

The European Court of Human Rights and Political Rights: The Need for More Guidance

Hans-Martien ten Napel*

The European Court of Human Rights' conception of democracy rather thick, inclusive – Increasing number of complaints of violations of Article 3 of the First Protocol – Requirements of this provision that have to be complied with still thin – Limitation clauses of Article 11 to be interpreted strictly – Court's response to Islamic political parties and movements – Requirements with respect to the governance and politics of the States Parties should become stricter – Level of tolerance of religion in the public domain ought to increase – Need for more guidance from the Court not just an academic discussion

INTRODUCTION

According to the Preamble of the European Convention on Human Rights (hereafter, ECHR), fundamental freedoms are best maintained by 'an effective political democracy', among other things. Yet, at the time of drafting of the Convention, the States Parties were not able to agree on an Article defining the concept of effective political democracy.¹

Thus, it was not until 20 March 1952 that Article 3 of the First Protocol to the Convention was adopted, which reads as follows:

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.

* Lecturer of Constitutional Law at Leiden University in the Netherlands, also Fellow of the E.M. Meijers Institute for Legal Studies, and Senior Researcher at the Netherlands School of Human Rights Research. Earlier versions of this article were presented at the conference on 'Multiculturalism – Template for Peace or Recipe for Conflict?', West Yorkshire School of Christian Studies, Leeds, 8 Dec. 2007, and an academic staff exchange between the Law Faculties of Oxford and Leiden on 25-27 Sept. 2008. I would like to express my thanks to all participants for their valuable comments.

¹ Susan Marks, 'The European Convention on Human Rights and its "Democratic Society"', *British Yearbook of International Law* (London, Oxford University Press 1995) p. 209 at p. 221-224.

European Constitutional Law Review, 5: 464–480, 2009

© 2009 T.M.C.ASSER PRESS and Contributors

doi:10.1017/S1574019609004647

Yet this formulation can also be regarded as ‘an unsatisfactory text, which is the result of a compromise, and which continues to give rise to problems of interpretation.’²

Meanwhile, according to Ovey and White, ‘[t]he number of complaints of violations of Article 3 of Protocol 1 is increasing, and there is evidence that the Court is giving fresh emphasis to this provision as essential to the foundations of democratic legitimacy of the State.’³ The question is therefore: what are the exact requirements of this provision of the First Protocol that have to be complied with?

Before answering this question, we will first explore the Court’s conception of democracy. Because of the important role that political parties play according to the Court, the article will also look at the case-law on Article 11 ECHR concerning freedom of association. Moreover, since the European Court of Human Rights interprets this latter Article in the light of Articles 9 and 10 concerning freedom of thought, conscience and religion and freedom of expression, respectively, relevant parts of the case-law on these Articles will be taken into account as well.⁴ The article ends with some concluding remarks about necessary adjustments in the Court’s approach to political rights for it to be of greater relevance to the interpretation of national law.

THE COURT’S CONCEPTION OF DEMOCRACY

As the text of Article 3 of the First Protocol is not entirely clear, the European Commission of Human Rights (hereafter: ECmHR) and, later, the European Court of Human Rights have had to determine its precise scope to a considerable extent by themselves. There was no alternative, if only because, as the Court puts it, democracy ‘appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.’⁵

One will search in vain for a well-considered definition of a democratic society in the case-law of the European Court.⁶ This is understandable in so far as it is precisely a feature of such a society that it does not have such an unequivocal character. A recent resolution by the Parliamentary Assembly of the Council of

² Clare Ovey and Robin White, *Jacobs and White. The European Convention on Human Rights* (Oxford, Oxford University Press 2006) p. 388.

³ *Ibid.*, at p. 390.

⁴ Since, in a sense, all rights embodied in the European Convention are ‘political’, including for example the right to a fair trial, even then this analysis is not complete, but then neither can it be.

⁵ ECtHR 30 Jan. 1998, Case No. 133/1996/752/951, *United Communist Party of Turkey a.o. v. Turkey*, para. 45.

⁶ Cf. A. Logemann, *Grenzen der Menschenrechte in demokratischen Gesellschaften. Die “demokratische Gesellschaft” als Determinante der Grundrechtsschranken in der Europäischen Menschenrechtskonvention* (Baden-Baden, Nomos Verlag 2004) p. 298-299.

Europe rightly describes democracy as ‘an open, never-ending process in which the freedom of all citizens to affect their own lives should be increased.’⁷

This does not mean, however, that it is impossible to derive certain contours of a democratic society from the case-law. Thus, with respect to Article 10 on the freedom of expression, the Court speaks of ‘the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”’.⁸

More generally speaking, the term ‘pluralism’ also forms the key to the European Court’s conception of democracy: ‘there can be no democracy without pluralism.’⁹ In the past the Court had already indicated that freedom of thought, conscience and religion is indispensable for this: ‘The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.’¹⁰ In recent case-law, however, the Court describes pluralism in an even more comprehensive manner as ‘built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.’¹¹ Closely related to this is what the Court remarked earlier, namely that ‘democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.’¹²

With a view to the pluralism envisaged by the Court, the freedom of association in general is of great value. Political parties in particular, however, can be regarded as

a form of association essential to the proper functioning of democracy (...). (...) By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organizations which intervene in the political arena.¹³

⁷ Resolution 1547, ‘State of Human Rights and Democracy in Europe’, adopted by the Assembly on 18 April 2007 (15th Sitting), para. 42.

