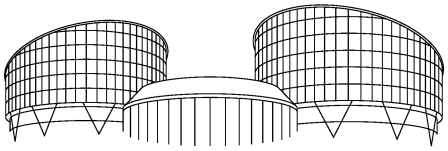

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

29 November 2022

Judicial Seminar 2023

Judges preserving democracy through the protection of human rights

Background Document

Contents

Introduction

"[The Court] has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society…The only type of necessity capable of justifying an interference with any of [the Convention rights] is, therefore, one which may claim to spring from a "democratic society". Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it," - United Communist Party of Turkey and Others v. Turkey, 30 January 1998, *Reports of Judgments and Decisions* 1998-I.

Democracy as a form of government is a universal benchmark for human rights protection; it provides an environment for the protection and effective realisation of human rights.

The European Court of Human Rights (the "ECtHR" or the "Court") has consistently held that democracy constitutes a fundamental element of the 'European public order'**.** The Preamble to the European Convention on Human Rights (the "ECHR" or the "Convention") establishes a very clear link between democracy and the Convention and asserts that human rights and freedoms are best realised and maintained by an effective political democracy and by a common understanding of human rights. Indeed, constitutional-law theory and political science have asserted that the existence of a democracy depends on respect for civil and political rights and freedoms. This is similarly reflected within the system of the European Union ("EU") which is built on fundamental rights, democracy and the rule of law as set out in Article 2 of the Treaty on European Union.

However, after a period of increased democratisation around the world, many democracies appear to be backsliding. Indeed, in May 2021 the Secretary-General of the Council of Europe noted that Europe's democratic environment and democratic institutions were in mutually reinforcing decline. This trend has accelerated in the wake of the Covid-19 pandemic, with the Council of Europe's European Commission for Democracy through Law ("Venice Commission") observing in June 2020[1] that the enormous extent of the challenge posed by the pandemic required, and continues to require, great democratic resilience in order to avoid that emergency powers curtail fundamental rights and conflict with the rule of law.

In this context, independent judges both institutionally and individually are to be regarded as fundamental guardians of democracy through the protection of human rights. Judges of both the ECtHR and of national courts have a vital mission in protecting individuals against rights abuses through the affirmation of the rights and freedoms enumerated in the Convention and in national constitutions. In particular, the Venice Commission has stressed that "[t]he holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital particularly during election campaigns. Restrictions on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality".[2]

This background paper discusses the Court's case-law under the following Articles in so far as they demonstrate the role of judges in preserving democracy through the protection of human rights: (i) Article 10 *(freedom of expression*); (ii) Article 11 (*freedom of assembly and association*); (iii) Article 3 of Protocol No. 1 (*electoral rights*); and (iv) Article 6 (*independence of the judiciary*). These themes are divided into a number of sub-themes, according to the Court's case-law.

[1] European Commission for Democracy Through Law (Venice Commission), "Respect for Democracy, Human Rights and the Rule of Law During States of Emergency: Reflections" (CDL-AD(2020)014, 19 June 2020), § 24 (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e).

[2] see CDL-AD(2002)023-rev2-cor, § 60.

I. Freedom of expression (Article 10) and democracy

Indissociable from democracy, freedom of expression is enshrined in a number of national, European, international and regional instruments which promote this political system. As noted above, democracy is recognised as the only system capable of guaranteeing the protection of human rights. In its interpretation of Article 10 of the Convention, the Court has held that "*freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man*" (*Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).

1. The role of the press as a "public watchdog," and its importance in a democratic society

The importance the Court attaches to freedom of expression, and in particular its role in a democracy, is reflected in the heighted protection it affords to those tasked with upholding democratic values namely journalists, academics and opposition politicians. Indeed, the positive obligations under the Convention imply, among other things, that the States are required to establish an effective mechanism for the protection of journalists in order to create a favourable environment for participation in public debate of all those concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even if they are irritating or shocking to the latter. In this connection, the Court has consistently held there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on the debate of questions of public interest.

Furthermore, the Court has always asserted the essential role played by the press as a "watchdog" in a democratic society, and it has connected the task of the press in imparting information and ideas on all matters of public interest to the public's right to receive them (*Axel Springer AG v. Germany* [GC], no. 39954/08, § 79, 7 February 2012).

In *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, 10 January 2019, the Court considered the case of a well-known investigative journalist who had been highly critical of the Government, and who had received a threatening letter demanding that she cease her activities. Hidden cameras were installed in her flat by unknown persons without her knowledge and consent. During a criminal investigation opened into the activities the applicant lodged a complaint that the prosecuting authorities were refusing to take obvious and simple investigative steps. In response, the prosecuting authorities published a report on the status of the investigation. That status report alleged that the applicant and her lawyer had been spreading false information in the media and went on to disclose sensitive personal details such as the names and addresses of her friends, family and colleagues. The Court found that the applicant had repeatedly brought her concerns and fears that she was the victim of a concerted campaign orchestrated in retaliation for her journalistic work, to the attention of the authorities. The Court had regard to the reports on the general situation concerning freedom of expression in the country and the particular circumstances of the applicant's case. In the circumstances, the Court held that the criminal acts complained of were either linked to the applicant's journalistic activity or should have been treated by the authorities when investigating as if they might have been so linked. In that situation, Article 10 required the respondent State to take positive measures to protect the applicant's journalistic freedom of expression, in addition to its positive obligation under Article 8 to protect her from intrusion into her private life.

Given the importance of pluralism in a democratic society, the Court has held that domestic law must guarantee that public broadcasters provide a forum for public discussion in which as broad a spectrum

as possible of views and opinions can be expressed. It is of the essence of democracy to allow diverse political programmes to be proposed and debated. Given the importance of what is at stake under Article 10, the State is the ultimate guarantor of pluralism. The Court considers that, in the field of audio-visual broadcasting, states have a duty to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting, inter alia, the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audio-visual media are not prevented from imparting this information and comment. For this reason, the Court has proved lenient with regards to restrictions whose very purpose is to ensure media pluralism. In *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, 5 April 2022, the Court considered the case of a media broadcaster whose license had been revoked by the national media regulator for failing to accord equal airtime to a diverse range of political parties. In finding that the interference had been proportionate and justified, the Court took into account numerous factors. Firstly, the revocation of the licence had been part of a gradual and uninterrupted series of sanctions imposed by the regulator. The applicant in question had already been sanctioned on several previous occasions for similar conduct. Furthermore, domestic law contained detailed rules designed to ensure the regulator's independence and was accompanied by sufficient procedural safeguards such as the ability of the applicant to make representations before the media regulator and challenge its findings in the domestic courts. It was further relevant that sanctions imposed in the applicant's case did not prevent it from using other means of communicating its views such as the internet and social medial platforms.

2. The role of other public watchdogs

Journalists, however, are not the only actors who may fulfil the "public watchdog role". For instance, the Court has accepted that when NGOs draw attention to matters of public interest, they are also exercising a public watchdog role of similar importance to that of the press. In *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016 the applicant NGO was founded in 1989 with the task of monitoring the implementation of international human-rights standards in Hungary and providing related legal representation, education and training. In the context of a survey regarding the efficiency of the system of public defence, the applicant requested from various police departments the names of the public defenders retained by them and the number of their respective appointments. Seventeen police departments complied with the request; a further five disclosed the requested information following a successful legal challenge. However, the applicant was unsuccessful in its action against a further two police departments which refused to disclose the requested information. The Court was satisfied that the applicant intended to contribute to a debate on a matter of public interest and the refusal to grant the request had effectively impaired its contribution to this debate. The subject matter of the survey concerned the efficiency of the public defenders system and was closely related to the right to a fair hearing, a fundamental right in Hungarian law and a right of paramount importance under the Convention. Any criticism or suggested improvement to a service so directly connected to fair-trial rights had to be seen as a subject of legitimate public concerns. Although the information requested concerned personal data, it did not involve information outside the public domain. The Court concluded that notwithstanding the State's margin of appreciation, there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

Similarly, in *Eminağaoğlu v. Turkey*, no. 76521/12, 9 March 2021, in addition to being a judicial officer, the applicant was also the chair of the association Yarsav, which defended the interests of members of the judicial professions and the principle of the rule of law. The Court reiterated that when an NGO drew attention to matters of public interest, it was exercising a public watchdog role of similar importance to that of the press and could thus be characterised as a social "watchdog" warranting

similar protection under the Convention as that afforded to the press. Consequently, the applicant had not only the right but also the duty, as chair of this legally established association, which continued to engage freely in its activities, to express an opinion on questions concerning the functioning of the justice system. At the same time, the Court noted that the Government's submissions about the duty of discretion of members of the judiciary were relevant. Ultimately, however, particularly in view of the fact that the decision-making process had been highly defective and had not afforded the safeguards that were indispensable to the applicant's status as a judicial officer and as the chair of an association of judges and prosecutors, the impugned restrictions on the applicant's right to freedom of expression under Article 10 had not been accompanied by effective and adequate safeguards against abuse.

Furthermore, the Court has consistently emphasised the importance of freedom of expression for members of parliament, this being political speech *par excellence*. However, States are not precluded from reacting when members of Parliament engage in disorderly conduct and disrupt the normal functioning of the legislature. Indeed, orderly debate in Parliament ultimately serves the political and legislative process, the interests of all members of the legislature, enabling them to participate on equal terms in parliamentary proceedings, and the interests of society at large (*Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, §138-141, 17 May 2016). Nevertheless, given the importance of parliamentary speech in a democratic society, any sanction against an MP for engaging in disorderly conduct must be accompanied by sufficient procedural safeguards. Hence in *Karácsony*, the Court found a violation in respect of four MPs who had been fined by the Hungarian Parliament for having gravely disrupted parliamentary proceedings by displaying billboards accusing the government of corruption. The procedure resulting in their fines consisted of a written proposal of the Speaker and its subsequent adoption by the plenary without debate. The decisions to fine them did not contain relevant reasons why the applicants' actions were considered gravely offensive to parliamentary order and none of the remedies proposed by the government allowing for the applicants to challenge the fines were effective. They were limited to a general possibility of making a statement in Parliament or petitioning certain parliamentary bodies without any guarantee that the applicants' arguments would be considered in the relevant disciplinary procedure. Thus, the Parliamentary disciplinary process was insufficient to protect the applicants' Article 10 interests.

3. Balancing freedom of expression against the interests protected under Article 8

As a corollary to the heightened protection afforded to the press, politicians, by the nature of their position in society, lay themselves open to close scrutiny of their actions and speech by both journalists and the public at large. Taking the view that in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion, the Court has established that the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician (*Castells v. Spain*, 23 April 1992, Series A no. 236). Generally speaking, this principle of tolerance applies to all members of the political class. This does not mean that politicians are unentitled to protection of their reputation, even when not acting in a public capacity. However, in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues (*Lingens v. Austria*, 8 July 1986, Series A no. 103).

The role of national judges takes on particular importance when it comes to balancing the right to freedom of expression against the right to respect for private life. In *Axel Springer AG v. Germany* [GC], no. 39954/08, § 89-95, 7 February 2012, the Court set out a list of criteria to be taken into account in such cases including the contribution of the impugned publications to a debate of general interest, the degree to which the person affected was well known, the subject of the report, the form and consequences of the publication and the severity of the sanction imposed.

These criteria were applied in *Axel Springer AG v. Germany (no. 2)*, no. 48311/10, 10 July 2014. There, the applicant had published an article implying that the former German Chancellor had resigned his political functions and had called an early election with the sole aim of taking on a lucrative position in a Russian-German consortium. The former Chancellor successfully obtained an injunction prohibiting publication of the passages describing the suspicions levelled against him and the applicant's appeals against this were unsuccessful. Finding a violation of Article 10, the Court noted that the subject matter of the Article was clearly of considerable public interest, given the former Chancellor's high profile. With regard to the severity of the penalty imposed, the applicant company had merely been the subject of a civil-law injunction against further publication of one passage from the article. Nonetheless, this prohibition could have had a chilling effect on the exercise of the applicant company's freedom of expression. The Chancellor, as a head of government, had numerous opportunities to publicise his or her political choices and to inform the public of them and had to display a greater degree of tolerance. Also of relevance, was the fact that the article did not recount details of the Chancellor's private life with the aim of satisfying the curiosity of a certain readership but discussed his conduct while in office as Federal Chancellor and his controversial appointment within a German-Russian consortium shortly after leaving office.

