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The Concept of Democracy and the European Convention on Human Rights

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The Concept of Democracy and the European Convention on Human Rights

Dr. Joseph Zand*

Abstract

The European Convention on Human Rights, for the most part, guarantees civil and political rights.¹ It is a unique international instrument that provides what is widely regarded as the most effective trans-national judicial process for complaints brought by citizens and organizations against their respective governments.² The aim of this article is to contribute to the continuing debate on the notion of democracy according to the European Convention on Human Rights. Not only has the Convention been a standard-setter in Europe, but it is also a source of inspiration in promotion of democracy and democratic values for other regions of the world. With this in mind, the article considers the appropriate elements of the Convention which directly concerns democratic values. To that end, the article critically examines the relevant Articles of the Convention on the notion of democracy as well as on the jurisprudence of the European Court of Human Rights. Furthermore, in recent decades, the Convention has made a telling contribution in relation to transition to peace and democracy in the former communist Eastern European states.

KEY WORDS:

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

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, Dec. 10, 1948, Eur. Ct. H.R., <https://echr.coe.int>.
2. *The European Convention on Human Rights and the European Court of Human Rights*, INT'L REV. OF SWED., <http://www.manskligarattigheter.se/en/who-does-what/european-council/the-european-convention-on-human-rights-and-the-european-court-of-human-rights> (last visited Feb. 8, 2017).

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I. Introduction

The heinous atrocities committed in the course of the World War II, produced a flurry of aspirational and binding documents and treaties, such as the Universal Declaration of Human Rights, the Genocide Convention, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ However, European Convention on Human Rights (Convention) is undoubtedly the most effective human rights instrument ever devised. Since its enactment, the Convention has been a standard-setting text for transition to peace

3. *A Short History of Human Rights*, HUMAN RIGHTS HERE AND NOW (Nancy Flowers ed.), <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm> (last visited Feb. 8, 2017).

and democracy throughout Europe.⁴ It is worth noting that the Council of Europe is no longer limited to the Western European states.⁵ Ever since the collapse of the Soviet Union and the end of the Cold War, geographic and cultural influence of the Convention has progressed eastward and now encompasses all of the former Soviet Eastern Bloc states.⁶ In fact, at present, forty-seven countries representing 800 million citizens have now recognized the right of their citizens to bring cases against them at the European Court of Human Rights (Court).⁷ The Convention is also becoming increasingly a source of legal inspiration in other legal jurisdictions. The Convention was created as a standard-setter and upholder of liberal democracy in Europe, and ever since the issue of democracy has been one of its inseparable fundamental features.⁸ Therefore, the Convention was

4. *Klass and Others v. Germany*, App. No. 5029/71, 59 Eur. Ct. H.R. 22 (1978). *Soering v. United Kingdom*, App. No. 14038/88, 88 Eur. Ct. H.R. (1989).
5. Under Statute of the Council of Europe 5 U.N.T.S. 103, a member state 'must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.' The significance of the Convention's role in giving meaning to these obligations has been highlighted in recent years by the fact that becoming a party to the Convention is now a political obligation of membership of the Council of Europe: EUR. CONS. ASS., *Honouring Commitments Entered Into by Member States When Joining the Council of Europe*, 14th Sess., Doc. No. 7037 (1994), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=16442&lang=en>.
6. For example, Russia which ratified the Convention in May 1998 and Georgia which only joined the Council of Europe in April 1999 and ratified the Convention in June 1999. Council of Europe, Chart of Signatures and Ratifications of the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Sep. 21, 1970 C.E.T.S. No. 14 (<http://assembly.coe.int>). See generally James A. Sweeney, *Divergence and Diversity in Post-Communist European Human Rights Cases*, 21 CONN. J. OF INT'L L. 1 (2005).
7. *The Court in Brief*, EUR. CT. OF HUM. RTS., www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Feb. 9, 2017).
8. Indeed, in the preamble to the Convention, a clear link is established between the Convention and liberal democracy by stating that the maintenance and furtherance of human rights and fundamental freedoms can only be safeguarded by an effective liberal democracy and a common understanding and observance of human rights. Furthermore, the preamble goes on to assert that European countries have a common heritage of political tradition, ideals, freedom and the rule of law, which are the principles of liberal democracy and the underlying values of the Convention itself. See generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. OF INT'L L. 46 (1992); see also Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N. Y. U. J. OF INT'L L. AND POL. 289, 295 (1995); STEVEN WHEATLEY, *THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW* (2010).

designed to maintain and promote the ideals and values of a democratic society.⁹

The ‘*Travaux Préparatoires*’ of the Convention unequivocally states that it was created to “prevent rebirth of totalitarianism”, to “defend our people from dictatorship”, and to “strengthen the resistance in all our countries against insidious attempts to undermine our way of life”.¹⁰ The Convention goes on to impress upon the citizens of member countries of the Council of Europe that it would “define and guarantee the political basis of this association of European nations” and “ensure that member states of the Council of Europe are democratic and remain democratic” while providing a “code of law for the democracies.”¹¹

The European Convention on Human Rights was a direct product of the immediate post-war era to unify Europe.¹² The Convention was a reaction to the serious human rights abuses that Europe had witnessed in the course of the Second World War.¹³ But “it can also be viewed in the context of the much longer struggle to secure respect for personal autonomy, the inherent dignity of persons, and equality of all men and women.”¹⁴

The preamble to the European Convention on Human Rights (Convention) asserts that European countries have a common heritage of political tradition, ideals, freedom and the rule of law, which are the principles of liberal democracy and the underlying

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9. Kjeldsen, Busk Madsen and Pedersen v. Denmark, App. Nos.: 5095/71, 5920/72 and 5926/72, 23 Eur. H.R. Rep. 27 (1976) HUDOC, <http://www.echr.coe.int>.
 10. *Council of Europe, Collected Edition of the “Travaux préparatoires” of the European Convention on Human Rights*, vol. 1, 30, 192; vol. 5, 332 (1975-1985).
 11. *Id.* at 4, 50, 60.
 12. The main reason for the Convention was partly the need to elaborate on the Council of Europe membership obligations and commitments. See European Convention of Human Rights, Nov. 4, 1950, 231 U.N.T.S. 221, C.E.T.S. 5, U.K.T.S. 71, http://www.echr.coe.int/Documents/Convention_ENG.pdf (entered into force 3 September 1953, Council of Europe, at 28 October 2013, hereinafter cited as ‘Convention’).
 13. See generally DJ HARRIS, ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 1 (3d ed. 2014) (For the framers, democracy was given a vivid significance, in contrast to the recent experience of “fascism, hitlerism, and communism.”).
 14. CLARE OVEY & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 3 (5th ed. 2010); Susan Marks, *The European Convention on Human Rights and its ‘Democratic Society’*, in *BRITISH YEARBOOK OF INTERNATIONAL LAW* 209-10 (1995).

values of the Convention itself.¹⁵ Hence, it is fair to say that the Convention was designed to maintain and promote the ideals and values of a democratic society.¹⁶ Moreover, the Convention was to achieve all this by providing a collective guarantee, if not of all applicable rights and freedoms, then at least of those considered “essential for a democratic way of life.”¹⁷

Since its creation, the European Court of Human Rights (Court) has had to preside over many cases in which the question of democracy and its concept within the framework of the Convention as well as the rights of anti-democratic actors in a liberal democracy have been dealt with.¹⁸ This article will deal with relevant articles of the Convention, which encapsulate the concept of democracy through the case-law of the Court and how its jurisprudence has evolved in this regard since the 1950s. In doing so, this article will look into the Courts conception of democracy in such areas as the essential requirements of any political system based on liberal democracy.

