THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RESTRICTING RIGHTS IN A DEMOCRATIC SOCIETY WITH SPECIAL REFERENCE TO TURKISH POLITICAL PARTY CASES

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ABSTRACT

The main concern of this thesis is the dissolution of political parties by the Turkish Constitution Court and the response of the European Court of Human Rights. This study will analyse and compare the approaches to restrictions of fundamental rights under the European Convention on Human Rights by both national courts and the Strasbourg Court.

The protection of human rights has to be balanced by accommodations in favour of the reasonable needs of the State to perform its duties for the common good. Ensuring that State does not take improper advantage of such accommodations requires a measure of international control. National restrictions, which are necessary in a democratic society, are allowed subject to the supervision of the Court of Human Rights. Political parties are a form of association essential to the proper functioning of democracy, and restrictions on freedom of association should be construed strictly. Only the most compelling reasons can justify dissolution of political parties.

This thesis aims to identify the democratic values set out in the case law of the Strasbourg organs, and to explore the cases concerning the dissolution of political parties in the light of those values. The approach of the national courts will be contrasted with that of the Strasbourg court in those cases, which have resulted in applications under the European Convention.

The thesis draws a distinction between an ideology-based paradigm and a rights-based paradigm in such cases. The national court has adopted an ideology-based approach, whereas the Strasbourg court has adopted a rights-based approach. However, in the Refah Partisi case, the Strasbourg court appears to have adopted an ideology-based approach. This was unfortunate as this resulted in a decision that is in conflict with the approach it had adopted in earlier cases; those previous cases had contributed significantly to the development of democratic values in Turkey.
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<tr>
<td>A Series A</td>
<td>Publications of the European Court of Human Rights, Judgments and Decisions</td>
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<td>AYMKD</td>
<td>Avrupa Insan Haklari Mahkemesi Anayasa Mahkemesi Kararlari Dergisi</td>
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<tr>
<td>B Series B</td>
<td>Publications of the European Court of Human Rights, Pleadings, Oral Arguments and Documents</td>
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<td>BYBIL</td>
<td>British Yearbook of International Law</td>
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<td>Connecticut Journal Of International Law</td>
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<td>CD</td>
<td>Collection of Decisions of the European Commission of Human Rights</td>
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<td>DR</td>
<td>Decisions and Reports of the European Commission of Human Rights</td>
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<td>E Esas</td>
<td>European Convention on Human Rights</td>
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<td>EHRLR</td>
<td>European Human Rights Law Review</td>
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<td>European Human Rights Reports</td>
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<td>HRJ</td>
<td>Human Rights Journal</td>
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<td>Human Rights Law Journal</td>
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<td>HRQ</td>
<td>Human Rights Quarterly</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>KT Karar Tarihi</td>
<td>Law on Political Parties</td>
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<td>LPP</td>
<td>Oxford University Press</td>
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<td>ÖzDEP</td>
<td>O zgurluk ve Demokrasi Partisi</td>
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<td>RG Resmi Gazete</td>
<td>Sociali st Party</td>
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<td>SP</td>
<td>Turkiye Birlesik Komunist Partisi</td>
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<td>TBKP</td>
<td>Grand National Assembly of Turkey</td>
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<td>TGNA</td>
<td>Yearbook of European Law</td>
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CHAPTER 1
INTRODUCTION

General Points

Turkey is the most striking example amongst the few effective democratic states in existence in which the predominant religion is Islam. It is possible to say that it is the only secular, democratic and pro-Western country in the Islamic world.\(^1\) In Turkey Islam is confined to the sphere of people’s private lives, in order to create space for secular and national democratic values. Although Turkey is far from being a “perfect” democracy, it has still managed to find a way of combining Islam with secular democracy.

In Turkey, real electoral culture began only after 1946. Indeed, after 27 years of one-party rule under the Kemalist Republican People’s party, there was change, or rather a revolution of democratic electoral practice emerged in the aftermath of World War II and established itself fully with the elections of 1950.\(^2\) However, there have been several military interventions in the democratic governance of the country since then, when the military considered Kemalist\(^3\) principles to be in danger or feared the loss of the political power of the military leadership. Indeed, in 1960, the military undertook a

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2 Lewis, B.; The Emergence of Modern Turkey; (London: Oxford University Press, 1961), p.297
3 Kemalism is the name given to the official doctrine guiding the Turkish political establishment in its secular, republican era, particularly during the 1920s and 1930s, following the collapse of the Ottoman Empire. Kemalism bears the name of Mustafa Kemal Ataturk, founder of modern Turkey and initiator of the reformist current. Kemalism could be described as a mere set of political practices inspired by the tendency of Ataturk’s followers to praise reformist action over written words. It is associated basically with six principles: nationalism (milliyetcilik), secularism (Laiklik), republicanism (cumhuriyetcilik), populism (halkcilik), statism (devletcilik) and revolutionism (inklapscilik). See Mateescu, D.C., “Kemalism in the Era of Totalitarianism: A Conceptual Analysis” (June 2006) 7 Turkish Studies No.2, 225-241
coup d'état which brought the democratic experience temporarily to an end. The principal reason was that the democratic leadership had weakened the status and political power of the army.⁴ A second military coup occurred in 1980, as a result of several years of political and social unrest due to ineffective coalition politics. From 1980 to 1983 democracy was de facto suspended in favour of military rule. The military prepared a new constitution and put to referendum. However, it was obviously prepared without consensus. During the referendum campaign, opponents of the draft were forbidden to express their views. The Constitution, in the end, was accepted by a 92% majority of the electorate. Citizens should have free access to information and they should be well informed. Thereby, the issues put to the electorate may be discussed openly and without any restriction on any opponent's opinion. These conditions did not apply in Turkey during this referendum. The new constitution abolished the Senate, reduced the membership of the Grand National Assembly and enlarged the political power of the President of the Republic. It also dissolved several political parties. The third, although indirect, intervention by the military took place in 1997, when the National Security Council was used in order to close down the Welfare Party, whose leader, Erbakan was then Prime Minister⁵. He was forced to resign and by 1998, the Constitutional Court had dissolved his party.

The current 1982 Constitution of Turkey was conceived of after a military coup, as a response to the previous situation of anarchy and terror. So the fear of terror played a vital role in shaping the new constitution. The 1982 constitution is extremely

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⁵ For more on this indirect military intervention which is known as 28 February process see ch.5 background information on Refah Partisi
authoritarian with respect to political rights and liberties. Chapter four of the Constitution is devoted to political rights. The rights to vote, to be elected, to engage in political activity and to form political parties are regulated. Moreover, the 1982 Constitution prohibits associations from pursuing political aims, participating in political activities and receiving support from political parties or giving support to them. They are also prohibited from taking joint action with labour unions. In brief, the 1982 constitution conceived a political system that is highly centralised with a depoliticised society. Article 2 of the Constitution indicates the character of the Republic:

“The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Ataturk and based on the fundamental tenets set forth in the Preamble.”

Article 2 of the Constitution lays down principles for the interpretation of the Constitution. These principles are binding. The fifth paragraph of the Preamble to the Constitution reads as follows:

“No protection shall be given to activities that run counter to Turkish national interests, the fundamental principle of the existence of the indivisibility of the Turkish State and territory, the historical and moral values of Turkishness, or the nationalism, principles, reforms and modernism of Ataturk. As required by

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the principle of secularism there shall be absolutely no interference of sacred religious feeling in the affairs of State and politics.”

Perhaps because of the lack of a cultural heritage of individualism, the state is considered as sacred in Turkish culture. The '82 Constitution puts severe restrictions on the rights and freedoms of the individual; it puts special emphasis on the idea of protecting the state vis-à-vis the individual. Priority is given to the state and the rights and freedoms of individuals are to be protected in the light of this priority. As may be seen from the Preamble and Article 2 of the Constitution, which refers to the national interest, indivisibility of the Turkish state, the historical and moral values of the Turkish nation, and the principles of Ataturkism, the Constitution favours collective values rather than individual values. To sum up, individuals have rights to the extent that they are not in conflict with the interests of the State. This conception of the predominance of state has given rise to fundamental human rights breaches. The question of how the dissolution of political parties in Turkey amounted to a breach of the European Convention on Human Rights will be examined in chapters 5, 6, and 7 of this thesis.

The 1982 Constitution clearly provides the framework for a democratic legal order but embodies the principles of Ataturk first. It may be said that there are two basic orientations in value behind the Constitution: universal liberal democratic values and principles; and those other principles which claim the legacy of the particular experience of the Turkish polity. The orientation which gives rise to human rights

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10 see also Magnarella, P.J.(ed.), *Middle East and North Africa; Governance, Democratisation, Human Rights*, (Aldershot: Ashgate, 1999) at 144
breaches in Turkey is where the state organs claim that Turkey, because of its strategic location and Islamic past, has a particular experience of the state polity which therefore allows a narrow space to fundamental rights. This approach apparently is not in accordance with universal democratic experience. Therefore, there is an obvious conflict between the values of the Turkish Constitution and those of the European Convention on Human Rights. This conflict will be examined in detail in later chapters, especially in chapter 7 which analyses both the approaches of the Turkish legal order and the European Convention system towards the dissolution of political parties.

The Convention and its Rights Restriction System

In particular circumstances the State Parties to the European Convention on Human Rights are allowed to interfere with the rights and freedoms guaranteed under it. The basic reason for allowing restrictions or limitations of rights is the need to strike a balance between the individual’s freedom and society’s just demands for the efficient and effective operation of government. Controlling and regulating the rights of each individual in the interest of all, may in fact better achieve protection of the rights themselves. Particularly, the need to protect the individuals from violence by others entitles even obliges the State to take measures which on occasions require the rights of individuals to take second place to the right of society as a whole to be secure. In the final analysis, restrictions on the rights of individuals are designed to secure the liberty of all individuals in a given society. These ideas underlie the limitation and restriction regime under the European Convention on Human Rights.
The Convention employs a variety of techniques to limit the scope of the rights and freedoms or to permit restrictions on rights and freedoms in specified circumstances. Article 15 allows special restrictions on a number of rights and freedoms in time of war or other public emergencies which fundamentally threatens the nation. Some of the articles setting out specific rights or freedoms make express provision for restrictions that meet certain qualifying conditions. Apart from the articles, which guarantee the rights and freedoms, there are general provisions set out in Articles 15 to 18 which authorise the restrictions of rights in various forms.

However, although the requirement for such limitations is unavoidable there is always the risk that the state may abuse those grounds for restriction in the name of the common good. States have a wide discretion in assessing the grounds of restriction. The discretion has been defined in the margin of appreciation doctrine. The doctrine, established by the Strasbourg organs, gives the State Parties to the Convention the opportunity to strike a balance between the common good of society and the interests of the individual, when considering restricting rights. This has been defined as 'the latitude allowed to Member States in their observance of the Convention'. The margin of appreciation doctrine is a cornerstone concept through which the Convention derives its force, meaning and effect, and by which the individual and society is protected in the exercise and enjoyment of the rights and freedoms guaranteed under the Convention. There are two emerging and evolving standards in the interpretation and application of the doctrine, namely; the comparative survey or

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11 Dickson, B., "Law Versus Terrorism: Can Law Win?", [2005] EHRLR Issue 1, 11 at 12
13 see ch. 3 for more on the ‘Margin of Appreciation Doctrine’.
‘European Consensus’ approach; and the ‘fundamental rights in a democratic society’
approach. The former seems to have displayed a pattern of consistency, uniformity
and coherence and shows signs of becoming fully entrenched in the system and
accepted by the community of states as a whole.15

One of the main Convention tools for managing the tension between national power
and international supervision is the concept of “democratic necessity,”16 which is
found in a number of the Articles. The concept can be defined as being that certain
rights, guaranteed by the Convention, may only be restricted by the domestic
authorities within the limits of what is necessary in a democratic society. This concept
requires that national standards for restrictions should be compatible with the
European standards set out by the Convention institutions and common practices of
European states. In this regard, it is obvious that the Convention aims to establish a
system of standard principles against which the specific behaviour of national
authorities in specific circumstances can be measured.

The requirements of the community to which the individual belongs, and the concept
of ‘the welfare state,’ result in a general acceptance that the individual has no absolute
or unfettered right in any matter and that the welfare of the individual, as a member of
society, lies in a happy compromise between his/her rights as an individual and the
interests of society. In this framework, the protection of the Convention rights
themselves will be better achieved by controlling and regulating the rights of each
individual in the interests of all. Rawls is of the opinion that a basic liberty can be

15 These concepts are discussed in more details in ch.3
16 See ch. 4 for more on the concept of democratic necessity
limited or denied solely for the sake of one or more other basic liberties. Dworkin sees constraints on the rights as justifiable only when they are necessary to protect the liberty or security of others. In the final analysis, restrictions or limitations on the rights of individuals are designed to secure the liberty and happiness of all individuals in a given society. As the Convention’s founders were aware of these ideas they accommodated restrictions into the Convention. However, despite the ‘margin of appreciation’ doctrine the state concerned does not have an unlimited power while making restrictions: they are empowered, but subject to the Convention institution’s international supervision based on democratic necessity.

The European Convention on Human Rights and Democracy

The Preamble to the Convention 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 by on the one hand, an effective political democracy, and on the other, a common understanding and observance of human rights. Some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention. The central concern of the founders of the European human rights system was to prevent reoccurrence, in any state, of a process similar to Germany’s slide into totalitarianism; a slide which conformed to the legal niceties of German

19 Here we provide only a brief explanation as the issue of democracy and the Convention, especially the democratic necessity clause will be looked in detail in Ch. 4
20 that statement of the Preamble was referred to by the Court in its judgements; among others *Klass and Others v. Germany*, Judgment of 6 September 1978, Series A No. 28; (1979-80) 2 EHRR 214, paras. 28, 59
domestic law, O'Donnell clearly states that: "... [T]he Convention of course is designed to maintain 'democratic society'..."

The idea that European countries have a common heritage and political tradition of ideals of freedom and the rule of law is also stated in the Preamble. Furthermore, The European Convention on Human Rights, as the basic human rights law of Europe, provides for a common set of standards applied across many countries. One of the aims of the Convention is to realise the aims and ideals of the Council of Europe as expressed in its statute and to establish a common public order of free European democracies with the object of safeguarding a common heritage of political traditions and the rule of law. Several times the Court has pointed out that the Convention was designed to maintain and promote the ideals and values of a democratic society. So, democracy is without doubt a fundamental feature of the European public order, as has been established by the Strasbourg institutions. Another important point made by the Court is that pluralism is entirely essential in the proper functioning of democracy. By pointing out that there can be no democracy without pluralism, the Court established the well known principle that freedom of expression, as enshrined in Article 10 ECHR, is applicable, (subject to paragraph 2), not only to "information" or "ideas" that are regarded as favourable or inoffensive or indifferent, but also to those...

23 Kjeldsen, Busk Madsen and Pedersen v. Denmark, Judgment of 7 December 1976, Series A No. 23; (1979-80) 1 EHR 711, paras. 27, 53, see also the Soering v. the United Kingdom, Judgment of 7 July 1989, Series A No. 161; (1989) 11 EHR 439, paras. 35, 88
24 Loizidou v. Turkey, Judgment of 23 March 1995 (preliminary objections), Series A No. 310; 20 EHRR 99
that offend, shock or disturb.\textsuperscript{25} The Court is of the view that only allowing this wide breadth of ideas to be freely expressed will make pluralism in society work.

Another connection between democracy and the Convention is Article 3 of Protocol 1. This provides that "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." As free elections are a fundamental characteristic of democracy Article 3 of Protocol 1 is, accordingly, very important in the Convention system. Article 3 requires that laws be made by a legislature responsible to the people.\textsuperscript{26} The Court held in \textit{Mathieu-Mohin and Clerfayt v. Belgium} case\textsuperscript{27} that the reference in Article 3 to the free expression of opinion implies two things: (1) the freedom of expression that is already protected by Article 10; and (2) the principle of equality of treatment to all citizens in the exercise of their right to vote and their right to stand for election.\textsuperscript{28}

The research question of this study could be formulated as: Are the dissolution of political parties in Turkey necessary in a democratic society in the framework of 'rights restriction system' of the European Convention on Human Rights? Until Refah Partisi (Welfare Party) case the answer of Strasbourg Court has been a clear No. To what extent, does the European Convention on Human Rights require a certain form of democracy in each Member State taking into account the particular position of Turkey as illustrated through the case law on the banning of political parties? The

\textsuperscript{25} \textit{Handyside v. United Kingdom}, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737
\textsuperscript{26} Merills, J.G., \textit{The development of international law by the European Court of Human Rights.} (Manchester Univ.Press, Manchester, New York, 1988), p.114
\textsuperscript{27} \textit{Mathieu-Mohin and Clerfayt v. Belgium}, Judgment of 2 March 1987, Series A, No. 113; (1988) 10 EHRR 1,b
\textsuperscript{28} ibid para.54
Strasbourg Court in previous six political party cases from Turkey consistently decided that the dissolution of a political party can not be accepted in a democratic society with a view that the measure as drastic as dissolution of the political party should be a last resort in a liberal democracy. However, in Refah Partisi case, suddenly it deviated from its established liberal approach and turned back to its approach in 1950s on the German Communist Party case by allowing the dissolution of Refah by the Turkish Constitutional Court. In initial six political party cases from Turkey, the Strasbourg Court rightly took the liberal 'rights based approach' to the issue of political party dissolutions. In Refah case on the other hand the Strasbourg Court accepted the Turkish Constutional Court's special Turkish type democracy concept. The hypothesis of this thesis is that; The Strasbourg Court changed its 'rights based approach' to 'ideology based approach' in Refah Partisi case by easily accepting the reasoning of the Turkish Constitutional Court without a detailed European supervision.

In overall, the thesis aims to ascertain how useful are the safeguards that the Convention and its institutions provide (or should provide) in the sensitive area of restricting the rights of individuals in a democratic society. This work will consider whether the dissolution of political parties by the Turkish Constitutional Court is compatible with the standards set out by the Strasbourg organs aiming also to explore why the Strasbourg Court in the Refah Partisi case departed from the liberal approach that it had established in the previous Turkish Political Party cases. The specific reference point of this thesis is the issue of the political party dissolution cases from the Turkish Constitutional Court and the responses by the European Court of Human

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29 For 'rights based approach' and 'ideology based approach' see ch. 7 of the thesis.
Rights. It is obvious that dissolving a political party for the benefit of the whole of society is a restriction of the right to freedom of assembly and association. In democracies, political parties are the means of representation of the different opinions and interests found within a country’s population. As representatives of this width of opinion, through political institutions and the media, at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.\(^{31}\) It is obvious that political parties are forms of association essential to the proper functioning of democratic pluralism. So, it will be necessary to look at the dissolution of political parties in detail within the framework of the restriction of the fundamental rights.

**Methodology and Structure**

The critical analysis of both primary and secondary sources and literature is the methodology for this study. The general framework of this thesis will be established by examining the Convention and the Turkish Constitution, the case law of both the national and international Courts and the secondary literature. Then the political party cases from Turkey will be investigated to determine whether the dissolution of the political parties in Turkey is compatible with the ‘democratic society’ requirement and common European standards expressed by ECHR. Furthermore, this thesis critically analyses the Turkish Constitution and the case law of the Constitutional Court concerning the dissolution of political parties.

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\(^{30}\) The dissolution of political parties cases of Turkish Constitutional Court will be examined in ch.5 and the Strasbourg Court’s response to them will be explored in ch.6

\(^{31}\) *Lingens v. Austria*, Judgment of 8 July 1986, Series A No. 103; (1986) 8 EHRR 103, paras. 26, 42
As the study will be based on a critical and analytical examination of primary and secondary sources it will use doctrine, case law, legislation and official reports. Apart from the legal literature it will also utilise the literature in political science. In this study, I will make a detailed examination of the case law of both the Commission and the Court of Strasbourg relating to the rights guaranteed particularly under Articles 8-11 of the Convention within the framework of their contribution to the concept of ‘necessary in a democratic society’. The analysis of Convention case law will be supplemented by studies of doctrine dealing with both the Convention and national law, as well as studies of national legislation, case law and administrative practice. This study concentrates more upon the Court judgements simply because the Convention system grants more importance to a Court judgement compared to a Commission decision on the merits. Both published reports and the Courts’ web based database HUDOC have been used as the sources of Strasbourg case law.

After a brief introduction to the thesis in chapter 1, chapter 2 will explore the ‘rights restriction system’ of the ECHR concentrating particularly on the legitimate grounds that contributes to the later discussions in the thesis. The Turkish legal order’s approach to the issue of restriction of rights, thus, the comparison and contrast with that of the Convention is done in this chapter. This chapter reveals that the main difference between Strasbourg system and Turkish system is the Turkish Constitution’s emphasis on special Turkish type Democracy which results in a narrow understanding of fundamental rights.

When determining the scope of the restriction of the guaranteed rights and freedoms the ‘margin of appreciation’ and ‘necessary in a democratic society’ concepts are at
the heart of the Court's review of the decisions made by states. Therefore, Chapter 3 will be devoted to examining and exploring the margin of appreciation doctrine, specially its application to the rights fundamental to democracy. Chapter 4 will look at the democracy in political science literature and the concept of necessary in a democratic society as explained by the Strasbourg case law. Chapter 4 will also reveal the issue of to what extent the anti-democratic views and political parties should be allowed in a liberal democracy.

Then we will move on to examine the issue of dissolution of political parties in both Turkish and Strasbourg contexts. While Chapter 5 is exploring the approach of Turkish Constitutional Court and Constitutional law to political parties, chapter 6 looks at decisions of Strasbourg Court in political party dissolution cases particularly those from Turkey. These two chapters give us the opportunity to compare and contrast the findings of national legal order on the one hand with that of international legal order of Strasbourg on the other. The main difference between them seems to be the Turkish legal order's claim of having a special type democracy because of the country's strategic location and its historical background. The thesis will finish with critical analysis done by comparing and contrasting the case law of Turkish Constitutional Court in political party dissolutions with that of Strasbourg Court in chapter 7 and the overall conclusions in chapter 8.
CHAPTER 2

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

Introduction and General Remarks

Human rights and fundamental freedoms are subject to the general rule that no-one has the right to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' recognised elsewhere.\(^{32}\) To prevent this, where necessary, it is legitimate to restrict the fundamental rights of individuals. In addition, the common good may justify laws restricting the exercise of fundamental rights. The purpose of such restrictions is to protect the moral ethos of society.\(^{33}\) Controlling and regulating the rights of each individual in the interests of all, in fact better achieves protection of the rights themselves. So in the final analysis, restrictions or limitations on the rights of the individual are designed to secure the liberty of all individuals in a given society. These ideas underlie the limitation and the restriction of rights under the ECHR.\(^{34}\) In effect, the control of restrictions is respectful of the state's sovereignty, in that it disregards the hierarchy of norms; the pre-eminence of the European norm is indeed tempered by taking into account national interests.\(^{35}\) As Greer suggests, a cursory reading of the Convention might suggest that what it gives with one hand it takes away with the other, since most of the rights which the High

\(^{32}\) http://www.hreoc.gov.au/human_rights/briefs/hr4.1 accessed on 15/05/2004, see also Art.18 ECHR


Contracting Parties have agreed to respect and protect are subject to so many broad and often vague exceptions, restrictions and qualifications.\textsuperscript{36}

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

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

\textsuperscript{36} Greer, S., Public Interests and Human Rights in the European Convention on Human Rights, (Strasbourg: Council of Europe Publication, January 1995)
investigated. The examination of safeguards against the abuse of restrictions will follow that. The second section will be devoted to explore the rights restriction system of Turkish Constitutional Law which will give us the opportunity to compare and contrast with that of the Strasbourg. The main difference between Strasbourg system and Turkish system is the Turkish Constitution's emphasis on special Turkish type Democracy which confines democracy to that of established in it. This understanding, unlike the Strasbourg system, gives rise to a narrower approach to fundamental rights with the aim of protecting the state vis-à-vis individual.

1. NATURE AND SCOPE OF THE LIMITATIONS ON CONVENTION RIGHTS

According to the Convention, some freedoms, such as freedom from torture and freedom from slavery cannot be restricted by governments in the interests of balancing other competing interests. Governments within defined boundaries, with the aim of protecting competing interests, can restrict other freedoms. They may be defined as 'limitable freedoms.' These restrictions or limitations are themselves constrained by international human rights law. Any restriction must be justifiable by reference to one or more of the legitimate objectives. The first condition for a restriction to be justified is that it should have one of the legitimate aims established by the Convention. These legitimate aims vary according to the right in issue, but typically include the interests of national security or the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; and the protection of the rights and freedoms of others. Whether the measure in question pursues one of the stated legitimate aims, it is usually uncontroversial and the Court has rarely found that a state
was not pursuing the aim it asserted. If it could establish that a restriction or interference was not, in truth, in pursuit of one of the legitimate aims, for example where someone was punished for publishing an article, ostensibly to prevent disorder, but in reality with the aim of hindering his trade union activity, there would be a violation of Article 18. However, while the Court may accept that the policy or measure pursued was one of the legitimate aims laid down in the relevant Article, it will not necessarily accept that the specific objective pursued by the policy was ‘necessary in a democratic society’. The extent of the interference with a right will obviously be another highly material factor. A measure that reduces or restricts a right, in such a way or to such an extent that the very essence of the right is impaired, will constitute a disproportionate interference.37

In particular circumstances states are allowed to interfere with rights and freedoms guaranteed under the Convention; therefore, the state may inter alia: deprive an individual of his life or liberty in certain circumstances;38 require the performance of forced or compulsory labour in well-defined cases;39 exclude the press and the public from all or part of a trial;40 interfere with the right to respect for a person’s private and family life, his home and his correspondence;41 limit or curtail the freedom to manifest one’s religion or beliefs, in worship, teaching, practice and observance;42 regulate the right to freedom of expression by requiring the licensing of a

38 Article 2 of the Convention. The European Convention for the Protection of Human Rights and Fundamental Freedoms ETS No: 005, opened for signature in Rome on 04 November 1950 and came into force on 03 September 1953
39 Article 4 (2) ECHR
40 Article 6 (1) ECHR
41 Article 8 (2) ECHR
42 Article 9 (2) ECHR
broadcasting, television or cinema enterprise, or subject such freedom of expression to formalities, conditions, restrictions or penalties; \textsuperscript{43} restrict the right to freedom of peaceful assembly and to freedom of association with others, including the right to join trade unions; \textsuperscript{44} deprive a person of his possessions; \textsuperscript{45} control the use of property, or secure the payment of taxes or other contributions or penalties; \textsuperscript{46} impose certain conditions on the rights to vote and to stand for election; \textsuperscript{47} and restrict, within its territory or any particular area thereof, the liberty or movement and the freedom to choose a residence. \textsuperscript{48}

All of these restrictions are permitted to a Contracting Party in the very article that sets out the right in question. The Convention employs a variety of techniques to limit the scope of its rights and freedoms or to permit restrictions on rights and freedoms in specified circumstances. Some of the articles contain expressive clauses, which indicate that certain activities do not fall within the scope of the article. Secondly, Article 15 allows special restrictions on a number of rights and freedoms in time of war or public emergency. Finally, some of the articles setting out specific rights or freedoms make express provision for restrictions that meet certain qualifying conditions. \textsuperscript{49} Apart from the article itself that guarantees the right and freedom, general provisions set out in the Articles 15 to 18 authorise the restriction or limitation of rights in various forms.

\textsuperscript{43} Article 10 ECHR
\textsuperscript{44} Article 11 ECHR
\textsuperscript{45} Article 1 of the First Protocol
\textsuperscript{46} ibid
\textsuperscript{47} Article 3 of the first protocol
\textsuperscript{48} Article 2(3) and (4) of the Fourth Protocol
\textsuperscript{49} Hovius B, "The Limitation Clauses of the European Convention on Human Rights and Freedoms and section 1 of the Canadian Charter of Rights and Freedoms: A Comparative Analysis" in (1986) 6 YEL 1, p. 9
The restriction system of the Convention is largely based on the restriction principles found in Articles 8-11. Articles 8-11 have some similar features. Each of them has been formulated in an almost identical manner. The first paragraph sets out the basic right. The second paragraph typically expresses the conditions and forms of restriction of the basic right. Articles 8, 9, 10 and 11 deal with the protection of private and family life, freedom of thought and religion, freedom of expression and freedom of association and assembly, respectively.

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

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

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Table 1  Limitation Grounds in Articles 8-11

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

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formulated with the aim of setting up General Interpretative Principles Relating to the Justification of Limitations and Interpretative Principles Related to Specific Limitation Clauses


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

The rights guaranteed in the Convention and its Protocols can be split into two broad categories; derogable rights and non-derogable rights. According to Article 15 of the Convention, a State Party to the Convention is permitted to derogate from certain provisions of the Convention in times of public emergency, to the extent strictly required by the exigencies of the situation. On the other hand non-derogable rights cannot be derogated or restricted in any situation even in times of war or public emergency. In this respect Article 3 is an absolute non-derogable right, guaranteed by the Convention. There will be no place to derogate or restrict the right not to be tortured. Another non-derogable right is the right to life guaranteed by Article 2, but Article 15(2) itself makes the exception of deaths caused by lawful acts of war. Furthermore, Articles 4 (1) and 7 set forth non-derogable rights. The Protocol 6 together with Protocol 13 abolishes the death penalty; under Article 3 of Protocol 6 derogation from the sixth Protocol is prohibited. Derogation arises, in certain emergencies so that a state can be free from their obligations under the Convention. However, given the language of Article 15, it does enhance the position taken by the Court that proportionality of derogation measures will ordinarily require a process of supervision to prevent or reduce the possibility of abuse of the derogation.53

Absolute and Qualified Rights

Rights and freedoms set forth in the Convention can be grouped as either absolute or qualified according to the permissibility of their limitation or restriction. Qualified

rights permit the state to interfere with the rights guaranteed, on the condition that the interference is prescribed by law; has a legitimate aim; and is necessary in a democratic society. Articles 8-11, Article 1 of Protocol 1 and Article 2 of the Protocol 1 are defined as qualified rights, because they permit the limitation in their second paragraphs.54

The absolute rights set out in the Convention start with Article 2, the right to life. Although the right to life is classified as absolute under Article 2, execution may take place following a court conviction of a crime for which the death penalty is allowed, (it should be borne in mind that this is subject to the prohibition of the death penalty under Protocol 6 which applies to the states bound by it). In addition to this, Article 2 establishes that deprivation of life is not a breach of the Convention where it results from the use of force which is no more than absolutely necessary in: (a) defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and (c) in action lawfully taken for the purpose of suppressing a riot or insurrection. The list of absolute rights continues: Article 3, the prohibition of torture and inhuman and degrading treatment; Article 4(1) the prohibition of slavery or servitude; and Article 7 the prohibition of the retrospective effect of criminal law. Protocol 6 concerns the abolition of the death penalty and Article 4 Protocol 7 prohibits criminal trial for an offence for which one has already been acquitted or convicted. Therefore as regarding absolute rights, neither in times of emergency nor in a normal situation any restriction or limitation is not permitted. For the other rights and freedoms provided and guaranteed under the Convention certain restrictions are permitted. These restrictions can be in different

forms. In many cases, the nature and scope of the restriction measure is decisive for the question of whether or not a violation has taken place.55

**Inherent Limitations**

For some time, the Commission, took the view that in addition to the expressly mentioned restrictions (or in the absence of an express reference), the scope of the rights and freedoms laid down in the Convention would be subject to implied limitations. Unlike the express restrictions, these implied restrictions were inherent in those rights and freedoms themselves, so that, as long as they and their inherent limitations were respected, there would be no breach and the question as to possible limitations did not arise.56 However, the Court rejected this doctrine, adopting the view that the enumeration given there is exhaustive. It stated that there is no room for inherent limitations.57 Therefore, it is now established that the only restrictions which are allowed are those which are expressly permitted by either the general articles of the Convention, or the limitations contained in individual articles.58

56 Ibid p.763
57 see Vagrancy cases De Wilde, Ooms and Versyp v. Belgium, Judgement of 18 June 1971, Series A No.12 (1979-80) 1 ECHR 373, see also Golder v. United Kingdom, Judgement of 21 February 1975, Series A No.18; (1979-80) 1 ECHR 524, para. 44
The Legitimate Aims of Limitations

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

National Security

The term "national security" includes two distinct elements, "national" and "security." The word "national" is generally used to refer to that which concerns a country as a whole. The word "security" suggests the protection of territorial integrity and political independence against foreign or internal force, or threats of force. Although the terms national and security can have these meanings, it should be recognised that both terms can be used to refer to different things. The word "nation" can be used to refer to both a cultural, ethnic etc. grouping within a state, (generally with a past history of independence before incorporation into a larger unit), as well as the state itself. As to the term "security," it may be defined as a state of being free from fear, risk of threat etc.; in other words either an absence of threats, or the existence of threats but coupled with adequate safeguards. The principal cases in which the national security defence

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has been raised indicate that it concerns the security of the state and the democratic constitutional order from threats posed by enemies from both within and outside. Cameron, in this framework, is of the opinion that, in an era of global interdependence, the ordinary meaning of "national security" cannot be limited to the simple preservation of territorial integrity and political independence from external armed attack, or interference by foreign powers. National security must also logically encompass espionage, (economic or political), and covert action by foreign powers. Moreover, notwithstanding a lack of foreign involvement, purely internal threats to the existing political order by use of force must also be checked. Certainly these are considered by most, if not all, governments as legitimate national security concerns.

Basically, the aim of the national security restriction ground is to protect the existence of the nation or its territorial integrity or political independence against force, or threat of force. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. It is very important that vague or arbitrary limitations should not be imposed; the restriction may only be invoked when there are adequate safeguards and effective remedies against abuse.

The national security concept is as old as the nation state itself but it began to be used generally at the beginning of the cold war. The first example of its statutory usage was apparently the US National Security Act of 1947.

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

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

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66 Nicol, A., "National Security Considerations And The Limits Of European Supervision" (1996) EHRLR 1, p.41
67 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Principle 2. U.N. Doc. E/CN.4/1996/39 (1996). These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgements of national courts), and the general principles of law recognised by the community of nations. These principles aim to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information.
In a number of cases the national security defence has been an issue under the right to respect for private and family life, home and correspondence; the right to freedom of assembly and association\textsuperscript{68}; and the right to freedom of expression. In the early cases where the national security exception was raised, interference with the right to respect for private and family life, home and correspondence was raised in connection with the use of secret surveillance.\textsuperscript{69} Although the Strasbourg institutions accepted that secret surveillance constitutes an interference with Article 8,\textsuperscript{70} they also decided that this interference could be justified where it is strictly necessary to protect democratic institutions.\textsuperscript{71} The Strasbourg Court stated in the well known \textit{Klass} case that technical advances in espionage and the development of European terrorism made secret surveillance particularly necessary.

In July 1999, the Court gave almost identical judgements in a series of Article 10 cases.\textsuperscript{72} These related to government actions against a number of newspapers and magazines on the basis that they were provoking division amongst the people of that may be imposed in the interests of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms.


\textsuperscript{70} \textit{Klass v. Germany}, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.41


Turkey, and threatening the integrity of the state.\textsuperscript{73} The various publications had made what the Court accepted were powerful and acerbic criticisms of the Turkish Government and its politics.\textsuperscript{74} In particular, it said that the Convention left little room for the restriction of political speech. Here democracy was on the side of the individual. A democratic government had to be open to criticism and scrutiny, in this case by the media.\textsuperscript{75}

The judgements were given in an objective style, and in each case the main focus of the Court was on whether the publication in question had incited violence. Where the publication incited the violence, the Court found that the government had not been in violation of its responsibilities under the Convention in taking action against publishers. In view of the objective assessment of this question, it was odd that the Court described the government as having a greater margin of appreciation in cases where there was an incitement to violence. The language of the margin here is confusing. What the Court really meant was simply that there was no violation in these cases. The use of the incitement of violence criterion appears as an intersection of the essential issues of necessity and proportionality. The Court seemed to suggest that national security and territorial integrity could only be threatened by some act of violence, i.e. actual terrorist activity.\textsuperscript{76} In the absence of some such threat, it would not be necessary to restrict publication. Proportionality depended on the same question, where violence was incited it would be proportionate to impose restrictions. The single question of incitement can fulfil both roles, but the two questions remain distinct.

\textsuperscript{73} Under Criminal Code Article 312 (1) and (2)
\textsuperscript{74} \textit{Ceylan v. Turkey}, (App 23556/94), Judgement of 8 July 1999, Reports 1999-IV, (2000) 30 EHRR 73; case para.33
\textsuperscript{75} see ibid para.34
However, while the Court’s method does cover the questions of necessity and proportionality, it was criticised by the concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve. They stated that:

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

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

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

76 ibid. para.36. In these cases The Turkish Government did not explain its view on the threat posed in detail rather it relied on the language of the convention.
Article 8 should be considered as justified on the ground of protecting national security. The Court agreed with the state making the important evaluation that protecting national security requires state authorities to have the power to collect and store information on persons in a register which is withheld from the public. On the other hand, the Court stated that it was equally necessary that there should be adequate safeguards to prevent abuse of the system. Safeguards can mitigate the effects of derogation, or as here a limitation. That being the case they should be as extensive as possible in the circumstances. Therefore, in a field where abuse is potentially so easy in individual cases and might have extremely harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge.

This general statement of principle, which asserts the essential importance of safeguards in a system for collecting information about individuals, was reaffirmed in another cornerstone case *Klass v. Germany*. In this case the applicants were lawyers. In the past some of them had represented clients who were suspected of engaging in anti-constitutional activities. The applicants claimed that they might be subjected to security service telephone taps. They complained that there was no requirement that anyone subject to surveillance be told of the fact after it had finished, nor was there

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78 ibid para.59, The Commission reached a similar conclusion in *Friedl v. Austria*, Report of 19 May 1994, Series A, No. 305-B, (1996) 21 EHRR 83. The case was concerned to withholding by the police of photographs taken during a demonstration, notwithstanding that there had been no prosecution. This case was settled and the merits has not been reached the Court.
79 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.41, para.56
80 *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214,
81 The Commission Report, quoted at para 27 of the Judgement. In this case there was an issue as to whether the applicants could be victims under the direct victim requirement, since they had no clear information about whether their clients had been subject to telephone taps or not. The Court decided that it was unacceptable that an applicant be denied such status on the basis of the secrecy of the very measures about which he complains. Para.36
any means available under German law of preventing such surveillance. The German government claimed that their secret surveillance laws were justified under the second paragraph of Art.8. The Court stated in general that:

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

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

Under the German surveillance system the safeguards were extensive. Surveillance could only be used where there was an immediate danger to the constitutional order,

82 ibid, para.10
83 Klass v. Germany, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.48
84 ibid, para.42 The Court also in Sunday Times v. United Kingdom, Judgement of 26 November 1991, Series A No.217; (1992) 14 EHRR 229 at para.65 stated that the job of the Court was not balancing of two principles, but interpreting limited exceptions to a single basic right. Obviously this is not literally true, the limits are always pursuant to a different principal to the one represented by the substantive right, but it suggests a certain strictness of approach. On this also see Soulier G. "Terrorism" in
where there was no other means available and where there was some factual basis to suspect the person monitored. Furthermore a judicially qualified officer, who passed only required information on to the authorities, supervised this. Perhaps the most important of the safeguards was that there was a parliamentary board (which included members of the opposition), to whom the responsible minister had to report. There was also a commission appointed by the parliamentary board whose main duty was to monitor the use of surveillance power. There was an additional requirement that the person concerned was to be informed, at the point where it was possible to do so without jeopardising the purpose of the surveillance. It had to be noted that, because of the nature of the job, this might well be a very long time after it had started (if it was a large-scale operation). 85 Despite the fact that there was such an extensive and complicated safeguard system, its weakness was that there was no possibility of judicial involvement or a legal remedy at any point. The Court argued that this was a serious shortcoming, stating that:

“One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the preamble of the Convention. The rule of law implies, inter-alia, that interference by the executive authorities with an individual’s rights should be subjected to an effective control which should normally be assumed by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.” 86

85 Klass v. Germany, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, paras.18-21
86 ibid para.55
Despite this finding, the Court came to the conclusion, and notwithstanding that there is need of a narrow interpretation of the exceptions to Article 8, that the German system fell within the government’s margin of appreciation. It seems that the Court was significantly influenced by the inclusion on the parliamentary board of members of the opposition, and in the end was convinced that this board, and the commission on surveillance, were sufficiently independent to be an adequate substitute for judicial control. As for the applicants’ second complaint; that the information held about them was not available to them, the Court agreed with the Government’s submission that it would often defeat the object of the surveillance automatically to require that the subject be informed of the monitoring as soon as it had finished.

In the Klass case the Court gave emphasis to the general concept of democracy. The Court ultimately saw the measures as essential to defend democracy, and themselves of a sufficiently democratic character to be within the narrow conception of the second paragraph. The issue of proportionality was another important matter within the general character of this case. However, the question of what limitation to the right was actually needed; what role records relating to men such as the applicants would actually play in the fight against terrorism has not been considered. Since there was no suspicion relating to their activities, there would not, apparently, be any need to retain their records that would not also justify the maintenance of similar records relating to any member of the public, whether they had ever been subject to an “examination” or not. It is hard to accept that such a necessary reason existed, and would have justified the retention of the information under Article 8(2).

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87 ibid para 49
88 ibid para 56
89 ibid para 58
91 see the dissenting opinion of Mr Klecker in Klass.
In *Klass v. FRG*\(^92\) the Court accepted that legislation granting powers of secret surveillance over the mail, post and telecommunication was, under exceptional conditions, necessary in a democratic society in the interests of national security and even for the prevention of disorder or crime (subject to the existence of adequate and effective guarantees against abuse).\(^93\) The Court came to the conclusion that where there is adequate control of surveillance, which operates properly, a reasonable balance will have been struck between the rights of the individual and the needs of a democratic society.

In *Vogt*\(^94\) the applicant complained about her dismissal from a civil service post as a secondary school teacher. This was on the alleged ground that her membership in the German Communist Party (DKP) violated the duty of political loyalty owed by civil servants to both the Federal Republic and the Land of Lower Saxony. The interference was defended by the German government under the national security, prevention of disorder, and the protection of the rights of others exceptions to the right to freedom of expression and the right to freedom of association and assembly. The Commission declared the application admissible, and in November of 1993, it issued an opinion finding that there had been a violation by West Germany of both Article 10 and Article 11. The Commission specifically refuted the fundamental basis of *Glasenapp*\(^95\) and *Kosiek*\(^96\), stating that:

\(^92\) *Klass v. Germany*, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214,
\(^93\) ibid, paras. 43, 48 and 59
\(^96\) *Kosiek v. the Federal Republic of Germany*, Judgement of 28 August 1986, Series A No.105;(1987) 9 EHRR 328. In the *Kosiek* and *Glasenapp* cases the Court was of the opinion that the dismissal of a civil servant because of some opinions made public by the civil servant, were not to be seen as an interference with the exercise of the right to freedom of expression as guaranteed by Art.10. The Court was of the opinion that it was not the issue of freedom of expression, but that of access to the civil service.
"The Commission does not consider that in the present case, concerning the dismissal of a permanent civil servant, "access to civil service lies at the heart of the matter." It finds, with the parties, that the dismissal of the present applicant, on account of her political activities in the DKP, interfered with the exercise of her freedom."97

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

Judge Jambrek, delivered a separate and well-reasoned dissenting opinion. He argued that a number of factors should have been given due weight by the majority. These

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

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

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

In the *Piermont v. France* case the applicant took part in a demonstration in favour of the independence of French Polynesia. In a speech, she expressed support for anti-nuclear demands and for independence. The French authorities ordered her expulsion from French Polynesian territory and banned her from re-entering it. She claimed that this interference breached her right to freedom of expression under Article 10. The French Government relied on “territorial integrity” to justify the interference. The Court accepted that it was aimed at the prevention of disorder and in the interests of territorial integrity. The Court in its judgement, referred to the importance of free

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100 ibid.
101 See note 67. A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).
102 *Piermont v. France*, Judgement of 27 April 1993, Series A No. 314; (1995) 20 EHRR 301
political debate and that the speech was given in an authorised non-violent
demonstration without any disorder. It reached the conclusion that the orders of the
French Government had not been ‘necessary in a democratic society’.