Threats to freedom of expression, and its role in the democratic order, may arise from a variety of sources. In *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021, for instance, the Grand Chamber considered the compatibility of mass surveillance measures with Article 8 and 10 of the Convention. The Court acknowledged that, on the one hand, bulk surveillance regimes are an extremely valuable tool against threats that sophisticated technology poses to democracy, such as cyberattacks, which can disrupt democratic processes. On the other hand, the Court emphasised that such regimes must be subject to strict oversight due to their capacity to undermine democracy if used inappropriately. As part of this balancing exercise, the Court recalled the importance of freedom of expression in the context of protecting democracy, and in particular the importance of safeguarding journalistic sources. The Court ultimately found that the bulk interception regime, as well as the regime for requesting intercepted material from foreign Governments and intelligence services, violated Article 10. The Court was particularly concerned by the fact that UK law governing the bulk interception of communications had contained no requirement that the use of selectors or search terms known to be connected to a journalist be authorised by an independent and impartial decision-making body. Moreover, when it had become apparent that a communication which had not been selected for examination through the deliberate use of a search term known to be connected to a journalist had nevertheless contained confidential journalistic material, there had been no safeguards to ensure that it could only continue to be stored and examined by an analyst if authorised by an independent decision-making body.

4. The importance of the internet and other new methods of communicating ideas in a democratic society

The Court has noted on several occasions that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. In view of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news, facilitating the dissemination of information generally and promoting the pluralism that is so essential to the democratic system.

Nevertheless, the Court has also recognised the negative effects of the unlimited dissemination of online information, especially when it comes to speech that undermines democratic values. In *Delfi*

AS v. Estonia [GC], no. 64569/09, ECHR 2015 the Court found no violation in a case where domestic courts had imposed damages on an internet news portal for offensive comments posted on its site by anonymous third parties. Acknowledging the important benefits that could be derived from the Internet in the exercise of freedom of expression, the Court reiterated that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights. Moreover, the Court observed that the impugned comments constituted hate speech and direct incitement to violence; that the applicant company's news portal was one of the biggest Internet media in the country; and that there had been public concern about the controversial nature of the comments it attracted. As regards the necessity of the interference with the applicant company's freedom to impart information, the Court attached particular weight to the professional and commercial nature of the applicant's news portal, and to the fact that it had an economic interest in the posting of comments. Moreover, only the applicant company had the technical means to modify or delete the comments published on the news portal. Furthermore the Court took into account the mechanisms in place on the applicant's website dealing with comments amounting to hate speech or speech inciting to violence, but noted that they had been insufficient in the particular circumstances of the case.

In *Magyar Jeti Zrt v. Hungary*, no. 11257/16, 4 December 2018, the applicant company operated a popular online news portal in Hungary. Following an incident where intoxicated football supporters had shouted racist remarks and made threats against students at a school whose students were predominantly Roma, the leader of the Roma minority local government gave an interview to a media outlet in which she described the football supporters as "members of Jobbik for sure". The media outlet uploaded the video of the interview to Youtube. The applicant company published an article on the incident on its website, including a hyperlink to the Youtube video. The right-wing political party Jobbik brought successful defamation proceedings against the applicant company arguing that by using the term "Jobbik" to describe the football supporters and by publishing a hyperlink to the Youtube video, the respondents had infringed its right to reputation. Bearing in mind the role of the Internet in enhancing the public's access to news and information, the Court noted that the very purpose of hyperlinks was, by directing to other pages and web resources, to allow Internet users to navigate to and from material in a network characterised by the availability of an immense amount of information. Hyperlinks contributed to the smooth operation of the Internet by making information accessible through linking it to each other. Punishing a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there were particularly strong reasons for doing so, such as where the journalist had not acted in good faith in accordance with the ethics of journalism.

In *Hoiness v. Norway*, no. 43624/14, 19 March 2019, the Court refused to impose liability on an Internet forum for anonymous comments published on its site. The claim arose from the publication of allegedly defamatory comments on a discussion forum operated by a Norwegian news portal. The Court accepted that the applicant would have faced considerable difficulties in attempting to pursue claims against the anonymous posters. However, it observed that the forums in which the comments were found were unlikely to be considered as a continuation of the portal's editorial articles. In contrast to the *Delfi AS*, cited above, the Court found there to be sufficient mechanisms on the company's website to deal with the kind of comments complained of: there was an established system of moderators who monitored content, interactive 'warning' buttons that readers could use to notify their reaction to comments, as well as the ability for readers to give warning by other means, such as email. Upon an overall examination and assessment of the measures that had been put in place in order to monitor the forum comments and the specific responses to the applicant's notifications, the domestic courts had found that the news portal company and its editor had acted appropriately. In

such circumstances, the Court found that the domestic courts had reviewed the relevant aspects of the case and acted within their margin of appreciation when seeking to establish a balance between the applicant's rights and those of the news portal and host of the debate forums.

Finally, the Court has viewed measures that block access to entire internet sites with great suspicion. In *OOO Flavus and Others v. Russia*, nos. 12468/15 and 2 others, 23 June 2020, the applicants were owners of online media outlets which published articles, opinion pieces and research by opposition politicians, journalists and experts, many of which were critical of the Russian Government, who had their websites blocked on the grounds that some of their webpages featured unlawful content. The Court reiterated that the wholesale blocking of access to a website was an extreme measure comparable to banning a newspaper or television station and had to be justified on its own separately and distinctly from the justification underlying the initial order targeting the illegal content contained within the site and by reference to the criteria established and applied by the Court under Article 10 of the Convention. Any indiscriminate blocking measure which interfered with lawful content or websites as a collateral effect of a measure aimed at illegal content or websites amounted to arbitrary interference with the rights of the owners of such websites. In the case at hand, the Russian government had not put forward any justification for the wholesale blocking order; nor did it explain what legitimate aim or pressing social need the Russian authorities sought to achieve by blocking access to the applicants' online media. Russian law did not provide owners of online media, such as the applicants, with any procedural safeguards capable of protecting them against arbitrary interference. Furthermore, Russian law did not require the authorities to justify the necessity and proportionality of the interference with the freedom of expression online or consider the question whether the same result could be achieved by less intrusive means. The Court also took into account the fact that the applicants had been unaware of the grounds for the blocking request until after access to their websites had been blocked and they had applied for a judicial review.

II. Freedom of assembly/association and democracy (Article 11)

1. Freedom of association

The Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and freedom of association (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 88, ECHR 2004-I and *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, *Reports of Judgments and Decisions* 1998-IV). Indeed, the way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. The participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively. Freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities. Indeed, forming an association in order to express and promote identity may be instrumental in helping a minority group to preserve and uphold its rights.

a. Links with a democratic society

i. The relationship between democracy, pluralism and freedom of association

The right to form an association is an inherent part of the right to freedom of association, even if Article 11 only makes express reference to the right to form trade unions. Indeed, the ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning. In *Sidiropoulos and Others v. Greece*, cited above, §§ 44-47, the domestic courts had refused to register a Macedonian cultural association on the grounds that it intended to undermine the country's territorial integrity. The Court found the association's aims – the preservation and development of the traditions and culture of the Macedonian minority – entirely legitimate. In its view, the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The statement of the national courts that the association represented a danger to Greece's territorial integrity had been based on a mere suspicion. Should the association, once registered, engage in activities incompatible with its declared aims or the law, it was open to the authorities to dissolve it. Consequently, the refusal to register the applicants' association was disproportionate to the objectives pursued.

The Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association. Indeed, the way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. In *Gorzelik and Others v. Poland* [GC], cited above, §§ 103-106, the Polish authorities refused to register an association characterising itself as an organisation of the Silesian national minority. They considered that the Silesians were not a national minority and registering the association as an "organisation of a national minority" would grant it electoral privileges which would place it at an advantage in relation to other ethnic organisations. The Court observed that the state of democracy in a country can be gauged by the way in which the right to freedom of association is secured under national legislation and in which the authorities apply it in practice. However, the Court held on the facts that the refusal to register the association did not violate Article 11 for the reasons given by the national authorities.

ii. Political parties[3]

Political parties play an essential role in ensuring pluralism and therefore come within the scope of Article 11. Any measure taken against them affects both freedom of association and, consequently,

[3] Political parties are discussed in further detail at section 1(c) below.

democracy in the State concerned. The exceptions set out in Article 11 are therefore to be construed strictly. On the one hand, in *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, § 103, ECHR 2003-II, as discussed in more detail below, the Court noted that a State may be justified under its positive obligations under Article 1 in imposing on political parties the duty to respect and safeguard the rights and freedoms guaranteed by the Convention and the obligation not to put forward a political programme in contradiction with the fundamental principles of democracy. In *Linkov v. the Czech Republic, no. 10504/03, 7 December 2006*, however, the Czech authorities refused to register a political party on the grounds that that the party's goal of "breaking the legal continuity with totalitarian regimes" had been unconstitutional. In the Court's view, there had been no evidence that party in question had not sought to pursue its aims by lawful and democratic means, or that its proposed change of the law had been incompatible with fundamental democratic principles, especially as the party's registration had been refused before it had even had time to carry out any activities. The Court reiterated in that connection that the could be applied only in the most serious cases. As the party had not advocated any policy that could have undermined the democratic regime in the country and had not urged or sought to justify the use of force for political ends, the refusal to register it had not been necessary in a democratic society.

iii. The importance of associations formed for other purposes

While, in the context of Article 11, the Court has often referred to the essential role played by political parties in ensuring pluralism, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. The participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively. As the Court explained in *Gorzelik and Others*, cited above, § 92, "pluralism is also 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."

Freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities. Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights. In *Ouranio Toxo and Others v. Greece*, no. 74989/01, § 37 and §43, ECHR 2005-X the Court held that there was a breach of Article 11 on account of the omissions of the Greek authorities. In particular, the State had failed to take adequate measures to avoid or contain the violence which had broken out after a political party, defending the interests of the Macedonian minority living in Greece, had put out a sign at the party headquarters with the party's name written in Macedonian. The police could have reasonably foreseen the danger of violence against members of the party and clear violations of freedom of association but had not intervened. Moreover, the public prosecutor had not considered it necessary to start an investigation in the wake of the incidents to determine responsibility. The Court emphasised that in cases of interference with freedom of association by acts of private individuals, the competent authorities have an additional obligation, beyond non-interference, to undertake an effective investigation. It is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote. Their members must be able to hold meetings without having to fear that they will be subjected to physical violence by their opponents. Such a fear would be liable to deter other associations or political parties from openly expressing their opinions on highly controversial issues affecting the community.

Furthermore, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society. The State's duty of neutrality and impartiality excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. In *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 96, ECHR 2006-XI Russian authorities refused the registration of a religious association on the grounds that it was an organisation of a supposedly paramilitary nature; that its title contained the words "branch" and "army" in its name; and that its founders were foreign nationals. The Court held this to be a violation of Article 11, noting that particularly weighty and compelling reasons are required for refusing to re-register a religious community that has existed for many years, and on the facts the reasons provided by the State were largely technical in nature and thereby insufficient.