II. The Notion of Democracy and the Convention

The drafters of the Convention devoted a prominent role to promotion of pluralism and democracy in Western European states by incorporating the idea of democracy as a cornerstone to protect the right of the individual.¹⁹ The notion of a ‘democratic society’ permeates the entire European Convention system. In the preamble to the 1949 statute of the Council of Europe, the participating states reaffirm “their devotion to the spiritual and moral values which are common heritage of their peoples and the true source of individual

15. In the preamble to the European Convention on Human Rights (Convention), a clear link is established between the Convention and liberal democracy by stating that the maintenance and furtherance of human rights and fundamental freedoms can only be safeguarded by an effective liberal democracy as well as a common understanding and observance of human rights. *Soering v. United Kingdom*, App. No: 14038/88, Series A-161, para 88.

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

17. *Supra* note 10, 43-4.

18. *See generally infra* note 19.

19. Warsaw Declaration, WARSAW SUMMIT COUNCIL OF EUROPE, www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp (The current mandate of the Council of Europe was established at a summit which took place in Warsaw in 2005); *See also Bowman v. United Kingdom*, 26 E.H.R.R. 1 (1998).

freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.”²⁰ The Strasbourg organs have emphasized the point that “democracy does not simply mean that the views of the majority must always prevail” but, “a balance must be achieved which ensures fair and proper treatment of minorities and avoid abuse of a dominant position.”²¹

In recent decades, the Court has turned its attention to the fundamental link between the substantive rights guaranteed by the Convention and the concept and existence of democracy within the member states.²² There is no doubt that the Court considers qualities such as pluralism, tolerance, broadmindedness, equality, liberty and encouraging self-fulfilment as important characteristics of any functioning democracy.²³ On the question of the relationship between democracy and the Convention the Grand Chamber in its unanimous decision in the case of *the United Communist Party of Turkey v. Turkey* held:

That is apparent, firstly, from the preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights.²⁴

Moreover, in its Grand Chamber decision in *Gorzelik and others v Poland* the ECtHR defined pluralism as ‘the genuine recognition of, and respect for, diversity and dynamics of cultural conditions, ethnic

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20. *Statute of the Council of Europe*, EUROPEAN TREATY SERIES - NO. 1, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680306052>.
 21. *Sorensen v. Denmark* and *Rasmussen v. Denmark*, Apps. 52562/99 and 52620/99, 11 January 2006 [GC], (2008) 46 EHRR 752, para. 58; *see also* the older case of *Young, James and Webster v. UK*, 13 August 1981, ECHR Series A, No. 44, para. 63.
 22. Sweeney, J.A., *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, Routledge, 2012, p. 19.
 23. *Oberschlik v. Austria*, No. 11662/85, Series A, No. 204, 23.5.91, para. 58; *see also* Ovey, and White, *European Convention on Human Rights*, *op. cit.*, p. 326; Merrills, J.G., “The Development of International law by the European Court of Human Rights”, Manchester U.P., 1993, especially chapter 8, ‘Human Rights and Democratic Values’.
 24. *The United Communist Party of Turkey v. Turkey*, (1998) 26 E.H.R.R. 121.

and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.²⁵

III. Democratic Rights and the Convention

The centrality of democracy to the Convention system does not mean that the precise form of democracy implied by the convention particularly clear.²⁶ Nonetheless, the Court has consistently maintained that at the heart of the notion of democracy is based on the full participation of all the citizens of the high contracting parties.²⁷ Participatory democracy includes ‘the formal conception of majority rule which concerns the method of decision-making and, over and above this requirement, also demand that the majority respect the equal worth of all citizens.’²⁸ Therefore, democracy is the only political model that the Convention aims for and finds compatible with it.²⁹ In a democracy, however, it is assumed that limitations on individual rights and freedoms for the common good or to protect more compelling rights of others would be justified.³⁰

As a democracy is based on the equal worth of individuals, at least certain human rights must be protected. In particular, political rights, such freedom of expression, the right to vote, and the freedom of assembly are understood as vital for a functioning democracy. Democracy must also be understood to require the protection of other human rights, such as the right to family life and correspondence and the right to religion. Therefore, according to the Court Articles 8, 9, 10 and 11 of the Convention encapsulate the concept of democracy have common features which may require interference with the use of the rights set out by these articles.³¹

25. *Gorzelik and others v Poland*, App. 44158/98, 17 February 2004, para. 92.

26. Sweeney, J.A., *The European Court of Human Rights in the Post-Cold War Era*, *op. cit.*, p. 148.

27. *Id.*

28. G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford U.P., 2013, p. 65.

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

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

31. *Zdanoka v. Latvia*, Appl. No. 58278/00 (2006) ¶115; *see also* G Van de Schyff, *The Concept of Democracy as an Element of the European Convention*, 38 *THE COMP. & INT’L LAW J. OF S. AFR.* (2005).

These interferences must be evaluated by the benchmark of what is “necessary in a democratic society.”³² The only type of necessity to justify interference can only derive from a “democratic society.”³³ If a restriction on democracy is prescribed by law, the Court then would consider whether the law, or rather the way in which it was applied, is “necessary in a democratic society” for any of the reasons outlined in the Articles.³⁴ Hence, the Court has developed the approach that states have a “margin of appreciation” in deciding whether a particular restriction on a right is required in the given circumstance.³⁵ In the case of *Handyside* the Court stated:

By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirement as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ to meet them.³⁶

The Court also goes on to say:

Whilst the adjective ‘necessary’ . . . is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessary in this context.”³⁷

IV. The Notion of Democracy and Relevant Articles of the Convention

As noted briefly above, through its case-law the Court has identified certain provisions of the Convention, which clearly encapsulate the concept of a democratic society³⁸ On this point it has

32. Conor Gearty, *Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal* (2000) 51 N. IR. LEGAL Q. 381, 388.

33. G.H. FOX, *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 93 (2000).

34. IAN LOVELAND, *CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HUMAN RIGHTS: A CRITICAL INTRODUCTION* 593 (Oxford U.P. 6th ed. 2012).

35. *See generally* YUTAKA ARAI-TAKAHSHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (Interesentia 2002).

36. *Handyside v. United Kingdom* (No. 24), 1 Eur. Ct. H.R. (Ser. A) 1, 17-19 (1976).