Prevention of Disorder or Crime

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

This exception is found in the Article 8 para.2, the right to respect for private and
family life, home and correspondence; Article 10 para.2, the right to freedom of

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104 Appl. 8170/78, X v. Austria, (1979) 22 Yearbook 308
105 Appl. 8231/78, X v. United Kingdom, (1982) 28 DR 5, Appl. 1753/63, X v. Austria, (1965) 8
   5442/72, X v. United Kingdom, (1975) 1 DR 41, Appl. 5270/72, X v. United Kingdom, (1974) 46 CD
   54
106 Appl. 5488/72, X v. Belgium, ((1974) 17 Yearbook 222,
107 Appl. 9237/81, B v. United Kingdom, (1983) 34 DR 68
expression; Article 11 para.2, the right to freedom of peaceful assembly and to freedom of association. The concept of order, as envisaged by this provision, refers not only to public order within the meaning of Articles 6(1) and 9(2) of the Convention; and Article 2(3) of the fourth Protocol. It also covers the order that must prevail within a group where such order can have repercussions on the general order in society.\textsuperscript{110} The following have all been accepted as justifiable measures by a state in its attempt to prevent disorder or crime: the recording of telephone conversations\textsuperscript{111}; placing a juvenile delinquent accused of a number of offences in a closed institution for observation and drawing up a psychiatric report as part of a juvenile investigation concerning him\textsuperscript{112}; and in the case of convicted prisoners, their surveillance and search by prison wardens, their removal from association with other prisoners, the requirement to wear prison uniform, and restrictions on correspondence.\textsuperscript{113} This exception has been frequently invoked in respect of cases regarding Article 8. In the \textit{Golder}\textsuperscript{114} case the Court held that by denying the applicant (a prisoner), access to a solicitor to discuss a libel action against a prison officer, the State had effectively denied him access to a fair and public hearing. The Court also ruled that his right to respect for correspondence under Article 8 had been breached. Again in relation to a prisoner's correspondence, in the \textit{Silver} case the Court agreed that there was no justification for holding back any prisoner's letters unless they discussed crime or violence.\textsuperscript{115}
In a number of cases the Court has found opportunities to examine whether religious practices could justifiably be restricted under the issue of disorder in society. Among these is the well known case of Kokkinakis v. Greece. After becoming a Jehovah’s Witness in 1936, Mr Minos Kokkinakis was arrested more than sixty times for proselytising. He was also interned and imprisoned on several occasions. Finding a violation of Article 9, in the case the Court stated that freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. In its religious dimension, this is one of the most vital elements since it supports the identity of believers and of their conception of life. But it is also a precious asset for atheists, agnostics, sceptics and those who are unconcerned by religion. The pluralism indissoluble from a democratic society, which has been won at great cost over the centuries, depends upon it. It may be understood from the Strasbourg case law that Article 9 provides protection for religious, non-religious, atheist, agnostic, sceptical and also neutral opinion. And this because the Article includes the right not to practise or to be associated with religious activities against one’s will. Thus, it necessarily involves the right to change one’s belief or religion, as much as it provides the individual with the right to his or her religion or belief.

In the same sense, but with a different dimension, in the Kalac v. Turkey case the Court decided that the applicant’s dismissal from the army was not an interference with his rights under Article 9. The applicant was a judge advocate in the army but was dismissed from his post for breaching the code of the army by being a member of the religious Suleyman sect. Here the Court decided that there was no interference with the applicant’s rights under Article 9, as the applicant had given the sect legal

assistance and intervened on a number of occasions in the appointment of servicemen who were members of the sect. The important distinction drawn by the Court in this case was that the dismissal of the applicant was not prompted because of the way he manifested his religion but by his conduct and attitude.\(^{118}\) It seems that the Court did not see any contradiction in stating that the authorities condemned the applicant’s conduct because it infringed the principle of secularism. The court clarified that his dismissal, or compulsory retirement, was not prompted by the way the applicant manifested his religion. As the reasoning seems quite complicated in this case, one should bear in mind that there is sensitivity regarding the secular establishment of the Turkish state and the role that the military plays in Turkish politics to preserve the secular State.

The Court here appears to have been strongly influenced by the evidence that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion (e.g. praying five times a day and performing other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque). However comparing this outcome with that of in *Kokkinakis v. Greece*, it seems to be a contradiction. Because, the Court noted that religious freedom implies, inter alia, freedom to manifest one’s religion in community with others, in public and within the circle of those whose faith one shares, as well as alone and in private.\(^{119}\) Therefore, it is not clear how the Court came to separate out the applicant’s “conduct and attitude” from the forms which manifestation of one’s religion or belief may take


\(^{118}\) see *Kalac v. Turkey*, Judgment of 1 July 1997, Reports 1997- IV; (1999) 27 EHRR 552, paras. 30-31
under Article 9, namely “worship, teaching, practice and observance.” This rather
artificial distinction, taken together with a “military life” narrowing of the meaning
of the right concerned, was the somewhat dubious basis for a finding of ‘no
interference’ with the first paragraph of Article 9. Accordingly, the Court saved itself
the task undertaken by the Commission, namely deciding whether the applicant’s
enforced retirement from the armed forces constituted a proportionate measure,
“prescribed by law”, pursuing a pressing social need. It is difficult to see why
considerations of military life and the role of the armed forces in pluralist countries
cannot properly be part of the determination of what is “necessary in a democratic
society” under the provisions of Articles 8(2), 9(2), etc., rather than artificially
narrowing what constitutes an interference with the substantive rights in Articles
8(1), 9(1), etc.

One of the more controversial Strasbourg cases regarding freedom of religion and
conscious was the Karaduman case. In this case, university regulations prohibited
the wearing of headscarves in identity photographs attached to the degree certificate
of a secular university. The Commission, surprisingly, ruled that this did not
constitute interference in the applicant’s right to manifest her religious beliefs. The
Commission stated its view that universities could restrict the freedom of students to
manifest their religion, in order to ensure the harmonious coexistence of students with

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119 see Kokkinakis v. Greece
120 App.No: 16278/90, Karaduman v. Turkey, 74 DR 93
121 The jurists of classical Islamic Law, basing their opinions on the verses on the Quran, concluded that
Muslim women were under a duty to veil themselves. On the other hand it should be expressed that the
obligatory character of the veil is not unanimously agreed amongst Muslims and the form of the veil
differs among the countries and cultures of the Muslim world. See Gallala, I., “The Islamic Headscarf: An Example of Surmountable Conflict between Sharia and the Fundamental Principles of Europe” (September 2006) 12 European Law Journal No.5, pp593-612
different religious allegiances. This could stand without complying with the requirements laid down in Article 9(2).\textsuperscript{122} The Commission stated that:

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

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

\textsuperscript{122} ibid at. 108
Grand Chamber decision of *Leyla Sahin v. Turkey*, however, the Court missed an opportunity to modify the earlier decision.

In *McVeigh* the applicants had been arrested and detained under the "Prevention of Terrorism" legislation in force in the United Kingdom. Various measures had been taken; such as fingerprinting and photography taken during their detention and of the retention by the authorities of certain records following their release. Two of the applicants, Mr McVeigh and Mr Evans also complained that they were not allowed to join or contact their wives. The applicants alleged breaches of Articles 5, paragraphs 1-5, 8 and 10 of the Convention. The government claimed that it was justified in preventing a suspect from contacting his family, as they might facilitate an act of crime by the destruction of evidence. The claim in this case was that Article 8 had been violated by the failure of the authorities to allow the men to contact their families to inform them about their detention. This aspect of the case is worth noting, because it is based on the previously neglected question of necessity; whether there was any reason shown by the government for preventing contact. It was concluded that there was not. The Commission rejected, in this application, the reason suggested by the government, that a suspect’s family would then inform accomplices, who might escape or destroy evidence. Surprisingly, in view of the contemporary case law, the margin of appreciation did not play a prominent role in *McVeigh*. However, it was clear from the Commission’s opinion that it was not prepared to scrutinise the decisions of the respondent government closely with a methodology similar to that prompted by the margin doctrine. It is possible that the Commission chose to avoid

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123 *Leyla Sahin v. Turkey*, App.No. 44774/98, Grand Chamber Judgment of 10 November 2005, for detailed examination of Leyla Sahin case see ch. 6, pp. 245-249
124 *McVeigh, O’Neill and Evans v. UK*, 25 DR 15
125 ibid. para. 239
126 ibid para. 238
the language of the margin because its consideration of this element of the case followed on from the more objectively considered Article 5 elements. In Murray\textsuperscript{127} the applicant was arrested at her home on 26 July 1982 by a member of the armed forces under Section 14 of the Northern Ireland (Emergency Provisions) Act 1978 under suspicion of involvement in the collection of money for the purchase of arms for the IRA in the United States of America, an offence under Section 21 of the 1978 Act and Section 10 of the Prevention of Terrorism (Temporary Provisions) Act 1976. The applicant has complained that her detention was in breach of Article 5 para. 1 of the Convention, in particular subsection (c) of that provision, as allegedly it was not for the purpose of bringing her before a competent legal authority or founded on any reasonable suspicion that she had committed any criminal offence. She, furthermore, complained that the manner in which she was treated both in her home and at the screening centre constituted a violation of Article 8 para. 1 of the Convention. In particular she complained about the entry into and search of her home, the recording of personal details concerning herself and her family and the retention of those records, including a photograph of her which was taken without her consent. She also complained that she was not informed promptly of the reasons for her arrest, contrary to Article 5 para. 2 of the Convention. The claims regarding Article 8 were similar to those in McVeigh. Not surprisingly in view of the finding that the arrest of Mrs. Murray did not disclose a violation of Article 5, the Court found that there was no violation of Article 8 in the entry and search of her home, or her subsequent questioning. Nor was it a violation that the information gathered was retained, a

\textsuperscript{127} Murray v. United Kingdom, Judgement of 28 October 1994, Series A No.300-A; (1995) 19 EHRR 193
decision based on the same reasoning, and displaying just the same limitations, as the
Commission decision in *McVeigh*.<sup>128</sup>

"A certain margin of appreciation in deciding what measures to take both in
general and in particular cases should be left to national authorities... The
present judgement has already adverted to the responsibility of an elected
government in a democratic society to protect its citizens and its institutions
against the threat posed by organised terrorism..."<sup>129</sup>

Again, the combination of the margin of appreciation and the moral authority attached
to those seen as being on the side of democracy was a powerful combination. In this
case, not only was there a neglect of the necessity question, at least in relation to the
retention of information about an unsuspected person,<sup>130</sup> but the Court also failed to
carry out [any more] than a balancing of the limitation on the applicant’s right with
the gravity of the situation. It seems that such a balancing would have produced a
result in harmony with the decision reached, but, as with necessity, it remains the case
that the proportion must be assessed in every decision. Instead, as a substitute for both
the questions of what was necessary and what was proportionate, the Court ensured
that the activities of the army were based on legitimate considerations and that none of
the personal details taken would appear to have been irrelevant to the procedures of
arrest and interrogation.<sup>131</sup>

<sup>128</sup> *McVeigh, O'Neill and Evans v. UK*, 25 DR 15
<sup>129</sup> ibid para. 90
<sup>130</sup> ibid para.91
<sup>131</sup> ibid paras. 92-93
While both *Brind v. UK*\(^{132}\) and *Purcell v. Ireland*\(^{133}\) were only admissibility decisions they are both significant cases. Both concerned the banning of broadcasts by members of organisations proscribed by the UK Prevention of Terrorism Acts (but also included the legal Political Party Sinn Fein). The objective was to try and prevent terrorists and their supporters from advocating their cause and gathering support for their activities. Both the respondent governments claimed that the terrorists' appearance on television gave their organisations an air of legitimacy. Therefore the ban would, in the United Kingdom Prime Minister, Margaret Thatcher's phrase, cut off the "oxygen of publicity" from them. In Ireland the ban included all statements made by those covered, while the UK version made exceptions for election campaigns and did not cover members when speaking as private persons, or on a matter entirely unconnected with terrorism. Neither ban prevented what the groups had said from being broadcast as reported speech. In the case of the UK ban, television pictures were even dubbed by an actor reading the statement word for word. Journalists whose work was affected by the bans brought the applications in both cases.

The question in *Brind* and *Purcell*, was whether such an infringement of Article 10 could be permitted in order to protect national security and prevent crime or disorder. Despite a number of issues being raised, the relatively short answer of the Commission in both cases was 'yes'. In *Purcell* the Commission pointed to the difficulty of establishing a balance between the protection of the state and freedom of information. In the end, it concluded, the importance of fighting terrorism outweighed the "inconvenience" the ban caused to the applicants.\(^{134}\) The arguments of the applicants were, it may be said, rather glossed over, and the emphasis of Article 10

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\(^{132}\) *Brind v. UK*, Decision of the Commission 77-A DR 42 (1994)

\(^{133}\) *Purcell v. Ireland*, Decision of the Commission 70 DR 262 (1989)
was shifted from their rights under the first paragraph, to the duties and obligations mentioned at the start of the second. Although it was only an admissibility decision, and there is a limit to how much analysis it should bear, Purcell shows the Commission seemingly making very little assessment of. It did little more than stamp its approval on the arguments of the Irish Government and the decision appears to depend very substantially on the margin of appreciation. Certainly there was no attempt to make any critical assessment of whether the measures could be said to be necessary.

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

"...appreciates that the logic of the continuation of the directions is not readily apparent when they appear to have very little real impact on the information available to the public. The very absence of such impact is, however, a matter the Commission must bear in mind in determining the proportionality of the interference to the aim pursued."\(^{135}\)

The Commission thus observed that in that respect at least the ban was not necessary, in that it had little real effect.\(^{136}\) However, despite going on to decide in the government’s favour, it did not propose or support any alternative reason why the ban was needed. Where the interference under the second paragraph does not appear to fulfil a legitimate purpose, it constitutes a violation of the Convention. The fact that it

\(^{134}\) ibid. p.279
\(^{135}\) Brind v. UK, Decision of the Commission 77-A DR 42 (1994), pp.42-54
is quite a small interference, and thus in proportion to the threat, should not enter into the picture. The Commission, in allowing the continued imposition of a limitation which is not needed, however small it appears to be, can only undermine respect for the Convention. Here, instead of the strong stance it could have taken, the Commission stated:

"[the interference] can be regarded as one aspect of a very important area of domestic policy... and the Commission has no doubt as to the difficulties involved in striking a fair balance between the requirements of protecting freedom of information... and the need to protect the state and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights."\(^{137}\)

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

**The Protection of the Rights, Freedoms and Reputations of Others**

This restriction ground is sometimes linked with the protection of health and morals and the prevention of disorder and crime grounds. It is also a broad and diverse category. As it covers a wide range of matters it is frequently invoked in the Strasbourg Jurisprudence.\(^{138}\)

\(^{136}\) See also *Guardian and Observer v. UK*, Series A No.216, para 69.

\(^{137}\) *Darby v. Sweden*, Judgement of 23 October 1990, series A No 187; (1991) 13 EHRR 774, paras.42-54

Within the UN system there is a principle that when a conflict exists between rights protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context a special weight should be afforded to rights not subject to limitations in the Covenant.139

This limitation ground was used in the *Otto-Preminger Institute* case.140 This case concerned the screening of an allegedly offensive film, which was considered to breach the right to respect for religious feelings when the rights in Articles 9 and 10 were read together.141

In *Oberschlick* the Court decided that the conviction of the applicants for defaming certain Austrian criminal court judges was justified under the protection of the reputation or rights of others clause of Article 10, para.2. The Court decided that discussion of judicial decisions was legitimate in a democratic society. However, it also held that it is necessary to protect public confidence in the judicial process against destructive attacks that are essentially unfounded. This was especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to critics.142

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141 ibid paras. 46-48
Assessment

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

The Safeguards against Abuse of Restrictions

Prescribed by Law

The “prescribed by law” criterion raises several important and interesting points. This expression has been interpreted as meaning that at least two requirements flow

\[^{142} Oberschlick v. Austria, Judgement of 23 May 1991, Series A No.204; (1994) 19 EHRR 389, para. 35\]
therefrom. First of all, the law must be adequately accessible: this means that the citizen must be able to have an indication of the legal rules applicable to a given case, which is adequate in the circumstances. Secondly, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able – if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This also supports the view that the word law refers not only to the state’s statute law, but also to its unwritten law: it also includes subordinate legislation and a royal decree. Whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms, which, to a greater or lesser extent are vague and whose interpretation and application are questions of practice.

Although terms are used in the different provisions in different forms of words, ("provided by law", "prescribed by law", "in conformity with law", "in accordance with law"), the meaning of each is the same. This wording reads in the French text of the Convention ‘prevue(s) par la loi’ in all cases. This established rule was reiterated and applied in other cases both by the Commission and the Court. It should be borne in mind that the phrase ‘in accordance with the law’ does not merely relate to the quality of the law, requiring it to be compatible with the rule of law. As the Court emphasised in the Malone case, this rule implies that there must be a measure of protection in domestic law against arbitrary interference by authorities with the rights safeguarded by the convention.

143 De Wilde, Ooms and Versyp v. Belgium, Judgement of 18 June 1971, Series A No.12 (1979-80) 1 EHRR 373 para.93
144 supra Handyside v. UK, para.49
145 supra,White, R.C. and Ovey, C., p.201
Necessary in a Democratic Society

This notion found in Article 29 of the Universal Declaration of Human Rights plays a paramount role in the European Convention on Human Rights. The notion of necessity implies the existence of a pressing social need.\textsuperscript{147} This may include the 'clear and present danger' test which was developed by the United States Supreme Court. It must also be assessed in the light of the circumstances of a given case, and it is for the national authorities to make an initial assessment of the reality of the necessity in this context.\textsuperscript{148} From the \textit{Sunday Times v. United Kingdom}\textsuperscript{149} case one could conclude that, in order to assess whether interference was based on sufficiently pressing reasons to render it "necessary in a democratic society," account must be taken of any public interest aspect of the particular case. It is not enough that the interference involved belongs to the class of the exceptions listed in the appropriate article of the Convention which has been invoked. Neither is it enough that the interference was imposed because the subject matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms. The court has to be satisfied, and the offending state must justify, that the interference was "necessary" having regard to the facts and circumstances prevailing in the specific case before it. Thus, in the \textit{Sunday Times} case the thalidomide tragedy was a matter of undisputed public concern. The court determined that the interference by the national courts in preventing the press from publishing certain information did not correspond to a

\textsuperscript{146} Malone \textit{v. United Kingdom}, Judgement of 2 August 1984, Series A No.82 ; (1985) 7 EHRR 14 para.67
\textsuperscript{147} Observer and Guardian \textit{v. The United Kingdom}, Judgement of 26 November 1991 Series A No. 216 (1992) 14 EHR 153 para.59
\textsuperscript{148} supra, Handyside \textit{v. United Kingdom}, although the national authorities have a certain discretion while assessing the existence of pressing social need, it has been established by the Convention organs that the Contracting States' margin of appreciation in assessing whether such a need exists, goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts.
sufficiently pressing social need, (namely, maintaining the authority of the judiciary), to outweigh the public interest in freedom of expression. Accordingly that restraint was not necessary in a democratic society.

In *Handyside v. United Kingdom*\(^{150}\) the court attempted to determine one of the essential foundations or elements of a democratic society, freedom of expression. It found that pluralism, tolerance and broadmindedness are essential elements of the concept. A democratic society must be pluralistic, tolerant and open, which inevitably entails the achievement of a delicate balance between the wishes of the individual and the utilitarian greater good of the majority. But this must begin from the standpoint of the importance of the individual, and the undesirability of restricting individual rights and freedoms. Thus, although the hallmarks of a democratic society are as stated herein and individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of minorities and individuals and avoids any abuse of a dominant position.\(^{151}\)

**Prohibition of Abuse of Rights and Restrictions**

A person, or a group of persons, cannot rely on the rights enshrined in the Convention, or its Protocols, to justify conduct which amounts in practice to an activity intended to destroy the rights or freedoms set forth in the Convention. Any such destructive

\(^{149}\) Supra, *Sunday Times v. United Kingdom*

\(^{150}\) Supra, *Handyside v. United Kingdom*

\(^{151}\) *Young, James and Webster v. United Kingdom*, Judgement of 13 August 1981, Series A No.44 (1989) 11 EHRR 439, para.63
activity would, in practice, put an end to democracy. It was precisely this concern which led the authors of the Convention to introduce Article 17\(^{152}\), which provides:

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

Following the same line of reasoning, the Court considers that no one should be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society.\(^{153}\) On the other hand, the Member States cannot use the restriction grounds arbitrarily as a requirement of Article 18, which provides that; "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

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Overview

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

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

2/ Protection of the rights and freedoms of others

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

Throughout the Constitution there exist two fundamental principles which affect the restriction of rights too: the principle of the indivisibility of the existence of Turkey with its state and territory and principles, reforms and modernism of Atatürk. The preamble states that no protection should be given to the activities that are in conflict with these principles.\(^{154}\) Article 68 of the Constitution provides that programmes and constitutions of political parties can not be contrary to the indivisible integrity of state as a territory and nation. The first outcome of this strict constitutional notion is territorial integrity: The separation and transferability of any land of the country is out of the question. Article 68 forbids any kind of separatist movement to be organised as a political party. It seems that, because of the demands of Kurdish separatist terrorist

\(^{154}\) Article 176 makes The Preamble, which states the basic views and principles underlying the Constitution, an integral part of the Constitution.
movements, the constitution makers have been sensitive to reassure the indivisibility principle. The second outcome of the indivisibility principle is the impossibility of federalism. As the structure of a federal state is based on federal and federate sovereignty, the principle of unity makes impossible the existence of more than one sovereign in one state’s structure. It also prevents the state from becoming one of a number of federated states in the federal structure. Therefore, no political party can even suggest the change of unitary form of the state. This is clearly in conflict with the case law of the Convention which rightly determines one of the principal characteristics of democracy to be the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Another inconsistency of the Turkish type democracy with western liberal democracy is that Turkish state sees itself as guardian of Kemalist ideology in its almost all regulations. The Law on Political Parties 1983 requires every political party to declare that they are faithful to the principles of Ataturk in their programmes and constitutions. However, it is an abstract principal requirement of liberal democracy that the state must not have any official ideology. Therefore, as Kemalism is not equivalent to democracy, this situation surely can not be reconciled with liberal democratic principles.

It is believed that when the use of one’s rights and freedoms is in conflict with others’ rights and freedoms, the conflict should be resolved via the constitution, law and adjudication. In Turkish constitutional law there are four forms of restriction upon

155 Soysal, M., 100 Soruda Anayasanın Anlami, (Istanbul: Gercek yayinlari, 1986), p.182
158 See Kanadoglu, K., Turk ve Alman Anayasa yargisinda Anayasyal degerlerin catismasi ve uyumlastirlmasi, (Istanbul: Beta Yayinlari, 2000)
fundamental rights and freedoms: 1/ restriction by the constitution; 2/ restriction by the legislature; 3/ restriction by the executive; and 4/ restriction by adjudication.

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

The Forms of Restriction of Fundamental Rights and Freedoms

1/ Restriction by Constitution

In some situations the constitution itself restricts fundamental rights and freedoms. Generally these restrictions take place in the very articles in which the rights and freedoms are set out. These articles contain prohibitions which may take either abstract or concrete forms. Where the prohibitions are in abstract form, the constitution awards the legislature a duty to concretise the restrictions. Some examples of the abstract form of the restrictions are that:
According to the fifth paragraph of the preface to the Constitution, activity cannot be protected where it is against the Turkish national interest; the indivisibility of the Turkish State; the historic and moral values of Turkishness; the principles of nationalism and revolutions of Ataturk. The principles set forth by Mustafa Kemal Ataturk (Commonly referred to as ‘Kemalism’) during the Turkish Revolution; advocate the ideas of republicanism, secularism, populism, statism, nationalism and revolution as the basis of the Turkish State. However, the basic principles of European nations – democracy, liberalism and recognition of civil rights – are noticeably missing in Kemalist ideology.\textsuperscript{159} Furthermore, Kemalist Revolution in Turkey established an explicitly secularist politics limiting public expressions of religious faith.\textsuperscript{160}

Due to Ataturk’s notion of ‘populism,’ which means that all Turks are one, Turkish political parties cannot be founded on the basis of class, religion, ethnic group or region. If a group is perceived to go too far towards one of these leanings, it can be banned and its members may be imprisoned. This notion, which can not be accepted as compatible with the European democracies, flies in the face of the liberalism that characterizes most Western democracies. In addition, it is a requirement of secularism that religious sentiment may not interfere with politics and state government. Authors and publishers of news material and other texts which jeopardise the security of the state should be punished.\textsuperscript{161} Another example of an abstract restriction which is set out in the Constitution is that the right to strike and lockout cannot be used to the public detriment. There are some clear and concrete prohibitions in the Constitution

\textsuperscript{159} Kubicek, Paul, “Turkish-European Relations: at a New Crossroads?” \textit{Middle East Policy}, vol. 6, no. 4 (1999), pp. 157-173.

\textsuperscript{160} Mellon, J., “Islamism, Kemalism and the future of Turkey” (March 2006) 7 Totalitarian Movements and Political Religions 1

\textsuperscript{161} Article 28/5 of the Constitution
regarding rights and freedoms. For example, political parties cannot engage in commercial activities.\textsuperscript{162} Political strikes and lockouts, as well as general strikes and lockouts are prohibited.\textsuperscript{163}

\textbf{2/ Restriction by legislature}

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

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

\textsuperscript{162} Article 69/2  
\textsuperscript{163} Article 54/7
ECHR's decisions on the Turkish cases. So, with this change the role of the legislature in the area of restrictions has been weakened.

3/ Restriction by the Executive

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

4/ Restriction by Adjudication

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

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

Restriction by law

This requirement is found in the European Convention on Human Rights too. The regulation of fundamental rights should be carried out by the democratic representative organ of the nation so that every citizen could easily access it. Briefly, the law should be clear, understandable and accessible by everybody. Restriction by principle of law basically means that the restriction of rights and freedoms cannot be done in an executive process.¹⁶⁵ Fundamental rights are protected properly only if the restriction grounds set out by law are obvious and clear, and more concrete than those in the Constitution. It should be borne in mind that, as the main law of the State, the Constitution regulates them in a very general framework.

Conformity with the Wording and Spirit of the Constitution

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

It is possible to say that, if restrictions and prohibitions (prohibitions on political parties) were not authorised in the Constitution, the laws that restrict rights improperly might have been ruled void by the Constitutional Court.\footnote{Tanor, B. and Yuzbasioglu, N., \textit{Turk Anayasa Hukuku}, (Istanbul: Yapi Kredi yayinlari, 2002) p.146} It seems that the spirit of the Constitution is not helpful to a liberal interpretation of freedom. There are a number of Constitutional Court and Court of Cassation’s decisions which interpret the Constitution as being in favour of authority in the freedom and authority balance.\footnote{Tanor, B. and Yuzbasioglu, N., \textit{Turk Anayasa Hukuku}, (Istanbul: Yapi Kredi yayinlari, 2002) p.147} The Constitutional Court has gone even further and stated that the democratic society context is limited to the one shown in the Constitution.\footnote{E.1984/14, K.1985/7, KT. 13.6.1985, AYMKD, sayi.21, s.173, Yargitay Hukuk Genel Kurulu, E.1980/4, K.1983/803, KT. 14.9.1983, AYMKD, sayi.11.} The problem here is that it is not possible to identify the spirit of the Constitution in a concrete way.

The Requirement of Democratic Social Order

This is similar to the ‘necessary in a democratic society’ requirement of the European Convention on Human Rights. Indeed, it is enshrined in the Constitution, as it has been seen, in line with international human rights documents. However, the problem
regarding this requirement in the Turkish Constitution is which type of democracy is meant? Is it the universal standard liberal and pluralist democracy, or the democracy identified in the Turkish Constitution, which is sometimes in conflict with the universal understanding of democracy? The 3rd paragraph of Constitution’s preamble, which according to the Article 176 is part of Constitution’s text, was stating that “recognition of the absolute supremacy of the will of the nation, and of the fact that sovereignty is vested fully and unconditionally in the Turkish Nation and that no individual or body empowered to exercise it on behalf of the nation shall deviate from democracy based on freedom, as set forth in the Constitution and the rule of law instituted according to its requirements” (emphasis added). Therefore, this expression confines democracy understanding of the Constitution to a special national democracy different from universal one. Although the last sentence was changed in 2001 by eliminating the expression of as set forth in the Constitution, which is welcomed, however, the specific Turkish type Democracy understanding is still alive throughout the constitution. Turkey, in its application to the European Commission on Human Rights that it recognises the right to individual application to European Commission on Human Rights, claimed that the ‘democratic society’ concept of the European Convention on Human Rights should be understood as the within the precincts of existing framework of the Turkish Constitution. Naturally, this restraint was not accepted by the Commission. On the other hand, in some recent Constitutional Court decisions there has been a positive development in departing from the concept of the specific Turkish type of democracy. In its decision on the law of police


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authority and duties especially, it came close to the universal liberal understanding of democracy.\textsuperscript{170}

**The Requirements of Secular Republic**

According to the second paragraph of Article 13 of the Constitution the restrictions to the fundamental rights and freedoms can not be incompatible with the “requirements of the secular republic”. This criterion is not found in the European Convention on Human Rights. Making ‘the requirements of Secular Republic’ as a limit of restrictions is a sign of the importance given by the Constitution maker to the principle of secularism. The Constitutional Court is of the view that having the constitutional privilege, principle of secularism should be taken into account while assessing all the fundamental rights and freedoms.\textsuperscript{171} It even further states that the freedoms that are incompatible with principle of secularism can not be protected.\textsuperscript{172} However, it is not obvious how to interpret the requirements of secular republic. There is not a uniform and agreed understanding of the principle. The requirements of Secular Republic change over the time. It is possible to see this change with Constitutional Courts decisions regarding Political parties. According to the Article 89 of Law on Political Parties, no political party can claim the partition of Directorate of Religious Affairs from State’s general administration. In 1993 this claim was one of the grounds of the dissolution of Freedom and Democracy Party.\textsuperscript{173} However, in 1997 The Constitutional Court, in the present author’s view rightly, departed from this stand. It rejected the dissolution of Democratic and Change Party who claimed that the

\textsuperscript{171} E.1989/1, K.1989/12, KT 7.3.1989, AMKD 25, p.150
\textsuperscript{172} ibid, p.152
\textsuperscript{173} E.1993/1 (Siyasi Parti Kapatma) K.1993/2, KT 23.11.1993, AMKD 30/2, p. 927
status of Directorate of Religious Affairs as a state institution should be ended. On the other hand, the Constitutional Court in one of its decisions decided that giving the right to supervise and control the religious issues to the state cannot be regarded as a restriction incompatible with the freedom of religion and conscious and the requirements of democratic social order.

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

The Essence Test

The Constitutional Court has developed the criterion of ‘harming the essence of a right’ to provide an irreducible sphere, which cannot be compromised in favour of other interests. Inspired by German constitutional law, the founding fathers of the Republic’s second Constitution (the 1961 Constitution) enacted the notion of the essential essence under 11/1 of the 1961 Constitution. This test also cannot be found in the European Convention system. The Constitutional Court still continues to implement this test reviewing it under the requirements of democratic society (art. 13), after the 1982 Constitution came into force. Now, with the changes made in the Constitution’s wording in 2001, the Constitution declares the doctrine once again as

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176 for example unnecessary head scarf ban in universities. See Leyla Sahin case, pp.245-249
the limit to legitimate restrictions, together with the requirements of the democratic order of society. The essence in that respect describes an irreducible or non-derogable part of a right, whereas proportionality concerns striking the right balance between loss and gain. The importance of the essence analysis in the assessment of proportionality is that it marks the border at which the proper balance is to be struck.

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

The Proportionality Test

Article 13 sets forth the proportionality test as a general principle to be applied while restricting basic rights. Article 12 of the Constitution also prepares a background to

this principle by stressing that “fundamental rights and freedoms also include the
duties and responsibilities of the individual towards society, his family, and other
individuals.” Individual rights and the public interest generate duties and
responsibilities and often require balancing and weighing against each other in order
to form a consistent system. This general provision of the Constitution hints that the
legislative and judicial organs, as well as the executive authorities, will weigh
interests and rights by balancing the duties generated by them. The Constitutional
Court’s explanation of the principle follows this understanding. One of the elements
of the principle of proportionality is measuring the degree of interference against the
degree of gain by the restriction.\textsuperscript{179} This criterion requires a proportionate government
response to an existing legitimate and rational need to interfere with a right. It aims at
a fair balance between a given restriction and its service to the protected value.

Conclusion

The European Convention on Human Rights contains fundamental guarantees of the
human rights of individuals. However, the reasonable need of a Contracting Party to
fulfil its public duties and obligations for the aggregate common good and welfare
necessitates restrictions on the stated rights. On the other hand, it is vital that there
should be a fair balance between the rights and freedoms exercisable and enjoyed by
the individual, and the needs of the community when imposing such restrictions. A
careful examination of the Convention reveals that it has established such a balance in
its restriction and limitation system. The rights and freedoms exercisable and enjoyed
by the individual and the state respectively are subject to different regimes of
suspension, supervision and control. On the one hand there are those limitations and

restrictions imposed by the state in the case of the individual, and by the Convention organs in the exercise of their review and supervisory powers in the case of the state. On the other hand the state, in the exercise of its right and duty to limit and restrict the rights and freedoms of the individual, guaranteed under the Convention, may do so only in strict conformity with the express provisions of the Convention. Such provisions are interpreted and applied by the Court, authorising and permitting such interference.

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

Like the European Convention on Human Rights, the Turkish Constitution guarantees the fundamental human rights determined by international human rights law. It also, in line with international law, provides restrictions on the rights where the common good of society and the rights and freedoms of others so require. According to the
amended Article 13, the limits have to be imposed by law, and should be in conformity with the wording and spirit of the Constitution. They should also meet the requirements of a democratic social order and secular republic. The restrictions should not damage the essence of the rights and freedoms and the restrictions should be proportionate. The requirement of democratic social order is similar to the ‘necessary in a democratic society’ clause of the Convention. Indeed, this was put into the Constitution in 2001 to bring it into line with the Convention. Before this amendment, Article 13, unlike the Convention, was a general restriction article containing restriction grounds which could be invoked in the restriction of all fundamental rights. Although the wording of the Turkish Constitution seems to be in line with the Convention, the problems in restrictions of the fundamental rights arise because of the understanding that Turkey has special circumstances and a special democracy as identified in the Turkish Constitution: A conception which is sometimes in conflict with the universal understanding of democracy.

To understand the rights restriction issue coherently we need to examine two other main pillars of the Convention’s rights restriction system: The ‘margin of appreciation doctrine’ and ‘necessary in a democratic’ society. Therefore the next two chapters will be devoted to examining the meaning and scope of the margin of appreciation doctrine and the concept of democratic necessity.
CHAPTER 3

THE MARGIN OF APPRECIATION DOCTRINE

Introduction

The margin of appreciation doctrine established by the Strasbourg organs gives the State Parties to the Convention the opportunity to strike a balance between the common good of society and the interests of the individual when they restrict rights. The underlying principle is that state authorities are in a better position than the international judge to decide the proper application of the Convention to specific contexts and 'to give an opinion on the exact content as well as on the 'necessity' of a restriction or penalty.' This doctrine, which permeates the jurisprudence of the ECHR, is based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions. The doctrine makes clear that the European Convention on Human Rights' protection is subsidiary to the protection provided by the Contracting Party. Basically, the term 'margin of appreciation' refers to the discretion given to a government when it evaluates factual situations and applies the provisions enumerated in the Convention. The author Yutaka states that the margin

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180 Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737 para.48
181 Benvenisti, E., “Margin of Appreciation, Consensus, and Universal Standards” (Summer 1999) 31 New York Univ. Journal of Int. Law and Politics
of appreciation refers to the 'measure of discretion allowed the Member States in the manner in which they implement the Convention’s standards, taking into account their own particular national circumstances and conditions.'\textsuperscript{183} He then goes on to discuss the importance of the principle of proportionality as a balancing tool, stating that: 'the principle of proportionality has been conceived to restrain the power of state authorities to interfere with the rights of individual persons, and hence it should be regarded as a device for the protection of individual autonomy.'\textsuperscript{184} The principle of proportionality requires that any potentially justified interference with a right should be the minimum necessary to secure the legitimate aim of the measure.

Before we begin to explore the 'margin of appreciation doctrine' this chapter will explain the principle of subsidiarity, which is the underlying ground of the doctrine. Then the meaning and interpretation of the doctrine, the principle of 'living instrument' and evolving standards with regard to interpretation and application of the doctrine will be examined. Because of their prime importance within the operation of the doctrine the rights fundamental to democracy also will be examined in this chapter.

**The Principle of Subsidiarity and the European Convention on Human Rights**

Although it is not expressly mentioned, it should not be thought that the principle of subsidiarity is without a role in the organisation and operation of the ECHR. The principle is implicit in the protection system established by the Convention. The

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ECHR's task is to provide a supplementary remedy to those safeguards which domestic law offers to individuals. Therefore, as was expressed in one of the judgements of Strasbourg, 'it is in no way the Court's task to take the place of the competent national courts but rather to review the decisions they delivered in the exercise of their power of appreciation.'\(^\text{185}\) The role of the Convention institutions is to supervise the national protection of rights and freedoms guaranteed in the ECHR.

In spite of the fact that the ECHR does not expressly mention the principle, the Court held that the protection offered by the Convention is subsidiary to that of national law. It stated that:

"The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ...

The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26),"\(^\text{186}\) (emphasis added).

In addition to the Court's judgement on the issue, a careful examination of provisions in the Convention enables us to see the implied subsidiary character of its mechanism. The combination of Articles 1, 13 and 35 clearly reflects the subsidiary character of

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\(^{184}\) ibid.  
\(^{185}\) Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737 para.50  
\(^{186}\) Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737 para.48; The court reached the same conclusion in the Belgian Linguistic Case, Judgements of 9 February 1967 and 23 July 1968, Series A Nos. 5 and 6; (1979-80) 1 EHRR 241-252 para. 10 stating "...In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider
the Convention. In this connection, the State Parties are obliged under Article 1 to secure the Convention rights and freedoms to everyone within their jurisdiction in any form that they freely choose. Article 13 clarifies the obligation of a State Party with regard to the enforcement of the rights and freedoms. It requires the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Its effect is thus to require the provision of a domestic remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.\textsuperscript{187} Article 13 makes clear the State Parties' specific obligation as a requirement of the general obligation under Article 1. As it was expressed in the \textit{Silver} case the application of Article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 to secure directly to anyone within its jurisdiction the rights and freedoms set out in section I.\textsuperscript{188} Article 35 completes the combination that reflects the subsidiary character of ECHR. Under this provision a potential applicant has to exhaust all available and sufficient domestic remedies, which are capable of providing redress for the particular violation. Only when there is no remedy at all, or the existing remedy is not effective, will the applicant be able to invoke the protection of the ECHR organs. The requirements of Articles 1, 13 and 26 taken together significantly reflect the subsidiary character of the Strasbourg mechanism.

Another reflection in the structure of the ECHR regarding subsidairity is Article 53. This provision reads;

\begin{footnotesize}
\textsuperscript{187} \textit{Vilvarajah and Others v. the United Kingdom}, Judgement of 30 October 1991, Series A No.215; (1993) 14 EHRR 248 para.122
\end{footnotesize}
"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

The provision ensures that the higher level and more favourable human rights’ guarantees in the national law of State Parties cannot be weakened by reference to less effective provisions of the ECHR. Therefore, it is obvious that the ECHR is not intended to replace domestic guarantees or to provide safeguards for rights and fundamental freedoms by ECHR guarantees only. In sum the Convention respects the more effective and better protection mechanisms of national laws. Article 41, also reflects the principle of subsidiarity. This provision requires that, where full reparation is not available under State Party national law, ‘just satisfaction’ can only be awarded by the Strasbourg machinery. The remedy and redress at international level in Strasbourg will come into play only when the national legal system cannot provide full reparation. As a result, the protection system of Strasbourg is secondary to that of national legal mechanisms. The redress at Strasbourg is ‘just satisfaction’ which includes the applicants’ legal costs and compensation for pecuniary and non-pecuniary damage. In the framework of subsidiarity, as we have examined it and according to the established case law of Strasbourg, it is the national authorities’ duty to promote and protect human rights and the fundamental freedoms of individuals. The ‘margin

188 Silver and Others v. UK, Judgement of 25 March 1983, Series A No.61; (1983) 5 EHRR 347 case para.113
190 “The Court’s decisions do not necessarily have the force of law in the legal systems of contracting states. Article 50 provides for cases in which the Court’s decisions are incompatible with decisions or measures taken by domestic judicial or other authorities and where the law of a state concerned allows only partial reparation to be made for the consequences of the decision or measure in question. The Court may, in such a situation, accord just compensation to the injured party.” Drzemczewski A, European Human Rights Convention in Domestic Law: A Comparative Study, (1983), p.5
191 In the Winterwerp v. UK, Judgement of 24 October 1979, series A No.33; (1979-80)2 EHRR 387 para. 46 the Court held on this issue that: “...the logic of the system of safeguard established by the Convention sets limits upon the scope of this review. It is in the first place for the national authorities,
of appreciation\textsuperscript{192} doctrine established by the Strasbourg's case law stems directly from the principle of subsidiarity.\textsuperscript{193} The Court stated in \textit{Open Door and Dublin Well Woman v. Ireland} that:

"...It acknowledges that the national authorities enjoy \textit{a wide margin of appreciation} in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the state authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them." \textsuperscript{194} (emphasis added)

According to the margin of appreciation doctrine, the Convention, in the first place, leaves each State Party the mandate of securing rights and freedoms guaranteed in the Convention within the domestic legal order.

\textsuperscript{192} Yourow H.C, \textit{The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence}, (Martinus Nijhoff Publishers) at p. 13 the author defines the 'margin of appreciation doctrine' "...as the freedom to act; manoeuvring, breathing or "elbow" room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been defined as the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its law."

\textsuperscript{193} Supra note \textit{Handyside} case, para.48,

\textsuperscript{194} \textit{Open Door and Dublin Well Woman v. Ireland}, Judgement of 29 October 1992, Series A No.246;(1993) 15 EHRR 244 para.68
The Origin, Meaning and Scope of the Doctrine

It seems that the first international tribunal to have recourse to the margin of appreciation in its jurisprudence is the European Court of Human Rights. Like all other legal rules which recognise or confer rights or impose limitations on them, they are subject to a continuing process of interpretation to determine their precise scope and application in ever-changing circumstances. The margin of appreciation doctrine initially responded to concerns of national governments that international policies could jeopardize their national security. This could explain the initial application of the doctrine in the context of derogations under Article 15 from treaty obligations due to self-proclaimed states of national emergency. This rationale, however, later was expanded to allow each country wide discretion to select policies that would regulate potentially harmful activities, such as incitement to violence or racist speech, by means befitting each State’s unique circumstances and societal constraints.

Application and enforcement of the Convention by the Court involves recourse to and application of the margin of appreciation doctrine and the development of standards for its application within the Convention’s federal framework. The doctrine has been defined as ‘the latitude allowed to member states in their observance of the Convention,’ and as being ‘one of judicial review which governs the extent to which the Commission and the Court will scrutinise a complained-of practice.’ It has been defined as ‘one of the more important safeguards developed by the Commission and

195 see nature and scope of limitations see ch. 2
196 Benvenisti, E., “Margin of Appreciation, Consensus, and Universal Standards” (Summer 1999) 31 New York Univ.Journal of Int.Law and Politics
the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy.¹⁹⁸ It implies therefore, "that special national contexts must be taken into account in reviewing restrictive measures"¹⁹⁹ imposed by the state, in respect of the exercise and enjoyment by the individual of the rights and freedoms guaranteed under the Convention.

In McGuinness²⁰⁰ the applicant was an elected Member of Parliament ("MP") for the Mid-Ulster constituency in Northern Ireland in the General Election held on 1 May 1997. The applicant made known to his constituents during the electoral campaign that, in line with official Sinn Féin policy, he would not take the oath of allegiance to the British monarchy which MPs are required to swear as a condition of taking their seats in Parliament. As he did not take the oath the applicant could not take his seat. The applicant claims in his complaint to European Court of Human Rights that the requirement to take an oath of allegiance to the British monarch is an unjustified interference with his right to freedom of expression and his religious beliefs guaranteed by Articles 10 and 9 respectively.

The Strasbourg Court, noting that the applicant freely contested the election in complete knowledge of the fact that he could only take his seat in the House provided that he complied with the oath requirement and evinced a clear intention not to do so, decided that, the requirement that elected representatives to the House of Commons take an oath of allegiance to the reigning monarch can be reasonably viewed as an

¹⁹⁸ Waldock, "The Effectiveness of the System Set Up by the European Convention of Human Rights" (1980) 1 HRLJ 1 p.9
²⁰⁰ McGUINNESS v. United Kingdom, App. No. 39511/98, Judgment of on 8 June 1999
affirmation of loyalty to the constitutional principles which support, inter alia, the workings of representative democracy in the respondent State. In the Court's view it must be open to the respondent State to attach such a condition, which is an integral part of its constitutional order, to membership of Parliament and to make access to the institution's facilities dependent on compliance with the condition. Therefore, the Court considers that the applicant cannot claim with justification that they have a disproportionate effect on his right to freedom of expression. It recalls that the oath requirement can be considered a reasonable condition attaching to elected office having regard to the constitutional system of the respondent State. On the Article 9 complaint, The Court is of the view that the applicant was not required under the 1866 Act to swear or affirm allegiance to a particular religion on pain of forfeiting his parliamentary seat or as a condition of taking up his seat; neither was he obliged to abandon his republican convictions or prohibited from pursuing them in the House of Commons. In conclusion The Court finds that the applicant's complaints are ill founded and the case is inadmissible. Taking into account the Court's finding in McGuinness and given the degree of deference paid by the Strasbourg Court vis-à-vis the way in which Member States derogate from the Convention under Article 15 it is understandable that it would want to be cautious in overturning a Member State's conceptualisation of what is necessary in a democratic society. However, a search for fundamental democratic values which will form the European Public policy under the margin of appreciation doctrine examination should identify and verify 'European democratic values' seems to be necessary. This will serve to strengthen the efficacy and effectiveness of the conceptual framework within which the margin of

201 See also, Vogt v. Germany, judgment of 26 September 1995, Series A no. 323, paras. 28, 59
appreciation is applied by furnishing a crucial insight into the more predictable and systematic modus operandi of the doctrine.\textsuperscript{202}

The margin of appreciation doctrine was first used by the Commission in cases involving derogations by governments, in terms of Article 15.\textsuperscript{203} In the Greece v. UK case the Commission, in relation to an emergency arising on the island of Cyprus, noted that the UK authorities ‘should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation’.\textsuperscript{204} In the Lawless case the Commission stated that the respondent state had ‘a certain discretion – a certain margin of appreciation...in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.’\textsuperscript{205} The first case in which the Court expressly relied on the margin of appreciation doctrine was Ireland v. UK. Here the Court gave the national authorities a ‘wide margin of appreciation’ in deciding ‘both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.’\textsuperscript{206}

The doctrine was extended and developed beyond the emergency cases under Article 15. The first case referring to the doctrine outside the context of Article 15 was the Commission decision in Iversen v. Norway.\textsuperscript{207} The case concerned a complaint of forced labour under Article 4. Subsequently the doctrine extended to the right to

\textsuperscript{203} The Court has successfully utilised the jurisprudential concept called the “margin of appreciation” doctrine to determine whether a particular law, or practice, or conduct of a Contracting Party puts that Party in violation of the Convention.
\textsuperscript{205} Lawless v. Ireland, Commission Decision, Series B (1960-61), p.82
\textsuperscript{206} Ireland v. UK, Judgement of 18 January 1978, Series A No.25; (1979-80) 2 EHRR 25, para.207
education as guaranteed under Article 2 of Protocol 1; the right to correspondence
of detained vagrants under Article 8; the right to correspondence with a solicitor for
a prisoner under Article 8; to Article 5 taken together with Article 14; and to the
right to free expression under Article 10, and so on.