In *Association Rhino and Others v. Switzerland,* no. 48848/07, §§ 60-63, 11 October 2011*,* the association Rhino was formed to protect the housing rights of its members who were occupying three empty buildings in Geneva. Due to the shortage of affordable housing, the canton of Geneva had an administrative practice to evict unauthorised occupants of empty buildings only if the owners have a building or renovating permit. The owners filed a request to dissolve the association which was granted by the tribunal of Geneva on the ground that the objective of the association was unlawful. The Court found a violation of Article 11, noting that the dissolution of an association is a harsh measure entailing significant consequences, which may be taken only in the most serious of cases. On proportionality, the Court observed that the dissolution of the association, which was essentially a legal act, had not by itself put an end to the occupation of the buildings. Hence, the State could not claim that the measure in question had been aimed in a practical and effective manner at protecting the property owners' rights. Likewise, the Court was not satisfied that the dissolution of the association had been necessary in order to prevent disorder, as the reason the occupants of the buildings had not been evicted was because the situation had been tolerated for a long time by the cantonal authorities.

iv. The relationship between freedom of expression, freedom of association and democracy

Given that the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions, the protection of opinions and the freedom of expression under Article 10 is one of the objectives of the freedom of association. The protection of opinions and the freedom to express them applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. In *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, §§ 40-41, ECHR 1999-VIII the dissolution of a pro-Kurdish political party, on the ground that it challenged the territorial integrity and secular nature of the State and the unity of the nation, was held to be a violation of Article 11. The Court observed that nothing in the association's political program could be considered as a call for the use of violence, an uprising or any other form of rejection of democratic principles. A political party's programme referring to the right to self-determination of "national or religious minorities" does not justify the party's dissolution if its words did not encourage separation from the State but were intended instead to emphasise that the proposed political project must be underpinned by the freely given and democratically expressed consent of such minorities. Similarly, in *Zhechev v. Bulgaria*, no. 57045/00, § 36, 21 June 2007 the refusal to register an association on the ground that its aims were "political" and incompatible with the State's Constitution was a violation of Article 11. The Court noted that the link between freedom of expression and freedom of association link was particularly relevant where, as on these facts, the authorities' stance towards an association was in reaction to its views and statements.

A recent example in which a link was drawn between freedom of expression, freedom of association and democracy can be seen in *Ecodefence and Others v. Russia*, nos. 9988/13 and 60 others, § 118 and § 158, 14 June 2022 which grouped together applications by 61 Russian NGOs that had been listed as "foreign agents" under the Foreign Agents Acts or their directors that had received administrative or criminal sanctions in connection with the act. The Court found that two key concepts of the Foreign Agents Act ("political activity", "foreign funding"), as applied to NGOs and their directors, fell short of the foreseeability requirement and judicial review failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive. The Court observed that the law was used to quash dissenting opinions in Russian civil society. By arbitrarily branding NGOs as "foreign agents" – which carries a severe stigma in Russia – the Russian government cut off NGOs from the public discourse and public funding opportunities. The law thus served as a "tool" to undermine independent NGOs and exercise control over Russian civil society.

b. Limiting freedom of association

i. Activities contrary to values of the Convention

Associations which engage in activities contrary to the values of the Convention cannot benefit from the protection of Article 11 by reason of Article 17 which prohibits the use of the Convention in order to destroy or excessively limit the rights guaranteed by it. In *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII the State authorities prohibited the formation of an association whose memorandum of association had anti-Semitic connotations. The Court found no violation of Article 11, considering in particular that the refusal of registration of an association on account of its name being misleading and defamatory does not constitute a particularly severe interference; it is not disproportionate to require the applicants to change the proposed name. Similarly, in *Hizb ut-Tahrir and Others v. Germany (dec.)*, no. 31098/08, § 73, 12 June 2012, the Court held that there was no violation of Article 11 in respect of a ban on the activities of an Islamist association for advocating the use of violence. In particular, the second applicant had repeatedly justified suicide attacks in which civilians were killed in Israel, and neither he nor the association had distanced themselves from that stance during the proceedings before the Court.

National authorities benefit from a broader margin of appreciation in their assessment of the necessity of interference in cases of incitement to violence against an individual, a representative of the State or a section of the population. In *Ayoub and Others v. France*, nos. 77400/14 and 2 others, 8 October 2020, the Court found the dissolution of two extreme right-wing associations to be justified where they had the characteristics of a private militia and were engaged in violence and public-order disturbances.

ii. Associations with policies not respecting rules of democracy or aimed at its destruction

While Article 10 guarantees that even ideas diverging from those of a democratic system could be expressed in public debate provided that they did not give rise to hate speech or incite others to violence, Article 11 does not prevent the States from taking measures to ensure that an association does not pursue policy goals that are contrary to the values of pluralist democracy and in breach of the rights and freedoms guaranteed by the Convention. In *Zehra Foundation and Others v. Turkey*, no. 51595/07, §§ 65-66 10 July 2018, the dissolution of an association whose activities were aimed at establishing a Sharia state, and to set up educational establishments and propagate ideas opposed to pluralist democracy among students, was held not to violate Article 11. The Court noted that the leaders of such an association could also legitimately be made subject to penalties. On the other hand, in *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 and 8 others, § 79 and § 91, ECHR 2014, following the implementation of a 2011 law that sought to address problems relating to the exploitation of State funds by certain Churches, the applicants alleged that the loss of their status as registered Churches and the requirement to apply to Parliament to be registered as incorporated Churches amounted to a breach of their rights under Article 11 read together with

Articles 9 and 14. In holding that there had been a violation of Article 11, the Court noted that the Government had not demonstrated that less drastic solutions to the problem perceived by the authorities – such as the judicial control or dissolution of Churches found to have abused the system of funding – were not available. The Court did note that Articles 9 and 11 only require the State to ensure that religious communities have the possibility of acquiring legal capacity as entities under the civil law; they do not require that a specific public-law status be accorded to them. At the same time, however, there is a positive obligation incumbent on the State to put in place a system of recognition which facilitates the acquisition of legal personality by religious communities. The State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom.

iii. Preventive measures

States are entitled to take preventive measures to protect democracy vis-à-vis both political parties and non-party entities. They cannot be required to wait until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention. Where the danger of that policy has been sufficiently established and imminent, a State may reasonably forestall the execution of such a policy before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime. In *Refah Partisi (the Welfare Party) and Others*, cited above, § 132, a political party had been dissolved by the Constitutional Court on the ground that it had become a "centre of activities against the principle of secularism". In finding no violation of Article 11, the Court considered that the acts and speeches of Refah's members and leaders had revealed the party's long-term policy of setting up a regime based on Sharia within the framework of a plurality of legal systems and that Refah had not excluded recourse to force in order to implement its policy. Given that those plans were incompatible with the concept of a "democratic society" and that the party had real opportunities of putting them into practice, the decision of the Constitutional Court could reasonably be considered to have met a "pressing social need". The Court placed weight on the fact that Refah was a large political party which had legal advisers conversant with constitutional law and the rules governing political parties, so they were deemed reasonably able to foresee the dissolution of the party if its leaders engaged in anti-secular activities.

Similarly, while drastic measures, such as the dissolution of an entire political party or the refusal to register a party may be taken only in the most serious cases, in *Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, § 80 and § 89, ECHR 2009, the Court found the dissolution of the party justified where it had pursued a strategy of "tactical separation" through terrorism and that there were significant similarities between them and the terrorist organisation ETA. In view of the situation that had existed in Spain for many years with regard to terrorist attacks, the links between the applicant parties and ETA could objectively be considered as a threat to democracy. Furthermore, the acts and speeches imputable to the applicant parties created a clear image of the social model that was envisaged and advocated by them, which was in contradiction with the concept of a "democratic society" and presented a considerable threat to Spanish democracy.

iv. Restrictions on members of armed forces, police and state administration

While the State is bound to respect the freedom of assembly and association of its employees, Article 11(2) *in fine* allows it to impose lawful restrictions on the exercise of these rights by members of its armed forces, police or administration. The term "lawful" in the second sentence of 11 § 2 alludes to the same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expression "prescribed by law" found in the second paragraphs of Articles 9 to 11. The concept of lawfulness used in the Convention, apart from positing conformity with domestic law, also implies qualitative requirements in the domestic law such as

foreseeability and, generally, an absence of arbitrariness. The restrictions imposed on the three groups mentioned in Article 11 are to be construed strictly and should therefore be confined to the "exercise" of the rights in question. These restrictions must not impair the very essence of the right to organise. In *Rekvényi v. Hungary* [GC], no. 25390/94, § 41 and § 61, ECHR 1999-III, Mr. Rekvényi was a police officer and the Secretary General of the Police Independent Trade Union. The Union filed a constitutional complaint against an amendment to the Constitution of Hungary that prohibited members of the armed forces, the police, and security services from joining a political party or engaging in political activities. The Union claimed that the law was an unjustified interference with his rights to freedom of expression and association. The Court determined that there was no violation of Articles 10 and 11, referring in particular to the relatively recent Hungarian experience with a non-democratic regime, in which police forces were in the service of the ruling political party. The restriction therefore served to protect national security and public safety and prevent disorder. Lastly, in *Erdel v. Germany* (dec.), 2007, no. 30067/04, 13 February 2007, the call-up of an army reserve officer was revoked owing to his membership of a political party suspected of disloyalty to the constitutional order. The Court declared the claim inadmissible, noting that, given the role of the army in society, it is a legitimate aim in any democratic society to have a politically neutral army.

In *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, no. 11828/08, §§ 67-70, 25 September 2012, the applicant trade union organised a public meeting in Bratislava to protest against prospective legislative changes to the social security of policemen and their low pay, during which a slogan was chanted calling for the Government to step down. The Minister of the Interior subsequently made a number of statements in the media criticising the meeting, warning in particular that any officers acting against the ethical code of the police again "would be dismissed." The Minister further removed the trade union's president from a managerial position in the police, and one of the applicants was removed from the supervisory board of the police health insurance company. The Court held that there had been no violation of Article 11, explaining that given their primordial role in ensuring internal order and security and in fighting crime, duties and responsibilities inherent in the position and role of police officers justify particular arrangements as regards the exercise of their trade-union rights. It is legitimate to require that police officers should act in an impartial manner when expressing their views so that their reliability and trustworthiness in the eyes of the public be maintained. Sanctioning trade union members to achieve this aim corresponds to a "pressing social need."

c. In focus: political parties

As briefly discussed above, political parties play an essential role in ensuring pluralism and the proper functioning of democracy such that any measure taken against them affects both freedom of association and, consequently, democracy in the State concerned. In *Republican Party of Russia v. Russia*, no. 12976/07, §§ 119-120, 12 April 2011, the Court found that the applicant party's dissolution for failure to comply with the requirements of minimum membership and regional representation was disproportionate to the legitimate aims cited by the Government. Even though the requirement for political parties to have a minimum number of members was not uncommon among Member States, the threshold set under Russian law, which in 2001 had jumped from 10,000 to 50,000 members, was the highest in Europe. The Court considered that such a radical measure as dissolution on a formal ground, applied to a long-established and law-abiding political party, could not be considered "necessary in a democratic society." It should be primarily up to the party itself and its members, and not the public authorities, to ensure that formalities are observed in the manner specified in its articles of association. A minimum membership requirement would be justified only if it allowed the unhindered establishment and functioning of a plurality of political parties representing the interests of various, even minor, population groups and ensuring them access to the political arena.

i. Nature of scrutiny of restrictions

The intensity of the Court's scrutiny depends on the type of association and the nature of its activities. In view of the difference in the importance for a democracy between a political party and a non-political association, only the former is subject to the most rigorous scrutiny of the necessity of a restriction on the right to associate. This means only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of 11 § 2 exists, 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. Such scrutiny is all the more necessary where, as in *United Communist Party of Turkey and Others*, cited above, § 57, an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.