⁸ ECtHR 7 Dec. 1976, Case No. 5493/72, *Handyside v. the United Kingdom*, para. 49.

⁹ *United Communist Party of Turkey*, para. 43. Cf. Aernout Nieuwenhuis, ‘The Concept of Pluralism in the Case-Law of the European Court of Human Rights’, *European Constitutional Law Review* 3 (2007) p. 367.

¹⁰ ECtHR 25 May 1993, Case No. 14307/88, *Kokkinakis v. Greece*, para. 31.

¹¹ ECtHR 17 Feb. 2004, Case No. 44158/98 (Grand Chamber), *Gorzeliak a.o. v. Poland*, para. 92. Repeated, for example, in ECtHR 5 Oct. 2006, Case No. 72881/01, *The Moscow Branch of the Salvation Army v. Russia*, para. 61.

¹² ECtHR 13 Aug. 1981, Case Nos. 7601/76, 7806/77, *Young, James and Webster v. the United Kingdom*, para. 63.

¹³ ECtHR 13 Feb. 2003, Case Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (Grand Chamber), *Refab Partisi (The Welfare Party) a.o. v. Turkey*, para. 87.

There is a clear link with Article 3 of the First Protocol in so far as it speaks of ensuring the free expression of the opinion of the people in the choice of the legislature. According to the Court, political parties play an indispensable role in achieving this:

Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. By relaying this range of opinion, not only within political institutions but also – with the help of 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 (...).¹⁴

The role of the state in this matter is, according to the Court, primarily that of an independent arbiter: 'the State has a duty to remain neutral and impartial.'¹⁵ The state plays an active role, however, in guarding the limits of pluralism, precisely with regard to political parties. After all,

[t]he possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (...).¹⁶

All in all, the first interim conclusion can be that the European Court adheres to a rather thick, inclusive conception of democracy, in the sense of ensuring 'adequate participation of minorities and other marginalized cultural groups.'¹⁷ In accordance with this definition, the pluralism envisaged by the Court comprises not only respect for classical human rights such as freedom of thought, conscience and religion and freedom of expression, but also the promotion of social cohesion by sincere recognition of and respect for cultural diversity. There is a crucial role to play here for political parties. With respect to the role of the state, the Court is more ambivalent. It ought to remain largely neutral, yet has an active part in guarding the limits of pluralism.

¹⁴ *United Communist Party of Turkey*, para. 44.

¹⁵ ECtHR 13 Dec. 2001, Case No. 45701/99, *Metropolitan Church of Bessarabia a.o. v. Moldavia*, para. 116.

¹⁶ *Refah Partisi (The Welfare Party)*, para. 99.

¹⁷ Human Development Report 2004, *Cultural Liberty in Today's Diverse World* (New York, UNDP 2004) p. 55.

ARTICLE 3 OF THE FIRST PROTOCOL

In the first case in which the European Court of Human Rights had to apply Article 3 of the First Protocol, *Mathieu-Mobin and Clerfayt v. Belgium* in 1987, the Court emphasized its importance in the Convention system. According to the Court, '[s]ince it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system.'¹⁸

Unlike most other substantive clauses in the Convention and its Protocols, the Article does not start with 'Everyone has the right to' or 'No one shall be', but with 'The High Contracting Parties undertake to.' It does not follow from this, however, that it is impossible to derive subjective rights from the Article. The Court agreed with the interpretation of the Article developed by the Commission, i.e., from an 'institutional' right to free elections,¹⁹ via the concept of universal suffrage,²⁰ to the individual right to vote and to stand for election.²¹ The different wording of the Article is rather seen to lie 'in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections.'²² As Article 3 of the First Protocol does not have a second paragraph containing limitation grounds, as in Articles 8-11, the Court has ruled that 'there is room for implied limitations.'²³

As far as these implied limitations are concerned, the States Parties enjoy a wide margin of appreciation.²⁴ In the end it is up to the Court, however, to determine whether 'the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.'²⁵ More particularly, the question is whether the free expression of the opinion of the people in the choice of the legislature remains ensured.

On the basis of these general principles it is possible to distinguish several requirements with respect to the governance and politics of the States Parties.

¹⁸ ECtHR 2 March 1987, Case No. 9267/81, *Mathieu-Mobin and Clerfayt v. Belgium*, para. 47.

¹⁹ ECmHR 18 Sept. 1961, Case No. 1028/61 (admissibility decision), *X. v. Belgium*.

²⁰ ECmHR 6 Oct. 1967, Case No. 2728/66 (admissibility decision), *X. v. Federal Republic of Germany*.

²¹ See in particular ECmHR 30 May 1975, Case Nos. 6745/74 and 6746/74 (admissibility decision), *W., X., Y. and Z. v. Belgium*.

²² *Mathieu-Mobin and Clerfayt v. Belgium*, para. 50.

²³ ECtHR 1 July 2004, Case No. 36681/97, *Sante Santoro v. Italy*, para. 54.

