FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 11)

INTERIGHTS MANUAL FOR LAWYERS | CURRENT AS AT JULY 2010

WITH THE GENEROUS SUPPORT OF THE OPEN SOCIETY FOUNDATIONS

Handbook Staff

EXTERNAL EDITORS/ AUTHORS	Jeremy McBride	INTERNAL EDITORS/ AUTHORS	Arpine Avetisyan Rachel Fleetwood Vahe Grigoryan Sophio Japaridze

INTERIGHTS Staff

EXECUTIVE DIRECTOR	Danny Silverstone	LAWYER, EUROPE	Yuri Marchenko
LEGAL DIRECTOR	Andrea Coomber	LAWYER, EUROPE (MATERNITY LEAVE)	Dina Vedernikova
LITIGATION DIRECTOR	Joanne Sawyer	LEGAL TEAM CO-ORDINATOR, EUROPE/ECONOMIC AND SOCIAL RIGHTS	Arpine Avetisyan
HEAD OF HUMAN RESOURCES AND GOVERNANCE	Amana Dawuda-Wodu	LEGAL TEAM CO-ORDINATOR, AFRICA/SOUTH ASIA/EQUALITY/ SECURITY AND THE RULE OF LAW	Moni Shrestha
HEAD OF FINANCE	Iryna Peleshko	SENIOR CONSULTANT/SPECIAL COUNSEL	Helen Duffy
SENIOR LAWYER, ECONOMIC AND SOCIAL RIGHTS	Iain Byrne	CONSULTANT, SECURITY AND THE RULE OF LAW	Steve Kostas
SENIOR LAWYER, SECURITY AND THE RULE OF LAW	Vesselina Vandova	INFORMATION AND PUBLICATIONS OFFICER	Rachel Fleetwood
LAWYER, AFRICA	Judy Oder	FUNDRAISING OFFICER	Vicky Lloyd
LAWYER, AFRICA	Solomon Sacco	LEGAL TEAM ADMINISTRATOR	Chloe Marong
LAWYER, EQUALITY	Pádraig Hughes	OFFICE AND HUMAN RESOURCES ADMINISTRATOR	Michelle Woodbine
LAWYER, EQUALITY	Sibongile Ndashe		
LAWYER, EUROPE	Constantin Cojocariu		
LAWYER, EUROPE	Sophio Japaridze		

INTERIGHTS Board of Directors

Lord Lester of Herne Hill QC PRESIDENT
Jeremy McBride, CHAIR
Priscilla Ashun-Sarpy, TREASURER
Professor Christine Chinkin
Tim Eicke
Anne Lapping
Dr Neville Linton
Alexandra Marks
Professor Rachel Murray
Donncha O'Connell
Emma Playfair
Dr Lynn Welchman

INTERIGHTS International Advisory Council

Professor Phillip Alston
Florence Butegwa
Roger Errera
Professor Yash P. Ghai
Asma Khader
Viviana Krsticevic
Marek A. Nowicki
Sonia Picado
Professor Gerard Quinn
Professor Martin Scheinin
Suriya Wickremasinghe

Using this Manual

This manual was originally designed by INTERIGHTS' Europe Programme for its training projects in Central and Eastern Europe and the former Soviet Union. Its purpose was to serve as a reference for lawyers on the European Convention on Human Rights.

The manual includes judgments of the European Court of Human Rights up to 10 July 2010. Any errors, omissions or faults are those of the authors.

Alternative formats of the manual are available upon request.

Acknowledgments

INTERIGHTS would like to thank all those who have been involved in the production of this manual, including the many interns and volunteers who contributed to the research and writing process.

Above all, INTERIGHTS would like to thank the Open Society Foundations, without whose financial and moral support this project would not have been completed.

Published by
INTERIGHTS
Lancaster House
33 Islington High Street
London N1 9LH
UK

Tel: +44 (0)20 7278 3230
Fax: +44 (0)20 7278 4334
E-mail: ir@interights.org
www.interights.org

TABLE OF CONTENTS

1. INTRODUCTION

1.1 Article 11 of the European Convention on Human Rights

> Article 11 – Freedom of peaceful assembly and association
>
> 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 11 of the European Convention on Human Rights ('the Convention') protects two closely related, complementary, yet distinct rights: (i) the right to freedom of peaceful assembly and (ii) the right to freedom of association with others. The rights are complementary in the sense that each freedom contributes to ensuring an effective right to the other (see P. Van Dijk, F. Van Hoof, A. Van Rijn and L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, Intersentia, 2006, p. 586). For example, a right to assemble would clearly be less effective without the ability of individuals to associate and organise their protest. The complementary nature of these rights is also evident from their joint treatment in the Convention and their close relationship in other international human rights instruments as well.

Article 11 is structured – like Articles 8, 9 and 10 of the Convention – in two paragraphs. The first paragraph defines the rights that are being protected. The second paragraph specifies in which circumstances the national authorities of a country are entitled to *legitimately* interfere with those rights. However, Article 11(2) goes further than Articles 8(2), 9(2) and 10(2) in permitting additional 'lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

In these materials, the scope of the rights to freedoms of peaceful assembly and association is discussed in sections 2 and 3, respectively. These sections examine the circumstances where Article 11 may be applicable to the subject matter of a complaint made to the European Court of Human Rights concerning these rights. Section 4 looks at the nature and extent of the State's responsibility for breaches of rights under Article 11. Section 5 discusses the meaning of the permissible State restrictions that are listed in Article 11(2) and the analysis in this regard by the European Court of Human Rights ('the Court').

1.2 The meaning and importance of the freedoms of peaceful assembly and association

Article 11 has been pleaded in only a relatively small percentage of the cases before the Court. However, this belies the importance of the freedoms it protects. The close relationship between

these four freedoms and the possibility of claiming a breach of alternative freedoms on the same set of facts (discussed in section 1.3 below) may, in some part, explain the lack of cases on Article 11. Strong traditions of trade union activity and political activism in many contracting States, together with favourable legal and institutional frameworks for such activity, may also be relevant. Along with the freedom of thought, conscience and religion and freedom of expression, protected by Articles 9 and 10 of the Convention, respectively, the freedoms of peaceful assembly and association are recognised by the Court as fundamental political freedoms vital to pluralist democracy. They are significant individual civil as well as political rights that protect against arbitrary interference by the State when persons choose to associate with others, and are fundamental to the existence and functioning of a democratic society (see, for example, **Rassemblement Jurassien and Unité Jurassienne v Switzerland (1979)**) The role of civil society is crucial. In **Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan (2008)**, the Court held that the 'harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, 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' (at paragraph 53).

The purpose of Article 11 is to allow people to come together and express, discuss and protect their common interests (see D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights*, Oxford University Press, 2009, p. 417). The freedoms of peaceful assembly and association provide space for the development of civil and political society, an arena for people to express different views, values or interests and a platform for such views, values or interests to be heard. The preservation and continuation of these freedoms is key to the existence and effectiveness of a whole range of organisations, including trade unions, non-governmental organisations, political parties, chambers of commerce, neighbourhood associations, religious associations and many others.

Article 11 provides that the right to freedom of association includes the right to form and to join trade unions. Unlike most other types of association, trade unions have an important role to play in economic as well as political life. Cases before the Court involving Article 11 can roughly be divided into two categories reflecting this dual aspect. Both rights have political and economic dimensions as demonstrations can also be for better working conditions. Economic rights cases concern employment-related matters, such as the right to join a trade union, or the right to bargain collectively (see C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights*, Oxford: Oxford University Press, 2006, p. 298).

In the case of **G. v Germany (1989)**, the former European Commission of Human Rights ('the Commission') noted that, as the rights of freedom of peaceful assembly and association are fundamental to democratic society, they are not to be restrictively interpreted.

Questions

1. Is there an effective civil society in your country? Are there many NGOs, local organisations, political parties or trade unions?
2. Is it difficult to establish a trade union or political or religious organisation in your country? If so, why?
3. Does anti-terrorist-legislation limit the scope of the right to freedom of peaceful assembly and association?
4. Consider the power of employers and the level of social protection in your country. Do employers have a disproportionate influence over domestic policy in this regard?

1.3 The relationship of Article 11 to other Articles of the Convention

1.3.1 Articles 8, 9 and 10 of the Convention

Articles 8, 9 and 10 provide for the right to respect for private and family life, the right to freedom of thought, conscience and religion and the right to freedom of expression respectively. The Court has, in numerous cases, noted that these rights are very closely related to each other and to Article 11.

As well as protecting the freedoms of peaceful assembly and association, the Court has made clear that the objectives of Article 11 include the protection of opinion and beliefs.

- In **Young, James and Webster v United Kingdom (1981)** the Court ruled (at paragraph 57) that '[t]he protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly, it strikes at the very substance of this Article (art. 11) to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.' (see also **Chassagnou and Others v France (1999)**, paragraph 100).

- In **Ezelin v France (1991)** the Court stated (at paragraph 37) that 'notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10. The protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11.'

The link between Article 10 and Article 11 is particularly relevant where authorities have interfered with the right to freedom of peaceful assembly in reaction to views held or statements made by participants in a demonstration or members of an association, for example (see **Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)**, at paragraph 85). Other cases in which the link between Article 10 and Article 11 has been discussed include **Vogt v Germany (1995)** (at paragraph 64), **Refah Partisi (The Welfare Party) and Others v Turkey (2001)** (at paragraph 44), **Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)** (at paragraph 85) and **Ahmed and Others v United Kingdom (1998)**.

Hasan and Chaush v Bulgaria (2000) and **Metropolitan Church of Bessarabia v Moldova (2001)** concerned claims that restrictions on the organisation of a religious community breached Article 9 and

Article 11. In each case, the Court interpreted Article 9 in light of Article 11. Each claim was analysed under Article 9 using principles derived from Article 11 jurisprudence. In **Refah Partisi (The Welfare Party) and Others v Turkey (2003)**, the Court discussed the role of religion and the role of freedom of expression in democratic societies. The cases of **Kimlya and Others v Russia (2009)** and **Jehovah's Witnesses of Moscow and Others v Russia (2010)** also concern violations of Article 9 interpreted in the light of the Article 11.

In each of **N.F. v Italy (2001)** and **Langborger v Sweden (1989),** a claim of violation of Article 8 arose in connection with an Article 11 claim. In *N.F. v Italy*, the applicant argued that a disclosure by the press of his membership of the Freemasons constituted a violation of his right to private life, irrespective of the issues whether membership of the Freemasons was lawful or not. In *Langborger v Sweden*, the applicant complained that the power, conferred on the Tenants' Union, to negotiate on his behalf the amount of the rent for the flat in which he lived was incompatible with the requirements of Article 8.

1.3.2 Article 13 – Right to an effective remedy

The absence of a remedy for alleged interferences with freedom of peaceful assembly and association are likely to engage Article 13, which provides a right to an effective remedy, as well as Article 11. In **Plattform 'Ärtze für das Leben' v Austria (1988)**, Article 13 was pleaded in relation to Article 11. The Court ruled (at §25) that 'Article 13 secures an effective remedy before a national 'authority' to anyone claiming on arguable grounds to be the victim of a violation of his rights and freedoms as protected in the Convention; any other interpretation would render it meaningless.'

1.3.3 Article 14 – Prohibition of discrimination

There can also be a link with the prohibition on discrimination in Article 14. Thus in **Danilenkov and Others v Russia (2009)** the Court found that it was 'crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to have the right to take legal action to obtain damages and other relief.' Therefore, the States are required under Articles 11 and 14 of the Convention to set up a judicial system that would ensure real and effective protection against the anti-union discrimination' found to exist in that case.

Questions

1. Why do you think that Court has held that Article 11 also protects opinions and beliefs?
2. Give examples from your domestic experience where restrictions on freedom of peaceful assembly affected freedom of expression or religion (or vice versa)?
3. Political groups are often formed in order to communicate better a particular viewpoint. Associations of individuals acting together can achieve a degree of political power or contribute to the diffusion of power that is characteristic of democratic societies. How diverse or pluralist is political society in your country?
4. How do domestic law and practice define the rights contained in Article 11 – through freedom of peaceful assembly or other related rights or concepts? Have the courts made the connection with democracy? How much flexibility are courts given to interpret these rights?

1.4 The rights of freedom of peaceful assembly and association under other international instruments

1.4.1 General international human rights instruments

Freedom of peaceful assembly and association are guaranteed by a number of general international human rights provisions

In the case of freedom of peaceful assembly these include Article 21 of the International Covenant on Civil and Political Rights, Article 11 of the African Charter on Human and Peoples' Rights and Article 15 of the American Convention on Human Rights. Article 8 of the International Covenant on Economic, Social and Cultural Rights provides for the right to strike.

Similarly freedom of association is guaranteed by Article 22 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the African Charter on Human and Peoples' Rights, and Article 16 of the American Convention on Human Rights, among others. Article 8 of the International Covenant on Economic, Social and Cultural Rights provides for the right to join a trade union and the right of trade unions to organise and function freely. However, it permits restrictions on the exercise of these rights by members of the armed forces or by the police, as does Article 22 of the ICCPR.

Other international and regional instruments also address the freedoms of peaceful assembly or association; see Article 5(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 7 of the International Convention on the Elimination of All Forms of Discrimination Against Women, Article 15 of the Convention on the Rights of the Child, Article 29 of the Convention on the Rights of Persons with Disabilities, Article 26 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and European Convention No. 124 on the Recognition of the Legal Personality of International Non-Governmental Organisations. See also the Convention Relating to the Status of Refugees (1951) (Article 15) accords the right of freedom of association to refugees. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) (Principles 12, 13 and 14) emphasises that police must not interfere with lawful and peaceful assemblies, and prescribes limits on the ways in which force may be used in violent assemblies. The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1998) (the 'Human Rights Defenders' declaration) reaffirms citizens' right to freely associate with others especially for the purpose of working for the protection and realisation of fundamental rights and freedoms. See section 7 for a full list of universal and regional instruments.

1.4.2 The International Labour Organization

The International Labour Organization ('the ILO'), founded in 1919, is the UN specialised agency that seeks the promotion of social justice and internationally recognised human and labour rights. The right to freedom of association has been most defined and elaborated in international labour law given the particular links between these rights and the ability of workers to secure their econom-

ic and social status. It is, therefore, one of the central provisions underpinning the work of the ILO. Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise (1950) establishes the right of all workers and employers to form and join organisations of their own choosing without prior authorisation. It also lays down a series of guarantees for the free functioning of organisations without interference by the public authorities. Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949) provides for protection against anti-union discrimination, for protection of workers' and employers' organisations against acts of interference by each other, and for measures to promote and encourage collective bargaining.

Other relevant ILO Conventions include Convention (No. 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (1973); and Convention (No. 151) concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (1981).

The ILO Committee on Freedom of Association, created in 1951, examines complaints of violations of the right to freedom of association.

1.4.3 The European Social Charter

The European Social Charter of the Council of Europe entered into force on 26 February 1965. Article 5 (the right to organise) protects the 'the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations.' However, it permits States to exclude the police and armed forces from the exercise of this freedom. Article 6 protects the right to bargain collectively and also guarantees in paragraph 4 the 'right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.'

The Council of Europe adopted the European Social Charter (Revised) on 3 May 1996 and it entered into force on 1 July 1999. In principle, there are no differences between the original and the Revised European Social Charter as regards the rights to freedom of peaceful assembly and association.

1.4.4 The European Union

The EU Charter of Fundamental Rights ('the Charter') is a binding declaration by EU member States that provides for freedom of peaceful assembly and freedom of association. Article 12(1) states that:

> *Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.*

The explanatory materials accompanying the Charter make clear that Article 12(1) is based on Article 11 of the Convention and Article 11(2) of the Community Charter of the Fundamental Social Rights of Workers (1989) which provides:

> *'Employers and workers of the European Community shall have the right of association in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests.*
>
> *Every employer and every worker shall have the freedom to join or not to join such organisations without any personal or occupational damage being thereby suffered by him.'*

The Community Charter of Fundamental Social Rights of Workers elaborates on the rights of employers and workers to form associations, to negotiate and to conclude collective agreements. It also upholds the right to strike, subject to obligations under national regulations. It is aimed at protecting the rights of workers in the European Community,

In 2007 the Council of Europe Committee of Ministers adopted a Recommendation (CM/Rec(2007)14) setting the framework for the legal status of non-governmental organisations (NGOs) in Europe. It stresses the essential contribution made by NGOs to the development and realisation of democracy and human rights, *inter alia,* through participation in public life and makes reference to the fact that 'the existence of many NGOs is a manifestation of the right of their members to freedom of association under Article 11 of the Convention and of their host country's adherence to principles of democratic pluralism.' Along with other safeguards that have to be in place for NGOs to function properly, the Recommendation refers to the prohibition of unduly restrictions introduced by law in relation to any person's right to NGO membership. In addition, it emphasises the obligation on governments to ensure the effective participation of NGOs in dialogue and consultation on public policy decisions, which should be facilitated by ensuring appropriate disclosure to or access to official information.