On the other hand, national authorities benefit from a broader margin of appreciation in their assessment of the necessity of interference in cases of incitement to violence against an individual, a representative of the State or a section of the population. In *Vona v. Hungary*, no. 35943/10, § 69, ECHR 2013 the Court found that the dissolution of a private association, whose activities were seen as having the potential to shape political life, was justified on the ground that it was involved in anti-Roma rallies and paramilitary parading that were deemed as steps towards implementing a policy of racial segregation. In a similar vein, in *Les Authentiks and Supras Auteuil 91 v. France*, nos. 4696/11 and 4703/11, 27 October 2016 the Court also emphasised that associations with the official aim of promoting a football club, as in this case, were less important than political parties in terms of democracy. The Court found that the dissolution of two association which were involved in repeated acts of violence related to football matches, resulting in the death of a supporter in one instance, was not a violation of Article 11. The dissolution orders had been necessary, in a democratic society, for the prevention of disorder and crime.

ii. Seeking change through legal and democratic means

Political parties must seek change through legal and democratic means; and the proposed changes themselves must be compatible with fundamental democratic principles: In *Yazar and Others v. Turkey*, nos. 22723/93 and 2 others, § 49 and § 56, ECHR 2002-II the Court set out two conditions on which a political party may promote a change in the law or the legal and constitutional structures 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. Consequently, a political party whose leaders incite to violence or put forward a policy which fails to respect democracy, or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy, cannot lay claim to the Convention's protection against penalties imposed on those grounds. On the facts, the Constitutional Court had dissolved a political party on the ground that it had undermined the integrity of the State on account of statements made by its leaders and officers which were contrary to the Constitution and in breach of the legislation on political parties, but also on account of the fact that it had lent its protection and assistance to some of its members who had committed illegal acts. Reiterating that the dissolution of a political party is a "drastic" measure, the Court considered that in a democratic society such interference with the applicants' freedom of association was not necessary in the instant case and was thereby a breach Article 11.

iii. Factors for examining refusal to register a political party or its dissolution

In examining whether the refusal to register a political party or its dissolution on account of a risk of democratic principles being undermined met a "pressing social need," the Court explained in *Refah Partisi (the Welfare Party) and Others*, cited above, § 104, that it takes into account the following points: (i) whether there was plausible evidence that the risk to democracy was sufficiently imminent; (ii) whether the leaders' acts and speeches taken into consideration in the case under review were imputable to the political party concerned; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and

advocated by the party which was incompatible with the concept of a "democratic society." The Court observed that a plurality of legal systems cannot be considered compatible with the Convention system, as it would introduce a distinction between individuals based on religion and thus, firstly, do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of different religions and beliefs and, secondly, create an unacceptable discrimination. The model proposed by Refah was of a state and society organised according to religious rules (sharia), and sharia was seen as incompatible with the fundamental principles of democracy. Member States may therefore oppose such political movements based on religious fundamentalism in the light of their historical experience. The Court concluded that, in view of the fact that Refah's plans were incompatible with the concept of a "democratic society" and the real opportunities it had of putting those plans into practice, the penalty imposed by the Constitutional Court could reasonably be considered to have met a "pressing social need".

On the other hand, in *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, no. 46626/99, ECHR 2005-I, where the authorities had refused registration of a party of communists, the Court did not accept the Government's argument that Romania could not allow the emergence of a new communist party to form the subject of a democratic debate. While it was prepared to take into account Romania's experience of totalitarian communism prior to 1989, it considered that that context could not by itself justify the need for the interference, especially as communist parties adhering to Marxist ideology exist in a number of countries. As there was nothing in the party's programme that could be considered a call for the use of violence or any other form of rejection of democratic principles or for the "dictatorship of the proletariat," the programme was not incompatible with a "democratic society." Similarly, in *Tsonev v. Bulgaria*, no. 45963/99, § 104, 13 April 2006, the authorities refused to register the Communist Party of Bulgaria, citing formal deficiencies in the registration documents and the alleged dangers stemming from the party's goals and declarations. The Court found no indication that the party was seeking, despite its name, to establish the domination of one social class over the others. Nor was there any evidence that in choosing to include the word "revolutionary" in the preamble to its constitution that it had opted for a policy that represented a real threat to the Bulgarian State. Moreover, there was nothing in the party's declarations to show that its aims were undemocratic or that it intended to use violence to attain them. The Court therefore determined that there had been a violation of Article 11.

In *Herri Batasuna and Batasuna*, cited above, § 91, the Court held that the acts and speeches imputable to the applicant parties created a clear image of the social model that was envisaged and advocated by them, which was in contradiction with the concept of a "democratic society" and presented a considerable threat to Spanish democracy. Accordingly, the dissolution of the association corresponded to a "pressing social need" and was proportionate to the legitimate aim pursued.

iv. Associations calling into question the way a State is currently organised

A common theme in the Court's jurisprudence is the idea that the essence of democracy is 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. In *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, no. 59489/00, 20 October 2005, the Bulgarian Constitutional Court declared that a political party had advocated separatist ideas and "imperil[ed] [Bulgaria's] national security". The party was consequently declared unconstitutional and dissolved. Finding a violation of freedom of association under Article 11, the Courted that on none of the occasions cited by the Constitutional Court in support of its decision did the applicant party's leaders and members hint at any intention to use violence or any other undemocratic means to achieve their aims. Even if it could be assumed that the political project advocated by the applicant party was indeed the autonomy or even secession of part of the national territory, this was not necessarily at variance with the principles of democracy. However shocking and unacceptable the statements of the applicant party's leaders and members might appear to the authorities or the

majority of the population and however illegitimate their demands might be, they did not appear to warrant the interference in question. The fact that the applicant party's political programme was considered incompatible with the prevailing principles and structures of the Bulgarian State did not make it incompatible with the rules and principles of democracy.

Similarly, in *Freedom and Democracy Party (ÖZDEP)*, cited above, § 41, the Constitutional Court had criticised ÖZDEP for having distinguished two nations in its programme – the Kurds and the Turks – and for having referred to the existence of minorities and to their right to self-determination, to the detriment of the unity of the Turkish nation and the territorial integrity of the Turkish State. The Court noted that, taken together, the passages in issue presented a political project whose aim was in essence the establishment – in accordance with democratic rules – of "a social order encompassing the Turkish and Kurdish peoples." In its programme ÖZDEP also referred to the right to self-determination of the "national or religious minorities;" however, taken in context, the Court considered that those words did not encourage people to seek separation from Turkey but were intended instead to emphasise that the proposed political project must be underpinned by the freely given, democratically expressed, consent of the Kurds. In the Court's view, like in *Socialist Party and Others v. Turkey, 25 May 1998, Reports of Judgments and Decisions 1998-III,* the fact that such a political project is considered incompatible with the current principles and structures of the Turkish State did not mean that it infringed democratic rules. The same applied, too, to ÖZDEP's proposals for the abolition of the Religious Affairs Department.

v. Financing and inspections of political parties

Financial activities of political parties necessarily need to be supervised for the purposes of accountability and transparency, which serve to ensure public confidence in the political process. In view of the primordial role played by political parties in the proper functioning of democracies, the general public may be deemed to have an interest in their being monitored and any irregular expenditure being sanctioned, particularly as regards political parties that receive public funding. Member States enjoy a relatively wide margin of appreciation regarding how they will inspect political parties' finances and the sanctions they will impose for irregular financial transactions. Nevertheless, any legal regulations governing the inspection of political parties' expenditure must be couched in terms that provide a reasonable indication as to how those provisions will be interpreted and applied. The financial inspection should never be used as a political tool to exercise control over political parties, especially on the pretext that the party is publicly financed. In order to prevent the abuse of the financial inspection mechanism for political purposes, a high standard of "foreseeability" must be applied with regard to laws that govern the inspection of the finances of political parties, in terms of both the specific requirements imposed and the sanctions that the breach of those requirements entails. In *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, §§ 105, 26 April 2016, the Court found that the Turkish Constitutional Court's order of the confiscation of a substantial part of the assets of Turkey's main opposition party to be a violation of Article 11. The Court considered, in particular, that the applicant party was not able to foresee whether and when unlawful expenditure would be punished by a warning or a confiscation order. Considering the serious consequences that a confiscation order may entail for a political party, the domestic law should have set out more precisely the circumstances in which such a sanction could be applied as opposed to the less intrusive sanction of a warning.

2. Freedom of assembly

The right to freedom of peaceful assembly is a fundamental right in a democratic society and is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. Notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10, where the aim of the exercise of freedom of assembly is the

expression of personal opinions as well as the need to secure a forum for public debate and the open expression of protest.

a. Links with a democratic society

i. General principles

The right to freedom of peaceful assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively. In view of the fundamental nature of this right, the Court has been reluctant to accept objections that the applicants have suffered no "significant disadvantage" and to dismiss Article 11 complaints with reference to Article 35(3)(b).

The right to freedom of peaceful assembly covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly. Although the primary purpose of Article 11 is to protect the right of political peaceful demonstration and participation in the democratic process, it would be an unacceptably narrow interpretation of that Article to confine it only to that kind of assembly, just as it would be too narrow an interpretation of Article 10 to restrict it to expressions of opinion of a political character. In *Friend and Others v. the United Kingdom* (dec.), nos 16072/06 and 27809/08, 28 November 2009 however, in the context of new UK legislation that made it a criminal offence to hunt a wild mammal with a dog except in certain, statutorily-defined, circumstances, the Court was not prepared to read the right so as to protect the hunt because the ban only prohibited gathering for the purpose of killing a wild mammal with hounds, not gathering *per se*.

States must not only refrain from applying unreasonable indirect restrictions on the right to assemble peacefully but also safeguard that right. At the same time, however, Article 11 is not absolute and only protects the right to "peaceful assembly," a notion which does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of Article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society. Where irregular demonstrators do not engage in acts of violence, public authorities must show a certain degree of tolerance towards peaceful gatherings so as the freedom of assembly guaranteed by Article 11 is not to be deprived of all substance. Article 11 protection should therefore extend to those assemblies that have caused a certain level of disruption to ordinary life, including to traffic. However, in *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 173-174, ECHR 2015 the almost complete obstruction of three major highways by a group of farmers in disregard of police orders and of the needs and rights of road users constituted conduct which, even though less serious than recourse to physical violence, was found by the Court to be "reprehensible." The farmers' criminal convictions were therefore held not to violate Article 11.[4]

ii. Legislative safeguards

The concept of lawfulness used in the Convention, including the reference to "lawful" in Article 11(2), apart from positing conformity with domestic law, also implies the qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness. For domestic law to meet the qualitative requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. In *Navalnyy v. Russia* [GC], nos. 29580/12 and 4

[4] See section 2(b)(iii) below for a further discussion on this issue.

others, § 108, 15 November 2018 the Court found Article 11 applicable to a peaceful "walkabout" gathering whereby groups of persons acted in a coordinated and purposeful way, to express a political message; the applicant did not consider them "marches" or "meetings" subject to notification under the applicable national law. An interference with the freedom of an assembly involving its disruption, dispersal or the arrest of participants may only be justifiable on specific and averred substantive grounds, such as serious risks provided for by law. The Court did not accept, in particular, the State's aim of prevention of disorder in relation to events where the gatherings were unintentional and caused no nuisance.

iii. Potential chilling effect of measures on assembly participants

In considering the proportionality of the State measure, account must be taken of its chilling effect. In particular, a prior ban of an assembly may discourage the participants from taking part in it. The temporary nature of the ban is not of decisive importance in considering the proportionality of the measure, since even a temporary ban could reasonably be said to have a "chilling effect" on the party's right to exercise its freedom of expression and to pursue its political goals. In *Christian Democratic People's Party v. Moldova*, no. 28793/02, §§ 71-78, ECHR 2006-II the Moldovan authorities temporarily banned an opposition party's activities, as a result of the gatherings it had organised in order to protest against the Government's plans to make the teaching of Russian language compulsory for schoolchildren. The Court found that, since the temporary ban on the applicant party's activities was not based on relevant and sufficient reasons and was not a necessary measure in a democratic society, there has been a violation of Article 11. In particular, the Court was not persuaded by the State's argument that some statements made at the gatherings, such as the singing of a fairly mild student song, amounted to calls to public violence. In *Bączkowski and Others v. Poland*, no. 1543/06, §§ 66-68, 3 May 2007 the Court noted that a prior ban can have a chilling effect on the persons who intend to participate in a rally even if the rally subsequently proceeds without hindrance on the part of the authorities.

Moreover, the use of force by the police for arresting assembly participants not engaged in any acts of violence may have a chilling effect on the applicants and others, discouraging them from taking part in similar public gatherings. In *Zakharov and Varzhabetyan v. Russia*, nos. 35880/14 and 75926/17, § 90, 13 October 2020 the Court noted that police force was used to arrest those participants in the assembly who had acted violently and disobeyed the police. However, the State had not submitted any explanations as to why force had to be applied in respect of the applicants, who were not arrested and did not engage in any acts of violence. The Court therefore found that the force used in respect of the applicants was unnecessary and excessive, in violation Article 11. Similarly, in *Navalnyy and Gunko v. Russia*, no. 75186/12, § 88, 10 November 2020 the Court noted that the first applicant's brutal arrest, as well as his subsequent administrative conviction, had a chilling effect, discouraging him and others from attending protest rallies or indeed from engaging actively in opposition politics.