37. *Id.* at 58.

38. *Austria v. Italy*, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R 116, 138 (Eur. Comm’n on H.R.).

been noted that, “in relation to the Convention proper, the Court’s conception of democracy is only elucidated incidentally-through consideration of the democratic rights contained in the convention.”³⁹ The substantive rights that are considered to comprise the concept of democracy are easily identified.⁴⁰ Express reference to the concept of democracy may be seen in the second paragraphs of Articles 8-11 of the Convention as well as Articles 2(3) and (4) of the Fourth Protocol.⁴¹

Each of the Articles 8-11 set out a Convention right in the first paragraph, and set out possible qualifications to the right in their second paragraph as a means of right-restrictive measures.⁴² In spite of some “differences of detail in the nature of the limitations arising under each article, there is sufficient commonality of approach to justify a collective consideration of these limitations before examining the substantive rights protected under each of these articles.”⁴³ The Court has explicated that “there is undoubtedly a link between all of these provisions, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedom.”⁴⁴

Initially, in regards to the concept of democracy, the Court considered Articles 10 protecting “Freedom of Expression” and Article 11 “freedom of Assembly and association” as the more relevant articles to the concept of democracy and democratic process.⁴⁵ This transpires in four ways, “through judgements on Articles 10 and 11, which guarantee freedom of expression and association respectively, on merits of applications and through Article 17 in decisions on admissibility, also relevant is the rather

39. Paul Harvey, *Militant Democracy and the European Convention on Human Rights*, 3 EUROPEAN LAW REVIEW 407, 412 (2004).

40. JAMES A. SWEENEY, THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA: UNIVERSALITY IN TRANSITION 151 (2013).

41. See HARRIS, O’BOYLE & WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 341-60 (1995).

42. Al-Nashif v. Bulgaria, App. No. 50963/99, Eur. Ct. H.R. (2002).

43. JACOBS & WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 308 (Clare Ovey & Robin C.A. White eds. 4th ed. 2006). See also STEVEN GREER, THE EXCEPTIONS TO ARTICLES 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1997).

44. Zdanoka v. Latvia, App. No. 58278/00, Eur. Ct. H.R., 36 (2006).

45. Handyside v. United Kingdom, App. No. 5493/72, Eur. Ct. H.R. (1976); Lingens v. Austria, App. No. 9815/82, Eur. Ct. H.R., 13 (1986); Oberschlik v. Austria, No. 11662/85, Eur. Ct. H.R., 17 (1991).

weaker protection offered by Article 3 of Additional Protocol No.1 (hereinafter Article 3 of Protocol No. 1), which obligates member states to hold free elections.”⁴⁶ Article 17 of the Convention sets out prohibition from the use of Convention rights from implying: “Any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”⁴⁷ Therefore, Article 17 prevents member states from abusing the Convention rights, curtailing the rights and freedoms of others, in other words, providing a safety mechanism specifically designed to prohibit totalitarian movements from using human rights as a means of furthering their cause.⁴⁸

Nonetheless, it has been noticed elsewhere that freedom of expression under Article 10 and Article 3 of Protocol No. 1, which provides the guarantee of free elections held at reasonable intervals are the two provisions of the Convention, “embodied the characteristics of a democratic society.”⁴⁹ The Court has stressed that “eminence of freedom of expression in a democratic society of which it is one of the essential foundations and one of the most basic conditions for its progress and of each individual’s self-fulfilment.”⁵⁰ In recent decades, Article 8 which protects “private and family life, home and correspondence,” and Article 9 which protects “freedom of religion and belief,” have also been considered by the Court in relation to the general concept of democracy.⁵¹

46. Hasan and Chaush v. Bulgaria, App. No. 30985/96, Eur. Ct. H.R. (2000).

47. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950.

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

49. ALISTAIR MOWBRAY, THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE PROMOTION OF DEMOCRACY, 704 (1999).

50. DELFI AS v. Estonia, No. 64569/09, Eur. Ct. H.R. para. 78, (2013).

51. See Halford v. United Kingdom, 20605/92 Eur. Ct. H. R. ¶ 24; Leander v. Sweden, 9248/81 Eur. Ct. H. R. ¶ 9; M.D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 282-284 (2008) (The Court has considered these articles particularly in relation to the issue of personal correspondence).

IV.A. Article 8: Right to Respect for Private and Family Life

Article 8 of the Convention protects four connected rights.⁵² Those include the right to private and family life and the right to respect for home and correspondence.⁵³ Each one of these rights is “autonomous” and the Court is not constrained by any national interpretation of them.⁵⁴ The Court consistently has refrained from providing a comprehensive definition of private life.⁵⁵ Article 12 of the Convention complements Article 8, guaranteeing the right to marry and find a family.⁵⁶ In addition, the member states of the Council of Europe have decided to reinforce the equality of spouses in family life by adopting Article 5 of the Seventh Protocol.⁵⁷

Article 8 places on states the obligation to respect a wide range of personal interest.⁵⁸ Article 8 secures not only negative but also positive aspects of the rights in question.⁵⁹ The Court has spelt out the dual nature of Article 8 rights: “Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities’

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52. IVANA ROAGNA, PROTECTING THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2012) (According to Article 8 of the Convention: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).
53. *See generally* IVANA ROAGNA, PROTECTING THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2012) (regarding Article 8 of the Convention).
54. DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 516 (3rd ed. 2014).
55. Niemietz v. Germany, 13710/88 Eur. Ct. H. R. ¶ 29.
56. *See* Schalk and Kopf v. Austria, 30141/04 Eur. Ct. H. R. ¶ 49 (Article 12 of the Convention states that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”).
57. Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, Nov. 1, 1988 (Article 5 of the Seventh Protocol states that “spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage, and in the event of its dissolution. This article shall not prevent states from taking such measures as are necessary in the interest of the children”).
58. DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 516 (3rd ed. 2014).
59. Marckx v. Belgium, 6833/74 Eur. Ct. H. R. ¶ 31.

adopting measures designed to secure respect for private life and home even in the sphere of the relations of individuals between themselves.”⁶⁰ On one hand, the state in question is obliged not to interfere with the domain of private and family life, home, or correspondence. On the other, the state is required to take particular necessary measures to realize the effective enjoyment of these rights.

IV.B Article 8 and Personal Correspondence

When the Court finds a particular measure to be in “interference” with the rights embodied under the first paragraph of Article 8, it must consider whether such interference may be justified by the conditions laid down in the second paragraph.⁶¹ The standard formula developed in the case law is common to other personal freedoms set out in Articles 9 – 11. A violation of Article 8 can only be justified providing it is “in accordance with the law,” has a “legitimate aim,” and is “necessary in a democratic society.”⁶²

The issue of interference with correspondence by national authorities has presented a new challenge to the court in recent decades. Correspondence includes postal correspondence, telephone calls, emails, and text messages.⁶³ According to the court, such interferences include opening, reading, censoring or deleting correspondence violates Article 8 of the Convention. The controversial issues of surveillance of communication and a prisoner’s right to correspondence have recently been under sharp scrutiny.⁶⁴

60. See *Dees v. Hungary*, 2345/06 Eur. Ct. H. R. ¶ 21; *Airey v. Ireland*, 6289/73 Eur. Ct. H. R. ¶ 32; *X and Y v. Netherlands*, 8978/80 Eur. Ct. H. R. ¶ 23.