Questions

1. Is your State a party to any international instruments that provide for freedom of peaceful assembly or association or related rights such as the right to strike?
2. Are the principles contained in these instruments implemented in domestic law? In what manner do they create effective rights?

2 FREEDOM OF PEACEFUL ASSEMBLY

2.1 Scope of the right to freedom of peaceful assembly

2.1.1 What kind of assemblies are protected by the Convention?

Freedom of peaceful assembly under Article 11 is broadly interpreted to include the organisation of, and participation in, marches or processions (see **Christians against Racism and Fascism v United Kingdom (1980)**) static assemblies or sit-ins (see **G. v Germany (1987)** discussed below) and both public and private events, whether formal or informal. In **Rassemblement Jurassien and Unité Jurassienne v Switzerland (1979)**, the Commission noted that Article 11 protects both 'private meetings and meetings in public thoroughfares.' However, although Article 11 will cover any gathering of persons for a common economic or political purpose, it is unlikely to be applicable to gatherings that purely social or are sporting in character.

However, the Court has now made it clear that Article 11 is unlikely to guarantee the right to hold a meeting in privately owned public space against the wishes of the owner. In **Appleby and Others v United Kingdom (2003)**, the applicants were prevented from distributing leaflets concerning a local political matter in the premises of a privately owned shopping centre. They claimed that the State had a positive obligation to guarantee their rights of freedom of expression and freedom of peaceful assembly. Analysing the claim under Article 10, the Court found that the applicants had not proven that they were, as a result of the refusal of the private company, effectively prevented from communicating their views to their fellow citizens. They also had alternative ways of expressing their views outside the premises of this shopping centre. In the admissibility decision of **Anderson and Others v United Kingdom (1997)**, the European Commission on Human Rights focused on the purpose of the gathering of the applicants, rather than on where it took place (in a shopping centre). The applicants complained that the withdrawal of their licence to enter a shopping centre for an indefinite duration (because of their anti-social activities) constituted a violation of their right to peaceful assembly under Article 11. The Commission rejected their claim and stated as follows:

> *There is, however, no indication in the above case-law that freedom of assembly is intended to guarantee a right to pass and re-pass in public places, or to assemble for purely social purposes anywhere one wishes. Freedom of association, too, has been described as a right for individuals to associate "in order to attain various ends" (No. 6094/73, Dec. 6.7.77, D.R. 9, p. 5, at p. 7; see also No. 8317/78, Dec. 15.5.80, D.R. 20, p. 44, at p. 98).... The Commission notes that the applicants had no history of using the Centre for any form of organised assembly or association. The Commission thus finds no indication in the present case that the exclusion of the applicants from the Centre interfered with their rights under Article 11 (Art. 11) of the Convention.*

This decision indicates that Article 11 will only be used to protect assemblies and associations that have ends or purposes which the Article was designed to protect, for example, political parties or trade unions. However, it also suggests that the rising prominence of private shopping centres as 'public' spaces in modern life may require certain freedom of peaceful assembly rights in those 'private' spaces.

G. v Germany (1989) (discussed below) indicates that, if an assembly is peaceful, the fact that it is illegal alone will not remove it from the protection of Article 11. Intervention by the State in such circumstances would have to be justified under Article 11(2), i.e., the law by which the peaceful assembly is declared illegal would have to be judged by reference to Article 11(2). Thus a State is not able to pass laws prohibiting all or particular classes of assembly.

2.1.2 Peaceful assemblies

Article 11 protects only 'peaceful' assemblies. The chief limitation on the scope of Article 11 is, therefore, the exclusion of assemblies where the participants or organisers have 'violent intentions that result in public disorder.' In the case of **Christians against Racism and Fascism v United Kingdom (1980)**, the Commission made clear that violence or disorder that is incidental to the holding of an peaceful assembly will not remove it from the protection of Article 11. It is the *intention* to hold a peaceful assembly that is significant in determining whether Article 11 is applicable, not the *likelihood* of violence because of the reactions of other groups or other factors. This notion of 'peaceful assembly' is key to an understanding of freedom of assembly as a pillar of democratic society; gatherings intended to create disorder or threaten the rule of law are anathema to democratic society and so will not be protected by the Convention. However, rival groups prepared to use violence are not permitted effectively to stifle freedom of peaceful assembly.

The Commission followed this reasoning in subsequent cases, including:

- In **G. v Germany (1989)** the applicant participated in an anti-nuclear demonstration in front of the US military barracks in Stuttgart. The demonstrators blocked the road that led to the barracks and the applicant failed to comply with a police order to leave the road. The applicant claimed that the subsequent police dispersal of the demonstration and his prosecution and conviction for failure to comply with the police order violated his right to freedom of peaceful assembly under Article 11. The State argued that this particular demonstration was not 'peaceful' and that, therefore, Article 11 was not applicable. The Commission held that the notion of 'peaceful assembly' does not include any demonstration where the organisers and participants have *violent intentions* that result in public disorder. Although the so-called 'sit-ins' were illegal under German law, the Commission felt that, as the right to freedom of peaceful assembly is one of the foundations of a democratic society, it should not be interpreted restrictively. The applicant and the other demonstrators had not been actively violent in the course of demonstration. Therefore the demonstration fell within the scope of Article 11. See also **Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)** and **Eva Molnar v Hungary (2009)** discussed below and the admissibility decision in **Lucas v United Kingdom (2003)**.

The foregoing case law does not imply that the State *violates* Article 11 if it prohibits an assembly very likely to result in violence (even if the organisers or participants do not intend violence) but that it must justify such a prohibition by reference to Article 11(2). An assembly organised with the intention of violence, on the other hand, does not fall within the scope of Article 11 at all. The Court in the **Stankov** case made clear that restrictions on assemblies by a State because of calls for the use of violence or rejection of democratic principles by the relevant organisers, albeit with no violent intention for the assembly in question, must be consistent with the requirements under Article 11(2).

- In **Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001),** the Court stated that 'an automatic reliance on the fact that an organisation has been refused registration as anti-constitutional cannot suffice to justify a practice of systematic bans on peaceful assemblies and it was therefore necessary in the present case to scrutinise the grounds invoked to justify the interference.

2.1.3 Protection of peaceful assemblies – counter-demonstrations

As already noted, even where the intentions of demonstrators are not violent public demonstrations may nevertheless pose a threat to public order when counter-demonstrators also assert their right to freedom of peaceful assembly. In such circumstances, the Court has held that the State has a positive obligation to protect those exercising their right to freedom of peaceful assembly from the threat of counter-demonstrations.

- In **Plattform 'Ärtze für das Leben' v Austria (1988)**, the Court ruled that, even though a demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote, the participants must be able to proceed without having to fear that they will be subjected to physical violence by their opponents. The Court made clear that, in a democratic society, the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly is not limited to a duty on the part of the State not to interfere; but rather Article 11 sometimes requires positive measures to be taken, even with regard to relations between individuals. The duty of States under Article 11 to take measures to enable lawful demonstrations to proceed peacefully is not an absolute guarantee and States have a wide discretion in the choice of the means to be used. In other words, the obligation of States under Article 11 is 'an obligation as to measures to be taken and not as to results to be achieved' (see paragraph 34).

- In **Christians against Racism and Fascism v United Kingdom (1980)** the Commission found that the threat of disorder from rivals does not in itself justify interference with any peaceful assembly. However, the State may legitimately interfere with the opponents' freedom of assembly (i.e. without breaching Article 11) if they attempt to disrupt the demonstrators' peaceful assembly by organising an assembly of their own with the intention of creating disorder.

- In **United Macedonian Organisation Ilinden and Ivanov v Bulgaria (2005)** the applicants complained that the members and followers of UMO Ilinden were prevented from holding peaceful meetings on a number of occasions. The Court noted that, on one of the occasions when they did not interfere with the applicants' freedom of assembly, the authorities appeared somewhat reluctant to protect the members and followers of Ilinden from a group of counter-demonstrators. As a result, some of the participants in Ilinden's rally were subjected to physical violence from their opponents. The Court recalled that genuine, effective freedom of peaceful assembly could not be reduced to a mere duty not to interfere on the part of a State which had ratified the Convention; it was that State's duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. The authorities were therefore bound to take adequate measures to prevent violent acts directed against the participants in Ilinden's rally, or at least limit their extent. However, it seemed that they, while embarking on certain steps to enable the organisation's commemorative event to proceed peacefully, did not take all the appropriate measures which could reasonably have been expected from them under the circumstances. The State therefore failed to discharge its positive obligations under Article 11.

2.1.4 Interference with the right of peaceful assemblies

In its practice the Court has dealt with several different types of interferences with the right of peaceful assemblies: refusal to authorise or permit the assembly, dispersal, evacuation from the place of assembly, bans and post-assembly penalties (both administrative and criminal)..

- In **Nurettin Aldemir and Others v Turkey (2007)** the applicants took part in demonstrations protesting against a draft bill proposed in the Turkish Parliament. These were forcibly ended by the security forces on the ground that the demonstrating in the specific location chosen for the protest was not permitted by law. The interference in the meetings and the force used by the police to disperse the participants, as well as the subsequent prosecution which took place against the applicants, although unsuccessful, could have had a chilling effect and discouraged the applicants from taking part in similar meetings. Accordingly, a violation of the Article 11 was found.

- In **Cisse v France (2002)** the applicant was a member of a group of aliens who organised a collective action which culminated in the occupation of a church by a group of some two hundred illegal immigrants, some of whom went on hunger strike. By the order of police authorities the applicant and other protesters were evacuated. The Court did not share the Government's position that the fact that the applicant had been an illegal immigrant sufficed to justify a breach of her right to freedom of association and assembly. Based on the fact that the hunger-strikers' health had deteriorated and sanitary conditions become wholly inadequate, and that having regard to the wide margin of appreciation left to States in this sphere, the Court found that the interference with the applicant's right to freedom of assembly was not disproportionate.

- In **Öllinger v Austria (2006)** the applicant, a parliamentarian, had notified the authorities that on All Saints' Day, 1 November 1998, at a certain time he would be holding a meeting at the Salzburg municipal cemetery in front of the war memorial, which could coincide with another gathering, held by people commemorating soldiers died in World War II, that applicant thought to be unlawful. The purpose of the meeting organised by the applicant was to be a commemoration of the Salzburg Jews killed by the SS during World War II. The authorities prohibited the meeting on the ground that it would endanger public order and security. The Court found that the prohibition in issue was disproportionate to the aim pursued, the assembly was in no way directed against the cemetery-goers' beliefs or the manifestation of them near the place, where the meeting should have been hold, as the Government pursued in its findings banning the assembly of the applicant. Moreover, the applicant expected only a small number of participants and envisaged peaceful and silent means of expressing their opinion. Instead of ensuring its positive obligation to protect and secure the gathering, the domestic authorities imposed an unconditional prohibition on the applicant's assembly, which gave the Court reason to conclude that the authorities had given too little weight to the applicant's interest in holding the intended assembly and expressing his protest against the meeting of those commemorating the death of SS soldiers during World War II, while giving too much weight to the interest of cemetery-goers in being protected against some rather limited disturbances.

- In **Galstyan v Armenia (2007)** the applicant was subjected to three days of detention for participating in a peaceful demonstration which was not prohibited by the Government. The Court ruled that by joining the demonstration, the applicant availed himself of his right to freedom of peaceful assembly and the conviction that followed amounted to an interference with that right, which was in breach of Article 11(2).

- In **Baczkowski v Poland (2007)** the authorities banned a planned march and several stationary assemblies. The appellate authorities, in their decisions of 17 June and 22 August 2005, quashed the first-instance decisions and criticised them for being poorly justified and in breach of the applicable laws. The decisions took place after the dates on which the applicants had initially planned to hold the demonstrations. However, the assemblies had taken place on the planned dates. The applicants had taken a risk in holding them given the official ban in force at that time. The assemblies were held without a presumption of legality, such a presumption constituting a vital aspect of effective and unhindered exercise of freedom of assembly and freedom of expression. The Court observed that the refusals to give authorisation could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the grounds that they did not have official authorisation and that, therefore, no official protection against possible hostile counter-demonstrators would be ensured by the authorities. Hence, the Court was of the view that, when the assemblies had been held the applicants were negatively affected by the refusals to authorise them. The legal remedies available to the applicants could not ameliorate their situation as the relevant decisions were given in the appeal proceedings after the date on which the assemblies were held. Therefore, the Court concluded that there had therefore been an interference with the applicants' rights guaranteed by Article 11.

2.2 Who benefits from this right and who can complain to the Court?

The right to freedom of peaceful assembly is capable of being exercised both by individuals participating in any 'peaceful' assembly (see **Rassemblement** case cited above) and by those organising the peaceful assembly (see, among others, **Plattform "Ärtze für das Leben" v Austria (1988)**; **RAI, Allmond and 'Negotiate Now' v United Kingdom (1995)**; and **Christians against Racism and Fascism v United Kingdom (1980)**) including associations (see **United Communist Party and Others v Turkey (1998)** (at paragraph 27) and **Grande Oriente d'Italia di Palazzo Giustiniani v Italy (2001)** (at paragraph 15)) Individuals prevented from participatingor compelled to join in Article 11 activities are also protected (see the closed shop cases including **Young, James and Webster v United Kingdom** cited above).

Article 34 of the Convention permits individual applications to the Court from any person, non-governmental organisation or group of individuals. For an association to be a victim, however, it must be directly prejudiced. In the admissibility decision of **Societatea de Vanatoare 'Mistretful' v Romania (1999)**, the Court held that only the members of an association could claim to be 'victims' under Article 34 because there was insufficient connection between the association and the harm suffered. An association is not excluded from the protection of the Convention simply because the State is not in favour of its activities and believes that they need to be restricted. Any restrictions must be justified under Article 11(2) (see **United Communist Party v Turkey** at paragraph 27). Note also that the granting of an amnesty by the State does not necessarily deprive the applicant of the status of a victim (see **Osmani and others v Former Yugoslav Republic of Macedonia (2001)**) Moreover, illegal nature of the organization *per se* does not prevent it from complaining about a violation of freedom of assembly (see **Stankov and the United Macedonian Organisation Linden v Bulgaria** at paragraph 92).

The case of **Cisse v France (2002)** makes clear that illegal immigrants are not denied the benefit of Article 11, although the State has a broad margin of appreciation in dealing with such cases.

3 FREEDOM OF ASSOCIATION

3.1 Scope of the right to freedom of association

3.1.1 The concept of association

Freedom of association allows individuals to come together to pursue activities or objectives of common interest, such as politics, sport, culture or charity. The concept of association under the Convention has an *autonomous* meaning independent of national law.

The Court's definition of 'association' does not protect mere social gatherings. In **Anderson and Others v United Kingdom (1997)** discussed above, Article 11 was held not to protect the applicants from exclusion from a shopping centre for alleged misconduct. The Court noted, in particular, that the applicants had no history of *organised* peaceful assembly or association.

- **McFeeley v United Kingdom (1984)** concerned prisoners who claimed that the security regime to which they were subject violated their right to freedom of association by denying them the right to meet. Their claim was held to be incompatible *ratione materiae* with the Convention.

These cases suggest that an 'association' must have a somewhat organised or institutional character to which someone can be said to belong or with which he can affiliate. However, as discussed below, an association need not have any formal or legal status in order to benefit from Article 11. Gatherings of a more transient character are protected under Article 11 by the separate right to freedom of peaceful assembly.

Associations that fall outside the scope of Article 11 protection include relationships with animals (**Artingstoll v United Kingdom (1995)**), with other prisoners, organisations whose predominant objective is profit making, and public law and professional bodies (see **Bollan v United Kingdom (2000)** where the Court found that Article 11 does not apply within the context of prisons to confer a right to mix socially with other prisoners at any particular time or place).

3.1.2 Public law bodies and professional bodies

According to the Court's case law, a public law institution founded by the legislature is not normally an association within the meaning of Article 11 of the Convention.