The Court is aware of the potentially chilling effects of criminal sanctions on assembly participants. However, on the facts of *Knežević v. Montenegro*, *(dec.),* no. 54228/18, 2 February 2021, the criminal sanction had not been for the applicant's organising and/or participating in the protests, but rather for assaulting a police officer in the performance of his duties. By his own submission, the applicant had repeatedly pushed the police officer, removed the officer's hat and taken it away. The officer had remained calm and applied no force whatsoever in respect of the applicant. The applicant's sentence of four months had been below the statutory minimum and therefore, although not insignificant, had not been contrary to Article 11.

b. Exigencies of a democratic society as a factor limiting freedom of association

i. Counter-demonstrations

A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. Participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. In *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, no. 44079/98, § 115, 20 October 2005 the national authorities had in many respects impeded the ability of the applicant association to exercise their freedom of assembly, including its refusal to allow the association's members and supporters to hold meetings and to prevent them holding commemorative events. The Court observed that on one occasion when the authorities had not interfered with the applicant's freedom of assembly, they had "appeared somewhat reluctant to protect the members and followers of Ilinden from a group of counter-demonstrators," resulting in some of the participants being subjected to physical violence. The Court therefore held that the authorities had failed to discharge their positive obligation to take reasonable measures to protect the participants.

ii. Prior notification requirements

It is important for associations and others organising demonstrations, as actors in the democratic process, to abide by the rules governing the notification process. However, regulations of this nature should not represent a hidden obstacle to freedom of peaceful assembly. In *Oya Ataman v. Turkey*, no. 74552/01, §§ 39-41, ECHR 2006-XIV the Court stressed the importance of taking preventive security measures such as, for example, ensuring the presence of first-aid services at the site of demonstrations in order to guarantee the smooth conduct of any event, meeting or other gathering, be it political, cultural or of another nature. On the facts, the forceful breaking up by the police of a peaceful demonstration held in a park during a busy period without the submission of a mandatory prior notification was held to be a violation of Article 11. Although the applicant and other demonstrators did not comply with the security forces' orders and attempted to force their way through, there was no evidence to suggest that the group in question represented a danger to public order, apart from possibly disrupting traffic. There were at most 50 people who wished to draw attention to a topical issue. The Court observed that the rally began at about 12 noon and ended with the group's arrest within half an hour. The Court was particularly struck by the authorities' impatience in seeking to end the demonstration which was organised under the authority of the Human Rights Association. On the other hand, in *Berladir and Others v. Russia*, no. 34202/06, 10 July 2012, restrictions were imposed by the Russian authorities on the applicants who wanted to demonstrate against an anti-immigration march, and the applicants were prosecuted for failure to comply with the national procedures for public gatherings. The Court found that the Russian authorities had provided the necessary conditions for the applicants to express their views while exercising peacefully their right to assembly, thereby holding that there had been no violation of Article 11. The Court was not persuaded that the applicants' preference for the location of their assembly outweighed the reasons of the authorities, namely the security of the participants and the need not to obstruct vehicles and pedestrians. The applicants had been given the opportunity to express their views at another venue but had not used it.

Similarly, in *Knežević v. Montenegro (dec.)*, cited above, against the authorities' authorisation, as well as relevant legislation in force at the time, protest organisers (including the applicant) had set up a stage not in the park but in the traffic lanes in front of Parliament. They had also set up about 300 tents on the road without any authorisation. They had also caused disruption to ordinary life and other activities to a degree exceeding that which was inevitable. The boulevard in question had been the busiest road in the city and blocking it had completely obstructed the normal activities of other people and services for twenty days. Therefore, a decision by the municipal police inspector ordering that the objects be removed, which had in no way interfered with the holding of the protest rally itself that the

authorities had tolerated for 20 days, was held not to be a violation of Article 11 and the application was declared inadmissible.

Restrictions such as prior notification requirements may be imposed by national authorities. Prior notification serves not only the aim of reconciling the right of assembly with the rights and lawful interests (including the freedom of movement) of others, but also the aim of preventing disorder or crime. In order to balance these conflicting interests, the institution of preliminary administrative procedures is a common practice in member States when a public demonstration is to be organised. Furthermore, the Court noted that the right to hold spontaneous demonstrations may override the obligation to give prior notification of public assemblies only in special circumstances, namely if an immediate response to a current event is warranted in the form of a demonstration. In particular, such derogation from the general rule may be justified if a delay would have rendered that response obsolete. In *Éva Molnár v. Hungary*, no. 10346/05, § 39, 7 October 2008 the dispersal of a demonstration about which the police had not been notified and which was not justified by special circumstances warranting an immediate response was held not to violate Article 11. The Court observed that the official results of the elections had been made public two months before the impugned demonstration, and that the outcome of those elections had been objectively established. To the extent that the demonstrators' aim was to express solidarity with the protestors at the Erzsébet Bridge, the Court was not persuaded that this matter would have become obsolete had the demonstrators respected the notification rule.

iii. Scope of meaning of "peaceful" assembly

Article 11 only protects the right to "peaceful assembly," a notion which does not cover a demonstration where the organisers and participants have violent intentions (as discussed in *Kudrevičius and Others*, cited above, § 173-174).

However, if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion. Any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it. In *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 97, ECHR 2001-IX the Bulgarian Supreme Court refused to register an association whose meetings were perceived as liable to disguise separatist aims to the benefit of the Macedonian minority in Bulgaria. The Court held this to be a violation of Article 11. That the fact that a group of persons calls for autonomy or even 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.

III. Electoral rights and democracy (Article 3 of Protocol No. 1)

Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system. The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.

Article 3 of Protocol No. 1 differs from the other substantive provisions of the Convention and the Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work in respect of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, comprising the right to vote (the "active" aspect) and to stand for election (the "passive" aspect).

1. Active aspect: Prohibition on minorities and specified groups from voting

The "active" aspect is subject to limitations. Here, as in any other area under Article 3 of Protocol No. 1, the member States enjoy a certain margin of appreciation which varies depending on the context.

However, given the importance of Article 3 Protocol 1 to the maintenance of a democratic system, the test relating to the "active" aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a group of persons from the right to vote. Hence, the supervision exercised consists in a relatively comprehensive review of proportionality. When an individual or group has been deprived of the right to vote—whether this be a member of a minority, an individual with additional mental or physical support needs or persons deprived of their liberty—the Court is particularly attentive.

The margin of appreciation afforded to States cannot, for example, have the effect of prohibiting certain individuals or groups from taking part in the political life of the country, especially through the appointment of members of the legislature. In *Aziz v. Cyprus,* no. 69949/01, § 29, ECHR 2004-V, the applicant, a member of the Turkish-Cypriot community living in the Republic of Cyprus, requested to be registered in the electoral roll with a view to voting in parliamentary elections. The Ministry of the Interior refused the applicant's request, explaining that under the Constitution members of his community could not be registered on the Greek-Cypriot electoral role. His attempts to challenge this domestically were unsuccessful. The Court took the view that, on account of the abnormal situation existing in Cyprus since 1963 and the legislative vacuum, the applicant was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives. The very essence of the applicant's right to vote was thus impaired. The Court also found a clear inequality of treatment in the enjoyment of the right in question, between the members of the Turkish-Cypriot community and those of the Greek-Cypriot community. There had accordingly been a violation of Article 3 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention.

With regards to the rights of prisoners to vote, the Court has repeatedly reaffirmed that that there is no question that a prisoner should forfeit his rights under the Convention merely because of his status as a person detained following conviction. The rights guaranteed by Article 3 of Protocol No. 1, given their inherent importance to the democratic system, are no exception. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public

opinion. Hence, in *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §70, ECHR 2005-IX, the Court found a violation of Article 3 of Protocol No. 1 because the voting ban in question had been a blanket ban applied automatically to anyone serving a custodial sentence. It affected 48,000 prisoners which was a high number, and concerned all sorts of prison sentences, ranging from one day to life, and for various types of offences from the most minor to the most serious. In addition, there was no direct link between the offence committed by an individual and the withdrawal of his voting rights.

Member States are not, however, prevented from implementing measures that are designed to enhance civic responsibility and respect for the rule of law and to ensure the proper functioning and preservation of the democratic regime. In *Scoppola v. Italy (no. 3)* [GC], no. 126/05, §106-109, 22 May 2012*,* the applicant had been sentenced to life imprisonment for murder, attempted murder, ill-treatment of members of his family and unauthorised possession of a firearm. Under Italian law his life sentence entailed a lifetime ban from public office, which in turn meant the permanent forfeiture of his right to vote. The Court noted that the ban applied only to persons convicted of certain well-determined offences or to a custodial sentence exceeding a statutory threshold. The legislature, the Court held, had been careful to adjust the duration of this measure according to the specific features of each case. It had also adjusted the duration of the ban depending on the sentence imposed, and therefore, indirectly, on the gravity of the sentence. Many of the convicted prisoners had retained the possibility of voting in legislative elections. In addition, this system had been complemented by the possibility for convicts affected by a permanent ban to recover their voting rights. The Italian system did not therefore violate Article 3 of Protocol No. 1.

It is possible for Member States to enact provisions aimed at ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs. However, the Court exercises particular caution when such measures affect a vulnerable group in society who have suffered considerable discrimination, such as the mentally disabled. In *Alajos Kiss v. Hungary,* no. 38832/06, § 39-44, 20 May 2010, for example, the Court considered the case of an applicant who had been diagnosed with bipolar disorder and who had been placed under partial guardianship in 2005 after a court found that, while he was able to take care of himself adequately, he was sometimes irresponsible with money and occasionally aggressive. By virtue of domestic law he automatically lost the right to vote. The Court held that the voting ban in question had been imposed as an automatic, blanket restriction, regardless of the protected person's actual faculties and without any distinction being made between full and partial guardianship. The Court further considered that the treatment as a single class of those with intellectual or mental disabilities was a questionable classification, and the curtailment of their rights must be subject to strict scrutiny. It therefore concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation, could not be considered proportionate to the aim pursued. On the other hand, in *Caamaño Valle v. Spain*, no. 43564/17, §§ 61, 72, 75, 11 May 2021, the Court reiterated that the aim of "ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs" was legitimate. On the facts, the applicant's daughter was intellectually disabled and, based on a thorough, individualised assessment by the domestic courts, she was considered to be highly influenceable and not aware of the consequences of any vote that she might cast. The Court therefore found that the domestic courts had balanced the interests at stake and that the disenfranchisement of the applicant's daughter had been individualised and proportionate to the legitimate aim. The Court was furthermore satisfied that the disenfranchisement of the applicant's daughter did not thwart the free expression of the opinion of the people, noting that the conditions for disenfranchisement applied only to those persons who were effectively unable to make a free and self-determined electoral choice.

It should also be noted that complaints concerning elections not falling under Article 3 of Protocol No. 1 may, if appropriate, be raised under other Articles of the Convention. Thus, in *Mółka v. Poland* (dec.), no. 56550/00, pp. 15-18, ECHR 2006-IV, the applicant was unable to vote in elections to municipal councils, district councils and regional assemblies. The polling station was not accessible to individuals in wheelchairs and it was not permitted to take ballot papers outside the premises. The Court took the view that it could not be excluded that the authorities' failure to provide appropriate access to the polling station for the applicant, who wished to lead an active life, might have aroused feelings of humiliation and distress capable of impinging on his personal autonomy, and thereby on the quality of his private life.