61. BERNADETTE RAINEY, ELIZABETH WICKS & CLARE OVEY, JACOBS, WHITE & OVEY: *The European Convention on Human Rights* 310-312 (2014).

62. DAVID HARRIS, MICHAEL O’BOYLE, EDWARDS BATES & CARLA BUCKLEY, *Law of the European Convention on Human Rights* 344 (2014).

63. *Malone v. United Kingdom*, App. No. 8691/79, Eur. Ct. H.R. (1984) (for interception of telephone calls); *Halfords v. United Kingdom*, Appl. No. 20605/92, Eur. Ct. H.R. (1997) (for email); *Golders v United Kingdom*, Appl. No. 4451/70, Eur. Ct. H.R. (1975) (for post).

64. *Kennedy v. United Kingdom*, Appl. No. 26839/05 Eur. Ct. H.R. (2010); see *Klamecki v. Poland* (no. 2), Appl. No. 31583/96, Eur. Ct. H.R. at 144 (2003); *Kucera v. Slovakia*, Appl. No. 48666/99, Eur. Ct. H.R. at 127 (2007); see also Mowbray, A., *European Convention on Human Rights*, Oxford U.P. at 561-589 (For a review of the relevant case law).

Therefore, in order to curb member state's discretionary powers, the Strasbourg organs have required that the law in question must be accessible and foreseeable.⁶⁵ In particular, the "foreseeability test" provides a crucial safeguard for the citizen by requiring the law to be "sufficiently clear" and precise and by giving "adequate indication" as to the circumstances in which and conditions on which any secret surveillance or interceptive measures are employed.⁶⁶ Another implication of the foreseeability test is the requirement that adequate safeguard against possible abuses must be provided clearly demonstrating the extent of the authorities' discretion and defining the circumstances in which it is to be exercised.⁶⁷ In other areas of complaints under Article 8, by contrast, the first standard has rarely been contested, and the Convention bodies have focused their examination on the third standard; "necessary in a democratic society."⁶⁸

The best example of this judicial oversight by the court was when it presided over a series of cases involving British citizens alleging illegal interception of their correspondence.⁶⁹ The Court held that due to the fact that there was no domestic law to regulate such activities there had been a breach of Article 8 by the United Kingdom.⁷⁰ These rulings prompted the British government to fill this lacuna by enacting the Regulation of Investigatory Powers Act 2000.⁷¹ As a consequence of this Act, the telephone tapping civil cases in the United Kingdom are now brought under Article 8 of the Convention as in the most recent case, brought by a number of British politicians and celebrities against the Metropolitan Police.⁷² They successfully argued that there was a breach of Article 8 since the police had failed to inform them about the telephone hacking and

65. *Sunday Times v. United Kingdom*, Appl. No. 6538/74, Eur. Ct. H.R. at 56 (1979).

66. *See Kennedy v. United Kingdom*, Appl. No. 26839/05, 18 May 2010, ¶ 119; *see also Klass and Others v. Germany*, Appl. No. 5029/71, 6 September 1978, ¶ 33.

67. *Michaud v. France*, Appl. No. 12323/11, Eur. Ct. H.R. at 88, ¶ 88 (2012).

68. *See Malone v. United Kingdom*, Appl. No. 8691/79, Eur. Ct. H.R. (1984); *see also Halfords v. United Kingdom*, Appl. No. 20605/92, 25 Eur. Ct. H.R. (1997).

69. *Id.*

70. *Copland v. United Kingdom*, Appl. No. 62617/00, Eur. Ct. H.R. at 41 (2001).

71. Regulation of Investigatory Powers Act 2000, c. 23 (Eng.).

72. *Phone hacking: Met police failed to warn victims*, BBC NEWS (Feb. 7, 2012), <http://www.bbc.com/news/uk-16922305>.

had failed in their duty to carry out a thorough investigation as part of its positive duty under Article 8.⁷³

Moreover, it is worth noting that the doctrine of margin of appreciation plays a pivotal role in the development of Article 8 case law providing states a certain degree of discretion particularly in certain areas where the court is reluctant to impede the decisions made by states in relation to issues “where a different approach is justified by local conditions.”⁷⁴ Nonetheless, in this regard, the court has shown willingness to keep the extent of the margin of appreciation under review through the development of its jurisprudence.⁷⁵

IV.C Article 9: Freedom of Religion and Belief

Article 9 of the Convention protects the right to freedom of thought, conscience, and religion.⁷⁶ In recent years, academic discussion of religious freedom in Europe and its relation to the concept of democracy has been dominated by the jurisprudence of the European Court of Human Rights under Article 9 of the Convention.⁷⁷ Moreover, Article 14 (prohibition of discrimination) of the Convention may be relevant to freedom of religion cases.⁷⁸ Hence, the Court has reiterated that Article 9 is not simply “one of the most vital elements that go to make up the identity of believer,” but also “a precious asset for atheists, sceptics, and the unconcerned.”⁷⁹ The right to freedom of thought, conscience, and

73. Bryant & Ors., R (on the application of) v. The Commissioner of Police of the Metropolis [2011] EWHC 1314 (Admin) (Eng.).

74. D.J. HARRIS, M. O'BOYLE & C. WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 363 (1995).

75. Valentino Acatrinei v. Rom., App. No. 18540/04, 3 Eur. Ct. H.R. 10 (2013).

76. According to Article 9 of the European Convention on Human Rights, protecting the right to freedom of thought, conscience and religion: (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in a community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others.