- **Chassagnou and Others v France (1999)** concerned a French law organising and regulating municipal or inter-municipality hunters' associations. The applicants were local landowners opposed to hunting who were required by the new law to become members of the local hunters' associations set up in their municipalities and to transfer hunting rights over their land to these associations for general use. They could not evade the obligation to join the association and to transfer their hunting rights to it unless the area of their land exceeded a given threshold. The applicants complained that the compulsory inclusion of their land and the obligation to join an association of whose objects they disapproved violated their right to freedom of association. The State argued that the

new associations were public law 'associations' and therefore outside the scope of Article 11, i.e., the claim was incompatible *ratione materiae* with the provisions of the Convention. Motivated by the concern that States could use national law to narrow the scope of freedom of association under Article 11 and defeat the object and purpose of the Convention, the Court ruled that the word 'association' in Article 11 has an *autonomous* meaning. Even though the associations in this case were partially regulated by public law, they fell within the scope of Article 11. The Court found that the hunting associations at issue in this case owed their existence to the will of Parliament but were nevertheless set up in accordance with the law on private associations. They did not remain integrated within the structures of the State and did not enjoy prerogatives outside the orbit of ordinary law, whether administrative, rule making or disciplinary, nor did they employ processes of a public authority, like professional associations. The Court concluded that these hunting associations were associations for the purposes of Article 11. See also **Köll v Austria (2002)**.

- In **Le Compte, van Leuven and de Meyere v Belgium (1981)** the rights of three medical doctors to practice medicine had been suspended by the regulatory body for the medical profession, the *Ordre des Médecins*. The applicants claimed that compulsory membership of the *Ordre des Médecins*, without which no one could practise medicine, and their subjection to the jurisdiction of its disciplinary organs were contrary to the principle of freedom of association. The Court ruled (at paragraph 64) that the organisation in question was a *public law* institution as it was founded not by individuals but by the legislature. It remained integrated with the structure of the State and judges were appointed to most of its organs by the State. Furthermore, it pursued an objective in the general interest, because under the relevant legislation it exercised a form of public control over the practice of medicine. Lastly, the Court noted that the *Ordre* was invested with administrative as well as rule-making and disciplinary prerogatives by the law and in this capacity it acted like a public authority. As the *Ordre des Medecins* could not be defined as an association falling within the ambit of Article 11, there could not be an interference with Article 11(1). Importantly, the Court noted that the establishment of the *Ordre* did not prevent doctors like the applicant from forming together or joining professional associations in addition to the *Ordre* and thus did not violate Article 11 on this account.

- In the admissibility decision of **Slavic University in Bulgaria and Others v Bulgaria (2004)**, the Court found a Bulgarian university was a 'public institution' and hence not an association within the meaning of Article 11 of the Convention.

- In the **Le Compte, van Leuven and de Meyere v Belgium (1981)** case the Court held that the regulatory bodies of the liberal professions are not associations within the meaning of Article 11 of the Convention.[I] The object of these bodies, established by legislation, is to regulate and promote the professions, whilst exercising important public law functions for the protection of the public. They cannot, therefore, be likened to trade unions but remain integrated within the structures of the State(See also **Albert and Le Compte v Belgium (1983)** as regards medical doctors; **Revert and Legallais v France (1989)** as regards architects; **A. and Others v Spain** (1990) as regards bar associations and **Barthold v Germany** (1985) as regards veterinary surgeons. See also **O.V. R. v Russia (2001)**.

- In **Sigurdur A. Sigurjonsson v Iceland (1993)**, the applicant was granted a licence to operate a taxi-cab. The standard form he used to apply for the license contained a statement to the effect that he was aware of the obligation to pay membership fees to Frami, a trade union for taxi drivers. He sub-

sequently paid the membership fees until 1985. When he then stopped payment, Frami informed him that it intended to exclude him from taxi station services until his fees were paid. The applicant said he did not wish to remain a member of the association. As a result, his license was revoked. He claimed that the obligation incumbent on him to be a member of Frami on pain of losing his licence constituted a violation of Article 11. The State argued that Frami was a professional organisation of public law character and hence not an association within the meaning of Article 11. The Court noted that although Frami performed certain public law functions, it was established under private law and enjoyed full autonomy in determining its own aims, organisation and procedure. Frami was, therefore, predominantly a private law organisation considered an 'association' for the purposes of Article 11 (see paragraph 31).

The Court has taken a similar approach to employment-related bodies such as work councils set up pursuant to legislation for the purpose of exercising the functions of staff supervision at work. See, in particular, the admissibility decisions of **Karakurt v Austria (1999)** and **Weiss v Austria (1991)**.

3.1.3 Political parties

The Court has explicitly ruled on a number of occasions that political parties are associations falling within the scope of Article 11. The Court has also noted that political parties play an essential role in all democratic societies.

- In **United Communist Party and Others v Turkey (1998)**, the applicants argued that the dissolution of the United Communist Party of Turkey ('the TBKP') and the banning of its leaders from holding similar office in any other political party infringed their right to freedom of association. The State argued that political parties were not associations in the sense of Article 11. The Court (at paragraph 24) rejected the State's arguments and held that the conjunction 'including' in Article 11 shows that trade unions are just one form through which the right to freedom of association can be exercised. In the Court's view, there could be no doubt that political parties come within the scope of Article 11, particularly, given their importance in a democracy. The Court noted that political parties are a form of association essential to the proper functioning of democracy and democracy is of vital importance to the Convention system (see also **Socialist Party and Others v Turkey (1998)**, **Sidiropoulos and Others v Greece** (cited below); **Freedom and Democracy Party (OZDEP) v Turkey** (cited below); and **Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v Turkey** (cited below)).

The importance of political parties in a democracy is evident also from the work of the European Commission for Democracy through Law (the Venice Commission) on the status of political parties in various member States. The Venice Commission adopted guidelines on the issue of financing political parties, the prohibition of political parties and analogous measures (10 January 2000, DCL-INF (2000)1.), and on legislation regarding political parties (15 March 2004, CDL-AD(2004)007) and prepared a report on the establishment, organisation and activities of political parties (16 February 2004, CDL-AD(2004)004).

The Venice Commission guidelines define the scope of the right to freedom of political association as including the freedom to hold political opinions and to receive and impart information without interference by a public authority and regardless of frontiers. The requirement to register political parties is not in itself considered a violation of this right.

3.1.4 Objectives of associations

The right to freedom of association protects associations formed to undertake any activity or pursue any objective that an individual can undertake or pursue alone, provided that those activities or objectives are lawful. The State cannot effectively negate the freedom of association by generally declaring the objectives of associations to be unlawful. Hence, all national laws restricting the objectives of associations (including constitutional laws) will be subject to scrutiny under the Convention. Most cases on this subject that have come before the Court have concerned political parties. The permissibility of restrictions on the objectives of political parties has been assessed in the context of the importance of democracy under the Convention.

An association established to seek a change in national law is protected under Article 11 as long as such change is sought by lawful means. This applies particularly to political parties whose advocacy of alternative policy is essential to the effective functioning of democracy (see **Refah Partisi (2003)** (cited below) at paragraph 87). The ability to seek changes in the established position can include changes in the existing constitutional structure of the State.

- In **United Communist Party and Others v Turkey (1998)**, the Court noted that an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State. The Court recognised that it is in principle open to the national authorities to take such action as they consider necessary to ensure the rule of law or to give effect to constitutional rights, but they must do so in a way that complies with the Convention and is subject to review by the Court (see paragraph 27). It should also be noted that the Court did rule on legality of the prohibition and/or dissolution of political parties before, but it was never so explicit about it.

Minority groups who seek a change in the constitutional structure of the State or merely seek to promote or protect their distinct identity through exercising their freedom of association have been subject to particular focus by the Court.

- In **Young, James and Webster v United Kingdom (1981)** the Court held that, although individual interest must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see paragraph 63).

- In **Sidiropoulos and Others v Greece (1998)** the applicants, who claimed to be of 'Macedonian' ethnic origin and to have a 'Macedonian national consciousness', decided to form a non-profit-making association called 'Home of Macedonian Civilisation.' The Court noted that the aim of the association was to promote and protect the culture of the region. The Greek authorities refused to register the association partly because the applicants publicly claimed to be of 'Macedonian' ethnic origin and, at the Conference on Security and Co-operation in Europe in Copenhagen, they had disputed the Greek identity of Greek Macedonia. With the refusal to register the association, the State also aimed to maintain national security, prevent disorder and to uphold Greece's cultural traditions and historical and cultural symbols. The Court ruled that the aims of the association appeared to be perfectly clear and legitimate: 'the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics, for historical as well as economic reasons.' (at paragraph 44).

- In **Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)**, the Court pronounced on the relation between the refusal to register an association and that association's right to peaceful assembly. The applicants claimed that their right to freedom of peaceful assembly had been violated because they were prohibited from holding meetings with their association to commemorate certain historical events. The association's aims were to 'unite all Macedonians in Bulgaria on a regional and cultural basis' and to achieve 'the recognition of the Macedonian minority in Bulgaria.' The meetings were banned on the ground that they would endanger public order. This conclusion was drawn from the fact that the association was refused registration by the State because its statute and programme were allegedly directed against the unity of the nation by seeking to disseminate the ideas of Macedonianism among the Bulgarian population which was prohibited under the Bulgarian Constitution. The Court ruled that 'an automatic reliance on the fact that an organisation had been considered anti-constitutional - and refused registration - could not suffice to justify under Article 11 § 2 of the Convention a practice of systematic bans on the holding of peaceful assemblies' (see paragraph 92). While noting that the refusal to register the association was relevant in the consideration of the dangers that its gathering might have posed, and without pronouncing on the well-foundedness of that refusal, the Court held that the bans on the applicants' meetings had not been justified as there had not been a real, foreseeable risk of violent action, of incitement to violence or of a rejection of democratic principles. The Court stressed that 'sweeping measures of a preventive nature to suppress 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, and however illegitimate the demands made may be – did a disservice to democracy and often even endangered it' (see paragraph 97).

- In **Gorzelik and Others v Poland (2004)**, the Polish authorities refused to register the applicants association with the name 'Organisation of the Silesian national minority.' The State argued that the association could not legitimately describe itself as an organisation of a 'national minority' as the Silesian people did not constitute a 'national minority' under Polish law. Furthermore, by registering the association the State would acknowledge the existence of a Silesian national minority. This acknowledgement would then allow the association certain privileges with regard to elections. The primary purpose of the State's action had been to forestall the applicants' likely attempt to use the registration of the association as a legal means for acquiring special status under the electoral law. The Court noted (at paragraph 93) that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the Preamble to the Council of Europe's Framework Convention, 'a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity. Forming an association to express and promote its identity could be instrumental in helping a minority to preserve and uphold its rights.'

- See also **United Macedonian Organisation Ilinden – PIRIN and Others v Bulgaria (2005)**.

The logical corollary of the Court's emphasis on freedom of association as an aspect of pluralist democracy is that political parties with 'undemocratic' aims or who use undemocratic means will not come within the scope of Article 11 protection.

- In **Refah Partisi (The Welfare Party) and Others v Turkey (2001)** the Welfare Party was dissolved by the Turkish Constitutional Court on the grounds that that it was a centre of activities contrary to the

principles of secularism. The Constitutional Court observed that secularism was one of the indispensable conditions of democracy. In Turkey, the principle of secularism was safeguarded by its Constitution on account of the country's historical experience and the specific features of Islam. The State argued that nothing obliged States to tolerate the existence of political parties that sought the destruction of democracy and the rule of law. The Court proceeded to define the limits within which political organisations can continue to enjoy the protection of the Convention while conducting their activities. It held that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions:

a) The means used to that end must be legal and democratic;
b) The change proposed must itself be compatible with fundamental democratic principles.

It necessarily follows that a political party whose leaders incite 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. Similar considerations apply to the exercise of rights under Articles 9 and 10 of the Convention (see **Yazar and Others v Turkey (2002)** at paragraph 49, and also **Stankov** (at paragraph 97) and **Socialist Party and Others v Turkey** (at paragraphs 46-47 and paragraphs 97-99)).

In determining the objectives of an association for the purposes of Article 11, the Court does not look only at its official programme or name or the statements of its leaders. In a series of cases, including **United Communist Party and Others v Turkey (1998)** (at paragraph 58) and **Socialist Party and Others v Turkey (1998)** (at paragraph 48), the Court noted that the programme of a political party or the statements of its leaders may conceal objectives and intentions different from those they proclaim. The content of the programme or statements must thus be compared to the actions of the party and its leaders and the positions they defend as a whole. In **United Communist Party**, the Court rejected the argument of the State that the Party's choice of name or statements its leaders made demonstrated a threat. It is important to note that the Court does not accept the legitimacy of making assumptions about objectives.

Questions

1. Are there registered political parties in your country whose ideology is contrary to fundamental principles of democracy? How are they treated under domestic law?
2. Does domestic law define 'minorities'?
3. Is there separate legislation on the registration of minorities? Do certain restrictions apply to the associations of minorities purely due to the character of the association?

3.2 Who benefits from this right?

The right to freedom of association is capable of being exercised both by individuals joining or forming an association and by an association itself. Individuals prevented from participating (see **Rassemblement**

cited above) or compelled to join in Article 11 activities are also protected (see, for example, the closed shop case of **Young, James and Webster v United Kingdom (1981)**. See also section 2.3.

- In the admissibility decision of **Church of Scientology Moscow and Others v Russia (2004)**, two individuals as well as the applicant church had sought to bring a claim resulting from the domestic authorities' refusal to grant re-registration to the church. The Court held that the individual applicants cannot themselves claim to be victims of a violation resulting from the domestic authorities' actions which affected only the applicant church. See also the admissibility decision in **Holy Monasteries v Greece (1990)**.

The case of **Cisse v France (2002)** makes clear that illegal immigrants are not denied the benefit of Article 11, although the State has a broad margin of appreciation in dealing with such cases.

3.3 Content of the right to freedom of association

3.3.1 The right to form and join an association

The right to freedom of association under Article 11 protects against the interference of the State in both the right to form an association (see, for example, **Gorzelik v Poland (2001)** and (2004) cited herein), including a political party or a trade union, and the right to join or remain a member of an existing one (see **Swedish Engine Drivers' Union v Sweden (1976)** (cited below) at paragraph 47). However, the right to freedom of association does not include the right to hold a specific office within an association (see **Fedotov v Russia (2004)**).

3.3.2 The right to have an informal association

The right to have an informal association can be inferred from the existing case-law. The associations which do not have registration or were refused registration but, nevertheless, were allowed to perform their activities on a domestic level, have *locus standi* under the Convention.

It is established that the refusal to register an association can, in principle, constitute an interference with Convention rights. However, if the association in question is not generally precluded from exercising its activities and authorities do not act arbitrarily, there will be no violation of Article 11. The nature of the refusal will duly be considered.

- In **Movement for Democratic Kingdom v Bulgaria (1995)**, the Movement failed to satisfy one of the mandatory legal pre-requisites for the establishment of a political party in Bulgaria. An unregistered association could still pursue its political activities but was prevented from participating in elections. The Movement argued that the refusal of registration constituted an arbitrary act from the authorities and thus, the breach of the Convention. The Commission underlined that the absence of registration on local level is not necessarily considered to be contrary to Article 11: a) whereas the domestic law in question allows such association to exercise its regular activities and b) the formal element of the requirement to register does not create an 'onerous' obstacle (in addition, nothing precluded the applicant association to act in conformity with the law).

- In **Larmela v Finland (1997)** : 'The Commission finds that although under national law recognition of an association's legal personality is dependent on its registration, an unregistered association can nevertheless be freely formed and engage in certain activities, just as it can possess funds through its members. It may be questioned, therefore, whether the fact that the association was unable to register prevented it from pursuing its objectives and thus at all constituted an interference with the applicant's right to freedom of association. In so far as there was an interference with the applicant's right to freedom of association, the interference was justified under Article 11 para 2 (Art. 11-2) of the Convention'.

- In **Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)**, the Commission found Ilinden's application admissible, despite the Government's objections related to the lack of standing domestically. The Commission stressed that 'any other solution would to a substantial degree restrict the right of non-governmental organisations to petition' as long as: the UMO has never been dissolved, it was authorised to perform its activities notwithstanding the refusal of registration and it was challenging the very fact of this refusal.

3.3.3 The right to register an association or gain legal personality

Although an 'association' must have some degree of continuity, it need not have any formal or legal status (including legal personality) in order to be protected by Article 11. There is an obligation to grant legal personality unless it can be shown that an association can operative effectively without it. The issue of additional rights might arise for certain categories of associations, such as public benefit ones. Associations benefit enormously in terms of organisational capability from being able to incorporate or otherwise gain legal personality. For example, legal personality enables an association to own property or set up bank accounts. The Court has recognised this in finding in **Sidiropoulos and Others v Greece (1998)** that the State's refusal to register the applicant's association was an interference with freedom of association(see also the case of **Metropolitan Church of Bessarabia and Others v Moldova (2001)**. and the case of **Presidential Party of Mordovia v Russia (2004)** at paragraphs 28-32).