The Convention as a ‘Living Instrument’

The Strasbourg Court began the articulation of this key methodology in the well-
known *Tyrer* case and held that “the Convention is a living instrument... which must
be interpreted in the light of the present day conditions.” The development of
‘living instrument’ principle is the sign of Court’s interpretation of the Convention in
such a creative way to cover situations that would not have been foreseen by the
drafters working in the late 1940s against a backdrop of the fascist atrocities before
and during the Second World War and the emerging totalitarian communist regimes
of the Soviet Union and its European satellite states. However, as the Court does
little justification or elaboration of the ‘living instrument’ doctrine and given the
benefit of hindsight, as the doctrine was to become the basis of considerable judicial
creativity, it would have been beneficial if the Court in *Tyrer* had expanded upon the
reasons for its adoption of such a doctrine.

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208 *Belgian Linguistic Case*, Judgements of 9 February 1967 and 23 July 1968, Series A Nos. 5 and 6;
(1979-80) 1 EHRR 241-252

209 *De Wilde, Ooms & Versyso (Vagrancy case) v. Belgium*, Judgement of 18 June 1971, Series A No.12;
(1979-80) 1 EHRR 372

210 *Golden v. UK*, Judgment of 21 February 1975, Series A No.18, (1979-80) 1 EHRR 524

211 *Engel and others v. Netherlands*, Judgment of 8 June 1976, Series A No.22, (1979-80) 1 EHRR 647

212 *Handyside v. United Kingdom*, Judgment of 7 December 1976, Series A No.24 (1979-80) 1 EHRR

213 *Tyrer v. UK*, Judgment of 25 April 1978, Series A No.26; (1980) 2 EHRR 1, para.31

Law Review 1, and for more on preparation work of the Convention the *Collected Edition of the
Travaux Préparatoires of the European Convention on Human Rights* (The Hague: Martinus Nijhoff,
1975)
In the Tyrer case\textsuperscript{216} the applicant was a fifteen year old United Kingdom citizen, resident in the Isle of Man. He had been sentenced by a juvenile court to three strokes of the birch for an assault occasioning actual bodily harm, contrary to Manx law. The Court, in determining whether the administration of such a punishment was degrading and contrary to Article 3 of the ECHR, recalled the living instrument principle\textsuperscript{217} Accordingly the Court could not but be influenced 'by the developments and commonly accepted standards in the penal policy of Member States of the Council of Europe'.\textsuperscript{218} The Court found that the UK was in violation of Article 3 of the ECHR.

The Turkish Government in \textit{Loizidou v Turkey},\textsuperscript{219} regarding applicant's complaints about interferences with her property located in northern Cyprus contended that its declaration, in 1987, recognizing the competence of the former Commission and original Court,\textsuperscript{220} was expressly restricted to actions taking place within the territorial boundaries of Turkey therefore, asserting that the applicant's complaints were inadmissible. The Court, on the other hand, applying the living instrument principle not only to the substantive provisions of the Convention, but also to the provisions which govern the operation of the Convention's enforcement machinery such as Articles 25 and 46 and stating that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago, concluded that Turkey's purported territorial restrictions were invalid but again with a little explanation.

\textsuperscript{215}ibid, Mowbray
\textsuperscript{216}Tyrer v. UK, Judgment of 25 April 1978, Series A No.26, (1980) 2 EHRR 1
\textsuperscript{217}ibid para.31, on the Convention being which must be interpreted in the light of present-day conditions; see Marckx v. Belgium, Judgment of 13 June 1979, Series A No.31; (1979-80) 2 EHRR 330, paras. 19, 41; Airey v. Ireland, Judgment of 9 October 1979, Series A No. 32, paras. 14, 15, 26; and, as the most recent authority, Mamatkulov and Askarov v. Turkey, Judgment of 4 February 2005, para. 121,
\textsuperscript{218}Tyrer v. UK, Judgment of 25 April 1978, Series A No.26, (1980) 2 EHRR 1
\textsuperscript{219}Loizidou v Turkey (Preliminary Objections) Serial A 310; (1995) 20 EHRR 99.
Furthermore, the Court has used the evaluative interpretation as an element of the “democratic necessity” test. The Court asserted that it has the power to update the Convention and to respond to the developing attitudes and needs of the ‘democratic society.’ The Court, therefore, held that Member States were under an obligation to comply with the developing standards. The Court has defined the sources from which it deduces the existence of “evolved” common standards. These are (a) legislation of the Member States of the Council of Europe; (b) International Instruments in which the Member States of the Council of Europe participate, even where the respondent state is not a party to them.221 The Court, in a number of cases, has unambiguously determined the direction of the evolution in standards, which has been especially important in the light of criticism and fears expressed in this regard.222 It should be bear in mind that, the ‘living instrument’ doctrine has enabled the Court to creatively update the interpretation of a number of Convention Articles in varied situations and it has also been used as a tool to determine the width of margin of appreciation left to the state party. One of the keys to success of ECHR, which remained the “jewel in the crown”223 among other international human rights instruments, both regional and global, has been its flexibility in being a “living instrument” enjoying a recursive relationship with national legislation, yet leaving to each individual party the discretion of implementing the rights enshrined in it.224

220 under Articles 25 and 46 of the pre-Protocol 11 Convention.

221 Marckx v. Belgium, Judgement of 13 June 1979, Series A No.31; (1979-80) 2 EHRR 330, para.41
The Interpretation, Application and Role of the Doctrine

In light of the doctrine the Court has seen the Strasbourg organs play a role subsidiary to that of the several national legal systems, as has been demonstrated in frequent judgements, for 'it is for national authorities to make initial assessment' of whether a particular action or law is in conformity with the Convention and in so doing they are entitled to a certain margin of appreciation.\textsuperscript{225} As it is aware of the variability and diversity of local conditions and the sensitivities of the Contracting Parties the Court has reiterated that it 'cannot disregard those legal and factual features which characterise the life of the society in the State which...has to answer for the measure in dispute.'\textsuperscript{226} Nor can it 'assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention.'\textsuperscript{227} The margin of appreciation doctrine has been developed in an attempt to strike a balance between national views of human rights and the uniform application of Convention values. The doctrine also takes into account particular cultural and social conditions within national societies.\textsuperscript{228} The Court has stated that 'the national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the


\textsuperscript{225} Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737 para.48

\textsuperscript{226} Belgian Linguistic Case, Judgements of 9 February 1967 and 23 July 1968, Series A Nos. 5 and 6; (1979-80) 1 EHRR 241-252 para.10

\textsuperscript{227} ibid

Convention,\textsuperscript{229} and that ‘review by the Court concerns only the conformity of these measures with the requirements of the Convention.’\textsuperscript{230}

The doctrine was best expressed in its proper perspective by the Court when it concluded that ‘it falls in the first place to the Contracting State, with its responsibilities for the ‘life of its nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so how far it is necessary to go in attempting to overcome the emergency. In this regard Article 15(1) leaves those authorities a wide margin of appreciation.\textsuperscript{231} However the national authorities are in principle in a better position than the international judge to decide, interpret and apply the laws in force.\textsuperscript{232} Nevertheless, the states do not enjoy an unlimited power in this respect. The Court is responsible for ensuring the observance of the states’ engagements, (Article 19). It is empowered to rule whether the states have gone beyond the ‘extent strictly required’ by the exigencies of the crisis\textsuperscript{233} or ‘to give a ruling whether a restriction or penalty is reconcilable’ with any alleged infringement of the rights and freedoms guaranteed under the Convention.\textsuperscript{234} In adverting to the doctrine as being ‘accompanied by a European supervision’ the Court concluded that ‘such supervision concerns both the aim of the measure challenged and its ‘necessity’. This covers not only the basic legislation but also the decisions applying it, even one given by an independent court.\textsuperscript{235} The Court has emphasised that it is in no way its task ‘to take the place of the competent national courts but rather to review the decisions they delivered in the

\textsuperscript{229} Belgian Linguistic Case, Judgments of 9 February 1967 and 23 July 1968, Series A Nos. 5 and 6; (1979-80) 1 EHRR 241-252 para.10
\textsuperscript{230} ibid
\textsuperscript{231} Ireland v. UK, Judgment of 18 January 1978, Series A No.25; (1979-80) 2 EHRR 25 para.207
\textsuperscript{232} Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737 para.48
\textsuperscript{233} Ireland v. UK, Judgment of 18 January 1978, Series A No.25; (1979-80) 2 EHRR 25 para.207
\textsuperscript{234} Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737 para.49
exercise of their power of appreciation.\textsuperscript{236} This review is not limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith but is subject to the Court’s control as regards the compatibility of the State’s conduct with the engagements it has undertaken under the Convention. The Court is critical in determining the scope of the rights and freedoms guaranteed under the Convention. The doctrine is like a pivot around which the several rights, freedoms, duties and obligations of the parties are drawn. The court is the final interpreter andarbiter by way of reviewing the state’s action and conduct and its duty is to redress any alleged imbalance that may arise between the competing interests of the individual and the state.

The margin of appreciation doctrine has been criticised on the grounds that it invariably leads to a finding which is favourable to the respondent state and that this threatens the continued viability of the Convention.\textsuperscript{237} Another criticism is that it is increasingly difficult to control and objectionable as a legal concept because of the absence of clear standards for its use.\textsuperscript{238} It seems that such criticism raises issues which should be addressed. However, the critics may have failed to give due weight to the fact that the Convention is a ‘living instrument’ which has to be applied in a supranational context, embracing several legal, political and economic systems, social and cultural habits and customs, and a range of other relevant factors such as philosophical and ideological beliefs. As such the doctrine must display characteristics of flexibility if it is to be accommodated within the complex textual differences in the Convention and give the latter true meaning and effect. The criticisms have forgotten

\begin{flushright}
\textsuperscript{235} ibid  \\
\textsuperscript{236} ibid  \\
\textsuperscript{238} Higgins R., “Derogations under Human Rights Treaties” (1976-77) 48 BYIL 281, at 315
\end{flushright}
the fact that, although the Convention contains wide, vague and sometimes imprecise 
proscriptions intended to regulate, limit and restrict state action and conduct, it has 
nonetheless set out certain criteria, guidelines and standards such as 'necessary in a 
democratic society', and 'prescribed by law.' These assist the Court in giving effect to 
the Convention when interpreting and applying the provisions. The criticism forgets 
that all judicial bodies do exercise a certain degree of discretion and self-restraint and 
that the jurisprudence of the Court, including the doctrine, has to emerge, evolve and 
develop, and also to gain acceptance, respect and credibility from each and every 
Contracting Party in the community within which it operates. Critics have not 
recognised that the doctrine has been interpreted and applied not in the abstract but in 
concrete circumstances. Resort has been made to acceptable aids to interpretation such 
as the Vienna Convention on treaties, and other international legal principles as the 
Convention is an international instrument.

Evolving Standards Regarding the Scope, Interpretation and Application of the 
Doctrine

The decisions of the Court have revealed that the extent to which a state may limit and 
restrict the rights and freedoms guaranteed by the Convention depend on the latitude 
allowed to a state in the exercise of its margin of appreciation. In determining this 
latitude the Court has successfully evolved and developed a standard based on an 
examination of the laws, practices, attitudes and perceptions of the Member States of 
the Council of Europe in a search for consensus -or a lack of consensus- and of the 
international community where appropriate. The adoption and application of this 
standard is thus crucial in assessing permissible and impermissible state action and
conduct as regards the exercise of the State’s rights, duties and obligations under the Convention. This is exemplified in such cases as the *National Union of Belgian Police* case.\(^{239}\) Here the Belgian government had refused to engage in consultation with the complainant union, as it did with other unions, on the grounds that Belgian legislation only required the government to consult with a certain class of unions: those which were open to all municipal employees. The complainant union did not qualify under this criterion. The Court found that Article 11 of ECHR did not guarantee any particular treatment of trade unions. It observed that State Parties to the Convention did not, in general, incorporate any right to consultation for all unions and concluded that such a right was not an element necessarily inherent in the specific right guaranteed. What would be inferred, said the Court, was a right that a union be heard and that Article 11 certainly leaves each state a free choice of the means in reaching this end.\(^{240}\) The absence of a consensus among Member States in this case thus permitted the state a wide margin of appreciation.

In the *Engel and Others* case\(^{241}\) the applicants alleged that the government had violated Article 14 of the Convention by giving out different punishments to soldiers depending upon rank. The Court, in upholding the government’s action, resorted to and applied the consensus standard as reflected in its observations therein, when it stated that such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law. In this respect, the European

\(^{239}\) *The National Union of Belgian Police v. Belgium*, Judgment of 22 October 1975, Series A, No. 19; (1979-80) 1 EHRR 127

\(^{240}\) ibid, para.39

\(^{241}\) *Engel and Others v. The Netherlands*, Judgement of 8 June 1976, Series A No.22; (1979-80) 1 EHRR 647
Convention allows the competent national authorities a considerable margin of appreciation.\textsuperscript{242}

In the \textit{Handyside} case\textsuperscript{243} the applicant alleged that the British Government’s action in convicting him of publishing obscene material and seizing copies of it had infringed his right to freedom of expression under Article 10 of the ECHR. Although acknowledging that there was an infringement of the applicant’s rights as alleged, the British Government sought to justify its action by invoking the accommodation clause of Article 10. The clause allows restrictions that are ‘necessary in a democratic society’ for the protection of morals. The seizure of the material was temporary pending the outcome, and similar provisions for seizure existed in the domestic law of many of the Member States.\textsuperscript{244} However, despite the submission that the book was allowed to be published in many Member States, the Court concluded that there was an absence of consensus among the states as to what constituted morality by noting that:

"It is impossible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far reaching evolution of opinion on the subject".\textsuperscript{245}

\textsuperscript{242} ibid para.72
\textsuperscript{243} \textit{Handyside v. United Kingdom}, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737
\textsuperscript{244} ibid para.57
\textsuperscript{245} ibid para.48
The Court simply posed an absence of consensus to the applicants' assertion of consensus. This absence of consensus (which was in accordance with the Court’s earlier jurisprudence) would inevitably lead to the conclusion that the government had wide latitude in the measures it took to protect morals. Accordingly it justified the action taken in this instance. This counter position is reflected in the Court’s comparative assessment of the Member States’ conduct in this field. The Contracting States have each fashioned their approach in the light of the situation in their respective territories; they have regard, inter alia, to the different views prevailing there about what is demanded for the protection of morals.246

The decisions so far referred to were resolved in favour of the state whose action was contested by the applicants. But it does not follow that the Court was biased, or applied the wrong principles of law, or arrived at a manifestly erroneous assessment of the facts. On the contrary the Court has made every effort to develop and crystallise the doctrine as harmoniously and coherently as possible within acceptable limits.

In the Marckx case247 the applicant, an unmarried mother, claimed on behalf of her infant child and herself. She claimed that the law in Belgium on the maternal affiliation of an illegitimate child, on his family relationships, and on his patrimonial rights infringed her own and her child’s rights under Article 8 of the Convention. Thus she sought redress. The Court decided in favour of the applicant and her child. It remarked that while ‘support and encouragement of the traditional family is in itself legitimate and even praiseworthy,’248 it could not be given at the expense of the illegitimate family which was equally protected by Article 8. The Court again

246 ibid para.57
247 Marckx v. Belgium, Judgment of 13 June 1979, Series A No.31; (1979-80) 2 EHRR 330
reiterated that the Convention 'must be interpreted in the light of present day conditions'\textsuperscript{249} and that it could not but be struck by the fact that the domestic law of the great majority of the Member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments.\textsuperscript{250} The Court's approach in evolving a clear and discernible standard in its recourse to the doctrine was again exemplified and discussed in the \textit{Sunday Times} case.\textsuperscript{251} In this case a British court had banned the publication by The Sunday Times newspaper of a major expose of the thalidomide litigation which had been pending for over ten years in the British courts. The government defended the injunction on the basis that it was necessary for 'maintaining the authority and impartiality of the judiciary' under the accommodation clause of Article 10. The Court decided in favour of the applicants. The Court pointed to the margin of appreciation as complementary to European supervision in covering not only the basic legislation but also the decisions applying it. Such supervision is not limited to whether a respondent state exercised its discretion reasonably, carefully and in good faith. The court articulated once again the comparative and consensus approach to the standard that should be applied when giving effect to the doctrine. Again, the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10(2). The \textit{Handyside} case concerned the 'protection of morals.' The view taken by the Contracting States of the 'requirements of morals' varies from time to time, and from place to place, especially in our era. State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements. The same cannot entirely be said for the far more objective notion of the authority of the judiciary. The

\textsuperscript{248} ibid para.40  
\textsuperscript{249} ibid para.41  
\textsuperscript{250} ibid  
\textsuperscript{251} \textit{Sunday Times v. United Kingdom}, Judgement of 26 November 1991, Series A No.217; (1992) 14 EHRR 229
domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention (including Article 6) which have no equivalent as far as 'morals' are concerned.\textsuperscript{252} In the Sunday Times case the Court then concluded, accordingly, that a more extensive European supervision corresponds to a less discretionary power of appreciation.\textsuperscript{253}

In the \textit{Dudgeon} case\textsuperscript{254} the Court embarked upon an extensive discussion of the doctrine and its interpretation and effect within the context of Article 8 of the ECHR. The applicant alleged that the United Kingdom had violated his right to private life, protected by Article 8, by maintaining laws making it a criminal offence for consenting males to engage in homosexual acts in private. These laws, enacted in 1861 and 1885, were still in force in Northern Ireland, though not in the rest of the United Kingdom. The government in its defence argued that the alleged breach of Article 8 was permissible interference because it was 'necessary in a democratic society' for the protection of morals, or the rights of others under that Article's accommodation clause. Although it was agreed that the aims were permissible, as advocated by the government, the principal question that still remained was whether the challenged legislation was 'necessary in a democratic society' to meet those aims.

In its approach to the problem of democratic necessity the Court first of all, in \textit{Dudgeon} unlike in previous cases, sought to interpret the relevant aspect of the accommodation clause of the Article as well as to identify and emphasise the nature of the right allegedly infringed. The Court interpreted 'necessary' as implying the

\textsuperscript{252} ibid para.59
\textsuperscript{253} ibid
existence of a 'pressing social need'\textsuperscript{255} for the interference, not just that it should be 'reasonable.' It then concluded that not only the aim of the interference, but also the nature of the activities\textsuperscript{256} and, \textit{a fortiori}, the right restricted, would necessarily affect the scope of the doctrine\textsuperscript{257} within a democratic society, the hallmarks of which are pluralism, tolerance and broadmindedness. The Court then proceeded to apply these principles and in so doing ruled that the UK was in breach of its obligations under Article 8 of the Convention. It concluded that the restrictions were not within the government's margin of appreciation, on the basis that most of the Member States of the Council of Europe no longer considered it appropriate to criminalise homosexuality. The Court further offered that there was no evidence that harm would be caused to morals in Northern Ireland. In so finding the Court, inter alia, stated:

"As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance of homosexual behaviour to the extent that in the great majority of the Member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States. In Northern Ireland itself the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. No evidence has been adduced to show that

\textsuperscript{254} Dudgeon v. United Kingdom, Judgement of 22 October 1981, Series A No.45; (1982) 4 EHRR 149, \textsuperscript{255} ibid para.51 \textsuperscript{256} ibid 52 \textsuperscript{257} ibid
this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law."  

Convention Rights Fundamental to Democracy

One of the other evolving standards produced by the Court in determining the scope of the margin of appreciation is its attempt to identify and assess the nature and quality of a particular right and the extent to which that right is fundamental in a democratic society. A careful analysis of the Strasbourg case law suggests that certain rights are singled out as belonging to 'fundamental rights in a democratic society' therefore placing them in a higher position in the hierarchy of rights. Hence, the margin of appreciation allowed to national authorities tends to narrow in cases involving 'fundamental rights' requiring a more stringent standard of proportionality.  

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

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258 Dudgeon v. United Kingdom, Judgement of 22 October 1981, Series A No.45; (1982) 4 EHRR 149, para.60
The Right to Freedom of Expression

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

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

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

The right to freedom of expression is regarded as a fundamental guarantee by all regional and universal human rights instruments. The question is why freedom of expression is considered valuable. One of the answers to this question is that it is valuable because freedom of expression offers a medium for finding the truth. Judge Holmes stated in the Abrams case that the power of ideas is the best test of truth; because, in this way an idea will enter into a market of ideas where it will be open to competition.260 Another reason, which explains the importance of freedom of expression, is the notion of democracy. Democracy requires that ideas should be

259 See Yutaka, A.T, The Margin of Appreciation Doctrine... supra, p.246
260 Abrams v. United States, 250 U.S. 616 (1919)
freely circulated, imported and exported. At the basis of democracy is the idea of consent to, and participation in, government. Freedom of expression which is essential to both participation in and consent to government is one of democracy’s preconditions. Freedom of expression is important in the context of effective political democracy, and it plays a central role in the protection of the other rights under the Convention. The connection between democracy and freedom of expression was recognised by the Court, for the first time, in the Handyside case. The Court here determines the characteristics of a democratic society as ‘pluralism’, ‘tolerance’ and ‘broadmindedness.’ According to the Court the purpose of freedom of expression is to allow the exchange of information and opinions.

Freedom of expression is subject to restrictions. Article 10(1) provides expressly that states may require the licensing of broadcasting, television or cinema enterprises. Article 10, (like its counterpart Articles 8, 9 and 11), in its second paragraph, provides that states may restrict the right to freedom of expression in pursuit of one of the legitimate aims specified. This is when the restriction is prescribed by law and necessary in a democratic society. However, these restrictions must be narrowly interpreted and the need for the restriction must be convincingly established. The margin of appreciation, in restricting the freedom of expression, will vary depending on the purpose and nature of the limitation and the subject matter in question. For example, there is a wider margin of appreciation in respect of issues of morality and

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262 Merrills, J.G. The development of international law by the European Court of Human Rights, (Manchester University Press, 1988) p.122
264 Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737, para. 49
commercial speech, but a narrower margin of appreciation in respect to political speech. \(^{267}\) The Court gives a higher level of protection to expressions that contribute towards social and political debate, criticism and information but a lower level of protection to artistic and commercial expression. \(^{268}\)

The Court considers political debate to be at the core of the concept of a democratic society. Therefore, freedom of expression has a particular importance for elected political representatives. To give an example, the Court found violation of Article 10 when a Basque opposition senator was convicted for writing an article critical of the government. \(^{269}\) However, politicians have a wide protection regarding their freedom of expression; so, the limits of acceptable criticism are wider for a politician than for a private individual. This is particularly the case when the criticism appears in the press, as the press is one of the best means by which the public can hear the ideas of political leaders. \(^{270}\)

In *Oberschlick v. Austria*, the applicant journalist was convicted of defamation when he published criminal information laid against the secretary-general of the Austrian Liberal Party. Here the politician had advocated discrimination against immigrant families in relation to family allowances. The Court found that Article 10 had been violated, as the applicant had contributed to a public debate on an important political question, and a politician who expressed himself in such a way should expect a strong


reaction from journalists and the public. The Court stated that a politician ‘inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.’

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

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

The Right to Freedom of Assembly and Association

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

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

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

Freedom of assembly and association is one of the pillars of a democratic society. Democracy is concerned with respecting individuals and giving attention to their claims. So, permitting people to express their concerns by demonstrating or forming interest groups are means to a democratic end. In addition, acting with like-minded people in pursuit of goals that are socially acceptable contributes to the self-realisation of the individual.\textsuperscript{274} For these reasons freedom of assembly and association, like freedom of expression, is regarded as a fundamental right for the proper functioning of democracy.\textsuperscript{275} One of the prerequisites of the right is that the assembly must be peaceful. Article 11 does not protect assemblies with violent intentions which result in public disorder. However, an assembly that includes a real risk of a violent counter-demonstration, where the violence is outside the control of the organisers, will still be regarded as under the guarantee of Article 11.\textsuperscript{276} The right to freedom of assembly and association is connected to the right to freedom of expression and the right to freedom of thought, conscience and religion. The Court in, \textit{Chassagnou and others v. France}, stated that rights under Articles 9 and 10 would be of very limited scope if there were no a guarantee of the right to share beliefs and ideas in community with others, especially through associations of individuals.\textsuperscript{277} As it was expressed by the

\begin{footnotesize}
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\item \textsuperscript{274} Merrills, J.G. \textit{The development of international law by the European Court of Human Rights}, (Manchester University Press, 1988) p.125
\item \textsuperscript{275} \textit{United Communist Party of Turkey and others v. Turkey}, Judgement of 30 January 1998, (1998) 26 EHRR 121, para.25
\item \textsuperscript{276} Appl.No.8440/78, \textit{Christians Against racism and Fascism v. UK}, Decision of 16 July 1980, para.4
\item \textsuperscript{277} \textit{Chassagnou and others v. France}, Judgment of 29 April 1999; (2000) 29 EHRR 615, para.100
\end{itemize}
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Court, one of the aims of the right to freedom of peaceful assembly and association is the freedom to hold opinions and to receive and impart information and ideas.\textsuperscript{278}

The \textit{Ezelin} case\textsuperscript{279} was the first case in which the Court found a breach of the right of peaceful assembly. Here the applicant was a lawyer (avocat) and the chairman of the Guadeloupe Bar. He complained that the French courts had imposed a disciplinary penalty on him by way of reprimand. The sanction was because he had taken part in a demonstration protesting at the use of the Security and Freedom Act. He had not expressed his disapproval of insults uttered by other demonstrators against the judiciary. The Commission here contended that a disciplinary penalty, based on an impression to which Mr Ezelin’s behaviour might have given rise, was not compatible with the strict requirement of a ‘pressing social need’ and so was not regarded as necessary in a democratic society.\textsuperscript{280} The Court, agreeing with the Commission, decided that the freedom to take part in a peaceful assembly is of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act. As Ezelin himself had not committed any such act during the demonstration, the penalty imposed on him could not be considered as necessary in a democratic society.\textsuperscript{281}

In \textit{Stankov and the United Macedonian Organisation Ilinden v. Bulgaria}\textsuperscript{282} the applicant association was founded on 14 April 1990. Its aims, according to its statute and programme, were to “unite all Macedonians in Bulgaria on a regional and cultural

\textsuperscript{278} \textit{Ahmet and others v. UK}, Judgment of 2 September 1998, (2000) 29 EHRR 1, para.70


\textsuperscript{280} ibid. para.50

\textsuperscript{281} ibid. para.53

basis” and to achieve “the recognition of the Macedonian minority in Bulgaria”. According to the applicants’ submissions before the Court, the main activity of the applicant association was the organisation of celebrations to commemorate historical events of importance for Macedonians in Bulgaria. Its statute stated that the organisation would not infringe the territorial integrity of Bulgaria and that it “would not use violent, brutal, inhuman or unlawful means.” In 1990 Ilinden applied for registration. The Bulgarian courts, after examination of the statute and programme, refused registration for the reason that the applicant association’s aims were directed against the unity of the nation; that it advocated national and ethnic hatred; and that it was dangerous to the territorial integrity of Bulgaria. Therefore, several requests of applicant associations for meetings and assemblies were refused by the authorities for the reason that the applicant association was not a legitimate organisation. Most importantly the applicant association was a separatist group which sought the secession of the region of Pirin from Bulgaria. The applicants submitted that the ban on meetings organised by them in commemoration of certain historical events, and the attitude of the authorities at the relevant time, was aimed at suppressing the free expression of ideas at peaceful gatherings. As such they amounted to an interference with their rights under Article 11 of the Convention. The Court considered that while past findings of national courts, which have screened an association, are undoubtedly relevant in the consideration of the dangers that its gatherings may pose, an automatic reliance on the very fact that an organisation has been considered anti-constitutional – and refused registration – could not justify, under Article 11 paragraph 2 of the Convention, a practice of systematic bans on the holding of peaceful assemblies. The Court reiterated that the fact that a group of persons calls for autonomy, or even

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283 ibid, para.10
284 ibid, para.92
requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country’s territorial integrity and national security.\(^{285}\) The Court in conclusion stated that, in circumstances where there was no real foreseeable risk of violent action or of incitement to violence, or any other form of rejection of democratic principles, a ban was in the Court’s view not justified under paragraph 2 of Article 11 of the Convention. The Court found that the authorities overstepped their margin of appreciation and that the measures banning the applicants from holding commemorative meetings were not necessary in a democratic society, within the meaning of Article 11 of the Convention.\(^{286}\)

The Strasbourg Court in *Le Compte, van Leuven and De Meyere v. Belgium*\(^ {287}\) ruled that public law associations fall outside the scope of Article 11. The applicants in this case were medical doctors who had been subject to disciplinary punishments by the Belgian *Ordre des medecins* which was a public professional association. The applicants complained that the obligation to join the *ordre* inhibited their freedom of association. The Court, like the Commission, unanimously found no breach of Article 11. The professional associations, established and governed by public law, were part of the regulatory framework and had the duty to ensure the maintenance of professional standards in the public interest.\(^ {288}\) Therefore, the right to freedom of association applies only to private-law organisations.

\(^{285}\) ibid, para.97  
\(^{286}\) ibid, paras. 111-112  
One of the associations to have been given an important weight and protection by the Convention organs is the political party. The Strasbourg organs in recent times have received quite a number of applications from the political parties of Turkey. The first of these cases was United Communist Party of Turkey v. Turkey. The Court here established the principles which it has applied in subsequent political party cases. The applicant political party was formed in June 1990, and intended to participate in the upcoming general election. It submitted its constitution and programme to the Principal State Council at the Court of Cassation for registration. The Council applied to the Constitutional Court for the dissolution of the applicant party. The grounds relied upon by the Council were that the party used the word “communist” in its name; that its activities were likely to undermine the territorial integrity and unity of Turkey; and that it was the successor of a previously dissolved party. The particular concern of the Council was the applicant’s advocacy of the rights of the Kurdish population of Turkey, and a solution to the conflict between the Turkish State and the Kurds. Both Convention institutions rejected the respondent state’s contention that Article 11 did not apply to political parties. Turkey's argument was based on the specific mention of trade unions in Article 11. Another issue, which the Commission and the Court both considered, was the relationship between the right to freedom of expression and the right to freedom of assembly and association.

289 The analysis of the treatment of political parties by the Turkish Constitutional Court and Strasbourg organs lies at the heart of this thesis; the reader is therefore advised that the detailed examination and analysis of those political party cases will be made in later chapters.
291 ibid, para.132
292 see ibid. para.147

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

However, the Refah Partisi case saw an interesting outcome from the Strasbourg organs. It is the first political party case in which the Court found no violation of Article 11 since the case of the German Communist party, half a century earlier. The Refah Partisi, unlike the United Communist Party, was a well established party and indeed in power when the dissolution proceedings started. The decisions of both the Turkish Constitutional and Strasbourg Courts were based on speeches made by the leaders, and some of the members, of the party. The main ground for dissolution was the Refah’s intention to establish a plurality of legal systems based on differences in

293 ibid para.135
294 ibid,para.136
religious belief. They wished to establish Islamic Law, a system of law that was seen by the Strasbourg organs as incompatible with democracy. The Court here stated that although political parties are entitled to campaign for changes in legislation or to the legal or constitutional structures of the state, they could only enjoy the protection of Article 11, if the means used to those ends were lawful and democratic, and the proposed changes themselves were compatible with democratic principles. The Strasbourg Court in this case granted a wide margin of appreciation to the State party in contradiction with its previous political party cases.

The Right to Free Elections

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

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choices of the legislature.'

Article 3 of Protocol 1 requires, therefore, that laws should be made by a legislature responsible to the people. As it is referred to in the Preamble to the Convention, free elections are a condition of 'effective political democracy.' This may also be found in the concept of a democratic society, which runs through the Convention. The Court

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297 Ibid, p.331
established that since Article 3 of Protocol 1 enshrines a characteristic principle of
democracy, it is accordingly of prime importance in the Convention system.298 The
Court, in the Bowman case, stressed that there is a strong connection between Article
10, which is another benchmark of democracy, and Art.3 of Protocol 1: ‘free elections
and freedom of expression, particularly freedom of political debate, together form the
bedrock of any democratic system.’299 Unlike the majority of other Convention rights,
Article 3 of Protocol 1, by requiring the Member State to hold democratic elections, is
primarily concerned with a positive obligation.

The Court looked at the scope and significance of Article 3 Protocol 1 when it first
interpreted it in the case of Mathieu-Mohin and Clefayt.300 The applicants were
French speaking Belgian parliamentarians who lived in a Flemish district of Brussels.
Because of the constitutional arrangements of Belgium they were unable to participate
in the decision making of the Flemish Council. They therefore complained that their
exclusion from the Flemish Council violated Article 3 Protocol 1. The Court here
approved the Commission’s finding that the provision included the right of universal
suffrage.301 Therefore, the right contains the right to vote and the right to stand for
election.302 Although the right to participate in government is fundamental to
democracy, the Court expressed the view that constitutional arrangements in the
Contracting States can make the right to vote and to stand for election subject to

298 See ibid and also, Merrills, J.G. The development of international law by the European Court of
Human Rights, (Manchester University Press, 1988) p.114. For the cases on this issue see Matthews v.
26 EHRR 121, para.45
EHRR 1
336,
302 Apps. 6745-46/76, W,X,Y and Z v. Belgium, Decision of 30 May 1975, 18 Yearbook 244
108
various conditions. Therefore, the right is not an absolute one. In the case of Zdanoka v Latvia, the applicant complained about her disqualification from standing for election to parliament, on the ground that she had actively participated in the Communist Party of Latvia (hereafter "the CPL"), which amounted to a breach of her right to stand for election guaranteed by Article 3 of Protocol No. 1. The government argued that the interference was legitimate. Having failed to obtain a majority on the Supreme Council in the democratic elections of March 1990, the CPL and the other organisations listed in section 5(6) of the Parliamentary Elections Act, had decided to take the unconstitutional route of setting up a Committee of Public Safety, which attempted to usurp power and to dissolve the Supreme Council and the legitimate government, thus abandoning democracy. Referring to its reasoning in Refah Partisi, the Court considered that no-one should be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. However, the Court found a violation of Article 3 of Protocol 1, as the applicant had never been accused of having been secretly active within the CPL after the latter's dissolution. Nor had she sought to re-establish that party in its previous totalitarian form, and had never been investigated for, or convicted of, any offence.

In a democracy, the realisation of the right to free elections may only be achieved with the participation of political parties. However, the question of individuals in a political party complaining of violation of the right to free elections when the party has been dissolved was determined in the Zdanoka case by the Court under Article 11, rather

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303 Mathieu-Mohin and Clefayt v. Belgium, Judgment of 2 March 1987, Series A, No.113; (1998) 10 EHRR 1, para.52
304 Zdanoka v Latvia, App. No 58278/00, judgement of 17 June 2004
305 Ibid. para. 79
306 Ibid. para. 98
than the free election article. The Court avoided addressing the question of whether the right to form and maintain a political party falls within the scope of Article 3 of Protocol 1.\textsuperscript{307} According to the Court, states are not obliged to introduce a specific system of elections, so they enjoy a wide margin of appreciation in the choice of voting system. On the interpretation of the word 'legislation,' the Court stated that it does not necessarily mean only the national parliament; it has to be interpreted in the light of the constitutional structure of the state in question.\textsuperscript{308} Here the Court found that a regional council had sufficient competence and powers to make it a constituent part of the Belgian legislature. This was an important finding as it enabled the Court to bring the regional council within the scope of the Article 3 Protocol 1. The status of the European Parliament was looked at in the Matthews case.\textsuperscript{309} The UK government here argued that the European Parliament should be excluded from the scope of Article 3 on the ground that it is a supranational, rather than a national, representative organ. Analysing the power of the European Parliament, the Court rejected the government's argument, concluding that the European Parliament is part of legislature of Gibraltar and under the scope of Article 3 of Protocol 1. On the question of the method of appointing the legislature the Convention supplies only general guidance. It simply provides that the elections shall be ‘free,’ ‘at reasonable intervals,’ by ‘secret ballot,’ and under conditions that will ensure the free expression of the opinion of the people.

\textsuperscript{308} Mathieu-Mohin and Clefayt v. Belgium, Judgment of 2 March 1987, Series A, No.113; (1998) 10 EHRR 1, para.53
\textsuperscript{309} Matthews v. UK (App.24833/94) Judgment of 18 February 1999; (1999) 28 EHRR 361
Conclusion

The Court has evolved the 'margin of appreciation' doctrine to give meaning, effect and reality to the wide, vague and imprecise provisions of the Convention. Such vague clauses would have allowed a Contracting Party unlimited and unbridled conduct based on its own experience and interpretation without the meaningful participation of the competent and authoritative organs of the Convention to interpret and apply them.

The Strasbourg organs have held that restrictions on fundamental rights enjoy different levels of the margin of appreciation depending on which of the aims enshrined in the subject Article they are designed to promote. In the matters of national security especially, Contracting States enjoy a wide margin of appreciation. In addition, a broader margin of appreciation is also permitted in matters concerning the protection of morals. Where the Strasbourg organs decide that there is no widespread standard moral ethos between Member States it gives a wide margin to national authorities. The width of the margin of appreciation may depend on many things, and the Court has over the years offered a selection. However, it cannot be legitimate for this to be determined by the Court's prior perception of the respondent state. Other sources of information may be usefully used during the course of a judgement, and perhaps ought to be used more often.

The margin of appreciation doctrine is the concept by which the Convention derives its force, meaning and effect. The margin of appreciation doctrine seeks to strike a fair balance between the demands of the general interest of the community and public order on the one hand, and the requirements of the protection of the individual rights
and freedoms on the other, within the context and framework of the Convention. In arriving at such a balance the scope of a state’s right to limit and restrict the rights and freedoms of the individual will necessarily be determined.

Two emerging and evolving standards in the interpretation and application of the doctrine have manifested themselves, namely: a) the comparative survey or 'European Consensus'; and b) the rights that are 'fundamental to a democratic society' approach. The former seems to have displayed a pattern of consistency, uniformity and coherence with signs of it becoming fully entrenched in the systems and accepted by the community of states as a whole. Where the Court finds a European Consensus, it gives the Member State a narrow margin of appreciation. Also, where the matter is related to rights fundamental to democracy, namely freedom of expression and freedom of association and assembly, especially if it includes a political aspect, the state has a narrow margin of appreciation. However, where morals are at issue, the Strasbourg organs enable the state with a wide margin of appreciation.

The margin of appreciation doctrine, established by the Strasbourg organs, gives the State Parties to the Convention the opportunity to strike a balance between the common good of society and the interests of the individual, when considering restricting rights. Another Convention tool for managing the tension between national power and international supervision is the concept of “democratic necessity,” which is found in a number of the Articles. The concept can be defined as being that certain rights, guaranteed by the Convention, may only be restricted by the domestic authorities within the limits of what is necessary in a democratic society. This concept requires that national standards for restrictions should be compatible with the
European standards set out by the Convention institutions and common practices of European states. The following chapter will explore the notion of democratic necessity clause of the Convention in light of the notion of democracy in political literature.
CHAPTER 4
THE CONCEPTS OF 'DEMOCRACY' AND 'DEMOCRATIC NECESSITY'

Introduction

In recent years, an increasing number of national communities have organised themselves along the lines of "democracy" or made their first steps in that direction. The problem of the effective protection of human rights has become more and more interwoven with the problem of the proper interaction between, on the one hand, "sovereignty", which reflects the reality of and the need for an effective management of social relations, and on the other, "unity" based on shared visions, ideals and concerns. Aspirations towards "unity" have been most explicitly expressed in the recognition of the universality of the fundamental human rights of individuals, irrespective of their allegiance to one of the multitude of cultures and national entities. This has resulted in the essential transformation of the global social organisation. Basically domestic relationships between an individual and his state have become a matter of legitimate interest to other states and the international community as a whole. A considerable body of institutions and instruments, including those of a legal nature, have emerged to regulate these relationships, the most prominent of them being the UN. On the other hand, we should bear in mind that these institutions and instruments have been the product of negotiations between nation states. At the present stage of development, mechanisms of "unity" remain secondary and supplementary to that of sovereignty. This fundamental power sharing in the world community has been naturally reflected in the most successful international human rights instruments such as the European Convention for the Protection of Human
Rights and Fundamental Freedoms. In the mechanism the main tools for managing the tension between national power and international supervision are ‘margin of appreciation’ and the “democratic necessity” clause that may be found in a number of Convention articles. This clause means basically that certain rights guaranteed by the Convention can be restricted by domestic authorities only within the limits of what is necessary in a democratic society.

The connection between ‘democracy’ and ‘human rights’ can be found both in the statute of the Council of Europe and the Convention. In the Preamble to the Statute of the Council of Europe the Contracting States declare that they are ‘Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.’ The preamble therefore clearly shows that the only political regime which is compatible with the Convention is democracy. Furthermore, the idea of representative government and the requirements of democratic participation are laid down in Article 3 of Protocol No.1. The protocol requires ‘free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature.’ This is clearly a basic requirement of representative government, but as a charter of democratic participation it has rightly been described as very thin.310

Another important reference to democracy is found in the second paragraphs of Articles 8-11 of the Convention. According to these Articles, the restrictions upon fundamental rights which are prescribed by law and have a legitimate aim, can only be justified if they are ‘necessary in a democratic society’.

Democracy is usually defined as “rule by the people” in the political theory texts.\textsuperscript{311} The definition that Weale offers is that “in a democracy important public decisions on questions of law and policy depend, directly or indirectly, upon public opinion formally expressed by citizens of the community, the vast bulk of who have equal political rights.”\textsuperscript{312} So, if we came across a system of government in which there was no dependence at all on public opinion in important public choices, then we would withhold the name democracy from that system.\textsuperscript{313}

In this chapter I will begin by examining the concept of democracy and the democratic concept in political theory. This may give the reader the benefit of a clear understanding of what is meant by democracy and in what perspective political parties are seen. Furthermore, if the view of these democratic theories about representation and participation is understood, it will be easier to establish the role and treatment of political parties in different types of democracies. It must be noted that the main aim here is to establish the role and treatment of parties in liberal democracies, especially with regard to political participation and representation. Therefore, the classification of the types of democracy will be made mainly according to these concerns. I will then move to an examination of the operation of the democratic necessity notion to clarify what is meant by “necessary in a democratic society” for the Convention’s purposes.

The main focus of this thesis is to look at the dissolution of the political parties of Turkey, though this will be examined later in detail. When we look at the reasoning of national and international instruments in this matter we will see that the dissolution of those parties was legitimised basically on the grounds that it was necessary for the

protection of democracy. In this framework it is necessary for our study to look at the place of democracy in the political science literature, and of its interpretation in the case law of the Strasbourg organs in the framework of the “democratic necessity” notion of the Convention.

1. THE CONCEPT OF DEMOCRACY IN POLITICAL THEORY

Defining the Democracy

Although many changes and improvements have occurred since then, as is well known and generally accepted, the first democracy was conceived of, established and organised in Athens in the fourth and fifth centuries BC. One of the most difficult questions to answer satisfactorily is: what is democracy? The term ‘democracy’ in its modern sense came into use during the course of the nineteenth century to describe a system of representative government in which the representatives are chosen by free competitive elections. Democracy is the name of a system which is open to change and improvement and in which society can willingly decide its future. There is no agreed upon definition of democracy. Some definitions are so vague as to be virtually useless and others so specific as to be obviously incomplete. Democracy does not consist of a single unique set of institutions. There are many types of democracy, and their various practices bring about a similarly wide range of effects.