In *Toplak and Mrak v. Slovenia,* nos. 34591/19 and 42545/19, §119, 26 October 2021, by contrast, the Court examined compliance with positive obligations to take appropriate measures to enable the applicants, suffering from muscle dystrophy and using a wheelchair, to exercise their right to vote on an equal basis with others. It acknowledged that a general and complete adaptation of polling stations in order to fully accommodate wheelchair users would no doubt facilitate their participation in the voting process. However, the States enjoy a margin of appreciation in assessing the needs of people with disabilities in respect of elections and the means of providing them with adequate access to polling stations within the context of the allocation of limited State resources. Given that both applicants voted in a 2015 referendum (about which they had complained), that a ramp was installed at the polling station at the request of the first applicant and that, at the request of the second applicant, a visit to the polling station for his electoral area was arranged a few days beforehand, the Court found that any problems they may have faced did not produce a particularly prejudicial impact on them so as to amount to discrimination. As regards the 2019 European Parliament election, the lack of voting machines was not found to be discriminatory for the first applicant who was able to be assisted by a person of his own choice under legal duty to respect secrecy.

2. Passive aspect

Provisions that prevent individuals from standing for national Parliaments on the sole basis of their race cannot be justified in a democratic society. In *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009 the applicants were citizens of Bosnia and Herzegovina and were of Roma and Jewish origin. However, under the 1995 Constitution of Bosnia and Herzegovina – which formed an annex to the 1995 Dayton Peace Agreement – only Bosniacs, Croats and Serbs, described as "constituent peoples", were eligible to stand for election to the tripartite State presidency and the upper chamber of the State Parliament, the House of Peoples. The applicants were accordingly not able to stand for election. The Court accepted that the impugned constitutional provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing". The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace. This could explain the absence of representatives of the other communities – such as local Roma and Jewish communities – at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society. However, the Court could not but observe numerous positive developments that had taken place in Bosnia and Herzegovina since the Dayton Peace Agreement including *inter alia* Bosnia and Herzegovina's decision to join NATO's Partnership for Peace and the ratification of a Stabilisation and Association Agreement with the EU. Moreover, by ratifying the Convention and its Protocols thereto in 2002 without any reservations, the respondent State had specifically undertaken to review, within one year, its electoral legislation with the help of the Venice Commission, and to bring it in line with the Council of Europe standards where necessary. A similar commitment had also been given when ratifying the Stabilisation and Association Agreement. Lastly, while it was true that the Convention itself did not require the respondent State to totally abandon its peculiar power-sharing system, the opinions of the Venice

Commission clearly demonstrated the existence of other mechanisms of power-sharing which did not automatically lead to the total exclusion of representatives of the other communities. In conclusion, the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked objective and reasonable justification.

With regards to the passive aspect under Article 3 of Protocol No. 1, it is permissible for states to implement measures restricting individuals' ability to stand for election when the measure in question is itself designed to protect the democratic order or to ensure the proper functioning of the public authorities. In *Miniscalco v. Italy*, no. 55093/13, 17 June 2021, the applicant was disqualified from standing as a candidate in the regional elections on account of his final conviction for abuse of authority. The Court found that the measure complained of corresponded to an urgent need and was compatible with the principle of the rule of law and the general objectives of the Convention. Having examined the existing legal framework, the Court concluded that the disqualification had been surrounded by guarantees. In particular, the disqualification was preconditioned on the existence of a final criminal conviction strictly defined by law, it was limited in time and its foreseeability fell within the wide margin of appreciation enjoyed by the State.

Such is the inherent importance of Article 3 of Protocol No. 1 to the democratic order, any measures designed to restrict an individual's right to stand for election must be accompanied by sufficient procedural safeguards and be based on foreseeable legal provisions. In *Ādamsons v. Latvia*, no. 3669/03, 24 June 2008, in which the Court considered the case of a former officer in the Border Guard Forces of the former Soviet Union. After the breakup of the Soviet-Union, he abandoned the army to go into Latvian politics and subsequently served as Minister of the Interior and then Prime Minister. After leaving the government in power to the opposition, his Parliamentary mandate was revoked under the Parliamentary Elections Act, which disqualified citizens who were or had been serving officers of organs of public security of the USSR. In the light of the particular socio-historical background to the applicant's case, the Court accepted that during the first years after Latvia had regained independence electoral rights could be substantially restricted without this infringing Article 3 of Protocol No. 1. However, with the passing of time, a mere general suspicion regarding a group of persons no longer sufficed and the authorities had to provide further arguments and evidence to justify the measure in question. The legal provision applied in this case targeted former officers of the KGB. Having regard to the wide-ranging functions of that agency, that concept was too broad: taken at face value it could be understood to include all those who had served in the KGB, regardless of the period concerned, the actual tasks they had been assigned and their individual conduct. In the case at hand, the applicant had never been accused of being directly or indirectly involved in the misdeeds of the totalitarian regime, or in any act capable of showing opposition or hostility to the restoration of Latvia's independence and democratic order. Moreover, he had only very belatedly been officially recognised as ineligible, after ten years of an outstanding military and political career in the restored Latvia. Only the most compelling reasons could justify the applicant's ineligibility in those circumstances.

In *Etxeberria and Others v. Spain*, nos. 35579/03 and 3 others, 30 June 2009, however, the Court considered the case of Spanish nationals and electoral groupings whose candidatures had been annulled by the Supreme Court on the grounds that they were pursuing the activities of three political parties which had been declared illegal and dissolved on account of their support for violence and for the activities of the ETA, a terrorist organisation. The Court found that the national authorities had obtained considerable evidence enabling them to conclude that the electoral groupings in question wished to continue the activities of the political parties concerned. After an examination in adversarial proceedings, during which the groupings had been able to submit observations, the domestic courts had found an unequivocal link with the political parties that had been declared illegal. Lastly, the political context in Spain, namely the presence in the government bodies of certain autonomous

communities (particularly in the Basque country) of political parties calling for independence, proved that the impugned measure was not part of a policy to ban any expression of separatist views. The Court thus found that the restriction had been proportionate to the legitimate aim pursued.

3. Ensuring the integrity of the election process

In *Communist Party of Russia and Others v. Russia*, no. 29400/05, 19 June 2012, the Court considered whether the State had a positive obligation under Article 3 of Protocol No. 1 to ensure that coverage by regulated media was objective and compatible with the spirit of "free elections", even in the absence of direct evidence of deliberate manipulation. It found that the existing system of electoral remedies was sufficient to satisfy the State's positive obligation of a procedural nature. Indeed, the applicants' complaint about unequal media coverage was examined by an independent body in a procedure which afforded the basic procedural guarantees, and a reasoned judgment was given; the applicants did not explain what other remedies or legal tools could possibly be more effective.

As to the substantive aspect of the obligation and the allegation that the State should have ensured neutrality of the audio-visual media, the Court took the view that certain steps had been taken to guarantee some visibility to opposition parties and candidates on TV and to secure the editorial independence and neutrality of the media. Namely, the opposition parties were able to convey their political message to the electorate through the media that they controlled. Further, the applicants did obtain some measure of access to the national-wide TV channels: they were provided with free and paid airtime, with no distinction made between different political forces. These arrangements had probably not secured *de facto* equality, but it could not be considered established that the State had failed to meet its positive obligations in this area to such an extent as to amount to a violation of Article 3 of Protocol No. 1.

State obligations also extend to the post-election period. In *Davydov and Others v. Russia*, no. 75947/11, 30 May 2017, the Court emphasised that during this period, the State had a positive obligation to ensure careful regulation of the way in which the results of voting are ascertained, processed and recorded. Post-election phases must be surrounded by precise procedural safeguards; the process must be transparent and open, and observers from all parties must be allowed to participate, including opposition representatives. The Court pointed out, however, that Article 3 of Protocol No. 1 was not conceived as a code on electoral matters designed to regulate all aspects of the electoral process. Thus, the Court's level of scrutiny in each case depended on the aspect of the right to free elections. Tighter scrutiny should be reserved for any departures from the principle of universal suffrage, but a broader margin of appreciation could be afforded to States where the measures prevented candidates from standing for elections. A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation. The case itself concerned alleged anomalies in federal legislative and municipal elections. The applicants had participated in these elections in various capacities: they were all registered on the electoral rolls, some had also stood for election to the legislative assembly, and others were members of electoral commissions or observers. The Court found there had been a violation of Article 3 of Protocol No. 1: the applicants had presented an arguable claim that the fairness of the elections had been seriously compromised by the procedure in which the votes had been recounted. Such irregularities could lead to gross distortion of the voters' intent in all the constituencies concerned. But the applicants had not had their complaints about the recount process effectively examined by the domestic authorities, i.e. the electoral commissions, the public prosecutor, the commission of inquiry or the courts.

The Court further emphasised that the margin of appreciation afforded to States can only be validly exercised in accordance with the rule of law. In in *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, 13 October 2015, the results of 23 polling stations set up abroad had been invalidated on

account of alleged anomalies, depriving an MP of his seat. The Court examined the interference with the voting rights of 101 electors and the right to stand for election of the MP and his party. It found that only purely formal grounds had been given to invalidate the election in several polling stations. In addition, the circumstances relied on by the court to justify its decision were not provided for, in a sufficiently clear and foreseeable manner, in the domestic law, and it had not been shown that they would have altered the choice of the voters or distorted the result of the election. In addition, electoral law did not provide for the possibility of organising fresh elections in the polling stations where the ballot had been invalidated – contrary to the Venice Commission's Code of Good Practice in Electoral Matters – which would have reconciled the legitimate aim pursued by the annulment of the election results, namely the preservation of the legality of the election process, with the subjective rights of the electors and the candidates in parliamentary elections. Consequently, there had been a violation of Article 3 of Protocol No. 1, even though the Court emphasised that it did not overlook the fact that the organisation of fresh elections in another sovereign country, even in a limited number of polling stations, might face major diplomatic or organisational obstacles and additional costs.

Finally, in *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020, the applicant had failed to win a seat in the Walloon Region Parliament by only 14 votes and called for a re-examination of about 20,000 ballot papers. While the relevant committee found the applicant's complaint well-founded and proposed a recount, the Walloon Parliament, not yet constituted at the material time, decided not to follow that conclusion, and approved all the elected representatives' credentials. The Court took into account the fact that the Walloon Parliament had examined and rejected the applicant's complaint before its members were sworn in and their credentials were approved. As to the scope of the procedural safeguards against arbitrariness in this case, the Court stressed that the guarantees of impartiality of a decision-making body were intended to ensure that the decision taken was based solely on factual and legal considerations, and not political ones. Given that members of parliament cannot be "politically neutral", in a system where parliament is the sole judge of the election of its members, particular attention had to be paid to the guarantees of impartiality laid down in domestic law as regards the procedure for examining challenges to election results. Furthermore, the discretion enjoyed by the body concerned must be circumscribed with sufficient precision by the provisions of domestic law. The procedure in electoral disputes must also guarantee a fair, objective and sufficiently reasoned decision. Complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing.

IV. Independence of the judiciary (Article 6) and democracy

The Court has always emphasised the prominent place held in a democratic society by the right to a fair trial (*Stanev v. Bulgaria* [GC], no. 36760/06, § 231, ECHR 2012). The guarantee "is one of the fundamental principles of any democratic society, within the meaning of the Convention" (*Mamaladze v. Georgia*, no. 9487/19, § 91, 3 November 2022).The judge offers legal protection in disputes between citizens and the government and between citizens themselves, thereby helping to ensure fair and just societies, and limiting abuse by governments and state authorities.

The right to a fair hearing must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. Arbitrariness entails a negation of the rule of law and cannot be tolerated in respect of procedural rights any more than in respect of substantive rights.

1. Links with a democratic society

The rule of law underpins an effective functioning of democracy. An efficient, impartial, and independent justice system whose decisions are enforced is an essential pillar of the rule of law and a precondition for the enjoyment of all fundamental rights and freedoms. It also constitutes a key element of public trust in justice and in democratic institutions more broadly. The judiciary's fundamental role in a democracy is to guarantee the very existence of the rule of law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

i. General principles

The right to a fair trial is one of the fundamental principles of any democratic society, within the meaning of the Convention. Legal aid is critical in a democratic society since it creates equality of arms and gives ordinary people access to specialised information on the law and on how they can best defend their interests. It ensures that the rule of law is human rights based, laying the foundation in a democratic society for the equal exercise of the right to justice of every individual. In this context, while Article 6(1) does not imply that the State must provide free legal aid for every dispute relating to a "civil right", the Convention is intended to safeguard rights which are practical and effective, in particular the right of access to a court. Hence, in *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32 the Court concluded that Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court, in this case due to the complexity of the relevant law or procedure, together with the existence of a statutory requirement under national law to have legal representation.