- In **Gorzelik and Others v Poland (2004)** (at paragraph 55) the Court stated that "[t]he most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning." The compatibility with Article 11 of State restrictions on the ability of associations to register or gain legal personality is discussed below.

> ***Question***
>
> How do you register an association in your country? How do you get legal personality? Are there different classifications of associations?

3.3.4 Dissolution of associations

The Venice Commission guidelines define the scope of the right to freedom of political association as including the freedom to hold political opinions and to receive and impart information without interfer-

ence by a public authority and regardless of frontiers. The prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the national constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution. Dissolution or prohibition of a political party is a very far-reaching measure that should be used with utmost restraint.

The freedom of association means little if an association can be dissolved by the State at will, if it does something with which the government disagrees.

- In **United Communist Party and Others v Turkey (1998)**, the Court held that "[t]he right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention." The protection afforded by Article 11 therefore lasts for the entire life of an association and, therefore, dissolution of an association by the State must comply with the requirements of Article 11(2). See also the judgments of the Court in the **Refah Partisi** case and in **Socialist Party and Others v Turkey (1998)**, **Freedom and Democracy Party (ÖZDEP) v Turkey (1999)** and **Yazar and Others v Turkey (2002)**.

- In **Tüm Haber Sen and Çınar v Turkey (2006)** the applicants complained that the dissolution of the trade union Tüm Haber Sen and the enforced cessation of its activities (on the grounds that civil servants could not form trade unions) infringed their right to freedom of peaceful assembly and association under Article 11. The Court reiterated that Article 11 was binding on the 'State as employer', whether the latter's relations with its employees were governed by public or private law. Tüm Haber Sen had been dissolved solely on the ground that it had been founded by civil servants and its members were civil servants. The Court noted that the Government had provided no explanation as to how the absolute prohibition on civil servants forming trade unions, imposed by Turkish law met a 'pressing social need'. In the absence of any concrete evidence to show that the founding or the activities of Tüm Haber Sen had represented a threat to Turkish society or the Turkish State, the Court was unable to accept that the union's dissolution could be justified by an absolute statutory prohibition. In view of the lack of clear legislative provisions on the subject at the relevant time and the broad manner in which the courts had interpreted the restrictions on civil servants' trade-union rights, Turkey had failed to comply with its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention.

- In **Christian Democratic People's Party v Moldova (2006)** the applicant, an oppositional party having seats in the Parliament at the material time, alleged that its right to freedom of assembly and association had been violated as a result of sanctions imposed on it for organising unauthorised gatherings. The authorities advanced three grounds for imposing sanctions on the applicant party: that it had not obtained authorisation for its gatherings in accordance with the Assemblies Act; that children had been present at its gatherings; and that some statements made at the gatherings amounted to calls to public violence. After examination the Court found that none of the grounds recalled by the Government was 'sufficient and relevant' for the application of the restrictions of Article 11(2). The Court found that even 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, the more so since it was imposed on the eve of the local elections. Therefore, the Court found that Moldova violated the right of the applicant party under Article 11.

3.3.5 The negative right to freedom of association

Compulsion to join an association can also have the effect of depriving an individual of freedom of association. There have been a number of cases before the Court concerning the question whether people have the right *not to join* a trade union or the right to *withdraw from* a trade union. The issue of *not entering* into a collective agreement has also been brought before the Court.

One can distinguish two types of 'forced association': *de jure* forced association and *de facto* forced association. *De jure* forced association occurs where the membership of a certain association is legally imposed on someone, for example, where individuals are legally bound to join a certain association in order to be able to exercise their profession. *De facto* forced association occurs where individuals theoretically have the choice to join or not join an association but not joining (or withdrawing) would have serious negative consequences. According to the case-law of the Court, compulsion to join professional bodies is not deemed in violation of Article 11 of the Convention (For further information see Wino J.M. van Veen, 'Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms', *International Journal Not-for-Profit Law*, Volume 3, issue 1, September 2000).

- In **Young, James and Webster v United Kingdom (1981)**, the Court held that, assuming that Article 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention. However, a threat of dismissal was a most serious form of compulsion and here it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union. Such a form of compulsion 'strikes at the very substance of the freedom guaranteed by Article 11' (see paragraph 55).

- In **Sigurdur A. Sigurjonsson v Iceland (1993)** the Court noted that compulsory membership of trade unions does not exist under the laws of the great majority of the States party to the Convention. On the contrary, a large number of domestic systems contain safeguards, which, in one way or another, guarantee the negative aspect of the freedom of association. Furthermore, it argued that compulsory membership of trade unions is in breach of ILO Conventions Nos. 87 and 98. It concluded (at paragraph 35) that Article 11 must be viewed as encompassing a negative right of association.

- In **Gustafsson v Sweden (1996)**, a Swedish restaurant owner complained that union action against his restaurant infringed his right to freedom of association. The applicant had not joined either of the two associations of restaurant employers in Sweden and he was therefore not bound by any collective labour agreement. However, the applicant was pressurised into signing a collective agreement. The Court merely noted that the measures taken (e.g. the union action) must have involved considerable pressure on the applicant to meet the union's demands to be bound by a collective agreement and concluded (at paragraph 45) that, to a degree, the enjoyment of his freedom of association was thereby affected.

- In **Sibson v United Kingdom (1993)**, there was no direct interference on the part of the State either. In this case, the applicant, Mr. Sibson, was a heavy goods vehicle driver and a member of the Transport and General Workers Union (TGWU). After a dispute with a fellow driver, he filed a complaint with the TGWU against this colleague. This complaint was unsuccessful and, as a result, the applicant resigned from the TGWU and joined another union. Later, the TGWU-members signed a

so-called closed shop agreement and demanded that the applicant be employed elsewhere or they would go on a strike. The applicant's employer – trying to find a compromise – gave the applicant the option of either joining the TGWU again or working at another depot. The applicant refused to do either and, on the ground of 'constructive dismissal,' he resigned. In English law 'constructive dismissal' is defined as occurring when: '...an employee shall be treated as dismissed by his employer if...the employee terminates [his] contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct'. The applicant alleged before the Court that, since the UK law provided no meaningful remedy for a person, such as himself, who had suffered a detriment as a result of his not belonging to a particular trade union, he had been the victim of a violation of Article 11. The Court distinguished the case from **Young, James and Webster v United Kingdom (1981)**. As Sibson did not refuse to (re)join a union on account of specific beliefs or convictions, the case did not have to be viewed in the light of Articles 9 and 10. Importantly, the applicant could have prevented loss of livelihood by going to work at another depot and his employer was contractually entitled to move him to another depot. Having regard to these various factors, the Court came to the conclusion that Mr Sibson was not subjected to a form of treatment striking at the very substance of the freedom of association guaranteed by Article 11.

- In **Sørensen and Rasmussen v Denmark (2006)** one of the applicants had been dismissed from employment as a holiday relief worker for refusal to join a trade union pursuant to a pre-entry closed shop agreement (a closed shop is an undertaking or workplace where there is in existence a union membership agreement, that is an agreement or arrangement between one or more trade unions and one or more employers or employers' associations having the effect in practice of requiring employees of a certain class to be or become members of a specified union). The other applicant wanted to move to a different trade union but fear of dismissal prevented him from doing so. The applicants complained that the existence of pre-entry closed-shop agreements in Denmark and their application to them violated their right to freedom of association guaranteed by Article 11. In determining the principles applicable to the case, the Court considered that there was no distinction in the scope of protection under Article 11 between pre-entry and post-entry closed shop agreements. The Court held that the applicants were in fact compelled to join a particular trade union and that such compulsion struck at the very substance of the negative right to freedom of association guaranteed by Article 11. In determining whether the Government had failed to secure the applicant's Article 11 rights, the Court looked at whether a fair balance had been struck between the applicants' interests and the need to ensure that trade unions were enabled to strive for the protection of their members' interests. In this regard, the Court noted that closed-shop arrangements had been used in Denmark for a long time but covered only a small percentage of the Danish employment market. Moreover, there had been attempts to change the Danish law regarding closed-shop agreements but this had failed. The Court further noted the lack of support in the contracting States for the maintenance of closed-shop agreements and that European instruments such as the Social Charter clearly indicate that the use of closed shop agreements in the labour market is not an indispensable tool for the effective enjoyment of trade-union freedoms. The Court concluded that the State had failed to protect the applicants' negative right to trade union freedom in violation of Article 11.

- In **Le Compte, van Leuven and de Meyere v Belgium (1981)** discussed above the Court found no interference with the freedom of association regarding the compulsory membership of the medical practitioners' union 'Ordre des médecins'. In paragraphs 63 and 64 of the judgment, the Court underlined that a) the Ordre was established by the Belgian legislature, b) it was a public law institution exercising *specific public function* in general interest – namely, the protection of

health, c) it was 'legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary law' using 'processes of public authority'. Therefore, it was not considered to be an 'association' within the meaning of Article 11 (at paragraph 65). For finding no breach of the freedom of association, in paragraph 65, particular attention was given to the fact that 'the setting up of the Ordre by the Belgian State' did '*not* prevent practitioners from forming together or joining professional associations'.

Questions

1. Do individual employees in your country have the right to choose which union to join, or the right not to join at all? Is access to trade unions for non-State employees restricted?
2. How does domestic law treat closed shop practices? Can the State intervene to uphold the rights of an individual who is forced to join a union when threatened with the loss of his or her job?

3.4 Trade unions

The second clause of Article 11(1) refers to trade unions as a particular type of organisation falling within the ambit of the right to freedom of association (i.e., 'including the right to form and to join trade unions for the protection of his interests'). The conjunction 'including' clearly shows that trade unions are but one example among others of the form in which the right to freedom of association may be exercised. A great number of cases brought to the Court under Article 11 have dealt with questions concerning trade unions.

The use of the words 'for the protection of his interests' has raised questions as to whether trade unions derive additional rights from Article 11 in representing the interests of their members.

- **National Union of Belgium Police v Belgium (1975)** concerned a union that was open to all members of the municipal police, including rural policemen, regardless of rank, but excluded members of the two State police forces: the criminal police attached to the prosecuting authorities and the *gendarmerie*. Belgian law guaranteed freedom of trade unions in matters such as establishment, organisation and in their activities. However, it did not guarantee to trade unions rights of consultation with public authorities acting as employers. In order to avoid having to negotiate with an ever-increasing number of parties, the public authorities fixed certain criteria for selection based on the idea of 'representativeness' of trade unions. The applicant union complained that the refusal of the State to recognise it as one of the organisations with consultation rights under Belgian law put it at a disadvantage compared with other trade unions. The applicant claimed that this greatly restricted its field of action and tended to oblige the members of the municipal police to join other trade unions. The Court ruled that the words 'for the protection of his interests' indicate that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. In the opinion of the Court, it followed that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. However, Article 11(1) leaves each State a free choice of the means to be used towards this end. Consultation, the Court continued, is one of these methods, but not the only one. All the Convention requires is

that the national law enables trade unions to protect their interests. So although there is a right for the trade unions to be heard, there is no right to be consulted. See also **Swedish Engine Drivers' Union v Sweden (1976)** and **Wilson and Others v United Kingdom (2002).**

Although Article 11 protects the right of trade unions to represent the interests of their members, it is clear that it does not secure any particular or special treatment of trade unions or trade union members by the State. The Court has indicated that enjoyment of particular treatment of unions or their members, for example the right to be consulted (see **National Union of Belgian Police v Belgium (1975)**), the right to collective bargaining (see **Swedish Engine Drivers' Union v Sweden (1976)**), or the right to a salary increase collectively negotiated (see **Schmidt and Dahlstrom v Sweden (1976)**), are not indispensable to, or inherent in the right to effective enjoyment of trade union freedom. Whether the denial of treatment by a State of a trade union or its members constitutes a breach of Article 11 in a particular case will depend on its gravity and whether it affects the substance of the rights guaranteed by Article 11; each State has the choice of the means it employs to guarantee those rights.

- In **Sanchez Navajas v Spain (2001)** the applicant claimed that the right to freedom of association gave him the right – as a trade union representative – to fifteen hours of paid leave for trade union activities. The right was granted by his employer, but later this decision was reversed when the employer found out that the applicant had spent his paid leave studying employment legislation and this was not seen as being in the interests of the members of the trade union. The State contested the applicability of Article 11. The Court noted that, while Article 11(1) presents trade union freedom as one form or a special aspect of freedom of association, the Article does not secure any particular treatment of trade union members by the State, such as the right to enjoy certain benefits, for example, in matters of remuneration. Such benefits are not indispensable to the effective enjoyment of trade union freedom and do not constitute an element necessarily inherent in a right guaranteed by the Convention. The Court nevertheless considered that it may infer from Article 11 of the Convention that workers' representatives should as a rule, and within certain limits, enjoy appropriate facilities to enable them to perform their trade union functions rapidly and effectively. In this case though, the applicant had not shown why it was imperative for him to study the new legislation in order to be able to perform his duties as a trade union representative. Therefore, there was no interference with his right to trade union freedom; the contested measure did not attain such a degree of gravity as to affect the right guaranteed by Article 11(1) of the Convention substantially. See also the admissibility decision in **Unison v United Kingdom (2002)**.

Questions

1. Does the State have a legal framework regulating the activity of trade unions? Are there any limitations on who can become a member of a trade union?
2. Are there any professional organisations which perform trade union functions?
3. Does the law allow 'essential' State employees such as police or members of the armed forces to join trade unions? Under what conditions?
4. Are all trade unions subject to the same legislative framework?
5. Do the authorities give trade unions total independence of action without State interference? In what circumstances may the State act to prevent or force union action?

3.4.1 The right to collective bargaining

Neither the Convention nor the Court has defined the term 'collective bargaining.' In ILO Convention No. 154 of 1991, the term is described in Article 2 as follows:

> *collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:*
>
> *(a) determining working conditions and terms of employment; and/or*
> *(b) regulating relations between employers and workers; and/or*
> *(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.*

The right to collective bargaining is not mentioned in Article 11 but the Court has considered the issue on several occasions.

- In **Swedish Engine Drivers' Union v Sweden (1976)**, the Swedish Engine Drivers' Union complained of the refusal by the National Collective Bargaining Office to enter into collective agreements with it, notwithstanding that it did so with the large trade union federations and, occasionally, with independent unions. The applicant union claimed that this policy was intended to weaken and even to crush the applicant union by encouraging engine drivers and the other employees concerned to leave or to refrain from joining the union. The Court noted that, although Article 11(1) presents trade union freedom as one form or a special aspect of freedom of association, the Article did not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them. Not only is this latter right not mentioned in Article 11(1), but neither can it be said that all the Contracting States incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom. It is thus not an element necessarily inherent in a right guaranteed by the Convention' (see paragraph 39). So the right to collective bargaining is not necessarily within the scope of Article 11. Only if the denial of collective bargaining affects the substance of the right under Article 11 will it be covered.

- In **Gustafsson v Sweden (1996)**, the Court stated once more that national authorities may, in certain circumstances, have a positive obligation to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association. However, the Court found that Article 11 does not as such guarantee a right not to enter into a collective agreement. The positive obligation incumbent on the State under Article 11, including the aspect of protection of personal opinion, may well extend to treatment connected with the operation of a collective bargaining system, but only where such treatment impinges on the freedom of association. Compulsion, such as in this case, that does not significantly affect the enjoyment of that freedom, even if it causes economic damage, cannot give rise to any positive obligation under Article 11. This was the case even though the Court gave special consideration to the fact that the applicant's main objection to signing the agreement at issue was his general disagreement with the bargaining system in Sweden. The Court noted that it was important, in view of the sensitive character of the social and political issues involved, that States should be given a wide margin of appreciation in their choice of means employed. See also **Wilson and Others v United Kingdom (2002)**.

- In **Demir and Baykara v Turkey (2008)** the applicants complaints that as a result of the decisions of Court of Cassation their trade union lost its legal possibility to collective bargaining as a part of its activity. The Court 'having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of Article 11 § 2 – a category to which the applicants in the present case do not, however, belong.'

Questions

1. Is there a system of collective bargaining (like in Sweden) in domestic law?
2. If so, how does the system affect the free choice of individual workers?

3.4.2 The right to strike

The Court has also been confronted with the issue of whether Article 11 includes the right to strike. The right to strike, like the right to collective bargaining, is not explicitly listed nor is it an element necessarily inherent in Article 11.

