice of Iceland, 26-28 August 1993*, Strasbourg, Martins Nijhoff Publishers, vol. 34A, 1994,p. 35.
[14] As the Court said it should be seen, for instance, in REFAH §43.
[15] Art 20, nº1 of the Universal Declaration reads as follows: "Everyone has the right to freedom of peaceful assembly and association".
[16] J.VELU, R.ERGEC, *Convention Européenne des Droits de L'Homme*, Bruxelles, Bruylant, 1990., pp. 645-646. The authors make a good summary of the *travaux préparatoires* of art. 11.

préparatoires[17] of the latter, one can see that its drafters were willing to include political associations under the range of associations art. 20 protects.

Analysing the ECHR in the context of other international law instruments that also endow protection to freedom of association, this line of reasoning finds some support. Art. 22 of the United Nations Covenant on Civil and Political Rights does not list any possible purposes of an association, being consequently assumed that the protective scope of the provision is broad[18]. Even art.16 of the American Convention on Human Rights, which does include a list of possible purposes, expressly mentions the political ones as valid goals for an association to pursue. The African Charter on Human and Peoples' Rights, in its art. 10, nº1, recognises the right to free association despite the aims of the association itself, provided that it "abides the law"[19].

The importance of free political association for the good functioning of a democratic State, as for the effectiveness of several other rights protected by the Convention, has been stressed by the former Commission on Human Rights. In the case of the *German Communist Party*[20] the Commission implicitly accepts that art 11 applies to this type of associations. The explicit recognition that art 11 endows protection to political parties is manifested before the Court in *TBKP* and in *SP*[21], where the Commission expressed the opinion that "if art. 11 was consider to be a legal safeguard that ensured the proper functioning of democracy, political parties were one of the most important forms of association it protected".

[17] A. VERDOODT, *Naissance et signification de la Déclaration Universelle des Droits de l'Homme* Louvain/Paris, Nauvelaerts, 1964, p 191.
[18] M. NOWAK, *U.N. Covenant on Civil and Political Rights- CCPR Commentary*, Kehl/Strasbourg/Arlington, Engel, 1993, p.386. In p.388 the author says to be undisputed the inclusion of political parties under the umbrella of art. 22, though stressing the fact the *travaux préparatoires* were not that clear on the matter.
[19] This is a so-called "clawback clause", said to hinder the potentialities of the full enjoyment of a fundamental right. See C. FLINTERMAN and C. HENDERSON "The African Charter on Human and Peoples' Rights", in R. Hanski and M. Suksi, *An Introduction to the International Protection of Human Rights: A Textbook*, Abo, Abo Akademi University, 1999, p. 390.
[20] KPD v FRG (Case of the German Communist Party), Commission Decision of 20 July 1957, application. nº250/57, Year Book 1, p.222. This decision is not, unfortunately, available on the internet site of the ECourtHR.
[21] TBKP, § 23 and SP, § 28.

The ECourtHR when addressing the delicate problem of the disbandment of political parties by a decision of a national court of law took the chance to express its views about the type of associations falling under the protection of art. 11. Paying attention to the wording of art. 11, the Court assessed the conjunction "including" "clearly shows that trade unions are but one example among others of the form in which the right of freedom of association may be exercised"[22]. It also referred to the *travaux préparatoires*, holding the view that it was not possible to conclude that because the Convention only mentions trade unions, those who drafted the Convention intended to exclude political parties from the scope of art. 11[23]. The direct mention of trade unions can be understood for historical reasons, due to the relevance of issues current at the time.

However, in the Court's view, neither the wording of art.11 nor the *travaux préparatoires* are the arguments that weight the most. The main justification to include political parties under the auspices of art.11 lays on the fact that "political parties are a form of association essential to the proper functioning of democracy"[24], requiring the Convention the maintenance of a democratic system in each of the member States, in order the rights protected therein to achieve full realization. The Court followed the same reasoning in the Case of the *Turkish Socialist Party*[25], retaking it in a recent decision of 9 April 2002, setting aside the argument put forward by the Turkish government that "the States parties to the Convention at any moment decided to submit to the control of the Strasbourg organs their constitutional institutions"[26].

The ECourtHR does see the right to form associations others than trade unions is one which is inherent in the right to freedom of association, and that the protection of political parties' activities is an important means by which the preservation of a democratic society can be attained. Unfortunately, there are still some controversial

[22] TBKP, §24.
[23] Ibid.
[24] TBKP, § 25.
[25] SP, §29.
[26] HEP, §30. This argument had already been brought before the Court in SP, §27.

issues that the Court dismissed itself from clarifying, loosing the opportunity to better develop its jurisprudence concerning freedom of association. For instance, a positive definition of association[27] would be a very useful concept for establishing to which associations art. 11 is applicable, consequently endowing coherence and juridical security to the Court's decisions.

The most relevant aspect that comes out from the established case-law, relates to art 11 being positioned at the light of the object and purpose of the Convention, highlighting democracy as "a fundamental feature of the European public order"[28]. The Court clearly stated, that its method of interpretation of the Convention should take into account art. 31, 32 and 33 of the Vienna Convention on the Law of the Treaties of 1969, which set out the essential rules for the interpretation of intergovernmental agreements[29]. The Convention and its protocols should be read as a whole. A proper interpretation of its dispositions implies taking into account the context, the object and the purpose, as well as the complementary means of interpretation (the *travaux préparatoires*)[30]. However, because the law enshrined in the Convention is not static, as its object doesn't allow it, due account should be paid to the fact that the purpose of the Convention shall always remain in harmony with the rhythm at which society evolutes[31]. Accordingly, the Court uses a teleological method, which pursues a dynamic

[27] B. DUARTÉ, « Les Partis Politiques, la Démocratie et la Convention européenne des Droits de L´Homme », Revue Trimestrielle de Droits de L'Homme, 1999, p. 318.
[28] TBKP, §45.
[29] Case Golder v UK, Judgement of 21 February 1975, application nº 00004451/70, published in A-18, also available in www.echr.coe.int, § 34 and §35. An interesting aspect is that at the time of this judgement the Vienna Convention was not yet in force, and because the art. 4 does not allow it to have retroactive effect it was supposed the said convention not to be used to interpret the ECHR, as this one is from 1950. Notwithstanding, the Court of Strasbourg referred to it even before it entered into force, and nowadays it is commonly accepted that its principles are applicable to the ECHR.
[30] W. J. G. VAN DER MEERSCH, « Quelques aperçus sur la méthode d'interprétation de la Convention de Rome du 4 novembre 1950 par la Cour Européenne des Droits de l'Homme », *Mélanges Offerts à Robert Legros*, Bruxelles, Éditions de L'université Libre de Bruxelles, 1985.
[31] O. JACOT-GUILLARMOD, « Régles, méthodes et principes d'interprétation dans la jurisprudence de la Cour eoropéenne des droits de l'homme » in *Convention Européenne de Droits de l'Homme- Commentaire article par article*, op. cit. p. 45. The author quotes the judge Ganshof Van Der Meersch who stresses the evolutionary character of the convention dispositions.

interpretation[32] of the Convention. On the one hand, this teleological conception leads to a finalist and extensive assessment of the rights and freedoms included in the Convention, justifying the reasoning that stands for the inclusion of political parties on the scope of application of art. 11. On the other hand, it is this conception that demands a restrictive interpretation of the authorised limitations to the rights and freedoms the Convention protects. These two idiosyncrasies are in direct correlation, being the latter a corollary of the former[33]. A good example of the broad application art. 11 is intended to have can be found in the *Sidiropoulos* case, where the Court emphasised that "citizens should be able to form a legal entity in order to act collectively in a field of mutual interest", not specifying any in particular, and adding that this characteristic is "one of the most important aspects of the right to freedom of association".[34]

The dynamic interpretation of the Convention demands the recognition of the crucial role political parties have in nowadays societies. The right to vote belongs to all the individuals of a given polity, making the direct relation between voters and elected representatives impossible in practice. Political parties appear in this context as intermediate structures capable of establishing the link between both categories. Their activities "form part of a collective exercise of freedom of expression", allowing the representation of "the different shades of opinion to be found within a country's population" [35], which will end up being reflected in the composition of the institutional structures of the State.

Moreover, the Court does say that "the way in which national legislation enshrines this freedom (freedom of association) and its practical application by the authorities

[32] F. MATSCHER, op. cit., p.22-25. The author prefers to speak of an evolutionary interpretation rather than a dynamic one, and advises carefulness in its use. From his stance, « la société peut être dynamique et, par conséquent, le législateur aussi, mais pas le juge. La tache de ce dernier est exclusivement celle d'interpréter les normes dans le sens qu'elles ont acquis d'après les conceptions idéologiques et sociales d'aujourd'hui ». Although I agree with this position, along this work the notions of evolutionary and dynamic interpretation are going to be used indistinctively.
[33] W.J. GANSHOF VAN DER MEERSCH, op. cit., p. 210.
[34] Case Sidiropoulos v Greece, Judgement of 10 July 1998, application nº 00026695/95, published in Reports 1998-IV,§ 40. Available in www.echr.coe.int
[35] TBKP, §43 and §44.

reveal the state of democracy in the country concerned"[36]. It is this direct link between the protection of the rights political parties enjoy under the Convention's system and the vital role of those rights for the construction and maintenance of a democratic society that I will discuss, by way of analysing the case-law of the Strasbourg Court.

1.2 DIRECT APPLICABILITY OF ART. 11 WHEN THE PROBLEM OF DISSOLUTION OF POLITICAL PARTIES IS CONCERNED

In the cases brought before the Court concerning the problem of dissolution of political parties, the Turkish government presented two arguments intended to avoid the applicability of art. 11. The first, contending that when the programme of a party attacks a State's constitutional order, art 11 should be declared inapplicable ratione materiae. The second, as art 11 shall not apply, when the programme of the party is in contradiction with the fundamental principles of the State as well as with the freedoms endowed in the Convention, art 17 should have a role to play.

1.2.1 THE CONSTITUTIONAL ORDER OF THE STATE, CAN IT IMPAIR THE APPLICABILITY OF ART. 11?

In *TBKP*, the government alleged that in several national constitutions the provisions concerning political parties were found in the part relating to fundamental constitutional structures, and that neither art 11 nor any other disposition of the Convention referred to either political parties or to the States' constitutional structures. As the "States Parties to the Convention had at no stage intended to submit their constitutional institutions (…) to review by the Strasbourg institutions"[37], the criteria set forward in the Court's case-law would not be applicable to the issue of political

[36] Sidiropoulos, § 40.
[37] TBKP, §19 and §21, arguments after repeated in SP §27.

parties dissolution. This is so because the declarations made by their political leaders cannot be seen at the light of the ordinary political speech based on the pluralism of opinions[38]. In conclusion, the question of dissolution of political parties should be left to national Constitutional Courts, as falling within the scope of the State's margin of appreciation.

The Court, though stressing the Principle of Subsidiarity of its jurisdiction in relation to the protection afforded by national law, recognises its competence on the matter. The justification of the aforementioned principle relies upon the fact that national authorities are better placed to assess the concrete evidence of the case, being the role of the Court solely to examine the compatibility of their decisions with the Convention[39]. To fundament its competence the Court, in *TBKP*[40], puts forward three arguments. The first relates to the obligation enshrined in art. 1 whereby States should "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention", that together with arts. 14, 13 and 56 demarcates the scope of the Convention *ratione personae, materiae and loci.* The second, as the Convention makes no distinction as to the type of national rules that should be assessed compatibility with it, States should be required compliance in respect to their "jurisdiction as a whole". The third, stating the irrelevance of the merely legislative or constitutional nature of the provisions to be subject to review under the Convention. It becomes clear that any domain of the national legislation can in some way interfere with the human rights protected under the aegis of the Convention, and that it is for the Court to see if the interpretation national law was given respects the established Convention frame. That being so, all constitutional choices of a State should be in conformity with the Convention. Even if *TBKP* and *SP* had hindered territorial and national integrity of the

[38] HEP, §30.
[39] O. JACOT-GUILLARMOD, op. cit, p. 53. The author refers to the settled case-law covering the Principle of Subsidiarity.
[40] TBKP, § 29, §30 and §31. In fact, only in TBKP the Court elaborates on this problem, limiting itself in SP §29 to make reference to the previous decision.

Turkish State, principles endowed constitutional safeguard, they can still rely on the protection of art.11 of the Convention[41].

In *ÖZDEP* the government put forward a preliminary objection by which the party could not be regarded as a victim of dissolution, as it had already been dissolved voluntarily when the Constitutional Court proceedings were still pending. The Strasbourg Court agrees that the "voluntary dissolution" intended to avoid certain legal consequences, such as the ban of their leaders to hold a similar office in any other party. However, as the Turkish domestic law provides that a voluntarily dissolved party remains in existence for the purposes of dissolution by the Constitutional Court, the Court decided to dismiss the government preliminary objection[42]. Moreover, the Court stresses that the decision "to dissolve the party was not made freely, as the decisions of leaders and members of associations should be if they are to be recognised under art 11".[43] Once more, the ECourtHR endorses the contention that any judicial decision which curtails the right to freedom of association or limits its free and voluntary exercise should be subject to the Court's control of compatibility with the Convention.

From the reading of the aforementioned judgements becomes clear the ECHR requires the compliance of national institutions, despite the political, constitutional or jurisdictional nature of the latter ones. This appears to be the direct consequence of the obligations States assumed, as they accepted to place themselves under the compulsory jurisdiction of the Court of Strasbourg. The minimum standard of human rights protection enshrined in the Convention needs to be respected inside the borders of all States parties to it. Otherwise, the efficiency and authority this international legal

[41] B. DUARTÉ, op. cit, p. 328.
[42] Worth of noticing is the Dissident opinion of Cabral Barreto, who discusses the quality of victim of the applicant, for "Lors de la décision de la Cour Constitutionnelle le requérant n'avait plus d'existence sur le plan juridique; en outré, le droit qui était méconnu était le droit à la liberté d'association auquel il avait renoncé auparavant". It is also highlighted the difference between the rights of the association itself and the individual rights of its members (ÖZDEP, Opinion of the Commission, Report of 12 March 1998, published in Reports 1999-VIII, p.361ss).
[43] ÖZDEP, §26. *Mutatis mutandis* REFAH§78.

instrument has been building over the years will end up being undermined. This tendency of the Court to behave like a Supranational Constitutional Court, setting aside the interpretation made by the national constitutional judge when declaring the "*unconventionality*" of his decision, has not always been well accepted[44]. However, the constitutional nature of the control of "*conventionality*" operated by the ECourtHR can surely be sustained[45] if one takes into account the intensity of the review which is present in the case-law relating to dissolution of political parties.

1.2.2 DOES ART. 17 PREVENT THE APPLICABILITY OF ART. 11?

Art. 17 of the ECHR reads as follows: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in an activity or perform any act aimed at the destruction of any of the rights and freedoms set forth (…)" in the Convention. It is particularly relevant to see whether this disposition can be applied to the question of dissolution of political parties, as the Turkish government often invokes it before the Court.

In TBKP, SP and REFAH the government alleged before the Court that art 17 should be applicable, as those political parties "had called into question both the bases of the

[44] J-F FLAUSS, "La Cour Européenne des Droits de l´Homme est-elle une Cour Constitutionnelle ? », Droit et Justice, nº19, 1997, p. 71. The professor when studying the constitutional nature of the ECourtHR achieves the conclusion that, at the time (1997, before the full-time Court had been set up), the ECourtHR still could not be assimilated to a Constitutional Court. Notwithstanding, he does stress that with the entry into force of a coherent system allowing direct individual applications to be submitted before the Court (Protocol 11) the European system would meet all the characteristics of a concentred constitutional control (p.91). See also E.A. ALKEMA ("The European Convention as a Constitution and its Court as a Constitutional Court ", in *Protecting Human Rights. The European Perspective. Studies in memory of Rolv Ryssdal*, Köln/Bonn/München, Carl Heymanns Verlag KG, 2000, pp. 57-62) and his suggestions for better extend the potentialities of the Court's constitutional role.

[45] F. RIGAUX, "Interprétation consensuelle et interprétation évolutive" in *L'Interprétation de la Convention Européenne des Droits de L'Homme*, Droit et Justice, nº 21, 1998. The author adresses the issue of judicial self-retraint as opposed to judicial activism, concluding that "l'opposition entre la Cour européenne des droits de l'homme et une cour constitutionnelle étatique est, sur la question des méthodes d'interprétation, moins forte qu'on ne pourrait penser "(pp. 43-44).

Convention and the freedoms it secured " since their actions "would inevitably incite violence and enmity between the various sections of the Turkish society"[46].

Certain authors consider important to give an autonomous role to play to art. 17, as it can be said to be a plus in relation to the limitations of rights the Convention normally allows[47]. This would be the case, for instance, of the normal limitations to the freedom of association art 11, nº2 endows. Conversely, this disposition would imply a déchéance, i.e., art 17 should be intended to avoid that an activity which doesn't respect the freedoms consecrated therein (activité liberticide) can benefit from the protection the Convention affords[48]. That is to say if a State, a group or a individual use the rights endowed in the Convention for the destruction of the European democratic order as understood by the Court, the democracy itself, they shall see curtailed the rights they normally enjoy. In the Case of the German Communist Party (KPD), the Commission found the application inadmissible as the main aims of the party demanded the resort to the dictatorship, in order to implement a regime in itself incompatible with the Convention, consequently leading to the destruction of the rights and freedoms protected therein. The Commission considered art 17 a "disposition de nature plus génerale" than the second paragraphs of art. 9, 10, 11, aimed, according to the travaux préparatoires, at avoiding that totalitarian groups use in their favour the rights stated in the Convention. Because art. 17 was applicable to the case in question, the party could not invoke the infringement of any other right it would normally enjoy as a

[46] TBKP §21, SP §27, REFAH §27.
[47] S. VAN DROOGEHENBROECK, "L'article 17 de la Convention Européenne des Droits de l'Homme, est-il indispensable ? " , Revue Trimestrielle des Droits de L'Homme, nº 46, 2001, p. 544. The author criticises the view of Velu and Ergec as to which art 17 is not an indispensable disposition of the Convention. He sees it as the only valuable means by which the Convention can put an end to antidemocratic activities of certain groups and individuals (les liberticides). The same contention is endorsed by O. DE SCHUTTER (« Le droit d'être à l'abri du discours d'incitation à la haine ou à la discrimination raciale ou religieuse », in *Le Noued Gordien des partis antidémocratiques. La loi, une épée à double tranchant ?*, Gent, Mys and Breesch, 2001, p. 137) in his study concerning the rights of the victims of discriminatory religious and racist speeches.
[48] S. VAN DROOGHENBROECK, op. cit. p. 546.

political association. The reason of the inadmissibility was, then, the incompatibility ratione materiae[49] with the Convention[50].

However, the Court, contrarily to the Commission's view in the German Communist Party, tends not to consider the autonomous utility art. 17 can have in order to avoid antidemocratic activities. In Vogt, when the dismissal of a teacher due to her membership of the Communist Party was at stake the Court didn't analyse the question at the light of art. 17. After, in Sidiropoulos, the Court took into account the government's preliminary objection by answering that art. 17 could not be applicable "as there is nothing relevant in the association's memorandum of association to warrant the conclusion that the association relied on the Convention to engage in an activity or perform any acts aimed at the destruction of any of the rights and freedoms set forth in it"[51]. This conclusion had already been achieved by the Court in TBKP[52]. In this latter, the Court stated that in order to find a compromise between the requirements of defending democratic society and individual rights, "any intervention by the authorities must be in accordance with paragraph 2 of article 11". Thus, only "when that review is complete will the Court be in position to decide, in the light of all the circumstances of the case, whether art 17 of the Convention should be applied"[53]. In REFAH, the Turkish Constitutional Court invoked the incompatibility of the party programme with art. 17 of the ECHR, as the party was "using democratic rights and freedoms with a view to replacing the democratic order with a system based on sharia

[49] According to art 27, nº2, nowadays art. 35, nº3 of the Convention.
[50] German Communist Party, op. cit. However, the Commission also uses art. 17 as an interpretative clause of the rights and freedoms set forth in the Convention. In Kühnen v Frederal Republic of Germany (Comm. Dec. of 12 July 1988, app. nº 12194/86, published in Decisions and Reports, nº 56, p.205-214) the Commission used art 17 to assess the necessity of the measure within the meaning of art. 10, nº2. Therefore Mr Kühnen, a journalist leader of an organisation aiming at reinstalling the National Socialist Party prohibited in Germany, was seen as being using his freedom of expression as a "basis for activities which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms" it protects.
[51] Sidiropoulos, §29.
[52] TBKP, §60.
[53] TBKP, §32. *Mutatis mutandis* SP, §29 *in fine.*

(...) aimed at bringing democratic order to an end"[54]. However, and despite the government's allegation of a breach of art 17, the ECourtHR concluded that after assessing the government's restrictions at the light of art 11, nº2 there was no need of examining art 17 separately.[55]

When the dissolution of political parties is at stake, the Court's method implies at first an analysis of the governmental restrictive measures from the point of view of art. 11, nº2 and, only after, can art 17 be given a role to play. Even so, in Sidiropoulos, the Court examined in the field of preliminary objections whether or not art 17 was applicable. Despite finding or not a violation of art. 11, the Court, up to now, didn't take in hands the drawing of the necessary conditions under which art. 17 can be applicable. It only referred to the need of analysing all the circumstances of the case, showing preference for an exam in concreto. In TBKP, the Strasbourg Court stated a clear preference for a non-formal approach, which takes into account the specificities of the concrete situation of the party concerned: a forbidden word ("communist") used by the party in its name cannot justify dissolution itself. Consequently, due account needs to be paid to the content of the party's programme and to the positions and actions taken by its leaders[56].

In conclusion, when the dissolution of political parties is at stake, the methods followed by the Commission and by the Court seem to diverge. Whether the direct consequence of art 17's applicability should be a décheance of the right to freedom of association or not is a question still to be answered by the Court.[57]

[54] REFAH, §27.
[55] REFAH, §85.
[56] TBKP, § 53, §54 and §58.
[57] S. VAN DROOGHENBROECK, op. cit. p. 558 and 559. It is interesting the conclusion to which the author arrives when analysing the case *Lehideux and Isorni v France,* concerning freedom of expression. This case relates to an advertisement published in the Le Monde defending the revision of the condemnation of Pétain. For the government the case should be considered incompatible *ratione materiae* with the Convention, ie, immediately "guillotinée". The Court assessed that the justification of a pro-nazi policy could not benefit from the protection of art. 10 (so, implying a décheance). Contradictorily, it is after assessing there was a violation of art 10 that the Court concludes art 17 should not be applicable. So, in the author's view, when art. 17 should be called upon to play its most important role, which is sanctioning a potentially antidemocratic activity, it ends up not being used at all.

1.3 EXTENT OF THE PROTECTION AFFORDED BY ART. 11 TO POLITICAL PARTIES

Freedom of association endows both the right to found a political party and the right for that party to freely pursue its political activities. In *TBKP*, the Turkish government put forward a contention by which art 11 guaranteed only the right to form an association, consequently not preventing the said association from being dissolved. The Court held the view that "the Convention is intended to guarantee rights that are not theoretically or illusory, but practical and effective". The protection of art. 11 lasts indeed for "an association's entire life", requiring its dissolution by national authorities to be assessed within the frame provided for by art. 11, nº2 [58]. By way of the Principle of Useful Effect, the Court again points out the necessity of interpreting extensively the freedoms endowed in the Convention in order to ensure them an effective protection.

The principles applicable to an association deserving the protection of art.11 are the same whether it is a political party or not. Analysing the decisions the Court held until the present day on the question of the dissolution of political parties, it becomes clear that no particular rights are recognised to political parties. In *TBKP,* in *SP* and in *REFAH* the Court saw the confiscation of the parties' assets as coming within the scope of art.1, Protocol1, and the banning of their leaders from taking part in elections as a problem demanding the application of art.3, Protocol 1.These were considered to be "incidental effects" (*TBKP and SP*) or "secondary effects"(*REFAH*) of the dissolution of those parties, not needing therefore to be analysed separately.[59]It seems then secure to conclude that the scope of protection of art 11 doesn't include neither the right of political parties to

[58] TBKP, §33.
[59] TBKP, § 64, SP, §57, Refah, §87.

own property nor the right of their leaders to stand as candidates for elections. Notwithstanding, resort, respectively, to art 1 and 3 Protocol 1 can be forseen[60].

A question arises whether art. 11 can be said to recognise implicit rights considered inherent to freedom of political association. It was in its *Case Golder*[61] that the Court first laid down the requirements for implicit rights to be recognised. Notwithstanding the fact the ECourtHR doesn't recognise implicit rights derived from art. 11, nº1 to political parties, it does allow them the possibility of making use of any other provision of the Convention. In *HEP* and *ÖZDEP*, the applicants complained also for breaches of arts. 9,10, and 14; in *TBKP* and *SP* the complains included violations of art. 18; in *REFAH* they extended them to disrespect of art. 17[62]. To all these complaints the Court responded by considering unnecessary to examine them separately, at any stage saying these dispositions were not applicable. In sum, there is an implicit recognition that those dispositions can be applicable to political parties.

Bearing in mind that the Convention is a living instrument which needs to be interpreted at the light of present-day conditions, the Court points out that art. 11 endows both the right to freely join an association (positive right) and the right to refuse to join in (negative right). In its decision *Young, James and Webster* the Court assessed that "it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and ever compulsion to join a particular trade union is compatible with the intention of that

[60] B. DUARTÉ, op. cit.,p.324. The author mentions that the Commission, in a Decision of 18 May 1974, had already stated that art. 11, nº1 doesn't give any privileged status to political parties, as for instance the right to participate in elections or the right to exclude the payment of subventions of political parties because of their participation in the political campaigns.
[61] In Golder § 36, the Court states that the Right to a Court is guaranteed by art. 6, nº1, not by using an extensive interpretation (that would impose new obligations on the Contracting States) but by resorting to the context, object and purpose of the Convention, as well as to the general principles of law.
[62] Respectively, freedom of thought, conscience and religion, freedom of expression and prohibition of discrimination, limitation on use of restrictions on rights and prohibition of abuse of rights. In TBKP §62, SP §55, ÖZDEP §49, REFAH §85, HEP §62.

provision" [63]. The Court referred to the principle of free adhesion to an association, though it avoided giving a general answer about the negative right of freedom of association[64].