The public character of proceedings before judicial bodies protects litigants against the administration of justice in secret with no public scrutiny, and is also a means of maintaining confidence in the courts. In order to determine whether the forms of publicity provided for under domestic law are compatible with the requirement for judgments to be pronounced publicly within the meaning of Article 6(1), in each case the form of publicity to be given to the judgment under the domestic law must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6(1). In *Mamaladze*, cited above, § 99, in holding that there had been a violation of Article 6 § 1 the Court found that the trial court had not sufficiently addressed the applicant's argument regarding the possibility of only partly closing the trial to the public and that certain public statements following his arrest, the prosecuting authorities' disclosing material from the criminal case file, and a non-disclosure obligation, considered cumulatively, had encouraged the public to believe he had been guilty before the actual verdict. Ultimately, however, the Court considered that the

proceedings as a whole had been fair, notably with regard to the applicant's allegations concerning the key evidence – cyanide found in his suitcase checked into a Berlin flight. There had therefore been no violation of Article 6 § 1 in this latter respect.

However, the "right to a court" and the right of access are not absolute; they may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. In *Stanev*, cited above, §§ 241-246, the procedural rights of persons declared to be partially lacking legal capacity were impaired under national law. The Court noted that, in principle, any person declared to be incapacitated had to have direct access to a court in order to seek the restoration of his or her legal capacity, and there was a trend in European countries to that effect. Furthermore, the international instruments for the protection of people with mental disorders attached growing importance to granting such persons as much legal autonomy as possible. The Court therefore held that the lack of direct access to court for the applicant seeking restoration of his legal capacity was a violation of Article 6.

Furthermore, there is a right within the meaning of Article 6 § 1 where a substantive right recognised in domestic law was accompanied by a procedural right to have that right enforced through the courts. The mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right. Indeed, the Court explained in *Regner v. the Czech Republic* [GC], no. 35289/11, §§ 102 and 119, 19 September 2017, that Article 6 applies where the judicial proceedings concern a discretionary decision resulting in interference in an applicant's rights. On the facts, a Ministry of Defence official challenged the revocation of his security clearance, which had prevented him from continuing to perform his duties as deputy to the first Vice-Minister. Admittedly, security clearance did not constitute an autonomous right. However, it was a fundamental condition for the performance of the applicant's duties. Its revocation had had a decisive effect on his personal and professional situation, preventing him from carrying out certain duties at the Ministry and harming his prospects of obtaining a new post within the State authorities. Those factors were found to be sufficient for the applicant to be able to claim a "right" for the purposes of Article 6 when challenging the revocation of his security clearance.

The employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the "special trust and loyalty" that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties so that they can render decisions *a fortiori* based on the requirements of law and justice, without fear or favour. As the Court explained in *Grzęda v. Poland* [GC], no. 43572/18, § 264, 15 March 2022, it would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality (citing *Bilgen v. Turkey*, no. 1571/07, § 79, 9 March 2021).

ii. Courts must inspire confidence in a democratic society

In order to determine whether a tribunal can be considered to be independent as required by Article 6(1), appearances may also be important. In *Sramek v. Austria*, 22 October 1984, § 42, Series A no. 84 the Court considered that where, as in this case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society. On the facts,

the Land Government, represented by the Transactions Officer, acquired the status of a party to the case when they appealed to the Regional Authority "tribunal" against the first-instance decision in Mrs. Sramek's favour, and one of the three civil servants on that appeal tribunal had the Transactions Officer as his hierarchical superior. That civil servant occupied a key position within the tribunal: as rapporteur, he had to set out and comment on the results of the investigation and then to present conclusions. The Court therefore concluded that there had been a violation of Article 6(1).

2. Particular facets of democracy and the functioning of the judiciary

i. Sanctions against (including removal of) judges

Disciplinary proceedings may involve particularly serious consequences for the lives and careers of judges: the accusations can result in the judge's removal from office or suspension from duty and thus very serious penalties which carry a significant degree of stigma. When a State initiates such disciplinary proceedings, public confidence in the functioning and independence of the judiciary is at stake; and in a democratic State, this confidence guarantees the very existence of the rule of law. In *Harabin v. Slovakia*, no. 58688/11, § 133, 20 November 2012 the Court emphasised that observance of the guarantees under Article 6 is particularly important in disciplinary proceedings against a judge in his capacity as president of the Supreme Court, given that the confidence of the public in the functioning of the judiciary at the highest national level is at stake. On the facts, the Court considered that the Constitutional Court, when balancing between two positions, namely the need to respond to the request for exclusion of its judges and the need to maintain its capacity to determine the case, failed to take an appropriate stance from the point of view of the guarantees of Article 6 in that it did not answer the arguments for which the exclusion of its judges had been requested.

In *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 214, 6 November 2018 the Court examined the review by a judicial body of disciplinary proceedings (the "CSM") against the applicant judge and the issues of the independence and impartiality of that body, the scope of the review and the lack of a public hearing. The CSM had ordered the judge to pay a fine and imposed two penalties of suspension from duty, and the Judicial Division of the Supreme Court upheld the CSM's decisions. The applicant alleged, among other things, lack of independence and impartiality of the Supreme Court owing to the dual role of its President and the careers of its judges. The Court stressed that the judicial review carried out had to be appropriate to the subject matter of the dispute. The Court concluded that, "taking into consideration the specific context of disciplinary proceedings conducted against a judge, the seriousness of the penalties, the fact that the procedural guarantees before the CSM were limited, and the need to assess factual evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case – the combined effect of two factors, namely the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court and the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial-review stage, meant that the applicant's case was not heard in accordance with the requirements of Article 6(1) of the Convention."

Judges cannot be excluded from the protection of Article 6 on the grounds of their status alone; moreover, judicial independence should be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to other official functions that a judge may be called upon to perform that are closely connected with the judicial system. In *Grzęda*, cited above, § 327, the Court found that the exclusion of access to a court for a judge who was a member of the National Council of the Judiciary ("NCJ") (which had constitutional responsibility for safeguarding judicial independence) and who had been prematurely removed from his post following a legislative reform, in the absence of any judicial oversight of the legality of that measure, had not been justified on

objective grounds in the State's interest. It is not enough for the State to establish that the civil servant in question participates in the exercise of public power. The Court pointed out that "[m]embers of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office is able to render such protection effective." Similarly, in *Żurek v. Poland*, no. 39650/18, 16 June 2022, following the applicant judge's criticisms of the changes to the judiciary initiated by the legislative and executive branches, the applicant was removed from the NCJ before his term had ended, and had no legal avenue to contest the loss of his seat. Following the same reasoning as in *Grzęda*, cited above, the Court found that the lack of judicial review of the decision to remove the applicant from the NCJ, absent any justification by the Polish Government, had breached his right of access to a court. The Court emphasised the overall context of the various judicial reforms undertaken by the Polish Government, including that of the NCJ that had affected the applicant, which had resulted in the weakening of judicial independence and what has widely been described as the rule-of-law crisis in Poland.

Furthermore, in *Eminağaoğlu v. Turkey*, no. 76521/12, 9 March 2021, when the applicant was a judicial officer of the first grade, he was transferred to a post in Çankırı by the Second Chamber of the High Council of Judges and Prosecutors (HSYK) by way of disciplinary sanction on account of his statements and criticisms, particularly about high-profile cases in the media. The Court considered it was difficult to say that the proceedings before the HSYK complied with the requirements of the procedural safeguards under Article 6: they were in fact mainly written proceedings and afforded very few safeguards to the judge/prosecutor concerned. In this connection, the relevant legislation did not contain any specific rules on the procedure to be followed, on the safeguards afforded to judges and prosecutors before the HSYK, or on the manner in which evidence was to be admitted and assessed. Moreover, while HSYK decisions could be challenged by way of an appeal lodged with its Plenary Assembly, there was no evidence to suggest that the latter afforded the guarantees of a judicial review. The previous finding as to the lack of procedural safeguards before the HSYK was also valid for the Plenary Assembly, and therefore neither could be characterised as a "tribunal" within the meaning of Article 6.

ii. Institutional requirements

In the determination of their civil rights and obligations, everyone is entitled to a hearing by an independent and impartial tribunal established by law. While the institutional requirements of Article 6 § 1 each serve specific purposes as distinct fair trial guarantees, they are all guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers, both fundamental in a democratic society. The need to maintain public confidence in the judiciary and to safeguard its independence vis-à-vis the other powers underlies each of those requirements. The Grand Chamber in *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, refined and clarified the relevant case-law principles. A "tribunal" is characterised by its judicial function and must also satisfy a series of requirements, such as independence, in particular of the executive, impartiality, and duration of its members' terms of office. In addition, it was inherent in the very notion of a "tribunal" that it be composed of judges selected on the basis of merit through a rigorous process to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – were appointed. Having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the process of appointing judges necessarily constituted an inherent element of the concept of "establishment" of a court or tribunal "by law". There thus had to be a systematic enquiry whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned

fundamental principles and to compromise the independence of the court in question. "Independence" referred, in this connection, to the necessary personal and institutional independence that was required for impartial decision making, and characterised both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties. On the facts, the applicant had been denied his right to a "tribunal established by law", on account of the participation in his trial of a judge whose appointment procedure had been vitiated by grave irregularities that had impaired the very essence of the right at issue.

An example of bodies that have been recognised by the Court as having the status of a "tribunal" within the meaning of Article 6 § 1 can be seen in *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021, which related to bodies set up on an exceptional and transitional basis to re-evaluate the ability of the country's judges and prosecutors to perform their functions in an effort to combat corruption. Regarding independence, once appointed, the vetting bodies had not been subject to any pressure by the executive during the examination of the applicant's case. That their members had not been drawn from the corps of serving professional judges had been consistent with the spirit and goal of the vetting process, specifically in an attempt to avoid any individual conflicts of interest and to ensure public confidence in the process. The Court considered that the fixed duration of their terms of office was understandable given the extraordinary nature of the vetting process, and that the domestic legislation had provided guarantees for their irremovability and for their proper functioning. Regarding impartiality, there had been no confusion of roles for the body in question: the statutory obligation to open the investigation was not dependant on it bringing any charges of misconduct against the applicant; its preliminary findings had been based on the available information without the benefit of the applicant's defence; and it had taken its final decision on the applicant's disciplinary liability on the basis of all the available submissions, including the evidence produced and the arguments made by the applicant at a public hearing. The mere fact that it had made preliminary findings in the applicant's case was not sufficient to prompt objectively justified fears as to its impartiality.

No particular term of office has been specified as a necessary minimum. Irremovability of judges during their term of office must in general be considered a corollary of their independence. However, the absence of formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that other necessary guarantees are present (*Campbell and Fell v. the United Kingdom*, 28 June 1984, § 80, Series A no. 80). On the facts of *Campbell and Fell*, the Court observed that the term of office was relatively short but that there was a very understandable reason: the members were unpaid and it might well have proved difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer.

iii. Appearance of independence and impartiality

Even appearances may be important. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. For instance, where a tribunal's members include persons who are in a subordinate position in terms of their duties and the organisation of their service, vis-à-vis one of the

parties, accused persons may entertain a legitimate doubt about those persons' independence. Therefore, in *Şahiner v. Turkey*, no. 29279/95, §§ 45-46, ECHR 2001-IX, the Court considered that the applicant – tried in a martial-law court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear being tried by a bench which included two military judges and an army officer acting under the authority of the martial-law commander. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat in that court made no difference in this respect.

In deciding whether, in a given case, there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified. Thus, the existence of impartiality must be determined on the basis of the following: (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, namely by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. In applying the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary. However, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee. On the objective test, the Court stated in *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009 that "justice must not only be done, it must also be seen to be done" (citing *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. On the facts of *Micallef*, cited above, § 56, the lack of statutory right to challenge a judge on the basis of their family ties with a party's advocate was held to be violation of Article 6.