- In **Schmidt and Dahlström v Sweden (1976)**, the applicants were members of trade unions affiliated to two of the main federations representing Swedish State employees. During negotiations for a new collective agreement, the applicants' unions called for selective strikes not affecting the sectors in which the applicants worked. The applicants complained that, on conclusion of the new agreement, they, as members of the 'belligerent' unions, were denied certain retroactive benefits paid to members of other trade unions and to non-union employees who had not participated in the strikes. They alleged that this was an unfair distinction to their prejudice as compared with non-union officials and members of unions who had refrained from strike action, in violation of Article 11. The Court recalled that the Convention 'safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible, it nevertheless left each State a free choice of the means to be used towards this end. The Court stressed that while the grant of a right to strike represented without any doubt one of the most important of these means, there were other means, too. Article 11 does not explicitly include the right to strike and, where granted 'may be subject under national law to regulation of a kind that limits its exercise in certain instances.' In this regard, the Court made reference to the Social Charter of 18 October 1961. It noted that Article 11required merely that 'under national law trade unionists should be enabled, in conditions not at variance with Article 11 (art. 11), to strive through the medium of their organisations for the protection of their occupational interests.' It went along those lines that the Convention, like the Social Charter neither secured 'any particular treatment of trade union members by the State, such as the right to retroactivity of benefits, for instance salary increases, resulting from a new collective agreement' (see **Schmidt and Dahlström v Sweden (1976)** at paragraph 34) but

there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances.'[2] Therefore, Article 11 does not explicitly include the right to strike – this right is not indispensable for the effective enjoyment of trade union freedom and in no way constitutes an element necessarily inherent in a right guaranteed by the Convention. Regarding the importance of the right to strike, see also **Wilson and Others v United Kingdom (2002).**

Questions

1. Does domestic law acknowledge the right to strike and, if so, under what circumstances? What limits are there on the right to strike?
2. Is this right guaranteed by legislation, case law or by the constitution?

4 STATE RESPONSIBILITY

Article 1 is the principal provision of the Convention dealing with state obligations. It provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention' (see also **Refah Partisi (The Welfare Party) and Others v Turkey (2001)** at paragraphs 96-103). Article 1 is very important as the Articles of the Convention dealing with rights and freedoms do not on their own impose any obligations on States party to the Convention but rather are a mere declaration of separate rights.

Any breach of its obligations under Article 1 entails the international responsibility of the State. This responsibility extends to breaches by the State of the Convention in its capacity as employer as well as by public authorities and other emanations of the State. According to the Court, the State incurs responsibility in its capacity as employer whether under public or private law (see **Swedish Engine Drivers' Union v Sweden (1976)**; **Schmidt and Dahlstrom v Sweden (1976)** and **Vogt v Germany (1995)**).

4.1 Negative obligations

There are two types of obligations that can be distinguished under the Convention. The States party to the Convention have, above all, the negative obligation to refrain from any interference with the rights protected in Article 11 unless this interference is in accordance with Article 11(2) (see **Wilson and Others v United Kingdom (2002)**, at paragraph 41). The negative obligation to refrain from arbitrary interference with the rights protected in Article 11 logically follows from the clause 'no restrictions shall be placed upon...' of Article 11(2).

4.2 Positive obligations

States party to the Convention have a positive obligation to ensure respect for the rights protected under Article 11.

- **Young, James and Webster v United Kingdom (1981)** concerned a 'closed shop' agreement concluded between British Rail and three trade unions, providing that thenceforth membership of one of those unions was a condition of employment (see **Swedish Engine Drivers' Union v Sweden (1976)**, paragraph 39). The applicants failed to satisfy this condition and were dismissed from their jobs. The British legislation in force at the time of the dismissal of the applicants neither prohibited 'closed-shop' agreements nor did it provide for the right not to belong to a union. However, it did provide protection for unfair dismissal. The applicants claimed that their right to freedom of association as protected by Article 11 had been violated. The Court ruled that, under Article 1 of the Convention, each State has the obligation to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention. Hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the State for any resultant breach of the Convention was thus engaged on this basis (see paragraph 49). In this

case, even though the State did not directly interfere with the right to freedom of association, it was still found to have violated the right to freedom of association, since the domestic legislation lacked sufficient protection of that right.

- **Plattform 'Ärtze für das Leben' v Austria (1988)** concerned an association of doctors campaigning against abortion and seeking to bring about reform of the Austrian legislation on the matter. They held two demonstrations that were disrupted by counter-demonstrators despite the presence of a large police contingent. The Court acknowledged the existence of positive obligations under Article 11 by stating that 'genuine, effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11.' The Court found that Article 11 (like Article 8) sometimes requires positive measures to be taken, even in the sphere of relations between individuals. In its judgment, the Court kept to the circumstances of the case and ruled that it 'does not have to develop a general theory of the positive obligations which may flow from the Convention' (see paragraph 31). The Court thus left open whether the negative right to freedom of association is to be considered on an equal footing with the positive right (on this point, see **Gustafsson v Sweden (1996)** at paragraph 45).

- **Ouranio Toxo and Others v Greece (2005)** concerned a political party whose declared aims included the defence of the Macedonian minority living in Greece. In 1995 the party affixed a sign on the front of its headquarters in the town of Florina in the two languages spoken in the region, Greek and Macedonian. It included the word 'vino-zito', written in the 'Slav alphabet', which means 'rainbow' in Macedonian, but was also the rallying cry of forces who had sought to take Florina during the civil war in Macedonia. The sign prompted a negative reaction from the local church, the town council and local population and culminated on an attack on the premises, damage to the building and assault on those inside. The police did not intervene to stop the attack, despite being in close proximity, and the public prosecutor failed to investigate those responsible. However, criminal proceedings were brought against some of the applicants because, it was alleged, their sign incited discord. The applicants claimed a breach of their freedom of association under Article 11. The Court noted the risk of causing tension within the community by using political terms in public did not suffice, by itself, to justify interference with freedom of association. The Court observed that the town council had clearly incited the town population to gather in protest against the applicants and some of its members had taken part in the protests. It considered that it would have been more in keeping with the values inherent in a democratic system for the local authorities to advocate a conciliatory stance, rather than to stir up confrontational attitudes. With regard to the conduct of the police, the Court found that they could reasonably have foreseen the danger that the tension would boil over into violence and clear violations of freedom of association. The State should therefore have taken adequate measures to avoid or, at least, contain the violence. However, they had not done so. The Court noted also the failure of the public prosecutor to investigate. The Court considered that in cases of interference with freedom of association by individuals, the competent authorities had a duty to take effective investigative measures. In those circumstances, the Court found that by both their acts and omissions the Greek authorities had violated Article 11.

- See also **Sibson v United Kingdom (1993)** in the discussion on compulsion above and **Wilson and Others v United Kingdom (2002).** In this case, the applicants with various professional backgrounds had all been offered financial incentives to surrender the right to union representation for collective bargaining. They had refused, and had thus received less significant pay

increases or benefits than their colleagues who had waived their right to union representation. The Court was faced with the questions of whether there was an obligation by the state to impose on employers to recognise trade unions for the purposes of collective bargaining and whether the financial incentives to render the right for collective bargaining were lawful. On the first question, the court stated that there was a wide margin of appreciation as to how trade union freedom might be secured. Collective bargaining was not indispensable for the effective enjoyment of trade union freedom. In the United Kingdom's national legislation, there were other measures available to promote the interest of the trade union's members, such as the possibility of strike. On the second point, the Court stated that if a system of collective bargaining was voluntary, there had to be possibilities for the trade unions to make employers accept collective bargaining. Such possibilities included strike. The state had the obligation to assure that employers could not undermine the right of individuals to permit their union to represent them. The Court noted that United Kingdom law made it possible 'for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests', mentioning that 'this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association'. It considered that the United Kingdom had failed in its positive obligations to ensure the enjoyment of rights under Article 11.

5. RESTRICTIONS ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION

5.1 Introduction

Article 11, like Articles 8, 9 and 10, does not guarantee absolute rights. States party are entitled to restrict the rights protected in the Article but only under strict conditions. These conditions have partially been derived from two legal principles that play a very important role under the Convention – the concept of *the rule of law* and the related principle of *legality*. The principle underlying both these concepts is that measures that restrict rights ought to be subject to effective control and review. In other words, restrictions must comply with law.

Assemblies of a public character raise a number of practical issues that ought to justify at least a minimum amount of consultation with authorities regarding time, location, traffic management and other factors. These issues may include safety, security and inconvenience or even economic loss to those affected by the peaceful assembly. Hence, certain forms of regulation, such as the requirement to give prior notice or obtain an authorisation or permit for an assembly, do not constitute an interference with the right to freedom of peaceful assembly and do not need to be justified under Article 11(2) (see **Rassemblement** cited above). The logic of allowing such regulation is reinforced by the fact that the authorities are obliged to guarantee that the peaceful assembly will not be disrupted – informing the authorities in due time of a planned demonstration allows them to secure the presence of police to protect the peaceful character of the demonstration. There is no case law establishing the standard of scrutiny with respect to authorisation.

Anything beyond the requirement for a permit may constitute an interference with Article 11 rights that requires justification. A system of permits must not affect the right to hold a peaceful assembly altogether, unless there are clear violent intentions. If the conditions for permission are too broad or general or concern a wide category of assemblies or exclude one or more groups or individuals, they must be justified under Article 11(2) (in **Ezelin v France (1991)** the Court stressed that penalties could not be used to effectively stifle the freedom of expression of a French lawyer). History has shown that governments often use public order laws to hinder political opponents and, although the State is entitled to seek to balance the interests of those exercising their rights with the common good, such balancing of interests will be analysed under Article 11(2).

Article 11 provides an *exhaustive* list of the circumstances in which state parties are allowed to restrict the rights it protects. The exceptions are similar to the restrictions set forth in Articles 8(2), 9(2) and 10(2). According to Article 11(2), restrictions are lawful only when they are: (1) prescribed by law *and* (2) necessary in a democratic society to pursue one of the following legitimate aims:

- In the interests of national security or public safety, or
- For the prevention of disorder and crime, or
- For the protection of health and morals, or
- For the protection of the rights and freedoms of others.

The last clause of Article 11 allows the contracting States to *lawfully* restrict the right to freedom of peaceful assembly and association of certain categories of people, namely members of the armed

forces, the police and members of the administration of the state. The word *lawful* has the same meaning as the phrase 'prescribed by law' used in the second clause of Article 11. These additional restrictions are not contained in Articles 8, 9 and 10. The State party can also derogate from the rights to freedom of peaceful assembly and freedom of association in times of war or public emergency threatening the life of the nation under Article 15 of the Convention.

When assessing State restrictions on Article 11 rights the Court applies the following tests:

TEST UNDER ARTICLE 11

1. Whether Article 11 is applicable to the subject matter of the complaint.

2. Whether there has been an interference with Article 11 rights.

    When the Court establishes that there has been an interference with the rights set forth in Article 11, it will then assess whether this interference is in accordance with paragraph 2. In practice, the Court poses a series of questions in a particular order when evaluating any restriction on Article 11 rights. Each of the specific questions will be discussed separately in the following paragraphs.

3. Whether such interference is:

    a. Prescribed by law
    b. For a legitimate aim
    c. Necessary in a democratic society, as demonstrated by:
        i. Pressing social need
        ii. Proportionality to the legitimate aim pursued.

5.2 Margin of appreciation

States party to the Convention have a certain *margin of appreciation* when determining whether in a certain case the rights protected in Article 11 can be restricted. The exact scope of the margin of appreciation depends on the circumstances of the case. The idea of the margin of appreciation stems from the Court's role not as the primary enforcer of rights but rather as the review body for domestic compliance with international standards. Where the margin of appreciation is narrow, for example in the case of restrictions on political parties, a State must give weightier reasons for any such restrictions (see, for example, **United Communist Party v Turkey (1998)** and **Gorzelik v Poland (2001)** and **(2004)**).

5.3 Interference

The rights protected in the Article can be restricted provided that these restrictions are in accordance with paragraph two of the Article. When restrictions do not fall within the ambit of the provisions of paragraph 2, they will violate Article 11. Of course, before examining whether a restriction is in accordance with the second paragraph, one has to decide whether the restriction in question consti-

tutes an 'interference' with Article 11 at all. Often this question is easy to answer and the parties will not contest the matter.

- In the case **Ezelin v France (1991)**, the applicant – a French lawyer – availed himself of his freedom of peaceful assembly by joining a demonstration – targeted against two court decisions – for which prior approval had been given. During the demonstration, protesters threatened police officers with violent language and painted insulting and offensive graffiti on various administrative buildings. Afterwards, the applicant's Bar association disciplined him. The State claimed that there was no interference with the right to freedom of peaceful assembly since the applicant was able to take part in the demonstration unhindered and was able to express his convictions publicly in his professional capacity and as he wished. He was reprimanded only *after* the event and on account of personal conduct that was deemed to be inconsistent with the obligations of his profession. The Court disagreed, holding that the term 'restriction' also includes measures – such as punitive measures – taken not before or during, but after a meeting (see paragraph 39).

5.4 Prescribed by law

The first thing the Court considers after it has found that there has been an interference of Article 11 is to determine whether this interference has been *prescribed by law.* Article 8 uses the phrase 'in accordance with law' but this has a similar meaning. See **Silver and Others v United Kingdom (1983)** at paragraph 85. This phrase implies that the interference should have a basis in domestic law.

In **Adali v Turkey (2005)** the Court observed that there seemed to be no law regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the 'green line' into southern Cyprus in order to engage in peaceful assembly with Greek Cypriots. Therefore, the manner in which restrictions were imposed on the applicant's exercise of her freedom of assembly was not 'prescribed by law.'

Not only should the interference be in accordance with domestic law, the law itself should also be of a certain quality. Two aspects of this 'quality' of law are specifically referred to, namely that it should be *foreseeable* and *accessible*.

5.4.1 Quality of the law; accessibility and foreseeability

- In **N.F. v Italy (2001)**, the applicant, a judge and member of a Masonic lodge read in the national press that certain State prosecutors were investigating lodges associated with the Grande Oriente d'Italia di Palazzo Giustiniani of which his lodge was a part. Because of this investigation, he tried to distance himself from the lodge and became a 'dormant member'. The authorities subsequently questioned him about his membership of the lodge and he had to appear before the disciplinary section of the National Council of the Judiciary where he was given a warning. As a result of this warning, he was denied a promotion for which he fulfilled all of the other conditions. He submitted to the Court that the disciplinary sanction in question amounted to an interference with his right to freedom of association. In analysing whether the sanction was 'prescribed by law,' the Court noted that measures that interfere with Article 11 should not only have a basis in domestic law, 'but also refer to the quality of the law in question, requiring that the law should be *accessible* to the person concerned and *foreseeable* as to its effects.' Law is foreseeable 'if it is formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct' (see

paragraphs 26-29). The Court held that, in order for a measure to be foreseeable, the applicant must have been able to foresee, 'to a degree that is reasonable in the circumstances, the consequences which a given action may entail.' However, those consequences need not have been foreseeable with absolute certainty – the law has to be able to adapt to changing circumstances in a society and that is not possible when the law is too rigid (see paragraph 34). In this case, the condition of foreseeability was not satisfied. On the issue of foreseeability, see also the case of **Maestri v Italy (2004)**.

- In **Gorzelik and Others v Poland (2004)**, the applicants claimed that the reason for the State's refusal to register their association was a political one; the law was used to deny the Silesians a minority status. Since Polish law did not provide any definition of 'minority,' the association could not have known what criteria had to be fulfilled in order for their association to be registered. The law was therefore allegedly not foreseeable. The Court noted that no internationally agreed definition of minorities existed and that state practice as to the recognition of minorities varied. While it appeared to be the European consensus that minorities had to be protected, international law did not require adopting a particular definition of the term. By failing to define the term in Polish legislation, therefore, Poland was not in breach of framing the law in a way that makes it foreseeable. In interpreting the notion of national minority, the Polish Courts had considered the statutory law applicable to national minorities and associations as well as social factors like the legal consequences of registering a national minority as such. The law was hence sufficiently foreseeable.

5.5 Legitimate aim

After the Court has ruled that an interference has been prescribed by law, it then considers whether that restriction pursues one of the so-called *legitimate aims* as laid down in paragraph 2 of Article 11. Paragraph 2 gives an exhaustive list of these legitimate aims (see also **Sidiropoulos and Others v Greece (1998)** at paragraph 38). The interference in question should be *necessary in a democratic society*, in the interests of *national security or public safety*, for the *prevention of disorder and crime*, for the *protection of health and morals* or for the *protection of rights and freedoms of others*. What the exact meaning of these 'aims' is will be discussed in the following paragraphs. For more cases on the legitimate aims see also the INTERIGHTS' Manual on Article 10. Often the State will claim that the interference pursues more than one of the legitimate aims of paragraph 2.