Whether art. 11 includes the right to be active in an organisational and administrative capacity and to be an office-holder in a political party is a question the Court didn't answer in the *Case Ahmed v. U.K.*, despite the insistence of the applicants[65]. From the stance of some doctrine[66], the right to participate in the administration or direction of an association is not included among the protected rights of the Convention, being set aside by the traditional concept of freedom of association.

As the Court often refers, art. 11 should be interpreted on the light of art. 10, "having regard to the fact that the freedom to hold opinions and to receive and impart information and ideas is one of the objectives of freedom of assembly and association as enshrined in Article 11"[67]. In this sense, political parties should resort to other provisions of the Convention to demand effective protection of their rights, such as access to media or preparation and distribution of leaflets expressing their political views.

For all that has been said, it is deemed fundamental to identify which rights do political parties hold under the ECHR, special attention being paid to the case-law developed by the Court of Strasbourg, not forgetting the decisions of the former Commission. This will be focused upon on the following item.

[63] Case of Young, James and Webster v. U.K., Judgement of 13 August 1981, Application nº 00007601/76, §52. This judgement is available on the internet in www.echr.coe.int . Worth of noticing is the Concurring Opinion of Judges G. Van Der Meersch, Bindschedler-Robert,Liessch, Matscher, Gölcüklü, Pinheiro Farinha and Pettiti, where they held the view that the negative aspect is correlative of the positive aspect of freedom of association and that the mere fact of being obliged to give the reasons for one's refusal to belong to a certain association is already a violation of art. 11.
[64] I. CABRAL BARRETO, *A Convenção Europeia dos Direitos do Homem*,Coimbra, Coimbra Editora, 1999, p.216. The author refers to the Case Sigurjonsson v Ireland, Judgement of 30 June 1993, where the Court assessed the refusal of a taxi driver to join an association deemed compulsory to obtain the necessary licence to exercise his profession.
[65] Case Ahmed and Others v. U.K., Judgement of 2 September 1998, Application nº 00022954/93, Reports 1998-VI, § 67 and 70. Also available in www.echr.coe.int
[66] J.VELU and R. ERGEC, op cit, p.652.
[67] As for instance in Ahmed, § 70 and REFAH, §45.

CHAPTER 2. GUIDING FACTORS FOR THE EXERCISE OF FREEDOM OF POLITICAL ASSOCIATION UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS

2.1 RIGHTS GUARANTEED BY THE CONVENTION

2.1.1 RIGHT TO FORM A POLITICAL PARTY

The right to form a political party presupposes individuals can freely create a political association without needing a previous authorisation from the State where they intend to exercise their activities[68].

However, in some member States of the Council of Europe a current practice requiring the registration of political parties exists. The European Commission for Democracy Through Law (known as the Venice Commission) engaged in a deep comparative survey of the legislation and practice of the participating States[69], arriving to the conclusion that in several of them registration is more a formal requirement. If in Germany, Greece or Switzerland registration is not required, in Austria, Spain or Norway this requirement is a simple formality. Contrarily, in Czech Republic, Poland, Latvia and Russia there is a control of the material requisites applicable to political parties activities. Can this material control be seen as amounting to a restriction to freedom of political association as enshrined in the Convention?

According to the "*Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*"[70], also prepared by the Venice Commission, "the prerequisite of

[68] N. VALTICOS, op. cit, p.421.
[69] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, Report adopted in its 35th plenary meeting, Venice, 12-13 June 1998. Available in www.venice.coe.int
[70] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, "Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures", adopted in Venice, 10-11 December 1999, available in www.venice.coe.int

political parties' registration will not in itself be considered to be in violation" of art. 11[71]. The States parties that have been denying registrations, do it for failure to comply with formal criteria such as insufficient number of members, using names that are able to be confused with already existing names or failing to submit financial reports. Even so, in the Explanatory Report to the just mentioned guidelines[72], it is mentioned a possibility of the required registration to be regarded as a restriction to arts. 10 and 11 of the Convention. Nevertheless, it will only amount to a violation of those dispositions if the principles of legality and proportionality are not respected. This is to say that in some situations the requirement to register a political party can be assessed under the requisites set forward in art. 11, nº2.

The Strasbourg Court, in the *Sidiropoulos Case*, analysed the complaint of a Greek association called "Home of Macedonian Civilisation", whose registration had been refused by the Greek courts' on the grounds that the applicants "intended to dispute the Greek identity of Macedonia and its inhabitants and undermine Greece's territorial integrity"[73]. The judges endorsed the contention that although "States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation", the refusal to register as such an association "deprived the applicants of any possibility of jointly or individually pursuing the aims they had laid down in the association's memorandum of association and of thus exercising the right in question (right to form an association)"[74]. Even though the case relates to a cultural and not to a political association, it becomes clear the Court sees the requirement of registration as a restriction to freedom of association, though the requirement itself is not considered incompatible with the Convention.

In a more recent case, the Court was faced with the refusal of Polish authorities to register an association entitled "Union of People of Silesian Nationality" on the grounds that both the intended name and certain provisions of the Union's memorandum of

[71] Ibid. 1st Guideline.
[72] Ibid. §6.
[73] Sidiropoulos, § 39.
[74] Ibid., repectively, § 40 and §31.

association, which characterised Silesians as a "national minority", implied that their real intention was to circumvent the provisions of the electoral law. The Court analysed the problem of registration of a "cultural" association that could, in the near future, meet the conditions to exercise its rights in broader terms as a political association. Consequently, from the Court's point of view, "it was reasonable on the part of the authorities to act as they did in order to protect the electoral system of the State, a system which is an indispensable element of the proper functioning of a "democratic society" within the meaning of Article 11"[75]. In conclusion, the refusal to register an association in order to be legitimate needs to accomplish with the requirements set forth in art 11, nº2, mainly it needs to be seen as a vital way to protect the democratic society the Convention safeguards.

Another dimension of the right to form a political party is the possibility of choosing its name. It is current in some States to forbid the use of certain names. For instance, in Portugal parties may not use names containing direct references to religions or churches, while in Slovenia the names shall not include previous names of foreign states, parties or natural and legal persons.[76] These are formal restrictions that don't interfere with the programme of the party concerned. The ECourtHR held the view, in *TBKP*[77], that "a political party's choice of a name cannot in principle justify a measure as dissolution, in the absence of other relevant and sufficient circumstances". Even if the name chosen by a political party is forbidden by national law (formal restriction), it can still continue to pursue freely its activities as long as its aims respect the principles of democracy (material restriction). Once more, resorting to democratic principles is of outstanding importance.

[75] Gorzelik v Poland, Judgement of 20 December 2001, application nº 44158/98, available on the web site of the ECourtHR. The quotation refers to §66 of the judgement.
[76] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, Report 12-13 June 1998, op. cit.
[77] TBKP, §53 and 54.

2.1.2 RIGHT TO CONTRIBUTE TO POLITICAL DEBATE

Political parties can be seen as the privileged holders of the right to freedom of expression since it is through their action that the various ideas present in a certain society, the different views by which a solution to common problems can be attained, will be put into practice.

The Court several times expressed the view that "art. 11 must also be considered in the light of art. 10", meaning "the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in art. 11". It also referred that it applies directly to political parties due to their "essential role in ensuring pluralism and the proper functioning of democracy". Political parties deserve the protection of art 10 because their action guarantees the pluralism of ideas in society, the only way by which democracy can be said to exist. In short, "there can be no democracy without pluralism". [78]

In the Court's view, art. 10 does not need to be analysed separately when the problem of dissolution of political parties is at stake. The guideline principles developed by its case-law under the aegis of art 10 apply entirely to freedom of expression when political parties rely on its protection. In *Handyside*[79] the Court stated that freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'." This reasoning was retaken in the jurisprudence relating to dissolution of political parties, adding the Court that because political parties' activities "form part of a collective exercise of freedom of expression"[80] they can rely on the protection art. 10 provides for.

[78] This formula has been followed by the Court in TBKP §42, SP §41, ÖZDEP §37, REFAH §44, HEP §46.
[79] Case Handyside v UK, Judgement of 07 December1976, application nº 00005493/72 , published in A-24. Also available in www.echr.coe.int , §49. Also in §25 of Vogt v. Germany (Judgement of 26 September 1995, application nº 00017851/91,published in A-323, available on the internet site of the ECourtHR www.echr.coe.int) this idea arises.
[80] TBKP §43

The question of freedom of expression of opposition politicians in relation to governmental policies has been analysed by the Court in two significant decisions: the cases *Castells* and *Incal*. In *TBKP*, the Court refers to its decision *Castells* where it held the view that despite "freedom of political debate is undoubtedly not absolute in nature (…) the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician". Moreover, it recognised the important role politicians have while elective representatives of the people, thus when matters of public interest are at stake, "interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court"[81]. This is so because politicians represent a certain electorate and should be capable of defending their interests. By the same token, the Court asserted in *Incal* that "in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion"[82].

In both of the just analysed judgements the Court reiterates that freedom of political expression should be authorised in the broadest possible terms, having as the sole limitation the incitement towards violence or hatred between citizens. From the reading of the cited passages it is undoubted that the Court is willing to protect the polemical attacks by opposition parties and politicians on governmental programmes, provided the criticisms remain inside the boundaries of the democratic process (the "democratic society" embodied in art. 10, nº2). A final remark: these two cases relate to two difficult situations lived in the countries concerned, often being a

[81] Case Castells v Spain, Judgement of 23 April 1992, Application nº 00011798/85, published in A236, also available in www.echr.coe.int , § 46 and 42. This case relates to an opposition politician who severely criticised the Spanish government's attitude in relation to the situation lived in the Basque Country at the time. See *mutatis mutandis* HEP, §59.

[82] Case Incal v Turkey, Judgement of 6 June 1998, Application nº 00022678/93, published in Reports 1998-IV, also available in the internet site of the ECourtHR www.echr.coe.int The judgement *Incal* refers to an opposition politician, author of a leaflet intended to draw attention to the Kurdish problem in Turkey. In that leaflet, Mr. Incal drew a number of virulent remarks about the policy of the Turkish government and made serious accusations, holding the authorities responsible for the situation. Before the leaflet to be distributed, the party asked the local prefecture for permission to begin the distribution. The request was referred to the local National Security Court which issued an injunction ordering the seizure of the leaflets and prohibiting their distribution. The sentence of the Turkish court included: nearly seven months of imprisonment, a fine and a disqualification from driving during fifteen days, prohibition of taking any job in the civil service and of engaging in activities with political organisations and trade unions. Worth to note is that Mr. Incal is a political leader militating in the HEP, a party that the Turkish Constitutional Court would after dissolve in 1993.

source of conflicts, the problem of the separatist Basques in Spain and the problem of the Kurdish minority living in Turkey.

Another dimension of the right to freedom of political expression concerns the dissemination of political opinions and ideas through the media. The Court takes that into account in *Castells*, sublining the importance of press as it "enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society"[83]. Once more, the political debate and democratic society go in tandem. If, on the one hand, the press gives "the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders", on the other hand, it also "gives politicians the opportunity to reflect and comment on the preoccupations of public opinion"[84]. In conclusion, in a democratic society political leaders are supposed to divulge their points of view in the widest possible way, in order to increase the public consciousness about the problems a particular society is facing, as well as the ways by which they intend to respond to them.

[83] The critics of the press towards political leaders who defend right-wing ideas has been understood by the Court at the light of the overall case-law concerning freedom of expression, being measures impinging upon it subjected to the strictest scrutiny. A good example can be found in Lingens v Austria (Judgement of 8 July 1986, application nº00009815/82, published in A-103, also available in www.echr.coe.int), where the Court found that the use of expressions like "basest opportunism", "immoral" and "undignified", in a magazine, to describe a Federal Chancellor at the time, should be seen against the background of a post-election political controversy. Those expressions were considered value-judgements, consequently not susceptible of proof (§46), and restrictive measures could not be assessed as 'necessary in a democratic society'(§47). The same reasoning was retaken in Oberschlick (nº1) v Austria (Judgement of 23 May 2001, application nº 00011662/85, published in A-204), in relation to a leader of the FPÖ criticised in the press for having advocated policy measures which could be compared to the programme of the Social Nationalist party of 1920. Also in Lopes Gomes da Silva v Portugal (Judgement of 28 September 2000, application nº 00037698/97, available in the aforementioned web-site), the Court applied the same principles to the critics expressed in the newspaper Público to Mr. Silva Resende, highlighting "that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation" (§34).

[84] Castells, § 43.

The Court addressed the question of balancing the right to freedom of expression and fair elections in the case *Bowman*.[85] After considering "the right to freedom of expression under Article 10 in the light of the right to free elections protected by Article 3 of Protocol No. 1", as both rights are inter-related and operate to reinforce each other, the Court went on to elaborate that "in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain *restrictions, of a type which would not usually be acceptable*, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature".[86] The purpose of restrictions on election expenditure is to secure equality between candidates, preventing wealthy candidates from distorting the fair competition process by spending more in campaigning. Even so, despite the reference that States should be accorded a "margin of appreciation, as they do generally with regard to the organisation of their electoral systems"[87], the Court did not clearly define the margin of appreciation it was willing to recognise to States when regulation of freedom of expression during election campaigns is at stake. A. Mowbray sustains the opinion that the margin of appreciation for rules impinging upon freedom of expression is narrower than when the right to vote and to stand for election are at stake. The author explains: the right to freedom of expression is expressly recognised in art 10, whilst the rights to vote and stand for election are implied rights protected under art.3 Protocol 1. The latter would allow a less tight control of the national restrictive measures, in comparison with the Court's strict control when freedom of expression is at stake, "reflecting the Court's longstanding special protection for matters of political expression as the bedrock of democracy"[88]. Freedom of political expression can say to be given more weight than freedom to engage in politics (right to vote and to stand for elections).

[85] Bowman v UK, Judgement of 19 February 1998, application nº 00024839/94, published in Reports 1998-I. Also available in www.echr.coe.int The Society for the Protection of the Unborn Child, priory to an election, distributed leaflets stating: "we are no telling you how to vote, but it is essential for you to check on the candidates' voting intentions on abortion". The leaflets then detailed each of the candidates' attitudes towards abortion. Mrs. Bowman, while executive director of that society was charged with an offence by during the electoral period conveying information to electors with the aim of promoting and procuring the election of a candidate. The Commission expressed the opinion (by 28 votes to 1) that had been a violation of art. 10, a contention not followed by the Court.
[86] Bowman, § 41, §42 and §43.
[87] Ibid. §41, §38 and §48.
[88] A. MOWBRAY, "The role of the European Court of Human Rights in the promotion of democracy", Public Law, 1999, p.724.

2.1.3 RIGHT TO CONTEST THE STATE

More than contesting the government policies, political parties are also accorded the right to contest the State, i.e., its existing laws and its current constitutional organisation, provided they don't put at stake "democracy itself". Falling within the scope of both arts. 10 and 11, this right endows the possibility of expressing fierce criticism towards national institutions and, at the same time, advocating changes in law that are seen as more capable to respond to the needs of the different sectors of the population. This is a right belonging to political parties themselves, while associations in their collective exercise of freedom of expression.

This right to challenge the State's organisation has been identified throughout all the ECourtHR's case-law concerning the problem of dissolution of political parties. The *TBKP* referred in its programme the necessity of finding a democratic and peaceful solution to the Kurdish problem, which "is a political one arising from the denial of the Kurdish people's existence, national identity and rights". Consequently, the party advocates "ending military and political pressure on the Kurds, (…) bringing the State of emergency to an end, abandoning the 'village guards' system and lifting bans on the Kurdish language and Kurdish culture (…) The existence of the Kurds must be acknowledge in the Constitution"[89]. The party thus defends changes in the governmental policy and also in the national constitution, fighting for the rights of the Kurdish minority in Turkey. After, in *SP*, the Court had to analyse the speeches made by its political leader standing for the creation of a federal system in Turkey, whereby "Kurds and Turkish would be represented on a equal footing and on a voluntary basis"[90]. *ÖZEDP,* another party dissolved by the Ankara Constitutional Court, stood for the creation of "a democratic assembly of representatives of the people elected by universal suffrage (…) represent the interests of the Turkish people, the Kurdish people and any other minority", as well as for "no government interference in religious

[89] TBKP, §9 that refers to some passages of the TBKP programme.
[90] SP, §47.

affairs"[91], fighting for the abolition of the Religious Affair Department of the government. The dissolution of *HEP* was based on public declarations made by its leaders where, once again, the right to self-determination of the Kurdish people and the recognition of the linguistic rights of minorities were at stake[92].

In the aforementioned judgements, the right to make political campaign for a change in the legal and constitutional bases of the State was bound to obey two conditions in order to respect the parameters established by the Convention. Firstly, "the means used to that end must in every respect be legal and democratic" [93], i.e., the only process by which those changes can be attained is solely the democratic regular one. Secondly, "the change proposed must itself be compatible with the fundamental democratic principles"[94], i.e., the content of the advocated changes needs to comply with the notion of democracy as it has been understood by the Court. The fact that a federal system defended by a political party is "considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy"[95]. The Court also highlighted 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 they not harm democracy itself."[96]. Once again, the respect for 'democracy itself' appears as the main guideline to assess the limits until where political criticism can go. In this regard, it seems essential to delimitate the concept of democracy. As the Court also noted in *Young, James and Webster*, "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position"[97]. That is so as a truly democratic State needs to provide for institutions that do represent the interests of all sectors of the population, including minorities. The current form a State has was a

[91] ÖZDEP, § 8.
[92] HEP, §26.
[93] REFAH, § 47, HEP § 49, TBKP §50.
[94] Ibid.
[95] SP, §47.
[96] ÖZDEP §41 in fine.
[97] Young, James and Webster, §69.

choice of a majority that can in the future become a minority; so if the current institutions do not correspond anymore to the views of the majority they should better be changed.

That having been said, it can legitimately be assumed that the monarchic or republican, parliamentarian or presidential nature of a certain political regime can also be criticised. It is therefore relevant to pay attention to the different solutions provided for at national level, in order to assess eventual coherence among member States of the Council of Europe. By way of example I will refer to the French[98] and Portuguese[99] constitutional systems, as in both of them it is prohibited the republican form of government to be changed by means of a constitutional revision. The constitution is a fundamental legal instrument of a State and bears at its core an idea of stability, as it intends to respond to the challenges posed to several generations of citizens. In order this stability to be ensured, the majority of the constitutions impose limits for their revision[100], such as the just mentioned ones. As B. Duarté[101] notes, taking into account the case-law of the Strasbourg Court, a political party should be allowed to introduce in its programme the return to monarchy and to propose a constitutional revision towards it (to be approved, for instance, by way of a referendum), once it arrives to power. Because political parties are deemed to represent all the ideas present in a certain society, they should not be sanctioned by that fact. In *SP* and in *ÖZDEP*, the Court found that each party had been dissolved by the Turkish Constitutional Court "solely for exercising its freedom of expression"[102], which is to say that advocating constitutional changes in the structures of a State falls within the scope of protection of freedom of expression.

[98] Art. 89 of the French Constitution of 1958.
[99] Art 288 of the Portuguese Constitution of 1976, which endows the so-called "material limitations" to Constitutional revision, refers explicitly to the republican form of government in b).
[100] J.J. GOMES CANOTILHO, "Direito Constitucional e Teoria da Constituição", Coimbra, Almedina,, 2002, p.1044 ss. The author makes a general description of the limitations constitutional revisions have to respect.
[101] B. DUARTÉ, op. cit. p.340.
[102] SP §48 in fine and ÖZDEP §42 in fine.

Something different is the individual right politicians have to criticise the current institutional organisation of the State. Though "Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical, that does not mean, however, that he lost his right to criticise the government"[103]. This individual right unquestionably falls under the protection provided by art. 10.

In conclusion, the right to individually and collectively contest the State are protected by the shield of art. 10. Despite the fact some national constitutions impose limits to their revision, the Court acknowledges that the Convention accords political parties the right to criticise even the most fundamental constitutional principles of the State as long as that criticism doesn't hinder 'democracy itself'. The notion of democracy appears in the eyes of the Court as the only legitimate criterion to evaluate if the Right to Contest the State has been exercised within the limits set forth by the Convention.

2.1.4 RIGHT TO RUN FOR ELECTIONS

Among the rights intended to guarantee the good functioning of the Convention's democratic system, art 3, Protocol 1 is certainly one of those that has more relevance[104]. It alludes to the Right to Free Elections, resting on the States parties to the Convention the duty "*to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*". Does it require all citizens to be accorded equal rights of eligibility to stand for elections? Does it mean that all legally constituted political parties have the right to run for elections?

[103] Castells, § 43.
[104] As acknowledged by the Court in the Case Mathieu-Mohin and Clerfayt v Belgium, Judgement of 2 March 1987, application nº 00009267/81, published in A113, § 47 . This judgment can also be found in www.echr.coe.int

The vague formulation of this disposition demands immediate resort to the case-law of the Court, as to identify the right-holders of such a right and the conditions in which it can be exercised.

The individual right of eligibility to stand for election to a national parliament was examined by the Court in *Gitonas*[105]. The applicants complained alleging that the annulment of their election infringed the right of the electorate freely to choose their representatives and their own right to be elected under art. 3, Protocol 1. The government alleged the restrictive measure intended to preserve the " independence of members of parliament and the principle of the separation of powers". The Court assessed that art 3, Protocol 1 does protect " subjective rights to vote and to stand for elections" and, because it doesn't set them any explicit limitations, there is room for "implied limitations"[106]. Those limitations were already taken into account in the case *Mathieu-Mohin and Clerfayt* and in the already quoted case *Golder*[107], where the Court held the rights stated in the Convention are not absolute, giving national authorities a wide margin of appreciation. The Court endorsed the contention that despite the fact the State has a wide margin of appreciation, varying the rules governing the status of parliamentarians "according to the historical and political factors peculiar to each State", they can "not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness".[108]

It is important to stress the Court, once more, acknowledges the importance of some national restrictive measures in order to protect the democratic system itself. The Greek system of disqualification was seen as "somewhat complex", but it was "essential

[105] Case Gitonas v Greece, Judgement of 1 July 1997, application nº 00018747/91; 00019376/92 ; 00019379/92 ; 00028208/95 ; 00027755/95, published in Reports 1997-IV. Also available in www.echr.coe.int. This case put together the applications of five Greek nationals who were elected to the Greek parliament during the elections held in 1990 and 1993. Their elections were challenged and the Special Supreme Court annulled each of the applicants' elections on the grounds that they had held prohibited public positions for more than three months during the three years prior to their standing for parliament, consequently violating art. 56, nº6 of the Greek Constitution.
[106] Gitonas, § 38 and 39.
[107] Mathieu-Mohin and Clerfayt, § 52 and Golder, § 38.
[108] Gitonas, § 39, which repeats what the Court had already said in Mathieu-Mohin and Clerfayat, § 52.

for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many - and sometimes important - decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced"[109]. Democracy presupposes change, rotation at least, of the political leaders that hold office. When referring to the rights of individuals to run for office, the Court is indirectly ensuring political parties the right to equal and genuine conditions to compete for elections, seeking to prevent those parties who already have members in public positions from taking advantage of them in order to influence the electorate and by that way to continue to hold power.

In *Ahmed,* the Court addressed the issue of restrictions on political activities of public servants. The applicants claimed that the restrictions imposed violated the subjective rights to vote and to stand for elections protected by art.3 Protocol 1, by unjustifiably limiting the electorates' choice of candidates, but the Court was straightforward in rejecting this argument. As for their freedom of political expression, the Court assessed the restrictions posed by the government regulation intended to protect a legitimate aim under art.10, nº2, "namely to protect the rights of others (…) to effective political democracy at the local level."[110]. The Court also confirmed the existence of a pressing social need for the government's action in order the principle of political neutrality of sensitive posts in local authorities to be preserved.

[109] Gitonas, § 41 and 40. It is worth to note that the Court was unanimous in finding no violation of art.3 Protocol 1.

[110] Ahmed, §46 and §54. The United Kingdom had imposed regulations designed to lay down a framework of rules restricting the participation of a substantial number of local government officers in certain kinds of political activities which might impair the duty of impartiality they owed to their local authorities. The applicants, who held politically restricted posts under the regulations were forced to curtail with their political activities. Mr Ahmed had to withdraw his candidature for the London Borough of Enfield, Mr Perrin and Mr Bentley had to give up the office they held in the Labour Party as well as reframing from supporting candidates of that party, whilst Mr Brough was also forced to resign the position he held inside a political party.

As we can see, the Court's judgement strongly affirms the importance of protecting democratic process operating at the local level of government. The Court adopted this stance because of the range of functions performed at the local level of government and the effects these types of programmes directly have on the citizens' choices. Again, the Court reassures citizens living inside the jurisdiction of Contracting States their right to live in an effective political democracy will be protected. Regrettably, the Court lost the opportunity to declare that local authority elections fall within the scope of art. 3 Protocol 1, at least when the authority exercises significant governmental powers[111]. Moreover, the Court could have assessed whether or not the elections to the European parliament were covered by the range of application of art.3 Protocol 1, but it dismissed itself from answering.[112] Notwithstanding, a few months later, in *Matthews*[113] it held the view that the elections to the European parliament were indeed inside the scope of protection of art.3 Protocol 1.