77. NORMAN DOE, *LAW AND RELIGION IN EUROPE* 40 (2011).

78. SAMANTHA KNIGHTS, *FREEDOM OF RELIGION, MINORITIES, AND THE LAW* 56 (2007).

79. Buscarini and Others v. San Marino, App. No. 24645/94, Eur. Ct. H.R. 8 (1999).

religion is unqualified⁸⁰ This includes the right to hold a religion or belief and to change it.⁸¹ For the Article to apply, a belief must “attain a certain a level of cogency, seriousness, cohesion and importance,” and more importantly, by the possible qualifications in Article 9(2).⁸² This allows the state to interfere with the right if the three tests in Article 9(2) are met.⁸³ The interference must be “prescribed by law,” have one of the legitimate aims listed in Article 9(2) and be “necessary in a democratic society.”⁸⁴

Despite the importance and the extent of interests protected by Article 9, some observers have argued that due to the cautious approach adopted by the Court and the Commission in the early days of the Convention, traditionally, relatively few applications were made alleging violations of Article 9; only a small proportion of those have given rise to successful claims.⁸⁵ The case-law related to this right is very recent, with the first judgment finding a violation of this article only delivered in the much referred to *Kokkinakis* case in 1993.⁸⁶

However, since then a rich and often controversial jurisprudence has begun to develop, including two judgments on Turkish attempts to ban the wearing of Muslim headscarves in certain higher education establishments; the fallout from Publication of cartoons of the Prophet Muhammad in Denmark in 2005, and the Grand Chambers reversal of the judgment backing a challenge to the display of the Christian crucifix in Italian state schools.⁸⁷ There is no doubt that

80. RUSSELL SANDBERG, LAW AND RELIGION 82 (2011).

81. *Id.*

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

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

84. *Id.*

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

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

87. *Leyla Şahin v Turkey* (GC), 18 March 2011, Appl. No. 30814/06) and discussed in Altıparmak, K. & Karahanoğulları, O., “after Şahin: the Debate on Headscarves is not Over”, *European Constitutional Law Review* 2 (2006) 268, McGoldrick, D., Human Rights and Religion: the Islamic Headscarf Debate in Europe, Oxford: Hart, 2006. BBC Website, “Special Report, the Muhammad cartoon row”, 7 February 2006, available at: <http://news.bbc.co.uk/2/hi/in_depth/4677976.stm> at 28 October 2013. *Lautsi v. Italy*, (GC), 18 March 2011 (Appl. No. 30814/06).

Switzerland's attempt to ban the construction of new minarets will also give rise to some thought-provoking legal arguments.⁸⁸

IV.D Democracy as a limit on restricting freedom of religion

Justifying a restriction on religion or belief, and the extent to which it is “necessary in a democratic society,” has often been a controversial issue.⁸⁹ In line with other international human rights instruments on religious liberty, Article 9 enshrines the rights in the first paragraph, and provides for the possible qualifications to the right in the second paragraph. The qualifications of Article 9 are slightly different to the other personal freedoms since they pertain only the manifestation of religion or belief (the *forum externum*), rather than the act or state of believing itself (the *forum internum*). Interpreting the scope of Article 9 (1) has been rather challenging, and the European Commission's decision in *Arrowsmith v. United Kingdom*, that not all actions motivated by religious belief fall within it, has been met with some criticism.⁹⁰

In applying the limitations contained in Article 9 (2), the Court has been rather sensitive to varied constitutional traditions of the member states, notwithstanding the fact that this approach has been criticized by certain scholars.⁹¹ The main characteristic of Article 9 in relation to this study is the extent to which the Court has recognised a strong link between religion and a democratic society. According to the Court, “freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention.”⁹² In this manner, Article 9 needs to be interpreted in light of other Convention rights, such as the Article 11, the right of assembly and association.⁹³ Consequently, interference with the rights stipulated in Article 9 may be examined not only as an

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

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

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

91. *Ibid.*

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

93. *Id.*, para. 62.

infringement on the applicant's own religion or beliefs, but also as an indirect violation on the democratic fabric of society.⁹⁴

Restrictions on Article 9 must comply with the conditions specified in Article 9 (2). They must be prescribed by law and be necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁹⁵ These specific "interests" are more commonly referred to in the European jurisprudence as "legitimate aims."⁹⁶ It is also important to note that other major international human rights instruments adopt the same approach to the issue of religious belief by striking a balance between the "legitimacy" of restrictions and their "necessity" to limiting freedom of religion.⁹⁷

IV.E Article 10: Freedom of Expression

Article 10 guarantees freedom of expression, which has been described as "one of the cardinal rights guaranteed under the Convention."⁹⁸ This notion comprises the actual freedom of

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

95. *Id.*

96. *Id.*

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

98. According to Article 10 of the Convention:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licencing of broadcasting, television or cinema enterprise.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. *See generally* Macovei, M., "Freedom of Expression: A to Implementation of Article 10 of the European Convention on Human Rights", *Human Rights Handbooks*, No. 2 2nd edition, 2004.

expression, freedom of information, freedom of communication via mass media, and specific parts of the freedom of artistic and academic expression.⁹⁹ Indeed, the marked importance of this right and the demand for its special protection due to its close linkage to democracy's political process is an indispensable part of the Convention.¹⁰⁰ The Court has consistently maintained that states are under obligation to ensure that private individuals can effectively exercise their right of communication between themselves.¹⁰¹

Furthermore, freedom of political debate is at the very core of the concept of democratic society, which prevails throughout the convention.¹⁰² The Court has repeatedly reiterated that "freedom of expression constitutes one of the essential foundations of democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment."¹⁰³ The convention has underlined the need for transparency and accountability on the part of the high contracting states.¹⁰⁴ In ascertaining whether a positive obligation to act exists in a particular situation, certain regard must be had to the fair balance that has to be struck between the general interest of the community and interests of individuals.¹⁰⁵

The most protected class of expression has been political expression, since the Court considers such expression as an essential part of any effective pluralist democracy, in order to ensure respect for fundamental human rights.¹⁰⁶ The court has emphasised this point forcefully that "in a democratic system, the acts or omissions of the government must be subject to the close scrutiny not only the

99. Grabenwarter, C., *European Convention on Human Rights: Commentary*, Beck/Hart Publishing, 2014, P. 252.

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

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

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

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

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

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

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

legislative and judicial authorities but also the press and public opinion.¹⁰⁷ This point was reiterated in *the United Communist Party of Turkey* case, in which the court considered pluralism at the heart of its conception of democracy.¹⁰⁸ Hence, the court firmly puts the onus on the member states as the “ultimate guarantors of the principle of pluralism”, especially in the context of media.¹⁰⁹

As the Court famously held in *Handyside v. United Kingdom*, even opinions which “shock, offend, or disturb” should be tolerated.¹¹⁰ In line with this the Court in the case of *Vajnai v. Hungary* has reiterated that:

A Legal system which applies restrictions on human rights in order to satisfy the dictates of public feelings – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in democratic society, since the society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto.¹¹¹

In the recent case of *Cumhuriyet Vakfı and Others v. Turkey*, the Court reiterated the importance of freedom of expression as “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual self-fulfilment”.¹¹²

IV.E(i) Freedom of Expression and Transition to Democracy

In recent decades, both the Court and the Commission have acknowledged that in a transition to democracy it may be legitimate to curtail forms of speech which are very critical of the state.¹¹³ As Judge Carrillo Salcedo in the case of *Castells v. Spain* observed:

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

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

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

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

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

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

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

In a situation where politically motivated violence poses a constant threat to the lives and security of the population, it is particularly difficult to strike a balance between the requirements of protecting freedom of expression and the imperatives of protecting the democratic state.¹¹⁴

Since the collapse of the Soviet Union and accession of all of the former Soviet Bloc states in Europe to the Council of Europe, the Court has been faced with an entirely different challenge of transitional democracies in those states.¹¹⁵ Nevertheless, the Convention “to which most central and Eastern European countries acceded in the years immediately following the demise of communist regimes, was a crucial signpost on the road to democracy and the rule of law.”¹¹⁶ It is worth noting that such challenges were not limited to the former Soviet Bloc states and the Court had previously faced similar tasks in the case of Southern European states.¹¹⁷

Although, the process of transition does not prompt the Court to deviate from its established jurisprudence but the Court’s judgments on the freedom of expression are of particular salience to transitional process.¹¹⁸ Therefore, the Court’s case-law has strongly adopted an approach in which information exchange and pluralities of opinions is of paramount importance in any democratic society, therefore, restoring a balance between the citizens’ fundamental rights and the state—a balance completely void in the era of authoritarian rule in the former communist states of Eastern Europe.¹¹⁹

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

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

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

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

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

119. *Id.* at 149.