²⁴ *Ibid.*

²⁵ *Mathieu-Mobin and Clerfayt*, para. 52.

The first of these requirements is the presence of a legislature, without which Article 3 of the First Protocol would not make sense. This was already recognised by the European Commission of Human Rights in 1969, when it ruled that the Article ‘presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society.’²⁶ In practice, the problem for the Court – fortunately – has not so much been the absence of a legislature in a particular State Party, but the question of which specific institutions qualify as such, apart from obvious examples such as the House of Commons or the Dutch Second Chamber. After all, according to the Court, the word ‘legislature’ is not necessarily limited to national parliamentary bodies. Each time, the term has to be interpreted in the light of the constitutional structure of the particular state.²⁷ This much is clear: that the body in question needs to have rulemaking authority.²⁸ More specifically, it has to be an ‘inherent primary rulemaking power.’²⁹ Consequently, as the Court made clear in 2000 in a case concerning the Vladivostok Municipal Council and mayor, ‘the power to make regulations and by-laws which is conferred on the local authorities in many countries is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1 to the Convention, even though legislative power may not be restricted to the national parliament alone.’³⁰ The fact that not only national parliamentary bodies qualify also implies that supranational structures can potentially come under the requirements of Article 3 of the First Protocol. In 1987, despite the Single European Act of 1986, the Commission still did not regard the European Parliament as a full legislature.³¹ Twelve years later, however, the Court designated the European Parliament as such in the case of a British citizen who had applied in vain to the Electoral Registration Officer for Gibraltar to be registered as a voter at the elections to the European Parliament. In deciding this way, the Court took into account, among other things, the extension of the powers of the European Parliament that had taken place as a result of the Treaty of Maastricht (1992).³² All in all, the criteria used by the Court to determine whether an institution qualifies as a legislature do

²⁶ ECmHR 5 Nov. 1969, Case Nos. 3321/67, 3322/67, 3323/67 and 3344/67 (report), *The Greek case*, para. 319.

²⁷ *Mathieu-Mobin and Clerfayt*, para. 53.

²⁸ *W., X., Y. and Z. v. Belgium*.

²⁹ The British ‘metropolitan county councils’ did not possess such ‘inherent primary rulemaking power’. ECmHR 5 July 1985, Case No. 11391/85 (admissibility decision), *Booth-Clibborn a.o. v. the United Kingdom*.

³⁰ ECtHR 25 Jan. 2000, Case No. 51501/99, *Cherepkov v. Russia* (admissibility decision).

³¹ ECmHR 9 Dec. 1987, Case No. 11123/84 (admissibility decision), *Tete v. Frankrijk*. See also ECmHR 10 March 1988, Case No. 11406/85 (admissibility decision), *Fournier v. Frankrijk*.

³² ECtHR 18 Feb. 1999, Case No. 24833/94 (Grand Chamber), *Mattbevs v. the United Kingdom*, para. 54.

not exhibit outstanding clarity. The approach taken rather resembles the adage ‘I know a legislature when I see one.’³³ As the Article has thus far been applied mostly to the highest legislative bodies, and the sometimes considerable degree of local autonomy in the States Parties does not appear to be recognised, it is possible to maintain that the Court interprets it in a ‘minimalistic’ way.³⁴

As far as elections for the legislature are concerned, Article 3 of the First Protocol requires ‘free elections at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people.’ For the Court, this does not imply a preference for a particular electoral system. It allows the States Parties a wide margin of appreciation in this respect. Thus, in 1987, the Court ruled that

any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the ‘free expression of the opinion of the people in the choice of the legislature’.³⁵

This was in line with the approach followed by the Commission, which had already decided in 1976, in a case against the United Kingdom, that Article 3 of the First Protocol does not require a particular electoral system such as the system of proportional representation.³⁶ In 1996, the Commission declared the complaint of an Italian regional party about the transition to a new and less favourable electoral system inadmissible. According to the Commission, the Convention ‘does not compel the Contracting Parties to provide for positive discrimination in favour of minorities.’³⁷ In 2008, the Court even ruled that an electoral threshold of 10%

³³ Ph. Kiiver, Annotation of ECtHR 11 Jan. 2005, Case No. 66289/01, *Py v. France*, VI *European Human Rights Cases* (2005) p. 257-266 at p. 266. The original contains the word ‘legislator’.

³⁴ Geert Goedertier and Yves Haeck, ‘Artikel 3 EP. Recht op vrije en geheime verkiezingen’ [Article 3 First Protocol. Right to free and secret elections], in Johan Vande Lanotte and Yves Haeck (eds.), *Handboek EVRM. Deel 2. Artikelsgewijze commentaar* [ECHR Handbook. Part 2. Article-by-article commentary] (Antwerpen/Oxford, Intersentia 2004) p. 447 at p. 471 [my translation]. Cf. Jeroen Schokkenbroek, ‘Free Elections by Secret Ballot’, in Pieter van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th edn. (Antwerpen-Oxford, Intersentia 2006) p. 911 at p. 932.

³⁵ *Mathieu-Mohin and Clerfayt*, para. 54.