Democracy has a very broad content in terms of time, culture and background and there is no agreement on the best way of delimiting this, because of the diversity of

313 ibid
democratic systems. According to Ware, "for a process or system to be democratic, then, the rules and procedures employed must bring about results that optimally promote or defend the interests of the largest number of people in the relevant arena."\(^{316}\) It is by means of democracy that people have the opportunity to exercise control over certain aspects of a regime or organisation. The question is what the citizen has control over. At this point, democratic theorists vary very widely, some of them such as Schumpeter,\(^{317}\) Dahl,\(^{318}\) Sartori,\(^{319}\) and Riker,\(^{320}\) emphasise that only a very limited type of control is available. In this sense democracy is a matter of voters having the right to remove from office governments which they have come to dislike at periodical intervals. Some critics argue that elections and other devices must give choices to citizens, as a means of controlling those who make decisions on their behalf, when direct decision making by the people is impossible or improper.\(^{321}\)

**Types of Democracy**

The question of whether democracy should mean an indirect aid to decision making or some kind of direct popular power has given rise to three main types of democracy. These are liberal or representative democracy; direct or participatory democracy; and economic or social democracy, usually based on a one party model.\(^{322}\) On the other hand, Pickles, separating representative and liberal democracy, argues that there are four kinds of democracy: representative democracy; direct democracy; political

\(\text{316 Ware A. Citizens, Parties and the State, (Princeton, New Jersey: Princeton Press University, 1987), p.8} \)
\(\text{320 See Riker, W.H., Liberalism against Populism, (San Francisco: W.H Freeman, 1982)} \)
democracy (which may be called liberal democracy); and 'Economic and social
democracy.' However, for the purpose of this thesis it will be sufficient to examine
only the liberal and representative democracies.

Representative Democracy

Both democratic and undemocratic political systems have rulers. However, a
democratic political system can be distinguished by the fact that the ruler occupies not
only a specialised, authoritative role but also has the ability to give legitimate
commands to others. It is important to note the conditions under which the rulers
came to power and the accountability structures. This is usually related to the holding
of fair elections. The people elect others to represent themselves and act on their
behalf, according to published positions and specific opinions. All supporters of
representative democracy agree on the principle that the citizens of a modern political
democracy should act through their elected representatives who, in turn, hold the
ruling elite accountable. Representative democracy is an indirect form of
democracy.

In his work on Representative Democracy, Mill, in order to answer the question of
what is the best form of government, said that the best form of government is, in fact,
representative democracy. Nevertheless, whereas he believed all should have equal
rights, and opposed the unearned privilege of inherited wealth, or discrimination on

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p.11
323 See Pickles, D., Democracy, (London: Methuen, 1971)
p.76
grounds of sex, creed or colour, this did not extend to a commitment to giving everyone an equal say in government.326

Democracy is a political system, as Macpherson points out, in which the whole people make and are entitled to make the crucial decisions on important matters of public policy.327 According to Abraham Lincoln’s famous definition, the word “democracy” simply means government of the people, by the people, and for the people.328 Yet no political system at any time, democratic or not, has ever provided for all of the people to choose the government, much less to exercise governmental power. On the other hand, elitist theory does not agree that people have the capability to realise the common good. Rather they see democracy in institutional and procedural terms.329 As to the definition of democracy, Schumpeter says that it would seem, more or less, that a political system in which governmental power depends on winning competitive elections could be counted as democracy. He goes on by stating that the democratic system of government is best identified in institutional and procedural terms, rather than in terms of the ideals which democracy is supposed to serve.330 He defines the democratic method as “institutional arrangements for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the people’s votes.”331 He claims that democracy is simply a method of decision

making that cannot itself function as an ideal. This definition places the elite very firmly at the heart of democracy by virtue of its division between individuals in power and the people. He argues against what he calls the classical doctrine of democracy. He objects that there can be no common good which people can be persuaded to agree on.

Sartori asserts that “if we have a majority that cannot be turned into a minority, then, we are no longer dealing with a democratic majority - that is, within a system whose rule of the game is the majority principle.” On the other hand, it is stressed by others that the norms of democracy dictate inclusive citizenship and political equality, and it is not, as some argue, only a matter of popular sovereignty. The representative democracy process works in such a way that representatives agree that those who achieve a greater degree of electoral support will not hinder the losers from taking office, or exerting influence in the future. In turn, the losing representatives will respect the rights of the victors to formulate the policy.

Liberal Democracy

A new concept of democracy was born after some Western countries such as Britain and United States became liberal states. It was called liberal democracy. Although it was developed from representative democracy, Liberalism’s main concern is not political representation but the individuals’ rights. Many liberals believe that there is a necessary connection between liberalism and democracy. On the other hand, some

\[332 \] ibid, p.242
\[333 \] ibid.251
opponents believe that democracy is incompatible with liberalism. Throughout the
development of early liberalism, democracy was merely a means to achieve the
realisation of a number of basic human rights. The nature of the liberal ends
determined the character of the democratic means, but democracy was not an end
itself.337 However, today, when one mentions democracy, it is mostly “liberal
democracy” which comes to mind. Most countries which are accepted as democracies
are liberal states and call themselves liberal democracies. Thomas Hobbes saw
democracy as a hindrance to the safeguarding of the one fundamental right of the
individual to life. John Locke338 claims that governments are established to secure
fundamental human rights and the government is limited by this special duty. In his
theory, government has two main duties: (a) to secure rights and (b) to realise public
order.339 Locke, who is the father of liberalism, was not a democrat and merely
believed that, what one might nowadays consider to be the elements of democracy
could serve as only one instrument for preserving his expanded version of human
rights.340 Rousseau attempts to create a union of both authority and liberty. Consent
was a balance between the individual and government for Locke, for Rousseau and
Hobbes the contract was constitutive of society itself.341 The transition was from the
older liberalism to reformist liberalism in John Stuart Mill, who changed not the
instrumental role of democracy, but the scope of human rights.342.

Defining “liberal democracy” is as difficult as defining the word “democracy” itself.
Some say that the term “liberal democracy” is a qualification of “democracy,” and it

338 For more information on Locke see Leyden, W., *Hobbes and Locke*, (Hong Kong: MacMillan Press,
1982)
& Sons Ltd, 1959), pp.174-177
refers to democracy of a limited kind. However, this may not be clear. It could be said that the adjective “liberal,” as applied to a system of government, classically indicates a concern with individual freedom that centres on the need to restrain the power and authority of government. In the classical view ‘democracy’ refers to the location of a state’s power, i.e. in the hands of the people, whereas ‘liberal’ refers to the limitation of a state’s power.

It is argued that, for the purposes of this thesis, liberal democracy as one form of democracy refers to a set of institutions, which includes: free elections; competing political parties; freedom of speech; responsible government; and the rule of law. Liberal democracy aims to aggregate individual preferences into a collective choice. It could be said that fundamental rights serve as limits on democracy. Liberal democracy is a system in which fundamental political rights and liberties are preserved and protected from infringement, even by means of the democratic process itself. Liberalism is democracy’s absolute premise and foundation. Liberal democracy evolved from the idea that “majoritarian decision-making is to be preferred” to “the idea of a pluralist system which leaves various groups in society different amounts of influence over decisions in proportion to their interest in those decisions.”

Liberal democracy can be defined as:

“[A]s the extent to which a political system allows political liberties and democratic rule. Political liberties exist to the extent that the people of a

country have the freedom to express a variety of political opinions in any media and the freedom to form or to participate in any political group. Democratic rule exists to the extent that the national government is accountable to the general population and each individual is entitled to participate in the government directly or through representatives.  

Liberal democracy is a contemporary concept, which tries to reconcile those quarrelling brothers: "In the modern world, democracy has often been perceived by liberals as a threat or potential threat to individual freedom, and there have been warnings about the tyranny of the majority and the tyranny of public opinion." Historically, democrats and liberals have always battled with each other. Modern democracies, according to Sartori, hinge on, (a) limited majority rule, (b) election procedures, and (c) the representational transmission of power. He also states that, in order to isolate liberalism from democracy, it could be said that liberalism calls for liberty with equality. The distinction becomes that liberalism is above all a technique for limiting the state's power, whereas democracy is the insertion of popular power into the state. Liberalism needs democracy for two reasons. Firstly, despite the fact that in liberalism all individuals are free and equal by nature and masters of themselves, a liberal polity needs some mechanism by which the people can give their consent to, and bestow on the government, the right to govern. Secondly, liberalism expects the government to set up and maintain a system of rights based on the principle of maximum liberty. The government, however, may not by its own inclination set up such a system or may violate it. A liberal polity, therefore, needs a

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348 ibid, p.84
mechanism by which the people can control and force the government to realise its
trust. Since liberalism needs these kinds of mechanisms, it turns to democracy to
provide them and defines democracy in terms of them.

Liberal democracy has been developed in liberal states where mostly representative
democracy has been practised. The basic relationship between liberalism and
democracy from de Tocqueville\textsuperscript{349} to de Ruggiero,\textsuperscript{350} to Kelsen\textsuperscript{351} has been the
relationship between liberty and equality. Holden argues that there are three main
concepts which have a key role in the idea of liberal democracy. According to Holden,
to answer questions which may arise when one thinks about or uses the notion of
liberal democracy, one should examine the relationships among the key concepts of
democracy. These concepts are equality and liberty.\textsuperscript{352}

Liberal democrats assume that there is a very close connection between individual
liberty and limited government and that threats to individual liberty come only and
mainly from the state or government. The word 'liberty' means freedom in a social
context. The term 'individual liberty' then, refers to the freedom of individuals with
respect to their social, and particularly their political, environment. The central point
is that a liberal democrat can make sense of the notion of the people making a
decision only where there is freedom to present different viewpoints to the people and
where the people are free to make whatever decision they wish. In this way, freedom
of speech, organisation and assembly and so on, are seen as essential components of
democracy. In other words, essential individual liberties must be present in a

\textsuperscript{349} See De Tocqueville, A., \textit{Democracy in America}, (New York: A.A Knopf, 1945)
\textsuperscript{350} See De Ruggiero, G., \textit{The history of European Liberalism}, (Oxford: Oxford University Press, 1927)
democracy. It may be said that liberal democracy is democracy of a limited sort, a system in which there are restrictions on the extent of people’s decision making. Liberal thinkers highlight the concept of negative liberty since they think that the logic of the free market requires that. Negative liberty means an absence of intimidation rather than a positive power to enabling capacity. It is ‘freedom from’ rather than ‘freedom to’. This draws a sharp distinction between freedom and ability. The definition of freedom in the sense of ‘positive freedom’ is criticised by Hayek. According to his definition of negative freedom, freedom is something that is akin to power or ability.353

Liberal democracy is a form of representative democracy and highlights individual rights, pluralism and participation. Fukuyama claims that liberal democracy has quite simply surpassed all contemporary ideologies and is the only viable ideology remaining.354 Rights to freedom of expression and association are the main concerns in a liberal democracy. The political parties are regarded as indispensable elements of liberal democracies. Since Political Parties aggregate public interests and function as communication channels between public and government, one could say that political parties are the most important organisations in liberal democracies, more so than in any other kind of democracy. Interest optimalisation and civic orientation can be achieved in liberal democracies far more than in any other democracies. With principles of the rule of law and limited government, liberal democracy makes it possible for the public to exercise control over government. But the question here is at what cost to liberalism or to democracy is the exercise of control achieved? Political

parties could be state machines designed to mobilise and educate the public in some systems. However, one could not say that there was free competition or pluralistic structure in such regimes, since they would be based on merely one-party systems, such as communism. Thus, such a role is not possible in a liberal democracy.

The Importance of Political Parties in Democracy

Having examined the concept of democracy and particularly liberal democracy, one may say that liberal democracy could not be achieved without political parties. Parties are a most important element of democracy. In direct democracies political parties may not be able to function as they do in representative democracies, including liberal democracies. However they are still important in order to mobilise the public and to form and shape public opinion on issues in question. In socialist democracies (or one-party systems) political parties act as state machines to educate people and carry out formal ideologies from top to bottom. Political parties in newly established democracies play an essential role as well. In liberal democracies, based on basic rights and civil liberties such as the equal right to vote, freedom of expression and freedom of association, rights and freedoms can be exercised effectively only with the existence of political parties. Since modern democracy is characterized by representative governments and large electorates, political parties have many important functions to play. It is obvious that the ability of an individual to influence government depends on collective action within organized groups. Political parties can often spread information more extensively and effectively than an individual, and for less cost. At the same time, this spreads any risk associated with

355 see Gunther, R., Diamond, L., "Functions of Parties", in Political Parties and Democracy 3, 7-9 (Richard Gunther and Larry Diamond eds., Johns Hopkins Univ. Press, 2001)
such activity among many participants. By grouping varied individual interests along central societal cleavages, parties facilitate the ability of an individual voter to choose among fewer, and clearer, alternatives. The aggregation of public opinion through elections also produces legitimacy of political parties. Hence, political parties play an important role, as they enable the individual to participate more intensively in political life. In conclusion, it is quite right to say that modern democracy has come to depend on political parties.

The Treatment of Anti-Democratic Expressions in Democracy

In democracies freedom of expression is accepted as a natural right and has a privileged status. However, there are some kinds of expressions which can not be accepted as merely expression of thoughts. Therefore, these kinds of expressions can not benefit from the protection of freedom of expression and they are defined as legally unprotected expressions. Basically these expressions are:

1. Expressions that include words of obscene, slander, blasphemy, and words against honour.
2. Incitement to war.
3. Expressions that aims hatred and discrimination between nations, religions and races.

358 Birch, A. H., The Concepts and Theories of Modern Democracy, (Routledge, 1993), p. 84
4. Incitement to crime.360

These objective limits of freedom of expression are necessary to protect social peace, pluralism and common life.361 Apart from these objective limits of freedom of expression, the question of whether non-democratic views should benefit from the protection of freedom of expressions results in too much debate. Some scholars are of the view that even the anti-democratic expressions should have protection of freedom of expression in liberal democracy.362 However, the opposite thinkers claim that as the democracy has to protect itself against anti-democratic activities the freedom of expression can not be granted to totalitarian and the views that aim the destruction of democracy.

According to the view which accepts the protection of anti-democratic opinions, freedom of expression is the most important feature of the democracy. Prohibiting the anti-democratic views harms freedom of expression itself; thus, contention with totalitarian views should be made by expression of ideas in publicly open discussions. Otherwise, banning those views will push them into underground and they can recourse to violence.363 If Democracy closes its doors to different opinions it would be accepted as the synonym of status quo and it can not renovate itself. To prevent this, democracy should always be open to different opinions.364 As a requirement of real function of freedom of expression even the national socialist and communist views should have its protection. Because, the real danger is not those views, the expression of national socialist and communist views will not destroy the democracy. On the

360 ibid
363 ibid, Kapani
contrary, if liberal democracy can not find solutions to social problems, it could be destroyed and totalitarian regimes could exist. According to Selcuk, all anti-democratic views should have the protection of freedom of expression. Because, if the state determines and protects a certain ideology (even if this is democracy) in its constitution, it would lose its main duty as an impartial mediator and it would be partial. As it would have resulted in prohibiting different opinions from determined ideology, there would have been hierarchy of views instead of equality of them. Democracy should be tolerant to anti-democratic views basically for two reasons: first, like learning swimming in the sea democracy should be learnt in democracy. Therefore, not giving the opportunity to those views to express them will make the achievement of democracy difficult. Secondly, if those views can not find a way to express them, they will go underground and will be more dangerous for democracy.

In summary, those who advocate the right to freedom of expression of people who have even anti-democratic views, do this because of freedom of expression being a fundamental right of individuals and also for the view that it is necessary for the proper development of democratic state.

The scholars who advocate the idea of not giving protection of freedom of expression to enemies of freedom, basically claim that democracy should protect itself from being destroyed. They support their stance with the examples of destruction of democracy by the fascist and national socialist regimes in Italy and Germany before World War II. They did this by benefiting from freedom of liberal democratic

365 op.cit. Lippincott, pp.63-64
regime. Like all other regimes, democracy has the right to protect itself against threats that aim its destruction. Liberal democracy can not watch its destruction for the sake of principle of freedom; therefore, in such a situation it will use its legitimate right to self defence. To protect its life, especially against the threat of fascism, democracy should take the necessary precautions. In a democratic regime the activities that deny any of the fundamental principles of democracy can not be allowed. Therefore, the expression of totalitarian and dictatorial views could be allowed, as long as they do not establish an organisation to achieve their anti-democratic aims. If those anti-democratic views are not allowed to establish political party like organisation, most probably they will be ineffective over the time. According to Eastman, the enemies of democracy are aiming to destroy it not directly by armed forces but by using the principles which are the essence and pillar of the democracy. Therefore, making these destructive ideas free will end the democracy. According to Kapani, as long as they stay as mere expression of opinions all the views including the anti-democratic ones should not be restricted. However, they will lose their protection if they incite destructive activities and encourage the use of force and violence. In terms of organised expression of opinions, he is of the view that, the ideas that aim to destroy the democratic regime and establish a dictatorial regime can not be allowed to be organised.

In a pluralist democracy, the solution to end the threat of anti-democratic views should be made by giving the opportunity to debate those views with the pro-

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368 Tezic, E., 100 Soruda Siyasi Partiler, (Istanbul : Gercek yayinevi, 1976), p.132
democratic views freely in the society instead of banning them.\textsuperscript{373} After considering both sides on whether anti-democratic views should be allowed or not, the present author is of the view that the mere abstract expression of anti-democratic and totalitarian views by the individuals should be allowed, however, those views can not be allowed to be organised. Because individuals typically pose less of a threat to the democratic system than organized groups, restrictions on their rights are subject to stricter scrutiny.\textsuperscript{374} Although tolerance is a fundamental principle of democratic government, it could be argued that where the survival of the democracy itself is threatened, survival takes priority over tolerance. In this framework, the political parties who openly declare their aims to end one or more fundamental features of democracy can not be allowed. For example, if a party announces its intention to suppress minorities once it attains power, claiming justification in an electoral mandate, then that party may be subject to suppression while it is itself in the minority.\textsuperscript{375} On the other hand, the exclusion or suppression of political parties for allegation of their subversive nature goes to the heart of the democratic process. Whereas safeguarding of democracy is a worthy goal, experience suggests that the power to exclude groups from the political process is often exercised arbitrarily and in a fashion that detracts from rather than enhances the democratic character of the state.\textsuperscript{376} Therefore, the total prohibition of a political party must satisfy a higher level of scrutiny based on concrete and unquestionable evidences since such a measure impinges not only on the right to free and fair elections but also the freedom of association which are the fundamental pillars of democracy.\textsuperscript{377} The democracy should

\textsuperscript{373} Arasli, O., "Insan Haklari Evrendesinde Kulturel Haklardan Dusunce Ozgurlugu ve Anayasal Duzenimiz" (1978) Ulusal Kultur Yil 1, Sayi 2, p.146
\textsuperscript{374} see Fox, H.G., Nolte, G., "Intolerant Democracies" (1995) 36 Harvard International Law Journal 1
\textsuperscript{375} ibid
\textsuperscript{376} ibid
\textsuperscript{377} ibid
find such a balanced way that it can protect itself against its enemies but still remaining democratic.

The issue of unacceptable views in democracy is important especially when those views are based on religion. Many interpreters define faith as the fundamental, non-rational, incorrigible sense of the sacred which embraces all of the believer’s life and determines his or her beliefs, values and behaviour.378 Therefore there is a myth that religious based views which particularly make claims to truth are not compatible with democracy’s fundamental value of tolerance or mutual respect and should therefore be prohibited from the public.379 However, the important thing is whether the warrant being religious or not is compatible with the basic values of democracy, for instance, the arguments that appeal racist ideologies or to doctrines of religious persecution are incompatible with the fundamentals of democracy. On the other hand precluding those arguments from the public sphere could easily lead to a violation of freedom of expression. The solution is to educate the citizens regarding the fundamental values of democracy, so that when they encounter such arguments they will reject them. In conclusion, the different religious views should be welcomed into the pluralistic conversation of democracy as long as they agree to abide by the fundamental values of democracy: a commitment to freedom, equality and mutual respect.380

379 ibid, p.159
380 ibid, p.173
2. THE CONCEPT OF ‘NECESSARY IN A DEMOCRATIC SOCIETY’ IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

General Framework

Developing its understanding of “democratic necessity”, the Strasbourg organs, in fact, have employed the concept of “quasi-emergency situations” which are seen as definitely of an exceptional character. It is in these “irregular” situations requiring the “correctional” interference of a state, that the latter is deemed to have a legitimate aim in restricting certain rights. Taking this approach, the Convention organs have relied on an analogy with the logic of their reasoning in the cases of the real emergencies\(^{381}\) of Article 15.\(^{382}\) The bridge of analogy between the real, and what we may call routine, emergency situations was built by the Commission’s decision in the case of \(\text{Iversen}\), which concerned the compulsory allocation of doctors to the northern regions of Norway. Having recalled the margin of appreciation reasoning in the Article 15 cases, the Commission said that “in the analogous circumstances of the present case... [it] cannot question the judgement of the Norwegian Government and Parliament as to the existence of an emergency as there is evidence before the Commission showing the reasonable grounds for such judgements.”\(^{383}\)

The real emergencies revealed certain features of actual restrictive practices of states that were not that explicit in respect of the routine limitations of Articles 8-11. It is, however, exactly these features which allow the reconciliation of the restrictive


\(^{382}\) Art.15 para.1 reads: “In time of war or other public emergency threatening the life of the nation any high Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”

practices with the elementary ideas and requirements of democracy (and therefore, to subject these practices to the legal control and regulation). First of all, every restriction of human rights must be nothing other than a direct response to the irregularities, which have evidently occurred in the life of the society organised along the principles of democracy. The only goal of these restrictions must be the restoration of the normal functioning of the society. The restrictions must not overstep, in the scope of their subject-matter, the borders determined by this goal.

It may be argued that the European organs have developed in essence a uniform philosophy as regards the two types of “necessity” referred to in the Convention. They are; that which allows derogations from certain Convention rights, and that which has similar effect as regards restrictions in the name of legitimate aims.\textsuperscript{384} The aim of the analysis in both spheres has been basically the same: to develop and apply a clear operative set of principles to “regulate necessity” and measure its particular practical manifestation against the Convention standards, and the proper operation of the necessity principle in a democratic society.

After \textit{Handyside}, the view of the majority of members of the European organs has been that the recognition of the legitimate aim in the Convention text, and in domestic legislation, in itself does not avail the Contracting States of the possibility of lawfully restricting freedoms.\textsuperscript{385} However, Article 10 paragraph 2 does not give the Contracting States an unlimited power of appreciation. As the Court is responsible\textsuperscript{386} for ensuring the observance of those states’ engagements, it is empowered to give the

\textsuperscript{384} This “necessity” is expressed in Art.15 in the terms of “war or the public emergency” and “strict requirements of the exigencies of the situation”. By analogy with Art.8-11, legitimate aim in this case can be held to be “meeting threat to the life of the nation”.

\textsuperscript{385} \textit{Handyside v. United Kingdom}, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737, para.48
final ruling on whether a restriction or penalty is reconcilable with freedom of expression, as protected by Article 10. And such supervision concerns both the aim of the measure challenged and its necessity, so it covers not only the basic legislation but also the decision applying it, even one given by an independent court.\textsuperscript{387}

After the judgements in \textit{Handyside}, the concept of the mediated operation of the element of legitimate aim in the necessity test became the centrepiece of the European Court of Human Right's jurisprudence in assessing the necessity of restrictions. Basically, the mediated operation concept relies on the understanding that the task of the effective supervision of the exercise of national discretion can be adequately performed; only if the Court's review verifies that there is a real danger to the legitimate aim, or social value behind it. Will the Court accept that the restriction is necessary? This verifiable factor of threat resulting from the abuse of the Convention right is an indispensable medium for inclusion of the legitimate aim element into the concept of democratic necessity.

This understanding has led to the following structure of supervisory analysis. After deciding on the legality and legitimacy of the restriction, the European Human Right's organ proceeds to ascertain that the reasons advanced by the government to justify it, are relevant and sufficient.\textsuperscript{388} The first criterion serves to clarify whether the mentioned reasons are appropriate as a matter of the factual circumstances of the case, and, as regards complex aims, what particular elements of the latter are actually

\begin{footnotesize}
\textsuperscript{386} Before Protocol 11 the Commission also was responsible for this observation with the Court.

\textsuperscript{387} \textit{Handyside v. United Kingdom}, Judgement of 7 December 1976, Series A No.24, (1979-80) 1 EHRR 737, para. 49

\textsuperscript{388} \textit{Handyside v. United Kingdom}, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737, para. 50
\end{footnotesize}
This criterion is, in fact, a transposition of the formal requirement of legitimacy on the factual, specific, situation obtained in the case. The criterion of sufficiency presupposes the test of necessity itself. The European organ has to verify, and the respondent government to ‘convincingly establish,’\textsuperscript{390} that the particular restrictive measure has been a response to the actual threat to the values behind the legitimate aim that is a ‘pressing social need.’\textsuperscript{391} As stated in the \textit{Oberschlick v. Austria}, the organ of supervision has to satisfy itself that the domestic authorities have applied standards which are in conformity with the requirements of the Convention, and moreover, that in doing so they have based themselves on an acceptable assessment of the relevant facts.\textsuperscript{392}

This is followed by the analysis of proportionality of the restriction to the legitimate aim, or more precisely the threat, which the restriction is designed to meet. At the stage of establishing the fact of the existence of the ‘pressing social need’ the Strasbourg organs, undertake the balancing of the conflicting interests involved in the case, or the restriction. As observed by the Court in the \textit{Sunday Times} case “to assess whether the interference complained of was based on sufficient reasons which rendered it ‘necessary in a democratic society’ account must be taken of every public interest aspect of the case.” The supervisory organ is called upon to weigh the interests involved and to assess their respective force.\textsuperscript{393} This balancing is, in essence, a determination of what limitations on the rights and freedoms of individuals may be permitted as ‘necessary in a democratic society’. Referring to this process of balancing, the Court stated in \textit{Klass} that, “some compromise between the

\textsuperscript{390} \textit{Barthold v. Germany}, Judgement of 23 March 1985, Series A No. 90; (1985) 7 EHRR 383, para.58
\textsuperscript{391} \textit{The Sunday Times v. UK}, Judgement of 26 April 1979, 2 EHRR 245, para.67
\textsuperscript{392} \textit{Oberschlick v. Austria}, Judgement of 23 May 1991, Series A No.204; (1994) 19 EHRR 389, para.60
requirements for defending democratic society and individual rights is inherent in the system of the Convention.\textsuperscript{394}

The concept of ‘democratic society’ is being further developed and clarified by the Strasbourg organs’ and they aim to achieve a balance between the approach of the state and international supervision, and it stands as a reference scale for performing and measuring the outcome of such balancing. As one writer puts it, ‘the Court’s supervisory function inevitably has in it a creative, legislative element comparable to that of the judiciary in common law countries; so that in certain cases its exercise might strain the enthusiasm of the Member States.’\textsuperscript{395} This observation shows that the operation of the ‘democratic necessity’ clause presupposes, as a matter of fact, simultaneous exercise by the Convention organs of the two balancing processes, that between the domestic and European powers in the field of the implementation of human rights; and that of weighing up the conflicting interests of individuals and interests implied in the responsibilities of the governments in democracy. Within this framework the European institutions have developed the complex system of rules for clarification of the borders of competence between them, and the national authorities. Only clear vision of this borderline, which is established a new in each particular case under review, makes possible the effective European supervision. This supervision does not allow the Member States to abuse their position as factual holders of power and, at the same time, remains free from arbitrariness. One author states that, “There is a legitimate area of action conferred on the national authorities and a legitimate area of review conferred on the Commission and the Court, in other words a shared

\textsuperscript{393} The Sunday Times v. UK, Judgement of 26 April 1979, 2 EHRR 245, para.65
\textsuperscript{394} Klass v. Germany, Judgement of 6 September 1978, Series A No.28; (1979-80) 2 EHRR 214, para.59
\textsuperscript{395} Waldock, H., ” The Effectiveness of the System set up by the European Convention on Human Rights”, (1980) 1 HRLJ 1, p.9
responsibility for enforcement, with the Court having the ultimate power of
decision.\textsuperscript{396}

The Limits of the States' Discretion

In \textit{Handyside} the Court stated that "whilst the adjective "necessary," within the
meaning of Article 10 para. 2, is not synonymous with "indispensable" in Articles 2
para.2 and 6 para.1, the words "absolutely necessary" and "strictly necessary" and, in
Article 15 para.1, the phrase "to the extent strictly required by the exigencies of the
situation," neither has it the flexibility of such expressions as "admissible", "ordinary"
(Article 4 para.3), "useful" (the French text of the first paragraph of Article 1 of
Protocol No. 1), "reasonable" (Articles 5para. 3 and 6para. 1) or "desirable".\textsuperscript{397} The
expression "necessary in a democratic society" implies that the interference
corresponds to a "pressing social need" and, in particular, that it is proportionate to the
legitimate aim pursued. The Contracting States have a certain margin of appreciation
in assessing whether such a need exists, but it goes hand in hand with European
supervision, embracing both the legislation and the decisions applying it, even those
given by an independent court.\textsuperscript{398} The Court is therefore empowered to give the final
ruling on whether a "restriction" is reconcilable with the rights protected by the
Convention.

The European discretion extends to the assessment of both the facts of the case under
review and the relevant domestic laws in their application. Given the sovereign state's

\textsuperscript{396} Mahoney, P., " Judicial Activism and judicial Self-Restraint in the European Court of Human
Rights: Two Sides of the same Coin", (1990) 11 HRLJ 57, p.81
\textsuperscript{397} \textit{Handyside v. United Kingdom}, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR
737, para.48
actual possession of instruments of power and the Strasbourg organs' authority granted under Article 19 of the Convention, it is evident that the demarcation of the borderline between the competences of a sovereign state and of the European Court in matters of protection of relative human rights, depends on both the domestic concept of the scope of national appreciation and the Strasbourg concept of the scope of its activism. The sovereign power actually reigns in the majority of factual situations in the individual/state relationship, and only a small part of the latter comes, through contentious proceedings, under the European supervision. However, it is the Court, which gives the final ruling on the matter. For the purposes of our analysis it is, therefore, though it may seem paradoxical, exactly the scope of the European discretion that must be put under close scrutiny. There are three basic sources from which these limits can be deduced. The first is the Convention’s text itself. This allows the supervisory organs to ascertain the textual requirements as to the strictness of ‘necessity’ as regards each Article of the Convention. In the Golder case the Court referred to the restrictive formulation used in paragraph 2 of Article 8 (“There shall be no interference...”), to hold that it “leaves no room for the concept of implied limitations.” In Handyside the Court stressed that according to paragraph 2 of Article 10 “whoever exercises his freedom of expression undertakes ‘duties and responsibilities’... The Court cannot overlook...a person’s ‘duties’ and ‘responsibilities’ when it enquires, as in this case, whether ‘restrictions’ or ‘penalties’

399 see Mahoney, P., “ Judicial Activism and judicial Self-Restraint in the European Court of Human Rights: Two Sides of the same Coin”, (1990) 11 HRLJ 57
400 Golder v. United Kingdom, Judgement of 21 February 1975, Series A No. 18; (1979-80) 1 EHRR 524, para.44
were conducive to the 'protection of morals', which made them 'necessary in a
democratic society'.

The second source of the European discretion is the very concept of “democratic
society,” which has a central place in the necessity test. The role of this concept, as a
reference scale in the supervisory analysis, in itself leads the European organs to
continuously undertake a systemic interpretation of the Convention, as a source of
fundamental principles of the democratic organisation of the society. Thus, to search
for and to establish the necessary links of correlation between the treaty’s different
provisions. Moreover, it prompts these organs to undertake what may be called the
‘general overview’ or the very broad sociological analysis of the functioning, and the
principles which govern it. Such an inquiry has eventually led the European organs to
formulate the set of basic characteristics of a ‘democratic society’ and the ‘rights
fundamental to democracy’.

The third source of limited discretion is the common standards of legislature and
practice existing, and gradually evolving within, the democracies of the Council of
Europe. Indeed, according to its Preamble, the Convention is built upon the ‘common
heritage’ of the ‘like-minded’ European countries, and reference, in the supervisory
analysis, to some generally accepted denominators is both natural and indispensable.
If a contested measure in one Member State has gained wide acceptance amongst the
majority of State Parties, this would strengthen the judicial drive to enforce such a
measure, even against the national legitimacy of an opposing state. In Gustafsson v.
Sweden, the Court perceived the converse, namely a ‘wide degree of divergence’

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401 Handyside v. United Kingdom, Judgement of 7 December 1976, Series A No.24 (1979-80) 1 EHRR 737, para.49
within domestic systems, on the question of protective intervention by the state, and hence found it reasonable to yield to the national appreciation.\textsuperscript{402} Furthermore, the task of ensuring the ‘further realisation of human rights and fundamental freedoms’ leads the Strasbourg organs to look for social developments within the European democracies. These indicate the necessity of raising the threshold, or extending the scope of protection, afforded under the Convention. For instance, in \textit{Autronic AG v. Switzerland}, The Court found the banning of unauthorised reception of television broadcasts from a satellite unnecessary, emphasising that “later developments can be taken into account in so far as they contribute to a proper understanding and interpretation of the relevant rules.”\textsuperscript{403}

**Restricted Activities and Privileged Activities**

Some forms of activity are privileged. That is, they are subject to ‘special’ protection in democratic society. The concept of privileged activities is based on the supervisory body’s own understanding of the role of the corresponding rights and values, protected by them in the functioning of democratic society, as an institution, as a system of social organisation and management, and as a community of private individuals, the primary aim of which is the creation of the most favourable conditions for the free development of every member. The leading criterion for distinguishing certain activities as ‘privileged’ is the nature of their link with the public interest. It must be either strong or virtually non-existent. Thus, in their case law the Strasbourg organs have determined, as subject to special protection, two extreme manifestations of this link. These are: freedom of expression, especially in the context of public

\textsuperscript{402} \textit{Gustafsson v. Sweden}, Judgment of 25 April 1996; (1996) 22 EHRR 409, para.45
debate; and the right to respect for private life, including the sexual life of the individual. As seen from the subsequent analysis, the main feature of the privileged activities is the lowest degree of relativity of specific social values. In the relevant cases, the European organs often relied upon the notion of vital interests, interests of special, distinguished importance, either for society as a whole, or for the life of its individual members. Freedom of expression has been defined, by the Strasbourg organs, as the right fundamental to the functioning of a democracy, both as an institution and as a community of individuals. One author explains that "while the Convention, of course, is designed to maintain 'democratic society' the Court appears to pick up intuitively some rights as more fundamental than others. (...) This distinction by the Court may be rooted in the history of the Convention. The central concern of the founders of the European Human Rights system was to prevent re-occurrence in any State of a process similar to Germany's slide into totalitarianism, the slide which conformed to the legal niceties of German domestic law." The Court, also in *Handyside*, stated that its "supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society.' Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such

404 *The Sunday Times v. UK*, Judgement of 26 April 1979, 2 EHRR 245, para.66
405 In political theory, Liberal democracy is seen as a form of representative democracy and highlights individual rights, pluralism and participation. A liberal democrat can make sense of the notion of the people making a decision, only where there is freedom to present different viewpoints to the people, and where the people are free to make whatever decision they wish. Therefore, freedom of expression, association and assembly and so on, are seen as essential if democracy is to exist at all. See p. 136-137 above
are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’ As pluralism, tolerance and broadmindedness are hallmarks of a “democratic society,” this, therefore, entails certain consequences. The first is that these ideals and values of a democratic society must also be based on dialogue and a spirit of compromise, which necessarily entails mutual concessions on the part of individuals. The second is that the role of the authorities in such circumstances is not to remove the cause of the tensions by eliminating pluralism, but, as the Court again reiterated only recently, to ensure that the competing groups tolerate each other.

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of people who are members of minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals, or groups of individuals, which are justified in order to maintain and promote the ideals and values of a democratic society. In the Sunday Times case the court referred to the concept of the “public interest” and the “vital interest” of society’s members. To assess whether the interference was necessary in a democratic society “account must...be taken of

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408 See Ouranio Toxo and Others v. Greece, Judgment of 20 October 2005, para. 40
409 See, mutatis mutandis, Young, James and Webster v. the United Kingdom, judgment of 13 August 1981, Series A No. 44, paras. 25, 63; and Chassagnou and others v. France, Judgment of 29 April 1999; (2000) 29 EHRR 615, para. 112,
every public interest aspect of the case..." The court concluded that the families of the numerous victims of the tragedy had a vital interest in knowing all the underlying facts and the various possible solutions. In a number of cases the Court has pointed out that there is a direct link between the freedom of expression and the freedom of assembly and manifestation, protected under Article 11.

The Relationship between Restriction and the Legitimate Aim

The clarification of this link serves the purpose of determining the extent of the pressing social need and accordingly the proportionality of the restrictive measure. The case of *Campbell v. UK* concerned the opening and reading, by the prison authorities, of correspondence between a prisoner and his solicitor and the opening, (without reading), of some of his correspondence with the European Commission on Human Rights. The Court distinguished, first of all, between the applicant’s incoming and outgoing mail, pointing out that these two categories imply different possibilities of abuse on the part of a prisoner. Therefore, their link with the alleged need to prevent disorder and crime is of different strengths. Consequently, the degree of pressure of this need is different, and the relevant necessity has to be met with different restrictions, for the latter to be proportionate. Therefore, the Court distinguished between two levels of surveillance; opening letters without reading them; and opening and reading the correspondence. The Court in this case held that

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411 The Sunday Times v.UK, Judgement of 26 April 1979, 2 EHRR 245, paras. 65, 66
412 See Ezelin v. France, Judgement of 26 April 1991, Series A No. 202; 14 EHRR 362, also the political party cases of Turkey that will be examined in detail later in this study. United Communist Party of Turkey and others v. Turkey, (1998) 26 EHRR 121; Socialist Party v. Turkey (1999) 27 EHRR 51; The Freedom and Democracy Party (OZDEP) v. Turkey (2001) 31 EHRR 27, Judgement of
the prison authorities might open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure, which the normal means of detection have failed to disclose. The letter, however, should only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, such as opening the letter in the presence of a prisoner. The reading of the prisoner’s mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that a privileged channel of communication is being abused in that the contents of the letter endanger prison security, or the safety of others, or are otherwise of a criminal nature. What may be regarded as reasonable cause will depend on all the circumstances, but it presupposes that the existence of facts and information was being abused. As regards the correspondence with the Commission, the court observed that the risk of forging the Commission’s stationery for criminal purposes was negligible; therefore, any interference in this respect was not justified. The Court found a violation of Article 8.413

In the case of Open Door and Dublin Well Woman v. Ireland, the Court, though having readily accepted that the protection of morals, in the particular circumstances, might include considerations of protection of an unborn life, pointed out nevertheless, that the link between the providing of information and the destruction of an unborn life was not as definite as contended. The restricted activities comprised only an explanation of available options, not advocacy nor the encouragement of abortion.414

8 December 1999; Refah Partisi (the Welfare Party) and Others v. Turkey, (Grand Chamber) Judgment of 13 February 2003; (2003) 37 EHRR 1

413 Campbell v. United Kingdom, Judgement of 28 June 1992 series A No.223; (1993) 15 EHRR 137, para.48
Common Standards of Europe

According to the Preamble, the Convention is built upon the "common heritage of political traditions, ideals, freedom and the rule of law." In addition, "further realisation of human rights and fundamental freedoms" is considered to be "one of the methods" of the "achievement of greater unity." At the same time, fundamental freedoms themselves "are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend." To put it another way, the unity of the Member States is the engine and the environment of the Convention. When we speak about the environment we should not forget that it is also characterised by the pluralism and relativity of practices of the Member States. This social environment is under constant development. This is reflected in the changing understanding of what limitations on the exercise of human rights are actually 'necessary' for the normal functioning of democracy and the free development of individuals. The Court in its Wemhoff judgement stated that since the Convention "is a law making treaty, it is ... necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest degree possible the obligations undertaken by the parties."" 

The Court, in Kjeldsen, Busk Madsen and Pederson v. Denmark made a direct link between its interpretation and the promotion of democracy. Having observed that any interpretation of the Convention's rights must be consistent with "the general spirit of

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414 Open Door Counselling and Dublin Well Woman v. Ireland, Judgement of 29 October 1992, Series A No.246; (1993) 15 EHRR 244, para.75
416 Wemhoff v. Germany, Judgement of 27 June 1968, Series A No.7, (1979-80) 1 EHRR55, para.8
the Convention which is an instrument designed to maintain and promote the ideals and values of a democratic society,"\textsuperscript{417} the Court, on the other hand, stated in the \textit{Sunday Times} case that the main purpose of the Convention is "to lay down certain international standards to be observed by the Contracting States...this does not mean that absolute uniformity is required..."\textsuperscript{418} In conclusion, the impression that one gets from the review of the Court’s record in comparative analysis, is that the Court is ready to rely on the "common practices" principle, and on evaluative method, whenever it is willing to impose a homogenous vision of standards as opposed to the respondent Government’s claims of relativity. It enjoys a considerable discretion in doing this. Only elaboration of clear criteria and precise methodology of comparatives can make the latter an effective tool in the arsenal of the democratic necessity test. However, it can be said that the Strasbourg Court never explained the clear boundaries of a democratic society.

\textbf{The Convention’s approach to Anti-Democratic views}

To what extent, does the Convention permit anti-democratic views? Article 17 of the ECHR provides some insight into this question. It stipulates that the convention does not confer on “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” enshrined in the convention. Therefore Article 17 was designed specifically to prevent totalitarian movements from using human rights as a vehicle for their cause. In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use

\textsuperscript{417} Kjeldsen, Busk Madsen and Pederson v. Denmark, Judgement of 7 December 1976, Series A No.23; (1979-80) 1 EHRR 711, para.53
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 freedoms of others.\textsuperscript{419} From the 1950s until very recently, all of the Court's jurisprudence on anti-democratic actors concerned Fascist and Communist applicants and without question the Court's analysis of these claims has been through a cold war lens. In relation to the former the line of cases is rather simple: the Court has been consistent in its refusal to consider applications from any racist and Fascist groups from any state. All such cases have been declared inadmissible either as manifestly ill-founded or removed from the protection of the Convention by Art.17.\textsuperscript{420} In the early years of the convention, the European Commission relied on article 17 in its support of West Germany's ban on the German Communist Party as well as its exclusion of individuals who distributed racist pamphlets from participation in an election.\textsuperscript{421} Article 17 suggests that a state might be entitled to act in a preventive manner toward associations or organizations that aim to destroy the rights and freedoms enshrined in the convention, but it fails to stipulate any criteria for determining whether an organization or association fits this description. Therefore, The Strasbourg Court should provide legal standards for defining those associations, organizations, or actions against which a state is entitled to act in a militant manner.

Apart from Article 17 jurisprudence, especially, the Strasbourg Court is sensitive not to allow anti-democratic views to organise in the form of political parties. In Refah Partisi case the Court upheld the decision of the Turkish Constitutional Court to ban an Islamist party. In 2003, the grand chamber of the Court unanimously upheld the

\textsuperscript{418} \textit{The Sunday Times v. UK}, Judgement of 26 April 1979, 2 EHRR 245, para.61
\textsuperscript{420} ibid
\textsuperscript{421} \textit{K.D.P. v. Germany}, 1 Y.B. ECHR. 222, (Eur. Comm'n on H.R.)
chamber’s ruling, stating that “it is not at all improbable that totalitarian movements, organized in the form of democratic parties, might do away with democracy, after prospering under a democratic regime, there being examples of this in modern European history.” It further held that state authorities possess a right to protect state institutions from an association that, through its activities, jeopardizes democracy. Therefore, the answer of the question as to what conclusion the European Court of Human Rights might come if an openly racist party were to gain significant power in a so called liberal western democracy is clear: it will not allow to such a political party to function.

Conclusion

The preamble of the Convention and its structure clearly show that the only political regime compatible with the Convention is democracy. The review of political theory literature, on the other hand, reveals that ‘democracy’ has a very broad content in terms of time, culture and background and there is no agreement on the best way of delimiting this, because of the variety of democratic systems. Neither in the Convention, nor in the case law, is there a statement as to which kind of democratic system is required. The only expression is ‘political democracy’, set out in the Preamble and referred to in the case law. However, when we compare the findings of the case law regarding the features of democracy and political theory’s classifications

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423 ibid, para.96, (“The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardizes that State’s institutions, of the right to protect those institutions.”).
of democracy, one can say that ‘liberal democracy’ is the system that best suits the Convention.\textsuperscript{424}

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

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

\textsuperscript{424} see, above pp. 120-126
basic principles about restriction as (1) pressing social need; (2) proportionality of the measure with the legitimate aim it seeks; (3) tolerance; and (4) broadmindedness.

The examination of the concept of democracy in political theory, particularly liberal democracy, and the findings of the Strasbourg organs in their case law, show that liberal democracy could not be achieved without political parties. Parties are a most important element of democracy. In liberal democracies, founded on basic rights and civil liberties such as the equal right to vote, freedom of expression, and freedom of association, rights and freedoms can be exercised effectively only with the existence of political parties. In line with political theory, the Strasbourg organs consider political parties as fundamental elements of a properly functioning democracy.425 However, the examination of both the political science literature and Strasbourg case law reveals that, although the political parties are necessary components of a properly functioning democracy, the political parties that aim at the destruction of the fundamentals of democracy and rights and freedoms guaranteed in the Convention can be prevented.