IV.F Article 11: Freedom of Assembly and Association

Freedom of assembly and association provides protection for the formation of collective entities by individuals for any lawful purpose.¹²⁰ Thus, political parties play a special role within the guarantee of freedom of association due to their pivotal role in the functioning of a democratic government.¹²¹ The Grand Chamber has referred to ‘the primordial role played in a democratic regime by political parties enjoying the freedoms and rights enshrined in Article 11 and also in Article 10 of the Convention.’¹²²

Not only citizens in fledgling democracies of Eastern Europe but also some nationals of the more established democracies in Europe have had to rely on the Court’s jurisprudence in relation to the rights to freedom of assembly and association (Article 11 of Convention) and the obligation upon states to hold free elections (Article 3, of Protocol No. 1 of the Convention).¹²³ Article 11 protects the two distinct if sometimes connected freedoms of peaceful assembly and association.¹²⁴ In occasions, states have sought to

120. Maruhn, T., ‘General Principles’ in Ehlers, D. & Becker, U. (eds.), *European Fundamental Rights and Freedoms*, de Gruyter, 2007, p. 122.

121. The right to freedom of association as provided in Article 11 of the Convention reads as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

122. *Linkov v. The Czech Republic*, no. 10504/03, para 34, 7 December 2006; *Redfearn v. United Kingdom*, no. 47335/06, para 55, 6 November 2012.

123. Article 3, of Protocol No. 1, states: ‘the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under condition which will ensure the free expression of the opinion of the people in the choice of the legislature.’ Hamilton, M., ‘Transition, Political Loyalties and the Order of the State’, in Buyse, A. & Hamilton, M. (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge U.P., 2011, 151-184, p. 151.

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

justify interference with these rights in order to foster democratic values, in turn leading to allegations of excessive rights limitations¹²⁵

In recent years, the Court has had to deal with the more practical application of the notion of democracy in regards to freedom of assembly and association.¹²⁶ The eligibility to stand for election to a national parliament was examined in the case of *Zdanoka v Latvia*, which concerned refusal by the Latvian authorities to allow the applicant, Mrs. Tatjana Zdanoko,¹²⁷ a member of *the Communist Party* of Latvia to be included on the resident's register to stand for the first parliamentary elections in 1993—since Latvia's regaining independence from the Soviet Union in 1991¹²⁸

The Chamber and Grand Chamber in this case adopted entirely different approaches to the interpretation of someone's eligibility to stand for election. On the one hand, in its Chamber judgment, the Court held that the electoral restrictions by the Latvian government in 1995 had violated Mrs Zdanoka's P 1-3 right. The Chamber felt compelled to "adhere to the same criteria" permitted by Articles 8-11, since "the only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to emanate from democratic society."¹²⁹ However, the Grand Chamber held that:

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

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

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

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

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

129. European Convention on Human Rights art. 8-11, Nov. 4, 1950.

establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8 to 11 of the Convention.¹³⁰

Hence, the implied defense to “the institutional order of the state” echoes specific reference to Article 3 of Protocol No. 1.¹³¹ By adopting this approach the Grand Chamber established a high supervisory threshold in which case a violation would only take place if procedural deficiencies gave rise to likely arbitrary treatment.¹³² It is clear that the Grand Chamber was of the opinion that Article 3 of Protocol No. 1 does not exclude the restrictions on electoral rights, since it may be imposed on “an individual who has, for example seriously abused a public position or whose conduct threatens to undermine the rule of law or democratic foundations”¹³³.

This approach is very much in step with Allen’s observation that “there is reluctance to allow the Court to be used as a forum for hearing disputes that have their origin in the pre-transitional era” since “there is a strong, though not universal, belief within the European Court that there is little to be gained by investigating the stories of victim.”¹³⁴ In other words, in such cases, the contracting states are given considerable latitude to establish their constitutional rules regarding the status of parliamentarians which inevitably would include the criteria for disqualification.¹³⁵ This would include ensuring the independence of members of parliament as well as electorate’s freedom of choice.¹³⁶ The wide margin of appreciation given to states is mainly because each state has historical and political factors unique to them and the criteria would vary accordingly.¹³⁷ Nonetheless, according to Hamilton:

One apparent consequence of the more relaxed scrutiny of Article 3 of Protocol 1 is that no assessment need be made of extant transitional risk. This again sharpens the contrast with Articles 10 and

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

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

132. *Id.*; see also *Zdanoka v Latvia*, *op. cit.*, para. 107-108.

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

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

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

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

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

11 of Convention which demand attention to the imminence of an evidenced threat.¹³⁸

However, the Court was unanimous in its decision that there had been no violation of Article 3 of Protocol 1 by Latvia.¹³⁹ Indeed, this judgement indicates the court's concern regarding fairness of free elections as well as enabling states to place limitations on the senior holders of public office to gain electoral advantage whilst still connected with the prestige and powers of such offices.¹⁴⁰

However, in an apparent U-turn, the Court has found violations of Article 3 of Protocol 1 in the cases of *Adamsons v. Latvia* with similar background.¹⁴¹ Some scholars have observed that the above two cases indicate a narrowing of the gap between Article 11 and Article 3 of Protocol 1 scrutiny.¹⁴² In *Adamsons*, the Latvian government had disqualified a former low-ranking officer of the KGB border guard from standing the 2002 general election.¹⁴³ In a departure from the previous approach, not only did the Court consider the affiliation of this person's involvement with the previous regime but crucially considered his activities in the society since the collapse of the Soviet Union which according to the Court:

The Court considered, in the light of the particular socio-historical background to the applicant's case that during the first years after Latvia had regained independence, electoral rights could be substantially restricted without thereby infringing Article 3 of Protocol No. 1. However, with the passing of time, a more general suspicion regarding a group of persons no longer sufficed and the authorities had to provide further arguments and evidence to justify the measure in question.¹⁴⁴

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

139. *Zdanoka v. Latvia*, App. No. 58278/00, Eur. Ct. H.R. (2006).

140. Mowbray, "the Role of the European Court of Human Rights in the Promotion of Democracy", *op. cit.*, p. 708.

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

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

143. *Adamsons v. Latvia*, App. No. 3669/02, Eur. Ct. H.R. at 3 (2008).