If a particular interference cannot be justified in the light of one of the aforementioned aims, there will have been a violation of the Article. The fact that the Court finds that the restriction pursued one of the legitimate aims does not automatically mean that there has been no violation of the Article. The Court still has to consider whether the restriction complies with the proportionality test.

5.5.1 In the interests of national security or public safety

This is one of the aims that is most often invoked by States. The Court seems quite willing to accept the appeal of Governments to this aim; it leaves the State with a *wide margin of appreciation* on the matter.

- In **Grande Oriente d'Italia di Palazzo Giustiniani v Italy (2001)**, the applicant association was an Italian masonic association that grouped together several lodges. Under Italian law, the applicant had the status of an unrecognised private-law association without legal personality. In 1996, the regional government laid down the rules to be followed for nominations and appointments to

public office for which it was the appointing authority. Italian law set out the terms and conditions for submitting applications for nominations and appointments. It provided, *inter alia*, that candidates must not be Freemasons. The applicant submitted that this legislation infringed its right to freedom of association. Although the State did not indicate which aim the measure in question pursued, the Court ruled nonetheless that the law in question was introduced to 'reassure' the public at a time when there was controversy surrounding the role played by certain Freemasons in the life of the country. The Court therefore accepted (at paragraphs 19-21) that the interference was intended to protect national security and prevent disorder.

5.5.2 For the prevention of disorder or crime

This legitimate aim has been invoked by States, both in relation to the right to freedom of peaceful assembly as well as in relation to the right to freedom of association. Again, States have a relatively wide margin of appreciation in this area.

- In **Cisse v France (2002)** the applicant was a member of a group of aliens without valid residence permits who decided to take collective action to draw attention to the difficulties they were having in obtaining a review of their immigration status in France. Their campaign culminated with a decision to occupy a church, in which the group took up residence for approximately two months. Neither the priest nor the parish council of the church objected to their presence and the religious services and various ceremonies proceeded as planned and without incident. The Court noted that the evacuation was ordered to put an end to the continuing occupation of a place of worship by persons, including the applicant, who had broken French law. The interference therefore pursued a legitimate aim, namely the prevention of disorder (see paragraphs 44-46).

- In **Eva Molnar v Hungary (2009)** the applicant and a number of other individuals participated in an action of support of demonstrators who had previously blocked some important streets in Budapest. There was no prior notification to the authorities of both demonstrations as was required by Hungarian law. The police, facing an unmanageable situation with regulating the city circulation of transport, broke up with the demonstration. The applicant unsuccessfully appealed the actions of police before the national judiciary. The Court's position in this case was that prior notification served not only the aim of reconciling, on the one hand, the right to peaceful assembly and, on the other hand, the rights and lawful interests (including the right of movement) of others, but also the prevention of disorder or crime. In order to balance these conflicting interests, the institution of preliminary administrative procedures is common practice in Member States when a public demonstration is to be organised, and that 'such requirements do not, as such, run counter to the principles embodied in Article 11 of the Convention, as long as they do not represent a hidden obstacle to the freedom of peaceful assembly protected by the Convention...The Court therefore considers that the right to hold spontaneous demonstrations may override the obligation to give prior notification to 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'. This was not the position in the present case.

See also the cases of **Ezelin v France (1991)**, **Rassemblement Jurassien and Unité Jurassienne v Switzerland (1979)** and **Christians against Racism and Fascism v United Kingdom (1980)**.

5.5.3 For the protection of health or morals

For one occasion on which this aim was raised before the Court in defence of a claim under Article 11 see the admissibility decision in **Larmela v Finland (1997).** The applicants in that case had founded an association called the Cannabis Association of Finland, whose aim was 'to influence intoxicant policy and legislation with a view to making the use, availability and domestic cultivation for personal use of cannabis legal for Finnish citizens of age as well as to study the use of cannabis in different cultures and periods of time.' The Finnish Minister of Justice refused to register the association. The European Commission on Human Rights ruled that under Article 11 the State was permitted to deny this association registration with the aim of protecting the health and morals of the country. The case was declared inadmissible (**Larmela v Finland**, admissibility decision of 28 May 1997. For a more in-depth examination of this aim, see INTERIGHTS Manual on Article 10).

5.5.4 For the protection of the rights and freedoms of others

States party to the Convention are also permitted to limit the rights guaranteed by Article 11 to protect the rights and freedoms of others.

- In **Chassagnou and Others v France (1999)**, the State argued that, by providing for the pooling of small plots of land and requiring their owners to join a local hunter's association, a new French law sought to ensure democratic participation in hunting in order to give as many people as possible access to a leisure activity which would otherwise have been bound to remain the exclusive prerogative of the owners of large estates. The Court noted that the only aim invoked by the State to justify the interference complained of was 'protection of the rights and freedoms of others.' These 'rights and freedoms' are themselves among those guaranteed by the Convention or its Protocols but the need to protect them might lead States to restrict other rights or freedoms likewise set forth in the Convention. The Court found that this constant search for a balance between the fundamental rights of each individual constitutes the foundation of a 'democratic society.' The balancing of individual interests that may well be contradictory is a difficult matter, and States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the Court to assess whether or not there is a 'pressing social need' capable of justifying interference with one of the rights guaranteed by the Convention. It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect 'rights and freedoms' that are not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right (see paragraphs 112-113).

In short, this means that when the Contracting States are aiming to protect rights that are laid down in the Convention they have a wide margin of appreciation. However, when they seek to protect rights of others that do not fall within the scope of the Convention, their margin of appreciation is limited. See also the admissibility decision of **W.P. and Others v Poland (2004)**.

5.6 Necessary in a democratic society

After the Court has concluded that the interference pursued one of the legitimate aims set forth in paragraph 2, it must determine whether the interference was *necessary in a democratic society*. The Court has phrased this condition as follows :

> *The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from* 'democratic society' (See **United Communist Party of Turkey and Others v Turkey (1998)** at paragraph 45).

The clause *necessary in a democratic society* implies two conditions:

> i. there has to be *a pressing social need* for the interference, and in particular,
> ii. the interference should be *proportionate* to the legitimate aims pursued.

The Court is often quite lenient when it comes to deciding whether a legitimate aim is being pursued by a certain measure. The test of necessity and proportionality is more stringent, however. It is often this test that proves decisive in a case.

5.6.1 Necessity – pressing social need

One of the key determinants of n*ecessity* is whether or not there is a *pressing social need* that justifies a particular interference (See **Handyside v United Kingdom** (1976) at paragraph 48). Whether there is a pressing social need in a particular case is in the first place for the national authorities to decide. But although the national authorities do have a certain *margin of appreciation*, the assessment of the national authorities is subject to supervision by the Court. Furthermore, the Court's task is not to substitute its own view for that of the national authorities, but to review under Article 11 the decisions it delivered in the exercise of its discretion. This means that the Court must look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify the interference are 'relevant and sufficient.' The Court must satisfy itself that the national authorities apply standards that are in conformity with the principles embodied in the Convention (See **Gorzelik v Poland (2004)** at paragraph 96)

- In **Freedom and Democracy Party (ÖZDEP) v Turkey (1999)**, the Turkish State applied to the Constitutional Court for an order dissolving ÖZDEP on the grounds that its programme sought to undermine the territorial integrity and secular nature of the State and the unity of the nation. While the Constitutional Court proceedings were still pending, the founding members of the party resolved to dissolve it in order to protect themselves and the party leaders from the consequences of a dissolution order – namely a ban on their carrying on similar activities in other political parties. The Constitutional Court subsequently made an order dissolving ÖZDEP. The applicant claimed that its right of freedom of association had been violated. The Court agreed with the State that the interference pursued some legitimate aims, namely preventing disorder, protecting the rights of others and ensuring national security. The Court then had to determine whether ÖZDEP's dissolution could be considered to have been necessary in a democratic society, that is to say whether it met a 'pressing social need' and was 'proportionate to the legitimate

aim pursued.' The Court held that, in view of the essential role played by political parties in the proper functioning of democracy, the exceptions set out in Article 11 were, where political parties are concerned, to be construed strictly; only convincing and compelling reasons could justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 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. The Court continued by noting that one of the principal characteristics of democracy is the possibility it offers of resolving the problems of a country through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there could be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned (see paragraphs 43-44).

- In the case **Refah Partisi (The Welfare Party) and Others v Turkey (2003)**, the Court examined whether the dissolution of a political party because of its alleged threat to democratic principles met a 'pressing social need.' The Court first noted that pluralism was indissociable from a democratic society, and would indeed depend on it. The Court in this regard underlined the importance of the right to freedom of peaceful assembly and freedom of thought, conscience and religion was one of the foundations of a "democratic society" within the meaning of the Convention. In restating an opinion by the Commission, it found that the principle of secularism was 'certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy.' An attitude which fails to respect that principle would not enjoy the protection of Article 9 of the Convention. States had the right to protect their institutions if associations jeopardised them. The Court noted that 'a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles.' Thus, a 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' (see paragraph 98). Restrictions imposed on Article 11 in this regard had however to be construed narrowly.

  The Court's analysis on the pressing social need then concentrated on the following points:

  1. Whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent.
  2. Whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole.
  3. 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'.

  In general, the Court noted that 'constitution and programme of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions' and thus analysed

the actions of the party leaders as well as their positions. On the first point, the Court noted that 'a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent'. The probability of their seizure of power was high, given the latest opinion polls. On the second and third point, the Court found 'that the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a "pressing social need"' (see paragraph 132).

- In **Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania (2005)** the applicants complained that the domestic courts' refusal of their application to register the PCN as a political party had infringed their right to freedom of association. In assessing whether the refusal to register the party was 'necessary in a democratic society' the Court reiterated the principles it laid down in previous Article 11 cases – in summary: (i) Article 11 must be considered in light of Article 10; (ii) there can be no democracy without pluralism and freedom of expression also protects offensive speech; (iii) there are two conditions on which a political party may campaign for a change in the law or the legal and constitutional structures of the State; (iv) necessary in a democratic society implies that there must be a 'pressing social need;' and (v) the Court must not take the place of the competent national authorities but it has a role in assessing compliance with Article 11. The Court took the PCN's political programme and constitution as a basis for assessing whether the interference in question was necessary, as the domestic court reasons for refusal of registration were based on those documents. The Court refused, however, to take into account policy statements made a number of years subsequent to the denial of registration (citing the **Dicle v Turkey** case), as this would have involved assessing facts outside of the scope of the case that were not considered by the domestic courts in denying registration. However, the Court did not consider that these statements could reasonably be construed as a call for the use of violence for political ends or as a policy in breach of the rules of democracy. The Court considered that the domestic courts did not show any way in which the PCN's programme and constitution were contrary to the country's constitutional and legal order and, in particular, to the fundamental principles of democracy. Moreover, it could not be argued that the PCN's programme was belied by practical action incompatible with democracy as the party did not have the opportunity to take any action at all. The Court further considered that the historical background in Romania could not in itself justify the need for the interference. The Court concluded that the criteria for defining 'pressing social need' were not met. Hence there was a violation of Article 11.

- In **Tsonev v Bulgaria (2006)** the applicant alleged that the refusal of the courts to register the Communist Party of Bulgaria had infringed his freedom of association and was unnecessary in a democratic society. The Bulgarian Government had based their decision to refuse registration on formal deficiencies in the registration documents and the alleged dangers stemming from the party's goals and declarations. Regarding the alleged defects in its constitution and registra-

tion documents, the Court noted that the relevant domestic legislation did not specify the exact manner in which the party's constitution had to be drafted, what procedures were necessary or what formalities there needed to be in order to execute such documentation. It was the national courts' task to elucidate the true tenor of these provisions and thus give the party's founders clear notice how to draft the relevant documents in order to be able to obtain registration. In view of this and of the insufficient clarity of these courts' holdings on the formal shortcomings which they identified in the party's registration documents, the Court considered that that ground for refusing registration had not been made out. Neither could it accept that the fact that the party's aims were identical to those of certain other parties could serve as grounds to refuse the registration of a party in a pluralistic and democratic society. Finally, the Court found nothing in the party's declarations, as set out in the preamble to its constitution, which could lead to the conclusion that its aims were undemocratic or that it intended to use violence to attain them. The Court concluded that the reasons invoked by the authorities to refuse the registration of the party were not relevant and sufficient, thus, the interference with the applicant's freedom of association could not be deemed necessary in a democratic society.

- In **Vordur Olafsson v Iceland (2010)** the applicant was a master builder and a member of a professional association of his choice. Under Icelandic law individuals and companies engaged in particular business activities, including also the activity of the applicant, had to pay membership dues to the Federation of Icelandic Industry, the Industry Charge, irrespective of whether they were members. The charges were collected by the state on behalf of the Federation. The latter pursued policies with which the applicant disagreed and which were contrary to his interests, and consequently giving rise also to issues under Article 10 of the Convention in addition with the incompatibility of his compulsory membership of the Federation with his right to freedom of association. In examining the issue of whether the interference with the applicant's right to freedom of association was proportional, the Court paid attention to the status of the Federation and its relations with the public authority. The Court was not persuaded with the position of the Government that merely reporting obligation of the Federation to the state could involve substantial and systematic supervision by the former. The Court gave importance in the instance case to the circumstance that the lack of transparency and accountability towards non-members, such as the applicant, who were obliged financially to support the Federation through their payment of the Industry Charge and, subsequently concluded that not only did the relevant national law define the Federation's role and duties in an open-ended manner and failed to set out specific obligations for the Federation, there was also a lack of transparency and accountability, *vis-à-vis* non-members such as the applicant, as to the use of the revenues from the Industry Charge. The Court did not find 'that the restriction on the applicant's freedom of association entailed by the obligation to financially support the Federation contrary to his own opinions was supported by sufficient reasons and was "necessary".'

5.6.2 Proportionality

Inherent to the notion of necessity is the requirement that the restriction must be proportional to the aim(s) pursued. In other words, the national authorities are required to use the method that least restricts the rights protected in Article 11. In order to decide whether the authorities have succeeded in doing so, it must be examined whether a proper balance has been achieved between the conflicting interests of those involved. The national authorities, again, have a certain margin of appreciation in this regard (See **Young, James and Webster v United Kingdom (1981)** at paragraph 63. On proportionality generally, see **Ezelin v France (1991)** and **National Union of Belgian Police v Belgium (1975)**).

- In **Christian Democratic People's Party v Moldova (2006)** the applicant, at the time an opposition political party, complained that a temporary ban imposed on its activities violated its right to freedom of peaceful assembly and association as under Article 11. The Court considered the three grounds relied upon by the domestic authorities: that the CDDP had not obtained an authorisation for its gatherings in accordance with applicable domestic law, that children were present at its gatherings, and that some statements made at the gatherings amounted to calls to public violence, and found that they were not 'relevant and sufficient reasons' to justify imposing such a ban on the CDDP's activities. The Court stressed that only very serious breaches such as those which endanger political pluralism or fundamental democratic principles could justify a ban on the activities of a political party. Since the CDPP's gatherings were entirely peaceful, there were no calls to violent overthrow of the Government or any other encroachment on the principles of pluralism and democracy, it could not reasonably be said that the measure applied to it was proportionate to the aim pursued and that it met a pressing social need. It further remarked that despite its temporary nature, the ban could reasonably be said to have had a 'chilling effect' on the Party's freedom to exercise its freedom of expression and to pursue its political goals, the more so, since it was adopted on the eve of the local elections. Although the ban was subsequently lifted, the Court considered that even a temporary ban was not necessary in a democratic society. Accordingly, there had been a violation of Article 11 of the Convention.

- See also **United Macedonian Organisation Ilinden and Others v Bulgaria (2006)**.

- In **Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania (2005)** discussed above, the Court concluded in paragraph 60 that "a measure as drastic as the refusal of the applicants' application to register the PCN as a political party, before its activities had even started, is disproportionate to the aim pursued and consequently unnecessary in a democratic society".

- In **Öllinger v Austria (2006)** the applicant, a member of Parliament, was aiming at holding a meeting at Salzburg municipal cemetery on All Saints' Day to commemorate the killing of Sazlburg Jews by SS soldiers (with participants holding commemorative messages in their hands or attached to their clothes). This would have been a counter-gathering to another meeting – planned exactly at the same time – that was usually held in memory of the SS soldiers killed in World War II. There was a risk of disturbances if the two assemblies were held simultaneously. The applicant was refused the right to hold the meeting. The main legal argument upheld by the Austrian Constitutional Court was the interest of cemetery goers not to be disturbed at All Saints' Day while traditionally visiting the cemeteries. Although the case mainly addressed the competing fundamental rights, while finding that Austria failed to strike a fair balance between the concurring interests, the Court concluded that 'unconditional prohibition of a counter-demonstration [was] a very far-reaching measure', requiring a 'particular justification' and was 'disproportionate to the aim pursued' (paragraph 47).