The Court addressed the issue of restrictions on the eligibility of career police officers in the *Rekvényi* Case[114]. This case, by analysing the particular political situation lived in Hungary after the 1949-1989 totalitarian regime, gives us a clear idea of the concessions the Court is prepared to make in order to guarantee the successful implementation of the democratisation process in the member States of the Council of Europe. The government held that the just mention legal measures aimed at depoliticising the public institutions in Hungary, as the overwhelming majority of the

[111] A. MOWBRAY, op.cit., p.710. In fact, the Commission had already avoided answering the same question in 1979 in its Decision J. Glimmerveen and J. Hagenbeek v The Netherlands (Comm. Dec. of 11 October 1979, application nº 8348/78 and 8406/78, published in Reports and Decisions nº18, pp 187-197).
[112] Ahmed, §76.
[113] Matthews v UK, Judgement of 18th February 1999,application nº 00024833/94, published in Reports of Judgements and Decisions 1999-I, §54. Also available on the internet site of the ECourtHR in www.echr.coe.int .
[114] Case Rekvényi v Hungary, Judgement of 20th May 1999, application nº 00025390/94,published in Reports of Judgements and Decisions 1999-III. Also available in www.echr.coe.int . In 1993, art. 40/B §4 of the Hungarian Constitution was amended in order to prohibit members of the police, armed forces and security services from joining any political party or engaging in political activities. Mr. Reckvényi was a police officer and a member and Secretary General of the Police Independent Trade Union who, after had unsuccessfully challenged the constitutionality of that amendment, complained to the Commission for breaches of arts. 10 and 11 of the Convention.

military and police officers had belonged to the ruling party. The Court found the legitimate aim of ensuring "that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers" is compatible with "democratic principles".[115] Taking into account the historical background of Hungary, the Grand Chamber held the restrictions to the applicants freedom of expression and freedom of association whilst protecting "the police force from the direct influence of party politics can be seen as answering a 'pressing social need' in a democratic society". However, restrictions cannot go to such an extent as to completely impair the exercise of those rights. Though not able to acquire membership in a political party, police officers were still able to undertake some activities enabling them to articulate their political opinions and preferences. They could still "promote and nominate candidates, organise election campaign meetings, *vote in and stand for elections to Parliament, local authorities and the office of mayor,* participate in referenda, join trade unions, associations and other organisations"[116] For what has been said, it appears the possibility of individuals to exercise their rights to vote and to stand as candidates for elections (in this case, eventually, as independent candidates) is given more weight over their rights to membership of a political party. The individual right to run for elections seems to be, in the eyes of the Court, one of those that, when conflicting with other fundamental rights or aims, deserves to prevail.

In its very recent decision *Selim Sadak and Others*[117], the Court analysed the problematic of dissolution of a political party from the perspective of its direct effects on the individual right to be elected. After retaking its traditional reasoning regarding the

[115] Rekvényi, §39, §41.
[116] Rekvényi, § 48, §49
[117] Case Selim Sadak and Others v Turkey, Judgement of 11 June 2002, application nº 25144/94, 26149/95 to 26154/95 and 27101/95, available in www.echr.coe.int . This case brings together thirteen applications of former members of the Turkish national parliament who lost their mandates as a direct consequence of the dissolution of the political party in which they were militants (DEP- Democracy Party) and through which they were elected as deputies. The Ankara Constitutional Court dissolved DEP on the grounds of danger to the territorial integrity of the Turkish State and attempt to hinder the unity of the Turkish nation. After, the applicants were faced with a criminal prosecution whereby they were accused of separatism and attack to the territorial integrity of the State, capable of being punished with death penalty.

importance of art 3 Protocol 1 for the maintenance of a truly democratic political system, the Court acknowledged that this disposition guarantees not only the right to stand as a candidate for elections but also the right to carry out a political mandate[118]. The Strasbourg Court avowed that the dissolution of a political party is a heavy sanction due to the effects it has on the individual rights to be elected and to fully conduct a parliamentary mandate. Therefore, this sanction is seen as incompatible with the substance of the just mentioned rights[119]. Albeit the request of the applicants for the Court to assess a violation, among others, of art 10 and 11, it considered unnecessary to examine the facts at the light of those dispositions due to the conclusions achieved by applying art 3 Protocol 1[120]. It is disappointing the Court states that "DEP was dissolved (…) and the applicants, deputies members of the party, saw their right to engage in political activities curtailed and could not continue to exercise their mandate"[121], acknowledging two different rights (the right to engage in political activities by means of participating in the collective exercise of freedom of association, clearly falling inside the scope of art 11, and the right to carry out a political mandate, which goes under art 3 Protocol 1), to then not approach the issue from the perspective of art 11. Moreover, it seems inconsistent the Court asserts the motives for the dissolution of DEP were the speeches of its former leader and a declaration setforth by the central committee of the party[122], to after decline the analysis to which extent those declarations could be a valid ground for dissolution[123]. In short, by taking into account only the effects of the political party's dissolution on the right of their members to carry out the mandate to which they have been elected, the Court misses the core of the problem (if the dissolution could be considered valid at the light of art 11, nº2) and

[118] Selim Sadak § 32 and §33. The Court makes reference to a previous decision of the Commission (Ganchev v Bulgary, Decision of 25 November 1996, application nº 28858/95, Published in Reports and Decisions nº87, p.130) where it already identified the right to an effective exercise of the political mandate as falling within the scope of protection of art 3 Protocol 1.
[119] Ibid. §38 and §40.
[120] Ibid §47.
[121] Ibid §38. The original in french as follows : « le DEP a été dissout (…) et les requérants, députés membres du parti, se sont vus interdire l'exercice de leurs activités politiques et n'ont pu continuer à exercer son mandat ».
[122] Ibid. §36.
[123] As it was asked by the government (§44) and contested by the applicants (§45).

hinders the complete effectiveness of its decision (it remains unanswered whether the applicants can continue to perform their political activities as members of that particular party). In fact, at no point the Court said the DEP was respecting the principles of democracy and could, consequently, be accorded the protection the Convention affords to political parties under art 11.

The passages cited appear to suggest that the Court pays due account to the historical background of the States, allowing them a large margin of appreciation when protected interests such as national security are at stake. The State appears as the guardian of democracy, being allowed to impose restrictions on the freedom to join a political party for the sake of guaranteeing independence and impartiality of public officers (either local government officers or police and military officers). The intention pursued by those restrictions to individual rights can indirectly aim at ensuring the equality among competing political parties, in order them to be given the same conditions to influence the electorate. Implicitly, political parties are seen as right-holders of the right to run for elections, being granted equal opportunities of competition by the Court's case-law. However, the Court did not say that political parties as such could consider themselves victims of violations of their rights to run for elections or to be represented in the parliament, falling within the scope of application of art.3 Protocol 1 understood, respectively, as the collective exercise of the individual rights to stand as a candidate and to carry out a parliamentary mandate once elected protected therein.[124] Be that as it may, the Court already recognised that the violation of art. 3 Protocol 1 can be comprehended as an incidental effect of a political party dissolution,

[124] S. MARCUS-HELMOS, "Art 3, Protocol 1" *Convention Européenne des Droits de l'Homme- Commentaire article par article*, op. cit. p.1015. The author mentions that is still open the question whether or not political parties can afford the protection given by art3, Protocol 1, regrettably without further elaborating on the problem.

therefore not denying the applicability of the aforementioned provision to political parties.[125]

2.1.5 RIGHT TO FREEDOM OF CONSCIENCE AND RELIGION

Art. 9, nº1 of the ECHR states that "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 Community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

The issue of freedom of conscience and religion of elected politicians was analysed by the Court in Buscarini[126], where it became clear that "the Court will not permit States to impose specific religious obligations upon elected politicians where those burdens are contrary to the individuals' protected freedoms under art 9, nº1"[127]. In this case Mr Buscarini and Mr Della Balda, two elected politicians to the Parliament of San Marino, had requested permission to take their statutory oath of office without making reference to any religious text. As their request was denied they were forced to take their oath on the Gospels, contrarily to their personal beliefs, suffering thus an interference with their right to freedom of conscience and religion. The government, before the Strasbourg Court, alleged that "the wording of the oath in question was not religious but, rather, historical and social in significance and based on tradition. The Republic of San Marino had, admittedly, been founded by a man of religion (…) and form of words in issue had lost its original religious character"[128]. Despite the

[125] TBPK, §63. The fact that the leaders of TBKP were banned from taking part in the elections was seen as an incidental effect of the party's dissolution, therefore not needing to be separately considered by the Court. *Mutatis mutandis*, REFAH §87. Regrettably, in Selim Sadak, the Court lost the opportunity to say if political parties could rely on art 3 Protocol1, simply stating that « la décheance des requérents de leur mandat parlamentaire est la conséquence de la dissolution du parti politique auquel ils appartenaient et est indépendente de leurs activités politiques menées à titre personnel » (§37).
[126] Case Buscarini and Others v San Marino, Judgement of 18 February, 1999, application nº00024645/94, published in Reports of Judgements and Decisions 1999-I.Also available in www.echr.coe.int .
[127] A. MOWBRAY, op. cit. p.723.
[128] Buscarini, §32.

allowances the Court normally makes when the historical background of a State is called into question, it unanimously held that it "indeed constitute a limitation within the meaning of the second paragraph of Article 9, since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats"[129]. Conversely, the Commission stated in its report "it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs"[130].

It is worth to note that the Court didn't even analyse if the restriction in question could be covered by one of the legitimate aims of art 9, nº2, as it would be in any event incompatible with the Convention. This is so as, once more, the Court assesses the restrictions imposed to the rights enshrined in the Convention from the perspective of the need to preserve the fundamental idiosyncrasies of a democratic society. Political representatives should be independent of any binding religious State's orientation. As it was stressed by the Court, "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention (…).The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it"[131]. The Court then highlights the importance freedom of religion has for believers, as a corner-stone of their identity, as well as for atheists, agnostics, sceptics and the unconcerned[132].

In Hasan and Chaush v Bulgaria,[133] the two applicants contested the decision of the Directorate of Religious Denominations, a governmental agency attached to the Council of Ministers of Bulgaria, which declared the election of Mr Gendzhev in 1988 as Chief Mufti of the Muslims in Bulgaria null and void and proclaimed his removal from

[129] Ibid. §34.
[130] Ibid. §39.
[131] Buscarini, §38 and §34. The Court makes reference to its previous case-law concerning freedom of religion (Kokkinakis v Greece, Judgement of 25 May 1993), where it had already stated the importance of pluralism for democratic societies, mentioning freedom of religion as one of its most valuable aspects.
[132] Ibid §34. *Mutatis mutandis* REFAH §49.
[133] Case Hasan and Chaush v Bulgaria, Judgement of 26 October 2000, application nº 00030985/96, available in www.echr.coe.int

that position. The applicants claimed a violation of art. 9 as well as art 11 of the Convention. The Court took the view that "where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference". Moreover, it emphasised that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords"[134], unanimously holding a violation of art 9. This decision is highly relevant as it considers an association itself can claim to be a victim of a violation of the right to freedom of religion.

Though in the Buscarini case only the rights of individuals were at stake, it is perhaps possible to hold some contentions related to the rights of political parties. At the light of the Court's decision, political parties are given an indirect protection, as their elected representatives remain free from any governmental limitations concerning their personal religious beliefs. It is therefore ensured that politicians convey in the governmental institutions to which they were elected only their personal ideology, which holds a direct link to the one of the political party they freely joined in. In a way, the reasoning of the Court protects the Principle of Secularism as a fundamental principle of the democratic society.

In Hasan and Chaush the Court recognises the possibility of religious associations to claim breaches of art.9, as their freedom of religion is the uppermost important feature of a religious association. Following this reasoning, one can consider that political parties themselves can also claim to be victims of violations of art 9, in their freedom of thought and conscience, as the ideology they sustain is the core of a political association as such. Because freedom of thought and conscience includes the crucial dimension of manifesting individually or collectively, in public or in private, by

[134] Ibid. §62

whatever means[135] one's personal beliefs, it can be held that for political parties the right to manifest their ideology (their "beliefs"), by way of their contribution to the political debate and by competing in elections, necessarily comes under the umbrella of art 9.

2.2 DUTIES IMPOSED UPON POLITICAL PARTIES

2.2.1 DUTY TO RESPECT THE TERRITORIAL INTEGRITY OF THE STATE

In the case-law related to dissolution of political parties, the Turkish government invoked, among others, the legitimate aim of protecting the territorial integrity of the State. The problem of national minorities in Turkey becomes recurrent in these judgements. The aims of these political parties are understood by the Turkish Constitutional Court as invoking a Right to Self-Determination which the Convention does not expressly protect and which recognition could hinder the integrity of the Turkish borders. The ways the Turkish government, the Commission and the Court understand the protection of territorial integrity deserve our careful attention.

A preliminary remark shall be done. Art 10, nº2 expressly indicates, among the legitimate aims States can rely on, the protection of territorial integrity as well as national security. However, art 11, nº2 refers only to national security. As the Court often said, art. 11 should be interpreted at the light of art 10. Therefore, whether or not

[135]J. A. FROWEIN, "Art. 9" in *Convention Européenne des Droits de l'Homme- Commentaire article par article*, op. cit. p.357 and 358. The author notes that the text of art 9, nº2 is not that clear in what the manifestation of one's beliefs is concerned, when one's beliefs are not religious ones. It is necessary the existence of a direct relation between the beliefs and the way of expressing them. Notwithstanding, the author states that the disposition of art. 9 could be interpreted as limiting the freedom to manifest one's beliefs to the traditional religious activities. Consequently, only by way of a case by case approach the scope of application of art. 9 nº2 will be defined.

the aims of art 10 can serve as guiding factors to interpretate the scope of art 11 is a pertinent question.[136]

Despite the limitative enumeration of the legitimate aims in art 11, they refer to vague and general concepts such as "national security" and "territorial integrity" which can be subjected to different interpretations. Notwithstanding, they have an autonomous Convention meaning as they justify the restrictions that can be imposed to the rights consecrated therein.[137] For the Turkish government territorial integrity is conceived in tandem with the unity of the State[138]. The *TBKP* was dissolved by the Constitutional Court of Ankara because its programme made direct reference to two nations: the Kurdish and the Turkish ones. By doing so, the party intended to hinder the basis of Turkish citizenship, which was independent of any ethnic origin.[139] From the government's perspective any attempt to challenge the way the States' institutions are organised, either by way of the setting up of a federation or the recognition of particular cultural and linguistic rights of national minorities, would mean to acknowledge a right to self-determination, which is deemed incompatible with the unity of the State.

The Commission tends to see the legitimate aims endowed in art 11, nº2 at the light of art 10, nº2. In *SP*, it considered that prohibiting activities which, in the view of the

[136] V.COUSSIRAT-COUSTERE, "Art 11, nº2" *La Convention Européenne des Droits de L'Homme-Commentaire article par article*, op. cit. p.431. The author stresses that even though art 11 appears as *lex specialis*, it should be interpreted at the light of arts 9 and 10, in order to assess "le degrée de la contrainte exercée sur les convictions ou opinions personnelles de la victime".
[137] N. VALTICOS, op. cit, p.428. Also J. VELU and R. ERGEC, op. cit. p. 149, §192.
[138] A similar reasoning was adopted by the Commission in Decision A Association and H. v Austria (Decision of 15 March 1984, application nº 9905/82, published in Decisions and Reports, nº 36, p.187-193). A . was a political party recognised under Austrian law which was forbidden to hold a public meeting intended to commemorate the Day of German Unification. The Commission took the views of the government and acknowledged that the meeting intended to be used for pan-German propaganda in favour of the union with Germany, as it was expressed in a leaflet they intended to distribute. This leaflet included a map illustrating what the applicants considered to be the territorial basis for the German unification. But, above all, the Commission took into account the programme of the party to conclude that "the negation of the concept of an Austrian nation in this programme and the emphasis laid down on the German character of Austria, justified the authorities' fear that the proposed meeting might be used as a platform to activate a policy against Austria independence and separation from Germany" (p.192).
[139] TBKP, §10 and §28. The same arguments were invoked against the speeches of the political leaders of SP §42, §43 and §47. *Mutatis mutandis* ÖZDEP, §35, §38 and HEP §22, §56.

government, were likely to cause "the collapse of the State or the division of its territory could be said to be intended to protect 'national security' and territorial integrity".[140] In *TBKP*, the Commission expressed the view that because the party programme drew a distinction between Turks and Kurds, "it could be regarded as openly pursuing the creation of a separate Kurdish nation and consequently a redistribution of the territory of the Turkish State". Therefore the dissolution ordered by the Constitutional Court could be seen as "protecting territorial integrity and thus 'national security'"[141]. The just quoted passages indicate the Commission acknowledges that the aim of protecting territorial integrity can serve as justification for a restrictive measure to freedom of association.

The ECourtHR, however, has a different stance. It only takes into account the legitimate aim of protecting national security. However, it shows a certain ambiguity when it holds that "the dissolution of *TBKP* pursued *at least one* of the legitimate aims set out in art 11"[142]. Be that as it may, when assessing the necessity of protecting the legitimate aim of national security, the Court elaborates as if territorial integrity was one of the dimensions of national security. It analyses the programmes of the several dissolved parties as well as the speeches of their leaders and members, stressing the need of reading them together with all the facts of the case and in the context where they were made. For instance, in *ÖZDEP*, the distinction laid down in its programme between Kurdish and Turkish people was considered as part of "a political project whose aim is in essence the establishment –in accordance with democratic rules- of 'a social order encompassing the Turkish and Kurdish peoples'". The Court gives high relevance to the fact that the party respects democratic rules in order to attain its goals. Moreover, the

[140] SP §35, ÖZDEP § 32, HEP §38. Also the Opinions of the Commission in SP §73 (Report of 26 November 1996, published in Reports 1998-III, p. 1263 ss), in TBKP § 75 (Report of 3 September 1996, published in Reports 1998-I, p. 32ss) and in ÖZDEP § 70 (op. cit., p.361ss).
[141] TBKP §40.
[142] TBKP §41. In HEP some doubts remain as to whether the Court considers territorial integrity to be encompassed in the scope of art 11, nº2. In §39, the Court simply states its agreement with the Commission's view, which considers as legitimate aims, once more, territorial integrity and national security.

Court holds the view that "the programme also refers to the right to self-determination of the 'nationals and religious minorities'; however, taken in the context, those words do not encourage people to seek separation from Turkey but are intended to emphasise that the proposed political project must be underpinned by the freely given, democratically expressed, consent of the Kurds."[143] Contrarily to the political programme of *TBKP*, where the Court concludes that it doesn't "describe (the Kurdish) as a minority nor makes any claim- other than the recognition of their existence- for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population",[144] the programme of *ÖZDEP* expressly refers to the need to recognise Kurdish as a minority in Turkey.

From the Court's point of view, a distinction shall be made. One thing is the duty political parties have to respect the territorial integrity of the State understood in a restrictive way, i.e., their political programmes cannot aim at redesigning the established frontiers of a given State. Therefore, the right to self-determination of a certain part of the population cannot lead to separatism from the State to which they belong. Something different is the right political parties have to challenge the institutional organisation of a State, i.e., if national ethnic or cultural minorities exist inside its borders political parties can advocate institutional changes in order their political concerns to be better expressed. So, when a political party proposes the creation of a federalist State (as in *SP*) what is at stake is regional autonomy and not territorial integrity, that despite being prohibited in national constitution is surely compatible with the principles setforth in the ECHR[145]. When the creation of "Kurdish departments", in order the Kurdish people to be able to express their culture and use

[143] ÖZDEP §41.
[144] TBKP §56.
[145] A very recent and interesting case has just been declared admissible by the Court (Perinçek et le Parti des Travailleurs v Turkey, Final decision on admissibility of 26 February 2002, application nº00046669/99. The original in French is available in www.echr.coe.int). Mr. Perinçek, the former president of SP, has been convicted to prison and forbidden of engaging in any political activity, allegedly due to the diffusion of separatist propaganda able to menace the integrity of the State. Worth to recall is that some of the political speeches he made while president of the SP are the factual basis which lead to the aforementioned sanctions.

their language, is advocated the Court endorses the contention that "the right to self-determination and the recognition of linguistic rights are not as such contrary to the fundamental principles of democracy".[146]

Although the problem of national minorities is not consensual among the member States of the Council of Europe[147], the ECourtHR strongly reaffirmed its commitment to protect their right to self-determination as long as it doesn't impair the territorial integrity of the State and the Convention's democratic society[148]. On the other hand, this posture of the ECourtHR responds to the necessity some States feel to prohibit political organisations that aim at secession.[149]

2.2.2. DUTY TO RESPECT THE PRINCIPLE OF NON-INCITMENT TO VIOLENCE

As the Court noted several times, "one of the principal characteristics of democracy (is) the possibility it offers of resolving a country's problems through dialogue, without

[146] HEP §57. Recently, in Stankov and the United Macedonian Organisation Ilinden v Bulgaria (Judgement of 2nd October 2001, application nº 00029221/95; 00029225/95. Available in the ECourtHR's web site.), the Court held that "the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 of the Convention" (§89).

[147] F. BENÔIT-ROHMER ("La Cour de Strasbourg et la protection de l'intérêt minoritaire: une avancée decisive sur le plan des principes?, Revue Trimestrielle des Droits de l'Homme, 2001, pp. 999-1015) discusses the fact that certain rights inscribed in the Framework Convention for the Protection of National Minorities ought to be given an indirect protection by means of resorting to the ECHR. This would be the case of the rights of minorities to freedom of assembly, freedom of association, freedom of expression and freedom of thought, conscience and religion (art 7 Framework Convention) which content is to be precised by the Convention and, of course, by the jurisprudence of the ECourtHR (p.1012).

[148] In the case Gorzelik, the Court expressly mentioned that "it is not its task to express an opinion on whether or not the Silesians are a 'national minority'" (§62). The government's fear that "had the members of the Union been recognised as a "national minority" in the process of the registration of their association, they would automatically have been afforded an unqualified and legally enforceable claim to special privileges granted to national minorities by the relevant legislation" (§61) was indirectly protected by the Court's decision taken on the grounds that the same individuals could always form an association if they were "prepared to compromise on points that were particularly sensitive for the State"(§64).

[149] As, for instance, the case of an organisation in Corsica advocating the independence of the island which ended up being dissolved by the Conseil d'État (Decision of the Conseil d'État of 16 October 1992, published in Recueil 1992, p. 371).

resort to violence, even when they are irksome."[150] That is why the most difficult questions for a country, like the problem of national minorities, should always be dealt within the political arena[151].

In order to assess if political parties respect the rules of the democratic game, the Court uses its own method. Though "the taking of evidence is governed by the rules of domestic law and that is in principle for national courts to assess the evidence before them"[152], the Court understands that a party's political programme may conceal intentions different from the ones it proclaims, being therefore necessary to compare the content of the programme with the party's intentions and the positions it defends, assessing the speeches of political leaders in the context where they were released[153].

In *TBKP,* the Turkish government alleged that when the protection of the "general clause of public order"[154] is at stake it is not required that the "risk of violence justifying the interference should be real, current or imminent". The government then makes reference to the case-law of the Commission and the Court to warrant the conclusion that restrictions may be imposed without "being necessary to determine whether there was a current risk of violence or a causal link with an act of violence directly provoked by the use of the expression" [155]. The Court didn't present a detailed framework on this point[156] and therefore the intensity of the link between violence and disbandment of political parties remains ambiguous. To grasp something out of these matters, it will be worthwhile to give some attention to the Court's case-law.

[150] TBKP §57 and REFAH §46.
[151] HEP §57, *in fine.*
[152] Sidiropoulos, § 45.
[153] TBKP, §58, SP §48, HEP §50, REFAH §48.
[154] F. SUDRE, «Les Obligations Positives dans la jurisprudence européenne des Droits de l'Homme », Revue Trimestrielle des Droits de l'Homme, nº 23, 1995, p.363. The author mentions the « clause d'ordre publique » enhrined in the second paragraph of arts. 8 to 11. This concept of public order refers to the democratic order itself, while being the essence of all the prescribed legitimate aims (see J. VELU and R. ERGEC, op. cit, p.150, §192 in fine).
[155] TBKP §49.
[156] TBKP §59. Because the TBKP was dissolved even before it had been able to start its activities and the dissolution was ordered solely on the basis of its programme, the Court could not assess if the activities of the party (as there was none) were intended to promote violence.

In the case of *ÖZDEP*, the Court had to consider the problem of the dissolution based exclusively on the programme of the party concerned. Much weight was given to the inclusion in the programme of a proposal to create "a democratic assembly of representatives of the people elected by universal suffrage". Bearing in mind the non-incitement to violence as one of the democratic principles deeply enrooted in the Convention, the Court saw it as "an essential factor to be taken into consideration" then finding unanimously a violation of art. 11[157]. When the speeches of political leaders are the factual basis for the disbandment, the Court places them in the right context and assesses them at the light of the broad framework of freedom of expression. This was the case in *SP*, where the Court concluded that more strong appeals directed to the Kurdish population in order to assert certain political claims (such as "the Kurdish people are standing up") cannot be regarded as an incitement to violence[158]. In *HEP*, the Court denoted for the first time the necessity of an explicit reference of the use of violence for political purposes[159]. The Court saw the issue of political parties encouraging violence from the perspective of the common European standards, bearing in mind what could be considered an ordinary practice in the other States of the Council of Europe[160]. It stressed to be prepared to take into account the difficulties some States feel in combating terrorism[161], but terrorism has no role to play when the parties' programmes and the public interventions of political leaders declare attachment to democracy.

The *REFAH* decision was the main responsible for raising even more doubts on this point. In short, the ECourtHR was faced with the dissolution of a political party by the

[157] ÖZDEP §40.
[158] SP §46. Also in Incal the Court concluded that a message read out at a ceremony to a group of people including words such as "resistance", "struggle" and liberation" does not necessarily constitute an incitement to violence and uprising (§50). Recently, in Stankov, the Court considered that though "some of Ilinden's (the association) declarations apparently included an element of exaggeration as they sought to attract attention", that does not mean that in themselves they seek to provoke violence (§102).
[159] HEP §55. According to the original in french, " le HEP n'exprimait aucun soutien ou approbation explicites pour la violence à des fins politiques ".
[160] SP §46 in fine, ÖZDEP §40 in fine.
[161] SP §52, TBKP §59, ÖZDEP §46.

Constitutional Court of Ankara, which had been accused of going against the principle of secularism in Turkey. In its judgement, the Court of Strasbourg stated for the first time the validity of the disbandment of a political party[162], however by a Chamber majority of four votes to three. The reasoning of the Court was based mainly in three aspects: the set up of a plurality of legal systems, the intention to apply the *sharia* to the Muslim community and the reference to jihad, i.e., holy war as a political method[163]. I will now analyse this third ground for dissolution.