³⁶ ECmHR 6 Oct. 1976, Case No. 7140/75 (admissibility decision), *X. v. the United Kingdom*. See also ECmHR 8 March 1979, Case No. 8364/78 (admissibility decision), *Kennedy Lindsay a.o. v. the United Kingdom*; ECmHR 18 Dec. 1980, Case No. 8765/79 (admissibility decision), *The Liberal Party, Mrs. R. and Mr. P. v. the United Kingdom*; ECmHR 8 Dec. 1981, Case No. 8941/80 (admissibility decision), *X. v. Iceland*.

³⁷ ECmHR 15 April 1996, Case No. 25035/94, *Magnago and Südtiroler Volkspartei v. Italy*.

in Turkey, although ‘excessive’, did not violate Article 3 of the First Protocol.³⁸ Yet, as Ian Budge has remarked, ‘[w]hat might have been justified then [1983] as an exceptional measure to buttress a still fragile democracy can hardly be justified now when the democracy is considered sufficiently stable and mature to seek membership of the European Union.’³⁹ Moreover, in its resolution on democracy referred to above, the Parliamentary Assembly of the Council of Europe declared that ‘[i]n well-established democracies, there should be no thresholds higher than 3% during parliamentary elections.’⁴⁰ Only if a whole group of voters is prevented from taking part in the elections has the Court demonstrated willingness to intervene.⁴¹

As set out above, the Court reads into Article 3 of the First Protocol the requirement of universal suffrage. The individual right to vote, however, is not absolute. Exclusion of particular parts or categories of the population is conceivable, as long as it is compatible with the underlying objectives of the Article. For example, the Commission declared a complaint about the requirement of 4-year residency for voting in local elections inadmissible. Although the required term was rather long, it served the purpose of protecting minorities that otherwise ran the risk of being outvoted by residents of other regions who might move to Trentino-Alto on purpose shortly before the elections: ‘The Commission recognises the importance of the protection of linguistic minorities for stability, democratic security and peace, which has been shown by the upheavals of European history, and as a source of cultural wealth and traditions.’⁴² In a similar vein, the Court ruled in 2005 that there was no violation of Article 3 in the case of a requirement of a 10-year residency for the right to vote. This was because of special circumstances in New Caledonia on the way to self-determination, after a turbulent political and institutional history.⁴³ Prisoners constitute a special category of voters. Originally they could also be excluded from the right to vote, because – as the Commission put it – it concerned a ‘limited group of individuals’.⁴⁴ In 2005, however, the Court ruled in *Hirst v. the United Kingdom* – referring to recent Canadian

³⁸ ECtHR 8 July 2008, Case No. 10226/03, *Yumak and Sadak v. Turkey*.

³⁹ As quoted in the Joint Dissenting Opinion of Judges Tulkens, Vajić, Jaeger and Šikuta, para. 5.

⁴⁰ ‘State of Human Rights and Democracy in Europe’, para. 58.

⁴¹ ECtHR 22 June 2004, Case No. 69949/01, *Aziz v. Cyprus*. See also ECtHR 8 July 2008, Case No. 9103/04, *The Georgian Labour Party v. Georgia*.

⁴² ECmHR 15 Sept. 1997, Case No. 23450/94 (admissibility decision), *Polacco and Garofalo v. Italy*.

⁴³ ECtHR 11 Jan. 2005, Case No. 66289/01, *Py v. France*.

⁴⁴ ECmHR 6 Oct. 1967, Case No. 2728/66 (admissibility decision), *X. v. Federal Republic of Germany*. See also ECmHR 14 April 1998, Case No. 24827/94 (admissibility decision), *Holland v. Ireland*.

case-law – that prisoners could not be deprived of their right to vote without taking into account relevant factors such as the length of the prison sentence and the severity of the offence in question.⁴⁵ All in all, the Court has not often found violations of Article 3 of the First Protocol in connection with the right to vote, although it has to be admitted that this is partly because – in contrast with its case-law on electoral systems – the Court has occasionally been willing to take into account the position of minorities and other special circumstances. Apart from *Hirst v. the United Kingdom*, *Matthews v. the United Kingdom* (1999) was a well-known case in which the Court established a violation of the Article, but only because in 1994 Gibraltar had not held European elections at all.⁴⁶

With respect to the conditions under which the right to stand for election can be exercised, the States Parties enjoy a considerable margin of appreciation as well. Although these conditions usually serve the purpose of guaranteeing the independence of the representatives once they have been elected and the freedom of choice of the voters, the exact criteria can vary once again as a result of historical and political circumstances. According to the Court, the right to stand for election can be subjected to even stricter conditions than the right to vote.⁴⁷ Nevertheless, in recent years, the Court appears to find more violations of the right to stand for elections than of the right to vote. The first time, in 2002, concerned a language test that politicians in Latvia had to pass in order to qualify for the list of candidates in parliamentary elections, and the Court found that the procedure that had been followed was considered unfair.⁴⁸ Other violations also mostly concerned newer member states of the Council of Europe.⁴⁹

According to Ovey and White, ‘there has been considerable narrowing of the wide margin of appreciation referred to in the earlier cases now that the Court seems to be adopting a more robust test for interferences which States impose.’⁵⁰ On the basis of the analysis above, however, the second interim conclusion must be that despite the increasing number of complaints of violations of Article 3 of the First Protocol, the requirements of this provision that have to be complied with are still thin in light of the inclusive democracy conception the Court adheres to. It is not only the case that the term ‘legislature’ is being interpreted in a minimalistic way in the light of the growing importance attached to the protection and strengthening of local democracy in Europe but also, with respect to electoral

⁴⁵ ECtHR 6 Oct. 2005, Case No. 74025/01 (Grand Chamber), *Hirst v. the United Kingdom*.