- In **Bukta and Others v Hungary (2007)**, the applicants organised a demonstration in front of the Hotel Kempinski in Budapest protesting against Hungarian Prime Minister attending a particular reception. The police were not informed as was required by Hungarian law (the law required three days in advance notice, while applicants learned about the reception in question a day before). Around 150 people gathered causing a sharp noise which led the police to disband the gathering. The Court noted that 'in the circumstances of the present case, the failure to inform the public sufficiently in advance of the Prime Minister's intention to attend the reception left the

applicants with the option of either foregoing their right to peaceful assembly altogether, or of exercising it in defiance of the administrative requirements' (paragraph 35). The Court concluded that 'in special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly' (paragraph 36).

5.7 Members of the armed forces and the police and administration of the State

The last sentence of the second paragraph of Article 11 provides that States are entitled to lawfully restrict the rights set forth in Article 11 in the case of members of the armed forces, members of the police or members of the administration of the State.

The meaning of 'lawful restriction' has been discussed in a number of cases before the Court.

- In **Vogt v Germany (1995)**, the applicant obtained a post as a teacher with the status of probationary civil servant in a State secondary school. Before the end of her probationary period, she was appointed as a permanent civil servant. During her studies the applicant had joined the German Communist Party (DKP). The applicant was dismissed from her post as a civil servant for having persistently refused to dissociate herself from the DKP on the ground that in her personal opinion membership of that party was not incompatible with her duty of loyalty to the State. The applicant claimed her right to freedom of association had been violated. The Court ruled that the notion of 'administration of the State' in the final sentence of Article 11(2) should be interpreted narrowly, in the light of the post held by the official concerned. The Court found that the measures complained of did not comply with the proportionality test. The Court found it unnecessary to examine whether or not teachers fell within the scope of the phrase 'administration of the State' (see paragraphs 66-68).

- In **Rekvényi v Hungary (1999)**, the applicant was a police officer and the Secretary General of the Police Independent Trade Union. New laws were adopted amending the Constitution to prohibit members of the armed forces, the police and security services from joining any political party and from engaging in any political activity. The Police Independent Trade Union filed a constitutional complaint with the Constitutional Court claiming that the amended Article of the Constitution infringed constitutional rights of career members of the police, was contrary to the generally recognised rules of international law and had been adopted by Parliament unconstitutionally. The applicant claimed before the Court that his rights under Articles 10 and 11 had been violated. The Court considered that question with the same structural approach as used for the evaluation of a limitation under the first sentence of Article 11(2). A fair balance had to be struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10(2). The Court thus tested whether the restriction had been prescribed by law, had a legitimate aim and was necessary in a democratic society. It also tested whether there had been a 'pressing social need' for the imposition of a limitation. In applying this test, the Court stated to 'bear in mind that whenever civil servants' [and also military personnel's or police officers'] right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interfer-

ence is proportionate" to the legitimate aim in question' (see paragraph 43). In that case, since regard had been made to the national margin of appreciation 'the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a "pressing social need" in a democratic society' (see paragraph 48)

- In **Demir and Baykara v Turkey (2008)** the first applicant was a member of the trade union Tum Bel Sen and the second applicant was its president. This trade union was established by civil servants of several municipalities and aimed to promote democratic trade unionism and help its members in their aspirations and claims. The authorities have considerably limited the activity of the trade union based only on the fact that the founders of the organization were civil servants. In this case the Court took a position that 'that "members of the administration of the State" cannot be excluded from the scope of Article 11. At most the national authorities are entitled to impose "lawful restrictions" on those members, in accordance with Article 11(2). In the present case, however, the Government have failed to show how the nature of the duties performed by the applicants, as municipal civil servants, requires them to be regarded as "members of the administration of the State" subject to such restrictions. Accordingly, the applicants may legitimately rely on Article 11 of the Convention and any interference with the exercise of the right concerned must satisfy the requirements of paragraph 2 of that Article'. See also the case of **Grande Oriente d'Italia di Palazzo Giustiniani v Italy (2001).**

5.8 Article 16

Further restriction to the right to freedom of peaceful assembly and association can be found in Article 16 of the Convention which allows contracting parties to impose restrictions on the political activity of aliens, *inter alia*, in relation to Article 11 of the Convention. So far the Court has not had an opportunity to deliberate regarding the potential violation of Article 11 where Article 16 was invoked as a justification for restricting the right to peaceful assembly and manifestation. However, the scope of Article 16 was discussed by the Court in **Piermont v France (1995)** in relation to Article 10 of the Convention. The case concerned the applicant's (a German citizen and a member of the European Parliament) expulsion from the country and a prohibition to re-enter due to her participation in a demonstration in French Polynesia against the Government and the statements she made regarding nuclear testing and the French presence in the Pacific. The applicant complained that the administrative measure taken against her had, amongst other rights, infringed her right to freedom of expression. After a discussion whether the applicant had to be considered an 'alien' and consequently whether the restrictions in Article 16 applied to her, the Court found that European Union nationals present in a member State of the European Union of which they did not have citizenship were not 'aliens' for the purposes of Article 16 (see paragraphs 60-64).

Questions

1. How do the authorities deal with disruptive but peaceful assemblies? What is the extent of the police or security forces' discretion when dealing with public demonstrations – for example, in deciding to disperse an assembly attacked by a mob or to protect it? What measures are the police permitted to take when faced with violence? What is the extent of the authorities' power to arrest and detain a participant in a peaceful assembly that has become violent?

2. What range of restrictions may the authorities place upon peaceful assemblies? What is the basis (in law or discretion) for these restrictions? If the decision is discretionary, who makes it, and is the decision subject to reviewed? Are those who wish to assemble entitled to make representations to this person? What has to be established by those wishing to assemble?
3. Is there specific legislation regulating public rallies? Is authorisation required? What are the grounds on which a rally could be refused or banned? Is there any specific procedure? What authority grants the permission and/or imposes the ban? Is appeal available of a decision to refuse permission or ban an assembly? How are appeals considered – does the appeal court take into account the proportionality of the refusal or ban? Are there examples of total prohibitions of assembly in certain areas?

6 SELECTED EXCERPTS FROM CONVENTION JURISPRUDENCE

6.1 Introduction

6.1.1 The relationship of Article 11 to other Articles of the Convention

6.1.1.1 Articles 9 and 10

Refah Partisi (The Welfare Party) and Others v Turkey (2001)

44. The Court further reiterates that, notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy...The fact that their activities form part of a collective exercise of the freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention (see the United Communist Party of Turkey and Others v Turkey judgment of 30 January 1998 ..... §§ 42 and 43).

Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)

85. ...Such a link is particularly relevant where – as here – the authorities' intervention against an assembly or an association was, at least in part, in reaction to views held or statements made by participants or members.

6.1.1.2 Organised religion

Hasan and Chaush v Bulgaria (2000)

61. In the present case the parties differ on the question whether or not the events under consideration, which all relate to the organisation and leadership of the Muslim community in Bulgaria, concern the right of the individual applicants to freedom to manifest their religion and, consequently, whether or not Article 9 of the Convention applies. The applicants maintained that their religious liberties were at stake, whereas the Government analysed the complaints mainly from the angle of Article 11 of the Convention.

62. The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention...Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life

against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable...

65. Further, the Court does not consider that the case is better dealt with solely under Article 11 of the Convention, as suggested by the Government. Such an approach would take the applicants' complaints out of their context and disregard their substance.

The Court finds, therefore, that the applicants' complaints fall to be examined under Article 9 of the Convention. In so far as they touch upon the organisation of the religious community, the Court reiterates that Article 9 must be interpreted in the light of the protection afforded by Article 11 of the Convention.

Metropolitan Church of Bessarabia v Moldova (2001)

118. Moreover, since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, 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 and is thus an issue at the very heart of the protection which Article 9 affords (see *Hasan and Chaush*, cited above, § 62).

In addition, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6 (see, *mutatis mutandis*, *Sidiropoulos and Others v Greece*, judgment of 10 July 1998, *Reports* 1998-IV, p. 1614, § 40, and *Canea Catholic Church v Greece*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2857 and 2859, §§ 33 and 40-41, and opinion of the Commission, p. 2867, §§ 48-49).

Refah Partisi (The Welfare Party) and Others v Turkey (2003)

92. ...While freedom of religion is in the first place a matter of individual conscience, it also implies freedom to manifest one's religion alone and in private or in community with others, in public and within the circle of those whose faith one shares...

96. The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions. In this connection, the Court points out that it

has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system. For there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11 – a matter which the Court considers below. Only when that review is complete will the Court be in a position to decide, in the light of all the circumstances of the case, whether Article 17 of the Convention should be applied (see United Communist Party of Turkey and Others, cited above, p. 18, § 32).

6.1.1.3 Article 14

Danilenkov and Others v Russia (2009)

123. ...The wording of Article 11 explicitly refers to the right of "everybody", and this provision obviously includes a right not to be discriminated against for choosing to avail oneself of the right to be protected by trade union, also given that Article 14 formed an integral part of each of the Articles laying down rights and freedoms whatever their nature (see *National Union of Belgian Police,* cited above, § 44). Thus the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership which, according to the Freedom of Association Committee, constitutes one of the most serious violations of freedom of association capable to jeopardize the very existence of a trade union (see paragraph 107 above).

124. The Court finds crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to have the right to take legal action to obtain damages and other relief. Therefore, the States are required under Articles 11 and 14 of the Convention to set up a judicial system that would ensure real and effective protection against the anti-union discrimination.

134. However, the principal deficiency of the criminal remedy is that, being based on the principle of personal liability, it requires proof "beyond reasonable doubts" of direct intent on the part of one of the company's key managers to discriminate against the trade-union members. Failure to establish such intent led to decisions not to institute criminal proceedings (see paragraphs 38-39, 45, 47 and 49 above). Furthermore, the victims of discrimination have only a minor role in the institution and conduct of criminal proceedings. The Court is thus not persuaded that a criminal prosecution, which depended on the ability of the prosecuting authorities to unmask and prove direct intent to discriminate against the trade union members, could have provided adequate and practicable redress in respect of the alleged anti-union discrimination. Alternatively, the civil proceedings would allow fulfilling the far more delicate task of examining all elements of relationship between the applicants and their employer, including combined effect of various techniques used by the latter to induce dockers to relinquish DUR membership, and granting appropriate redress.

135. The Court will not speculate on whether the effective protection of the applicants' right not to be discriminated against could prevent future unfavourable actions against them from the part of their employer, as the applicants suggested. Nonetheless it considers that given an objective effect of the employer's conduct, the lack of such protection could entail fear of potential discrimination and discourage other persons from joining the trade union, which may lead to its disappearance, thus negatively affecting the enjoyment of the freedom of association.

6.2 Freedom of peaceful assembly

6.2.1 Protection of peaceful assemblies

Plattform 'Ärtze für das Leben' v Austria (1988)

32. A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The 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. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be (see, mutatis mutandis, the X and Y v Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, § 23)...

34. While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, pp. 33-34, § 67, and the Rees judgment of 17 October 1986, Series A no. 106, pp. 14-15, §§ 35-37). In this area the obligation they enter into under Article 11 (art. 11) of the Convention is an obligation as to measures to be taken and not as to results to be achieved.

Adali v Turkey (2005)

267. ...The Court notes in addition that States must not only safeguard the right to assemble peacefully but must also refrain from applying unreasonable indirect restrictions upon that right (**[citing Djavit An v Turkey**, § 57**]**).

6.3 Freedom of association

6.3.1 Concept of association

Chassagnou and Others v France (1999)

100. ...If Contracting States were able, at their discretion, by classifying an association as "public" or "para-administrative", to remove it from the scope of Article 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective...

Freedom of thought and opinion and freedom of expression, guaranteed by Articles 9 and 10 of the Convention respectively, would thus be of very limited scope if they were not accompanied by a guar-

antee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.

The term "association" therefore possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point.

6.3.2 Public law bodies

Le Compte, van Leuven and de Meyere v Belgium (1981)

65. Having regard to these various factors taken together, the Ordre cannot be considered as an association within the meaning of Article 11 (art. 11). However, there is a further requirement: if there is not to be a violation, the setting up of the Ordre by the Belgian State must not prevent practitioners from forming together or joining professional associations. Totalitarian régimes have resorted - and resort - to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses...The Court notes that in Belgium there are several associations formed to protect the professional interests of medical practitioners and which they are completely free to join or not (see paragraph 22 above). In these circumstances, the existence of the Ordre and its attendant consequence - that is to say, the obligation on practitioners to be entered on the register of the Ordre and to be subject to the authority of its organs - clearly have neither the object nor the effect of limiting, even less suppressing, the right guaranteed by Article 11 par. 1...

Sigurdur A. Sigurjonsson v Iceland (1993)

31. ...Frami was established under private law and enjoyed full autonomy in determining its own aims, organisation and procedure. According to its Articles, admittedly old and currently under revision, the purpose of Frami was to protect the professional interests of its members and promote solidarity among professional taxicab drivers; ..... Frami was therefore predominantly a private-law organisation and must thus be considered an "association" for the purposes of Article 11...

Chassagnou and Others v France (1999)

101. It is true that the ACCAs owe their existence to the will of Parliament, but the Court notes that they are nevertheless associations set up in accordance with the Law of 1 July 1901, and are composed of hunters or the owners of land or hunting rights, and therefore of private individuals, all of whom, a priori, wish to pool their land for the purpose of hunting.

Similarly, the fact that the prefect supervises the way these associations operate is not sufficient to support the contention that they remain integrated within the structures of the State (see...Le Compte, Van Leuven and De Meyere v Belgium...§ 64). Furthermore, it cannot be maintained that under the Loi Verdeille ACCAs enjoy prerogatives outside the orbit of the ordinary law, whether administrative, rule-making or disciplinary, or that they employ processes of a public authority, like professional associations.

Slavic University in Bulgaria and Others v Bulgaria (2004)

According to the Court's case-law, a public law institution founded by the legislature is not an association within the meaning of Article 11 of the Convention (see Köll v Austria...Sigurour A. Sigurjonsson v Iceland...§ 31; Le Compte, Van Leuven and De Meyere v Belgium...§§ 64-65).

...In examining whether a specific organisation is an association within the meaning of Article 11 the Court must have regard to the reality of the situation and take into account various factors such as (1) whether it owes its existence to the will of parliament, (2) whether it is set up in accordance with the law on private associations, (3) whether it remains integrated within the structures of the State, (4) whether it enjoys prerogatives outside the orbit of ordinary law, such as administrative, rule-making or disciplinary, and (5) whether it employs processes of a public authority, like professional associations (Chassagnou and Others, cited above, § 101).

....In addition, the Court notes that the Convention organs have previously stated that Swedish universities are public institutions (see M.A. v Sweden, no. 32721/96, Commission decision of 14 January 1998, unreported).

6.3.2.1 Regulatory bodies for liberal professions

O.V.R. v Russia (2001)

The Court notes that the Convention organs have consistently held that the regulatory bodies of the liberal professions are not associations within the meaning of Article 11 of the Convention... The object of these bodies, established by legislation, is to regulate and promote the professions, whilst exercising important public law functions for the protection of the public. They cannot, therefore, be likened to trade unions but remain integrated within the structures of the State.

Having regard to the Notary Act No. 4460-1 of 11 February 1993 and the statutory functions of notary chambers, the Court is of the view that such chambers are not associations within the meaning of Article 11 of the Convention.

6.3.2.2 Work councils

Karakurt v Austria (1999)

The Court considers that works councils not only owe their existence to the will of parliament, but are also set up in accordance with the provisions of the Industrial Relations Act. Thus, a works council is only envisaged for a work place with five or more employees. The number of members of the works council is fixed in relation to the number of staff, and in case of a small number of staff, it consists of one person only. The staff, i.e. the body of persons employed at a work place which is not in itself an association, elect the members of their works council for the purpose of exercising, like the other representative bodies established under the Industrial Relations Act, the functions of staff participation at work. In these circumstances, a works council cannot be considered as an "association" within the meaning of Article 11 § 1 of the Convention.

6.3.3 Political parties

Refah Partisi (The Welfare Party) and Others v Turkey (2001)

47. The Court takes the view that a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons (see...the Socialist Party and Others v Turkey...§§ 46 and 47, and Lawless v Ireland judgment of 1 July 1961 (merits)...§ 7). **[Note:** See also the case of **Yazar v Turkey**, at §49.]

Presidential Party of Mordovia v Russia (2004)

28. The Court recalls that Article 11 applies to associations, such as political parties ..., all the more so to a party which, like the applicant, is not suspected of undermining the constitutional structures.