I will start by noticing that when the proceedings to dissolve *REFAH* started, *REFAH* was at the time the party in government being its leader the Prime Minister, which highlights the broad popular legitimacy it gathered[164]. Notwithstanding, the majority of the Court found that, despite no reference in government documents calling for the use of force or violence as a political weapon, the speeches of its leaders alluded to the possibility of resorting to force in order to overcome obstacles on the political route. The Court thus founded its decision on twelve individual acts and statements of the leaders and members or former members of REFAH[165]. Being so, three aspects should be highlighted. The first one concerns the interpretation of art. 11 at the light of art.10, and the extension of freedom of political expression to ideas that offend, shock or disturb[166]. Bearing in mind what was previously said in relation to the Right to Contribute to Political Debate (2.1.2 of this work), one can assume that more heavy reasons should be deemed necessary to justify the dissolution of a political party. The second facet I would like to point out is that the majority of the Court relied upon the fact the party leaders "did not take prompt practical steps to distance themselves from those members of Refah who had publicly referred with approval to the possibility of

[162] Before 2001 only the Commission had declared compatible with the Convention the dissolution of a political party. The first and emblematic case is the German Communist Party Case (op. cit.).
[163] REFAH, §68.
[164] A. BOCCKEL, « Le Droit Constitutionnel Turc à l'épreuve européenne. Réflexions à partir d'une décision de la Cour Constitutionnelle turque portant dissolution du parti islamique REFAH », Revue Française de Droit Constitutionnel, nº 40, 1999, p. The author explains the political background of REFAH and the context in which it was dissolved, with pertinent references to the relevant Turkish national law.
[165] REFAH, Joint Dissident Opinion of Judges Fuhrmann, Loucaides and Sir N. Bratza, p. 1.
[166] As the Court previously stated in TBKP §42-43, SP §41, ÖZDEP §37.

using force against politicians who opposed them (…) and did not dispel the ambiguity of these statements"[167]. The main question arising is to which extent can a political party as such be responsible for the individual opinions of its members and leaders. Should a party be forced to take disciplinary measures against its extremist members (as, for instance, their suspension of membership) in order to stress its distance from their political views? And if it doesn't, does it mean that it shares its views? In the *Joint Dissident Opinion*, the judges pointed out they were not convinced that "in failing to take measures against (some members of the party) or to disavow the terms of (their) speeches, *REFAH* is to be held to have adopted (their) views as their own".[168]In fact, a political party has its own personality in terms of the Convention[169] and a sanction like disbandment affects not only its extremist members but also all the others, as well as all individual supporters who share the views of that party. The third and final aspect that deserves our attention relates to the sanctions suffered by individual politicians. If certain individuals don't comply with the rules of the democratic game, for instance by making speeches that rise violence, isn't it for the State concerned to bring them

[167] REFAH § 74 in fine. In it's previous case-law Zana v Turkey (Judgement of 25 November 1997, application nº 00018954/91, published in Reports 1997-VII, also available in www.echr.coe.int), the Court had to analyse an interview given to a newspaper by the former Mayor of Dyarbakir, the most important city in the south-east of Turkey, at the time when PKK (a terrorist movement) had been performing massacres in that part of the country. The statements of Mr. Zana considered, on the one hand, "PKK (as a) national liberation movement", while going on to say that he is not "in favour of massacres" and, on the other hand ,that "anyone can make mistakes and the PKK kill women and children by mistake." (§57). The Court assessed the contradictory and ambiguious nature of those statements: "they are contradictory because it would seem difficult simultaneously to support the PKK, a terrorist organisation which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; they are ambiguous because whilst Mr Zana disapproves of the massacres of women and children, he at the same time describes them as "mistakes" that anybody could make (§58). In this regard, the Strasbourg Court considered the restriction of Mr Zana freedom of expression to be proportinate to the democratic society's legitimate right to protect itself against the activities of terrorist organisations (§55 and §62), for, due to the particular public position he held, such a speech would incite, even more, the wave of violence the country was living in.
[168] REFAH, Joint Dissident Opinion p. 6.
[169] REFAH, Joint Dissident Opinion p. 4.

before justice? In *HEP*, the Court paid due account to this fact[170]. However, in its previous decision *REFAH* that seems not to have been given that much significance. Even so, as it is avowed in the *Joint Dissident Opinion*[171]: "it is of considerable importance to note that no prosecution was ever brought against the three leading members of the party in respect of any act or statement complained of (…) while certain members of the party were prosecuted for statements made, it is notable that in all but one case the prosecution was launched after the proceedings to dissolve the party had commenced." The passages cited appear to suggest that the Court, in *REFAH,* distanced itself from its case-law concerning freedom of political expression[172], and that individual speeches of political leaders alone can serve as enough basis to provoke the dissolution of a party. However, since this decision is under appeal to the Grand Chamber, general conclusions cannot yet be drawn[173].

2.2.3 DUTY TO RESPECT THE PRINCIPLE OF NON-DISCRIMINATION AND THE PRINCIPLE OF SECULARISM

One of the main features of democracy lays in its ability to bring together the various and different perspectives by means of which each and every individual assumes he can attain his self-fulfilment in life. The mutual respect and co-habitation of

[170] HEP, §55. Conform to the original in French, it was stated that "l'incitation à l'insurrection (est) passible de sanctions pénales en Turquie. Or, à l'époque des faits, aucun responsable du HEP n'a été frappé d'une condamnation pénale pour un tel acte. (…) En l'absence d'appels à recourir à la violence ou à d'autres moyens illégaux, la thèse du gouvernement (…)ne convainc pas la Cour."
[171] REFAH, Joint Dissident Opinion, p. 3.
[172] As for instance what it established in Castells §42, against the allegation of the government that Mr Castells speech intended to incite violence (§41). Also in Piermont v France (Judgement of 27 April 1995, application nº 015773/89, 15774/89, published Series A314. Available in www.echr.coe.int), §76, the Court stressed that "a person opposed to official ideas and positions must be able to find a space in the political arena", retaking the formula expressed in Castells. While member of the European Parliament, Mrs Piermont should be able to express her political ideas in support of the anti-nuclear and independence demands made by several local parties in the French Polynesia. Notwithstanding, the Court stressed that « at no time did the MEP called for violence or disorder »(§77). It appears to be uppermost clear that freedom of political expression is to be understood in broad terms, so the expression of political ideas that shock or disturb does not amount, in itself, to a speech that incites violence.
[173] The Grand Chamber Hearing took place on the 19th June 2002, going the judgement to be delivered in a later date. See the Press Release issued by the Registrar on the Court's web site.

individuals with equally valid though opposite ideas is the core of a pluralist democratic society.

The Court several times appointed the State as the guardian of tolerance and pluralism in a democratic society[174]. Pluralism implies the free expression of the people in the choice of the legislature, being that unconceivable without the participation of a plurality of political parties representing the different shades of opinions to be found within a country's population. It intends to ensure that everybody can have a place in the political arena, despite the ideas advocated. However, there are some political parties whose proposals can contribute to discrimination and to the incitement of hatred among individuals. Because political parties are the privileged actors which can transmit their propaganda and ideas throughout the media, contributing to the formation of a collective public consciousness, should parties defending discriminatory ideas, as they represent a threat to the pluralism and mutual respect which are the basis of a democratic society, have their freedom of expression curbed on those grounds? In what follows, I will survey the ECourtHR jurisprudence concerning freedom of expression, mainly related to speeches that can be considered discriminatory, to see in which way the case-law under art 11 (as art 11 should be interpreted at the light of art 10) reflects the conclusions of the former.

In *Jersild*[175] the Court stressed the right of the media to impart information and ideas as well as the right of the public to receive them, being the role of the media as the public watchdog its most important task[176]. Consequently, the Court held the view that "the punishment of a journalist for assisting in the dissemination of statements made by

[174] Informationsverein Lentia and Others v. Austria, Judgment of 24 November 1993, application nº 00013914/88; 00015041/89; 00015717/89; 00015779/89 ; 00017207/9, published in series A-276, §38. *Mutatis mutandis* TBKP §44.
[175] Case Jersild v Denmark, Judgement of 23 September 1994, application nº 00015890/89, published in A-298. Also available in the ECourtHR web site. In this case the Court looked upon the conviction of a Dennis journalist for having aided and abetted the dissemination of racist ideas. He had interviewed a group of young people called themselves "the Greenjackets", whom during a TV interview had proffered abusive and derogatory remarks against immigrants and ethnic groups in Denmark.
[176] Ibid §31.

another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest", however, not without saying that "the remarks in respect of which the Greenjackets (the interviewed group) were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10"[177]. Regrettably, the Court didn't further elaborate about the diffusion of speeches that incite discrimination[178].

Contrarily, it is in two decisions of the Commission, the *Kühnen* and *Remer* ones, that we find clear guidelines to approach this problem. In *Kühnen*, the Commission stresses that art 10, nº2 aims at protecting the "basic order of freedom and democracy and the notion of understanding among peoples". Therefore, because the publication of pamphlets advocating the reinstitution of national socialism in Germany could revive anti-semitic sentiments among the population (as they emphasised the pride of race), the Commission considers the applicant cannot rely upon the right to freedom of expression as his "policy clearly contains elements of racial and religious discrimination"[179]. Years after, in *Remer*[180], the Commission retakes the same reasoning and concludes that when making the necessary balancing between the public interest of preventing disorder in Germany, due to the incitement to hatred against Jews, and the applicant's right to impart publications denying the existence of the gassing of Jews in the concentration camps under the Nazi regime, the restriction of the applicant's freedom of expression does not constitute a violation of art 10. Moreover, "the Commission finds that the applicant's publications ran counter to one of the basic ideas

[177] Ibid §35.
[178] Prof Sudre goes further in his conclusions drawn when analysing the Jersild case. In fact, he interpretates the Court's decision as « faire prévaloir la liberté de la presse sur les droits d'autrui à être protégé contre la discrimination raciale » (F. SUDRE, « Droit International et Européenne des Droits de l'Homme», op. cit. p.303).
[179] Kühnen, Comm. Dec., op. cit.
[180] Remer v Germany, Comm. Dec. of 6 September 1995, application nº 25096/94, published in Decisions and Reports 82-A, p. 117-125. This decision is not available on the internet. Mr Remer was a retired general author of a publication aimed at informing the German population about the "truth" regarding in particular the concentration camp in Auschwitz and condemning the government' preferential treatment of foreigners (Jewish and gypsies) towards nationals. He was criminally convicted by the German Courts. Worth of noting is also the way the Commission applies art 17 to interpret art 10, nº2.

of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination"[181]. In both decisions the Commission is very clear: the encouragement of racial hatred and discrimination justifies, in a society that sees itself as democratic, pluralist and fair, the restriction of freedom of expression of individuals standing for those ideas.

In what the collective exercise of freedom of expression by political parties is concerned, some analogies can be drawn. Political parties, much more than a single individual, can disseminate discriminatory ideas and influence in a large scale the ways of thinking and behaving of the masses. However, limitations of the right of political parties to convey their ideas throughout society seem to be subject to a more closed scrutiny on the part of the Court, for political parties are one of the pillars on a democratic society and rely on a secure base of popular legitimacy[182]. Bearing this in mind, the Court attached a very important meaning to the fact the federalist system proposed by *SP* would allow the representation of Turks and Kurds on an equal footing and on a voluntary basis[183], being that one of the main reasons to disavow its dissolution by the Ankara Constitutional Court.

In a recent case the ECourtHR had the opportunity of examining the principle of prohibition of discrimination when applied to the positions sustained by a political party. As it was previously mentioned (in 2.2.2 of this work), one of the grounds which lead to the dissolution of *REFAH* was the fact that by proposing a plurality of legal

[181] Ibid.
[182] In its Decision J. Glimmerveen and J. Hagenbeek v The Netherlands, op. cit., the Commission analysed the question of distribution of leaflets inciting racial discrimination. This case is of particular relevance for three main reasons. Firstly, though the applicants were individuals, the distribution of the leaflets was an activity aimed at expressing the views of a political party (the 'Nederlandse Volks Unie'), in which one of the applicants was president. Secondly, for the Commission interpreted art 10, nº2 at the light of art 17, to then conclude that the expression of the political ideas of the applicants (that all non-white people should be removed from the Netherlands' territory) was an activity within the meaning of art 17, and consequently the applicants could not rely on art 10 (a clear 'décheance', as previously mentioned in this work). Finally, because the applicants were also prevented from participating in the municipal elections in Amsterdam and The Hague, and the Commission dismissed itself from answering whether municipal elections were falling within the scope of application of art3, Protocol 1, as it considered that "the applicants intended to participate in these elections and to avail themselves of the above right for a purpose which the Commission just found to be unacceptable under art 17".
[183] SP §47

systems to be introduced in Turkey it advocated a societal model incompatible with the Convention for two main reasons. Firstly, because it would lead to discrimination between citizens based on their attachment to different religions. Secondly, for the separation between the State and Religious institutions conquered over the years, which characterises the content of the Principle of Secularism, had been put at stake impairing the neutrality of the policy which should be brought about by the States' institutions.

Consequently, the Chamber agrees with the Ankara Constitutional Court that the set up of a plurality of legal systems, under which society would be divided into several religious movements, would surely introduce "a distinction between individuals based on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement"[184]. On the one hand, a difference between individuals in all fields of private and public law according to their religion cannot be justified at the light of art. 14, and cannot maintain the fair balance of interests in a democratic society between the interests of certain religious groups (that want to be governed by their own rules) and the interest of a pluralist society as a whole (which requires tolerance and broadmindedness). It seems then clear that the Court transports the principles already developed in its case-law under art 10 to interpret the problem of discriminatory political speeches arising under art 11[185]. On the other hand, the Court asserts the State's role as "the neutral and impartial organiser of the various religions,

[184] REFAH §69 and §70.
[185] This is so as in REFAH the facts on which the majority of the Constitutional Court based its judgement for determining its dissolution were twelve individual acts and statements. Also the ECourtHR notes that the constitution and the programme of the party didn't have any part to play in the decision (§67).

denominations and beliefs"[186], acknowledging "the Principle of Secularism in turkey is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights"[187]. Also the *Joint Dissident Opinion*[188] highlights the importance the Principle of Secularism in Turkish society, as this country is the only one with "a substantially Islamic population which adheres to the principles of a liberal democracy", and stresses the risk to democracy which the departure from the secular ideals represent.

From the just quoted passages it seems the Court takes into account, once more, the concept of democracy inherent in the Convention to identify the duties political parties are subjected to. Democracy has thus the function of permitting the Court a creative interpretation of the Conventions' dispositions[189], in order the ECHR to be able to respond to the challenges posed by present day problems. Consequently, political parties whose ideologies do not respect the Principle of Non-discrimination and the Principle of Secularism are in contravention with the democratic system enshrined in the Convention. However the Gordian knot still needs to be untied: should these political parties be simply set away from the political arena, or can they rely on their

[186] REFAH §51. This idea of democracy as a "neutral ideology" is also studied by G. DE STEXHE ("Qu'est-ce qui est et n'est pas démocratique? La démocratie comme logique et comme projet" in *Pas de liberté pour les ennemis de la liberté ?*, Bruxelles, Bruylant , 2000, pp.111-113), who asserts that from this perspective democracy would be seen solely as a collective procedural space, regulated by an ideal of radical tolerance, of neutrality. According to the author this way of seeing democracy, if absolute, would lead to the destruction of the democratic system. Democracy should therefore be understood as,« le type de socialité qui vise à instituer ce qui signifie à maintenir une décision résolue, un projet particulier ». In conclusion, though impartial the State should not be neutral, but democratic.

[187] REFAH §52. F. RIGAUX (op. cit., pp.49-50) notes that the place religion occupies inside a State is still a controversial aspect among the European countries. Despite being in some cases only a formal controversy (as for instance the case of the UK and of the three Scandinavian kingdoms, that still have a State religion though they are deeply secularised), there are still other countries that in fact support a certain religion (as the case of Greece, where the Constitution accords a privileged status to the Orthodox Church). Consequently, the ECourtHR drew a parallel between morals and religion to say that there is no common standard among the States of the Council of Europe when the protection of religion is concerned, this allowing States a wider margin of appreciation.

[188] Joint Dissident Opinion of Judges Furhmann, Loucaides and Sir N. Bratza, p.3.

[189] M. O GUILLARMOD, "Rapports entre Démocratie et Droits de l'Homme" in *Démocratie et Droits de L'Homme, Actes du Colloque organisé par le gouvernement hellénique et le Conseil de l'Europe*, Kehl/Strasbourg/Arlington, N.P. Engel Verlag, , 1990, p. 63. The author clearly identifies the function the Convention's democratic society performs, which surely coincides with its underlying conception of democracy, as a general principle for interpreting the Convention, i.e., the source of the "fonction créatrice d'interprétation".

right to freedom of expression as long as they respect the rules of democracy to attain power? An attempt to answer this question will be the purpose of my analysis under chapter 3.

2.2.4 THE GUARANTEE OF NEUTRALITY OF PUBLIC OFFICERS

The Right to Run for Elections, previously analysed in 2.1.4, appears in the eyes of the Court as one of those rights that should be given more weight in a democratic society. Even though, this is not an absolute right. Art 11, nº2, second paragraph ECHR prescribes that "*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."* Infringements upon individual membership of political parties, hindering in some cases the possibility of individuals to run for elections, seem to be legitimate if it is at stake the preservation of neutrality of public officers. Whether or not this non-aligned status of public officers can be seen as a characteristic of the Convention's democratic society is what I will try to address in the present item.

The Commission, in its *Report Vogt*, analysed the applicability of art 11, nº2, second part and concluded that that "the applicant, as a secondary school teacher, was not a member of 'the administration of the State' within the meaning of this provision (…)The functions of the teaching profession (…) do not by definition involve the exercise of State authority".[190] Both the Commission and the Court concluded the existence of a breach of art 11, as to the national court's decision to dismiss Mrs. Vogt from her job. But the Court's conclusion was achieved not without considering the specificities of Germany's historical background. After recognising the State is "entitled to require civil servants to be loyal to the constitutional principles on which it is founded", the Court went on elaborating that the experience lived by Germany under

[190] Opinion of the Commission in Vogt, Report of 30 November 1993, published in A-323, § 88. Available in www.echr.coe.int , in annex to the Court's judgement.

the Weimar Republic was not to be forgotten, being this circumstance given "understandably lent extra weight to this underlying notion and to the corresponding duty of political loyalty imposed on civil servants"[191]. Even so, the Court paid due regard to the fact that "at the material time a similarly strict duty of loyalty does not seem to have been imposed in any other member State of the Council of Europe, whilst even within Germany the duty was not construed and implemented in the same manner throughout the country"[192]. For what has just been said, it seems that for the Court to authorise a national measure restricting membership of a political party attention should be given to the practice in other States members of the Council of Europe. This is so, as the Court's conception of democratic society stands upon a "common heritage of political traditions, ideals, freedom and the rule of law" where "are to be found the underlying values of the Convention"[193]

In *Ahmed*, the majority of the Court followed the arguments of the British government foreseeing the necessity of protecting the rights of others to an effective political democracy at local level, considering regulations restricting the participation of certain categories of local government officers in forms of political activity as a valid response. Nevertheless, the position of the Chamber about a possible violation of arts 10 and 11 of the Convention was by no means consensual (six votes to three, sustaining there was not), and a coherent explanation of the width of the national margin of appreciation was unfortunately absent[194]. In his *Concurrent Opinion*, judge De Meyer held that "people are entitled to count on the objectiveness, impartiality and political neutrality of their servants", being therefore a duty for individuals working "in public service (to) renounce 'politics', that being a restriction on their freedom of expression, freedom of association and electoral rights that is inherent in their position". The extremely

[191] Vogt §59.
[192] Ibid.
[193] TBKP §45.
[194] Worth to note is that the Commission in its opinion (Ahmed, Opinion of the Commission, Report of 29 May 1997,published in Reports 1998-IV, pp.2391-2409) concluded for a violation of art. 10 (§86), having considered unnecessary to examine separately art 11. However, this decision is not unanimous (thirteen votes to four).

opposite contention was endorsed in the *Joint Dissident Opinion*, where it was said that though it is important to ensure the neutrality of public officers, "the primary responsibility and discretion is placed on the civil servants themselves, with possibilities for corrective but not preventive restraint"[195]. From this stance, it becomes important to verify the existence of similar measures in other fellow countries of the CoE, in order to assess the necessity of such a grave restrictive measure for a democratic society. And, as it was certified by the *Joint Dissident Opinion*, "in other member States of the Council of Europe, which claim to be strong democracies as well, a regulation with similar far-going restrictions to the freedom of expression of civil servants has not been considered necessary"[196].

The Court also manifested its availability to allow certain national restrictions when the State in question is going through a democratisation process. In fact, in *Rekvényi* the Grand Chamber held (by sixteen votes to one) that the prohibition of police officers to join political parties was both lawful and necessary in a democratic society, under the meaning of art 11, nº2, second paragraph. The government alleged that the restriction in question "could not be regarded as disproportionate to the legitimate aims pursued, since police officers' right to freedom of association had been restricted *exclusively* in respect of political parties"[197]. Is it not because those restrictions are imposed exactly in respect to political parties that they should be considered disproportionate? Unfortunately, the Court only considered, under art 11, nº2, second paragraph, the question of the "lawfulness", dismissing itself from saying something about the proportionality requirement[198]. The *Dissenting Opinion* of Judge Fischbach expresses exactly this concern. As he understands it, though public servants are subject by means of their duties to an obligation of discretion (agreeing therefore with the majority's view that there was no violation of art 10), something different is the right

[195] Ahmed, Joint Dissident Opinion of Judges Spielmann, Pekkanen and Van Dijk, §5.
[196] Ibid.
[197] Rekvényi §57.
[198] Rekvény §59. The Court simply recalled the already explained reasoning to conclude there was not a violation of art 10, considering the same reasons valid for art 11 without further elaborating on this (§61).

to join a political party, which is not only "a right (but) a democratic duty, which all citizens have to hold opinions and political convictions".[199] Referring to the *travaux préparatoires*, this judge avows that restrictions to art 11, nº2 need always to be weight from the perspective of necessity in a democratic society. It is because membership to a political party appears, normally, as the necessary platform to exercise the individual right to stand for elections, that curtailing the former would consequently impair the latter.

The passages cited show that the Court is willing to take into account the political background of the State concerned (as in *Vogt*), understanding the sensitive situation of countries where a democratic regime was recently implemented (the case of Hungary, in *Rekvényi*), as well as considering the particular circumstances of a certain State when they differ from the common international context of the other members of the CoE (as in *Ahmed*). It cannot be denied the Court allows national governments a considerable margin of appreciation when art 11, nº2, second paragraph is at stake[200]. However, I feel forced to conclude that, though public officers hold special duties in virtue of their professional activities, their political neutrality cannot be considered an idiosyncrasy of a truly democratic society. Moreover, and following the opinion of judge Fischbach, I do endorse the contention that political parties' membership holds good even more so in the case of countries that just recently broke free with a totalitarian regime, as it is for them of highest importance that all citizens engage in

[199] Rekvényi, Dissenting Opinion of Judge Fischbach. A similar reasoning was stated in the Commission Opinion (op. cit.), Concurring Opinion of Mr. Loucaides, though based upon the right to freedom of expression as enshrined in art 10.

[200] This considerable margin of appreciation was also present in a Commission Decision of 1985 (Decision Van Der Heijden v The Netherlands, 8 March 1985, published in Reports and Decisions, nº41, p.264). The present case concerns a judgement of a court in The Netherlands terminating an employee's contract because of his activity in a political party whose aims were considered hostile and capable of hindering the public image of the Limburg Immigration Foundation, to which the applicant was working. The Commission confirmed that such a restriction in the exercise of the freedoms enshrined in art 10 and11 was to be seen necessary in a democratic society (p.271).

the consolidation of the democratic process, being "the future prepared for in a spirit of open-mindness and tolerance"[201].

In conclusion, and paying attention to the line of reasoning that I have been following, as political detachment of public officers cannot be understood as a characteristic of a democratic society no duty arises for political parties, in order to comply with the Convention, not to include public officers in their leadership or to present them as candidates of the party when competing in elections.

[201] Rekvényi, Dissenting Opinion of Judge Fischbach. Also Mr. Loucaides, (Opinion of the Commission, Report of 9 July 1998, published in Reports 1999-III, Concurring Opinion of Mr. Loucaides, p. 2407) is of the same opinion. He clearly states, "Times have changed. (…) There should be no distinction between more privileged and less privileged individuals. The fact that individuals enter the civil service of a country cannot be interpreted as placing them in a more disadvantageous position vis-à-vis other individuals as regard human rights. (…) This is in line with the openness of government inherent in the concept of democracy".

CHAPTER 3. DISSOLUTION OF POLITICAL PARTIES: WHAT ROLE FOR THE CLAUSE "NECESSARY IN A DEMOCRATIC SOCIETY"?

3.1 FRAMING THE PROBLEM: THE NOTION OF "DEMOCRATIC SOCIETY" AND THE ISSUE OF ANTI-DEMOCRATIC PARTIES

The control of the Strasbourg Court has been extensive in certain core areas which are essential to the proper functioning of pluralist democracies and which lie at the heart of the object and purpose of the Convention. Accordingly, restrictions that suppress the criticism by elected politicians to the executive branch of power, which limit the right to carry out a political mandate, which compel someone to join an association against his or her political will have been subjected to the closest scrutiny. On the basis of a similar reasoning, the Court has accorded little margin of appreciation with respect to restrictions on the freedom of religion of elected politicians. On the other hand, a wider measure of discretion has been left to the State when dealing with the individual right to stand as a candidate for elections. The aim of the present item is, then, to analyse what are the main guidelines, as well as the intensity of the Court's scrutiny, when dissolution of political parties is concerned.

Limiting conditions to art 11 fallow a characteristic pattern: first, they should be provided for by law; secondly, they need to be said to pursue one of the legitimate aims set forth in art 11, nº2 catalogue; thirdly, they must be "necessary in a democratic society". This last condition, for it is the one whose assessment is always more controversial, will now deserve my attention. In fact, the clause "necessary in a democratic society" appears as a supplementary condition to control the legitimacy of

national restrictions[202]. In other words, democracy is called here to perform a defensive function of the right to freedom of political association against abusive governmental restrictions, among of which the most radical one, dissolution of a political party. What I will now try to investigate is, as the Court stated that dissolution can be only justified when in presence of "convincing and compelling reasons"[203], how does it give this preposition some effect in the proportionality control of restrictions. Hence, whether the legitimacy of the State's restrictive measures stand for a question of political justification or factual necessity[204].