⁴⁶ ECtHR 18 Feb. 1999, Case No. 24833/94, *Matthews v. the United Kingdom*.

⁴⁷ ECtHR 19 Oct. 2004, Case No. 17707/02, *Melnychenko v. Ukraine*, para. 57.

⁴⁸ ECtHR 9 April 2002, Case No. 46726/99, *Podkolzina v. Latvia*.

⁴⁹ See, for example, ECtHR 19 Oct. 2004, Case No. 17707/02, *Melnychenko v. Ukraine*; ECtHR 19 July 2007, Case Nos. 17864/04 and 21396/04, *Krasnov and Skuratov v. Russia*.

⁵⁰ Ovey and White, *supra* n. 2, p. 399.

systems, that the Court establishes an absolute minimum standard while, particularly with respect to the right to vote, it has only rarely established violations. This approach can be regarded as traditionally Western from a comparative perspective, insofar as it emphasizes ‘individual freedoms, civil liberties and human rights, separation of powers between the three main branches of government, and political legitimacy rooted in the popular will.’⁵¹ This may not sound surprising, after all, in the sense that it involves the European Court of Human Rights. Yet at least one author speaks of a Rawlsian formal conception of the state, in so far as it remains limited to guaranteeing a basic societal structure in which everyone has a more or less equal chance to pursue his or her individual purpose in life.⁵² The choice for this particular conception of the state is not self-evident, even for an admittedly Western Court. Thus, according to the theory of multiculturalism, states are under an obligation to actively recognise and accommodate religious, ethnic, cultural and linguistic diversity in order to facilitate a functioning and stable liberal democracy in pluralist societies.⁵³

ARTICLE 11 ECHR

According to the Court, in so far as political parties are concerned, the limitation clauses in the second paragraph of Article 11 ECHR have to be interpreted 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.⁵⁴

Perhaps partly for this reason, the Court has in recent years established more violations of Article 11 than of Article 3 of the First Protocol.

⁵¹ Kennedy Graham, *The Role of Regional Organizations in Promoting Democracy*, Background Paper #7, The 6th International Conference of New or Restored Democracies (ICNRD-6) Doha, Qatar, 29 Oct.-1 Nov. 2006, p. 10. See also Marks, *supra* n. 1.

⁵² Pieter vanden Heede, ‘Het Europees Hof voor de Rechten van de Mens en het partijverbod: dansen op een slap koord’ [The European Court of Human Rights and banning political parties: walking the high-wire], in Maurice Adams and Patricia Popelier (eds.), *Recht en democratie. De democratische verbeelding van het recht [Law and democracy. The democratic illusion of law]* (Antwerpen-New York-Oxford, Intersentia 2004) p. 193 at p. 221.

⁵³ Hans-Martien Th.D. ten Napel and Florian H. Karim Theissen, ‘Taking Pluralism Seriously. The US and the EU as Multicultural Democracies?’, in Bart C. Labuschagne and Reinhard W. Sonnenschmidt (eds.), *Religion, Politics and Law. Philosophical Reflections on the Sources of Normative Order in Society* (Leiden-Boston, Brill 2009) p. 363-392.

⁵⁴ *United Communist Party of Turkey*, para. 46.

Thus, for example, in its judgment in the case of the *United Communist Party of Turkey* (1998) the Court established a violation of Article 11, because the ban on the party concerned was not proportionate.⁵⁵ The same goes for the cases concerning the *Socialist Party* (1998),⁵⁶ the *Freedom and Democracy Party (Özdeğ)* (1999),⁵⁷ *Yazar a.o.* (2002),⁵⁸ *Dicle pour le Parti de la Democratie (DEP)* (2002),⁵⁹ *Parti Socialiste de Turquie (STP)*,⁶⁰ *Emek Partisi et Şenol* (2005),⁶¹ *Güneri a.o.* (2005)⁶² and *Demokratik Kitle Partisi et Elçi*⁶³ against Turkey. All of these cases concerned pro-Kurdish parties. Other cases involved parties in Russia,⁶⁴ Romania,⁶⁵ Greece,⁶⁶ Bulgaria,⁶⁷ Moldavia⁶⁸ and the Czech Republic.⁶⁹

As a matter of fact, the Court has established so many violations of Article 11 that the occasions in which the Court did not establish a violation draw attention. In its important Grand Chamber judgment *Refah Partisi (The Welfare Party) a.o. v. Turkey* (2003), the Court formulated two concrete conditions that political parties have to meet when proposing changes to the legislation or constitutional structure of the state: 'firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles.'⁷⁰ Application of these criteria in this case led the Court to the conclusion that the ban on the Islamic Welfare party did not result in a violation of Article 11.

According to the Court, 'a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system.'⁷¹ In addition, more generally, the Court concurred with 'the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the

⁵⁵ *Ibid.*, para. 61.