Furthermore, in *Stoimenovikj and Miloshevikj v. North Macedonia*, no. 59842/14, § 40, 25 March 2021 the Court found that it had been impossible for the applicant to request recusal of the judge from sitting in her civil case who had, five years earlier, sat in the criminal proceedings concerning the same parties and the same conduct, and relating to loan agreements that were very similar to those that were the object of the civil proceedings. Consequently, it was the responsibility of the judge, who was aware of the circumstances, to bring the matter to the attention of the President of the Supreme Court. The Court concluded that applicant's fears that the judge had already formed a view as to the merits of the civil case before it was brought before the Supreme Court can be considered to have been objectively justified. There was therefore a violation of Article 6(1).

iv. Internal organisation and existence of national procedures and safeguards

In order that the courts may inspire confidence in the public, account must also be taken of questions of internal organisation. In *Piersack v. Belgium*, 1 October 1982, § 30(d), Series A no. 53 the Court held that if an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

In addition to ensuring the absence of actual bias, the Court has reiterated that national procedures for ensuring impartiality are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. So, for example, in *Mežnarić v. Croatia*, no. 71615/01, § 36, 15 July 2005 the hearing of a constitutional complaint by a judge who had acted as counsel for the applicant's opponent at the start of the

proceedings led to a finding of a violation of Article 6(1). This was notwithstanding the fact that the judge had represented the applicant's opponent for only two months, and almost nine years before the Constitutional Court's decision.

The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor when taking into account questions of internal organisation. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. The Court has stated on many occasions that it will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified. In *Micallef*, cited above, § 100, the Court observed that Maltese law as it stood at the time of this case was deficient on two levels. Firstly, there was no automatic obligation for a judge to withdraw in cases where impartiality could be an issue. Secondly, the law did not recognise as problematic – and therefore as a ground for challenge – a sibling relationship between judge and advocate, let alone that arising from relationships of a lesser degree such as those of uncles or aunts in respect of nephews or nieces. Thus, the Court considered that the law in itself did not give adequate guarantees of subjective and objective impartiality. Here, the presiding judge was the uncle of the opposing party's advocate and also the brother of the advocate acting for the opposing party during the first-instance proceedings whose conduct was at issue in the appeal. This sufficed to objectively justify fears that the presiding judge lacked impartiality.

Lastly, similar national procedural safeguards to those available in cases of dismissal or removal of judges should likewise be available where, as in *Grzęda*, cited above, §§ 345-346 and 348-349, a judicial member of the National Council of the Judiciary has been removed from his position. In such circumstances, regard should be had to "the strong public interest in upholding the independence of the judiciary and the rule of law" and, if there had been reforms of the judicial system by the State, to the overall context in which they had taken place.

Conclusion

In her 2021 report on the "State of Democracy, Human Rights and the Rule of Law" the Secretary General of the Council of Europe commented that "Europe's democratic environment and democratic institutions are in mutually reinforcing decline." She warned against the danger that Europe's democratic culture would not fully recover. In the face of the current democratic climate, judges have an essential role to play in protecting the integrity of public institutions, and in particular courts. An efficient, impartial and independent justice system whose decisions are enforced is an essential pillar of the rule of law and a precondition for the enjoyment of fundamental rights and freedoms. The Court has recognised the mutually reinforcing relationship between certain rights and democracy and in particular the right to freedom of expression, freedom of association and freedom of assembly. To this end, the Court has afforded heightened protection to actors that promote democratic values, such as journalists, politicians, and academics. The Court also gives due consideration to the Internet as an unprecedented platform for freedom of expression. It has been observed in the Court's judgments that the level of democracy in a particular State can be determined by the way the right to freedom of association is protected on the national level, and that political parties, as well as associations formed for other purposes, have an essential role to play in preserving democracy.

The Court further emphasises that restrictions on the right to freedom of assembly and the right to freedom of expression must be lawful - which imposes a set of qualitative requirements, such as foreseeability, upon the domestic legal order, to ensure that democracy is preserved. This means that certain restrictions must be placed upon the power afforded to the armed forces, the police, and state administration.

Particular oversight has been placed by the Court upon the processes of national elections and national control of the judiciary, so that electoral rights and independence of the judiciary, which form another fundamental aspect of a democratic society, can be preserved.

Lastly, the protection of personal data has also received consideration in the Court's judgments, with the Court noting in particular that violations of the right to privacy can have a chilling effect on freedom of expression.

Therefore, a significant proportion of the Court's case law deals with the ways in which democracy can be preserved through protecting human rights, and the Court recognises the duty of the judiciary to protect and promote democratic values.

Annex

Judges preserving democracy through the protection of human rights

List of Cases

Ādamsons v. Latvia, no. 3669/03, 24 June 2008

Airey v. Ireland, 9 October 1979, Series A no. 32

Alajos Kiss v. Hungary, no. 38832/06, 20 May 2010

Association Rhino and Others v. Switzerland, no. 48848/07, 11 October 2011

Axel Springer AG v. Germany [GC], no. 39954/08, 7 February 2012

Ayoub and Others v. France, nos. 77400/14 and 2 others, 8 October 2020

Axel Springer AG v. Germany (no. 2), no. 48311/10, 10 July 2014

Aziz v. Cyprus, no. 69949/01, ECHR 2004-V

Berladir and Others v. Russia, no. 34202/06, 10 July 2012

Bączkowski and Others v. Poland, no. 1543/06, 3 May 2007

Big Brother Watch and Others v. the United Kingdom [GC], nos. 58170/13 and 2 others, 25 May 2021

Bilgen v. Turkey, no. 1571/07, 9 March 2021

Caamaño Valle v. Spain, no. 43564/17, 11 May 2021

Castells v. Spain, 23 April 1992, Series A no. 236

Christian Democratic People's Party v. Moldova, no. 28793/02, ECHR 2006-II

Communist Party of Russia and Others v. Russia, no. 29400/05, 19 June 2012

Cumhuriyet Halk Partisi v. Turkey, no. 19920/13, 26 April 2016

Davydov and Others v. Russia, no. 75947/11, 30 May 2017

De Cubber v. Belgium, 26 October 1984, Series A no. 86

Delfi AS v. Estonia [GC], no. 64569/09, ECHR 2015

Ecodefence and Others v. Russia, nos. 9988/13 and 60 others, 14 June 2022

Eminağaoğlu v. Turkey, no. 76521/12, 9 March 2021

Erdel v. Germany (dec.), 2007, no. 30067/04, 13 February 2007

Etxeberria and Others v. Spain, nos. 35579/03 and 3 others, 30 June 2009

Éva Molnár v. Hungary, no. 10346/05, 7 October 2008

Freedom and Democracy Party (ÖZDEP) v. Turkey [GC], no. 23885/94, ECHR 1999-VIII

Friend and Countryside Alliance v United Kingdom (dec.), ECHR 2068, 17 December 2009

Gorzelik and Others v. Poland [GC], no. 44158/98, ECHR 2004-I

Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020

Grzęda v. Poland [GC], no. 43572/18, 15 March 2022

Handyside v. the United Kingdom, 7 December 1976, Series A no. 24

Harabin v. Slovakia, no. 58688/11, 20 November 2012

Herri Batasuna and Batasuna v. Spain, nos. 25803/04 and 25817/04, ECHR 2009

Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, ECHR 2005-IX

Hizb ut-Tahrir and Others v. Germany (dec.), no. 31098/08, 12 June 2012

Hoiness v. Norway, Application No. 43624/14, 19 June 2019

Karácsony and Others v. Hungary [GC], nos. 42461/13 and 44357/13, 17 May 2016

Khadija Ismayilova v. Azerbaijan, nos. 65286/13 and 57270/14, 10 January 2019

Knežević v. Montenegro (dec.), no. 54228/18, 2 February 2021

Kudrevičius and Others v. Lithuania [GC], no. 37553/05, ECHR 2015

Les Authentiks and Supras Auteuil 91 v. France, nos. 4696/11 and 4703/11, 27 October 2016

Lingens v. Austria, 8 July 1986, Series A no. 103

Linkov v. the Czech Republic, no. 10504/03, 7 December 2006

Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, 8 November 2016

Magyar Jeti Zrt v. Hungary, Application No. 11257/16, 4 December 2018

Magyar Keresztény Mennonita Egyház and Others v. Hungary, nos. 70945/11 and 8 others, ECHR 2014

Mamaladze v. Georgia, no. 9487/19, 3 November 2022

Mežnarić v. Croatia, no. 71615/01, 15 July 2005

Micallef v. Malta [GC], no. 17056/06, ECHR 2009

Miniscalco v. Italy, no. 55093/13, 17 June 2021

Mółka v. Poland (dec.), no. 56550/00, ECHR 2006-IV

Moscow Branch of the Salvation Army v. Russia, no. 72881/01, ECHR 2006-XI

Mugemangango v. Belgium [GC], no. 310/15, 10 July 2020

Navalnyy and Gunko v. Russia, no. 75186/12, § 88, 10 November 2020

Navalnyy v. Russia [GC], nos. 29580/12 and 4 others, 15 November 2018

NIT S.R.L. v. the Republic of Moldova [GC], no. 28470/12, 5 April 2022

OOO Flavus and Others v. Russia, nos. 12468/15 and 2 others, 23 June 2020

Ouranio Toxo and Others v. Greece, no. 74989/01, ECHR 2005-X

Oya Ataman v. Turkey, no. 74552/01, ECHR 2006-XIV

Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania, no. 46626/99, ECHR 2005-I

Piersack v. Belgium, 1 October 1982, Series A no. 53

Radio France and Others v. France, no. 53984/00, ECHR 2004-II

Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13 and 2 others, 6 November 2018

Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98 and 3 others, ECHR 2003-II

Regner v. the Czech Republic [GC], no. 35289/11, 19 September 2017

Rekvényi v. Hungary [GC], no. 25390/94, ECHR 1999-III

Republican Party of Russia v. Russia, no. 12976/07, 12 April 2011

Riza and Others v. Bulgaria, nos. 48555/10 and 48377/10, 13 October 2015

Şahiner v. Turkey, no. 29279/95, ECHR 2001-IX

Scoppola v. Italy (no. 3) [GC], no. 126/05, 22 May 2012

Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, ECHR 2009

Sidiropoulos and Others v. Greece, 10 July 1998, *Reports of Judgments and Decisions* 1998-IV

Socialist Party and Others v. Turkey, 25 May 1998, *Reports of Judgments and Decisions* 1998-III

Sramek v. Austria, 22 October 1984, Series A no. 84

Stanev v. Bulgaria [GC], no. 36760/06, ECHR 2012

Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, nos. 29221/95 and 29225/95, ECHR 2001-IX

Stoimenovikj and Miloshevikj v. North Macedonia, no. 59842/14, 25 March 2021

The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria, no. 44079/98, 20 October 2005

The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria, no. 59489/00, 20 October 2005

Toplak and Mrak v. Slovenia, nos. 34591/19 and 42545/19, 26 October 2021

Trade Union of the Police in the Slovak Republic and Others v. Slovakia, no. 11828/08, 25 September 2012

Tsonev v. Bulgaria, no. 45963/99, 13 April 2006

United Communist Party of Turkey and Others v. Turkey, 30 January 1998, *Reports of Judgments and Decisions* 1998-I

Vona v. Hungary, no. 35943/10, ECHR 2013

W.P. and Others v. Poland (dec.), no. 42264/98, ECHR 2004-VII

Xhoxhaj v. Albania, no. 15227/19, 9 February 2021

Yazar and Others v. Turkey, nos. 22723/93 and 2 others, ECHR 2002-II

Zakharov and Varzhabetyan v. Russia, nos. 35880/14 and 75926/17, 13 October 2020

Zehra Foundation and Others v. Turkey, no. 51595/07, 10 July 2018

Zhechev v. Bulgaria, no. 57045/00, 21 June 2007

Żurek v. Poland, no. 39650/18, 16 June 2022