In what restrictions to freedom of political association are concerned, the Strasbourg Court was clear in identifying the existence of a margin of appreciation accorded to member States[205], which means that a violation of art 11 will "only be held to have occurred if national authorities have strayed outside the range of permissible

[202] P. T. VEGLERIS, op. cit., p.228. In TBKP §45 the Court held the view that "the only type of necessity capable of justifying an interference with any of those rights (art. 9, 10 and 11) is, therefore, one which may claim to spring from democratic society".
[203] For instance, in ÖZDEP §50.
[204] O. M. GARIBALDI, op. cit., pp. 33-42. The author engages in a detailed analysis of the functions the clause "necessary in a democratic society" performs in several international human rights documents. In what art 11 is concerned, I will summarise the aspects that can help in understanding the function of the clause therein. Garibaldi states that a modifier clause refers to the terms placed before it. In the case of art 11, the clause "in a democratic society" changes the word "necessary", i.e., the limitation must be necessary from the point of view of a democratic society. This is the perspective of the Court's jurisprudence, showing the case-law that the Court acknowledges the relationship between a limitation and its ends sometimes as a question of factual necessity (by referring to concrete problems democratic societies are nowadays facing) and others as a matter of political justification (by reference to principles of a democratic society that appear as a "pressing social need" to protect a legitimate interest; being one of those principles the proportionality one). However, this theory is incomplete for it does not explain the relationship the clause has with the words that are placed after it; in the case of art. 11, with the legitimate aims of "national security, public safety, prevention of disorder and crime, protection of health and morals, and protection of the rights and freedoms of others". Therefore, the author endorses the contention that the overall purpose of the clause 'in a democratic society' is best served if understood as creating "an independent, additional condition for the validity of a limitation, i.e., that the limitation, or, more precisely, the content of the limitation, be consistent with the principles of a democratic society". In this way, the clause embodies an independent requirement: it does not refer to the word *'necessary'* (does not modify the requirement that the limitation be necessary to protect a legitimate interest) but to the word *'limitations'* (it adds to the requirement of protecting a legitimate aim; it is a plus in relation to the *ends* of the limitation, for it ensures the legitimacy of the *means*). Garibaldi also highlights that, in practice, the reasoning followed by the Strasbourg institutions is not very different from his theory, for the limitations are deemed to protect a legitimate aim and, at the same time, be consistent with the principles of a democratic society.
[205] TBKP §46, ÖZDEP §44, REFAH §81, SP §50.

options"[206]. This margin, which allows States some discretion, is justified due to the lack of common standards among the members of the Council of Europe, stressing the Court the necessity of understanding the problems posed by the historical background of the country concerned[207] and respecting the Principle of Subsidiarity[208]. As for the scope of the margin of appreciation, the Strasbourg Court was unequivocal is saying that it is narrow[209]. This is so as the right to freedom of political association touches twice the core of the concept of democracy, for this right as such (protected under the auspices of art 11) requires the recognition of political parties as essential structures for the good functioning of the democratic process in a given country, and freedom of political expression (as endowed in art 10) is deemed to be essential to ensure the pluralism of ideas without which a democracy cannot be conceived[210]. Accordingly, the Court emphasises that, where the purpose of the exercise of art 11 right is to protect the applicants' right under art 9 and art10, the "limited margin of appreciation goes hand in hand with rigorous European supervision"[211]. It can, therefore, be contended that, in what dissolution of a political party is concerned, a paradox arises: on the one hand, the sanction of dissolution is justified, in the eyes of the government, by the legitimate aim of ensuring that the country's democratic character is not destroyed; on the other hand,

[206] P. MAHONEY, "Judicial activism and judicial self-restraint in the European Court of Human Rights. Two sides of the same coin", Human Rights Law Journal, nº11, 1990, pp.57-88. The author presents the doctrine of the margin of appreciation as an aspect of the judicial self-restraint of the Court, as opposed to the evolutive interpretation which is seen as a feature of judicial activism. As for the notion of margin of appreciation in the Court's case-law, the two main leading judgements in this area are Handyside (§48) and Sunday Times (Case of Sunday Times v U.K., Judgement of 26 April 1979, application nº 00006538/74 published in A-30, §59. Also available in the Court's web site).
[207] REFAH §65.
[208] HEP §51.
[209] TBKP §46, SP §50. REFAH §81. J. SCHOKKENBROEK ("The basis, nature and application of the margin of appreciation doctrine in the case-law of the European Court of human rights" in Human Rights Law Journal, vol. 19,1998, pp. 30-36) does a good systematisation of the factors that can lead to a variation in the width of the national margin of appreciation.
[210] P. WACHMANN, "Une certaine marge d'appréciation, considérations sur les variations du contrôle européen en matière de liberté d'expression", in *Les droits de l'homme au seul du troisième millénaire-Mélanges en hommage à Pierre Lambert*, Bruxelles, Bruylant, 2000, pp.1017-1042.
[211] Ibid. The very narrow margin of appreciation States are accorded under art 11, when interpreted at the light of art 10, lead some authors to doubt about the existence of such a margin (see B. DUARTÉ, op. cit., p.337). As for the width of the margin when art 9 is at stake, I recall what was previously said in 2.1.5 of this work (freedom of conscience and religion of elected politicians).

the right to freedom of political association, one of the pillars of democracy, is completely curtailed in the event of dissolution of a political party.

When the doctrine of margin of appreciation is applied to the cases brought before it, the Court uses the Principle of Proportionality to contra-balance the incertitude the use of this doctrine could lead to. In this respect, the Court tries to see if a "pressing social need" which can justify dissolution exists; such a need is assessed at the light of what can be seen as "necessary in a democratic society" [212]. Yet, the notion of democratic society does not always lead to a convincing solution, as the concept was not clearly defined by the Court, being only identified main guidelines and principles that can be said to be inherent to a society which considers itself as being democratic[213]. The nature and severity of a sanction such as disbandment is also taken into account when assessing proportionality[214]. I will now try to scrutinize what is the method the Strasbourg Court uses in order to apply these principles to the concrete cases under its jurisdiction, discussing its advantages as well as deficiencies. This analysis will essentially focus upon *REFAH* decision, for it was the judgement where the Court elaborated more upon the legitimacy of such a restriction.

The Strasbourg Court systematised in *REFAH* the two conditions a political party must respect, in order to be considered a valid partner in promoting public discussions of the relevant issues arising in a given society[215]. The first condition, of a procedural nature, requires the means the party uses to pursue legislative and constitutional reforms to be legal and democratic. That is to say the party can only attain power by way of the normal democratic elections commonly held in the country; hence, the legislative changes pursued should be approved by resorting to the normal decision-making process. The second condition relates to the content of the changes, being imperative they are compatible with the fundamental democratic principles. This last condition

[212] Gorzelik, §56 and TBKP §45 where the Court leaves no doubt when asserting that "the only type of necessity capable of justifying such interference is, therefore, one which may claim to spring from democratic society".
[213] Cf. supra 3.1.
[214] REFAH §83.
[215] REFAH §47, HEP §49.

imposes political parties to respect the territorial integrity of the State (2.2.1 of this work), the principle of non-incitement to violence (2.2.2), the principle of non-discrimination (2.2.3), the principle of secularism (2.2.3) and, more generally, that their actions don't aim at the destruction of democracy or at impairing the rights and freedoms afforded under a democratic system. In the event a political party doesn't comply with these principles it "cannot lay claim to the protection of the Convention against penalties imposed for those reasons"[216]. Worth to note is that the Court refers to penalties and not to dissolution in particular.

Accordingly, in order to assess the legitimacy of a dissolution measure, the Strasbourg Court deems essential to examine two different aspects. The first being the attribution to the party as a whole of the public positions defended by some of its members or leaders; the second the real chances a party has to implement, in a given country, a political regime incompatible with the Convention.

The Strasbourg Court compares the programme of the political party with the actions of the party and the positions it defends in order to assert whether it conceals objectives and intentions different from the ones it proclaims[217]. To accomplish this task, it becomes necessary to compare the content of the programme[218] or the party's statements with the actions of its leaders and the positions they defend taken as a whole[219]. In *TBKP* and in *ÖZDEP* the Court relied solely on the programmes[220]. In *SP* the Court scrutinised both the political programme and the speeches made by its leaders, holding the view they paid due respect to the principles of democracy[221]. Finally, in

[216] REFAH §47.
[217] REFAH §80, TBKP §58, HEP §50, SP §48, ÖZDEP §42.
[218] Which enjoys a presumption of *bona fides*. The same contention is endorsed by J-F FLAUSS in "Droit constitutionnel et Convention européenne des droits de l'homme. Le droit constitutionnel national devant la Cour européenne des droits de l'homme. Actualité jurisprudentielle 1997-1998-1999-2000", Revue Française de Droit Constitutionnel, nº44,2000, p.877.
[219] REFAH §48.
[220] TBKP was dissolved even before its activities had started (§51) and ÖZDEP had already been voluntarily dissolved by its leaders so as to avoid other sanctions arising from dissolution (§26).
[221] SP §46, §47 and §48.

HEP[222] and *REFAH*[223] it was examined the problem of disbandment mainly on the basis of political speeches made by the leaders and members of those parties. The question here at stake relates to the conditions of imputation of individual statements or actions of members and certain political leaders to the party as a whole. At this point, two observations suggest themselves. Firstly, if one acknowledges the existence of a fundamental human right to be represented in the Parliament[224], for a political party with a broad popular legitimacy[225] to be dissolved very grave and surely imperative reasons need to be invoked. Secondly, for public statements and actions of leaders and members of a party to be imputed to the party itself, in order to justify disbandment, it is necessary to show that those speeches do represent the political position of the party concerned and do constitute a serious threat to democracy. Therefore, it is deemed reasonable to require that the several speeches and actions complained for do not constitute isolated events occurring in different contexts, but represent the currently political position of the party[226]; the necessity to assess those facts in the context where they were held, to set away the ambiguity of political statements which can be used as evidence, not to take into account public positions of persons who are no longer members of the party, and not to give that much weight to statements held years before the dissolution procedure had commenced[227], seem logical guidelines for assessing the

[222] HEP §53.
[223] REFAH §67, where the Court acknowledges that the programme of the party had no part to play in the decision of dissolution. Also the 'actions' of REFAH's members (the visit of Mr. Kazan to a member of his party that was at the time in jail charged with inciting hatred, or the reception given to leaders of several religious movements) were not interpreted by the Court as imminent threats to the democratic system in Turkey (§73).
[224] M. MEDINA ORTEGA, "The right to be represented in the Parliament" in *Human Rights at the Dawn of the 21st Century- Karel Vasek Amicorum Liber*, Bruxelles, Bruylant, 1999, p. 319. See also the trend in the Court's case law under art3 Protocol 1 (Cf. supra 2.1.4).
[225] As referred in the Joint Dissident Opinion of Judges Fuhrmann, Loucaides and Sir N. Bratza, REFAH was the dissolved party with more political significance in Turkey, both due to its existence for nearly fourteen years and for its membership was, at the time, over 4.3 million people (p.1 of the Dissident Opinion).
[226] Ibid, p.3.
[227] If those statements were not object of individual disciplinary or criminal sanctions, they cannot serve to prove a trend in the attitudes of the leaders and members of the party, deemed to be disrespectful of the Convention rights.

compatibility of a dissolution with the principles stated in the ECHR[228]. Only in this way it can be contended the existence of a contradiction between the programme and the party's actions and public political positions.

As for the existence of a real possibility of a political party to implement its political views which could endanger the human rights protected under the Convention, the criteria used by the Strasbourg Court miss precision. In *REFAH*, the majority of the Chamber upheld two reasons to justify that the aims of that party were not theoretical but achievable[229]. The first reason concerns the political representation it had in the parliament; the party had nearly one third of the seats, which allowed it to strongly influence the legislation to be approved ('political representation criterion'). The second lies on the fact that, in the past, political movements based on religious fundamentalism had been able to seize political power in Turkey ('country's historical background criterion'). Notwithstanding I agree with the necessity of taking into account these two criteria, I do think the Strasbourg Court misses the core of the problem. In my opinion, a clear division should be placed between opinions and public statements of political leaders on the one hand, and proposed policy measures, public statements issued by the party, election manifestos, statute and programme of the party on the other hand. Accordingly, a difference should be acknowledged between

[228] In the Joint Dissident Opinion, each of the facts complained for is analysed in detail, only in that way being possible to establish the capacity of the evidence brought before the Court to justify dissolution. In fact, in REFAH, the division of opinions inside the Chamber is only due to the assessment of evidence, as the juridical principles applied are endowed with general agreement (see Dissident Opinion, p.1).
[229] REFAH §77. In its latest judgement, HEP, the Court also referred to the necessity of asserting a political party's real chances of installing a political system which would not be subjected to the approval of all political parties with parliamentary seat (HEP §58), regrettably without further elaborating on this matter.

opinions and activities[230], i.e., between the rights political parties are accorded which concern the exercise of their right to freedom of expression (art 11 interpreted at the light of the relevant jurisprudence under art 10), and their right to freedom of association (which falls under the umbrella of art 11, restrictions allowed if in concordance with nº2)[231]. In short, to conclude for the legitimacy of dissolution under art 11, an 'action criterion' should be fulfilled, i.e., if the statute, programme and election manifestos of a certain party are in accordance with the Convention (enjoying a *bona fides* presumption), it should be deemed essential to prove that the party has been taking steps to have approved policy measures which are, in themselves, contrary to the ECHR's dispositions.

In a way, the Strasbourg Court seems to defend the aforementioned position… though it does not draw from there all the desirable consequences. It was said in *ÖZDEP*[232] and *SP*[233], respectively, that in the absence of "*any concrete acts*" or "*concrete actions*" which could bind the parties, the penalty they had suffer (dissolution) was solely based on their right to freedom of expression, being therefore disproportionate. The same reasoning is followed in *REFAH*, for the Court takes due account to the applicants' allegation that the party did not propose any reform to the Turkish Constitution, asserting that "the content of the programme must be compared with the *actions* of the

[230] In S. Sakik, A. Türek, M. Alinak, L. Zana, M. H. Dicle and O. Dogan v Turkey (Comm. Dec. of 25 May 1995, published in Decisions and Reports, nº 81-A, 1995, pp.86-97), the Commission was faced with the problem of six ex-parliamentarians of Kurdish origin, former members of the DEP, a party dissolved by the Ankara Constitutional Court, who were convicted for terrorism. Among others, they complained for the violation of their freedom of expression, protected under art 10, as they had expressed their opinion about the Kurdish problem. Against the argument put forward by the government that "toute personne est libre d'exprimer ses idées(…) à condition que leur contenu ne porte pas atteinte à l'intégrité de l'État et à l'unité de la nation", the applicants alleged that the government was considering any opinion contrary to the official policy as an activity, without drawing a line between the concepts of 'activity' and 'opinion' (p. 96). As the application was considered, on other grounds, inadmissible, the Commission did not have the opportunity to express its views.

[231] This distinction is justified in order to probe the legitimacy of the sanctions when opinions or activities are complained for. Notwithstanding, the right to freedom of political expression is a fundamental feature without which the right to freedom of political association would have no meaning. This is why art 11 is understood as *lex specialis* in relation to art 9 and 10, being unnecessary to examine them separately (Opinion of the Commission in TBKP, op. cit., §88).

[232] ÖZDEP §42.

[233] SP §48.

party and the positions it defends"[234]; nevertheless, because the majority of the Court relies solely on the 'political representation' and 'country's historical background' criteria, putting aside the 'action criterion'[235], the dissolution measure is considered as being proportionate to the legitimate aims pursued. From the *Joint Dissident Opinion*, it also becomes clear the importance of distinguishing political opinions of individual persons from the taking of "*steps* to realise political aims which were incompatible with Convention norms"[236]. In this regard, it is the existence of any concrete action or steps undertaken by the party that can be said to represent a real threat to the democratic system in the country, and consequently, to the European public order. If no action arose, the measure of dissolution was applied so as to "prevent the realisation of the political aims which were incompatible with the Convention norms before those aims could be put into effect in a manner which compromised civil peace and the democratic system within the country"[237]. Thus, the restrictive national measure was not conveniently applied for at stake was the individual or the collective exercise of freedom of expression, to which dissolution cannot be foreseen as a sanction. Worth to note is that also the doctrine highlights the need to apply the aforementioned distinction when assessing the 'conventionality' of dissolution, in order to prevent misuses of the Convention by the State[238].

[234] REFAH §80.
[235] REFAH §80. In the Court's view, this criterion did not have any role to play for "Refah could not have been expected to include anti-secular objectives in the coalition programme, which was a political compromise reached with a political party of the centre-right". Regrettably, I cannot take the views of the Court for I consider this criterion to be the core one to assess the validity of a dissolution measure.
[236] Joint Dissident Opinion of Judges Fuhrmann, Loucaides and Sir N. Bratza, p.6.
[237] Ibid. As to the two speeches made by Mr. Erbakan advocating a multi-juridical system, the majority of the Chamber engaged in foreseeing the consequences it could lead to in impairing democracy (§69 and §70). Contrarily, the minority of the Chamber took into account that examining the effects such a measure could have was irrelevant, for there was "no evidence in the material brought before the Court that, once in Government, the party took any *steps* to introduce a multi-juridical system of the kind indicated", being therefore no genuine threat to the secular order (p.5).
[238] J. VELU and R. ERGEC, op. cit., p.139. When analysing the German Communist Party case, the authors express their concern about the way the Commission elaborated in this case. They state: "On peut se demander si un tel raisonnement, qui incrimine des professions de foi politiques plutôt que des actes intrinsèquement dangereux pour l'ordre démocratique, n'est pas de nature à favoriser des pratiques abusives".

By the same token, also the way the Strasbourg Court assesses the proportionality of dissolution in regard to the legitimate aim pursued by the government deserves critics. Being aware of the fact that the Court does not intend to substitute itself to the competent national authorities[239], and that, despite being narrow, a margin of appreciation is still accorded to them, I do believe that the Court should have had weighted the fact that other less curtailing measures could have been able to give a proper response to the problem. Though the "necessity" of a restrictive measure in a democratic society does not mean that the particular sanction should be the only one capable of protecting the legitimate aims invoked[240], it surely demands it (bearing in mind the "radical" and "drastic" nature of such measure, the importance of the right to freedom of political association for a democratic society and the seriousness of the interference, completely curtailing the right in question) to be subjected to a very strict proportionality test. As highlighted in the *Joint Dissident Opinion*, the tasks of the national Constitutional Court and those of the Strasbourg Court are quite different[241]. The task of the Constitutional Court was to see whether "the party had become a centre of anti-secular activity for the purposes of the Law on Political Parties. Having decided that it had, the dissolution of the party was mandated by the Law and the Constitution"; it was not for the Constitutional Court to assess the proportionality of the sanction or decide on alternative measures to be taken, for there were no alternative sanctions and to propose them would remain outside its sphere of competence. On the other hand, the task of the Strasbourg Court is to assess "whether the extreme measure of dissolution (…) could be considered as responding to a pressing social need and as a measure which was proportionate to the legitimate aims served". This is to say the Court does not need to consider dissolution as a valid response just because the national legislation does not provide for alternative less curtailing sanctions to approach the issue of 'anti-democratic parties' (if one can consider *REFAH* as such). In fact, the ECourtHR should bear in mind possible alternative solutions which would also be able

[239] HEP §51, TBKP §28.
[240] Handyside, §48, where the Court stated that "while the adjective 'necessary' is not synonymous with 'indispensible', neither has the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'." *Mutatis mutandis* Sunday Times §59.
[241] REFAH, Joint Dissident Opinion of Judges Fuhrmann, Loucaides and Sir N. Bratza, p. 6.

to address this problem, if a strict scrutiny is to be done. This concern is also present in the *Joint Dissident Opinion*, where the minority of the Chamber states as follows: "we cannot accept that, in terms of art 11, the blunt instrument of dissolving a party is to be seen as a genuine alternative to the taking of steps against the individual person responsible"[242].

My conclusion is, then, the Strasbourg Court needs to be more precise and better systematise the criteria it uses for assessing the validity of a national dissolution measure. Juridical security is dependent on that. It is the argument from democracy that gives support to the narrow margin of appreciation, so the defensive function of the clause "necessary in a democratic society" should be used to its full potentialities when assessing proportionality under art 11. In this regard, the issues of imputation of statements and actions of leaders and members to the party as a whole, and the existence of a real possibility for the party to implement a programme capable of destroying the democratic system, demand the strictest scrutiny from the Court. More, in order not to impair the clause to properly perform its defensive function, the Strasbourg Court is required to clearly define the contents of the criteria it uses. Despite the acknowledgement of the 'historical background' criterion, which can be considered of an accessory nature, the 'political representation' criterion needs to be read together with the 'action criterion', the latter entailing further elaboration and full application. Hence, the Court should give more weight to the legitimate aims invoked by the State when they involve a question of factual necessity, rather than a question of political justification, for only in this way abuses by the State can be prevented[243]. In doing so, the Court is forced to recognise that, for a dissolution measure to pass the proportionality test, it is imperative a political party as such had engaged in an action, taken effective steps, sought for having approved any legislative measure capable of

[242] Ibid., p.4.
[243] Though I acknowledge the issue of dissolution of a political party has an intrinsic political nature (see P. ESPLUGAS, "L'interdiction des Partis Politiques", Revue Française de Droit Constitutionnel, nº36, 1998, p. 675 and 708), I do think the question of factual necessity should be given a very important role to play.

hindering the rights setforth in the Convention; it seems difficult to envisage dissolution as a preventive measure[244]. If the party had not done so, the public statements and speeches of its members should be assessed at the light of art 10's case-law, for they represent either the individual or the collective exercise of freedom of expression. In this regard, it becomes necessary to assess if those statements remain inside the boundaries of 'ideas that shock or disturb' (tolerated in a broadminded democratic society), or constitute an incitement to violence, hatred or discrimination (being restrictive measures impinged upon the right to freedom of political expression legitimate). For all that has been said, it seems, then, difficult to conceive that a democratic society can foresee the dissolution of a party as a whole as a proportionate sanction to respond to the improper exercise of freedom of expression. The more so, if national authorities did not try to address the problem, at first, by resorting to less curtailing alternative measures, such as the individual and collective criminal prosecution[245].

3.3 STATES "POSITIVE OBLIGATION UNDER ART 11: REGULATORY FUNCTION OF THE CLAUSE "NECESSARY IN A DEMOCRATIC SOCIETY"

Along this study, I have been analysing the role the Court's conception of democracy has been playing in the protection of political parties is. A distinction between democracy as a principle and as a criterion was drawn[246]. As a *principle* democracy is understood as the political ideology common to all the member States of the Council of Europe and, thus, Contracting Parties to the Convention. Besides the founding principles of a democratic society the Strasbourg Court has been identifying in its case-

[244] Notwithstanding, on this point, the reasoning of the Court is unclear. In REFAH (§81) it was stated that "a State may reasonably forestall the execution of such a policy (…dissolution) *before* an attempt is made to implement it through *concrete steps* that might prejudice civil peace and the country's democratic regime".
[245] Alternative measures to dissolution will be further ahead analysed.
[246] Cf. supra 3.1.

law, it recently stated its definition of democracy. More, democracy is the only political ideology the Court sees as being compatible with the Convention, this meaning that some political ideologies were explicitly identified in the case-law of the Strasbourg institutions as contrary to the principles endorsed therein.

Contrarily, democracy is also used by the Court as a *criterion*[247] to assess the validity and legitimacy of the activities performed by the several Convention actors. It serves, first, to apply the ECHR to political parties and to spot the rights and duties they are accorded under its auspices. In this sense democracy is the *basis for the Court's evolutionary interpretation*, allowing it to give an interpretation of the Convention capable of responding to present-day problems. Secondly, democracy, as enshrined in the clause "necessary in a democratic society", has a *defensive function*. It allows political parties to preserve their rights against abusive interferences of the State motivated by reasons of public order. By means of this classical view of democracy (the vertical relationship political parties- State), States hold a negative obligation in the sense that they shall not interfere with the enjoyment of the right to freedom of political association protected by the Convention. Thirdly, democracy can be contended to have a *regulatory function,* for the Court uses it as a criterion to solve the conflicts arising between different protected human rights. The relationship here at stake is that between the right to freedom of political association political parties have and the "rights of others" (the community interests that, in some cases, can be classified as subjective rights). In virtue of this horizontal relationship political parties-community as a whole, some positive obligations arise to the State. What I propose is to survey the case-law of the Strasbourg Court to see to which extent it is defensible to say the State has a positive obligation to ensure the effective enjoyment of the right to freedom of association by a political party which is in a minority position. After, I will probe that States hold an obligation to search alternative measures to dissolution of

[247] The classification of democracy as a criterion for the Court's action that I will use is directly inspired in the one presented by M. O JACOT-GUILLARMOD, op. cit, pp. 60-70. Taking the author's concepts of "fonction defensive", "fonction regulatrice" and "fonction créatrice d'interprétation", I will apply them to the particular issue of political parties in order to discuss the possibility of enlarging the "fonction regulatrice".

political parties when dealing with parties that, albeit respecting the democratic process to attain power, express political views that can at some point be inconsistent with the dispositions of the Convention. Finally, and taking as example some national constitutional provisions, I will discuss the existence of a duty for the State to protect "democracy itself" and the way it can be accommodated with the issue of disbandment.

3.3.1 OBLIGATION TO ENSURE THE EFFECTIVE ENJOYMENT OF THE RIGHT TO FREEDOM OF POLITICAL ASSOCIATION BY POLITICAL PARTIES WHICH ARE IN A MINORITY POSITION

The Court understands the importance political parties have in increasing among citizens a clear consciousness of the problems society is going through, contributing therefore to the political debate by expressing the views of the different sectors of the population[248], whether these are the views of the majority or of a simple minority. Under this item I will analyse the relevant jurisprudence in order to discuss whether a positive obligation of ensuring the effective enjoyment of the right to freedom of political association arises for the States, as it would be of great importance especially for political parties that are in a minority position.