⁵⁶ ECtHR 25 May 1998, Case No. 20/1997/804/1007, *Socialist Party a.o. v. Turkey*.

⁵⁷ ECtHR 8 Dec. 1999, Case No. 23885/94, *Freedom and Democracy Party (Özdeğ) v. Turkey*.

⁵⁸ ECtHR 9 April 2002, Case Nos. 22723/93, 22724/93 and 22725/93, *Yazar a.o. v. Turkey*.

⁵⁹ ECtHR 10 Dec. 2002, Case No. 25141/94, *Dicle pour le Parti de la Democratie (DEP) c. Turquie*.

⁶⁰ ECtHR 12 Nov. 2003, Case No. 26482/95, *Parti Socialiste de Turquie (STP) e.a. c. Turquie*.

⁶¹ ECtHR 31 May 2005, Case No. 39434/98, *Emek Partisi et Şenol c. Turquie*.

⁶² ECtHR 12 July 2005, Case Nos. 42853/98, 43609/98 and 44291/98 *Güneri e.a. c. Turquie*.

⁶³ ECtHR 3 May 2007, Case No. 51290/99, *Demokratik Kitle Partisi et Elçi c. Turkiye*.

⁶⁴ ECtHR 5 Oct. 2004, Case No. 65659/01, *Presidential Party of Mordovia v. Russia*.

⁶⁵ ECtHR 3 Feb. 2005, Case No. 46626/99, *Partidul Comunistilor (Nepeceeristi) and Ungureanu v. Romania*.

⁶⁶ ECtHR 20 Oct. 2005, Case No. 74989/01, *Ouranio Toxo a.o. v. Greece*.

⁶⁷ ECtHR 20 Oct. 2005, Case No. 59489/00, *The United Macedonian Organisation Ilinden – Pirin a.o. v. Bulgaria*; ECtHR 13 April 2006, Case No. 45963/99, *Tsonev v. Bulgaria*.

⁶⁸ ECtHR 14 Feb. 2006, Case No. 28793/02, *Christian Democratic People's Party v. Moldavia*.

⁶⁹ ECtHR 7 Dec. 2006, Case No. 10504/03, *Linkov v. the Czech Republic*.

⁷⁰ *Refah Partisi (The Welfare Party)*, para. 98.

⁷¹ *Ibid.*, para. 119.

Convention.⁷² With respect to secularism, it ruled that this 'is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion.'⁷³

Less well-known but also noteworthy is an admissibility decision of December 2006. The Russian All-Nation Union had been declined registration because the Russian constitution forbade religious and ethnic parties. The Court ruled that there was no violation of Article 11, because 'the applicant's ability to lead a public association – whether based on ethnic affiliation as in the instant case, or otherwise – in the pursuit of that association's objectives has been unhampered.'⁷⁴

Just 4 days later, the Court ruled that the ban on an Islamic association that aimed to introduce sharia in Germany, among other things, also constituted no violation of Article 11. The measure was considered proportionate, because the association acted against the democratic order.⁷⁵

Nor was a violation of Article 11 established a year later in the case of a French party that was not registered in the financial register (necessary for public co-financing), because the largest part of its income came from a Basque party in Spain.⁷⁶ Otherwise, the cases in which no violation of Article 11 was established all concerned religious groupings (*Refah*, Russian All-Nation Union, and *Kalifatstaat*). This makes the rather exceptional withdrawal of its own case by the Turkish *Fazilet Partisi*, the successor to *Refah*, more understandable. In April 2006, the party withdrew its case because of a lack of confidence in the Court. The Court was believed to have been prejudiced against Muslims in the *Refah* case, among others.⁷⁷

All in all, the third interim conclusion must be that with respect to Article 11, the Court reacts relatively substantially and in a rather exclusivistic manner to Islamic political parties and movements in particular, paradoxically because of the same overly formal approach to democracy that led to remarkably thin requirements in the case of Article 3 of the First Protocol.⁷⁸ This impression is rein-

⁷² *Ibid.*, para. 123.

⁷³ *Ibid.*, para. 93.

⁷⁴ ECtHR 7 Dec. 2006, Case No. 17582/05 (admissibility decision), *Igor Vladimirovich Artyomov v. Russia*.

⁷⁵ ECtHR 11 Dec. 2006, Case No. 13828/04, *Kalifatstaat v. Germany*.

⁷⁶ ECtHR 7 June 2007, Case No. 71251/01, *Parti Nationaliste Basque – Organisation Regionale d'Iparralde c. France*.

⁷⁷ ECtHR 27 April 2006, Case No. 1444/02, *Fazilet Partisi and Kutun v. Turkey*.