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

This approach has since been reiterated by the Court in the case of and *Tanase v Moldova* in which the Court held that prevention of a Moldovan citizen holding dual nationality from standing in for election “some seventeen years after Moldova had gained independence and five years after it had relaxed its laws to allow dual-citizenship” was illegal.¹⁴⁵

IV.G The Convention Rights and Political parties

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

Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population. By relaying this range of opinion, not only within political institutions but also with the help of media at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of a democratic society.¹⁴⁶

In the case of *Socialist Party of Turkey v Turkey*, the Court emphasised on the importance of pluralism in a democratic society to the extent that challenging existing national structure was acceptable only through democratic means that “it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a state is currently organised, provided that they do not harm democracy itself.”¹⁴⁷ Hence, constitutional reform even of fundamental nature is a justifiable topic of political debate as long as the advocates are not seeking to undermine the very foundation of the national democratic system.¹⁴⁸

In the early 1990s, one of the challenges for the Court’s jurisprudence was presented with a series of cases involving closure

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

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

147. *Socialist Party of Turkey v Turkey*, (1998) 27 E.H.R.R. 51. at para 44.

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

of nine political parties in Turkey.¹⁴⁹ In the first eight cases the Court's approach was very similar in its reasoning. The reason for dissolution of these political parties was that they were all striving to settle the Kurdish problem democratically and advocating a federal state comprised of a Kurdish and a Turkish nation. The Court was of the opinion that it could not justify a ban and while the states could take measures to protect their institutions, a political party could not be excluded from the protection of the Convention simply because the activities of these political parties are regarded by the national authorities as undermining the constitutional structure of the state.¹⁵⁰ In the case of *the United Communist party of Turkey and Others*, the Court held that the mere inclusion of the word "Communist" in the name of the party could not justify dissolution of that party.¹⁵¹

Nonetheless, in contrast to the case of *the German Communist party*, this party posed no threat to Turkish society, as it did not pursue traditional communist aims.¹⁵² The Court was unanimous in their conclusion regarding the aforementioned parties that since they bore no responsibility for Kurdish terrorism, the dissolution violated Article 11.¹⁵³ However, in contrast to these cases, the seminal exception was the Court's now notorious decision in the case of *Refah Partisi v Turkey*, in which the court upheld the decision of the Turkish Supreme Court to ban an Islamist party.¹⁵⁴ The coming to prominence by the *Refah Partisi* in Turkey, very much reflected the rise of an 'Islamic resurgence' at the end of the twentieth century.¹⁵⁵

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

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

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

152. *Id.* at para. 57.

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

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

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

In spite of its secular political system Turkey a predominantly Muslim state was not different from other Islamic countries experiencing this sea change.¹⁵⁶

The Court unanimously ruled that there was no violation of article 11, a decision vehemently criticised by some prominent scholars such as McGoldrick.¹⁵⁷ This was mainly based on the fact that the leaders of *Refah* had made public speeches advocating imposition of *Sharia* law, which was considered irreconcilable with the notion of liberal democracy, as conceived by the Convention.¹⁵⁸ As Harvey puts it, “given that the party had over four million members this amounts to the largest single interference with freedom of association in European jurisprudence”.¹⁵⁹

In *Partidul Comunistilor (Nepeceristi) (PCN) and Ungureanu v. Romania*, the Court found a violation of Article 11 following the refusal of the Bucharest Court of Appeal to register PCN as a political party.¹⁶⁰ Although PCN openly purported to be a Marxist-Leninist organization, but very much distanced itself from the former Romanian Communist Party that had ruled Romania during the Cold War period. The Bucharest County Court held that PCN’s political programme aimed at “establishing a humane state based on communist doctrine, which would imply that the constitutional and

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

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

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

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

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

legal order in place since 1989 is inhumane and not founded on genuine democracy.”¹⁶¹

The Court in Strasbourg rejected the Romanian government’s argument that it could not permit “the emergence of a new communist party to form the subject of democratic debate”, and reiterated the importance of pluralism and political parties which applied to all of the signatories to the Convention.¹⁶² The Court stated that “political parties played an essential role in ensuring pluralism and the proper functioning of democracy” as well as “there can be no democracy without pluralism”¹⁶³ Moreover, the Court held that:

The Court is also prepared to take into account the historical background to cases before it, in this instance Romania’s experience of totalitarian communism prior to 1989. However, it observes that that context cannot by itself justify the need for the interference, especially as communist parties adhering to Marxist ideology exist in a number of countries that are signatories to the Convention.¹⁶⁴

The approach of the Court in the above case could be construed as quite a departure from previous case-law regarding former Communist Eastern European states. However, it should be pointed out that PCN had made it absolutely clear that it accepted pluralism, multiparty political system and had no affiliation with the former Romanian Communist Party¹⁶⁵ On the part of the Court, in the words of Hamilton “the Court has demonstrated its resolve to foster a robust and inclusive political sphere, underpinned by the values of pluralism and social cohesion”.¹⁶⁶ In this regard, the judgment of *Herri Batasuna and Batasuna v. Spain* is of significance, in which the Court held:

[I]t necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy

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

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

163. *Id.* at para. 44. and para. 45.

164. *Id.* at para. 58.

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

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

or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds¹⁶⁷

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

[A] State may "reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime."¹⁶⁸

In the recent case of *Vona v. Hungary*, the Court was of the opinion that the dissolution of the Hungarian Guard Association (*Magyar Garda*) by domestic court was lawful restriction of the applicant's rights under Article 11 of the Convention.¹⁶⁹ The said organization had openly advocated a racist message against the Romani population of Hungary. In the Court's view:

[T]he State is entitled to take preventive measures to protect democracy vis-à-vis such non-party entities as well, if a sufficiently imminent prejudice to the rights of others undermines the fundamental values upon which a democratic society rests and functions. One of such values is the cohabitation of members of society without racial segregation, without which a democratic society is inconceivable.¹⁷⁰

The Court found that the Hungarian authorities were entitled to take preventive measures in order to protect democracy and proscribe the organization due to its racist and divisive views.¹⁷¹ It is the established case-law of the Strasbourg organs which have consistently maintained that there are positive obligations to secure the effective enjoyment of the rights contained in Article 11.¹⁷² Not only everyone regardless of their status or background characteristics (ethnicity, place of origin, religion, disability, etc.) are entitled to

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

168. *Id.* at para. 81.

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

170. *Id.* at para. 57; see also *Refah Partisi v Turkey*, [GC], *op. cit.*, para. 102.

171. *Id.* at para. 58.