In *Young, James and Webster*[249], the Court stressed that the views of a majority should not always prevail and that the abuse of a dominant position of majorities should be avoided, in order the rights of groups that are in a minority to be protected. The Court also emphasised that pluralism is at the heart of its conception of democracy[250] and that the State is the "ultimate guarantor of the principle of pluralism"[251], imposing consequently on the State a clear duty to protect pluralism in a democratic society. As political parties are one of the vital actors in the maintenance of diversity in political

[248] TBKP §44.
[249] Young, James and Webster §63.
[250] TBKP §43.
[251] Informationsverein Lentia §38. This was stated in the context of protecting pluralism in broadcasting media.

debate[252], it seems undoubtedly that States do hold an obligation to ensure all political parties equal conditions to convey their ideas and to run for elections in equality of circumstances. The more so since the Court acknowledges the Convention is intended to guarantee rights that are not theoretical and illusory but practical and effective[253]. Accordingly, the right to freedom of political association would loose its meaning completely if the State would not be bound to ensure political parties that are in a minority the necessary conditions for the enjoyment of their right.

Bearing in mind the conclusions already drawn when analysing the content of the Right to Run for Elections (2.1.4 of this work), the Right to Contribute to Political Debate (2.1.2) and the Right to Contest the State (2.1.3) it is secure to endow the contention that either indirectly or directly the Court is committed to protect the equality of chances of political parties, paying special attention to parties that represent a minority's view. Indirectly, for instance, for the Court agrees that the purpose of restrictions on election expenditure is to secure equality between candidates[254] and, on the other hand, it strongly condemns restrictive measures on the freedom of expression of opposition political leaders[255] that clearly are in a minority. Directly, the Strasbourg Court accords political parties the right to pursue changes in the current institutional organisation of a State, being this right understood in broad terms as the Court defends a strict conception of territorial integrity (as concluded in 2.2.1). The just mentioned right is of great importance for countries where national minorities exist, as political parties which represent a minority point of view can invoke it to claim a better institutional representation of that particular sector of the population. Notwithstanding, the Court was only able to recognise a negative obligation for the contracting States not to interfere with the aforementioned rights.

[252] ÖZDEP §44, TBKP §25.
[253] TBKP §33, Golder §28 and §36(in the context of art. 6 to guarantee also the Right to a Court),.
[254] As it was the conclusion in Bowman, op. cit.
[255] For example, in the decisions Castells and Incal, op. cit.

In what the freedom to convey political ideas throughout the media is concerned, the Court took one more step in the protection of the points of view of political minorities. In the *Özgür Gündem*[256] case, the Court addressed the issue of freedom of expression of the press. However, because the content of the newspaper articles at stake related to the political position of a certain group (PKK), which the Turkish authorities classified as being a terrorist one, I will analyse this judgement in search for possible parallelisms that can be drawn with the right to freedom of political expression of political parties expressing the views of a minority.

In the first place, I will try to establish the parallelism between the roles played by the press and political parties in contributing to the political debate. The Court avowed the press has a central role in ensuring the proper functioning of democracy[257] and that the public has the right to be informed of all points of view, "of different perspectives on the situation (…) irrespective of how unpalatable those perspectives appear to the authorities"[258]. Thus, the duty of the press is "to convey information and ideas on political issues, even divisive ones", for "not only has the press the task of imparting such information and ideas (but also) the public has a right to receive them"[259]. It is because the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders that the Court clearly identifies a positive obligation for the State to protect freedom of the press, allowing it to effectively exercise the rights the Convention affords. The Court was very clear in stating that the Turkish government had failed in taking protective and investigative

[256] Case Özgur Gündem v Turkey, Judgement of 16 March 2000, application nº00023144/93, available in www.echr.coe.int . The applicant was a daily newspaper that had been subjected to attacks and harassment which lead to its forced closure and by which the Turkish authorities were directly or indirectly responsible. In the government's perspective the newspaper was an instrument of the terrorist organisation PKK which aimed at destroying the territorial integrity of Turkey by violent means. For a good analysis of the implications of this judgement see P. FONTBRESSIN, "La liberté d'expression, les obligations positives des autorités publiques et un juste équilibre", Revue Trimestrielle des Droits de l 'Homme, 2001, pp. 95-116.

[257] Özgür Gündem § 58. *Mutatis mutandis* Jersil §31, where the Court acknowledges the role of the press as the public "watch-dog".

[258] Ibid §70.

[259] Ibid §58. *Mutatis mutandis* §41 Lingens.

measures in order to ensure the newspaper's freedom of expression[260]. My question is then, as the Court states that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention"[261] and identifies political parties as one of the fundamental actors which contribute to the political discussion, do States also bear a positive obligation to ensure that all political parties shall disseminate their political positions? Though the Court didn't expressly say the State has a positive obligation to protect the freedom of expression as well as the freedom of association of political parties in a minority position, doesn't this positive obligation fall directly from the State's duty as the guardian of pluralism? Moreover, can the Court's intention to protect a minority's political position, by means of identifying a negative obligation for the State, be effective without the corresponding positive obligation be imposed upon the State?

The second problem I will now approach relates to the identification of the political groups that can rely on this governmental positive obligation. As the Court several times repeated[262], the pluralism and broadmindedness which characterise a democratic society imply that even ideas that offend, shock or disturb shall be tolerated. "That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy"[263]; because their activities form part of a collective exercise of freedom of political expression they are entitled to the protection afforded by arts 10 and 11. The same ideas of tolerance and broadmindedness were suggested in the decision *Özgür Gündem*. Albeit the government's allegation that "any positive obligation extends to the protection and promotion of the propaganda instrument of a terrorist organisation"[264], the Court clearly rejected its concerns. It stated: "The Court has noted the Government's submissions concerning its strongly-held conviction that *Özgür Gündem* and its staff

[260] Ibid §71.
[261] Lingens §42.
[262] As for instance in Özgür Gündem § 57, Vogt §52 and TBKP §43, Lingens §42.
[263] TBKP §43.
[264] Özgür § 39.

supported the PKK and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, *provide protection* against unlawful acts involving violence"[265]. The passages cited appear to suggest the Court is strongly committed to protect the freedom of political expression of political groups that are in minority, and the dissemination of their ideas through the press. Even if these groups are seen by the State as terrorists, that doesn't impair the duty the State has to protect them, the positive obligation the State bears. This reasoning of the Strasbourg Court holds good even more in the case of political parties that advocate ideas that offend, shock or disturb due to the importance of their contribution to the political debate.

Not only in relation to art 10 but also when art 11 is at stake, the Court already identified positive obligations arising for the States. In *Plattform Ärzte Für Das Leben* [266], when the Court assessed the scope of the State obligation in relation to the right to freedom of assembly, it clearly endorsed the contention that "genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11)". And this is so especially because the Court is aware of the fact that a demonstration may annoy or give offence to persons opposed to the demonstrator's ideas, trying those persons to disturb the exercise of the right to freedom of peaceful assembly. It is in such a case that a positive action of the State to ensure a successful enjoyment of the right to freedom of assembly is more needed. At this point, a question suggests itself: Is it not in respect to political parties which are in a minority, even if they stand for ideas that shock and disturb, that a positive action of the State to protect them is more required?

For everything that has been said, it seems the Strasbourg Court is strongly committed to ensure political groups in a minority position can convey their political points of view. In fact, the Court recognised the importance of each-and-all different political

[265] Ibid. §45.
[266] Plattform "ÄRZTE FÜR DAS LEBEN" v. Austria, Judgement of 21 June 1988, application nº 00010126/82, published in A139, §32. Also available in www.echr.coe.int

perspectives to have their own place in the political arena, in order pluralism in the European democratic society to be preserved. It already recognised a positive obligation arising for States under art 10 to protect freedom of political expression. More, it asserted that, in order the right to freedom of assembly enshrined in art 11 to be effectively guaranteed, States must bear a positive obligation to protect demonstrations, despite the fact they annoy or give offence to other persons. The argumentation setforth by the Court so as to identify the aforementioned positive obligation can be said to be applicable *a fortiori* to political parties. Hence, if we allow the clause "necessary in a democratic society" to perform its regulatory function to its full extent, it unquestionably falls from there that States do have a positive obligation to protect parties in a minority position from attempts of the majority to asphyxiate them. Regrettably, the Court didn't, up to now, expressly affirm the existence of a positive obligation falling upon the State to ensure the effective enjoyment of the right to freedom of association by political parties that are in a minority position.

3.3.2 OBLIGATION TO FIND ALTERNATIVE MEASURES TO DISSOLUTION WHEN DEALING WITH A PARTY WHICH RESPECTS THE DEMOCRATIC PROCESS OF ATTAINING POWER, BUT WHOSE LEADERS EXPRESS SOME POLITICAL VIEWS CONSIDERED INCOMPATIBLE WITH THE CONVENTION

In *REFAH,* the two conditions a political party must respect in order to be considered a valid partner in the pluralist democratic process of a country were settled[267]. When dealing with political parties which programmes are compatible with the Convention (the ideology of the party[268]), which respect the democratic rules of attaining power (procedural condition), and whose policy proposals respect the democratic principles setforth therein (substantive condition), the Court concludes that their right to freedom of association cannot be put at stake. On the other hand, if a political party

[267] REFAH §47, HEP §49. A procedural and a substantive condition, as mentioned in 3.2 of this work.
[268] See what ideologies the Strasbourg Institutions considered incompatible with the Convention in 3.1 of this work.

respects the democratic game, has a democratic programme, did not put forward any proposal of legislation that could be deemed anti-democratic, but whose leaders have expressed some political opinions that can be contended discriminatory or able to incite violence or hatred among the population, a restrictive national measure needs to pass the proportionality test of art 10, nº2[269]. Finally, if the Court is faced with a political party that respects the procedural condition, holds a democratic political programme, but whose members had put forward statements as well as engaged in actions which, as a whole[270], can be said to be in contradiction[271] with the objectives of the party as endowed in the political programme, a question of imputation arises. In this regard, it becomes indispensable to prove that those speeches and actions represent, in fact, the intention of the party itself to implement a political regime aimed at hindering the rights protected by the Convention. After that being proved, it is time to examine whether the party has real chances of putting into practice the policies it advocates, for only then, it can be contended it constitutes a threat to the democratic order of the State and, consequently, to the European public order. It is in this respect that the 'historical background', the 'political representation' and, especially, the 'action' criteria are given a role to play[272].

Consequently, the regulatory function of the clause "necessary in a democratic society" is called to perform its function. The role of the State is to weight the different and sometimes opposite interests arising in society, assessing how they should be conciliated in the way that better responds to the necessities of a democratic society. On the one hand, there is the right to freedom of political association (which endows freedom of political expression) political parties are accorded, despite the views they advocate and the particular sharp and sometimes even offensive language they use. On

[269] For at stake is the individual or, if it is possible to impute those statements to the party as a whole, the collective right to freedom of political expression. In this regard, it becomes important to bear in mind the Court's case-law concerning freedom of political expression, and the strict scrutiny restrictive national measures are subjected to. *Mutatis mutandis*, SP §48 and ÖZDEP §42.
[270] REFAH § 48.
[271] ÖZDEP §42, HEP §50 , SP §48.
[272] See how those criteria are applied by the Court in 3.2 of this work.

the other hand there are the interests (or even rights[273]) of certain individuals or groups that can feel discriminated by certain political speeches[274]. This conflict of interests leaves behind the traditional conception of human rights, as rights that protect individuals from the States' abusive interference (the so-called vertical relationship), to address the problem from the perspective of the relationship between two individuals (an horizontal relationship), who are holders of rights or interests protected under the Convention's aegis[275]. Though the Convention doesn't have application between private parties (direct horizontal effect), it can be contended the State holds a positive obligation to protect the rights of individuals from unlawful interferences of other private persons (indirect horizontal effect)[276]. In fact, it can be

[273] O. DE SHUTTER, op.cit. The author takes into hands the analysis of the conflicts arising between the right to freedom of expression of political parties and the right of individuals or groups to whom those speeches cause suffering. He highlights the rights of the victims of those discriminatory speeches, trying to find a "collective right of being protected against speeches that incite hatred", a truly subjective right that would at the same time demand a positive obligation from the State. Departing from the rights stated in the ECHR, the author identifies *de lege ferenda* four possible sources of that positive obligation: art.3 (the fact that racial discrimination can constitute a inhuman and degrading treatment), art 10 (as an environment exempt of this type of speech would be the only one where all individuals could valuably express their identities without feeling the pressure of a permanent censorship), art 8 (if an individual belongs to a group that is object of social censorship, that would damage his reputation) and art 14 (the fact that there is no protection against the negative image that is being conveyed about a certain group to which an individual belongs to, constitutes in itself a discriminatory treatment, due to the negative social stereotype it creates).

[274] If we take into account the public speeches of the different leaders of the several extreme right-wing political parties currently in the European political arena, we can easily deduct that their anti-immigration ideas (as for instance in Austria where the FPÖ -Austrian Freedom Party-defends action against the "invaders" Czechs, Hungarians and Slovenes or, in France, the National Front -FN), their discriminatory political proposals (in Belgium the Vlaams Blok –VB- has been defending that the possessors of a Flemish nationality should be accorded a principle of preference in receiving social support) or even their anti-ethnic advertisings (in the Netherlands The Liste Pim Fortuyn –LPF-, whose charismatic leader was recently murdered, stands for closing the doors to immigration and strongly opposes the "islamisation" of the society) can certainly interfere with the interests of some societal groups which are in a minority position. See a summary of the different political programmes in P. PERRINEAU, "L'Europe d'extrême(s) droit(s)" in Le Nouvel Observateur, 13-19 June 2002, pp. 14-22.

[275] P. DE FONTBRESSIN, « L'effet transcendantal de la Convention européenne des Droits de l'Homme » in Mélanges en Hommage à L.E.Pettiti, Bruxelles, Bruylant, 1999, pp. 231-249. The author holds the view that more than the vertical and horizontal effect, there is a new transcendental effect of the Convention, given by the common understanding of States and individuals of their common purpose in a universal society.

[276] D. SPIELMANN, "Obligations positives et effet horizontal des dispositions de la Convention" in *L'Interprétation de la Convention européenne des Droits de l'Homme*, Droit et Justice, nº 21, 1998, pp. 151-168. The author explains the interest the German theory of *Drittwirkung* can have in the interpretation of the ECHR, stressing the differences between direct and indirect horizontal effect to then put forward the arguments to the horizontal application of the Convention.

argued the State bears the primary obligation[277] to enact legislation capable of preventing private individuals from violating human rights. In other words, the States' responsibility then comes not only from an "active interference" in the rights of individuals but also from a "passive interference"[278], in the sense that the State's omission leads to a violation of a certain right or because it is due to this omission that the violation of a protected right by a private individual is tolerated at national level.

The Strasbourg Court already declined to develop a general theory of positive obligations which may arise from the Convention[279]. Even though, it identified the guidelines to be fallowed in order to spot whether a positive obligation for the State exists. In *Özgür Gündem*[280], it asserted that " regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is called for throughout the Convention". It is thus in the general interest of the community that the State holds the duty to enact legislation capable of balancing the contradictory interests of individuals or groups in order to provide for a just equilibrium. And such an obligation seems not to "impose an impossible or disproportionate burden on the authorities"[281]. Positive obligations appear in the Court's case-law due to its concern of ensuring the effectiveness of the rights protected and to give the Convention a dynamic interpretation[282]. They don't represent an extensive interpretation of the rights setforth in the Convention, as that

[277] Ibid. p.170. The author distinguishes between primary obligations for the State (enactment of substantive legislation capable of addressing human rights violations) and secondary obligations (the obligations aimed at run effective the primary ones, as for instance the availability of procedural guarantees whereby substantive human rights could be invoked before a court). Both are positive obligations, i.e., obligations of active protection.
[278] F. SUDRE "Les obligations positives dans la jurisprudence européenne des droits de l'homme", op. cit., pp. 363-384..
[279] Plattform "ÄRZTE FÜR DAS LEBEN §31.
[280] Özgür Gündem §43.
[281] Ibid. The Court retakes the formula already defined in the case Rees v. the United Kingdom, Judgment of 17 October 1986, application nº00009532/81, published in Series A no. 106, § 37. This decision is also available in www.echr.coe.int .
[282] F. SUDRE, "Les obligations positives dans la jurisprudence européenne des droits de l'homme", op. cit., pp. 363-384. A more recent version of this article can be found in Protecting Human Rights. The European Perspective. Studies in memory of Rolv Ryssdal, op. cit., pp1359-1376. The author analyses in depth these "obligations prétoriennes".

would impose new obligations upon the States[283]. Positive obligations arise by way of transforming a negative formulation of a right into a positive one or because the Court acknowledges them to be inherent to a certain right as that is the only way of ensuring its effectiveness[284].

In what political parties disbandment is concerned, what I propose to show is that a convenient interpretation of the relevant case-law at the light of the overall spirit of the Convention makes possible to defend the existence of a positive obligation for the State in finding alternatives to dissolution. The Strasbourg Court repeats along its case-law that "a dissolution of a political party (…is) a drastic measure and that measures of such severity *might* be applied only in the most serious cases"[285], implying this that "only convincing and compelling reasons can justify"[286] this type of restriction. Moreover, it also takes the stance that only when there is a real threat to "democracy itself"[287] can dissolution be envisaged as a valid response. The Court tries, thus, to assure the essence, the core, of the right to freedom of political association[288] remains untouched. Accordingly, what should a State do when dealing with statements of political leaders which seem capable of inciting violence or hatred among the population? What should the State's adequate response be when dealing with a party which advocates, by democratic means, policy changes that can hinder the enjoyment of some rights enshrined in the Convention? The State certainly cannot immediately

[283] Golder §76.
[284] Rees §35 and Cossey v UK, Judgement of 29 September 1990, application nº 00010843/84, published in A184,§37, also available in the Court's web site. Both cases relate to positive obligations inherent in art 8 of the Convention.
[285] REFAH §82. *Mutatis mutandis* SP §51. The radicalism of dissolution was highlighted in HEP §61. See also Selim Sadak § 38 where the Court asserts the heaviness of dissolution due to the indirect effects it has.
[286] ÖZDEP §44, TBKP §46.
[287] HEP §60, ÖZDEP §46.
[288] P. T. VEGLERIS, op. cit.,p.221. The author refers to the "Wesengehaltsgarantie" or "garantie du noyau essentiel" of a right, developed under the German Constitutional theory, which the ECourtHR applies in order to preserve the essential elements or the normal exercise of a right against abusive restrictions.

resort to dissolution as a valid sanction (as the Court emphasised), but it also cannot remain indifferent[289].

Other arguments, drawn from the Convention itself and from the relevant European legislation, seem to point to the existence of that positive obligation. The first relates to art 1, which imposes on the State a positive obligation of securing to everybody within its jurisdiction the rights and freedoms the Convention defines[290]. The Court of Strasbourg already acknowledged this positive obligation[291], retaking its previous reasoning in *REFAH*[292] in order to assert that the State is the responsible for establishing the rules which allow all individuals the enjoyment of the rights the Convention affords, consequently stressing the necessity of legislation to find a balance between divergent interests. More, the Principle of Useful Effect[293], one of the devices the Court uses, is the basis for the recognition that a positive obligation is inherent to the Convention system, for it is necessary to the effectiveness[294] of the right to freedom of political association. Also the Venice Commission, in its 5th Guideline on Prohibition and Dissolution of Political Parties[295], expressly says that because dissolution is a far-reaching measure, it should be used with utmost restraint. Purposely, it holds that if there are other measures which could remedy the situation, they should be envisaged. Hence, the General Assembly and the Committee of Ministers of the Council of Europe, aware of the danger for a democratic society of the use in politics of racist and

[289] This contention is endorsed by several authors. See on this problem the several contributions in « Pas de liberté pour les ennemis de la liberté ? », op. cit.
[290] This disposition points in the same direction as art 3 of the Statute of the Council of Europe.
[291] Young, James and Webster §49, where the Court held the view that « the responsibility of the respondent State for *any resultant breach of the Convention* is thus engaged on this basis ». A broad responsibility for the State is thus envisaged. Also Airey v Ireland, Judgement of 9 October 1979, application nº00006289/73, published in A32, §25,also available in the Court's web site.
[292] REFAH §70.
[293] O. JACOT-GUILLARMOD, op. cit., p. 49.
[294] As F. SUDRE notes is this theory of inherence, based upon art 1, that allows the Court "la possibilité de faire jouer la théorie des obligations positives *pour tout droit* et confère à celle-ci *un champ d'application général*"(« Les obligations positives dans la jurisprudence européenne des droits de l'homme », op. cit. , p.368).
[295] European Commission for Democracy through Law (Venice Commission), "Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures", op. cit.

xenophobic propaganda, adopted legislative measures in order to prevent breeding grounds for extremist parties and movements from developing inside the European borders[296]. In all those proposals the banning of a political party seems difficult to be regarded as a commendable "democratic strategy" on account of its heavy nature; notwithstanding, the necessity for a democratic society to take certain measures of a preventative or repressive nature to protect itself against threats to the very values and principles on which that society is based is explicitly admitted. My conclusion, then, is because the Strasbourg decisions demand to be interpreted at the light of the overall policy of the Council of Europe, as it refers to the political compromises the State undertook, compliance with both judicial and legislative directives require the State to adopt legislation capable of addressing the problem extremist political parties represent to the "European public order"[297].

I will now focus on the scope of this positive obligation. The Convention creates on national legislators the obligation to adopt norms which contribute to the complete realisation of the rights enshrined therein. Because the positive obligation arising for States is an obligation of means and not of result, they are accorded a large margin of appreciation as to the choice of the means available to comply with it[298]. In this regard, alternative measures to dissolution such as the prior resort to criminal prosecution of

[296] See the General Assembly Recommendation 1438 (2000) "Threat posed to democracy by extremist movements and parties in Europe"; General Assembly Directive 560 (2000); Council of Ministers Communication of the 21 January 2000; General Assembly Document nº 8607; Final Activity Report of the Group of Specialists on Democratic Strategies for Dealing with Movements Threatening Human Rights (DH-S-DEM), 5-7 May 1999. All documents available in www.coe.int .

[297] The ECourtHR sustains the Convention, at the light of the Preamble, creates objective obligations for the States which benefit from a "collective guarantee system" enshrined in art 1, as opposed to the traditional conception of international law treaties based upon the principle of reciprocity (Case Ireland v UK, Judgement of 18 January 1978, published in A-25, §70. Also available in www.echr.coe.int). See particularly on this topic the study of J. ANDRIANTSIMBAZOVINA, "L'élaboration progressive d'un ordre publique européen des droits de l'homme", in Cahiers de Droit Européen, nº 5-6, 1997, pp.655-739.

[298] Plattform 'Ärzte für das Leben' §34. See the critics on this point in D. SPIELMANN, op. cit., p.148.

party leaders[299], limiting the financing of parties which defend discriminatory policies[300], restricting their access to the radio and television[301], forbidding parties to run for elections[302] or establishing a maximum number of seats those parties can have in the parliament[303] will be *a posteriori* submitted to the control of the ECourtHR. In fact, the compliance with both negative and positive obligations is assessed in respect to the principles of margin of appreciation and proportionality[304]. As the purpose of both obligations is to achieve equilibrium between the rights of political parties and the

[299] See the French example: the convictions of Mr. Le Pen (the political leader of the National Front- NF) due to incitement to hatred, discrimination and racial violence (Judgement of 16 November 1987, Tribunal Correctionnel de Paris), challenge of crimes against humanity (Judgements of 18 December 1991 and 26 December 1997, Cour d'Applel de Versailles) and racist speeches (Decision of the Cour de Cassation, Judgement of 10 April 1998). Also Mrs. C. Mégret, 'maire' NF of Vitrolles was convicted for complicity in incitement to racial hatred (Judgement of 9 March 1998,Cour d'Appel d'Aix-en-Provence) as well as Mrs. C. Le Chevallier, maire of NF of Toulon, who was convicted on the basis of discrimination of political opinions (Judgement of 6 April 1998, Tribunal Correctionel de Toulon). These examples are taken from P. ESPLUGAS, op. cit., p. 699.

[300] Taking into account the Belgium example and the Decision of the Cour d'Arbitrage, Judgement of 7 February 2001, nº 10/2001. For the arguments *pro* this solution see M. VERDUSSEN, "Le financement public d'un parti raciste est-il légitime dans un État démocratique ?", in Revue Trimestrielle des Droits de l'Homme, 2001, pp.649-663. It is worth to refer two arguments sustained by the author. First, the fact that depriving a political party of public financing does not affect directly or indirectly its identity as a political party (which is not the case if resort to dissolution is foreseen). Secondly, for this measure affects a *droit-créance* guaranteed by ordinary law and not the freedom as such enshrined in the Constitution and the Convention.

[301] The Irish Law on radio and television, of 1972, had been forbidding the Sinn Fein (the political legal supporter of IRA, until 1994, from acceding to radio and TV in order to divulge its political ideas. As P. ESPLUGAS (op. cit., p.678) underlines, such a measure creates quite a contradictory political situation, for the candidates of that party can stand for elections but are not allowed to express their political views on the media.

[302] This is the solution envisaged by the Israelian Constitution of 1958, expressed in the Fundamental Law of the Knesset (national parliament). Section 7a Prevention of Participation of Candidates List, states as follows: "A candidates' list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as the state of the Jewish people; (2) negation of the democratic character of the State; (3) incitement to racism." The dispositions of the Israelian Fundamental Laws are available in www.constitution.org/cons . For the critics to this solution see P. GÉRARD, "La protection de la démocratie contre les groupements liberticides" in *Pas de Liberté pour les ennemis de la liberté ?*, op. cit., p. 98.

[303] In favour of this alternative solution see P. GÉRARD, op. cit., p.100. According to the author, this would have the advantage of not excluding *a priori* political parties from the electoral process, giving at the same time the possibility of limiting their influence inside national parliaments. However, one can claim that such a solution would be a source of frustration for the electorate, in the sense that they know in advance their votes would not be given the corresponding representation inside the official institutions.