⁷⁸ On the contrary, in Germany, where the constitution explicitly addresses the question of extremist parties, '[i]n practice, if not in theory, the use of article 21, section 2, to ban a party has been abandoned when the party's antidemocratic goals are not accompanied by illegal actions or

forced by judgments of the Court in several headscarf cases. Thus, for example, in *Leyla Şahin v. Turkey* (2005), the Grand Chamber of the ECtHR held that although a Turkish ban on wearing headscarves at state universities interfered with the right of students to manifest their religion, the interference can nevertheless be justified as necessary in a democratic society.⁷⁹

These judgments by the ECtHR have rightly raised severe concern. Thus, for example, Kevin Boyle in 2004 qualified the judgment in the *Refab* case as ‘unfortunate and wrong’:

There seems little doubt that in *Refab* the European Court has sought to weld together human rights, democracy and secularism. Is this the longer-term purpose of the judgment? Is it laying down a European model of human rights and democratic pluralism that is predicated on secularism? What implications flow for the rights protected under article 9 of freedom on religion?⁸⁰

A year later, during a conference in Strasbourg, T. Jeremy Gunn argued that (what was at the time) the Chamber’s judgment in *Leyla Şahin v. Turkey* ‘serves as a warning of how failing to analyse the issues objectively and openly can result in the suppression of human rights by an institution that was created to protect them.’⁸¹ According to Tore Lindholm, who qualified the judgment as ‘very problematic’, ‘[p]ublic discussion of the evolving case-law of the European Court of Human Rights (...) is called for, generally, and with respect to a growing number of cases on the human right to freedom of religion or belief.’⁸² Finally, Ingvill Thorson Plesner warned that

the approach of the ECtHR in the above mentioned cases exhibit[s] an understanding of the role of religious manifestations in the public realm that resembles what we might call ‘secular fundamentalism’ or ‘fundamentalist secularism’. (...) The ‘fundamentalist’ aspect of this approach lies in the fact that it imposes a secu-

preparation for the use of force’. Dan Gordon, ‘Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with that of the United States and West Germany’, 10 *Hastings International and Comparative Law Review* (1987) p. 347 at p. 376-377.

⁷⁹ ECtHR 10 Nov. 2005, Case No. 44774/98 (Grand Chamber), *Leyla Şahin v. Turkey*. See also Kerem Altıparmak & Onur Karahanogullari, ‘After Şahin: The debate on headscarves is not over’ (Case Note), *EuConst* 2 (2006), p. 268-292.

⁸⁰ Kevin Boyle, ‘Human Rights, Religion and Democracy: The Refah Party Case’, 1 *Essex Human Rights Review* (2004) p. 1 at p. 14.

⁸¹ T. Jeremy Gunn, ‘Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights’, p. 1 <<http://www.strasbourgconference.org/papers.php>>, visited 5 Jan. 2009.

⁸² Tore Lindholm, ‘The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Light of Recent Case Law (*Leyla Şahin v. Turkey*, 29 June 2004)’, p. 1 <<http://www.strasbourgconference.org/papers.php>>, visited 5 Jan. 2009.

larist way of life on all individuals when they enter the public domain, also on those whose religious identity calls for certain manifestations like wearing a particular jewel, clothing or other symbols.⁸³

Especially the ban by the German Federal Administrative Court of *Kalifstaat* was probably 'justified and by no means disproportionate' because the association contravened the principles of democracy and the rule of law as such.⁸⁴ Yet, as Karen Meerschaut and Serge Gutwirth have argued in an excellent book chapter published in 2008, 'legal pluralism cannot abstractly be coined incompatible with the Convention or as inherently discriminatory, as the Court seems to assume. It depends on the scope of legal pluralism as well as the form and content of the parallel religious or customary law to be practiced.'⁸⁵ That it is possible to discuss the topic of the rights of religious groups within a secular state in a more nuanced way, is demonstrated by the lecture delivered by the Archbishop of Canterbury at the Royal Courts of Justice on 7 February 2008, under the chairmanship of Lord Phillips of Worth Matravers, the Lord Chief Justice. In this lecture Archbishop Williams discusses a system of 'supplementary jurisdictions', based on the fundamental civil right to use private arbitration.⁸⁶ As the Lord Chief Justice himself has pointed out, '[t]here is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution.'⁸⁷ Advocating a system of 'parallel jurisdictions' goes admittedly a step further, yet does not automatically do away with the State's role as the guarantor of individual rights and freedoms either. In a system which requires citizens to have matters such as marriage, divorce or inheritance adjudicated under the relevant religious rules (including, in the case of Muslims, Sharia law),

⁸³ Ingvill Thorson Plesner, 'The European Court of Human Rights between Fundamentalist and Liberal Secularism', p. 1, 3 <<http://www.strasbourgconference.org/papers.php>>, visited 5 Jan. 2009.

⁸⁴ Verena Zöller, 'Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights', 5 *German Law Journal* (2004) p. 469 at p. 490.

⁸⁵ Karen Meerschaut and Serge Gutwirth, 'Legal Pluralism and Islam in the Scales of the European Court of Human Rights: The Limits of Categorical Balancing', in Eva Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp-Oxford-Portland, Intersentia 2008) p. 431 at p. 447. Cf. Javid Gadirov, 'Freedom of Religion and Legal Pluralism', in M.L.P. Loenen and J.E. Goldschmidt (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line* (Antwerpen-Oxford, Intersentia 2007) p. 81, who concludes at p. 95 'that the sweeping rejection of any kind of legal pluralism is over-simplistic and that certain degrees of pluralisation can be compatible with liberal democracy'.

⁸⁶ Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective', 10 *Ecclesiastical Law Journal* (2008) p. 262.