425 See chapters 5 and 6 for a detailed examination of political party cases.
CHAPTER 5

THE POLITICAL PARTY DISSOLUTION CASES DECIDED BY THE TURKISH CONSTITUTIONAL COURT

Introduction

In this chapter I will look at the decisions of the Turkish Constitutional Court in the dissolution of political party cases. Firstly, I will present some general facts concerning the national regulations of Turkey in terms of political parties. This will give the reader the opportunity to have a basic idea of the regulatory framework in terms of political situation in Turkey. Then the approach of the Constitutional Court in the political party dissolution cases will be investigated so that we can compare it with that of the European Convention on Human Rights institutions. Because of its divergent feature the Refah Partisi case will be examined more broadly. The background information on the Refah Partisi and the 28 February process which was regarded as a post-modern military intervention to political life of the nation will be provided for a clear understanding of the circumstances at the time of Refah's dissolution.

The Regulation of Political Parties

Background Information

Political parties, in the western sense, emerged for the first time in Turkey towards the end of the 19th century. During this period the graduates of modern universities, army
officers and civil servants pioneered political movements which essentially aimed to prevent the further decline of the Ottoman Empire. They sought to introduce the principles of nationalism, freedom and equality which had emerged in the west. During the era of the second Mesrutiyet\textsuperscript{426} (Second Constitutional Government) and thereafter, the İttihat ve Terraki (Committee for Unity and Progress) was the sole party. During the War of Independence the Republican Peoples' Party (originally the Halk Fırkasi), became the sole and dominant party, and it remained in power until the advent of the multi-party system in 1946. Indeed this was the case until the election to office of the Democrat Party in 1950.\textsuperscript{427} A competitive and pluralistic party system has been in operation in Turkey since 1946 with the establishment of the Democrat Party (DP), along with the People’s Republic Party (CHP). As in all other democratic countries the political parties are an indivisible and indispensable part of Turkish political life.

The formation, activities, supervision and dissolution of political parties are regulated by the provisions of the 1982 Constitution, and the Law on Political Parties (LPP) no. 2820, of 22 April 1983.\textsuperscript{428} All citizens of Turkey, with the exception of civil servants and members of the armed forces, who are over 18 years of age may form, or become, members of political parties. It is provided that they adhere to the standard procedures in this regard.\textsuperscript{429}

\textsuperscript{426} The Second Mesrutiyet era is the time between 1909 to 1919.
\textsuperscript{428} As the Constitution gives a significant place to political parties it contains two detailed articles regulating fundamental issues concerning regulation of them. Articles 68 and 69 regulate the operation of Political Parties. The Law on Political Parties (LPP) no. 2820 of 22 April 1983 regulates all details concerning political parties which are not included in the Constitution.
Citizens have the right to form political parties, and to join and withdraw from them in accordance with the established procedure. There is no need to have prior permission for formation of a political party. The parties are allowed to function freely in accordance with the provisions of the related laws and the Constitution. Political parties may be established by at least thirty citizens who are capable of being elected as deputy. The situations in which one cannot be elected as deputy are enumerated in Article 11 of the Law on the Election of Members of Parliament (LEMP). These provisions, which make a person ineligible for membership of the parliament, are as follows:

Even if they have been pardoned, any person who has committed the crimes stated in the first part of the Second Chapter of the Turkish Criminal Code, or the crime of publicly inciting the commission of any of those crimes cannot be elected as deputy. A person who has committed the crime of openly inciting the people to hatred and animosity on grounds of class, race, religion, sect or region, which are provided for in Article 312 of the Turkish Criminal Code, is enumerated in this category.

The first part of the Second Chapter of the Turkish Criminal Code provides a list of offences, which are crimes that make one ineligible to be elected as deputy. Some of the crimes in this part are offences against the ‘personality of the state’ (Art. 125 to 173). The other crimes in this list are: disclosure of news the publication of which has

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429 Article 68 of the Constitution. In the Turkish law order the age of adulthood is also 18.
430 The Constitution Article 68, Law on Political Parties (LPP) no. 2820, Article 5. Hereafter Law on Political Parties will be cited as LPP
431 LLP, Article 5. Deputy means member of parliament.
been prohibited (Art. 137); establishing or joining international organisations without permission (Art. 143); receiving decorations or salaries from hostile states (Art. 144); failure to report sedition to official authorities (Art. 151); engaging in publications that would endanger the security of the country, (Art. 155).

The Principal State Counsel supervises the formation of political parties. The law requires that the notification of the formation of a political party, and the document of receipt, should also be sent to the Office of Principal State Counsel. The Office of Principal State Counsel is authorised to examine and supervise the formation of a political party.

The Constitution requires that the internal procedures and decisions of the political parties must conform to democratic precepts. The financial auditing of the parties may only be made by the Constitutional Court. The dissolution of any political party is only possible upon a ruling of the Constitutional Court to this effect.

The Definition of Political Party

The law on political parties numbered 2820 currently defines a political party as follows:

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432 The Turkish Criminal Code is also known as Turkish Penal Code, the direct translation is the former one.
433 The Principal State Counsel is the civil servant who also could initiate the dissolution or any other applications against the political parties to the Constitutional Court. Although its direct translation is the Chief Public Prosecutor of the High Court of Appeals I will prefer to use term the Principal State Counsel. The Principal State Counsel is appointed by the President of the Turkey for a term of four years from among candidates nominated by the Plenary Assembly of the High Court of Appeals. He/She is empowered to initiate applications with the Constitutional Court for an order to dissolve political parties.
434 LPP Art. 8/final paragraph.
435 LPP Art. 9
"Political parties are organisations whose goal for the nation is to reach the level of contemporary civilisation within a democratic order of state and society by ensuring the formation of the national will."\(^\text{437}\)

The legislature states that political parties are the indispensable elements of democratic political life.\(^\text{438}\) Article 7 of the Law on Political Parties regulates the organisation of parties. The organisation of a political party consists of its central organs; its branch organisations in the provinces, districts and sub-districts; its group in the Grand National Assembly of Turkey; and its groups in provincial general assemblies and in municipal assemblies.

According to Article 5 of the Law on Political Parties another requirement concerning party organisation is that all political parties must establish their headquarters in the capital city, namely Ankara.

The highest authority within the political party is its own general congress.\(^\text{439}\) The central organisation of the party consists of the general congress, the leader of the party, its central decision-making and executive board, and its disciplinary board.

**Prohibitions for Political Parties**

Both the Constitution and the Law on Political Parties makes an extensive list of prohibitions that the Political Parties must obey. Some amendments have been made

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\(^{436}\) The Constitution Article 69. The dissolution procedure for political parties will be explained in detail later in this chapter.

\(^{437}\) LPP, Article 3

\(^{438}\) LPP, Article 4
to the Constitution in 1995, which provide a certain degree of relaxation in this matter. However, these amendments have not been reflected in the Law on the Political Parties. I should comment here that such prohibitions should not take place in a pluralist democracy.

The prohibitions have been set forth in the Constitution as follows:

The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.\textsuperscript{440}

Judges and prosecutors, members of higher judicial organs including those of the Court of Accounts, civil servants in public institutions and organizations, other public servants who are not considered to be labourers by virtue of the services they perform, members of the armed forces and students who are not yet in higher education institutions, can not become members of political parties.\textsuperscript{441} Before the 1995 amendments academic staff and students at higher education were not able to be members of political parties. The 1995 changes have permitted them to be members of political parties. The membership of the teaching staff at higher education institutions in political parties is regulated by law. This law cannot allow those members to

\textsuperscript{439} The general congress must meet in the frequencies that regulated in the party’s constitution. But this frequency cannot be less than two years or more than three years.

\textsuperscript{440} Article 68 of the Constitution

\textsuperscript{441} ibid
assume responsibilities outside the central organs of the political parties. It also sets forth the regulations which the teaching staff at higher education institutions shall observe as members of political parties. The principles concerning the membership of students at higher education institutions to political parties are regulated by law.442

Political parties shall not use, for the purpose of propaganda, religious sentiment or those things held sacred by religion.443 Political parties shall not receive financial assistance from foreign states; from international organisations; or from real or legal persons who are not of Turkish nationality.444

The Law on Political Parties adds even further prohibitions to this list. Some of these prohibitions are related to the protection of the democratic state order.

According to Article 78 of the Law on Political Parties, political parties may not:
“(...) pursue the goal of changing (...) the principles laid down in the Preamble to the Constitution (...)”

Almost all of the principles laid down in the Preamble to the Constitution are contained in the text of the Constitution itself, and there are also provisions concerning the principles to which political parties must conform. Those principles define the Turkish Republic as a Social State which is in conformity with the rule of law and Ataturk’s nationalism. The amended fifth paragraph of the Preamble reads as follows:

442 ibid
443 Inspired by Art. 24/final paragraph of the Constitution.
444 Art. 69/9 of the Constitution as amended.
"The recognition that no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics; the acknowledgment that it is the birthright of every Turkish citizen to lead an honourable life and to develop his or her material and spiritual assets under the aegis of national culture, civilization and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution in conformity with the requirements of equality and social justice”

Political Parties shall not argue that there exist in the territory of the Republic of Turkey any minorities based on differences of national or religious culture or differences of sect, race or language. They cannot pursue the goal of disturbing, or seek to disturb, the integrity of the nation by creating minorities in the territory of the Republic of Turkey through protection, development, or promotion and dissemination of languages and cultures other than Turkish language and culture. They should not use any language other than Turkish in the drafting and publication of their statutes and programmes, and in their outdoor or indoor meetings, rallies and propaganda activities, use or distribute placards, posters, records, audio and video tapes, brochures and declarations written in a language other than Turkish, or remain indifferent to the commission of such acts and actions by others, save that they may translate their
statutes and programmes into a foreign language other than one which is prohibited by law.

Political parties shall not pursue any goals contrary to the provisions of Article 136 of the Constitution which stipulate the status, as an entity within the general administration, of the General Directorate of Religious Affairs which is to perform the duties set out in its special law, aiming to ensure national solidarity and integration, remaining above all political opinions and ideas, and in accordance with the principle of laicism. The political parties can not aim to take the General Directorate of Religious Affairs out of general administration.\(^{445}\)

Political parties shall not carry out any activities outside their statutes and programmes, nor shall they decide to support another party in elections.\(^{446}\)

Political parties may not engage in any attitude, statement or action against the Military Intervention of 12 September 1980 which the Turkish Armed Forces, upon the call of the nation, carried out for the reasons stated in the Preamble to the Constitution, or against the decisions, communiqués and acts of the National Security Council (central organ of the military regime between 1980 and 1983).\(^{447}\)

**The Dissolution of Political Parties**

Part Five of the LPP is closely related to Part Four, which is entitled "Prohibitions Concerning Political Parties." To ensure conformity with the system of bans, the

\(^{445}\) LPP, Article 89  
\(^{446}\) LPP, Article 90, p.2
provisions of Articles 98 to 108 of the LPP regulates the procedures for the dissolution of political parties.

“The Constitutional Court shall dissolve a political party; Where its general meeting, central office or executive committee ... takes a decision, issues a circular or makes a statement ... contrary to the provisions of Chapter 4 of this Law, or where the Chairman, Vice-Chairman or General Secretary makes any written or oral statement contrary to those provisions.”

Where acts contrary to the provisions of Chapter 4 of this Law have been committed by organs, authorities or councils other than those mentioned in sub-section 1(b), State Counsel shall, within two years of the act concerned, require the party in writing to disband those organs and/or authorities and/or councils. State counsel shall [likewise] require, in writing, the permanent exclusion from the party of those members who have been convicted for committing acts or making statements, which contravene the provisions of Chapter 4.448

The Constitutional Court has the authority to decide cases concerning the dissolution of political parties. The Principal State Counsel of the Supreme Court is authorised by the law to initiate a dissolution case. Upon the application of the Supreme Court, the Principal State Counsel and the Constitutional Court decides the case by applying the provisions of the Criminal Procedures Law. The Constitutional Court considers the case on the basis of the file and adjudicates after hearing, if necessary, the oral

447 LPP, Article 97
448 LPP, Article 101
submissions of the Principal State Counsel and the representatives of the political party and all those persons capable of providing information about the case.\textsuperscript{449}

Status of the members of political parties dissolved permanently:
The persons who, through their acts, have caused the political party to be dissolved cannot join another political party, or take part as a candidate in elections to the Turkish Grand National Assembly, for a period of five years. Neither shall a new political party be founded the majority of whose members are former members of a political party previously dissolved.\textsuperscript{450}

The regulation of political parties is made in too much detail by Constitution and Law on Political Parties. There is a huge list of prohibitions for the political parties. Therefore political parties are allowed a very narrow right to have different standpoints from official ideology of the State. In 1995, as a result of a move towards democratisation to European standard, Article 69 and some other provisions of the Constitution were amended. The amendment has given more protection to political parties. The Constitutional Court, before this amendment, had an absolute discretion in deciding the matter of whether a political party had become the centre of activities contrary to the fundamental principles of the republic. The amendment provides that a political party is considered to be a centre of such activities when its members act intensively against the elementary principles of the republic. These activities are accepted explicitly, or implicitly, by organs such as the general congress, leader, central executive committee and the parliamentary group, or when these party organs themselves insistently are engaged in such activities. The amendment also empowered

\textsuperscript{449} LPP, Article 98
\textsuperscript{450} LPP, Article 95
the Constitutional Court to prevent political parties, temporarily or permanently, from receiving state aid instead of dissolving them. The amendment made to Article 149 strengthened the position of political parties in trials before the Constitutional Court. This amendment changed the required quorum to dissolve a party from a simple majority of eleven members of the Court, to three-fifths of them. Although these changes are welcomed they are not enough steps to liberalise the activities of political parties.

The Political Party Dissolution Cases of the Turkish Constitutional Court

Overview

In this section I am looking at those political party dissolution cases decided by the Turkish Constitutional Court. Since 1980, after the military intervention, more than 20 applications have been made to the Constitutional Court for political party dissolution. This resulted in the dissolution of quite a number of those parties. Those parties which were dissolved may be classified broadly into two categories.

a) Firstly, those parties which were dissolved for not adhering to formality requirements, such as their general congress not meeting with the required frequency, or not taking part in two general elections. Examples are: Cumhuriyet Halk Partisi (CHP); Demokrat Parti (DP); Dirilis Partisi; and Yesiller Partisi.
b) The second group may be classed as the politically motivated dissolution cases. The parties concerned may also be grouped according to the political opinion that the parties in question represented.

b.1) Pro-Kurdish political parties: Halkin Emek Partisi (HEP); Ozgurluk ve Demokrasi Partisi (ÖZDEP); Halkin Demokrasi Partisi (HADEP), Demokrasi Partisi (DEP).

b.2) Pro-Communist political parties: Turkiye Birlesik Komunist Partisi (TBKP); Sosyalist Parti (SP), Sosyalist Birlik Partisi (SBP); Sosyalist Turkiye Partisi (STP).

b.3) Pro-Religious Political Parties; Refah Partisi (RP), Fazilet Partisi (FP)

However, even pro-communist parties have been dissolved mainly because of the separatist elements in their arguments. Therefore this group together with pro-Kurdish political parties can be sub-grouped under the separatism. In conclusion we can argue that politically motivated dissolution cases have two broad grounds: Separatism and anti-secularism.

**Constitutional Court’s Political Party Judgments**

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<td>22.05.1997</td>
<td>Diss. Rejected</td>
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In 1993 Halkin Emek Partisi (HEP) was dissolved for the party’s views on Kurdish issue. HEP claims that the Kurdish people, who are suffering under immense oppression, have a distinct culture and tongue and they have the right to self determination. According to the Constitutional Court by claiming also that security forces are aiming to eradicate the Kurdish people as masses HEP came against the state, democracy, law, peace and brotherhood specially indivisibility of the state and nation. Although some opinions of the HEP can not be tolerated in democracy for the sake of country as a whole, there should be room for the debate of opinions different from the state’s official ideology. In the same context, Sosyalist Turkiye Partisi was dissolved as it stated there are separate Turkish and Kurdish nations and Kurdish nation has its right to self determination which are seen by the Constitutional Court as being incompatible with the principle of indivisibility of state and nation. Demokrasi Partisi (DEP) case looks different as party leaders openly praise the use of force and weapons in the struggle of Kurdish people. It claims that the violent struggle of PKK terrorist organisation is an independence struggle. The Constitutional Court found that reference had been made in the declaration and speeches to the existence of a separate Kurdish people in Turkey fighting for their independence, and that the acceptance of a Kurdish identity with all the consequences that entailed, namely the creation of an independent state and the destruction of the existing State, had been advocated. It also considered that there had been references to equality between two nations and that the acts of a terrorist organisation had been presented as a struggle for independence. The Constitutional Court said in conclusion that the activities of the DEP were among those that could be restricted under paragraph 2 of Article 11 of the European Convention on Human Rights. Therefore it would be legitimate not to allow a

\[451\] Halkin Emek Partisi (Siyasi Parti Kapatma), KT. 14.07.1993, E.1992/1, K.1993/1, AMKD 29(2)

\[452\] E.1993/2 (Siyasi Parti Kapatma), K.1993/3, K.T. 30.11.1993 AMKD 30(2)
political party that supports terrorist activities and violent methods to achieve political aims. Sosyalist Birlik Partisi\textsuperscript{454}, Demokrasi ve Degisim Partisi\textsuperscript{455}, Emek Partisi\textsuperscript{456} and Demokratik Kitle Partisi\textsuperscript{457} all have been dissolved on the same ground; in the view of Constitutional Court for their arguments on the existence of separate Kurdish and Turkish nations and Kurdish nation having right to self determination which is accepted by the Constitutional Court as being against the indivisibility of the Turkish state and nation.

Huzur Partisi was dissolved in 1983 for its programme being against principle of secularism and principles of Ataturk. Its programme states that it will bring an education system which gives importance to religious and moral values. It also states that they would like to add a ninth vowel letter to Turkish Alphabet. The Constitutional Court states that The Law on acceptance and application of Turkish Alphabet is a cornerstone revolution of Ataturk and no political party is allowed to change it. It states that principle of secularism should be understood in the boundaries of principles and revolutions of Ataturk. Therefore, the freedom of religion and conscious should be looked at within the framework of the Constitution. The Court concludes that Huzur Partisi by stating that it will reform the education system which will respect the religious and moral values is aiming to base the fundamental order of state on religious rules which is against the principle of secularism. It is very obvious that Constitutional Court is interpreting the secularism principle and revolutions of Ataturk very narrowly. Just with two sentences in Party’s programme The Court implies that it has a secret aim of establishing a theocratic state which is not the case.

\textsuperscript{453} E.1993/3 (Siyasi Parti Kapatma), K.1994/2, K.T. 16.06.1994, AMKD 30(2)
\textsuperscript{454} E.1993/4 (Siyasi Parti Kapatma), K.1995/1, K.T. 19/07/1995, AMKD 33(2)
\textsuperscript{455} E.1995/1 (Siyasi Parti Kapatma), K. 1996/1, K.T. 19.03.1996, AMKD 33(2)
\textsuperscript{456} E.1996/1 (Siyasi Parti Kapatma), K. 1997/1, K.T. 14.02.1997, AMKD 34(2)
\textsuperscript{457} E.1997/2 (Siyasi Parti Kapatma), K.1999/1, K.T. 26.02.1999, AMKD 37(2)
Fazilet Partisi was founded just before dissolution of Refah Partisi. After dissolution of Refah its deputies joined Fazilet. Fazilet itself was dissolved on 22.06.2001 for being an anti-secular party. There were two main reasons: (1) party’s defence of right to women who wear headscarf to be free to study at universities and work in public service and (2) Fazilet Party’s elected Deputy Merve Kavakci, who was wearing headscarf, wanted to take her post in Turkish Grand National Assembly and Fazilet’s other Istanbul Deputy Nazli Ilicak defended her right to take her post at Assembly. Merve Kavakci was barred from taking her post as Deputy. Like in Huzur Partisi case, The Constitutional Court’s secularism principle interpretation is very narrow here which can not be accepted in a liberal democracy. Just advocating freedom for women who choose to wear headscarf to do so was accepted as a reason for dissolving a political party. The Constitutional Court here sees the freedom for headscarf as discrimination against women, a threat to public order and even an infringement of right to freedom of belief which in my view the contrary is true.458

When we look at those cases where the dissolution was rejected we see that, either, the application is related to a formality issue, therefore, the Constitutional Court decides on giving warning to correct the issue instead of dissolving, or, the political motivation of the party has not been seen a serious breach of constitutional principles, therefore, decides that the unlawfulness did not occur.

In terms of allowed political parties, there are currently quite a number of political parties which fulfil the requirements of the higher electoral council which allowed their names to be listed in the ballots: Justice and Development Party (Adalet ve

Kalkınma Partisi), conservative, moderate Islamist; Republican People’s Party (Cumhuriyet Halk Partisi), nationalist, social-democratic; Motherland Party (Anavatan Partisi), conservative, neo-liberal; Nationalist Movement Party (Milliyetçi Hareket Partisi), far-right nationalist; True Path Party (Doğru Yol Partisi), conservative; Youth Party (Genç Parti), nationalist, protectionist; Felicity Party (Saadet Partisi) islamist; Democratic Left Party (Demokratik Sol Parti) social-democratic; Freedom and Solidarity Party (Özgürlük ve Dayanışma Partisi) socialist; Social Democratic People’s Party (Turkey) (Sosyal Demokrat Halk Partisi) social-democratic; Great Union Party (Büyük Birlik Partisi) far-right nationalist, Islamist; Liberal Democratic Party (Liberal Demokrat Parti), liberal. However, only two of them, Justice and Development Party (Adalet ve Kalkınma Partisi) and Republican People’s Party (Cumhuriyet Halk Partisi), received more than 10% of the votes (national threshold) in the latest general election of 3 November 2002 are therefore entitled to be represented in Parliament.

The leading four political party cases (Turkiye Birlesik Komunist Partisi, Socialist Party, Özgürlük ve Demokrasi Partisi and Refah Partisi) contain the general features of all politically motivated dissolution cases. Having also been brought before the European Court of Human Rights, therefore, in this study those cases will be treated separately in detail. In addition, it will give us the opportunity to compare the Constitutional Court’s approach with that of the Strasbourg Court as an international tribunal. So far, the Strasbourg institutions have decided seven political party cases from Turkey. The Fazilet Partisi withdrew its case before the Strasbourg Court delivered its judgement.
The United Communist Party of Turkey (Turkiye Birlesik Komunist Partisi)\textsuperscript{459}

The Turkiye Birlesik Komunist Partisi (TBKP) was formed on 4 June 1990. The Principal State Counsel, at the Court of Cassation, applied to the Constitutional Court for a decision to dissolve the TBKP on 14 June 1990. This was just after its formation, and at a time when it was preparing to participate in the general elections.

In his application Principal State Counsel made arguments mainly relying on some of the passages from the TBKP's programme. He made comment on those passages coming to the conclusion that, in light of the current regulations, the party should be dissolved by the Constitutional Court. The TBKP’s programme stated that:

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...[T]he United Communist Party of Turkey is the party of the working class, formed from the merger of the Turkish Workers’ Party and the Turkish Communist Party...The cultural revival will be fashioned by, on the one hand, the reciprocal influence of contemporary universal culture and, on the other, Turkish and Kurdish national values, the heritage of the Anatolian civilisations, the humanist elements of Islamic culture and all the values developed by our people in their effort to evolve with their times."
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The Turkish Workers’ Party had been dissolved on 16 October 1981. The Counsel stated that the constitution forbids establishment of a party as a successor to a previously dissolved party. He also argued that by using the name Communist the TKBP had stated that it aimed to establish the domination of one social class over all

others. He argued that, according to the Article 96 of Law on Political Parties No.2820, such a forbidden aim for a political party was a reason for its dissolution.

Another main argument that he relied upon concerned the party’s approach to the Kurdish issue. He quoted particularly from some passages from the 4-5th pages of the party’s program, in a chapter entitled “To have a peaceful, democratic and fair solution for the Kurdish problem.” In the part mentioned it was stated that the existence of the Kurds and their legitimate rights had been denied ever since the Republic was founded; even though the national war of independence was waged with their support. The authorities had responded to the awakening of Kurdish national consciousness with bans, oppression and terror. Racist, militarist and chauvinistic policies had exacerbated the Kurdish problem. That fact both constituted an obstacle to the democratisation of Turkey, and served the interests of the international imperialist and militaristic forces seeking to heighten tension in the Middle East, set peoples against each other and propelled Turkey into military adventures. The program also expressed the view that the Kurdish problem was a political one, arising from the denial of the Kurdish people’s existence, national identity and rights. The party was of the opinion that this problem could not be resolved by oppression, terror and military means. Recourse to violence means that the right to self-determination, which is a natural and inalienable right of all peoples, is not exercised jointly, but separately and unilaterally. The remedy for this problem was stated to be political. If the oppression of the Kurdish people and the discrimination against them were to end, Turks and Kurds must unite. The party expressed that it would strive for a peaceful, democratic and fair solution of the Kurdish problem, so that the Kurdish and Turkish peoples could live together, of their own free will within the borders of the Turkish
Republic. This would be on the basis of equal rights, and with a view to democratic restructuring founded on their common interests. This would contribute to the democratisation of Turkey and peace in the Middle East. The party was of the view that without a solution to the Kurdish problem, democratic renewal could not take place in Turkey.\textsuperscript{460} In summary Principal state Counsel is of the view that TKBP aims to undermine the territorial integrity of the State and the unity of the nation.\textsuperscript{461}

More ironically, according to the Law on Political Parties there are some words that the political parties are forbidden to use in their names such as fascist, communist etc. Therefore, having the word communist in its name is a sufficient reason to dissolve the TBKP.

On 16 July 1991 the Constitutional Court decided to dissolve the TKBP. According to the related articles of the constitution and no.2820 Law, the assets of the party were transferred to the treasury. Another consequence of the judgement was that the founders and managers of the party were banned from holding similar office in any other political entity.

The Reasoning of the Constitutional Court

In its judgement the Constitutional Court rejected the claim of Principal State Counsel that the TBKP claimed for, and aimed at, the supremacy of one social class, the proletariat, over all others. It held that, by citing the constitution of the party, the

\textsuperscript{460} ibid, p.7
\textsuperscript{461} ibid, pp.8-13
TBKP met the requirements of democracy, which was based on political pluralism, universal suffrage and freedom to take part in politics.\footnote{ibid, pp.60-64}

The court rejected the Principal State Counsel’s argument that no political party may claim to be the successor to a party that has previously been dissolved. In the court’s view, it is entirely natural and consistent with the concept of democracy for a political party to claim the cultural heritage of past movements and currents of political thought. It decided accordingly that the TBKP had not breached the provision relied upon. It stated that its intention was to draw upon the experience and achievements of Marxist institutions.\footnote{ibid, p.65}

In terms of the claim that the constitution and programme of the party contained statements which were likely to undermine the territorial integrity of the state and the unity of the nation, the Constitutional Court noted, that the constitution and programme referred to two nations. These were the Kurdish nation, and the Turkish nation. In the view of the Court the assertion that there were two distinct nations within the Republic of Turkey could not be accepted, whose citizens, whatever their ethnic origin, had Turkish nationality. In reality the proposals in the party constitution, covering support for non-Turkish languages and cultures, were intended to create minorities, to the detriment of the unity of the Turkish nation.

The Court reaffirmed that the Turkish State is unitary having only one nation. Thus, regional autonomy and the self-determination were prohibited by the Constitution. It considered that national unity was achieved through the integration of communities.
and individuals who, irrespective of their ethnic origin and on an equal footing, formed the nation and founded the state. The Court, referring to the Treaty of Lausanne, and the friendship treaty between Turkey and Bulgaria, expressed the view that there were no “minorities” or “national minorities,” other than those referred to in the mentioned treaties. It also stated that there were no constitutional or legislative provisions allowing distinctions to be made between citizens. Like all other citizens of Turkey, citizens of Kurdish origin could express their identity, but the Constitution and the law, precluded them from forming a nation or a minority distinct from the Turkish nation. In consequence, it came to the conclusion that the objectives of the TBKP encouraged separatism and the division of the Turkish nation. It considered this to be unacceptable and justified dissolving the party concerned.464

The Socialist Party (Sosyalist Parti)465

The Socialist Party was established on 1 February 1988. According to the LPP no.2820 on the same day as it was established the party’s constitution and program were submitted to the office of Principal State Counsel at the Court of Cassation, for assessment of their compatibility with the Constitution and Law no. 2820, (on the regulation of political parties). Two applications to dissolve the party were initiated by the Principal State Counsel. The Counsel, at the Court of Cassation, applied to the Constitutional Court on 15 February 1988 for the first time. This was when the Socialist Party was preparing to take part in a general election. He asked the Court for an order dissolving the Socialist Party. In this he relied on particular passages from its

464 ibid, pp.66-70
program. He accused the party of having sought to establish the domination of the working class with a view to establishing a dictatorship of the proletariat which is prohibited by Articles 6, 10 and 14, and former Article 68 of the Constitution, and sections 78 and 101(a) of Law no. 2820.

The Constitutional Court dismissed the first application as unfounded. In a judgement of 8th December 1988, published in the Official Gazette of 16 May 1989, the Court ruled that the political objectives stated in the Socialist Party's program did not infringe the Constitution. Criminal proceedings were then brought in the National Security Courts against some of the leaders of the Socialist Party. They were accused of spreading harmful propaganda in favour of the domination of one social class over others, contrary to Article 142 of the Turkish Criminal Code. Principal State Counsel applied to the Constitutional Court for a second time on 14 November 1991, for an order dissolving the Socialist Party. He accused the party of having carried out activities likely to undermine the territorial integrity of the state and the unity of the nation, contrary to Articles 3, 4, 14 and 66, and former Article 68 of the Constitution, and sections 78, 81 and 101(b) of Law no. 2820.

In order to support his application, Principal State Counsel relied in particular on some extracts from the Socialist Party's election publications and from oral statements made by its Chairman, Mr Dogu Perinçek, at public meetings and on television.

Three election publications were taken as a basis for the trial. These were:

1. "Serhildan çağrılari-1, Kawa atesi yaktı" ("Calls to stand up – no. 1, Kawa has lit the fire")
2. "Serhildan çagrılırı-2, Karpuz degil cesaret ekin" ("Calls to stand up – no. 2, sow courage, not watermelons")

3. "Çözüm-4, Kürt sorunu" ("Solution no. 4, the Kurdish problem")

The statements that the Principal State Counsel relied on mainly concerned the Socialist Party's approach to the Kurdish issue. In those extracts, the Socialist Party stated that the second dynamic is the Kurdish dynamic. The Socialist Party further stated:

"It is the call for equality and freedom, [it is] the Kurds' claim to rights as a nation. It is a request that the rights which the Turks enjoy be granted to the Kurds also. At the beginning of the century, a war of independence was waged in circumstances in which imperialists occupied the country and Turks and Kurds depended on one another and had to unite and fight, side by side. The Amasya Protocol\textsuperscript{467} provided: The homeland is composed of the lands where the Turks and the Kurds live. At the Erzurum and Sivas Congresses, oral and written declarations were made recognising the ethnic social and geographical rights of Kurds once the war was over and the men had hung up their weapons, an official ideology developed as though there was no longer any need for people from Urfa, Diyarbakir or Malatya to fight. Under that official ideology, there was no longer any room for Kurds. There were no more Kurds. Henceforth, only Turks existed. In the publication entitled 'Çözüm-4, Kürt sorunu' ('Solution no. 4, the Kurdish problem') it was stated that the collapse started where the regime was most tyrannical and most vulnerable. The political parties of the status quo failed to the east of the Euphrates\textsuperscript{468} they are no longer to be seen in the lands where the Kurdish people live.

The reason that parties of the status quo disappeared from the Kurdish provinces is that they were nationalist. Turkish nationalism has become bankrupt in the lands where the Kurdish problem will be resolved. Turkish nationalism has drawn its borders. It has divided Anatolia into two parts, situated to the east and west of the Euphrates. Turkish

\textsuperscript{466} A mythological hero in the Kurdish history.
\textsuperscript{467} Amasya Protocol was prepared by Ataturk and agreed by the representative delegates of Anatolian people during the preparation of War Of Independence in 1919.
\textsuperscript{468} A river in the south east of Turkey.
nationalism and its regime are in the process of drowning in the Euphrates. That is what is known as a bankrupt regime.

The State pays village guards and Special Forces, which it feeds to kill Kurds through the taxes it collects from the people. The cost of the bullets fired at Kurds, of petrol used in cross-border operations, in short, the cost of this special war is borne by the people. The Kurdish problem is at the same time a Turkish problem. Living freely, in brotherhood, heart to heart, in peace and harmony with the Kurdish people is a need for the Turkish people. Turks and Kurds are but one people. No Turk will be entitled to enter paradise if a single Kurd still remains in hell. The Socialist Party is determined to fight until the last Kurd is saved from hell.

The Kurdish nation has a full and unconditional right to self-determination. It may, if it wishes, create a separate State. The interest of the proletariat lies in the establishment, through democratic popular revolution, of a voluntary union founded on absolute equality of rights and freedoms. The right to secede is, at all times, an essential condition of that voluntary union.”

The State Counsel also relied on a speech made by the chairman of the party Mr Perincek. In one of those speeches he said that the Socialist Party is the last bridge between the Kurdish and Turkish people. The current status quo has failed with respect to the Kurdish problem and its deafening collapse can be heard from here. What is the only possible solution? This issue can only be resolved by respecting the wish of the Kurdish people. The real remedy lies with the Kurdish people. We will ask the Kurds: ‘What do you want?’ If, conversely, they seek secession, we will respect their wish. We will organise a referendum. We will ask the Kurdish people, everyone, from Hakkari to Antep: ‘Do you want to create a separate State in our land or not?’ The Socialist Party prefers unification. Who is inciting secession? The answer is the oppression of the Kurdish people by the Turkish State. We will defend unification by putting an end to that oppression and that will be proof of our
acceptance of the Kurdish people's will. The Socialist Party will defend the union of the two peoples within the federation and the joint exercise of power. The Socialist Party is the last bridge between the Kurdish and Turkish people. No party other than the Socialist Party has shared the Kurds' destiny, taken up a position against the Turkish State or is able to maintain that position.

On 10 July 1992 the Constitutional Court made an order dissolving the Socialist Party pursuant to section 101 of Law no. 2820. In accordance with section 107 of that Law there was a liquidation and transfer of party assets to the Treasury.

**Reasoning of the Constitutional Court**

The Constitutional Court first of all decided that, unlike the issue which had been decided in its first judgement about the dissolution of the Socialist Party on 8 December 1988, the one now before it was based on new facts and evidence, which gave rise to a different question of law.

The Constitutional Court stated that the Socialist Party referred in its political message to two nations: the Kurdish nation and the Turkish nation. But it could not be accepted that there were two nations within the Republic of Turkey, whose citizens, whatever their ethnic origin, had Turkish nationality. In reality the statements made by the Socialist Party, concerning Kurdish national and cultural rights, were intended to create minorities and, ultimately, to the establishment of a Kurdish-Turkish federation. This would be to the detriment of the unity of the Turkish nation and the territorial integrity of the Turkish State.
Like all nationals of foreign descent, nationals of Kurdish origin could freely express their identity but the Constitution and the law precluded them from forming a separate nation and state. The Socialist Party was ideologically opposed to the nationalism of Atatürk, which was the most fundamental principle underpinning the Republic of Turkey. The Socialist Party's political activity was also incompatible in its aim with Articles 11 and 17 of the European Convention on Human Rights; since it was similar to that of terrorist organisations, notwithstanding a difference in the means employed.

The Constitutional Court came to the conclusion that the Socialist Party encouraged separatism and incited a socially integrated community to fight for the creation of an independent federated state, which were unacceptable. This justified dissolution of the party. The Constitutional Court here, as in all other political party cases under the subject of separatism, acts in a very narrow vision accepting any different approach from that of official ideology dangerous to unity of the country. It does not give any room for political debate of the country's fundamental problems. It should bear in mind that the free debate of opinions even if they are about the change of constitutional political structure of the country should be welcomed in a liberal democracy as far as they do not recourse to use of violence.

The Freedom and Democracy Party (ÖZDEP) (Ozgürlik ve Demokrasi Partisi)

The Freedom and Democracy Party was founded on 19 October 1992. Like all the newly founded political parties it submitted its constitution to the Ministry of the Interior on the same day. It claimed, at its foundation, that both in domestic and foreign policy the aim of the Freedom and Democracy Party was to protect the
interests of all peoples and those of all workers. Furthermore, it was claimed that ÖZDEP would be the guarantor of the cultural, occupational, economic and political values of the various national or religious minorities and of every socio-professional category. It sought recognition of the right to form a political party. It would use political, democratic and ideological means to combat all fascist, fundamentalist, chauvinistic and racist movements or organisations hindering solidarity, unity and brotherhood between peoples.

Principal State Counsel at the Court of Cassation, on 25 February 1993 applied to the Turkish Constitutional Court to have ÖZDEP dissolved on the grounds that it had infringed the principles of the Constitution and the Law on the Regulation of Political Parties. He considered that the content and aims set out in the party's programme sought to undermine the territorial integrity and secular nature of the state and the unity of the nation.

Principal State Counsel relied on the programme of the party. He considered that the content and aims set out in the party's programme sought to undermine the territorial integrity and secular nature of the state and the unity of the nation. In the programme of the party there were claims that a dominant 'Turkish' philosophy had been maintained up to the present day, overriding the most natural rights and claims of the Kurdish people, by means of militaristic and chauvinistic propaganda and a policy of exile and destruction. State policy was said to be based on a capitalist system designed to oppress minorities — particularly Kurdish minorities. Even Turkish ones had been pursued in the name of modernisation and westernisation. It was said in the programme that the party had proposals on how to determine and define the prerequisites for establishing a social order, encompassing the Turkish and Kurdish
peoples. It regarded the peoples as the sole owners of the country’s wealth, natural wealth and mineral resources and it supported the just and legitimate struggle of the peoples for independence and freedom. The party would stand by them in this struggle. It would campaign for the voluntary unification of the Kurdish and Turkish peoples, who participated in the foundation of the country. It considered that there could be democracy only if the Kurdish problem were solved. This problem was deemed to concern every Turk and Kurd who supported freedom and democracy. It was stated that the party would guarantee to all religious and national minorities the right to worship as they please; to practise their religion freely; to freedom of thought; and to respect for their customs, cultures and languages. Every individual would be entitled to use the media, especially radio and television.

The founding members of ÖZDEP resolved to dissolve the party at a meeting on 30 April 1993, while the Constitutional Court proceedings were still pending. The Constitutional Court held, firstly, that the party’s resolution to go into voluntary dissolution did not prevent the court from deciding on the merits of the case, as it had been made after the commencement of the proceedings before it. The Constitutional Court made an order dissolving ÖZDEP on 14 July 1993, on the ground that its programme was apt to undermine the territorial integrity of the state and the unity of the nation, and violated both the Constitution and the Law on the Regulation of Political Parties.

**Reasoning of the Constitutional Court**

The Constitutional Court began by reiterating the constitutional principle that all persons living on Turkish territory, whatever their ethnic origin, formed a whole
united by their common culture. The different ethnic groups making up the "Turkish nation" were not divided into a majority and minorities. The court reiterated furthermore that no political or legal distinction based on ethnic or racial origin could be made between citizens. According to the Constitution, all Turkish nationals, without distinction, could avail themselves of all civil, political and economic rights. The Constitutional Court held that in every region of Turkey such persons as Turkish citizens of Kurdish origin enjoyed the same rights as other Turkish citizens. Since citizens of Kurdish origin were not forbidden to express their Kurdish identity, it could not be said that the Constitution denied their Kurdish identity. The Court stated that there was no ban on using the Kurdish language on any private premises, in any workplace, in the press, or in works of art and literature.

In the view of the Constitutional Court it was a fundamental principle that everyone is bound to observe the provisions of the Constitution even if they do not agree with them. The Constitution forbids propaganda based on racial difference and aimed at destroying the constitutional order. It pointed out furthermore, that by virtue of the Treaty of Lausanne, having a separate language or ethnic origin, is not, by itself, enough for a group to qualify as a minority.

The Constitutional Court observed that the content of the party's programme was based on the assumption that there were a separate Kurdish people in Turkey, with its own culture and language. The Kurds were portrayed in the programme as an oppressed people, whose democratic rights were being completely ignored. The Constitutional Court stated that the programme of the party implied that it called for a
right to self-determination for the Kurds, and that it supported their right to wage a “war of independence.” It assessed this stance as similar to that of terrorist organisations and so it constituted in itself an incitement to insurrection.

Another assessment given by the Court was on the party’s approach to the principle of secularism. The Constitutional Court noted that ÖZDEP’s programme contained a proposal for the abolition of the Religious Affairs Department of the government. It proposed an alternative policy that religious affairs should be under the control of the religious institutions themselves. After reiterating what was meant by the principle of secularism, the court said that advocating the abolition of the government’s Religious Affairs Department amounted to an undermining of the principle of secularism. This was contrary to section 89 of the Law on the Regulation of Political Parties. In its judgement the Constitutional Court pointed to the fact that the Charter of Paris for a New Europe condemned racism, ethnic hatred and terrorism and that the Helsinki Final Act guaranteed the inviolability of national frontiers and territorial integrity. It concluded that the party’s activities were subject, among others, to the restrictions referred to in paragraph 2 of Article 11, and to Article 17 of the Convention.

Refah Partisi (Welfare Party)

Refah Partisi was formed on 19 July 1983 after the 1980 military coup. It was a production of movement as known ‘National View’ led by Mr Necmettin Erbakan. The party became an important political actor in 1990s.

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469 Treaty of peace signed with Turkey at Lausanne on July 24, 1923 the convention respecting the regime of the straits and other instruments signed at Lausanne by the British Empire, France, Italy,
The party was embracing a set of aspiring yet vague references to the Ottoman past, and directing criticism against "cosmopolitanism" as opposed to the "national. The Refah wanted to recover the glorious position of the Muslims, and Turkish-Muslims (e.g. the Ottomans) in history. However ambiguous it may be, under the disguise of a historical and cultural discourse, the "national view" referred to Islam. Assuming the position of political spokesman for religious votes, Refah became the locus of the populist version of political Islam adapted to the formal democratic procedure.

Yalçin Akdoğan, an expert on Islamism, considers the political position of Welfare Party elucidated around the axis of religion and politics within the context of "the democratic version of the political Islam" and defines it as an intra-democracy movement: "Welfare Party is a party which aims at the articulation of religious claims with politics and doing politics with a religious legend, prescribing the revision of the political space in accordance with religious values, trying to increase the role played by the religion in domestic and inter-state relations, attesting particular importance to gain political legitimacy and supporting religiosity in general." Refah can be defined as a protest movement which successfully mobilized the reactions of those voters who saw themselves deprived by the privileged class of so-called "White Turks". Refah differentiated itself from other political movements by taking a critical stand on the westernization of Turkey. The issues related to the West and westernization served as a catalyst for the party's identity formation, public discourse

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470 Dagi, I.D., "Transformation of Islamic Political Identity in Turkey: Rethinking the West and Westernization." (March 2005) 6 Turkish Studies 1, pp.21-37
471 Dinc, C., "The Welfare Party, Turkish Nationalism and Its Vision of a New World Order" (Fall 2006) 5 Alternatives: Turkish Journal of International Relations 3
474 Yildiz, A., "Politico-Religious...supra, p.188
and policies. The actors, institutions, process and objective of westernization were questioned in the name of faithfulness, i.e. Islamic civilization, and in the search for power vis-à-vis the West. The party’s emphasis on “modernization and development”, on the other hand, remained as an important feature of Refah.

In the local elections in 1984, Refah received only 4.8 percent of the vote. It increased the share of its vote to seven percent in the general elections of November 1987, yet failed to pass the ten percent countrywide elections threshold. During early 1980s the party remained as a small marginal political party. However, the party got a promising and encouraging result in the 1989 local elections by receiving 9.8 percent of the votes, gaining mayorships of five provinces. This trend in the rise of the Refah continued throughout the 1990s. In the early 1990s, the Refah leadership came to realize the need for turning the party into a mass political movement, adopting an agenda that put stress on social problems rather than on religious themes, using modern propaganda methods. It particularly tried to mobilize the urban poor, who suffered from the liberalization policies of the 1980s that had had a negative impact on peripheral social and economic groups. Refah continued this policy till to the March 1994 local elections in which it proved its growing political power, receiving 19 percent of the vote and capturing the mayorships of 28 provinces, including Ankara and Istanbul. This was a shocking result for centrist and secularist political parties. The real shock, however, came with the 1995 general elections in which the Refah came first, holding approximately 22 percent of the votes. It obtained about 35% of

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476 see Dagi, I.D., “Transformation of Islamic... supra
477 ibid
479 Toprak, B., “Islam and Democracy in Turkey” (June 2005) 6 Turkish Studies 2
the votes in the local elections of 3rd November 1996. After a short-lived coalition
government of centre-right political parties ANAP and DYP, Necmettin Erbakan, the
leader of the Refah, formed a coalition government with the centre-right True Path
Party (DYP). For the first time in the republican history of Turkey, a pro-Islamic
political party came to power as a major force, holding a prime ministerial position.