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

effective enjoyment of these rights but the contracting states are under obligation to prevent and remedy any breach thereof.¹⁷³

IV.H. Article 17 and the Court's Jurisprudence

In the words of Pierre-Henri Teitgen, the French jurist who was one of the driving forces behind the drafting of the Convention which truly reflected the general post World War II perception that at certain times, democracies need to defend themselves against the threat of totalitarianism.¹⁷⁴ Adoption of Article 17 of the Convention which is prohibition on abuse of rights and to prevent totalitarian and extremist groups from justifying their activities by relying on the Convention encapsulates this approach.¹⁷⁵ This is exactly what the Court had to do in the early days of its existence. At this stage, it is worth noting that the Court's case-law regarding anti-democratic actors since its establishment until recent decades was mainly limited to Fascists and Communists applicants.¹⁷⁶

It is clear that the main idea behind the first proposal for a Convention was to provide human rights guarantees of a very basic and fundamental nature as a reaction to the atrocities committed in the World War II and the subsequent outbreak of the Cold war.¹⁷⁷

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

174. Pierre-Henri Teitgen, delivering a speech before the consultative Assembly of Council of Europe in September 1949, cited in Bates, E., *The Evolution of the European Convention on Human Rights, from Inception to the Creation of a Permanent Court of Human Rights*, Oxford U.P., 2010, p. 44.

175. ARTICLE 17, Prohibition of abuse of rights states: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

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

177. Harvey notes that "without question the court's analysis of these claims has been through a cold war lens." Harvey, P., "Militant democracy and the European Convention on Human Rights", (2004) *European Law Review*, 29(3), p. 413. See also Wildhaber, L., "Changing Ideas about the Tasks of the European Court of Human Rights", in Wildhaber, L., *The European Court of human Rights 1998-2006: History, Achievements and Reform*, (Kehl, Strasbourg, Arlington: N.P. Engel), 2006, pp. 136-

The court maintains a consistent approach of refusing to consider any applications in relation to fascist and racist group from any member states.¹⁷⁸

Indeed, all such cases have been refused as inadmissible either as manifestly ill-founded or removed from the protection of the Convention on the basis of Article 17, which covers a variety of activities on the far right of political spectrum, such as distributing racist and fascist pamphlets, and denial of the Holocaust.¹⁷⁹ It also discusses organising paramilitary training camps, denial of the Austrian state by advocating a Pan-Germanic nation, and attempts to revive the Fascist party in Italy.¹⁸⁰

However, the only possible exception to the jurisprudence of the court in that period was the case of *Lehideux and Isorni v. France*, which concerned a criminal conviction on the basis of a newspaper article in praise of Marshall Petain (who headed the collaborationist Vichy regime during the Nazi occupation of France), in which the court found a violation of Art.10.¹⁸¹ It went on to say that Art.17 would remove the use of Art.10 to negate the Holocaust from protection of Art.10 but since the article had not done so, therefore, Art.17 was not applicable.¹⁸² Judge Jambrek in his concurring opinion elaborated on conditions in which Article 17 would be applicable since:

The aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedom of others.¹⁸³

138; *See generally* Bates, the Evolution of the European Convention of the European Convention of Human rights, *op. cit.*, pp. 1-29.

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

179. *Kuhnen v. Germany* (1998) 56 D.R. 205; App. No. 12774/78 & 8406/78, *Glimmerveen and Hagenback v. Netherlands* (1978) 18 D.R. 187, *Garaudy v. France* [admissibility], 24.06.03.App. No.65831/01.

180. *Schimanek v. Austria*, Dec. 1.2.00. App. No.32307/96; *see Association A. and H v. Austria* (1984) 36 D.R. 187, App. No.9905/82; *see X v. Italy* (1975) 5 D.R. 833, App. No.6741/74.

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

182. *Id.* at para 47.

183. Concurring opinion of Judge Jambrek at para 2.

He was of the opinion that the best way to oppose the rise of an-anti-Semitism in Europe was “free critique” in which democracies, unlike dictatorships, can cope with the sharpest controversies.”¹⁸⁴ In relation to applicability of Article 17, he noted that “on the other hand the requirements of Article 17 also reflect concern for the defense of democratic society and its institution.”¹⁸⁵ In contrast, the Court has adopted a much more ambivalent attitude towards political movements on the left side of the political spectrum.¹⁸⁶ Although the Court after the end of the Cold War adopted a more tolerant and measured approach towards left-wing political movements.¹⁸⁷

V. Conclusion

The concept of a ‘democratic society’ encompasses the entire framework of the Convention and serves as a criterion for the assessment of legality of state action. The Convention entails a broad protection of the substantive rights that are said to be easily identified.¹⁸⁸ As it has been observed, the Court has derived its concept of democracy from the components of the contemporary model of democracy in Europe from its origin, preamble and text of the Convention. Indeed the drafters of the European Convention on Human rights adopted the notion of liberal democracy and pluralism as the very corner stone of the Convention.¹⁸⁹

In that regard, the Court considers liberal democracy as the only guarantee for fundamental freedom and human rights. The cases that this paper has analysed certainly reveal the Court’s adherence to representative democracy and free elections as well as the importance of transparency and accountability in public and political spheres. Along with reference to a ‘democratic society’ in relation to the qualification of rights, the substantive contents of Articles 10, 11 of the Convention and Article 3, Protocol I, combined provide a

184. *Id.* at para. 2.

185. *Id.* at para. 3.

186. *The Communist Party (KPD) v. Germany*, 20 July 1957 1Y.B. 222, EComHR; *Glaserapp v Germany*, (A/104) (1987) 9 E.H.R.R. 25; *Kosiek v. Germany*, app. No. 9704/82, 28 August 1986.

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

188. *Id.* ¶ 52.

189. *Id.*

democratic backbone to the Convention system.¹⁹⁰ These are the rights to free expression, free assembly and association, and the right to free elections.

In recent decades, the Court has recognised Article 9 of the Convention as “one of the foundations of a democratic society within the meaning of the Convention.” However, the abovementioned rights are not absolute and are subject to limitations set out in the second part of these articles. The restrictions must be prescribed by law and be necessary in a democratic society in the interest of public safety, for the protection public order, health morals, or for the protection of the rights and freedoms of others.

Furthermore, through the doctrine of “margin of appreciation” allows the member states certain discretion to interfere with or limit human rights in specific instances. This “margin of appreciation”, however, is increasingly subject to oversight by the Court in order to ensure objective compliance with the protected rights. This approach is increasingly adopted by the Court in cases concerning transitional democracies in former Communist totalitarian systems.

This paper has shown that since the collapse of the Soviet Union and accession of all of the former European communist states to the Council of Europe the Court has faced a huge challenge in upholding and enforcing the values of democracy, since most of these states were new to the notion of liberal democracy. This led to the emergence of new kind of applicant bringing litigation against new states defending those cases.

This new challenge has prompted the court to reiterate and articulate a coherent normative conception of democracy even though that conception is bound to be contested. As a result, democracy in the context of the Convention cannot be understood merely in a formal sense as majority rule. Democracy must primarily be understood as participatory democracy, with respect for different opinion and belief, and focused on freedom of expression as a means of ensuring active involvement of the people in the decision-making processes.

190. *Id.*