⁸⁷ Lord Phillips, 'Equality before the Law', East London Muslim Centre, 3rd July 2008 <http://www.judiciary.gov.uk/docs/speeches/lcj_equality_before_the_law_030708.pdf>, visited 5 Jan. 2009.

these rights and freedoms could and should be protected *via* judicial review, notably by the constitutional court, as is for example the case in India.⁸⁸

CONCLUSION

In a speech delivered in the spring of 2008, the President of the European Court of Human Rights rightly reminded his audience that the area of discretion accorded to States is a consequence of precisely the place of democracy in the Convention scheme. He added, however:

But just as democracy furnishes the *raison d'être* and the justification for the margin of appreciation, it also establishes its limits. In other words as we approach the core operation of democracy, such as the right to vote and the right to form political parties or again the right to participate in free political debate, so the margin of appreciation contracts almost to vanishing point.⁸⁹

On the basis of the case-law discussed above, the thesis of Ovey and White that the number of complaints of violations of Article 3 of the First Protocol is increasing can be endorsed. At the same time, a number of party ban cases have been decided under Article 11. This change can largely be explained by the accession to the Council of Europe of new – and from a democratic point of view often less stable – states such as Bulgaria (1992), Romania (1993), Latvia (1995), Moldavia (1995), Ukraine (1995), the Russian Federation (1996) and Georgia (1999). Given the character of the cases from the period since 1999 in particular, the Court's case-law on Article 3 of the First Protocol and indeed its case-law on Article 11 ECHR can without doubt be called important for the newer States Parties.⁹⁰ For the more established States Parties, such as the Netherlands and the United Kingdom, it has considerably fewer consequences. Although this in itself is of course not necessarily a bad sign, what does constitute a problem is that the case-law is not in line with the Court's own thick, inclusive democracy conception. For this purpose a double adjustment is necessary: the requirements with respect to the governance and politics of the States Parties should become stricter and the level of tolerance of religion in the public domain ought to increase.

⁸⁸ Meerschaut and Gutwirth, *supra* n. 85, p. 440.

⁸⁹ International Conference 'Protection of the Democratic Values in Administration of Justice', Baku, 2 May 2008, p. 2. See also Jean-Paul Costa, 'The Links Between Democracy and Human Rights under the Case-Law of the European Court of Human Rights, Helsinki, 5 June 2008 <<http://www.echr.coe.int/ECHR/EN/Header/Press/Other+Information/Presidents+speeches/>>, visited 5 Jan. 2009.

⁹⁰ Cf. Alistair Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy', 44 *Public Law* (1999) p. 703.

According to Kiiver, it is inherent to the character of the Council of Europe as an international organisation consisting of sovereign states that the requirements with respect to the internal constitutional relations can only be minimal.⁹¹ On the other hand, there is increasing attention recently within constitutional law for the question of constitutionalism in divided societies. According to a special issue of the *International Journal of Constitutional Law*, this concerns topics that range from ‘symbolic issues, such as the wording of preambles, to the choice of official languages; to the existence and character of internal political boundaries; the nature of the electoral system used to elect the legislature; the selection process, composition, and powers of the political executive, the bureaucracy, and the judiciary; the rules governing the formation of political parties; and the relationship between religious institutions and the state.’⁹²

One complication for a similar operationalisation of the inclusive democracy conception of the Court is that relatively few points of departure for it can be found in the text of the Convention. Therefore, questions will first have to be discussed in political forums, such as whether in order to guarantee an actual pluralism, the role of the state must not only be neutral and independent, but also relatively passive. Still, the Court can also be expected to make a contribution, since judges are ‘inevitably political philosophers too of a sort.’⁹³ The different wording of Article 3 of the First Protocol could be used, more than in the past, to emphasise the positive obligations of the States Parties. After all, according to the Court, the phrase ‘The High Contracting Parties undertake to’ is seen to lie ‘in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures.’⁹⁴ The application of Article 11 can be changed by the Court itself anyway. Hopefully, the Court will realise this in response to criticism of the less inclusive treatment of religion in the public domain in general, and Islam in particular, among other things that its case-law has given proof of.

In 2007 the Parliamentary Assembly of the Council of Europe adopted a report on the state of democracy in Europe, in which

the Assembly expresses its concern over the increasing number of deficits of democracy which may be observed in all Council of Europe member states. The

⁹¹ Ph. Kiiver, Annotation of *Sante Santoro v. Italy*, V *European Human Rights Cases* (2004) p. 795 at p. 801-802.

⁹² Sujit Choudhry, ‘Editor’s Note’, 5 *International Journal of Constitutional Law* (2007) p. 573 at p. 574-575.

⁹³ Marks, *supra* n. 1, p. 238.

⁹⁴ *Mathieu-Mobin and Clerfayt v. Belgium*, para. 50.

dysfunctioning of some political institutions, insufficient representativeness of many parliaments, too numerous concerns over implementation of basic principles of democracy such as separation of powers, political freedoms, transparency and accountability, result in the increasing feeling of political discontent and disaffection among citizens.⁹⁵

Seen from this perspective, the need for more guidance from the Court for the interpretation at the national level of the fundamental political rights dealt with in this article is not just an academic discussion.



⁹⁵ 'State of Human Rights and Democracy in Europe', p. 1.