It is possible to say that a number of factors contributed to the electoral success of the
Refah in the 1990s, remarkably the impact of international developments. The
rejection of Turkey’s full membership application in December 1989 by the European
Community (EC) occupies a central role since it had a weighty impact on the self-perception of the Turks, even of pro-western and secular groups, who felt excluded
from the West. Furthermore, the end of the Cold War brought back to the surface
the view that Islam and the West would be the clashing sides in the new era. Islamists
believed that the West would replace the communist threat that had now disappeared
with the threat of Islam as part of an effort to keep the West together and justify the
continued existence of NATO, since there were some indications for conception.
Samuel Huntington’s article on the “clash of civilizations” in 1993 spread this view
beyond the Islamists. The events concerning the Muslims in Bosnia and Azerbaijan in
the early 1990s also enhanced these views. The inconsistency between the western
diplomacy of protecting the Kurds in Turkey and its hesitation to stop the killings of
Muslims in Bosnia led Turkish public opinion to the conviction that the West was
employing a double standard. Therefore, the West lost its moral authority, appeal
and attraction in the eyes of the vast majority of Turkish people. In this nationalistic
wave of anti-westernism, the West was commonly portrayed as plotting against

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Turkey’s territorial integrity with the aim of resurrecting the Sevres Treaty, the treaty that divided up Turkey following the First World War.\textsuperscript{482} Hence the wave of anti-westernism in the first half of the 1990s served the interest of the Welfare Party, whose anti-West discourse gained a widespread legitimacy with the growing disappointment with the West.

The success of Refah in elections, on the other hand, was not enough for its continuation in government that it came into in 1996. The secular establishment, the army being its core was not happy with Refah being in government and found a way to force it out of power.\textsuperscript{483} The Turkish military, aligning with some sectors of civil society, launched a campaign against Refah and in effect against the government, justified by their concern for the future of secularism in the face of the Islamist challenge. Shortly after the formation of the Erbakan-led government the National Security Council (NSC), meeting on February 28, 1997, took a number of decisions to “reinforce the secular character of the Turkish state threatened by the Islamists.\textsuperscript{484} This was a starting point of which is known as 28 February process. To put pressure on the Refah government, numerous briefings, joined by judicial personnel, journalists and other professionals were organized by the General Staff of the Armed Forces on the danger of Islamic fundamentalism in which the ruling party was identified as a reactionary Islamic threat.\textsuperscript{485} 28 February process brought about the resignation of the present government and non-democratic, strict state control over all aspects of

\begin{thebibliography}{99}
\bibitem{ibid} ibid
\bibitem{Jung} Jung, D., “The Sevres Syndrom: Turkish Foreign Policy and its Historical Legacies,” (2003) 8 American Diplomacy 2
\end{thebibliography}
religious life. The military, with a long list of demands (officially ‘advice’) on 28 February, aimed at curbing the influence of Islamists in the economy, in education and inside the state apparatus.486 The so-called “Islamic capital”487 was exposed, boycotted and prosecuted to eliminate financial sources for Islamic movements. Tayyip Erdogan, the Refah’s popular mayor of Istanbul, was imprisoned as a means by which pressure over the Refah was demonstrated. Quranic courses run by various Islamic foundations were closed down, the remaining courses were strictly regulated and participation of students in these courses was made possible only after a certain age. The ban on wearing headscarf at universities was intensified. Islamic NGOs and foundations were put under strict control. In sum, as a result of the February 28 process, the discursive hegemony of Kemalism was reasserted, while Islam’s social and economic bases, as well as its political agents, were targeted.

Finally, as a concluding part of the campaign against the Islamists, the Principal State Counsel lodged a file in the Constitutional Court in May 1997 for the dissolution of the ruling Refah Party. The coalition government had to step down in July 1997 after a blunt threat of direct military intervention. Subsequently, the Refah was dissolved by the Constitutional Court in January 1998 on the grounds that it had become the centre of anti-secularist activities and Necmettin Erbakan Refah’s leader was banned from politics for five years. The Refah Partisi case is distinct from the other political party cases. It was still a ruling party, as the major part of a coalition government, when the

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485 A “National Policy Paper” prepared by the National Security Council (NSC) described the “reactionary forces” of Islam as the first priority threat to the Turkish state, more dangerous and immediate than the secessionist Kurdish nationalism. See Hürriyet (daily), 4 November 1997.


487 What meant by the term 'Islamic capital' is the Islamic business network established by Anatolian businessmen who knew to combine economic liberalism and cultural tradition around the religious and family values. This business network has rapidly developed after Turkey's transition to open-liberal economy in the 1980's and it has been seen as a threat to their economic interests by the secularist elites.
Principal State Counsel at the Court of Cassation applied to the Turkish Constitutional Court to have Refah dissolved and it was in existence for a long time as a lawful political party.

The Principal State Counsel referred to the acts and remarks by leaders and members of Refah in his support to the application. He gave several examples of their speeches. He stated that whenever the chairman and other leaders of Refah spoke in public they advocated the wearing of Islamic headscarves in state schools, and buildings occupied by public administrative authorities, whereas the Constitutional Court had already ruled that this breached the principle of secularism enshrined in the Constitution as being a fundamental principle upon which the state was founded. He gave, as an example, the Refah leader Mr Erbakan's speech at a meeting on constitutional reform in which he had made proposals tending toward the abolition of secularism in Turkey. He had suggested that the adherents of each religious movement should obey the rules of their own organisations rather than Turkish law. Furthermore, Necmettin Erbakan had asked Refah's representatives in the Grand National Assembly on 13 April 1994 to consider whether the change in the social order, which the party sought would be "peaceful or violent," and would be achieved "harmoniously or by bloodshed." In the State Counsel's application examples of speeches, calling for the secular political system to be replaced by a theocratic regime, were presented which had been made by several members of Refah, including some in high office. These persons had also advocated the elimination of the opponents of this policy, if necessary by force. The State Counsel claimed that the party, by refusing to open disciplinary proceedings against the members concerned, and even, in certain cases, facilitating the dissemination of their speeches, had tacitly approved the views expressed. One
example was a speech by MP Ibrahim Halil Çelik made on 8th May 1997, in which he had said, in front of journalists in the corridors of the parliament building, that 'blood would flow' if an attempt was made to close the "Imam-Hatip" theological colleges. He said that the situation might become worse than in Algeria, where he personally wanted blood to flow so that democracy could be installed in the country, that he would strike back against anyone who attacked him, and that he would fight to the end for the introduction of Islamic law.

The Principal State Counsel submitted that, according to the Convention and the case-law of the Turkish courts on constitutional law issues, there was nothing which obliged states to tolerate the existence of political parties that sought the destruction of democracy and the rule of law. He concluded that Refah Partisi, by describing itself as an army engaged in a jihad and by openly declaring its intention to replace the Republic's statute law by Islamic law, had demonstrated that its objectives were incompatible with the requirements of a democratic society. Refah's aim to establish a plurality of legal systems constituted the first stage in a process designed to substitute a theocratic regime for the Republic. The Refah party argued on the other hand that the content of the principle of secularism as applied in Turkey was the subject of current debate to which they were contributing, that statements and views of certain individuals had wrongly been attributed to the party and were not consistent with its constitution and the platform it had negotiated with its coalition partner, and that Refah had not done anything when in power that could properly be construed as imperilling Turkey's secular political system.

488 In this legal system each group would be governed by a legal system in conformity with its members' religious beliefs.
The Constitutional Court on 16 January 1998 decided to dissolve Refah on the ground that it had become a “centre of activities contrary to the principle of secularism.” It based its decision on sections 101(b) and 103(1) of Law no. 2820 on the Regulation of Political Parties. Refah’s assets were transferred to the Treasury as an automatic consequence of dissolution, in accordance with section 107 of Law no. 2820.

The Reasoning of the Constitutional Court

The Constitutional Court stated that, although political parties were the main protagonists of democratic politics, their activities were not exempt from certain restrictions. It said that activities by parties that were incompatible with the rule of law could not be tolerated. The Constitutional Court in its judgement, referred to the provisions of the Constitution that required respect for secularism in the various organs of political power. It also cited the numerous provisions of domestic legislation requiring political parties to apply the principle of secularism in a number of fields of political and social life. The Constitutional Court observed that secularism was one of the indispensable conditions of democracy. In Turkey the principle of secularism was safeguarded by the Constitution, on account of the country’s historical experience and the specific features of Islam in the country. The court concluded that the democratic regime was incompatible with the rule of Islamic law. The principle of secularism prevented the state from manifesting a preference for a particular religion or belief and constituted the foundation of freedom of conscience and equality between citizens, before the law. It stated that in order to preserve the secular nature of the political regime interference by the state had to be considered necessary in a democratic society, as a requirement of European Convention on Human Rights.
Since there was nothing specific in the party’s programme which provided evidence of an anti-democratic purpose, the Constitutional Court relied on a series of speeches by Welfare leaders. These speeches, it was alleged, demonstrated that the party intended to set up a plurality of legal systems, that it wanted to apply Sharia to the Muslim community and that it advocated jihad (holy war) as a political method. The Constitutional Court held that the speeches made by the members and leaders of the party, and acts submitted as evidence by the State Counsel, proved that Refah had become a “centre of activities contrary to the principle of secularism.” The Constitutional Court held that it had taken international human rights protection instruments into consideration. It also referred to the restrictions authorised by the second paragraph of Article 11 and Article 17 of the Convention. It pointed out in that context that Refah’s leaders and members were using democratic rights and freedoms with the aim of replacing the democratic order with a system based on Islamic law. It held that where a political party pursued activities aimed at bringing the democratic order to an end, and used its freedom of expression to issue calls to action to achieve that aim, the Constitution and supranational human rights protection rules authorised its dissolution.

In the Refah Partisi case Judges Hasim Kilic and Sacit Adali dissented from the majority decision. They expressed opinions, inter alia, that in their view the dissolution of Refah was not compatible, either with the provisions of the European Convention on Human Rights, or with the case-law of the European Court of Human Rights on the dissolution of political parties. They observed that political parties, which did not support the use of violence, should be able to take part in political life.
They stated moreover, that in a pluralist system there should be room for debate about ideas thought to be disturbing or even shocking.

The Constitutional Court’s Refah decision can be criticised as being unfounded. Aydintasbas rightly argues that Welfare Party which was a legal product of Turkish Parliamentary system neither posed a threat to the Turkish state nor intended to alter the fundamental precepts of the regime in order to establish an Islamic Republic. She further states that being in government was a learning experience for Refah and its 12-month rule illustrated a process of political negotiation between Turkey’s Islamists and the Kemalist establishment, since Refah accommodated a secularist political system and transformed its self-definition and foreign and economic policy. Onis argues that Refah was a party believing in parliamentary system and it was far more moderate than Islamic movements in other Muslim countries. It was trying to realise its policies within the parliamentary system. Therefore the right solution should not have been to dissolve it but to integrate into the system more intensively and give the opportunity to distance itself from authoritarian identity policies. Penalising the whole party instead of individuals who have done wrong can not be accepted as lawful and the dissolution of the party will not be useful for the democratisation in Turkey.

After dissolution of Refah, its MPs joined its replacement, the Virtue Party (Fazilet) that has already been established. Under the influence of its young middle-class reformist wing challenging Erbakan, Virtue spoke highly of democracy, emphasized individual choice in the matter of headscarves, and supported EU membership. That party came third in parliamentary elections in 1999 and the action for dissolution was

490 Onis, Z., ‘Sol Islamsla Barismali’ in Radikal (interview) August, 1998
491 see Alpay, S., ‘Refah Karari’ Milliyet (daily), 20.01.1998
brought when one of its successful candidates wanted to take the parliamentary oath wearing a headscarf. Yet Virtue, too, was dissolved by the Constitutional Court in June 2001. The movement then split into two parties, the Saadet Party representing the older generation loyal to Erbakan, and the AK (Justice and Development) Party representing the younger guard and led by Recep Tayyip Erdogan, Refah’s popular ex-mayor of Istanbul. The AK Party, which took a clearly pro-EU stance and de-emphasized the Islamic symbol politics of its predecessors, swept the 2002 elections and formed Turkey’s first single-party government in 15 years. Optimist tendency that AK Party’s capacity to reconcile Islam and Democracy seems to be prevailing, since the AK Party government has been able to put on a hope-injecting performance in almost all respects. Under Prime Minister Erdogan, renewed efforts have been made to adopt reforms to conform to European norms, changes needed for Turkey to avoid being blocked from joining the E.U. Anxious to advance Turkey’s entry into the E.U., Erdogan’s government has been prompted to press for a variety of pro-democratic reforms that could lead to an improved human rights picture. Ironically, the strongest opposition to Erdogan’s democratizing reforms has been coming from the generals heading Turkey’s passionately secular military establishment.492 Since AK Party’s coming into power in November 2002 after having sufficiently fulfilled the Copenhagen Criteria, accession negotiations with the EU began on October 3, 2005. The economy has been stabilized and the inflation rate is steadily decreasing. Some concrete steps has been taken for democratization; public broadcasting in Kurdish, teaching the Kurdish language in private language schools, and changing the composition and profile of the military-dominated National Security Council, which once set the parameters of civilian policy making, were some of the democratizing and civilianizing reforms introduced by the AK Party. Furthermore, the AK Party has

492 See Boulton, L., Turkey Faces text on human rights reforms, Financial Times, May 22, 2003, 2
managed to alter Turkey’s traditionally status-quo oriented stance on the divided island of Cyprus and has taken some genuine steps towards its unification in accordance with UN Secretary General Kofi Annan’s plan. EU Commissioner Gunter Verheugen, referred to speedy reforms under the AK Party government as “the second revolution after the establishment of the Republic by Ataturk.”

Analysis and Assessment

A critical examination of the Constitutional Court’s political party cases reveals that there are two main strands of reasoning which have underlain the political party dissolution cases of the Turkish Constitutional Court. These are:

a) The indivisible unity of the state.

b) Laicism, the principle of secularism.

The Constitutional Court is very sensitive about the indivisible unity of the state that is inherent in the Constitution and the Law on Political Parties. The prohibition of activities against the indivisible unity of the state is interpreted by the Court very widely. Almost any different opinion and suggestion about the structure of the state and social problems are threatened by the prohibition. Therefore a political party’s mention of “Turkish people-Kurdish people,” “the existence of Kurdish people,” “the unity of both peoples in peace,” the suggestion of “everybody’s right to be educated in

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495 Whereas the European Court of Human Rights is of the view that political parties are free to campaign for a change in the law or the legal and constitutional basis of the State, as far as the means
their native language,” or “a federative structure of state,” have been seen as being in opposition to the indivisible unity of the state. So, those expressions and suggestions have been reasons for the dissolution of the political party in question. The Constitutional Court does not even appear to make a distinction between those ideas which have reached only the stage of thought, and those which have initiated action. The Constitutional Court is of the opinion that any writing, speech or behaviour that may damage the unity of the country and nation should be prohibited for political parties.496 For instance, the United Communist Party of Turkey was abolished even before it started its activities, merely because it had the word “communist” in its name and for having remarks in its program that were not in conformity with the “indivisible unity of the State.”497 The Socialist Party, as it suggested a “federative structure of State,” on the one hand, and by standing against the nationalism of Ataturk in its political thought and actions on the other, was abolished for offending the same indivisibility principle.498 The Constitutional Court employs a unique rhetoric, one of whose components is sometimes fiction, to legitimise its political party case decisions. The fiction aims to increase the power of persuasion in its reasoning. The Constitutional Court, in a number of cases where it has interpreted the indivisible unity principle, makes such statements as:

“The harmful aims which are affected by foreign factors with some political reasons and which are based on some assumptions, interpretations and excuses intensified with human rights and freedom allegations can not be given the

used to that end in every respect, are legal and democratic and the change proposed itself is compatible with fundamental democratic principles. See above ch. 6

496 E.1993/1 (Siyasi Parti Kapatma) K.1993/2 K.T 23.11.1993 in AMKD 30/2, p.917

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The Constitutional Court in the following sentences, talks of “undebatable” and “unchangeable” concepts and principles. According to the Court, the source of those principles and concepts is the Constitution of the Turkish Republic. This statement could be assessed as a fiction. It is very difficult to argue that this statement reflects the truth. In spite of all its restrictive and authoritarian character the Constitution does not mention ‘undebatable’ values and concepts. The unchangeable nature of some of the principles of the Constitution does not mean that they are non-debatable. The Court accuses some political parties of not accepting the official discourse and of not giving it its place in their programmes. In conclusion, it tries to make the official ideology the ideology of all political parties. However, this is not in conformity with the concept of a “Democratic State,” which is also an unchangeable principle in the Constitution. There cannot be a place for any non-debatable concepts and values in a pluralist and democratic state.

Pluralism is a fundamental component of democracy in our era. So, obviously there must be debate about values. Political parties are the essential agents in achieving political pluralism. In addition to this, the Constitutional Court should take into account social and political realities, while it is interpreting the Constitution. Not taking into account those realities or reflecting them wrongly, will affect the potential

499 see AMKD, 27/2, p.965; AMKD, 28/2, p.803; AMKD 29/2, p.1166; AMKD 30/2, pp.912-913
500 AMKD, 27/2, p.965; AMKD 28/2, p.803; AMKD 29/2, p.1166
power of decisions in a negative way. It is quite normal for judges to have different opinions about what is required by the Constitution. But interpreting the Constitution with groundless assumptions about the realities of peoples' lives is a great shame.\(^{503}\)

The Constitutional Court’s interpretation of secularism rests on an “ideology-based” legal paradigm. It states that secularism in Turkey is the philosophy of the law.\(^{504}\) It further states that the limit to the rights and freedoms is the secularism principle. This principle, which has constitutional priority, is not contrary to democracy and it is obligatory to assess all the rights and freedoms in the framework of it. So, the freedoms and rights that are not compatible with this secularism cannot be protected.\(^{505}\) Regarding this principle, as it does alongside the indivisible unity principle, the Constitutional Court conducts a very narrow interpretation. It prohibits all different opinions on the assumption that those ideas could damage the Turkish state secularism. Here we can also see that it uses a fictional rhetoric in its reasoning. For example, the Huzur party was abolished when it included a statement in its programme saying that the party was of the opinion that provisions on religion in the Turkish education system should be the same as in western universities. The Court decided that this statement was against secularism.\(^{506}\) The Court also decided that the dissolution of the party was legitimate because the party’s authorities supported the idea that wearing the headscarf in educational institutions should be allowed. The Court stated that this was against its previous, decisions which had stated that the wearing of the headscarf in educational and public institutions is forbidden, and that this was a binding decision. Here the Court pointed out that its decisions are binding.

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505 AMKD 25, pp.150-152
on all institutions and that political parties are within those institutions. The problem here, however, is that there should be a difference between obeying decisions and criticising them. The Court is right to expect political parties to obey its decisions but it cannot expect all political parties to accept its interpretation of secularism.

On the other hand, the Court’s attitude toward secularism has naturally evolved over time. For example, its opinion about Article 89 of the Law on Political Parties has changed over a decade. The Constitutional Court, to support its decisions in the political party dissolution cases has referred to international human rights treaties, especially the European Convention on Human Rights. For instance, according to the Constitutional Court the actions of the Socialist Party, which were seen as in conflict with the Constitution, were said also to be against the principles of the European Convention on Human Rights.

Conclusion

In the Turkish legal system the Constitutional Court is the highest tribunal with the right to interpret the Constitution and apply it to the particular cases brought before it. Article 153 of the Constitution expresses the legally binding character of its decisions on all branches of state power. The Constitutional Court in Turkey came into existence under the 1961 Constitution which came to effect following the 1960

507 According to Article 89 of Law on Political parties, the political parties can not argue about separating the directorate of religious affairs from the state structure, the ironic thing, however, is that although this article was set up to protect the secularism principle against the so called anti-secular political parties, this article was employed to abolish a political party that was “secular one” without doubt, namely OZDEP (Freedom and Democracy Party). E.1993/1 (Siyasi Parti Kapatma), K.1993/2 K.T 23.11.1993 AMKD, 30/2, p.920

508 AMKD, 28/2, p.809; AMKD, 29/2, p.1172; AMKD, 30/2, p.919 also see Arslan, Z., ”Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasa yargısı: uyum sorunu ve öneriler”, Anayasa Yargısı 17 (Ankara Anayasa Mahkemesi yayınları, 2000) pp. 274-293
military intervention. The Court was created as a response to the perception (accepted by the military and bureaucratic elite) that the Democrat party, while controlling a parliamentary majority between 1950 and 1960 had abused its power, aiming to eliminate the opposition and to destroy the basic principles of the republic. The Constitutional Court has been protected and regulated by the 1982 Constitution, which is still in effect. Article 146 of the Constitution regulates all details concerning the appointment of the judges of the Constitutional Court. There are eleven regular and four substitute judges of the Court who are all appointed by the President of the Republic. The President directly appoints three regular and one substitute member in his own capacity. He/she appoints those judges from amongst high ranking bureaucrats and lawyers. The President appoints from among three candidates nominated by the High Court of Appeals, The Council of State, The Military High Court of Appeals, The High Court of Military Administrative Court and the Board of Higher Education, the other members of the Constitutional Court. The Constitutional Court judges retire automatically upon reaching the age of sixty-five, they cannot be dismissed by the executive (Article 147).

According to the Constitution the Court has three main duties. First of all, it reviews the constitutionality of laws enacted by the Parliament. The court makes its review based on the procedure of making the law and material compatibility of the law with the Constitution. The second task is to hear and rule on the particular cases that involve certain politicians and high ranking state officials such as the Prime Minister, cabinet ministers and members of the high courts, for instance members of the Constitutional Court and High Court of Appeals.
The third task, which concerns us in this study, is that Article 69 has authorised the Constitutional Court to dissolve political parties. Article 69 of the constitution stipulates three main reasons that political parties may be dissolved. In view of the said provision a political party shall be permanently dissolved:

a) If it is established that the program and statute of the political party in question violates the provisions of the fourth paragraph of Article 68 of the Constitution, which protects the indivisible territorial integrity of the state and the principles of the democratic and secular State.

b) If the Constitutional Court determines that the political party in question has become a centre of activities, which violate the provisions of the fourth paragraph of the Article 68.

c) If the political party accepts any financial assistance from other states, international organisations and foreign persons and corporate bodies.

A close scrutiny of the judgements of the Turkish Constitutional Court reveals that it establishes its dissolution of political parties on certain fears about what threats the parties in question may pose. These may be simply classified.

a) The threat to the indivisible territorial integrity of the state. As a result of this fear pro-Kurdish political parties, in particular, have been seen as posing a threat to divide the country.

509 Article 148 of the Turkish Constitution.
b) The threat to change the state’s regime to a communist regime. Fear of this outcome has caused procommunist parties such as the United Communist Party of Turkey, and the Socialist Party to have been dissolved.

c) The threat to the secular character of the state. This fear has led to the dissolution of pro-religious parties.

The Turkish Constitutional Court has dissolved many political parties. To give an illustration, during the nineteen eighties and nineties more than 20 political party cases were heard by the Court. I agree with Arslan that the Turkish Constitutional Court has adopted the ‘ideology based’ approach, which results in the narrow interpretation of political and civil rights.\textsuperscript{510}

\textsuperscript{510} See Arslan Z., "Conflicting paradigms: Political Rights in Turkish Constitutional Court" in (2002) Critical Middle Eastern Studies 9, see for ‘rights based approach and ‘ideology based approach’ ch.7
CHAPTER 6
STRASBOURG'S APPROACH IN THE TURKISH POLITICAL PARTY CASES

Introduction and General Remarks

The Strasbourg institutions started to receive a number of political party cases in the nineteen-nineties when Turkey accepted the Strasbourg institutions' compulsory jurisdiction, and the former Communist States of Eastern Europe joined the Council of Europe. Interestingly, there were no such cases from the German Communist Party case in 1957 until the nineteen-nineties. Turkey is the leading Member State of the Council of Europe in terms of the number of political party cases brought before the Strasbourg Institutions. In this chapter those political party cases decided by the Strasbourg Court will be investigated. The reasoning of the Court and its underlying principles will be explored. This will give us an opportunity to compare those assessments with those of the Turkish Constitutional Court.

Since Turkish political party cases will be looked at in detail later in the chapter, here it may be worth looking at examples of political party cases from other Member States. The very first political party case before the Strasbourg institutions was German Communist Party and Others v. Germany,511 in which the dissolution of the applicant party was based on the views expressed in its program, which were held contrary to democracy. In that instance, the Commission declared the case inadmissible deciding it to be legitimate to dissolve a party which has aims, expressly

511 German Communist Party and Others v. Germany, No. 250/57, Commission's report of 20 July 1957, Yearbook 1, pp. 222-225
stated in its program, that are contrary to democracy and pledged to attain those aims by the destruction of democracy.

In *Gorzelik and others v. Poland* 512 the applicants alleged a breach of Article 11 of the Convention as they had been refused permission to register an association called "Union of People of Silesian Nationality." The Polish courts refused registration because they considered that the applicants' association could not legitimately describe itself as an 'organisation of a national minority,' as the Silesian people did not constitute a "national minority" under Polish law. The description would have given the association access to the electoral privileges conferred under section 5 of the 1993 Elections Act.513 Therefore, registration of the applicants' association as an "organisation of a national minority" would amount to discrimination against other ethnic groups in the sphere of electoral law. The Court decided that it was not the applicants' freedom of association that had been restricted by the state, as the authorities did not prevent them from forming an association to express and promote the distinctive features of a minority but from creating a legal entity. That which, through registration under law on associations and the description it gave itself, would inevitably become entitled to a special status under the 1993 Elections Act. In conclusion, the Court stated that, given that the national authorities were entitled to consider that the contested interference met a "pressing social need" and given that the interference was not disproportionate to the legitimate aims pursued, the refusal to register the applicants' association could be regarded as having been "necessary in a

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513 The 1993 Elections Act provides privileges for 'registered national minority organisations' such as an exemption from the requirement that a party or other organisation standing in elections should get at least 5% of the votes, which is a prerequisite for obtaining seats in Parliament and, although the general requirement is to register an electoral list in at least half of the constituencies in the whole Poland, it is sufficient for an organisation of a national minority to have its electoral lists registered in at least five constituencies. See ibid, para.36
Accordingly there had been no violation of Article 11. With accession of former communist States of Eastern Europe to Council of Europe it seems that the European Court of Human Rights will confront challenging cases. The different political culture of these new democracies will impose difficulties for the Strasbourg Court in dealing with cases from them.

In the *Presidential Party of Mordovia v. Russia*, the applicant party was based in the Republic of Mordovia, a constituency of the Russian Federation. The new Federal Law on Associations required public associations to ensure that their articles of association complied with the Federal Law on Associations and to renew their registration by 1st July 1999. On 30 June 1999 the applicant party applied to the Ministry of Justice of Mordovia to renew its registration. It was refused renewal, with reference to the Federal Law on Associations and to the Law of the Republic of Mordovia on becoming an All-Republican Public Association. The decision stated that the applicant party had failed to create branches in more than half of the districts and cities of Mordovia, which did not allow it to qualify for the title "All-Republican." Furthermore, it stated that the applicant party’s articles of association did not comply with the requirement to include among its objectives, participation in the political life of society and in elections. The applicant party filed its objections with the Ministry of Justice of Mordovia on 8 July 1999, maintaining that the requirement to establish branches contained in Article 21 of the Federal Law on Associations applied exclusively to international, all-Russian or inter-regional public associations. It also contended that its articles provided for the applicant party’s participation in the political life of society and in elections. At the same time the

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applicant made a new application for the renewal of its registration, which was refused on the ground that it had missed the deadline for renewal.

The association, referring to the fact that through lack of registration it was not able to function for over three years, could not run for the 1999 elections and, furthermore, was prevented from renewing its registration in 2002 due to legislative changes, claimed that the authorities' refusal to renew its registration as a political party was contrary to domestic law and was not necessary in a democratic society. It thus constituted an unjustified interference with its right to freedom of association, contrary to Article 11 of the Convention. The government accepted that the refusal to renew the applicant party's registration and its dissolution were unlawful. However, they maintained that there had been no violation of the applicant party's rights under Article 11 of the Convention, since the Presidium of the Supreme Court of the Republic of Mordovia, acting in supervisory instance, acknowledged that. On 5 September 2002 it had ordered the registration of the applicant party. The Court accepted that, because of the measure in question, the applicant was unable to function for a substantial period of time and could not participate in regional elections. Furthermore, the damage appeared irreparable given that, under current legislation, the party could not be reconstituted under its original concept. As it was not in dispute that the interference in question was not "prescribed by law," the Court, therefore, did not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 11 (whether the interference pursued a legitimate aim and whether it was necessary in a democratic society), were complied with in the instant case, deciding that there had been violation of Article 11.
In *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*\(^{515}\) the applicant (PCN) was a political group which was refused registration as a political party in a judgement delivered by the Bucharest Court of Appeal on 28 August 1996. In refusing the application to register the PCN, the Bucharest Court of Appeal endorsed, without elaborating on, the reasoning of the Bucharest County Court to the effect that the PCN was seeking to gain political power in order to establish a humane State founded on communist doctrine. This, in the court’s view, implied that the applicants regarded the constitutional and legal order that had been in place since 1989 as inhumane and not based on genuine democracy. The applicants complained that the domestic courts’ refusal of their application to register the PCN as a political party had infringed their right to freedom of association, as guaranteed by Article 11 of the Convention. Here, examining the PCN’s constitution and political programme, the Court observed that the applicant party laid emphasis on upholding the country’s national sovereignty, territorial integrity and legal and constitutional order, and on the principles of democracy, including political pluralism, universal suffrage and freedom to take part in politics. It further noted that they did not contain any passages that might be considered as a call for the use of violence, uprising or any other form of rejection of democratic principles – an essential factor to be taken into consideration – or for the “dictatorship of the proletariat.”\(^{516}\) The Court stated that the domestic courts did not show any way in which the PCN’s programme and constitution were contrary to the country’s constitutional and legal order and, in particular, to the fundamental principles of democracy. Therefore, it did not accept the government’s argument that Romania could not allow the emergence of a new communist party to form the subject

\(^{515}\) *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, App. No. 46626/99, Judgment of 3 February 2005

\(^{516}\) *ibid*, para.54
of a democratic debate.\footnote{ibid, para.55} In conclusion, the Court decided that a measure as drastic as the refusal of the applicants' application to register the PCN as a political party, before its activities had even started, was disproportionate to the aim pursued and consequently unnecessary in a democratic society. Therefore, there had been a violation of Article 11 of the Convention.\footnote{ibid, para.55}

**Turkish Political Party Cases**

Since 1990 seven Turkish political party cases have been decided by the Strasbourg Court. Considering that Turkey accepted the compulsory jurisdiction of the Court only in 1989, this number might have been greater had Turkey accepted the compulsory jurisdiction earlier. Three of those seven cases, *Emek Partisi (EP) and Senol v. Turkey* (App.No. 39434/98), *Dicle for the Democracy Party (DEP) of Turkey v. Turkey* (App.No. 25141/94) and *Democracy and Change Party and others v. Turkey* (App.No. 39210/98 and 39974/98), are available only in French. These three cases, as they do not add a significant importance to arguments already raised in other leading four cases, will here be briefly touched upon. The leading four cases: *United Communist Party of Turkey and others v. Turkey; Socialist Party v. Turkey; The Freedom and Democracy Party (OZDEP) v. Turkey; and Refah Partisi (Welfare Party) v. Turkey* are examined in detail.

On 14 February 1997 the Constitutional Court ordered that the Emek Partisi (EP) be dissolved, on the ground that its constitution and programme were likely to undermine the territorial integrity of the State and the unity of the nation. The Strasbourg Court
noted that the EP’s dissolution amounted to interference with the applicant’s right to freedom of association. The party had been dissolved solely on the basis of its programme, before it had even been able to commence its activities. The Strasbourg Court noted that the relevant sections of the programme contained an analysis of the development of the working class in Turkey and throughout the world, and a critical analysis of the way in which the Government was fighting separatist activities. It accepted that the principles defended by the EP were not in themselves contrary to the fundamental principles of democracy. As the EP did not advocate any policy that could have undermined the democratic regime in Turkey and did not urge or seek to justify the use of force for political ends, its dissolution could not reasonably be said to have met a “pressing social need” and thus be “necessary in a democratic society”.519

The Democracy Party (DEP) was founded on 7 May 1993. It was joined by 18 members of the Turkish Parliament who had previously been in the Work of the People Party (Halkin Emegi Partisi – HEP), which was dissolved in July 1993. On 16 June 1994 the Constitutional Court ordered the dissolution of the DEP on the ground that its activities were liable to undermine the territorial integrity of the State and the unity of the nation. The Strasbourg Court noted in its judgement that the Constitutional Court had failed to examine in its judgment dissolving the party whether the DEP’s programme and constitution were legal.520 It had confined itself to deciding whether its political activities contravened relevant regulations and had relied on three declarations in reaching its decision. Consequently, the Court

518 ibid, paras. 60-61
519 Case of Emek Partisi and Senol v. Turkey, Appl. No. 39434/98, Judgment of 31/05/2005
520 Case of Dicle for the Democratic Party (DEP) of Turkey v. Turkey, Appl. No. 25141/94, Judgment of 10/12/2002

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considered that it need only examine those declarations and rejected the Government's request for it to widen the scope of its examination to encompass the criminal convictions of various members of parliament from the party following its dissolution.

As to whether the DEP pursued aims that contravened democratic principles, the Court noted that the written declaration and the speeches that had led to the dissolution of the party lent towards recognition of Kurdish identity and were fiercely critical of governmental policy towards citizens of Kurdish origin. Nevertheless, it did not find those declarations to be contrary to fundamental principles and reiterated that if democracy was to work properly, it was essential that political bodies be allowed make public proposals, even if they conflicted with the main planks of governmental policy or prevailing public opinion. Furthermore, the Court did not find persuasive the Government's argument that the DEP's call for autonomy or separatism was tantamount to support for terrorist acts. According to the Strasbourg Court, the Constitutional Court had not established to the requisite standard, in its judgment dissolving the DEP that the DEP was seeking to undermine democracy in Turkey through its political policies. The Court stated that DEP did not suggest any real prospects of establishing a system of government that did not meet with the approval of all the players on the political stage.

The Court observed that although they were severely critical of certain aspects of the Government's performance, the party had not expressed any explicit support or approval of the use of violence for political ends on the issue whether the DEP had carried on its political campaign by lawful and democratic means or whether its leaders had advocated the use of violence as a political tool with regard to the speech that had been made and the written declaration issued by the central committee. The
Court considered that, though fierce, such political criticism of the Turkish authorities could not in itself constitute evidence that the DEP was equivalent to an armed group implicated in acts of violence. The Court did not think that the aim of the party in making those declarations was other than to fulfil its duty of voicing the concerns of its voters. It consequently considered that there had been no "pressing social need" to dissolve the DEP on account of those two declarations.

As regards three messages of former president of DEP: firstly, that a separate unified Kurdish state was desirable; secondly, that the activities of the armed movement within the PKK compared to a war to liberate north Kurdistan and to found a Kurdish state there; and, lastly, that the DEP's political opponents, in particular the Turkish Government, were disreputable; The Strasbourg Court considered that the second and third messages amounted to approval of the use of force as a political tool and a call to use force. Although, in the circumstances existing at the material time those words were capable of inspiring a deep irrational hatred of those who were presented as the enemies of the population of Kurdish origin, recourse to violence appeared to have been presented as a necessary and justified means of obtaining freedom from the enemy, The Strasbourg Court found that the measure taken in respect of that declaration met a "pressing social need". It noted that criminal proceedings had been taken against the maker of the statement. However, it considered that what was at issue was a single speech by a former leader of the party that had been made overseas in a language other than Turkish and to an audience that was not directly concerned by the situation in Turkey. Its potential impact on "national security" public "order" or the "territorial integrity" of Turkey was therefore very limited. Accordingly, the Court found that that speech could not by itself justify so general a penalty being imposed as
the dissolution of an entire political party, particularly as the maker of the speech had already been prosecuted. Consequently, the dissolution of the DEP on account of the speech made in Iraq could not be regarded as proportionate to the aims pursued. Accordingly, the Court held that the dissolution of the DEP could not be regarded as “necessary in a democratic society” and that there had been a violation of Article 11.521

The Democracy and Change Party (DDP) was founded on 3 April 1995. Following an application by the Principal State Counsel the DDP was dissolved by the Constitutional Court on 19 March 1996 on the grounds that, inter alia, its programme was likely to undermine the territorial integrity of the State and the unity of the nation. The Constitutional Court found that behind the stated intention of promoting the development of the Kurdish language, the real aim of the DDP’s constitution was to create minorities to the detriment of territorial integrity and Turkish national unity, thereby encouraging separatism and the division of the Turkish nation. The Strasbourg Court found that the DDP had been dissolved purely on the basis of its programme, before it had had a chance to commence its activities. The Court noted that the relevant parts of the programme amounted to an analysis of the history and political aspects of the Kurdish question in Turkey and proposals aimed at bringing the oppression to an end and securing recognition for citizens of Kurdish origin of the rights contained in international treaties to which Turkey was a party. The Court accepted that the principles defended by the DDP were not, in themselves, contrary to the fundamental principles of democracy. The Court further noted that the DDP’s programme did not advocate recourse to violence as a political weapon. Therefore, in

521 ibid
the absence of a political programme liable to undermine democracy in the country and/or any invitation to use force for political ends or attempt to justify doing so, the dissolution of the DDP could not be reasonably considered as meeting a “pressing social need” and thus as being “necessary in a democratic society”. The Court accordingly held unanimously that there had been a violation of Article 11 of the Convention.522

One case received by the Strasbourg Court and worth mentioning was Fazilet Partisi v. Turkey, (App. No. 1444/02). Fazilet Partisi was founded in December 1997. After the dissolution of Refah in 1998, ex-Refah MPs joined Fazilet Partisi. In a judgement of 22 June 2001 the Constitutional Court dissolved Fazilet, on the ground that the party had become a “centre of activities contrary to the principle of secularism.”523

Fazilet Partisi lodged an application before the European Court of Human Rights on 28 May 2001, complaining of violations of Article 3 of Protocol 1 the right to free elections; Article 10 freedom of expression; and Article 11 freedom of assembly and association. The case was declared admissible on 30 June 2005 and the hearing on the merits took place on 13 October 2005. However, Fazilet’s chairman Mr Recai Kutan, in a Press Conference on 2 December 2005, declared that they had withdrawn their case from the European Court of Human Rights. He stated that, considering its judgements in the Refah Partisi and recently in the Leyla Sahin cases, the Strasbourg Court was prejudiced against Islam. They did not believe, therefore, that they would get justice from the Court.524

522 Democracy and Change Party and Others v. Turkey, Appl. No. 39210/98;39974/98, Judgment of 26/04/2005
523 E.1999/2, K.2001/2, (Siyasi Parti Kapatma), 22.06.2001, AMK
Principles established by the Strasbourg Court

Democracy is the only political regime compatible with the Convention

The Preamble to the Convention 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. The idea that European countries have a common heritage of political traditions, ideals, freedom and the rule of law is also stated in the Preamble. The Court has several times pointed out that the Convention was designed to maintain and promote the ideals and values of a democratic society. So, democracy is without doubt a fundamental feature of the European public order as established by the Strasbourg institutions. Another important point made by the Court is that pluralism is critically essential in the proper functioning of democracy. By pointing out that there can be no democracy without pluralism, the Court established the well known principle that freedom of expression, as enshrined in Article 10 is applicable, subject to paragraph 2, 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 Court is of the view that only allowing those ideas to be freely expressed will make the pluralism of society work.

That statement of preamble was referred by the Court in its judgements. Among others Klass and Others v. Germany, judgement of 6 September 1978, Series A no. 28, paras. 28, 59
Kjeldsen, Busk Madsen and Pedersen v. Denmark, judgment of 7 December 1976, Series A no. 23, paras. 27, 53, see also the Soering v. the United Kingdom, judgment of 7 July 1989, Series A no. 161, paras. 35, 88
Relation between Rights: Interrelation of Article 11 with Article 10

One of the established principles at work is that there is a necessary relation between the Article 11 right to assembly and freely formed associations, and the Article 10 right to freedom of expression where interference exists to political parties’ rights. In spite of Article 11’s autonomous role and particular sphere of application, the Court reaffirmed that it must also be considered in the light of Article 10. 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 Article 11.\(^{528}\)

Wider Freedom to Political Parties – Narrow Margin of Appreciation to the State

In democracies political parties are the means of representation of the different shades of opinion found within a country’s population. As representatives of this range of opinion, within political institutions and also with the help of the media, at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.\(^{529}\) It is obvious that political parties are a form of association essential to the proper functioning of democracy and to the realisation of pluralism. Because of their important function the exceptions set out in Article 11, where political parties are concerned, have to be construed strictly. Only convincing and compelling reasons can justify restrictions on such parties’ freedom of association. The Court also states that, in determining

\(^{527}\) Loizidou v. Turkey, judgment of 23 March 1995 (preliminary objections), Series A no. 310

\(^{528}\) United Communist Party of Turkey and others v. Turkey, (1998) 26 EHRR 121, para.42, see also the Young, James and Webster v. the United Kingdom, Judgment of 13 August 1981, Series A no. 44, paras. 23, 57

\(^{529}\) Lingens v. Austria, Judgment of 8 July 1986, Series A no. 103, paras. 26, 42
whether a necessity within the meaning of Article 11 para.2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with the thorough European supervision, embracing both the law and the decisions applying it, including those given by independent courts. Such a strict scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.\textsuperscript{530} While conducting this strict scrutiny the Court's task is to look at the interference complained of in the light of the case as a whole to determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient."\textsuperscript{531}

The Turkish Constitutional Court dissolved the United Communist Party on two grounds: one being the allegation that the TBKP had included the word "communist" in its name, contrary to section 96(3) of Law no. 2820 -the law on Political Parties- the other was that the TBKP sought to promote separatism and the division of the Turkish nation by drawing a distinction in its constitution and programme between the Kurdish and Turkish nations. The Strasbourg Court, therefore, confined its reasoning to these grounds. The law was such that the mere fact of using such a proscribed name, (the word "communist"), was sufficient, in itself, to lead to the dissolution of the party. The Court of Human Rights held that, given the absence of any evidence that this choice of name signified the adoption of policies by the party which represented a real threat to Turkish society or the state, the dissolution of a party based simply on its name could not be justified under the Convention.\textsuperscript{532} With regard to the

\textsuperscript{530} United Communist Party of Turkey and others v. Turkey, (1998) 26 EHRR 121, para.46
\textsuperscript{531} ibid para.47
\textsuperscript{532} ibid para.54, See also on this "Freedom of Association" case comment in (1999) 24 EL Rev. 157, p.158
second ground the Court stated that, even though the TBKP referred in its programme to the Kurdish “people” and “nation” and Kurdish “citizens,” it neither described them as a “minority” nor made any claim other than for recognition of their existence.

According to the Court, resolving a country’s problems through dialogue, without recourse to violence, even when it is irksome, is one of the principal characteristics of democracy. As democracy thrives on freedom of expression the Court is of the view that there is no justification in hindering a political group solely because it seeks to debate in public the situation of part of the state’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.\textsuperscript{533} Pluralism being at the heart of its conception of democracy, the European Court of Human Rights sees the State as the ‘ultimate guarantor’ of the principle of pluralism therefore of the political parties as other vital actors in the maintenance of diversity in political debate are political parties.\textsuperscript{534}

\textit{United Communist Party of Turkey and Others v Turkey}\textsuperscript{535}

Upon dissolution of the TBKP by the Constitutional Court on 16\textsuperscript{th} July 1991, the party and Mr Nihat Sargin and Mr Nabi Yagci, who were respectively Chairman and General Secretary of the TBKP, applied to the European Commission of Human Rights on 7 January 1992 seeking the international protection of the European Convention on Human Rights. The Commission, having declared the complaint admissible with respect to complaints under Articles 9, 10, 11, 14 and 18 ECHR and

\textsuperscript{533} ibid paras. 56, 57
Articles 1 and 3 of the First Protocol, referred the case to the Court on 28 October 1996.

The first challenge that the Strasbourg institutions considered in this case, before examining the merits, was the Turkish Government's claim that Article 11 did not in any event apply to political parties. The government expressed that view that it could be seen from a cursory examination of the Convention that neither Article 11, nor any other Article, made any mention of political parties or referred to the states' constitutional structures. The government went on to say that the only Article containing a reference to political institutions was Article 3 of Protocol No.1, which did not confer any right on individuals as it was worded so as to create an obligation on the state. It concluded that Article 11 should not be applied in the case. The Commission did not agree with the government in this matter. It was of the opinion that there was nothing in the wording of Article 11 to limit its scope to a particular form of association or group, or to suggest that it did not apply to political parties. On the contrary, Article 11 was considered to be a legal safeguard that ensured the proper functioning of democracy. The Commission considered political parties as one of the most important forms of association to be protected. The Commission referred to a number of decisions in which it had examined, under Article 11, various restrictions on the activities of political parties and even the dissolution of such parties. Therefore it entirely accepted that Article 11 applied to that type of association.