[304] Özgür Gündem, §43. The Court explicitly says that " the scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States".

interests of society as a whole, it seems desirable harmonisation in controlling States compliance[305].

Albeit the judgements of the Court are merely declaratory, compliance of the State part to it is obligatory[306]. Notwithstanding, the fact the Court doesn't address the problematic issues *in abastracto,* remaining inside the borders of the concrete case under discussion, doesn't impair the judgement to also be binding upon other member States of the Council of Europe. This is so as the decisions of the Court, while interpreting the Convention dispositions, acquire a force of its own[307]. Consequently, a positive obligation for all States party arise, in the sense they should harmonise national legislation with the Court's judgements if they want to avoid it to be subjected, in the near future, to the Court's remarks.

In sum, the trend in the Strasbourg Court's case-law requires all States to think of alternative legal measures to political parties dissolution, if they want to avoid their national legislation to be challenged before the ECourtHR as well as being subjected to public political disapproval by the Committee of Ministers of the Council of Europe.

3.3.3 OBLIGATION TO PROTECT "DEMOCRACY ITSELF"

The aim of the present item is to confront two opposite views which try to explain the role the State ought to play in order to protect the pluralist democracy enshrined in the

[305] F. SUDRE, "Les obligations positives dans la jurisprudence européenne des droits de l'homme", op. cit., p.33. The Court, in Özgür Gündem, was clear in saying that the "genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, *even in the sphere of relations between individuals*" (§43).
[306] I. CABRAL BARRETO, "A execução dos acórdãos do Tribunal Europeu dos Direitos do Homem ao nível interno", to be published in Estudos em Homenagem ao Conselheiro Arala Chaves, Lisboa. The author explains this binding force resorting to principles of coherence (with the international obligations States assumed under the Convention), coordination and cooperation (as guiding principles of the relation between member States party to the Convention) and "democratic constitutionality" (the position the Convention holds in the hierarchy of norms, i.e., standing at constitutional or, at least, supra-legal level).
[307] Ibid. In this sense the author quotes Rolv Ryssdal, who holds the contention that the interpretation of the Court, when defining the scope of application of the Convention dispositions, should be considered as a clarification of the its contents, being therefore imposed on States obligations not directly arising from the judgements but from the Convention itself.

Convention. With the purpose of taking a stance, the regulatory function of the clause "necessary in a democratic society" will be taken into account. After, the sources of a positive obligation to protect "democracy itself" will be identified at the light of the relevant case-law of the Strasbourg Court. Finally, so as to identify the content of that positive obligation, a comparative constitutional law analysis will search for a common standard among the member States, in what the disbandment of political parties is concerned, with the aim of helping illuminating some ambiguous passages in the Court's case-law.

The liberal conception of democracy, that was already pointed out as being the one endorsed by the Court[308], requires the State to refrain from intervening with the enjoyment of the right to freedom of political association. Only in this way the State would guarantee neutrality with regard to different political opinions, by not taking the side of any of the conflicting views. By allowing the political discussion to take place in the public space with the contribution of all the relevant participators, the State would give the grounds for the collective social and political search of the "common good", of the values of justice that ought to guide a particular society. By means of the so-called "communicative reason", different actors (individuals, associations, pressure groups, political parties) would argue their different normative claims, reciprocally trying to convince their partners, and the ideas based on stronger arguments and deep convictions would set aside the less susceptible of justification and, thus, more fragile ones. A consensus would then be reached, based on the recognition or rejection of validity claims and their underlying arguments. In this communicative action the procedural aspect, the respect of the procedural rules of democracy, prevails[309]. This same idea has also been expressed in the American jurisprudence in relation to freedom of expression under the metaphor of "free marketplace of ideas", a transposition of the

[308] Cf. supra 3.1.

[309] This view is in essence the one presented by the German philosopher J. Habermas in his Communication Theory. A good explanation of the basics of Habermas's legal theory can be found in D. MEUWISSEN, "Reflections on Habermas's Legal Theory and Human Rights" in *Protection of Human Rights. The European perspective. Studies in Memory of Rolv Ryssdal*, op. cit., pp.905-920.

neo-classic political economy conception[310]. Under the aegis of such a conception of democracy, freedom of political expression should be exercised to its full extent and, *a fortiori*, freedom of political association due to its crucial role in a democratic society, dismissing the State itself from any kind of intervention.

An opposite view would demand from the State a more active role in providing for the legal and material conditions for the individual enjoyment of rights. Conversely, the State would be called to take positive measures in order to harmonise the conflicting interests of various individuals and groups, to secure that in the societal space all opposite political views are granted an equal treatment, avoiding majorities from overstepping the interests of minorities. This governmental interventionism would be justified under the legitimate aim of "protecting the rights of the others", in order to ensure an environment of security and material justice where all individuals would find themselves in an equal position to put forward their ideas. Consequently, claims for protection of the interests of minorities, positive discrimination actions or State's financial assistance would be seen as valid ones. However, States' intervention in the enjoyment of fundamental rights is not as safe as it seems at first sigh. In *Ahmed*[311] it was highlighted "the risk of that notion (protection of the rights of others) being stretched so far as to lose almost all distinct meaning if it is held to cover 'rights'", i.e., if a State restrictive action is aimed at protecting a given right it is better it is not that said action the responsible for completely curtailing the right it seeks to protect. In what political parties are concerned, the main dilemma is whether, in recognising a positive obligation for the State in protecting the freedom of political debate of all political parties, one is not according anti-democratic parties the right to a positive action of the State to protect them. In fact, if one carefully reads the Court's judgement

[310] This idea was introduced in the American jurisprudence in 1919 by judge Holmes. As in the economic field, also in the political one (or, more precisely, in a pre-political field, as the ideological debate would be placed in the social sphere itself) the State would be absent, only in this way the exercise of the citizens' autonomy being guaranteed. For a complete description of the theory see O. DE SCHUTTER, op.cit.
[311] Joint Dissident Opinion of Judges Spielmann, Pekkanen and Van Dijk.

in *Özgür Gündem*[312] one can legitimately fear the State duty to protect freedom of political speech is pushed too far, opening the door to the misuse of the freedoms enshrined in the Convention by anti-democratic parties[313]. Also in the context of art 17 some authors expressed the concern that, by given it horizontal application, certain extremist political groups could claim the respect of their rights against concurrent rights of other individuals or groups[314]. Thus, this disposition which is intended to be used in order to ensure the good functioning of the democratic institutions, as the necessary condition for human rights to be respected[315], would lose completely its meaning. As the Strasbourg Court already acknowledged, there is always the danger legislative measures may pose of "undermining or even destroying democracy on the ground of defending it"[316].

In order to balance the perspectives just described, I shall resort, once more, to the clause "necessary in a democratic society" and to its regulatory function. As it was previously mentioned[317], the State has the duty to find the equilibrium between the interests of anti-democratic political movements and the interests of society as a whole, "the rights of others". If the State doesn't address the possible conflicts that can occur by means of enacting effective legislation, it can be held responsible for individual human rights violations by private parties under the Convention (the so-called indirect horizontal effect). In accordance, I shall suggest that when dealing with

[312] Özgür Gündem §43.
[313] P. DE FONTBRESSIN, op. cit., pp. 110-111. The author stresses the paradox of the States' positive obligation as pointed out by the Court, and expresses his fear that protection can be claimed by press organs disseminating racist and negation's ideas as well as by extremist political parties. He goes, in my opinion, a little bit too far in invoking the Saint Just formula "pas de liberté pour les ennemis de la liberté".
[314] S. VAN DROOGHENBROECK, op. cit., p. 562. The author endorses the contention that introducing a 'décheance' when art 17 is applied to relations between private parties would open the door to an anarchist privatisation of the Convention. In his opinion, combating activities of 'liberticides' should remain a task for the public authorities, in the sense of the prerogatives and duties they have. In short, a positive obligation for the State is foreseen.
[315] A. SPIELMANN, "La Convention européenne des droits de l'homme et l'abus de droit" in *Mélanges en hommage à L. E. Pettiti*, Bruxelles, Bruylant, 1998, p.681.
[316] Case Klass and Others v FRG, Judgement of 6 September 1978, application nº 00005029/7,published in A-28, §49. Also available in the web site of the ECourtHR.
[317] Cf. Supra 3.3.2.

political parties which represent a clear danger for democracy (by way of the policies they try to implement -the 'action criterion'-, because they have enough parliamentary representation to make them be approved- the 'political representation criterion'- assessed at the light of the political background of the country- the 'historical background criterion') the State is under an obligation to protect "democracy itself"(the democratic institutions of the country). What I propose to show is that this contention is legitimate if one reads the case-law of the Strasbourg Court at the light of the overall spirit of the Convention.

In *Vogt* the Strasbourg Court was sensitive to the argument put forward by the government as Germany should be a "democracy capable of defending itself", extra weight being given to this argument due to the historical experience of the country[318]. More recently, in *REFAH*[319], the Turkish government invoked the notion of 'militant democracy', i.e., a democratic system which defended itself against all political movements that sought to destroy it. This notion, born due to the experiences in Germany and Italy between the wars for the fascist and the national-socialist movements had come to power after more or less democratic elections, seems to have been accepted by the majority of the Chamber[320]. Contrarily to the Court's discrete attitude, the decisions of the Commission seem much more willing to identify a duty for the State to protect democracy against assaults of anti-democratic political parties. Accordingly, the Commission's decision declaring inadmissible the application lodged by the *German Communist Party* by means of invoking art 17 of the Convention is quite a clear example[321]. Hence, in its decision *A. Association v Austria*[322] the Commission leaves no doubt about the existence of a positive obligation for the State. When assessing that the restrictive governmental measure was justified in order to avoid the

[318] Vogt §54 and §59.
[319] REFAH §62.
[320] The Court was careful in stating 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" (REFAH §81 *in fine*). A question that imposes itself is whether the State, when at stake is a threat to democracy itself, *must* (and not simply *may*) take appropriate measures to combat that threat.
[321] German Communist Party, op. cit., p. 222.
[322] A. Association v Austria, op. cit., pp. 192-193.

proposed meeting to be used as a platform to activate a policy against Austrian independence and separation from Germany, the Commission states that " the invocation of this principle (principle of self-determination), in relation to the applicants' activities as a political party in Austria, can only mean that they don't accept that the Austrian people have already exercised their right to self-determination by proclaiming an independent Austrian State(…)To prohibit activities aimed at changing this situation is both an *international obligation of Austria* and a requirement of its domestic legislation".

Democracy appears to be, in the eyes of the Court, an imperative feature of the European public order. This becomes clear when analysing its case-law relating to freedom of political expression and to freedom of political association[323]. Accordingly, and for a question of coherence, an obligation to protect democracy itself arises for the State directly from the notion of European public order[324]. As already mentioned, the notion of European public order read together with art 1 of the Convention seems to indicate the State holds the duty to combat all attempts to hinder the democratic order, attempts which would prevent all individuals from equally benefiting from their human rights. By the same token, the Court acknowledged the intrinsic relationship between human rights, democracy and the rule of law, stressing the fact that "the rule of law cannot be sustained over a long period if persons governed by the same laws do not have the last word on the subject of their content and implementation"[325]. Notwithstanding, the Court asserts a prohibition for individuals to alienate their own rights, to renounce the guarantees the Convention affords them. After having introduced this idea in the context of other Convention dispositions[326], the Strasbourg

[323] See, for instance, Selim Sadak §32, Ahmed §52, HEP §47, TBKP §45.
[324] C. PICHERAL, *L'Ordre Public Européen. Droit commun et droit européen des droits de l'homme*, Paris, La Documentation Française, 2001, pp.345-348. The author establishes a direct link between positive obligations, European public order and democracy. According to her, "Les obligations positives peuvent ainsi accréditer l'image d'un ordre public européen(…) Le fait qu'elles représentent un adjuvant à l'effect horizontal de la Convention y contribue d'ailleurs. Inversement, l'ordre publique européen, centré sur les responsabilité d'un État démocratique, leur offre un fondement concevable."
[325] REFAH §43.
[326] C. PICHERAL, op. cit., p. 268. The author analyses the problem from the point of view of art 5.

Court recently transposed it to the domain of freedom of political association. It endorsed the contention that "there can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious", going on elaborating that "the State has a positive obligation to ensure everyone within its jurisdiction enjoys in full, and *without being able to waive them*, the rights and freedoms guaranteed by the Convention"[327]. The passages cited lead me to the conclusion that the positive obligation enshrined in art 1, together with the duty the State has to preserve and protect the European public order, contribute both to the imposition upon the State of an obligation to take measures in order to avoid democracy itself to be put at stake, even if that is the will democratically expressed by the majority of the population[328].

The European countries have a common heritage of political tradition, values and ideas that should be designed to promote and maintain the values of a democratic society, as it is affirmed in the preamble of the Convention[329]. As the Court several times referred, the enjoyment of individual rights identified as the foundations of a democratic society is the indispensable condition for each individual's self-fulfilment[330]. In the opinion of some authors, the fact that restrictive national measures are submitted to the test "necessary in a democratic society" does not create for the States party to the Convention the obligation to be or to become democratic[331]; however, if a State loses its democratic features it seems difficult to foresee that it can continue to accomplish with the political compromises it assumed under the Convention's auspices. For that reason,

[327] REFAh, respectively, §43 and §70.
[328] It is worth to remember what the Court pointed out in Airey §25: " the fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and 'there is … no room to' distinguish between acts and omissions".
[329] See the same understanding in the Court's case-law, for instance, in TBKP §45, REFAH §45, HEP §47.
[330] Özgür Gündem §57. In there the Court speaks in relation to freedom of expression.
[331] O. M. GARIBALDI, op.cit, p.27. The author refers to the human rights instruments in general. He does not say that States do have the obligation of being democratic, but he acknowledges that if they ought to be democratic it is by virtue of the instrument as a whole and not of the clause itself.

as the Court already indicated, democracy is undeniably a feature of the European public order. From the stance of some other doctrine, it is defensible the existence of a human right to democracy that has been implicitly recognised in the Court's case-law[332]. I would prefer to uphold the distinction between "human rights" (i.e., the subjective rights that are justiciable and enforceable before the Court) and "human (rights) principles" (i.e., the political and moral principles underlying the Convention which require the State to adopt policies aimed at their effective realisation)[333]. If one takes into account this differentiation, one can surely see democracy as a fundamental principle which imposes on the State the obligation to enact legislation capable of ensuring that the democratic character of political and civic institutions is not hindered[334].

In view of everything that has been said, it seems unquestionable the duty the State holds to protect "democracy itself". The problem of defining the scope of that positive obligation is, unfortunately, much more complicate. In fact, when dealing with anti-democratic political parties, the several members of the Council of Europe don't have a common approach[335]. Due to that, it becomes difficult to talk about the existence of a common standard. In fact, several national Constitutions include dispositions authorising the disbandment of political parties, something that can be also explained

[332] M.O. JACOT-GUILLARMOD, op. cit., pp. 70-71. The author talks about the recognition of a truly subjective right to democracy. From his perspective, the requirements of the "democratic society" are felt not only when the Court deals with rights that are subjected to that particular clause, but when it has to apply any material disposition of the Convention. In the latter, the clause appears as an implicit guarantee justified at the light of the preamble of the Convention read together with the preamble and art 3 of the Statute of the Council of Europe.

[333] This distinction is the one presented by Habermas to contest the existence of collective rights. See D. MEUWISSEN, op. cit., p. 917.

[334] Ahmed, Opinion of the Commission §71. The Commission took the stance that the UK restrictive measures were designed to "preserve the existence of an effective political democracy and that such an aim is compatible with the aim of 'protecting the rights of others' within the meaning of art 10, nº2".

[335]The same conclusion was expressed by the Venice Commission in its Report of 12-13 June 1998, op. cit.

for historical reasons[336]. As way of example, I will briefly refer to the German and Portuguese approach towards the problem of political parties dissolution.

The German Constitutional Court already had the opportunity of developing case-law in this area, as it was faced with the question of disbandment during the 50's, when it decided for the unconstitutionality of the *Sozialistsche Reichspartei* (SRP)[337] and of the *German Communist Party* (KPD)[338]. A party can be considered in contravention with art 21, nº2 of the Constitution if its political programme attempts against the "free and democratic fundamental order" (criterion of the aim of the party, which is more a subjective criterion in the sense that the judge needs to identify what are the real aims of the party) or if its members have a combative and hostile attitude against the constitutional order (this criterion makes necessary to prove that the members' actions

[336] In the countries of Eastern Europe it is worth to refer the constitutional dispositions of Poland (art 13 states: "Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be forbidden"), Romania (art 37, nº2 "Any political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity, or independence of Romania shall be unconstitutional") and Russia (art 13, nº5 "The establishment and the activities of public associations, whose aims and actions are directed at forcible alteration of the fundamentals of constitutional governance and violation of the integrity of the Russian Federation and undermining of the security of the state, the forming of armed units, the incitement of social, racial, national and religious strife are prohibited"). In Western Europe, the Spanish (art 22, nº2 "Associations which pursue purposes or use methods which are classified as crimes, are illegal" and nº5 "Secret and paramilitary associations are prohibited"), the Portuguese (art 46, nº4 " Armed, military and paramilitary organisations, racist organisations or organisations which espouse the fascist ideology shall be forbidden") and the German (art 21, nº2 "Parties which, by reason of their aims or the behaviour of their adherents, seek or impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality") Constitutions can be stated as examples. The full-text of the several referred Constitutions is available in www.constitution.org/cons

[337] Decision of the German Constitutional Court of 23 October 1952, BVG 23 October 1952, BVGE 1953, vol. 2, nº1, p.1.

[338] Decision of the German Constitutional Court of 17 August 1956, BVG 17 August 1956, BVGE 1957, vol. 5, nº14, p. 85. This case was brought before the Commission, being then declared inadmissible by way of the application of art 17 of the Convention. See German Communist Party, Commission Decision, op. cit.

are part of a strategy or reflect a global tendency that can be imputed to the party itself). Worth to note is that the applicability of art 21, nº 2 does not require that the party constitutes an 'imminent danger' to the democratic order. The Constitutional Court, in the first mentioned decision, identified the principles that can be said to be enshrined in the "free and democratic fundamental order", including therein, among others, the respect for fundamental rights, the principle of separation of powers, the principle of plural democracy and principle of equality of opportunities for political parties[339]. These criteria resemble in some aspect the ones of the Strasbourg Court; the identification of the fundamental principles of the democratic order and the relevance given to the attitude of the party members are common aspects. Regrettably, the Strasbourg Court was not accurate enough in identifying when can the members' actions be imputed to the party as a whole[340] or when it can be said to exist a considerable danger for 'democracy itself' in order the disbandment to be valid[341].

In Portugal declaring the extinction of a political party is of the exclusive competence of the Constitutional Court[342]. In fact, the control of the constitutionality of political parties is exercised *a priori* (i.e., as a party needs to require its registration near the Constitutional Court in order to acquire juridical personality, being for the Court to see if it complies with the necessary formal and material requirements; from the decision concerning the issue of registration it is always possible to appeal to the Grand

[339] M. UTTENDAELE and N. VAN LAER, "Une interdiction constitutionnelle des parties liberticides", in Revue Belge de Droit Constitutionnel, vol I, 1999, pp 65-76. Also B. RUDOLF, "Le Droit allemand face au discours raciste et aux partis racistes", Revue Trimestrielle des Droits de L'Homme, nº 46, 2001, pp. 298-303.

[340] See the divergences in REFAH between the Chamber's majority (§76) and the Joint Dissident Opinion(p.1),despite the agreement about the method to be followed (§48).

[341] The Court refers to the necessity of proving that the party had real chances of installing a governmental system that that would not be approved by all the actors in the political arena. See HEP §58, REFAH 77.

[342] According with art 46, nº2, 223, nº2, e) of the Constitution and art 104 of the Law of the Constitutional Court. See also the Law 28/82 of 15 January which is the Law on political parties. This is justified to the hybrid nature of political parties, which are both private, while associations freely crated by individuals, and public ones, due to their function and their constitutional and legislative status. See also the 7th Guideline of the Venice Commission, where the role of the judiciary is highlighted. For an overview of the juridical position of political parties in Portugal see J.M. CARDOSO DA COSTA, "Table Ronde: Constitution et Partis Politiques. Portugal", in Annuaire International de Justice Constitutionnelle, Paris, Economica, vol IX, 1993, pp.195-204.

Chamber of the Constitutional Court[343]) and *a posteriori* (i.e., a political party can be dissolved if it is deemed to be guided by an idea of "constitutional enmity"[344]). Only once was the Portuguese Constitutional Court faced with the question of disbandment of a political organisation. The *Movimento de Acção Nacional* (*MAN*)[345] was a political organisation allegedly espousing the fascist ideology. The Constitutional Court acknowledged that the notion of fascist organisation is a very broad one, as defined by the law[346], précising that what is prohibited is not that an individual espouses the fascist ideology, its public support or propaganda, but solely the formation of organisations that have fascism as its aim[347]. Political parties are thus included in the definition of organisations[348]. In what the notion of "organisation espousing the fascist ideology" is concerned, the Portuguese Constitutional Court stressed its difference in reasoning with its German homologous. Under the Portuguese Constitution there is a privileged prohibition of fascist organisations, which means that not all organisations that attempt to hinder the "free and democratic fundamental order" shall be

[343] Art 9 and 103 of the Law of the Constitutional Court. P ESPLUGAS, op. Cit., p.686, avows that this *a priori* control, before the party has had any possibility of exercising its activities deserves remarks, especially if one bears in mind what the Strasbourg Court considered in TBKP (the necessity of the existence of concrete elements that can show that particular party constitutes a threat to the democratic society).

[344] J.J. GOMES CANOTILHO, op. cit., p. 318. According to the author, under the Portuguese constitutional standards is possible to identify two "constitutional enmities" enshrined in art 46, nº4 of the Portuguese Constitution. The first one relates to the negation of the Portuguese historical background and the democratic principle, mainly its elements of popular sovereignty, equality, respect of the fundamental freedoms, freedom of expression and pluralist democracy; this justifies the prohibition of fascist organisations. The second, introduced by the Constitutional revision of 1997, concerns the disrespect of the principle of prohibition of racial discrimination; accordingly, it is forbidden to establish racist parties in Portugal. As the author points out, the latter principle also serves as basis to prohibit fascist organisation for the ideology they advocate normally includes the supremacy of a certain race.

[345] Decision of the Portuguese Constitutional Court of 18 January 1994, Acórdão nº 17/94, published in Acórdãos do Tribunal Constitucional, Coimbra Editora, vol. 27, 1994, pp.1193-1229.

[346] Law nº 64/78 of 6 October 1978 on prohibition of fascist organisations. As the Court states, it is not necessary that the organisation is endowed legal personality (§16 an §17 of the Decision).

[347] Decision 17/94, §16.

[348] Worth to note is that the German Constitutional Court draws a distinction between political parties and groups with political purposes (Decision of the German Constitutional Court of 17 November 1994, BVG 17 November 1994, BVGE, vol. 91). In order to accord political parties special protection against abusive interferences by the State, the Court introduced a supplementary criterion: to be considered a party, the group should have a "serious willingness" to influence the formation of the public political will, being this assessed at the light of the level of organisation of the group and its activities. See B. RUDOLF, op. cit., p. 302.

forbidden[349]. The Court goes on elaborating that the concept of fascist ideology as defined by the law[350] is not plain enough, and that despite it was proved the *MAN* advocated a conception of nationalist State, its militants identified themselves as racialists, and its publications clearly exalted the former leaders of the German national-socialism and the Italian fascism, because it was not proved that the *MAN* was an organisation with violent character it would be "inconsistent" to classify it as an "organisation espousing the fascist ideology"[351]. From all that has been said, it seems clear the attachment of the Portuguese Constitutional Court to the fact that an organisation should have a violent character in order to be dissolved[352], a stance undoubtedly near to the guidelines of the Strasbourg Court[353].

The aforementioned examples represent two diverse approaches to the problem of dealing with anti-democratic political parties, which are surely also different from the arrangements in other member States of the Council of Europe[354]. It becomes then difficult to defend the existence of a "common standard", of a large homogeneity among the varied national juridical systems, that could be used by the Strasbourg Court to accessorily help in identifying the content of the obligation States bear to protect "democracy itself"[355]. Hence, because we are in the field of "preventive measures" extra-

[349] Decision 17/94 §18.
[350] Art 3 of the Law 64/78.
[351] Decision 17/94 §19. The Constitutional Court balances the criterion of the ideology, the aim of the party (in nature, a more vague, *in abstracto* criterion) by way of resorting to the criterion of the violent nature of that organisation (a more *in concreto* criterion, allowing to take into account the current actions of the party).
[352] It is worth to note that the Court didn't have to decide if the MAN should be disbanded, as its leaders during the judicial procedures decided voluntarily to dissolve the organisation.
[353] Cf. supra 2.2.2.
[354] See the contributions of several authors in Revue Trimestrielle des Droits de l'Homme, nº 46, 2001.For Spain J. M. RADUA HOSTENCH,pp.379-383, for Luxembourg A. SPIELMANN, pp. 429-433, for Austria W. STRASSER and F. OPPITZ, pp.305-320, for Belgium D. BATSELÉ pp.337-342. For the juridical situation in France a good analysis of the problem can be found in P. ESPLUGAS, op. cit., pp.675-709, and in A. ROUX, "Table Ronde Constitution et Partis Politiques- France", Annuaire International de Justice Constitutionnel, vol IX, 1993, pp.135-156.
[355] G. VAN DER MEERSCH, "La référence au droit interne des États Contractants dans la jurisprudence de la Cour européenne des droits de l'homme " in Revue International de Droit Comparé, 1980, pp. 317-335. Worth to note is that sometimes the Court is in presence of an European consensus and decides not to rely on it, as it was the case in Lingens (see D.J. HARRIS, M. O'BOYLE, C. WARBRICK, op. cit., p.295).

carefulness is needed[356]. In this regard, the Court stated that it is essential that a political party represents a clear threat to democracy itself, by means of the real possibilities it has of implementing a governmental regime contrary to the Convention, for the sanction of dissolution to be justified[357]. Nevertheless, the Court held the view that "measures of such severity *might* be applied only in the most serious cases"[358]. The conclusion to be drawn from the aforegoing is, then, that the Court does not precise the content of the positive obligation States bear to protect "democracy itself", i.e., it is up to the national authorities to decide whether or not the dissolution of a political party can be seen as a valid sanction. Even so, the practical application of dissolution, like any other restrictive measure[359], will always be subjected to the rigorous European supervision[360].