The Court, like the Commission, stressed that although Article 11 refers to "freedom of association with others, including the right to form ... trade unions," the conjunction "including" clearly shows that trade unions are but one example among...
others of the form in which the right to freedom of association may be exercised.\textsuperscript{536} In the Court’s view, even more persuasive than the wording of Article 11, was the fact that political parties are a form of association essential to the proper functioning of democracy. It concluded, regarding the applicability of Article 11, that because of the importance of democracy in the Convention system there can be no doubt that political parties come within the scope of the Article.\textsuperscript{537} In conclusion, the Court decided that a measure as drastic as the immediate and permanent dissolution of the TBKP, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, was disproportionate to the aim pursued and consequently unnecessary in a democratic society.\textsuperscript{538}

The Court’s method in assessing the interference with a right protected by Convention consists of two steps:

a) whether there is an interference at all; and b) in the event of interference, whether the interference is justified. The interference is regarded as justified when it meets three conditions set out by the Convention: 1) The interference should be prescribed by law; 2) there should be a legitimate aim to the interference; and 3) the interference should meet the criterion of ‘necessary in a democratic society.’

In the TBKP case, the Court did not agree with the governments’ contention that there was no interference with the applicants’ right to freely form an association. The Court, considered that the interference is prescribed by law and that the dissolution of the

\textsuperscript{536} United Communist Party of Turkey and others v. Turkey, Judgment of 30 January 1998; (1998) 26 EHRR 121, para.24
\textsuperscript{537} ibid para. 25
\textsuperscript{538} supra TBKP v. Turkey, para.61
TBKP pursued at least one of the "legitimate aims" set out in paragraph two of Article 11: the protection of "national security." 539

Therefore, meeting the first two conditions of justification in this case, at the heart of the assessment of justification lay the question of whether the interference was necessary in a democratic society. In assessing the 'necessary in a democratic society' criterion the Court derived some fundamental principles. The TBKP case is important, because it is the first Turkish political party case to come before the Strasbourg Institutions. The European Court of Human Rights established fundamental principles, which are explored above, in this case. The Strasbourg Court referred to these principles in other political party cases.

Socialist Party v Turkey 540

The Constitutional Court decided on 10th July 1992 to make an order dissolving the SP. Upon this decision, the Party, Mr Dogu Perinçek and Mr Ilhan Kirit who were respectively Chairman and former Chairman of the SP, lodged an application to the Commission on 31 December 1992, which was then referred to the Court on 27 January 1997.

The Turkish government, again, in this case alleged that Article 11 did not in any event apply to political parties. The Court, as it had in the United Communist Party of Turkey case, held that political parties are a form of association essential to the proper functioning of democracy and that in view of the importance of democracy in the

539 ibid para.41
540 It will be referred as SP
Convention system upheld the legitimacy of the application. As such, there could be no doubt that political parties came within the scope of Article 11. The Court stated that it saw no reason to come to a different conclusion on this matter in the instant case, from its established judgement in the TBKP case.  

What was different in this case from the previous TBKP case, was that here all the parties accepted that the SP's dissolution amounted to an interference with the applicants' right to freedom of association. Upon accepting that there had been such interference the question of its justification was answered by the Court. The Court decided that the interference was "prescribed by law," since the measures ordered by the Constitutional Court were based on Articles 2, 3-1, 6, 10- and 14-1, and former Article 68 of the Constitution and sections 78, 81 and 96-3 of Law no. 2820 on the Regulation of Political Parties. As to the second step of the justification assessment, it was also accepted that dissolution of the SP pursued at least one of the legitimate aims set out in Article 11: the protection of "national security".

The Court reaffirmed its findings in the TBKP case that, in spite of its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10, since the protection of opinions and the need to express them freely is one of the objectives of the freedom of assembly and association as enshrined in Article 11. 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.

Since the Constitutional Court based its judgement on public statements made by Mr Perinçek, which it considered to constitute new facts and evidence that were binding on the SP, the Strasbourg Court confined itself to examining those statements. The Constitutional Court stated that, Mr Perinçek had advocated the creation of minorities within Turkey and, ultimately, the establishment of a Kurdish-Turkish federation, by distinguishing two nations – the Kurdish nation and the Turkish nation. It considered this as a threat to the unity of the Turkish nation and the territorial integrity of the state. In the view of the Constitutional Court, the SP was ideologically opposed to the nationalism of Atatürk, which was the most fundamental principle underpinning the Republic of Turkey. It saw the aim of the SP’s political activity as similar to that of terrorist organisations, no matter that it used different methods. In assessing the statements of Mr Perinçek, the Strasbourg Court took into account its previously decided judgement, that one of the principal characteristics of democracy is the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when the dialogue is irksome. After analysing Mr Perinçek’s statements, the Court did not find anything in them that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. On the contrary, he had stressed on a number of occasions, the need to achieve the proposed political reform in accordance with democratic rules. The Court noted that Mr Perinçek spoke out against “the former culture idolising violence and advocating the use of force to solve problems between nations and in society.”

The government submitted that one of the speeches of Mr Perinçek had been a call to violence, which could be not tolerated by a democracy. In that speech Mr Perinçek
had stated, “by holding meetings with thousands of people in the towns and provinces, the Kurds had proved themselves and broken down the barriers of fear.” Furthermore, by calling on those present to “sow courage, rather than watermelons,” Mr Perinçek had, in the Government’s submission, “exhorted them to stop all activities other than the destruction of order.” The government was of the view that by using the phrase, “The Kurdish people are standing up,” he had called upon them to revolt. The Strasbourg Court accepted that these phrases were directed at citizens of Kurdish origin and constituted an invitation to them to rally together and assert certain political claims. However, it found no trace of any incitement to use violence or infringe the rules of democracy. The Court concluded that the relevant statements were scarcely any different from those made by other political groups that were active in other countries of the Council of Europe.\(^\text{542}\)

Although the political programme of the SP was considered by the Constitutional Court as incompatible with the current principles and structures of the Turkish State, the Strasbourg Court stated that this did not make it incompatible with the rules of democracy. 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.

The Court considers the dissolution of a political party and banning its leaders from carrying on certain political activities, as a radical measure. It has stated that measures as severe as those may only be applied in the most serious cases.\(^\text{543}\) The Court referred to its findings in the TBKP case, that there is an essential role for political parties in

\(^{542}\) Socialist Party v. Turkey, (1999) 27 EHRR 51, para.46
\(^{543}\) Socialist Party v. Turkey, (1999) 27 EHRR 51 para.51
the proper functioning of democracy and a limited margin of appreciation for the state in interfering with their freedom of expression. It decided that dissolution of the SP was disproportionate to the aim pursued and consequently unnecessary in a democratic society. It found that there had been a violation of Article 11 of the Convention.

**Freedom and Democracy Party (ÖZDEP) v. Turkey**

ÖZDEP was the first pro-Kurdish political party to be dissolved by the Turkish Constitutional Court. The Constitutional Court made an order dissolving it on 14 July 1993. It based its decision on the ground that its programme was apt to undermine the territorial integrity of the State and the unity of the nation and violated both the Constitution and sections 78(a) and 81(a) and (b) of the Law on the Regulation of Political Parties, Law No 2820. Upon this decision ÖZDEP applied to the Commission on 21 March 1994 alleging a violation of Articles 9, 10, 11 and 14 of the Convention.

The Government claimed before the Court that ÖZDEP could not be regarded as a victim of the dissolution complained of. It grounded its claim on the fact that the party had been dissolved voluntarily on 30 April 1993, well before 14th July 1993 when the Constitutional Court had ordered its dissolution. In spite of the voluntary dissolution by the party itself, the Constitutional Court had decided to dissolve the party to prevent its leadership from forming a new party with the same name and status. The Court however, did not agree with the government on the preliminary objection. The Court stated that, as the government had not raised the preliminary objection before
the Commission under the requirement in Article 34 of the Convention that ÖZDEP should have standing as a victim, this objection amounted to an estoppel.\textsuperscript{545}

All the parties of the case accepted that the measure taken by the government amounted to an interference with the applicant's rights ensured by the Convention.\textsuperscript{546} As was already well established by the Council of Europe institutions such interference would constitute a breach of Article 11 unless it was “prescribed by law”, pursued one or more legitimate aims under paragraph 2 and was “necessary in a democratic society” for the achievement of those aims.

It was accepted by the Court that the interference was prescribed by law, because the measures ordered by the Constitutional Court were based on the Constitution and Law no. 2820 on the Regulation of Political Parties. Regarding the legitimate aims sought, the Turkish government claimed that the interference pursued a number of legitimate aims: preventing disorder; protecting the rights of others; and ensuring national security, including the territorial integrity of the country. However the Court, agreeing with the Commission on this matter, decided that the measures could be regarded as having pursued the protection of territorial integrity and thus the preservation of “national security,” which is set out in the second paragraph of Article 11 as a legitimate aim. That being the case, like other political party cases, at the heart of the justification assessment lay the determination as to whether the interference could be accepted as necessary in a democratic society.

\textsuperscript{544} It will be referred as ÖZDEP
\textsuperscript{545} The Freedom and Democracy Party (ÖZDEP) v. Turkey, Judgement of 8 December 1999, (2001) 31 EHRR 27; para.25
\textsuperscript{546} ibid para.27
The applicant party stated that it favoured a democratic and peaceful solution to the Kurdish problem. According to the party, it was wrong to suggest that the party sought the separation of Turkey. On the contrary, ÖZDEP’s programme had stressed the need for the country to remain unified. It also stated that there was nothing in ÖZDEP’s programme or activities such as a separatist aim. It claimed that, this indeed was confirmed by the fact that so far no prosecution had been brought against the parties’ leaders under Article 125 of the Criminal Code, which made it an offence to engage in separatist activities. The applicant party concluded that banning a political party, exclusively because it had announced in its programme that it intended to press for a just, democratic and peaceful solution to the Kurdish problem, could not be regarded as necessary in a democratic society. The action taken by the government therefore amounted to a breach of Article 11 of the Convention.\footnote{\textit{Ibid} para.35}

The Turkish government claimed that the objectives contained in ÖZDEP’s program aimed to incite part of the Turkish population to revolt or to engage in illegal activities such as devising a new political order and laws, which would have been incompatible with the constitutional principles of the Turkish State. The government in addition, claimed that ÖZDEP was using democratic freedoms in an attempt to divide Turkey by choosing, as its fundamental theme, alleged oppression by the Turkish State of minorities and, more particularly, of the Kurds. The government suggested that the party’s dissolution did not appear to have been a disproportionate measure and, accordingly should be considered as necessary in a democratic society.\footnote{\textit{Ibid}}
The Strasbourg Court having analysed ÖZDEP's programme, found nothing in it that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. While determining whether ÖZDEP's dissolution could be considered to have been necessary in a democratic society, that is to say whether it met a "pressing social need" and was "proportionate to the legitimate aim pursued," the Court took into account principles that it had already applied in previous political party cases. These principles may be grouped as follows:

When it carries out its scrutiny, the Court's task is not to substitute its own view for that of the relevant national authorities but rather to review, under Article 11, the decisions they delivered in the exercise of their discretion. In so doing, the Court has, in particular, to satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts.

Because of their essential role in the proper functioning of democracy, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11-2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.

The Court, having taken prior established principles into account, decided that the dissolution of ÖZDEP was disproportionate to the aim pursued and consequently unnecessary in a democratic society. Here there was a violation of Article 11 of the Convention.
The European Court of Human Rights in these three early Turkish political party cases (United Communist Party of Turkey, Socialist Party and Freedom and Democracy Party) on each occasion held that the aims and activities of the parties were not of a nature to pose a threat to national unity and the territorial integrity of Turkey. In so doing, the Court emphasised that it mattered little whether the activities of a party were deemed by the national authorities to undermine the constitutional structures of the state if the said party were at least able to participate in the political life of the country with due regard for democratic rules and without incitement to violence. Accordingly, the Court found that in each of the three cases there had been a violation of Article 11 on the freedom of assembly and association. The prohibition of the Welfare Party, however, is somewhat different, and because of its importance it will be addressed in a little bit more detail below.

Refah Partisi (The Welfare Party) and Others v. Turkey

This case differs from the others in certain respects. First of all previous dissolution cases decided by the Constitutional Court were judgements upon applications that had been made shortly after the foundation of the political parties in question. However, the application for the dissolution of the Refah Partisi was made some fourteen years after its foundation. At the time it was the largest political party in Turkey and indeed one of the two ruling parties of the coalition government of the country. It was a difficult case for the chamber of the European Court of Human Rights as well. The decision in the Chamber’s judgement was decided by a majority of four votes to three, determining that the government had not breached Article 11 by dissolving the Refah Partisi. The dissenting opinions, which will be looked at below, were very strong
ones. However, the Grand Chamber upheld the Chamber’s decision unanimously. One of the reasons for the absence of dissenting opinions in the Grand Chamber may be that, according to Article 27 paragraph 3 of the Convention, no judge from the Chamber which rendered the judgement shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned. Therefore, the dissenting judges in the Chamber decision could not take part in the Grand Chamber judgement.

The Constitutional Court dissolved Refah on 16 January 1998 on the ground that it had become a “centre of activities contrary to the principle of secularism.” It grounded its decision on sections 101(b) and 103(1) of Law no. 2820 on the Regulation of Political Parties.

The applicants, the party and three Turkish nationals, Necmettin Erbakan, Sevket Kazan and Ahmet Tekdal, applied on 22nd May 1998 to the European Court of Human Rights for redress. They alleged, in particular, that the dissolution of Refah by the Constitutional Court and the suspension of certain political rights of the other applicants, who were leaders of Refah at the material time, had breached Articles 9, 10, 11, 14, 17 and 18 of the Convention, and Articles 1 and 3 of Protocol No.1 to the Convention. After the coming into effect of Protocol 11, the applications were transmitted to the Court on 1 November 1998.

The Strasbourg Court’s Chamber decision was made on 31 July 2001. The case was then referred to the Grand Chamber at the plea of the applicants. Liberal scholars in Turkey then hoped that the Grand Chamber would repeal the Chamber’s decision. The Grand Chamber however, upheld the Chamber’s judgement and its reasons, on all
grounds. The Grand Chamber’s general observations, particularly those on the relationship between democracy and the Convention and on the interplay between Articles 9, 10 and 11 are distinguishable essentially only by a more generous reference to previous decisions of the Court to illustrate points of principle. In relation to the three categories of anti-secular statements that were at the heart of the case, the Grand Chamber added very little analysis of its own.\(^{550}\)

The Court first of all established that Refah’s dissolution and the measures which accompanied it amounted to an interference with the applicants’ exercise of their right to freedom of association. As has been well established by the Court such an interference will constitute a breach of Article 11 unless it is “prescribed by law,” pursues one or more legitimate aims under paragraph 2 and is “necessary in a democratic society” for the achievement of those aims. With regard to the interference being prescribed by law, the Court agreed with the parties that the interference concerned was “prescribed by law” (the measures imposed by the Constitutional Court being based on Articles 68, 69 and 84 of the Constitution and sections 101 and 107 of Law no. 2820 on the Regulation of Political Parties). As for the legitimate aim of the interference, the government submitted that several legitimate aims were pursued, namely protection of public safety, national security, the rights and freedoms of others and the prevention of crime. The Strasbourg Court agreed with the government on the legitimate aims pursued by the interference.\(^{551}\) The Court took into account the importance of the principle of secularism for the democratic system in Turkey. The Constitutional Court observed which was accepted by Strasbourg too that

\(^{549}\) Yayla, A., “RP karari bozulabilir” in Radikal (daily), 04.08.2001
\(^{550}\) Olbourne, B., “Refah Partisi (Welfare party) v. Turkey” case comment in (2003) 4 EHRLR 437, p.441
secularism was one of the indispensable conditions of democracy. The meaning would seem to be: no secularism, no democracy – or that democracy depends on secularism. I think we need to recognize that these are problematic assumptions and also that the presumed relationship of secularism and democracy deserves critical evaluation. Turkish secularism variant of the post-revolutionary French principle of secularism is a far more radical principle. Under secularism the state sharply circumscribes the role to be played by religion and religious institutions, depriving them of any autonomous say in public affairs.

In this case the Court looked at the democracy question more widely. According to the Court, the European Convention on Human Rights must be understood and interpreted as a whole. It states that human rights form an integrated system for the protection of human dignity. In that connection, democracy and the rule of law have a key role to play. It is a very important requirement of democracy that the people should be given a role. It clearly expresses that only institutions created by and for the people may be vested with the powers and authority of the state. Another requirement of democracy is that statute law must be interpreted and applied by an independent judicial power. 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, the Court suggests that there cannot be democracy.

The Court pointed out that there is a very close link between the rule of law and democracy. The Court sees the function of written law being to establish distinctions

552 ibid paras. 87 and 93
on the basis of relevant differences, so 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. It defines the rule of law as implying that all human beings are equal before the law, in their rights as in their duties. However, legislation must take account of differences, provided that distinctions between people and situations have an objective and reasonable justification, pursue a legitimate aim and are proportionate and consistent with the principles normally upheld by democratic societies. The Court stated that the rule of law cannot be said to govern a secular society when groups of persons are discriminated against exclusively on the ground that they are of a different sex or have different political or religious beliefs. Where entirely different legal systems are created for such groups the rule of law cannot be upheld.\(^5\^4\)

The Court established the boundaries of the political parties’ activities in a democratic society. The Court expressed its view that a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions:

a) The means used to that end must in every respect be legal and democratic;

b) The change proposed must itself be compatible with fundamental democratic principles.\(^5\^5\^5\)

The Court went on to say that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of


\(^{554}\) ibid

democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy, cannot lay claim to the protection of the Convention against penalties imposed for those reasons.\textsuperscript{556}

In determining whether the interference is necessary in a democratic society, the Court stated that the adjective “necessary,” within the meaning of Article 11 paragraph 2, implies the existence of a “pressing social need.” To determine ‘pressing social need’ the Court looks at the interference complained of in the light of the case as a whole and determines whether it is “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient.” The Court has to satisfy itself that the national authorities have applied standards in conformity with the principles embodied in Article 11. Furthermore the national authorities should base their decisions on an acceptable assessment of the relevant facts.\textsuperscript{557}

The Court devoted its scrutiny to the grounds on which the Constitutional Court found that Refah had infringed the principle of secularism. These grounds can be classified in three main categories:

a) Those which tended to show that Refah intended to set up a plurality of legal systems, introducing discrimination on the grounds of belief.

b) Those which tended to show that Refah wanted to apply sharia to the Muslim community.

c) Those based on references made by Refah members to jihad (holy war) as a political method.

The Court, agreeing with the government, considered that Refah’s proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion. This 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.\(^{558}\) The Court stated that such a societal model cannot be considered compatible with the Convention system. It gave two reasons for this determination. Firstly, the Court thought that it would dispense with the state’s role as the guarantor of individual rights and freedoms. It would also make the state a biased organiser of the practice of the various beliefs and religions in a democratic society. Secondly, it stated that such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy.\(^{559}\) The Court assumed that religious legal orders would assume jurisdiction over all fields of public and private law and that the state would be incapable of acting as the guarantor of individual rights and freedoms and as the impartial organizer of the practice of various beliefs and religion in a democratic society. On the other hand, there have been several scholars who found fault with the Court for reaching these critical conclusions in the absence of supporting evidence.\(^{560}\)

\(^{558}\) *Refah Partisi (Welfare Party) v. Turkey*, (41340/98), Grand Chamber Judgment of 13 February 2003, (2003) 37 EHRR 1, para.119, Chamber judgment para.70

\(^{559}\) Chamber Judgment para.70

Any question as to whether legal pluralism is consistent with the value of democratic government cannot be answered in the abstract. For instance, a proposed transformation of a unitary state into, say, a federal system that distributes lawmaking authority between two levels of government to secure greater local autonomy for a minority within its midst could just as easily enhance as diminish democratic government.\textsuperscript{561}

Regarding the second group of the grounds for dissolution - intending to introduce sharia (Islamic law) as the ordinary law and as the law applicable to the Muslim community - the Court held that sharia was the antithesis of democracy in that it was based on dogmatic values and was the opposite of the supremacy of reason and of the concepts of freedom, independence and the ideal of humanity developed in the light of science. The Court stated that many of the public speeches made by those members of Refah mentioned by the Constitutional Court had referred, sometimes in explicit terms, to the objective of establishing a regime based on sharia.\textsuperscript{562} The Grand Chamber concluded, concurring with the Chamber’s view, that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention.\textsuperscript{563} The Chamber and the Grand Chamber did not limit themselves regarding the issue of sharia to holding that the Turkish Constitutional Court’s observations were reasonably open to it or that they fell within a permissible margin of appreciation and both bodies went further and made explicit determinations that support for a regime based on sharia was incompatible with respect for democracy and human rights which it should

\textsuperscript{561} ibid.
\textsuperscript{562} Chamber judgment para.71
\textsuperscript{563} Grand Chamber Judgment, para. 119
not have done. First of all neither Refah’s programme nor its policy proposals give any sign that Refah intended to set up a regime based on sharia. Secondly, the Strasbourg’s categorical rejection of the possibility of any rapprochement between the sharia and human rights and the competence of the Court to make such an assessment are highly questionable. The Strasbourg Court rejects wholesale all of Shari’a instead of crafting a decision that allows for the future examination of the possible compatibility of different aspects of Shari’a with European Convention values. Had it been more nuanced in its response, it could have begun a jurisprudential dialogue between European and Islamic legal orders, where the individual tenets of one system are tested against those of the other. The Court appears to have accepted Turkish Constitutional Court’s arguments which are from the Kemalist depiction of the “caliphate” as a theocracy, and to the claim that Refah aims towards a reinstatement of a regime based on sharia.

Lastly the Court looked into the third category of the grounds for dissolution; the references by certain Refah members to the concept of jihad, whose primary meaning is a holy war; to be waged until the total domination of Islam in society is secured. The Court stated with regard to the method to be used to gain political power that, although it was not disputed before the Court that so far Refah had pursued its political ends by legitimate means, in the offending speeches its leaders alluded to the possibility of recourse to force in order to overcome various obstacles on the political route envisaged by the party for gaining and retaining power.

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565 see Macklem, P., “Militant Democracy, Legal Pluralism…” supra
566 Chamber para.74
In its scrutiny the Court in consequence considered that the penalty imposed on the applicants may reasonably be considered to have met a “pressing social need”. The Court found that the acts and speeches of Refah’s members and leaders were imputable to the whole of the party, that those acts and speeches revealed Refah’s long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a “democratic society” the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate. Then the Court’s task was to decide whether the interference complained of was proportionate to the legitimate aims pursued. The Court decided, considering the narrow margin of appreciation left to the national authorities in such a case, that the interference complained of was not disproportionate to the legitimate aims pursued, in the light of the fact that it answered a “pressing social need” and that the grounds cited by the Constitutional Court to justify Refah’s dissolution and the temporary forfeiture of certain political rights by the other applicants were “relevant and sufficient.” It decided therefore that there had been no violation of Article 11 of the Convention in the case. Although the Grand Chamber decision was taken unanimously the Chamber decision had been taken by four votes against three.

Refah Partisi case was a difficult decision for the Chamber. Judges Fuhrmann, Loucaides and Sir Nicolas Bratza delivered a strong joint dissenting opinion. They did not agree with the majority’s opinion that the dissolution of Refah was necessary in a

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567 Grand Chamber Judgment para.132
568 Chamber Judgment para.82, Grand Chamber Judgment para.133

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democratic society. They said that, in the previous dissolution of parties' cases which had come before Strasbourg, the Communist, Socialist, and ÖZDEP Parties were not only relatively small; they were at the time of dissolution in their infancy. They stated that on the contrary, Refah was founded in 1983 and had been in existence for nearly fourteen years before proceedings were brought to dissolve it. In that period it had grown to become one of the largest single political parties in Turkey, with a claimed membership at the time of its dissolution of over 4.3 million people. Apart from the size and importance of the applicant party, they stated that in previous cases the Constitutional Court had placed reliance on statements which were contained exclusively in the party's statute and programme. No reliance was placed on any individual statement made by the founders or leaders of the party, whether before or after the party had been formed. They stated further that in the case of Refah, the dissolution of the party was based exclusively on the public statements and/or actions of the leaders and members, or former members, of the party. They then noted that there was nothing in Refah's constitution or programme to indicate that the party was other than democratic; or that it was seeking to achieve its objectives by undemocratic means; or that those objectives served to undermine or subvert the democratic and pluralistic political system in Turkey.

The dissenting judges considered that particularly convincing and compelling reasons must be shown to justify a decision to dissolve an entire party. As in the present case, the acts or statements complained of were not linked in terms of time or place but were isolated events occurring in very different contexts over a period covering some six years and in certain cases long before Refah came to power. Moreover, they did state that considerable importance should be given to the fact that no prosecution was
ever brought against the three leading members of the party in respect of any of the acts or statements complained of. Nor did it appear that they were subject to any other measures, disciplinary or otherwise. They came to the conclusion that the dissolution of Refah and the confiscation of its property, as well as the ancillary orders made against the individual applicants were in violation of Article 11 of the Convention.569

In Refah, taking into account the strong dissenting opinions, the Strasbourg Court seems to have reached the judgment that is not supported by the evidence at hand. Refah had not at any point proposed legislation or taken other plain initiatives to bring about the “theocratic order” that the Court finds they envisioned. Indeed, their statutes and party programme contained no such proposals, and so were not presented as evidence, unlike the three previous cases before the Court. Furthermore, any evidence had not been uncovered of a criminal conspiracy to seize power and suspend the constitution. The Court in the Refah case seems to accept a lower degree of evidence. Because through its earlier political party jurisprudence, the Court imposes on states a certain position of condemning the dissolution of political parties in the name of prevention of harm to the democratic system. Therefore, one would at least expect some reasoning as to why dissolution is accepted, presumably as an exception, in the Refah case. For, surely, the Court itself must be guided by the prohibition of discrimination if it is to continue enjoying a high degree of legitimacy. As the dissenting judges in chamber decision stated, the evidence consisted exclusively of scattered statements and symbolic public acts by party members of various standing over a six-year period.570 The Strasbourg Court reaffirmed in Refah the principle that

569 See the joint dissenting opinion in the Refah case
it was essential for political pluralism that a party be allowed to advocate change to the nature of the state but also imposed two conditions: that the means used had to be legal and democratic and that the change proposed had to be compatible with fundamental democratic principles. Although it would seem consistent with the reasoning employed in the earlier cases, the application of these principles to Welfare Party is problematic and it is also illustrative of the difficulty in continuing to apply the doctrine beyond the original paradigm. The dissenting minority in the Chamber judgment pointed out that the means used by Welfare Party were legal and democratic and there was no actual violence by its leaders or members or any incitement to disorder, merely a failure to dispel any ambiguity from speeches discussing the party’s aims. Furthermore, considering that it is permissible to debate, or even to undermine, the existing constitutional structure of the state; it would appear therefore that a party could only be banned if it sought to change the something fundamental to democracy. If this is the criterion by which we determine whether a party is antidemocratic or not, then this becomes problematic when we seek to differentiate fundamental and non-fundamental changes or even to define each category. The Strasbourg Court strangely does not refer in either the Chamber or Grand Chamber judgment to the role of the military in ousting the Erbakan government, while a matter of historical record and openly admitted by those involved which was defined as the world’s first ever “post-modern” coup. The Court’s generalizations regarding Islam are provocative to all those Muslims who do not identify with the fundamentalist project, and will no doubt be exploited by political factors opposed to the integration of Muslims in European countries. The Refah judgment could be described as another missed

572 On the military intervention and the consequences for Turkish democracy see, Yavuz, M. H., “Cleansing Islam from the public sphere and the February 28 Process” (2000) 52 Journal of International Affairs 21
strategic opportunity for the integration of an Islamic political movement into
democratic politics, the conversion through the exigencies of political participation of
Islamists into "Muslim Democrats." When we read Refah judgment together with
Leyla Sahin case which upholds Turkey's ban on headscarf, one can infer that
Strasbourg has a problem of not to be able to deal with the issues related to Islam
properly. Unfortunately, these decisions provide a classic illustration of exactly how
decisions involving Islam should not be made. Although it is not directly a political
party case, as Leyla Sahin judgement will give useful insight to understand more
clearly its Refah judgement as well, it will be wise to examine it here.

In Leyla Sahin case the applicant was a student in her fifth year at the Cerrahpasa
Faculty of Medicine at Istanbul University. She had to give up her studies when a
circular was issued by the vice-chancellor of the university banning the wearing of the
Islamic headscarf on university premises. The applicant submitted that the ban on
headscarves in institutions of higher education constituted an unjustified interference
with her right to freedom of religion, in particular her right to manifest her religion.
She also argued that it was a violation of her right to education, as guaranteed by
Article 2 of Protocol No.1. In this case the Court again found no breach of the

573 see Moe, C. "Refah Revisited: Strasbourg's Construction of Islam"; Advance draft for circulation at
the Conference of Experts "Emerging Legal Issues for Islam in Europe Central European University,
Budapest, Hungary, 3-4 June 2005 available at: www.strasbourgconference.org/papers accessed on
21/11/2006

574 The banning of the headscarf in Turkey is a problem which has led to human rights breaches for
thousands of young women. The Turkish government has sporadically enforced a ban on headscarves
for students and teachers in universities since the 1980s. However, in 1997, implementation of the ban
intensified when the Turkish Army compelled the government to implement it without exception. Since
that time, women who wear the headscarf are barred from state employment, taking up elected posts in
parliament, appearing as lawyers in court, working as teachers in private schools and universities and,
in some cases, even from venturing onto state property. Thousands of women are now barred from
higher education in Turkey each year because of the headscarf ban. Women wearing the headscarf are
not permitted to register as university students, enter university campuses or enter examination rooms.
Those observed wearing the headscarf in class are warned about their behaviour, and if they persist in
wearing it are suspended or expelled. See Human Rights Watch report on Ban on Headscarf in Turkey,
applicants’ rights. The Strasbourg Court relied exclusively on the reasons cited by the national authorities and courts. In general and abstract terms, the two main arguments were: secularism and equality. The Court easily accepted that wearing the headscarf at University was not compatible with the principle of secularism. Secondly, that it was related to fundamentalist religious movements which exert pressure on students who did not practise their religion or who belonged to another religion. Therefore, the Court, found no reason to depart from the chamber’s reasoning, and decided that the interference was justified for the protection of the “rights and freedoms of others” and the “maintenance of public order.” In her dissenting opinion in this case Judge Tulkens, rightly stated that the Court gives a wide margin of appreciation on the ground that there is no European consensus on the issue; whereas the Court’s own comparative law assessment section of the judgement reveals that in none of the Member States has the ban on wearing religious symbols extended to university education. She also stated that, other than in connection with Turkey’s specific historical background, the European supervision that must accompany the margin of appreciation seems quite simply to be absent from the judgement.

In Leyla Sahin v. Turkey it seems that mere worries or fears were the grounds of justification for the interference, but not indisputable facts and reasons whose legitimacy is beyond doubt. To enlarge: firstly, the judgement does not address the applicant’s argument – which the Government did not dispute – that she had no intention of calling the principle of secularism, a principle with which she agreed, into doubt. Secondly, there is no evidence to show that the applicant, through her attitude, conduct or actions, contravened that principle. The government could not provide any

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576 ibid paras. 111, 114
577 ibid para.115
evidence that the headscarf the applicant wore as a religious symbol had been ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytize or to spread propaganda and undermine – or be liable to undermine – the convictions of others. Another problem of the judgement is the association made with fundamentalism. The mere wearing of the headscarf cannot be associated with fundamentalism. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest in this case, that the applicant held fundamentalist views. Therefore, although everyone probably agrees on the need to prevent radical Islam, the applicant’s personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest defence of fighting extremism. It should be borne in mind that the most obvious effect of the Leyla Sahin ruling is to effectively preclude an entire class of women from pursuing higher education in Turkey which is a situation that can not be accepted in terms Human Rights. Because, women are being forced to decide whether to obtain a higher education and deny their religious duties, or to forego an education in the name of their religion. The European Court of Human Right’s decision in Sahin appears to be rendering Article 9 more and more futile since the reasoning of the court essentially gave complete deference to the decision of national courts, in the name of the margin of appreciation doctrine, as well as stating that each nation is in the best position to make these kinds of considerations. However, it is difficult, then, to ascertain what role the European Court of Human Rights actually plays at all when it comes to Article 9. Obviously, these limitations that are keeping Muslims from peacefully and passively expressing their beliefs in a public sphere

578 See ibid, dissenting opinion of Judge Tulkens
579 ibid, see also Tumay, M., “Muhalefet serhi gerekceleri AIHM kararını curutuyor” in Yeni Asya (daily), 22.11.2005
surely constitute a violation of human rights.\textsuperscript{581} It is well known that the headscarf ban enjoys neither popular support nor democratic legislative legitimacy in Turkey. The Strasbourg Court ignored the fact that the headscarf laws of 1981-82 were actually imposed by a military junta that had come to power through a \textit{coup d'état} in 1980 and that repeated attempts by democratically elected governments to reverse the ban were prevented by the military and also the ban was intensified in 1997 in \textit{28 February process} which was a post-modern military intervention.\textsuperscript{582} One scholar argues that The \textit{Sahin} case illustrates how institutions with important responsibilities can misunderstand the complicated issues surrounding Islam in Europe and that, unfortunately, the judgment also serves as a warning of how failing to analyze the issues objectively and openly can result in the suppression of human rights by an institution that was created to protect them.\textsuperscript{583} When examined together with \textit{Refah Partisi} case The \textit{Leyla Sahin} Judgment gives rise to worries about the Strasbourg Court's ability to deal competently with Islam and Muslims, and about its readiness to deal with Islam and Muslims on an equal footing with other religious groups under its jurisdiction.\textsuperscript{584} Apart from \textit{Leyla Sahin} case, the headscarf issue played a role also in the \textit{Refah} case which dealt with the ban of the major political party in Turkey. Because, one of the reasons of dissolution was that representatives of the \textit{Refah} party had argued for allowing women to wear head scarves when entering public institutions like schools and universities or in other ways taking part in public life. In

\textsuperscript{582} for the democratically elected governments attempts to reverse the ban and an enhanced critic of \textit{Sahin} judgment see Gunn, J., "Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights" available at www.strasbourgconference.org/papers accessed on 21.11.2006
\textsuperscript{583} ibid, Gunn, J., "Fearful…
\textsuperscript{584} ibid and also see Moe, C. "Refah Revisited: Strasbourg’s Construction of Islam"; Advance draft for circulation at the Conference of Experts "Emerging Legal Issues for Islam in Europe Central European
these cases a wide “margin of appreciation” was emphasized by the Court, and the ban on respectively head scarves and a political party was accepted. However, it is obvious that a wide margin of appreciation is problematic in matters where the individual freedom of conscience is at stake. Therefore, it is possible to say that the Strasbourg Court’s handling of the case of Leyla Şahin v. Turkey has done nothing to show Muslims that their trust in the European Human Rights Regime is well founded – quite the contrary – and that is deplorable, both morally and with a view to the political future of Europe.585

The Venice Commission Guidelines on the Prohibition and Dissolution of Political Parties

Here, it will be useful to mention the Guidelines on the Prohibition and Dissolution of Political Parties prepared by the Venice Commission. The Venice Commission is the better known name of The European Commission for Democracy through Law. It is the Council of Europe’s advisory body on constitutional matters. It was established in 1990 and was initially conceived of as a tool for emergency constitutional engineering. The commission has become an internationally recognised independent legal think-tank. It contributes to the dissemination of the European constitutional heritage, based on the continent’s fundamental legal values, while continuing to provide “constitutional first-aid” to individual states. The Venice Commission also plays a unique and unrivalled role in crisis management and conflict prevention through constitution building and advice.586 The Guidelines on the Prohibition and

586 see these guidelines in Appendix 1, and for more information about Venice Commission see
Dissolution of Political Parties were adopted by the Venice Commission at its 41\textsuperscript{st} plenary session on 10-11\textsuperscript{th} December 1999.\textsuperscript{587}

The Guidelines assert the essential role of political parties in any democracy, considering that freedom of political opinion and freedom of association, including political association, represent fundamental human rights guaranteed by the European Convention on the Protection of Human Rights. These are the primordial elements of any genuine democracy as envisaged by the Statute of the Council of Europe.

**Concluding Remarks**

The history of the political party cases before European Court of Human Rights reveals that the well established western European democracies do not have a political party problem. There were no political party cases before Strasbourg institutions from the 1957 German Communist Party case until the nineteen-nineties. Since Turkey’s acceptance of the Strasbourg Court’s compulsory jurisdiction, and accession of former Communist Eastern European States to the Council of Europe, the Strasbourg Court had started to receive a number of such cases. The author is of the opinion that the main underlying causes which have produced so many political party cases from the countries in question seem to be the political demands of minorities and the place of the state-religion relationship. The Strasbourg Court has been very liberal, therefore, and contributed hugely in its case law to the understanding and implementation of universal human rights in the countries in question; with the exception of the *Refah Partisi* case.

\[http://venice.coe.int/site/main/presentation_E.asp\] visited on 20 April 2005


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To date there have been seven political party dissolution cases concerning Turkey before the Strasbourg Court. In the first six, the reasoning in each case was very similar. The original action for dissolution was brought principally because each party advocated in its programme a peaceful settlement to the Kurdish problem in Turkey and proposed a federal state comprised of a Kurdish and a Turkish nation. The Strasbourg Court held that this alone could not justify a ban, although states could take measures to protect their institutions, a political party should not be excluded from the protection afforded by the Convention simply because its activities are regarded by national authorities as undermining the constitutional structures of the state. However, in contrast to these cases, in Refah Partisi (Welfare Party v Turkey) the Court upheld the decision of the Turkish Constitutional Court to ban an Islamist party. This itself is remarkable as unlike the other six cases, the Welfare Party was not a new fringe party rather the largest single party in Turkey at the time of its dissolution. Although it will be analysed in more detail in the following chapter, the basic reason for the Court’s challenging decision in Refah Partisi is the uncritical acceptance and reliance upon the Turkish Constitutional Court’s reasons for dissolving the party without a detailed European supervision. Other factors which played an important role were the misconception that Islam is incompatible with democracy and negative political atmosphere after September 11.

It is a pity on the other hand that neither the Turkish Constitutional Court nor the Strasbourg organs referred to the Venice Commission’s guidelines on the prohibition and dissolution of political parties. There are two main differences between the Venice Commission Guidelines and the principles established by the Strasbourg Court judgements. Although the Venice guidelines provide that prohibition or enforced dissolution of political parties may only be justified in the case of parties which
advocate the use of violence, or use violence as a political means to overthrow the
democratic constitutional order, the Strasbourg Court, in addition to this, provides that
political parties which have known or secret aims that are not compatible with
democracy, could also be dissolved. However, the guidelines provide that a political
party as a whole cannot be held responsible for the individual behaviour of its
members where this is not authorised by the party within the framework of party
activities. The Court finds, however, that the party is responsible especially for its
leaders' speeches and behaviour.

Bearing in mind that, Turkey is realising a huge democratisation reform programme
under the European Union accession process, particularly which peaked during the
government of Development and Justice Party (Ak Party) under the leadership of
Refa's ex- Istanbul Mayor Recep Tayyip Erdogan since November 2002, it will in
future be much more difficult to ban political parties, such a measure being – it is to
be hoped – exceptional and used with the utmost restraint.
CHAPTER 7

ANALYSING THE NATIONAL AND INTERNATIONAL APPROACHES TO POLITICAL PARTIES

Introduction

The Judgements of the Turkish Constitutional Court and European Court of Human Rights on the dissolution of political parties have been examined in detail in the previous two chapters. In this chapter, I will analyse both entities’ approaches to the dissolution of political parties in a critical way. The aim here is to underline similarities and differences between the reasoning of both the national and international courts. The focus of this chapter is to determine the underlying policies and principles of both legal orders’ reasoning.

Arslan argues that there are two conflicting legal paradigms applied by the legal tribunals with respect to political rights. One of them is the liberal paradigm characterised by the ‘rights-based’ approach to basic rights and constitutional principles. The other one is the authoritarian paradigm, which rests on the ‘ideology-based’ approach to basic rights and constitutional principles. The distinction between these approaches is that, while the liberal paradigm gives priority to individuals and their rights vis-à-vis every kind of social and political association, the ideology-based paradigm favours the state and society over the individual, resulting in a narrow interpretation of fundamental rights.

The Influences on the Judges’ Decisions

It is believed that when embarking on constitutional interpretation in a case, judges are affected by various social, political and personal factors. According to Aristotle, in deciding their cases judges, who are affected by their affection, hate and personal interests may not find the truth of the matter in hand, thus their verdicts are hidden by their joy and pities. Interpretation is a multisided phenomenon. The interpreter’s moral understanding, the values that the interpreted text is based on and the social and political environment in which the interpretation is made, are all factors which affect the interpretation. Constitutions prioritise some values and there is not always a compromise about those values. Therefore the constitutional judges inevitably impose certain values. However, it is disputable whether those values are the ones set up in the constitution, or whether they are the values of the judges themselves. The important conclusion here though is that all constitutional interpretations are somehow based on some values. The decisions in constitutional cases reflect the judges’ understanding and explanation of constitutional values set up in the constitution. While interpreting the constitution judges use their paradigm which reflects their social and political opinions. As one author puts it, “one’s political choices determine one’s constitutional interpretation.” Another author explains the political perspective as a limitless horizon of all readings and understandings. In conclusion, the attitudes of judges towards constitutional disputes reflect their

591 ibid, p.862
political opinions. Dworkin is of the view that “constitutional politics has been confused and corrupted by the pretence that judges could use politically neutral strategies of constitutional interpretation.” Here the structural and personal limitations of constitutional judges are explained in the light of the legal paradigm concept. According to the Habermas, the legal paradigm reflects the opinions of the law society about implementation of the rights system and the constitutional principles. The main components of the legal paradigm are the values of the text to be interpreted, the social and political atmosphere in which the interpretation takes place and the interpreter’s fundamental preferences.

There is no doubt that the main cases that are affected by the legal paradigm are the political cases. The political cases may be seen as a political regime’s attempts to control its opponents by lawful procedures. The aim of the regime is to eliminate, or at least to humiliate, a political opposition that does not accept the official paradigm’s framework. The distinguishable characteristic of political cases is the perception of threat to the established political order. And it is not crucial whether the threat is a real one or not. The governing elite want to eliminate the political movement that it sees as a threat. There are two main aims in eliminating the opposition with a lawful procedure:

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To make the people believe that -as it has been done within the law- eliminating the threat is legitimate.

To damage –if it cannot eliminate- the legitimacy of the convicted political movement or person.⁶⁰²

Where political rights are at issue, we can say that there exist two conflicting legal paradigms. The previous examination of decisions of Turkish Constitutional Court and the Strasbourg Court regarding political party cases in chapters 5 and 6 and Strasbourg’s Leyla Sahin case reveals that both national and international judges are no exception who were affected by somehow their ideological stands and other social, political and personal factors, national and global political conjuncture.

**The Legal Approach of the Turkish Constitutional Court**

The role and legitimacy of constitutional review and constitutional courts have been debated by academics for a long time.⁶⁰³ With the achievements that we have today, on the other hand, human rights together with national will are being defined as components of democracy. So, protecting human rights is a condition of a constitutional court’s legitimacy. To put it another way, the constitutional courts are institutional tools to protect fundamental rights and freedoms against possible

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breaches of political authority.\textsuperscript{604} The Courts’ protective duty is derived from the “rights-based” approach. According to this approach, the judges should base their decisions on political principles that aim to protect the political rights of individuals.\textsuperscript{605} The Turkish Constitutional Court has explained, in a number of its judgements that the reason for its existence is to protect the fundamental rights and freedoms of individuals against possible threats from the legislator.\textsuperscript{606} However, especially in the political party cases, we can obviously see that it has used the “ideology based” paradigm, not the “rights-based” paradigm. As one author rightly claims, in the Turkish constitutional system, the constitutional judge is first of all a judge of constitutional ideology.\textsuperscript{607} Therefore for the Turkish Constitutional Court the protection of fundamental rights and freedoms is possible only on the condition that they are not in conflict with constitutional ideology. On the other hand, we should bear in mind that it is not clear enough what the Turkish constitutional ideology is or how it should be interpreted.

The Legal Approach of the European Court of Human Rights

Early Turkish Political Party Cases

The approach taken by Strasbourg Court has been twofold. In the early Turkish political party cases the European Court of Human Rights based its decisions on the pro-individual and liberty “rights-based” legal paradigm. In several cases involving


\textsuperscript{606} Anayasa Mahkemesi Kararlar Dregisi, AMKD c.22 p.365, for more detailed analysis of the Turkish Constitutional Court’s political party cases see ch.5, pp.194-199
the dissolution of political parties in Turkey, the Strasbourg Court has explored the extent to which a state can infringe civil and political rights in an effort to safeguard constitutional democracy. Until its most recent decision in Refah Partisi case, the Court had not been prepared to hold that the state is entitled to act in a militant manner and ban a political party in the name of democracy. However, in Refah Partisi case it surprisingly changed its established opinion and went in another direction. It went back to the approach that had been taken in the 1957 case of German Communist Party. In the early Turkish cases Strasbourg saw the dissolution of a political party as a last resort that could be employed only in very limited and exceptional situations.

As these cases have been broadly examined in the previous chapter, here only the general principles of the Strasbourg decisions will be dealt with and analysed. First of all, Strasbourg did not accept the Turkish Government’s objection that Article 11 of the Convention could not be employed for the protection of political parties. The Court made it clear that political parties are inevitable components in the proper functioning of democracy. Looking at the role of democracy in the Convention’s system there is no doubt that political parties are within the scope of Article 11. Therefore, dissolution of political parties will affect the freedom to organise and thereby negatively affect democracy in the subject state.

609 United Communist Party of Turkey and others v. Turkey, (1998) 26 EHRR 121, paras.25-31

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Secondly the restrictions set up in the second paragraphs of Article 11 should be interpreted narrowly. The restrictions upon political parties’ right to organise freely can only be legitimate where there are real and coercive reasons.\footnote{United Communist Party of Turkey and others v. Turkey, (1998) 26 EHRR 121, para 46, Socialist Party v. Turkey, (1999) 27 EHRR 51, para.50; Ozdep para.44}

Thirdly, when considering the matter, the European Court of Human Rights assesses the Article 11 right to freedom of assembly and association together with the Article 10 right to freedom of expression. In the political parties’ cases Strasbourg accommodated the principles regarding freedom of expression that was set up in the \textit{Handyside} case. Therefore, it states that freedom of expression protects not only innocuous expression but also that which disturbs or even shocks parts of society or the state.\footnote{United Communist Party of Turkey and others v. Turkey, (1998) 26 EHRR 121, paras. 42-43, Socialist Party v. Turkey, (1999) 27 EHRR 51, para 41, The Freedom and Democracy Party (OZDEP) v. Turkey, (2001), Judgement of 8 December 1999, 31 EHRR 27, para. 37}

Lastly, the European court of Human Rights emphasised the pluralist characteristic of democracy. The key concept of which is dialogue. One of the fundamental features of democracy is to solve a country’s problems with public debate (where that does not incite or include violence), even if the problems are disturbing.\footnote{United Communist Party of Turkey and others v. Turkey, (1998) 26 EHRR 121, para 57}

The Court made it very clear that the programme and projects of political parties that were not in conformity with the existing Turkish state structure and its principles could not be held on that ground alone to be contrary to democracy. Allowing the argument and debate of different political programs does not damage democracy itself but is at the core of democracy, even where those arguments criticise the existing state
structure. Here the Strasbourg Court clearly criticises the intention of the Constitutional Court to impose the constitutional ideology on the programmes of political parties.

In conclusion, the European Court of Human Rights in these early political party judgements accepted that only those political parties which adopt violence and terrorism should be kept out of political life. The legal approach that the Court used in the judgements is a "rights-based" legal paradigm which favours the individual against the state.

The Approach in the Refah Partisi Case

In the Refah Partisi case the European Court of Human Rights surprisingly took a different approach from the previous Turkish political party cases. Although it used the "rights-based" approach, which is pro-liberty and pro-individual in its previous political party cases, it based its decision in Refah Partisi on an "ideology-based" paradigm. The Strasbourg Court too casually accepted and relied upon, the reasoning of the Turkish Constitutional Court, without conducting -as it had in previous cases- a detailed European supervision. The Turkish constitutional court abolished the Refah Partisi for the reason that it was a centre of anti-secular activities. Secularism is not a restriction ground set up in the Convention, but the Strasbourg Court pointed out the importance of the secularism principle in the Turkish democratic system. The Court accepted that the dissolution of the party was aimed at protecting national security, public order and the prevention of crime, and the freedoms and rights of others. Here

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we can see that, from the beginning, the European Court of human Rights was accepting the Turkish Constitutional Court’s ideology and a logic that interpreted the freedoms so narrowly. It is obvious from previous judgements however, that even organisations that have anti-secularist ideas should be under the protection of Article 11.

The Court here tried to formulate the necessities of a democracy in relation to secularism. It accepted, without criticism that the conduct of laicism in Turkey is in conformity with human rights and the rule of law. However, the Strasbourg Court should not so uncritically have accepted Turkish laicism as democratic and it should have looked into its compatibility with European standards.

The Strasbourg Court creates two limitations to political parties’ actions.

a) The methods that a political party uses should be democratic and lawful.

b) The changes which that party suggests should be compatible with democracy.

The Court also states that not only projects that aim to destroy democracy but also projects that are not compatible with one or more of the principles of democracy are not guaranteed by the Convention. The problem remains that it does not explain what these principles are.

Another problem is that the Strasbourg Court alleges that political parties could have secret aims. There is a danger in accusing a party of having aims that they have not declared officially in their programmes and activities. One can imply that the Court, in such an instance, is not basing its decision on proven truths but on suspicion, which is not compatible with the rule of law.\textsuperscript{614}
In the *Refah* decision there is a problem of the proportionality of the degree of the restriction with the aim that was sought. The Court had already ruled in its previous judgements that dissolution of a political party is a very radical and drastic measure, which should be applied as a last resort. It is a contradiction for Strasbourg to see this measure as very drastic and then to decide that the dissolution of Refah Partisi was not a breach of the Convention. The remarks of some members of Refah could be seen as unacceptable, but then the measure taken should have been to penalise those members, not the whole party. It could be argued that there was no pressing social need for the dissolution of Refah. Onis argues that Refah Partisi believed in parliamentary democracy and it was aiming to realise its project within the democratic system. The solution should have been to integrate it into the system and make it more moderate and pluralistic. The dissolution of the party was a wrong decision.\(^{615}\) Alpay on the other hand states that the dissolution of Refah was arranged by the state establishment with 28 February\(^{616}\) era rather than being a legal issue.\(^{617}\)

**Islam and Democracy**

One of the problems with decision in *Refah* seems to be the Strasbourg Court's misapprehension that Islam is not compatible with democracy. European Court of Human Rights seems to be uncritically endorsing problematic factual assumptions about sharia rules and about principles such as secularism and democracy made by the Turkish Constitutional Court at face value, as a thorough analysis will indicate that

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\(^{616}\) For more on 28 February process see pp.187-189

\(^{617}\) 28 February era was an indirect intervention by the military which took place in 1997. The National Security Council was used in order to close down the Welfare Party, whose leader, Erbakan was then Prime Minister. He was forced to resign and by 1998, the Constitutional Court had closed down his
this amounts to bias and prejudice. The Strasbourg Court does not sufficiently distinguish Islamism, which is a recent social and political phenomenon, from Islamic law, or sharia, which is comprised of the enormous and complex literature of jurisprudence assembled over the centuries by Islam’s great jurists. However, in order to understand the Islamic law’s positioning as regards to democracy, it might be useful to discuss the matter in some detail, as in the following section.

The answer by most observers of question as to why pluralism, liberalism and democracy have been relatively weak in Islamic World seems is mistakenly directed to Muslim culture and more particularly Islam. This can directly be inferred from Strasbourg decision, which made explicit determinations that support for a regime based on sharia was incompatible with respect for democracy and human rights. Although it might be accurate to say that, according to some interpretations of Islamic requirements, individual rules of sharia law become incompatible with democracy, it would be grossly misleading to put forth the generalization that “the rules of sharia” are incompatible with democracy, as if all elements of the vast corpus of sharia law were inherently against democracy. There is considerable variation in the interpretations of religious law advanced by Muslim scholars and theologians. However, among these are expressions of support for democracy which insist that openness, tolerance and progressive innovation are well represented among traditions associated with the religion, and thus democracy is entirely compatible with Islam.


619 Tessler, M., “Islam and Democracy in the Middle East: The Impact of Religious Orientations on Attitudes toward Democracy in Four Arab Countries” (April 2002) 34 Comparative Politics, see also,
Therefore, the Strasbourg Court's argument that Islam is incompatible with democracy was unnecessary at a sensitive time. It seems that the Court was affected by prevailing opinion in the western world in such politically difficult times, which inclines toward the view that Islam is not compatible with the requirements of modernity and democracy. However, this essentially depends upon interpretation and attitude. Islam might seem uncompromising with either liberalism or civil society thus democracy, especially when we look at social, cultural and political structure in Muslim countries. However, this may be misleading as the acts of Muslim states that have done so much to discredit Islam do not necessarily prove that Islam itself is responsible for the failure of democracy, civil society and rule of law in these countries.  

Even though the shari'a is comprehensive and has an untouchable and immutable core, i.e. the ontological and epistemological sources of Islam, that has been decisively defined by God's word, but at the same time it is flexible and therefore suited to all times and places as there are flexible elements derived by human reason from this core, following the rules of Islamic jurisprudence. Therefore, interpretations of Islam vary according to changing times, places and sects, whether Sunni or Shia.

The Islamic legal theory (fiqh) distinguishes between the ibadat which involves the person's relation with his or her creator particularly the five pillars of Islam -the profession of faith, prayer, fasting, almsgiving and pilgrimage and the mu'amalat that

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covers all other aspects of daily life in terms of economic, political and family life. Although the *ibadat* are eternal and immutable, the *mu'amalat* on the other hand can be adapted to the changing requirements of time and locality as far as the results conform to the word and spirit of the shari'a.\(^{622}\) This is particularly facilitated by *ijtihad*, or independent reasoning based on maqasad ul-Sharia (objective of the Sharia), which is defined as 'human well-being'. The development of *fiqh* throughout the history is an indication of this.

Although there are unprogressive Muslim scholars who have difficulty in finding the compatibility of Democracy and Islam, it is important to realise on the other hand that there have been interpretations favourable to democracy in Islamic scholarship. In general, moderate and pragmatist Islamists and Muslim writers have been remarkably flexible with respect to modes of political organisation that provides for institutionalised checks on the ruler in the form of a separation of powers, parliamentary rule and even multiple parties.\(^{623}\) Muslim Democrats view political life with a pragmatic eye, as they reject or at least mark down the classic Islamist claim that Islam commands the pursuit of a *shari'a* state, and their main goal tends to be the more mundane one of crafting viable electoral platforms and stable governing coalitions to serve individual and collective interests —Islamic as well as secular—within a democratic arena whose bounds they respect, win or lose.\(^{624}\)

There are two main different schools of Islamic interpretations in terms of political structure of the State: *Sunni Islam* and *Shia Islam*. The essential distinction between them is *Shia's* concept of the *Imamate* and its restriction to the *Alids*, the House of Ali

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\(^{622}\) see Kramer, G., “Islamist Notions of Democracy” supra

\(^{623}\) ibid
-the cousin and son in law of Prophet Muhammad-. Shia school claims their Imams, being the descendants of Muhammad through his daughter Fatima, to be the true successors of the Prophet and Ali is held to be the only genuine successor of Muhammad.\textsuperscript{625} Shia are those who especially follow Ali and maintain his leadership and succession of the Prophet by his appointment (nass) and testimony publicly or privately, and also believe that Ali’s authority never goes out of his descendants.\textsuperscript{626} According to shia, the Imams are considered to be the successors of the Prophet and the rightful recipients of his authority. This is not because they are from his family; rather, it is because they are pious, obedient to Allah and personify characteristics that are pre-requisite for this level of religious-political leadership. Thus, they are not appointed by any popular consensus; Imamate is instituted by divine installation (nasb); only Allah truly knows who possesses the qualities required to fulfil this duty, therefore only He is capable of appointing them.\textsuperscript{627} Within the framework of the traditional Shi’a doctrine of Imamat, the political doctrine of “Wilayat al-Faqih” reconciles the authority of religion and the authority of the people. The doctrine creates the authority of a just and capable Mujtahid (jurist) as a legal system of political guardianship. The wilayat al-faqih (guardianship of the scholars) is a religious model of government which relies upon a just and capable jurist (faqih) to assume the leadership of the government in the absence of an infallible Imam.\textsuperscript{628} For Imamism the problem of leadership is not the question of people’s elections.\textsuperscript{629} Today only Iran which is predominantly shia has such an political structure. The ‘Wilayat al Fakih’ doctrine as requirement of Imamat is realised with the establishment of

\textsuperscript{625} MacRuaidh, A., “The Compilation of the Text of the Qur’an and the Sunni-Shia Dispute” available at http://debate.org.uk/topics/theo/dispute.htm, accessed on 10.01.2007
\textsuperscript{626} Vaezi, A., Shia Political Thought (Islamic Centre of England: 2004), p.54
\textsuperscript{627} ibid, pp.55-56
\textsuperscript{628} ibid, p.53
\textsuperscript{629} ibid, p.53
“Guardians Council”. Guardians Council could determine a law’s compatibility with Islam and had the power to dismiss the Supreme Leader. Guardians Council has also the constitutional power of “approbatory supervision” (nizarat-e estisvabi) over elections with the right of approving the credentials of candidates to make sure that only candidates who meet its standards actually serve in public office. Therefore, this supervisory power, which gives six clerics extensive power over Iranian elections, is one of the main obstacles to the development of a true democracy in Iran.630

In sunni school, on the other hand, there is an agreement that the truly Islamic system do not require any particular political order. The state, in an Islamic setting, cannot even be termed Islamic, specifically because the Quran contains no reference to an Islamic state with a particular kind of structure or ideology. Accordingly, ‘in the absence of a definition of the nature of the state in either the Quran or the Hadith, it is not only possible but essential for Muslims to evolve appropriate forms of government, keeping in view the social, economic and political imperatives of the time’ in line with human well-being as required by maqasid a;-Sharia.631 The important thing is the purpose of the state which should rest on some principles found in Qur’an and sunna.632 These principles are; Justice (‘adl), mutual consultation (shura), equality and freedom. Ghannouchi, being one of the prominent Muslim thinker and political activist, advocates an Islamic system that features free elections, equality of all secular and religious parties, a free press, majority rule, protection of minorities, and full women’s rights in everything from polling booths, dress codes, and divorce courts to the top job at the presidential palace. Islam’s role, thus, is to

629 ibid, p.100
630 Samii, A. W., “Iran’s Guardians Council as an Obstacle to Democracy,” (Autumn 2001) 55 Middle East Journal 4,
632 sunna means the words and acts of prophet Muhammad.
provide the system with moral values.\footnote{See Tamimi, A., \textit{Rachid Ghannouchi A Democrat within Islamism}, (Oxford, N.York: Oxford Unv.Press, 2001)} According to Abdul Karim Soroush, therefore, there is no contradiction between Islam and the freedoms inherent in democracy. Islam and democracy are not only compatible, their association is inevitable. In a Muslim society, one without the other is not perfect. Soroush argues that the will and beliefs of the majority must shape the ideal Islamic state. Islam itself is evolving as a religion, which leaves it open to reinterpretation: holy texts do not change, but interpretation of them is always in change because of the age and the changing conditions in which believers live. Furthermore, he states that everyone is entitled to his or her own understanding. No one group of people, including the clergy, has the exclusive right to interpret or reinterpret tenets of the faith. Some understanding may be more learned than others, but no version is automatically more authoritative than another.\footnote{See Sadri, A., and Sadri, M. (eds.), \textit{Reason, freedom and democracy in Islam essential writings of Abdolkarim Soroush}, (Oxford, N.York: Oxford Unv.Press, 2000)} This, thus, helps to overcome the imposing or totalitarian political attitudes.

On a more policy oriented positioning, Esposito and Voll are of the view that democratisation and Islam are “contradictory and competitive only if ‘democracy’ is defined in a highly restrictive way and is viewed as possible only if specific Western European or American institutions are adopted, and if important Islamic principles are defined in a rigid and traditional manner.”\footnote{Esposito, J.L., Voll, J.O., \textit{Islam and Democracy}, (New York, Oxford: OUP: 1996), p.21} In this framework, an open dialogue between moderate Muslim scholars with unprogressive scholars in streamlining the
tenets of Islam will be beneficial to take into account modern democratic values without abandoning the fundamentals of Islam itself.  

There are a number of very important concepts that could be regarded as foundations for an Islamic concept of democracy. There are three core concepts in Islam, that is, Tawheed (oneness of God), Risalat (Prophethood) and Khalifat (Caliphate), of which two may be interpreted in order to allow democracy within the shape of Islamic doctrine. The conceptualisation of these concepts provides indeed an “important basis for understanding the conceptual foundations for democratisation in the Muslim world.”  

Tawheed implies that all political legitimacy comes from God and therefore in Islam popular sovereignty is dismissed in favour of divine sovereignty. All people are created equal and no one has the right to impose his or her will on others. The Islamic law binds not only believers but also the rulers. The sovereignty ends in God which means that there can be no absolute sovereign—be it a person or a group of persons. Therefore, the absolute sovereignty of God makes any human hierarchy impossible, because before God all humans are equal, as essentialised by the concept of Tawhid or unity. In this account, since governing authority in Islam rests upon the will of people the executive ruler is supposed to be chosen by the community. It is also noteworthy that the Islamic conception of politics takes the accountability of governors to the people most seriously. The second concept related to the Muslim understanding of democracy is Khalifat, which means “representation.” In relation to this idea, Mawdudi emphasises that “the real position and place of man, according

636 Abootalebi, A.R., “Islam, Islamists, and Democracy” (1999) 3 Middle East Review of International Affairs 1
637 ibid, p.23
to Islam, is that of the representative of God on this earth, His vicegerent; that is to say ...he is required to exercise divine authority in this world within the limits prescribed by God.\textsuperscript{641} He concludes that every person in an Islamic society enjoys the rights and powers of the caliphate of God and in this respect all individuals, as already stated, are equal. Thus, while tawhid necessitates the vertical equality in terms of people’s positioning with God, Khalifah requires horizontal equality, namely the equality of the individuals.

It is important to state that the micro institutions of Islam form the basis for Islamic democracy, which is seen as affirming long-standing Islamic concepts of consultation \textit{(shurah)}, consensus \textit{(ijma)} and independent interpretative judgement \textit{(ijtihad)}.\textsuperscript{642} The Qur'an asserts certain norms to reflect the will of people in political and administrative affairs. \textit{Shura} (consultation) is one of those micro institutions, which should play a central role in governing people. Since they are representative agents of God, the Qur'an commands Muslims to make decisions after consultation, so, the people should be consulted by the ruler as a matter of respect. Incidentally, \textit{shura} represents a general right for people, carrying a progressive potential in any discussion on Islam and democracy.\textsuperscript{643}

Likewise \textit{ijma} (consensus), particularly in the development of Islamic law, has been an important concept. Although it has been mostly used to signify consensus among ulama (Islamic scholars) rather than among the general community, the concept of

\textsuperscript{641} Esposito and Voll, quoting Mawdudi, The Islamic way of life, ibid p.26
\textsuperscript{642} ibid p.27
\textsuperscript{643} Kanra, B., “Democracy, Islam and Dialogue: The case of Turkey” (Autumn 2005) 40 Government and Opposition 4
ijma can be directed towards the establishment of a legitimate order.  Especially among Sunni Muslims, *ijma* (consensus) has long been accepted as a formal validating concept in Islamic law and the concept played a fundamental role in the development of Islamic law and contributed considerably to the corpus of law or legal interpretation. The *ijma* or the consensus principle has great possibilities of developing the Islamic law and adapting it to changing circumstances. Therefore, consensus and consultation were frequently seen as the effective basis for Islamic democracy operating in modern times.

The third operational concept of *ijtihad* means exercise of informed and independent judgment. This concept is the key to the implementation of God's will in any given time or place, since, in Ahmed's words, "God has revealed only broad principles and has endowed man with the freedom to apply them in every age in the way suited to the spirit and conditions of that age. It is through the *Ijtihad* that people of every age try to implement and apply divine guidance to the problems of their times." The implication or the advocacy of *Ijtihad* can be a call for radical reform in Muslim world. Since the principles of Islam are dynamic, it is peoples' approach which has become static. *Ijtihad* can initiate fundamental rethinking to open avenues of exploration, innovation and creativity in the way of human well-being (maqasid ul Sharia). According to Iqbal, the only form *Ijma* can take in modern times is the transfer of the power of *ijtihad* from individual representatives of schools to a Muslim legislative assembly, which will secure contributions to legal discussion from laymen

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644 ibid
646 Esposito, J.L., Voll, J.O., *Islam and Democracy*, supra, p.28
648 see Esposito, *Islam and Democracy*, supra, p.29
who happen to possess a keen insight into affairs. On the implications of this concept for representative government, Iqbal clearly states that the republican form of government is thoroughly consistent with the spirit of Islam and further becomes a necessity in view of the new forces that are set free in the world of Islam. On the place of pluralism in Islam, there is general recognition as a result of a verse in Qur'an that God created people to be different, to meet and know each other, therefore, differences of opinion are natural, legitimate even beneficial to human kind and Muslim community. Quranic views of political matters are open to interpretation and have suggested that Islamic scripture, *sunna* (the words and actions of the prophet Mohammed), and *hadith* (narrations about the prophet and what he approved) may be able to serve as a “blueprint” for the construction of democracy.

The Islamic concepts of *shura* (consultation), *ijma* (consensus), and *ijtihad* (informed, independent judgment) seem to be compatible with democratic concepts and ideals. Furthermore, the democratic ideals of freedom of speech and diversity of thought appear to be upheld by the following words of the Prophet Mohammed: “Differences of opinion within my community is a sign of God’s mercy”. Islam also stresses racial equality and religious tolerance. The latter notion is exemplified by the Qur’anic verse “Let there be no compulsion in religion,” as well as examples from the life of Mohammed.

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650 ibid

651 see Kramer, G., “Islamist Notions of Democracy” supra


In short, the Quran, sunna, and hadith are open to interpretation; rather than serving solely as the basis of authoritarian and fundamentalist dogma, they may be able to act as the foundation for the development of Islamic democracy. Indeed the first Islamic State established by Prophet of Islam was based on a social contract called the Medina Constitution. This State of Medina was a multi-religious and multi-cultural federation in which Prophet Muhammad ruled by the consent of those whom he governed through the process of shura (consultation) and ijma (consensus). According to the Medina Constitution, Muslims and non-Muslims were equal citizens of Islamic State with identical rights and duties. Different religious communities enjoyed religions autonomy. By establishing a pluralistic state, Medina Constitution promised equal security and equality to all. Equality, consensual governance and pluralism were three pillars of this constitution. Therefore, Prophet Muhammad’s constitutional precedent shows that Islam is not a barrier, on the contrary, it can actually serve as a facilitator and an inspiration for democracy.

It should be noted that recent developments in further democratisation in Turkey under the AK Party, emerged from Refah tradition, indicates the compatibility of even soft-Islamism with rich cultural and spiritual trend with democratic norms of governance. In addition, while Malaysia and Indonesian democracies are developing through effective democratic institutions, elections in the Gulf region in particular Bahrain, Qatar and Kuwait alongside UAE and local elections in Saudi Arabia further indicates the compatibility of traditional authoritarian rules in the Muslim world with new democratic institutions.

655 Khan, M., “Prospects for Muslim Democracy: The Role of U.S Policy” (Fall 2003) 10 Middle East Policy 3
Therefore, given the availability of interpretations that Islam is absolutely compatible with democracy, the Strasbourg Court’s judgement and determination of the Islam-democracy relationship is rather confusing. Considering the examinations so far, therefore, indicates that there are reasons to assume that the Strasbourg Court’s perspective is affected by negative stereotypes about Islamism and fundamentalism rather than an objective evaluation of the issue. This may be animating its judgment without the Court acknowledging and perhaps not even realizing that it is factoring such attitudes into its decision.

Some writers incline to ignore a crucial distinction between Islam and Islamism, or Islam as a religion and tradition and Islamist ideology. The fact that, the latter associates with ideological fanaticism and some ideological-Islamic movements tend to uphold violent methods, does not mean that Islamic teaching itself renders a general licence for using violence. Indeed, historically Islam has a strong tradition of toleration and respect for diversity. It is unfortunate, also, that this misconception will not help moderate Muslim populations to integrate into the democratic process.

It is also important to argue that as an international legal instrument, the Strasbourg Court is not sufficiently able to decide about this issue, and as a contested issue this subject area would benefit from discussion by academics specialised in theology, political philosophy, politics and sociologists interested in the problem. It should be borne in mind that, as the Council of Europe, along with the European Union, extends eastwards to incorporate states formerly and perhaps even presently, living under varying traditions of democracy, one may question the appropriateness of absolutist

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categorisation, in considering the compatibility of a state's conduct with the rights and freedom guaranteed by the Convention. This is undoubtedly a substantial problem, when the Court takes a very robust attitude and endorses the taking of pre-emptive action, in the absence of evidence of anti-democratic conduct or conduct infringing the Convention, against a political party exercising power as the fairly and democratically elected government.\textsuperscript{657}

Concluding Remarks

The "rights-based" paradigm aims to recognise differences and accommodate them. So, it does not ask everybody to accept the same truth. However, the "ideology-based" paradigm aims to make everybody adhere to a single truth. This approach easily labels those who assert their difference as being 'other' within the "we-others" contrast. This approach's problem-solving method is not compatible with the idea of democracy because it sees people with a different identity as objects to be controlled. It tries to solve the problem by transforming the object at issue. The Turkish Constitutional Court's attitude in the political party cases, which subscribed to the "ideology-based" paradigm, inevitably brings a danger of the "judicialisation of politics."\textsuperscript{658} The European Court of Human Rights, in its early political party cases, accepted a "rights-based" approach and its liberal judgements contributed to the understanding of a pluralist contemporary democracy. However, its \textit{Refah Partisi} judgement was inconsistent with the principles set up in the previous cases. As explained above, the main reason seems to be its exclusive reliance on the reasoning of the Turkish

\textsuperscript{657} Olborne,B, "Refah Partisi (Welfare Party) v Turkey" case comment in (2003) 4 EHRLR 437, p 443.\textsuperscript{658} The "judicialisation of politics" means the tendency of judges, who are not accountable to voters, to make political decisions. However in a democracy the political decisions should be made by the political organs who will be accountable for their decisions. See William, R.H; Judges and Politics in the Contemporary Age, (London; Bawerdean, 1996), p.2.
Constitutional Court, without a coherent and detailed European supervision. Another reason, in the author's opinion, is the existence of a prejudiced view of the Islam-democracy relationship. Global and national political conjunctures, to a certain extent, have some effect on international and national tribunals' judgments. The real and immediate Communist threat in the nineteen-fifties shaped the Commission's decision in the German Communist Party case. When we come to the nineteen-nineties, as that threat was no longer present the Strasbourg organs were liberal towards political parties with Communist sympathies. However, the September 11 events and misconceptions about Islam seem to have had an effect on the Refah Partisi judgement of the Strasbourg Court. At the Turkish national level, the violent separatist terrorism in south-east Turkey has led the Turkish Constitutional Court to be very strict with pro-Kurdish political parties. The rise of political Islam and eventually Refah's success, since coming into power in 1996, alerted the establishments of the secular state and led to a post-modern indirect interference by the military. This political conjuncture most certainly affected the decision of the Turkish Constitutional Court.
CHAPTER 8

CONCLUSION

The success of a liberal democracy depends on the participation of its citizens. The most accepted and common form of participation is to participate in elections. The political parties are regarded as indispensable elements of liberal democracies. Since Political Parties aggregate public interests and function as communication channels between public and government, one could say that political parties are the most important organisations in liberal democracies, more so than in any other kind of democracy. Political parties could be state machines designed to mobilise and educate the public in some systems. In this framework, the political parties are the only means of representation available to citizens who want to influence the political policy process. Therefore, the existence and performance of political parties are essential for democracy. The examination of the concept of democracy in political theory, particularly liberal democracy, and the findings of the Strasbourg organs in their case law, show that liberal democracy could not be achieved without political parties. Parties are a most important element of democracy. In liberal democracies, founded on basic rights and civil liberties such as the equal right to vote, freedom of expression, and freedom of association, rights and freedoms can be exercised effectively only with the existence of political parties. Keeping this fact in mind, the prohibition or dissolution of political parties as a particularly far reaching measure should be used with utmost restraint. On the other hand, the examination of both the

659 see pp. 126-127
660 For more information on the meaning of democracy and the place of political parties within political literature see ch.4, and ch.6 for the case law of the Strasbourg organs
political science literature\textsuperscript{661} and Strasbourg case law\textsuperscript{662} reveals that, although the political parties are necessary components of a properly functioning democracy, the political parties that aim at the destruction of fundamentals of democracy and rights and freedoms guaranteed in the Convention can be prevented where there are concrete evidence and particularly if they recourse or incite to use of violence.

The Community as a whole has its requirements, which may call for a limitation of individual rights. In particular circumstances the State Parties to the European Convention on Human Rights are allowed to interfere with the rights and freedoms guaranteed under it. Apart from the articles, which guarantee the rights and freedoms, there are general provisions set out in Articles 15 to 18 which authorise the restrictions of rights in various forms. The first conclusion that we may draw from a perusal of the Convention and the Strasbourg case law is that neither the rights and freedoms guaranteed to the individual under the ECHR, nor the right of the state to limit and restrict the rights and freedoms so guaranteed in the exercise of its duty and obligation to the community at large, are absolute and unlimited. There are exceptions to the latter but in very limited circumstances, for instance, the prohibition of torture, cruel and inhuman or degrading treatment or punishment. Therefore, to be able to strike a proper balance between the rights of the individual and the requirements of society as a whole, it is necessary that improved human rights should be matched by accommodations in favour of the reasonable needs of the state to perform its public duties for the common good.\textsuperscript{663} Indeed, the accommodation being sought is not between the state and the individual, rather it is between the individual’s rights and

\textsuperscript{661} see ch.4 pp.130-131
\textsuperscript{662} see ch.4 pp.147-148
freedoms and the rights and freedoms of the community at large. Habermas notes that "the idea of human rights that is spelled out in basic rights may neither be imposed on the sovereign law giver as a limitation nor be merely instrumentalized as a functional requisite for legislative purposes. One is not possible without the other, but neither sets limits on the other." He argues that citizens as law-givers need to remain privately autonomous individuals who exercise their public autonomy collectively to make law. They are the addressees of the law when they exercise their private autonomy and the authors of the law when they practise their collective public autonomy.

Every restriction of human rights must be nothing other than a direct response to the irregularities which have evidently occurred in the life of the society organised along the principles of democracy. The only goal of these restrictions should be the restoration of the normal functioning of a society. The restrictions must not overstep in their scope the borders determined by this goal. After deciding on the legality and legitimacy of the restriction, the European Convention of Human Right's organs proceed to ascertain whether the reasons advanced by the government to justify it are relevant and sufficient. The Strasbourg organs concentrate not only on whether limitations are legal or pursue a legitimate interest, but on whether limitations can be legitimately justified, that is to say, whether they are necessary in a democratic society. The organs refer to demands for pluralism, tolerance, and broadmindedness as the hallmarks of a democratic society. They have set several criteria for determining the meaning of the words 'necessary in a democratic society.' The Strasbourg organs have ruled that the term 'necessary in a democratic society' implies that any restriction

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664 Habermas, J, "Constitutional Democracy; A Paradoxical Union of Contradictory Principles?," 29 Political Theory No. 6 December 2001, (766) at 767
on the fundamental freedoms should be relevant and sufficient to its aim, and should be imposed in a situation of pressing social need. Nonetheless, the Strasbourg organs themselves have not applied these criteria in every case. The first criterion serves to clarify whether the mentioned reasons are appropriate as a matter of factual circumstances of the case, and, as regards complex aims, what particular elements of the latter are actually applicable. This criterion is, in fact, a transposition of a formal requirement of legitimacy on the factual, specific situation obtaining in the case. The criterion of sufficiency presupposes the test of necessity itself, the European organs have to verify and the respondent government to convincingly establish, that the particular restrictive measure has been a response to an actual threat to the values behind the legitimate aim, that is, to 'pressing social need.' The concept of 'democratic society' is being further developed and clarified by the Strasbourg organs' balancing work.

Thus 'democratic necessity' allows for a national margin of appreciation but also makes possible an effective European supervision. The process and outcome of this supervision depend, eventually, on the limits the European organs set to their discretion. These are discerned from three basic sources; (a) the Convention’s text; (b) the general concept of a 'democratic society'; and (c) the common practices of the Member States. Although these limits are case-specific their determination is governed by certain general principles. The Strasbourg organs have developed the basic principles concerning restrictions as being (1) pressing social need, (2)

665 See Chapters 2, 3 and 4 for details
666 For clarification of democracy in political literature and Strasbourg case law, see ch.4

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tolerance, (3) broadmindedness and (4) proportionality of the measure with the legitimate aim it seeks.667

On the issue of restriction of fundamental rights, the 1982 Constitution of Turkey is extremely authoritarian with respect to political rights and liberties. The Constitutional Court is very sensitive about the indivisible unity of the state that is inherent in the Constitution. The prohibition of activities against the indivisible unity of the state is interpreted by the Court very widely. Almost any different opinion and suggestion about the structure of the state and social problems are threatened by the prohibition which very narrows room for the freedom of expression and freedom of assembly and association. The Constitutional Court is of the opinion that any writing, speech or behaviour that may damage the unity of the country and nation should be prohibited for political parties. The Turkish Constitutional Court has dissolved many political parties. From the 1980s to 1990s more than 20 political party dissolution cases were heard by the Constitutional Court. Article 69 of the Turkish Constitution stipulates three main reasons for which political parties may be dissolved. In view of the said provisions a political party must be permanently dissolved if it is established that the programme and statute of the political party in question violate the provisions of the fourth paragraph of Article 68 of the Constitution, which protects the indivisible territorial integrity of the state and the principles of the democratic and secular state. Dissolution will be ordered if the Constitutional Court determines that the political party in question has become a centre of activities which violate the provisions of the fourth paragraph of Article 68. Another reason to dissolve a political party is where the political party accepts any financial assistance from other states, international organisations, foreign persons and corporate bodies. In conclusion, the

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667 See ch.2 for the scope of the restrictions and principles which govern restrictions
Constitution is very strict in not allowing the political parties which it sees as a threat to indivisible and unity of the state, to the principle of secularism and political parties that receive foreign financial assistance. The Turkish Constitution generally referring to the strategic location and historical experience of the country confines democracy understanding of the Constitution to a special national democracy different from universal one. This approach results in a very strict and narrow approach in allowing political parties with a different opinion from that of the constitution. It is fair to assert that the Turkish legal system is not within the established democratic standard required by the European Convention on Human Rights. The Turkish Constitutional Court’s attempts to shape the programmes of political parties within the boundaries of “constitutional ideology” may be seen as a reflection of the “judicialisation of politics.” But this will inevitably lead to a legitimacy problem. If the Constitutional Court wants to overcome this problem it should accept the “rights-based” approach in its judgements.

In the early political parties cases, the Strasbourg rejected Turkish Constitutional Court’s special type democracy understanding. However, in Refah Partisi case it seems to have adopted Turkish Constitutional Court’s approach which the present author thinks that it was because of the lack of a detailed European supervision of the Turkish Constitutional Court’s reasoning. The Strasbourg Court does not realise the fact that the dissolution of Refah took place in a negative anti-democratic political atmosphere of 28 February process which has been seen as a post-modern military intervention. During 28 February process, the Turkish military, aligning with some sectors of civil society, launched a campaign against Refah and in effect against the government, justified by their concern for the future of secularism in the face of the
Islamist challenge. Shortly after the formation of the Erbakan-led government the National Security Council (NSC), meeting on February 28, 1997, took a number of decisions to reinforce the secular character of the Turkish state threatened by the Islamists. To put pressure on the Refah government, numerous briefings, joined by judicial personnel (judges and public prosecutors), journalists and other professionals were organized by the General Staff of the Armed Forces on the danger of Islamic fundamentalism in which the ruling party was identified as a reactionary Islamic threat. In conclusion, 28 February process brought about the resignation of the Refah-DYP government and non-democratic, strict state control over all aspects of religious life. And the dissolution of Refah by the Constitutional Court took place in this anti-democratic political atmosphere.

The Political Party dissolution cases of the Turkish Constitutional Court may be classified broadly into two categories: Those parties dissolved for not adhering to procedural requirements, such as not holding their general congress with the required frequency, or not taking part in two general elections. The others may be grouped as politically motivated dissolution cases. These parties also may be grouped according to the political motives that the parties in question held: Pro-Kurdish political parties, pro-Communist political parties and pro-Religious Political Parties.

668 Examples are: Cumhuriyet Halk Partisi, (CHP); Demokrasi Partisi, Demokrasi ve Degisim Partisi, (DDP); Demokrat Partisi, (DP); Demokratik Baris Hareketi, (DBH); Demokratik Kitle Partis, (DKP); Diriliş Partisi; Huzur Partisi; and Yesiller Partisi.
669 Halkin Emek Partisi, (HEP); Ozgurluk ve Demokrasi Partisi, (OZDEP); and Halkin Demokrasi Partisi, (HADEP)
670 Türkiye Birlesik Komunist Partisi, (TKBP); Sosyalist Parti, (SP); Sosyalist Birlik Partisi, (SBP); and Sosyalist Türkiye Partisi, (STP)
671 Huzur Partisi (HP); Refah Partisi, (RP); Fazilet Partisi, (FP)
So far only eight of those Turkish political parties have brought their cases before the European Court of Human Rights. The Fazilet Partisi withdrew its application after the hearing took place on the merits. The Strasbourg Court decided that Turkey was in breach of the Convention in all of the political party cases except in Refah Partisi. In the early Turkish political party cases, the European Court of Human Rights based its decisions on the pro-individual and liberty “rights-based” legal paradigm. In those cases, the Strasbourg Court has explored the extent to which a state can infringe civil and political rights in an effort to safeguard constitutional democracy. Until its most recent decision in Refah Partisi case, the Court had not been prepared to hold that the state is entitled to act in a militant manner and ban a political party in the name of democracy. In the early Turkish cases Strasbourg saw the dissolution of a political party as a last resort that could be employed only in very limited and exceptional situations. The Court made it clear that political parties are inevitable components in the proper functioning of democracy and emphasised the pluralist characteristic of democracy, the key concept of which is dialogue. One of the fundamental features of democracy is to solve a country’s problems with public debate (where that does not incite or include violence), even if the problems are disturbing. The Court made it very clear that the programme and projects of political parties that were not in conformity with the existing Turkish state structure and its principles could not be held on that ground alone to be contrary to democracy. Allowing the argument and debate of different political programs does not damage democracy itself but is at the core of democracy, even where those arguments criticise the existing state structure.

Here the Strasbourg Court clearly criticises the intention of the Constitutional Court to

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672 Türkiye Birleşik Komunist Partisi (TKBP); Sosyalist Parti (SP); Sosyalist Birlik Partisi (SBP); Ožgurluk ve Demokrasi Partisi (OZDEP); Refah Partisi (RP); Democracy and Change Party, Democratic Party (DEP), Emek Partisi and Senol

673 See ch.6

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impose the constitutional ideology on the programmes of political parties. In conclusion, the European Court of Human Rights in these early political party judgements accepted that only those political parties which adopt violence and terrorism should be kept out of political life. The legal approach that the Court used in these early judgements is a "rights-based" legal paradigm which favours the individual against the state.

The main principles that were established by the Strasbourg Court in these cases are as follows:

Strasbourg, by finding breaches of the Convention in the early political party cases, made a huge contribution for the development of democracy in Turkey. However, there is clearly a contrast between those cases and its decision in Refah partisi. The author is of the view that Strasbourg was wrong to take the "ideology-based" approach in Refah case.675 There was no evidence that Refah used, or intended to use, violence or terrorism, which Strasbourg had held previously to be the only reason for dissolution of a party. In Refah Partisi case, the European Court of Human Rights has pronounced on the meaning of key Islamic concepts such as sharia and jihad, and on their incompatibility with human rights and democracy, in a way that ignores the diverse interpretation of these concepts by Muslims. The Strasbourg unnecessarily antagonizes those committed to a legitimate public role for religion within a democratic framework and it establishes a problematic example for future cases involving Islam and Muslims. The Court has also made inferences about the possibility of a threat to Turkey's constitutional order that seem curious in light of the historical experience both in Turkey and with Islamist movements elsewhere. These

postulates help the Court reach a judgment that, in present author's view, is not supported by the concrete evidence. On the other hand it should be boner in mind that, the Strasbourg Court can not and should not be an expert on Islamic theology and history to make such conclusions about Islam’s compatibility with democracy. It seems the Court was affected by a prevailing western view that Islam is incompatible with both modernity and democracy. However, this is a matter of interpretation. As has been seen, there are interpretations favourable to democracy in Islamic scholarship. What caused the European Court of Human Rights to decide Refah Partisi in a freedom-restricting way was, it seems, a misunderstanding about Islam. The Court sees Islam as in conflict with democracy, which is not the case at least from the some interpretations of it. On the contrary, although it is not in practice in the most of the Muslim countries, the only political regime which could be said to be compatible with the fundamentals of Islam is democracy. In this sensitive era, when we need to open the doors of democracy to Muslim populations for their integration into the democratic system, Strasbourg’s current partial understanding of the Islam-democracy relationship could be an obstacle. In the era of where there is, to me a wrong, voice of clash of civilizations, the western liberal democracies and Islamic world should make much more effort to understand each other and cooperate for universal peace. The Strasbourg Court as a very important human rights and so peace mechanism of western democracy should have been more careful about its judgment of Islam and democracy issue.

675 For the concepts of ‘rights based’ and ‘ideology based’ legal paradigms see ch.7  
676 See ch.7 for an analysis of the Islam and democracy relationship  
677 For a detailed examination of different schools of Islam and Islam-Democracy compliance see chapter 7
Another important conclusion is that, neither the Turkish Constitutional Court nor the Strasbourg Court has referred to the Guidelines on Prohibition and Dissolution of Political Parties and Analogue Measures prepared by the Council of Europe Venice Commission which is surprising to me. There are two main differences between Venice Commission Guidelines and the Strasbourg Court’s judgement in Refah case. Firstly, according to the Venice Guidelines; prohibition, or enforced dissolution, of political parties may only be justified in the case of parties which advocate the use of violence, or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the Constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution. Secondly, a political party as a whole cannot be held responsible for the individual behaviour of its members not authorised by the party, within the framework of political/public and party activities. In Refah case the Strasbourg Court easily came to conclusion to confirm the dissolution of the party as a result of individual speeches and acts of some members of the party which should not be blamed on the whole party.

However, as Turkey wants to join the European Union, it is undertaking some fundamental reforms to make the necessary adjustments to her legal system. A variety of pro-democratic reforms that could lead to an improved human rights picture has been realised. Since AK Party’s coming into power in November 2002 after having sufficiently fulfilled the Copenhagen Criteria, accession negotiations with the EU began on October 3, 2005. The economy has been stabilized and the inflation rate is steadily decreasing. Some concrete steps have been taken for democratization; public

678 On these guidelines see Appendix 1
broadcasting in Kurdish, teaching the Kurdish language in private language schools, and changing the composition and profile of the military-dominated National Security Council, which once set the parameters of civilian policy making, were some of the democratizing and civilianizing reforms introduced by the AK Party. These reforms will certainly make a huge contribution for attaining a liberal democratic political system, which is the only system acceptable to the European Union.

To sum up, The Turkish Constitutional Court used ideology based approach in political party dissolution cases. The Strasbourg Court in all political party cases with the exception of Refah taking the rights based approach concluded that dissolution of political parties in Turkey can not be accepted as compatible with the standards set up by the Convention. However, its decision in Refah which is an indication of ideology based approach seems to be because it easily accepts the Turkish Constitutional Court’s arguments without a detailed European supervision. Taking into account the Strasbourg Court’s cases on headscarf issue together with Refah, one can imply that it has a misunderstanding about Islam’s compatibility with democracy. This also seems to be because of wrong image of Islam being circulated after September 11 events globally. The EU accession process of Turkey in my view is going to change the democratic course of Turkey with the result of a democracy more close to standards of western European ones. On the other hand, the Strasbourg Court should be more careful when judging on the human rights issues related to Islam in future with a vision of building bridges between European democratic values and pro-democratic Islamic views.

Appendix 1

The Venice Commission Guidelines on the Prohibition and Dissolution of Political Parties

That States should recognise that everyone has the right to associate freely in political parties. This right shall include freedom to hold political opinions and to receive and impart information without interference by a public authority and regardless of frontiers. The requirement to register political parties will not in itself be considered to be in violation of this right.

Any limitations to the exercise of the above-mentioned fundamental human rights through the activity of political parties shall be consistent with the relevant provisions of the European Convention for the Protection of Human Rights and other international treaties, in normal times as well as in cases of public emergency.

Prohibition, or enforced dissolution, of political parties may only be justified in the case of parties which advocate the use of violence, or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the Constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.

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680 See “http://venice.coe.int/site/main/presentation_E.asp” visited on 20 April 2005
681 ibid para.1
682 ibid, para.2
683 ibid, para.3
A political party as a whole cannot be held responsible for the individual behaviour of its members not authorised by the party, within the framework of political/public and party activities.684

The prohibition or dissolution of political parties is a particularly far-reaching measure, which should be used with utmost restraint. Before asking the competent judicial body to prohibit or dissolve a party, governments, or other state organs, should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other less radical measures could prevent the said danger.685

Legal measures directed to the prohibition or legally enforced dissolution of political parties shall be a consequence of a judicial finding of unconstitutionality and shall be deemed as of an exceptional nature and governed by the principle of proportionality. Any such measure must be based on sufficient evidence that the party itself and not only individual members pursue political objectives using, or preparing to use, unconstitutional means.686

The prohibition or dissolution of a political party should be decided by the constitutional court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial.687

684 ibid, para.4
685 ibid, para.5
686 ibid, para.6
687 ibid, para.7
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