[356] See the Joint Dissident Opinion of Judges Spielmann, Pekkanen and Van Dijk in Ahmed, §2, where it is retaken the previous reasoning of the Court in Observer and Guardian v. the United Kingdom (Judgment of 26 November 1991, § 60, also available in www.echr.coe.int).
[357] HEP §58 and §60; REFAH §77.
[358] SP §51, REFAH §82.
[359] D. BATSELÉ, op. cit., p. 341. In the author's opinion, for a question of effectiveness, the disbandment of a political party should be a solution to set aside as they can always be reconstituted. The criminal condemnation of political leaders for racist speeches and the prohibition of political parties to include among their members persons who had been convicted by racist speeches, under the sanction of dissolution, should be foreseen as an alternative. However, as the author clearly points out, dissolution appears always as the last resort sanction.
[360] TBKP §46, ÖZDEP §57.

CONCLUSION

The present thesis has attempted to illuminate how the notion of democracy enshrined in the European Convention on Human Rights has been used by the Strasbourg Court in order to accord protection to political parties.

The *first part of this study (Chapters 1 and 2)* was dedicated to thoroughly analyse the Court's case-law so as to clarify how the Convention can be applicable to political parties, as well as identifying the main guidelines for the exercise of freedom of political association. From that examination was concluded the Court recurrently resorts to the concept of democracy as a criterion to guide the application of several Convention dispositions to political parties, either directly (by recognising the political association as such, with its differentiated juridical personality, rights and duties) or indirectly (by means of the rights and obligations it accords to its members).

In the *second part of this work (Chapter 3)* the issue of political parties' dissolution was comprehensively examined. An attempt was done to clarify the main principles endowed in the notion of democracy, as it emerges from the Court's jurisprudence, for it was at the light of that notion the controversial issue of a party's disbandment was deemed to be scrutinized[361]. By way of acknowledging a defensive and a regulatory function to the clause "necessary in a democratic society", the obligations the State bears under the Convention were exhaustively inspected. Some main conclusions may be drawn from this assessment.

In the first place, it became clear that a measure of disbandment cannot be used *in abstracto* and *a priori*. The prohibition of a political party to exercise its right to freedom of association cannot be exclusively based on the analysis of its ideology and the compatibility of it with the democratic principles set forth in the Convention. Such a

[361] Cf. supra 3.1

subjective criterion would create incertitude, for the Court did not give a precise definition of democracy. Notwithstanding, this criterion has already been used by the Commission[362], the Court[363] and, at national level, by the German Constitutional Court[364]. A more objective criterion, by means of resorting to the programme, public positions and actions of the party is required. The Strasbourg Court has already identified two conditions (of a procedural and substantive nature) a political party should respect in order to be considered a valid partner in the pluralistic democratic process. In order to assert compatibility with them, the Court has established a method which consists in comparing the programme of the party with its statements and actions taken as a whole. It was found that the problem of imputation of the speeches and acts of political leaders, as well as the assessment of the existence of a real possibility for the party to implement the policies it advocates, require well-identified criteria. By way of deeply inspecting the Court's case-law, the 'historical background', the 'political representation' and, particularly, the 'action' criteria were recognised. Only if these three criteria are met, one can be said to be in presence of a real threat to the democratic regime in a country, being therefore legitimate a restrictive national measure impinging upon freedom of political association[365].

Secondly, for it was not clear which measures should the State take to successfully respond to a threat to the democratic society, it became imperative to assert the positive obligations it bears under the Convention. It was argued the State has a duty to protect the enjoyment of the right to freedom of association of all political parties, despite the ideologies they advocate, being this of particular importance for parties which are in a minority position. Then, an obligation for the State to find alternative measures to dissolution was probed, on the grounds of the relevant case-law of the Court and other relevant arrangements of the Council of Europe. Finally, it was drawn (directly from the notion of European public order) an obligation for the State to protect 'democracy itself', by means of enacting effective legislation capable of responding to

[362] As the sole basis for the dissolution of the German Communist Party.
[363] In the REFAH decision, now under appeal.
[364] In the Sozialistsche Reichspartei (SRP) and in the German Communist party (KPD) cases.
[365] Cf. Supra 3.2

the danger posed by a political party which, indeed, constitutes a threat to the European democratic society.

Democracy is a principle deeply enrooted in the Convention, to which the Court frequently resorts. In particular, when restrictive measures are placed on the rights of political parties, for freedom of political association constitutes the bedrock of a democratic society. In this regard, the Court has been establishing, along its case-law, the necessary framework to deal with the issue of political parties disbandment. A comprehensive clarification and full-application of the criteria the Court employs urges, mostly due to the contemporary challenges the European democratic society is facing[366].

[366] A decision of the Brussels Court of First Instance, now under appeal, (Rechtbank van eerste aanleg te Brussel, Decision of 29 June, 2001) concerns the dissolution of three associations which support the activities of the Vlams Blok. That is so as in Belgium political parties don't have legal personality, being then impossible to dissolve them. Also a procedure requiring the dissolution of the NPD (Nationaldemokratische Partei Deutschlands) has been declared admissible by the German Constitutional Court (BvB 1/01, 1 October 2001, BverfGE, 2). It can be foreseen that, in the event of dissolution to be declared valid, the Strasbourg Court will be called to assert the compatibility of that measure with the Convention.

BIBLIOGRAPHY

I. DOCTRINE

ALKEMA, E. A., "The European Convention as a Constitution and its Court as a Constitutional Court", Protecting Human Rights. The European Perspective. Studies in memory of Rolv Ryssdal, Köln/Bonn/München, Carl Heymanns Verlag KG, 2000.

ANDRIANTSIMBAZOVINA, J.,"L'élaboration progressive d'un ordre publique européen des droits de l'homme", Cahiers de Droit Européen, nº 5-6, 1997.

BATSELÉ, D. "Racisme et liberté d'expression. Examen de législation et de jurisprudence belges", Revue Trimestrielle des Droits de l'Homme, nº 46, 2001.

BEETHAM, B., Democracy and Human Rights, Cambridge, Polity Press, 1999.

BENÔIT-ROHMER, F., "La Cour de Strasbourg et la protection de l'intérêt minoritaire: une avancée décisive sur le plan des principes? ", Revue Trimestrielle des Droits de l'Homme, 2001.

BOCCKEL, A., "Le Droit Constitutionnel Turc à l'épreuve européenne. Réflexions à partir d'une décision de la Cour Constitutionnelle turque portant dissolution du parti islamique REFAH ", Revue Française de Droit Constitutionnel, nº 40, 1999.

CABRAL BARRETO, I., A Convenção Europeia dos Direitos do Homem, Coimbra, Coimbra Editora, 1999.

CABRAL BARRETO, I.,"A execução dos acórdãos do Tribunal Europeu dos Direitos do Homem ao nível interno", Estudos em Homenagem ao Conselheiro Arala Chaves, Lisboa, to be published.

CARDOSO DA COSTA, J.M.,"Table Ronde: Constitution et Partis Politiques. Portugal", Annuaire International de Justice Constitutionnelle, Paris, Economica, vol IX, 1993.

COUSSIRAT-COUSTERE, V., "Art 11, nº2", Pettiti, L-E, Decaux, E., Imbert E.H., La Convention Européenne des Droits de L'Homme-Commentaire article par article, Paris, Economica, 1995.

DE FONTBRESSIN, P., "L'effet transcendantal de la Convention européenne des Droits de l'Homme", Mélanges en Hommage à L.E.Pettiti, Bruxelles, Bruylant, 1998.

DE SCHUTTER, O., " Le droit d'être à l'abri du discours d'incitation à la haine ou à la discrimination raciale ou religieuse", Le Noued Gordien des partis antidémocratiques. La loi, une épée à double tranchant ?, Gent, Mys and Breesch, 2001.

DE STEXHE, G.,"Qu'est-ce qui est et n'est pas démocratique? La démocratie comme logique et comme projet", Pas de liberté pour les ennemis de la liberté ?, Bruxelles, Bruylant, 2000.

DUARTÉ, B., "Les Partis Politiques, la Démocratie et la Convention européenne des Droits de L´Homme", Revue Trimestrielle de Droits de L'Homme, 1999.

ELDIN G., FOURNIÉ P., MOINET-LE MENN A., SOUTOU G.H., L'Europe

de Robert Schuman, Paris, Presses de L'Université de Paris-Sorbonne, 2001.

ESPLUGAS, P.,"L'interdiction des parties politiques", Revue Française de Droit Constitutionnel, vol. 36, 1998.

FLAUSS, J-F, "La Cour Européenne des Droits de l´Homme est-elle une Cour Constitutionnelle ? ", Droit et Justice, nº19, 1997.

FLAUSS, J-F, "Droit constitutionnel et Convention européenne des droits de l'homme. Le droit constitutionnel national devant la Cour européenne des droits de l'homme. Actualité jurisprudentielle 1997-1998-1999-2000", Revue Française de Droit Constitutionnel, nº44, 2000.

FLINTERMAN, C. and HENDERSON, C. "The African Charter on Human and Peoples' Rights", R. Hanski and M. Suksi, An Introduction to the International Protection of Human Rights: A Textbook, Abo, Abo Akademi University, 1999.

GARIBALDI, G.O., "On the ideological content of Human Rights Instruments: The Clause 'in a democratic society' ", in Contemporary Issues in International Law, Essays in Honour of L.B. Sohn, N.P. Engel Publisher, 1984.

P. GÉRARD, "La protection de la démocratie contre les groupements liberticides" in Pas de Liberté pour les ennemis de la liberté?, Bruxelles, Bruylant, 2000.

GERMAR, M. P., "Liberté d'association et démocratie politique", Freedom of Association- Seminar organised by the Secretariat General of the CoE in cooperation with the Ministry of Justice of Iceland, 26-28 August 1993, Strasbourg, Martins Nijhoff Publishers, vol. 34A, 1994.

GOMES CANOTILHO, J.J., "Direito Constitucional e Teoria da Constituição", Coimbra, Almedina, 2002.

GUILLARMOD, M.O., "Rapports entre Démocratie et Droits de l'Homme" Démocratie et Droits de L'Homme, Actes du Colloque organisé par le gouvernement hellénique et le Conseil de l'Europe, Kehl/Strasbourg/Arlington, N.P. Engel Verlag, 1990.

HARRIS, D. J., O'BOYLE, M. and WARBRICK, C., Law of the European Convention of Human Rights, London/Dublin/Edinburgh, Butterworths, 1995.

JACOT-GUILLARMOD, O., « Règles, méthodes et principes d'interprétation dans la jurisprudence de la Cour européenne des droits de l'homme », Pettiti, L-E, Decaux, E., Imbert, P-H, Convention Européenne de Droits de l'Homme- Commentaire article par article,, Paris, Economica, 1995.

MAHONEY, P.,"Judicial activism and judicial self-restraint in the European Court of Human Rights. Two sides of the same coin", Human Rights Law Journal, nº11, 1990.

MARCUS-HELMOS, S.,"Art 3, Protocol 1", Pettiti, L-E, Decaux, E., Imbert, P-H, Convention Européenne des Droits de l'Homme- Commentaire article par article, Paris, Economica, 1995.

MARKS, S., "The European Convention of Human Rights and its 'democratic society' ", British Year Book of International Law, 1995.

MATSCHER, F., "Les contraintes de l'interprétation juridictionnelle. Les méthodes d'interprétation de la Convention européenne", L'interprétation de la CEDH, Droit et Justice, nº21, 1998.

MEDINA ORTEGA, M.,"The right to be represented in the Parliament", Human Rights at the Dawn of the 21st Century- Karel Vasek Amicorum Liber, Bruxelles, Bruylant, 1999.

MEUWISSEN, D., "Reflections on Habermas's Legal Theory and Human Rights", Protection of Human Rights. The European perspective. Studies in Memory of Rolv Ryssdal, Köln/Bonn/München, Carl Heymanns Verlag KG, 2000.

MOWBRAY, A., "The role of the European Court of Human Rights in the promotion of democracy", Public Law, 1999.

NOWAK, M., U.N. Covenant on Civil and Political Rights- CCPR Commentary, Kehl/Strasbourg/Arlington, Engel, 1993.

PERRINEAU, P., "L'Europe d'extrême(s) droit(s)", Le Nouvel Observateur, 13-19, June 2002.

PICHERAL, C., L'Ordre Public Européen. Droit commun et droit européen des droits de l'homme, Paris, La documentation française, 2001.

RADUA HOSTENCH, J.M., « Le discours raciste et la liberté d'expression en Espagne », Revue Trimestrielle des Droits de l'Homme, nº46, 2001.

RIGAUX, F.,"Interprétation consensuelle et interprétation évolutive", L'Interprétation de la Convention Européenne des Droits de L'Homme, Droit et Justice, nº 21, 1998.

ROUX, A.,"Table Ronde Constitution et Partis Politiques- France", Annuaire International de Justice Constitutionnel, vol IX, 1993.

RUDOLF, B.,"Le Droit allemand face au discours raciste et aux partis racistes", Revue Trimestrielle des Droits de L'Homme, nº 46, 2001.

SCHOKKENBROEK, J., "The basis, nature and application of the margin of appreciation doctrine in the case-law of the European Court of human rights", Human Rights Law Journal, vol. 19,1998.

SPIELMANN, A.,"La Convention européenne des droits de l'homme et l'abus de droit", Mélanges en hommage à L. E. Pettiti, Bruxelles, Bruylant, 1998.

SPIELMANN, A., « Du racisme. La situation au Luxembourg », Revue Trimestrielle des Droits de l'Homme, nº 46, 2001.

SPIELMANN, D., "Obligations positives et effet horizontal des dispositions de la Convention", L'Interprétation de la Convention européenne des Droits de l'Homme, Droit et Justice, nº 21,1998.

STRASSER, W. and OPPITZ, F. "Le discours raciste et sa répression en Droit Autrichien "in Revue Trimestrielle des Droits de l'Homme, nº 46, 2001.

SUDRE, F., Droit International et Européenne des Droits de l'Homme, Paris Presses Universitaires de France, 2001.

SUDRE, F., «Les Obligations Positives dans la jurisprudence européenne des Droits de l'Homme », Revue Trimestrielle des Droits de l'Homme, nº 23, 1995.

SUDRE, F., "Les obligations positives dans la jurisprudence européenne des droits de l'homme", Protecting Human Rights. The European Perspective. Studies in memory of Rolv Ryssdal, Köln/Bonn/München, Carl Heymanns Verlag KG, 2000.

UTTENDAELE, M. and VAN LAER, N.,"Une interdiction constitutionnelle des parties liberticides", Revue Belge de Droit Constitutionnel, vol I, 1999.

VALTICOS, N., « Article 11 », Pettiti, L-E, Decaux, E., Imbert, P-H, La convention européenne des Droits de L'Homme, Commentaire Article par Article, Paris, Economica, 1995.

VAN BOVEN, T., "Préambule", Pettiti, L-E, Decaux, E., Imbert, P-H,La Convention Européenne des Droits de l'Homme- Commentaire article par article, Paris, Economica, 1995.

VAN DER MEERSCH, G.,"La référence au droit interne des États Contractants dans la jurisprudence de la Cour européenne des droits de l'homme ",Revue International de Droit Comparé, 1980.

VAN DER MEERSCH, G.,« Quelques aperçus sur la méthode d'interprétation de la Convention de Rome du 4 novembre 1950 par la Cour Européenne des Droits de l'Homme », Mélanges Offerts à Robert Legros, Bruxelles, Éditions de L'université Libre de Bruxelles, 1985.

VAN DROOGEHENBROECK, S., "L'article 17 de la Convention Européenne des Droits de l'Homme, est-il indispensable ? ", Revue Trimestrielle des Droits de L'Homme, nº 46, 2001.

VEGLERIS, P.T., «Valeur et signification de la clause 'dans une société démocratique' dans la Convention Européenne des Droits de l'Homme », Journal of International and Comparative Law, vol 2,1968.

VELU, J. and ERGEC, G., Convention européenne des Droits de L'Homme, Brussels, Bruylant, 1990.

VERDOODT, A., Naissance et signification de la Déclaration Universelle des Droits de l'Homme, Louvain/Paris, Nauvelaerts, 1964.

VERDUSSEN,M.,"Le financement public d'un parti raciste est-il légitime dans un État démocratique ?", Revue Trimestrielle des Droits de l'Homme, 2001.

WACHMANN, P.,"La Cour européenne des Droits de L'Homme et la liberté d'expression : renforcement ou affaiblissement du contrôle ? ", Perspectives du Droit International européen- Recueil d'études à la mémoire de Gilbert Apollis, Paris, Éditions A. Pedone, 1992.

WACHMANN, P., "Une certaine marge d'appréciation- considérations sur les variations du contrôle européen en matière de liberté d'expression", Les Droits de l'homme au seul du troisième millénaire- Mélanges en hommage à Pierre Lambert, Bruxelles, Bruylant, 2000.

II- JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

- Golder v UK, Judgement of 21 February 1975, application nº 00004451/70, published in A-18.
- Handyside v UK, Judgement of 07 December1976, application nº 00005493/72, published in A-24.
- Ireland v UK, Judgement of 18 January 1978, published in A-25.
- Klass and Others v FRG, Judgement of 6 September 1978, application nº 00005029/7,published in A-28.
- Sunday Times v U.K., Judgement of 26 April 1979, application nº 00006538/74 published in A-30.
- Airey v Ireland, Judgement of 9 October 1979, application nº00006289/73, published in A-32.
- Le Compte, Van Leuven and De Meyere v. Belgium, Judgement of 12 March 1981, published in series A- 43.
- Young, James and Webster v. U.K., Judgement of 13 August 1981, Application nº 00007601/76.
- Lingens v Austria, Judgement of 8 July 1986, application nº00009815/82, published in A-103.
- Rees v. the U K, Judgment of 17 October 1986, application nº00009532/81, published in Series A no. 106.
- Mathieu-Mohin and Clerfayt v Belgium, Judgement of 2 March 1987, application nº 00009267/81, published in A-113.
- Plattform "ÄRZTE FÜR DAS LEBEN" v. Austria, Judgement of 21 June 1988, application nº 00010126/82, published in A139.
- Cossey v UK, Judgement of 29 September 1990, application nº 00010843/84, published in A-184.
- Castells v Spain, Judgement of 23 April 1992, application nº 00011798/85, published in A-236.

- Kokkinakis v Greece, Judgement of 25 May, application nº 00014307/88, published in A-260-A.
- Jersild v Denmark, Judgement of 23 September 1994, application nº 00015890/89, published in A-298.
- Informationsverein Lentia and Others v. Austria, Judgment of 24 November 1993, application nº 00013914/88; 00015041/89; 00015717/89; 00015779/89; 00017207/9, published in A -276.
- Piermont v France, Judgement of 27 April 1995, application nº 015773/89, 15774/89, published A-314.
- Vogt v. Germany, Judgement of 26 September 1995, application nº 00017851/91,published in A-323.
- Gitonas v Greece, Judgement of 1 July 1997, application nº 00018747/91; 00019376/92 ; 00019379/92 ; 00028208/95 ; 00027755/95, published in Reports 1997-IV.
- Zana v Turkey, Judgement of 25 November 1997, application nº 00018954/91, published in Reports 1997-VII.
- United Communist Party and Others v Turkey, Judgement of 30 January 1998, application nº 133/1996/752/951, published in Reports 1998-I.
- Bowman v UK, Judgement of 19 February 1998, application nº 00024839/94, published in Reports 1998-I.
- Socialist Party and others v Turkey, Judgement of 25 May 1998, application nº 20/1997/804/1007, published in Reports 1998-III.
- Incal v Turkey, Judgement of 6 June 1998, application nº 00022678/93, published in Reports 1998-IV.
- Sidiropoulos v Greece, judgement of 10 July 1998, application nº 00026695/95, published in Reports 1998-IV.
- Ahmed and Others v. U.K., Judgement of 2 September 1998, application nº 00022954/93, Reports 1998-VI.
- Matthews v UK, Judgement of 18th February 1999,application nº 00024833/94, published in Reports 1999-I.

- Buscarini and Others v San Marino, Judgement of 18 February, 1999, application nº00024645/94, published in Reports 1999-I.
- Rekvényi v Hungary, Judgement of 20th May 1999, application nº 00025390/94, published in Reports -III
- Freedom and Democracy Party (ÖZDEP) v Turkey, Judgement of 8 December 1999, application nº. 23885/94, published in Reports 1999-VIII.
- Özgur Gündem v Turkey, Judgement of 16 March 2000, application nº 00023144/93.
- Lopes Gomes da Silva v Portugal, Judgement of 28 September 2000, application nº 00037698/97.
- Hasan and Chaush v Bulgaria, Judgement of 26 October 2000, application nº 00030985/96.
- Refah Partisi (Welfare Party) and Others v Turkey, Judgement of 31 July 2001, application nº 41340/98, 41342/98, 41343/98 and 41344/98.
- Oberschlick (nº1) v Austria, Judgement of 23 May 2001, application nº 00011662/85, published in A-204.
- Stankov and the United Macedonian Organisation Ilinden v Bulgaria, Judgement of 2nd October 2001, application nº 00029221/95; 00029225/95.
- Gorzelik v Poland, Judgement of 20 December 2001, application nº 44158/98.
- Perinçek et le Parti des Travailleurs v Turkey, final decision on admissibility of 26 February 2002, application nº00046669/99.
- Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v Turkey, Judgement of 9 April 2002, application nº 22723/93, 22724/93, 22725/93.
- Selim Sadak and Others v Turkey, Judgement of 11 June 2002, application nº 25144/94, 26149/95 to 26154/95 and 27101/95.

All these judgements can be obtainable on the web-site www.echr.coe.int; the references presented are the ones appearing on that web-site.

III- DECISIONS OF THE COMMISSION

- KPD v FRG (Case of the German Communist Party), Comm. Dec. of 20 July 1957, application. nº 250/57, Year Book 1.
- X. v Italy, Comm. Dec. of 21 May 1976, application nº 6741/74, published in Decisions and Reports, nº5.
- J. Glimmerveen and J. Hagenbeek v The Netherlands, Comm. Dec. of 11 October 1979, application nº 8348/78 and 8406/78, published in Decisions and Reports nº18.
- A Association and H. v Austria, Comm. Dec. of 15 March 1984, application nº 9905/82, published in Decisions and Reports, nº 36.
- Van Der Heijden v The Netherlands, Comm. Dec. of 8 March 1985, published in Decisions and Reports, nº41.
- Kühnen v Frederal Republic of Germany, Comm. Dec. of 12 July 1988, app. nº 12194/86, published in Decisions and Reports, nº 56.
- H.,W.,P., and K v Austria, Comm. Dec. of 12 October 1989, application nº 12774/87, published in Decisions and Reports, nº62.
- S. Sakik, A. Türek, M. Alinak, L. Zana, M. H. Dicle and O. Dogan v Turkey, Comm. Dec. of 25 May 1995, published in Decisions and Reports, nº 81-A, 1995.
- Remer v Germany, Comm. Dec. of 6 September 1995, application nº 25096/94, published in Decisions and Reports 82-A.
- Ganchev v Bulgary, Comm. Dec. of 25 November 1996, application nº 28858/95, Published in Decisions and Reports nº 87.

IV- OPINIONS OF THE COMMISSION

- Opinion of the Commission in the Case of the United Communist Party and Others v Turkey, Report of 3 September 1996, published in Reports 1998-I.
- Opinion of the Commission in the Case of the Socialist Party and Others v Turkey, Report of 26 November 1996, published in Reports 1998-III.
- Opinion of the Commission in the Case of the Freedom and Democracy Party (ÖZDEP) v Turkey, Report of 12 March 1998, published in Reports 1999-VIII.
- Opinion of the Commission in the Case Vogt v Germany, Report of 30 November 1993, published in A-323, also available in www.echr.coe.int in annex to the Court's judgement.
- Opinion of the Commission in the Case Ahmed and Others v U.K., Report of 29 May 1997, published in Reports 1998-VI.
- Opinion of the Commission in the Case Rekvényi v Hungary, Report of 9 July 1998, published in Reports 1999-III, also available in www.echr.coe.int in annex to the Court's judgement.

V- OTHER RELEVANT LEGISLATION AND DECISIONS

General Assembly Recommendation 1438 (2000) "Threat posed to democracy by extremist movements and parties in Europe", available in www.coe.int

General Assembly Directive 560 (2000), available in www.coe.int

Council of Ministers Communication of the 21 January 2000, available in www.coe.int

General Assembly Document nº 8607, available in www.coe.int

Final Activity Report of the Group of Specialists on Democratic Strategies for Dealing with Movements Threatening Human Rights (DH-S-DEM), 5-7 May 1999, available in www.coe.int

European Commission For Democracy Through Law, Report adopted in its 35th plenary meeting, 12-13 June 1998. Available in www.venice.coe.int

European Commission For Democracy Through Law, "Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures", adopted in Venice, 10-11 December 1999, available in www.venice.coe.int

Full-text of national Constitutions referred to is available in www.constitution.org/cons

SRP, Decision of the German Constitutional Court of 23 October 1952, BVG 23 October 1952, BVGE 1953, vol. 2, nº1.

Decision of the German Constitutional Court of 17 November 1994, BVG 17 November 1994, BVGE, vol. 91.

KPD, Decision of the German Constitutional Court of 17 August 1956, BVG 17 August 1956, BVGE 1957, vol. 5, nº14.

MAN, Decision of the Portuguese Constitutional Court of 18 January 1994, Acórdão nº 17/94, published in Acórdãos do Tribunal Constitucional, Coimbra Editora, vol. 27, 1994.

Decision of the Brussels Court of First Instance of 29 June 2001, now under appeal, (Rechtbank van eerste aanleg te Brussel).

NPD, Decision on admissibility by the German Constitutional Court of 1 October 2001, BVB 1/01, 1 October 2001, BVGE, 2.