29. The Court also reiterates that a refusal to register an association may amount to an interference with the exercise of the right to freedom of association (see, inter alia, the Sidiropoulos and others v Greece judgment of 10 July 1998, Reports 1998-IV, §§ 31, 40)...

31. The Court accepts that the measure in question must have affected the applicant party, as claimed, since it was unable to function for a substantial period of time and could not participate in regional elections. Furthermore, the damage appears irreparable given that, under current legislation, the party cannot be reconstituted in its original concept.

32. It is not in dispute that the interference in question was not "prescribed by law". Having reached this conclusion, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 11 were complied with in the instant case – namely, whether the interference pursued a legitimate aim and whether it was necessary in a democratic society.

6.3.4 Objectives

United Communist Party and Others v Turkey (1998)

27. The Court notes on the other hand that an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions. As the Court has said in the past, while it is in principle open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions (see the Open Door and Dublin Well Woman v Ireland judgment of 29 October 1992, Series A no. 246-A, p. 29, § 69)...

29. The Court points out, moreover, that Article 1 requires the States Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". That provision, together with Articles 14, 2 to 13 and 63, demarcates the scope of the Convention ratione personae, materiae and loci (see the Ireland v the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 238). It makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention. It is, therefore, with respect to their "jurisdiction" as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention.

30. The political and institutional organisation of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional (see, for example, the Gitonas and Others v Greece judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV) or merely legislative (see, for example, the Mathieu-Mohin and Clerfayt v Belgium judgment of 2 March 1987, Series A no. 113). From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they are subject to review under the Convention.

Refah Partisi (The Welfare Party) and Others v Turkey (2003)

87. It is in the nature of the role that they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena.

6.3.4.1 Minorities

Sidiropoulos and Others v Greece (1998)

44. The Court notes, in the first place, that the aims of the association..., were exclusively to preserve and develop the traditions and folk culture of the Florina region...Such aims appear to the Court to be perfectly clear and legitimate; the inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics, for historical as well as economic reasons. Even supposing that the founders of an association like the one in the instant case assert a minority consciousness, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November 1990 – which Greece has signed – allow them to form associations to protect their cultural and spiritual heritage.

In the second place, in justifying its refusal of the application for registration, the Salonika Court of Appeal decided that it had "good reasons...to believe that the purpose of using the term 'Macedonian' [was] to dispute the Greek identity of Macedonia and its inhabitants by indirect and therefore underhand means, and discern[ed] in it an intention on the part of the founders to undermine Greece's territorial integrity".

In reaching that decision, the Court of Appeal, of its own motion, took into consideration as evidence material which the applicants maintained they had not been able to challenge during the proceedings as it had not been placed in the case file.

46. ....Similarly, in the instant case the Court does not rule out that, once founded, the association might, under cover of the aims mentioned in its memorandum of association, have engaged in activities incompatible with those aims. Such a possibility, which the national courts saw as a certainty, could hardly have been belied by any practical action as, having never existed, the association did not have time to take any action. If the possibility had become a reality, the authorities would not have been powerless; under Article 105 of the Civil Code, the Court of First Instance could order that the association should be dissolved if it subsequently pursued an aim different from the one laid down in its memorandum of association or if its functioning proved to be contrary to law, morality or public order (see paragraph 18 above).

Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)

89. The inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 of the Convention (see Sidiropoulos and Others..., § 44).

90. Admittedly, it cannot be ruled out that an organisation's programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the organisation's actions and the positions it defends (see United Communist Party of Turkey and Others, cited above, p. 27, § 58).

An essential factor to be taken into consideration is the question whether there has been a call for the use of violence, an uprising or any other form of rejection of democratic principles (see Freedom and Democracy Party (ÖZDEP), cited above, § 40). Where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression (see Incal v Turkey..., § 48, and Sürek v Turkey (no. 1), § 61...

97. The Court reiterates, however, 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.

Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress 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, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.

In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means.

98. The Court finds, therefore, that the probability that separatist declarations would be made at meetings organised by Ilinden could not justify a ban on such meetings...

107. 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.

The fact that what was at issue touched on national symbols and national identity cannot be seen in itself – contrary to the Government's view – as calling for a wider margin of appreciation to be left to the authorities. The national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be.

Gorzelik and Others v Poland (2004)

89. As has been stated many times in the Court's judgments, not only is political democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that must claim to spring from "democratic society"...

90. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see Young, James and Webster..., § 63 and Chassagnou and Others v France..., § 112).

91. Furthermore, given that the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions, the Court has also recognised that the protection of opinions and the freedom of expression within the meaning of Article 10 of the Convention is one of the objectives of the freedom of association (see, for instance, the Refah Partisi (The Welfare Party) and Others v Turkey judgment cited above, § 88).

92. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, 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. For 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. It is only natural that, where a civil society is functioning in a healthy manner, 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 collectively common objectives.

93. The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the Preamble to the Council of Europe's Framework Convention, "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity" . 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.

6.3.4.2 Conditions to a campaign for a change in the law

Refah Partisi (The Welfare Party) and Others v Turkey (2001)

46. The Court has also determined the limits within which political groups may conduct their activities while enjoying the protection of the Convention's provisions (see the United Communist Party of Turkey and Others judgment..., § 57):

> "... one of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned."

47. The Court takes the view that a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons ...

48. Nor can it be ruled out that the programme of a political party or the statements of its leaders may conceal objectives and intentions different from those they proclaim. To verify that it does not, the content of the programme or statements must be compared with the actions of the party and its leaders and the positions they defend taken as a whole...**[Note:** see also **Yazar and Others v Turkey (2002)** at §48-49.]

Refah Partisi (The Welfare Party) and Others v Turkey (2003)

99. The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (see Communist Party (KPD) v Germany, no. 250/57, Commission decision of 20 July 1957...). In view of the very clear link between the Convention and democracy (see paragraphs 86-89 above), no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole (see, mutatis mutandis, Petersen v Germany (dec.), no. 39793/98...).

6.3.4.3 Political programmes and actual objectives

Freedom and Democracy Party (ÖZDEP) v Turkey (1999)

40. Having analysed ÖZDEP's programme, the Court finds nothing in it that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. That, in the Court's view is an essential factor to be taken into consideration (see, mutatis mutandis, Okçuo lu v Turkey [GC], no. 24246/94, § 48, 8 July 1999, unreported). On the contrary, the need to abide by democratic rules when implementing the proposed political project was stressed in the programme...

41. The Constitutional Court also 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 notes that, taken together, the passages in issue present a political project whose aim is in essence the establishment – in accordance with democratic rules – of "a social order encompassing the Turkish and Kurdish peoples"...

In the Court's view, the fact that such a political project is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects 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 (see the Socialist Party and Others judgment cited above, p. 1257, § 47). The same applies, too, to ÖZDEP's proposals for the abolition of the Religious Affairs Department.

42. Admittedly, it cannot be ruled out that the passages concerned may conceal a different political design from the publicly proclaimed one. However, given the absence of any concrete acts suggesting otherwise, there is no reason to cast doubts on the genuineness of ÖZDEP's programme. ÖZDEP was therefore penalised solely for exercising its freedom of expression.

6.3.5 Content of the right to freedom of association

6.3.5.1 Legal personality

Sidiropoulos and Others v Greece (1998)

40. ...That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. 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. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions.

Gorzelik and Others v Poland (2004)

55. The Court recalls at the outset that the right to form an association is inherent in the right laid down in Article 11, even if that provision only makes express reference to the right to form trade unions.

The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning.

The way in which national legislation protects the freedom of association and the manner in which the State authorities apply the relevant provisions in practice give an indication of the development of democracy in the country concerned.

While it is true that States are entitled to satisfy themselves that an association's objectives and activities are in conformity with the domestic legal order, they must do so in a manner compatible with their obligations under the Convention and subject to the Court's review (see the Sidiropoulos and Others v Greece..., § 40).

6.3.5.2 Negative right to freedom of association

Young, James and Webster v United Kingdom (1981)

52. ...The Court recalls, however, that the right to form and to join trade unions is a special aspect of freedom of association (see the National Union of Belgian Police judgment of 27 October 1975..., par. 38); it adds that the notion of a freedom implies some measure of freedom of choice as to its exercise...To construe Article 11...as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee (see..."Belgian Linguistic" case...par. 5, the Golder judgment of 21 February 1975...par. 38, and the Winterwerp judgment of 24 October 1979...par. 60).
55. The situation facing the applicants clearly runs counter to the concept of freedom of association

in its negative sense. Assuming that Article 11...does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention. However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion...In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11...For this reason alone, there has been an interference with that freedom as regards each of the three applicants.

57. Moreover, notwithstanding its autonomous role and particular sphere of application, Article 11...must, in the present case, also be considered in the light of Articles 9 and 10...Mr. Young and Mr. Webster had objections to trade union policies and activities, coupled, in the case of Mr. Young, with objections to the political affiliations of TSSA and NUR (see paragraphs 34 and 43 above). Mr. James' objections were of a different nature, but he too attached importance to freedom of choice and he had reached the conclusion that membership of NUR would be of no advantage to him (see paragraph 37 above). The protection of personal opinion afforded by Articles 9 and 10...in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11...Accordingly, it strikes at the very substance of this Article...to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions. In this further respect, the treatment complained of - in any event as regards Mr. Young and Mr. Webster - constituted an interference with their Article 11...rights.

Sibson v United Kingdom (1993)

29. In arriving at its conclusion in the case of Young, James and Webster that there had been a breach of Article 11..., the Court held that although compulsion to join a particular trade union may not always be contrary to the Convention, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11...will constitute an interference with that freedom (ibid...para. 55). In the Court's opinion, the facts of the present case are such that it can, as was argued by the Government but disputed by the applicant, be distinguished from that of Young, James and Webster. It notes in the first place that, unlike Mr Young, Mr James and Mr Webster (ibid...para. 57), Mr Sibson did not object to rejoining TGWU on account of any specific convictions as regards trade union membership (and he did in fact join another union instead). It is clear that he would have rejoined TGWU had he received a form of apology acceptable to him...and that accordingly his case, unlike theirs, does not also have to be considered in the light of Articles 9 and 10...of the Convention. Furthermore, the present case is not one in which a closed shop agreement was in force...Above all, the applicants in the earlier case were faced with a threat of dismissal involving loss of livelihood ([Young]...para. 55), whereas Mr Sibson was in a rather different position: he had the possibility of going to work at the nearby Chadderton depot, to which his employers were contractually entitled to move him...their offer to him in this respect was not conditional on his rejoining TGWU; and it is not established that his working conditions there would have been significantly less favourable than those at the Greengate depot...Having regard to these various factors, the Court has come to the conclusion that Mr Sibson was not subjected to a form of treatment striking at the very substance of the freedom of association guaranteed by Article 11...

Gustafsson v Sweden (1996)

45. The matters complained of by the applicant, although they were made possible by national law, did not involve a direct intervention by the State. The responsibility of Sweden would nevertheless be engaged if those matters resulted from a failure on its part to secure to him under domestic law the rights set forth in Article 11...of the Convention (**[citing Sibson, para. 27]**). Although the essential object of Article 11...is to protect the individual against arbitrary interferences by the public authorities with his or her exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the most recent judgment delivered in this connection, Article 11...of the Convention has been interpreted to encompass not only a positive right to form and join an association, but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association (**[citing Sigurjónsson, para. 35**])...[N]ational authorities may, in certain circumstances, be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the negative right to freedom of association (**[citing Plattform "Ärzte für das Leben" v Austria, paras. 32-34**]). At the same time it should be recalled that, although Article 11...does not secure any particular treatment of the trade unions, or their members, by the State, such as a right to conclude any given collective agreement, the words "for the protection of [their] interests" in Article 11 para. 1...show that the Convention safeguards freedom to protect the occupational interests of trade-union members by trade-union action. In this respect the State has a choice as to the means to be used and the Court has recognised that the concluding of collective agreements may be one of these (**[citing Swedish Engine Drivers' Union, paras. 39-40**]). In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention to restrict union action aimed at extending a system of collective bargaining, and the wide degree of divergence between the domestic systems in the particular area under consideration, the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed.

Sørensen and Rasmussen v Denmark (2006)

56. The Court does not in principle exclude that the negative and the positive aspects of the Article 11 right should be afforded the same level of protection in the area under consideration. However, it is difficult to decide this issue in the abstract since it is a matter that can only be properly addressed in the circumstances of a given case. At the same time, an individual cannot be considered to have renounced his negative right to freedom of association in situations where, in the knowledge that trade union membership is a pre-condition of securing a job, he accepts an offer of employment notwithstanding his opposition to the condition imposed. Accordingly, the distinction made between pre-entry closed shop agreements and post-entry closed-shop agreements in terms of the scope of the protection guaranteed by Article 11 is not tenable. At most this distinction is to be seen as a consideration which will form part of the Court's assessment of the surrounding circumstances and the issue of their Convention-compatibility.

57. ...In the present case, the matters about which the applicants complain did not involve direct intervention by the State. However, Denmark's responsibility would be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law their negative right to freedom of association.

58. The boundaries between the State's positive and negative obligations under Article 11 of the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by a public authority which requires to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole (see, mutatis mutandis, Broniowski v Poland [GC], no. 31443/96, § 144, ECHR 2004-, and Hatton and Others v the United Kingdom [GC], no. 36022/97, §§ 98 et seq., ECHR 2003-VIII).

In the area of trade-union freedom and in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members may be secured (see Swedish Engine Drivers' Union v Sweden, judgment of 6 February 1976...§ 39; Gustafsson...§ 45; and Schettini and Others v Italy (dec.), no. 29529/95, 9 November 2000; Wilson & the National Union of Journalists and Others...§ 44). Thus, the Court has so far not found fault with a Contracting State's failure to impose on an employer an obligation to recognise a trade union or to provide for a system of compulsory collective bargaining (see Wilson & the National Union of Journalists and Others, § 44 and cases cited therein).

However, where the domestic law of a Contracting State permits the conclusion of closed-shop agreements between unions and employers which run counter to the freedom of choice of the individual inherent in Article 11, the margin of appreciation must be considered reduced. The Court recalls in this connection that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see Young, James and Webster, cited above, § 63, and Chassagnou and Others, cited above, §§ 112 and 113). In assessing whether a Contracting State has remained within its margin of appreciation in tolerating the existence of closed-shop agreements, particular weight must be attached to the justifications advanced by the authorities for them and, in any given case, the extent to which they impinge on the rights and interests protected by Article 11. Account must also be taken of changing perceptions of the relevance of closed-shop agreements for securing the effective enjoyment of trade-union freedom.

The Court sees no reason not to extend these considerations to both pre- and post-entry closed-shop agreements.

6.3.6 Trade unions

6.3.6.1 'for the protection of his interests'

National Union of Belgium Police v Belgium (1975)

39. The Court does not, however, share the view expressed by the minority in the Commission who describe the phrase "for the protection of his interests" as redundant. These words, clearly denoting purpose, show that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 para. 1...certainly leaves each State a free choice of the means to be used towards this end. While consultation is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11...to strive for the protection of their members' interests. **[Note:** see also **Swedish Engine Drivers' Union v Sweden (1976)** at §§39-41**]**

Wilson and Others v United Kingdom (2002)

42. The Court reiterates that Article 11 § 1 presents trade union freedom as one form or a special aspect of freedom of association (**[citing National Union of Belgian Police, § 38, and Swedish Engine Drivers' Union, § 39]**). ...A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard (**[citing National Union of Belgian Police, §§ 39-40, and Swedish Engine Drivers' Union, §§ 40-41]**). Article 11 does not, however, secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure the right to be heard (**[citing National Union of Belgian Police, §§ 38-39, and Swedish Engine Drivers' Union, , §§ 39-40]**).

6.3.6.2 Special treatment from the State for trade unions or their members

National Union of Belgium Police v Belgium (1975)

38. The majority of the Commission has expressed the opinion that the essential components of trade union activity, which in its view include the right to be consulted, come within the scope of the provision cited above. The Court notes that while Article 11 para. 1...presents trade union freedom as one form or a special aspect of freedom of association, the Article...does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it. Not only is this latter right not mentioned in Article 11 para. 1...), but neither can it be said that all the Contracting States in general incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom.

Swedish Engine Drivers' Union v Sweden (1976)

...[Article 11] does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them. ...It is thus not an element necessarily inherent in a right guaranteed by the Convention.

Schmidt and Dahlström v Sweden (1976)

34. ...[Article 11 para. 1]...does not secure any particular treatment of trade union members by the State, such as the right to retroactivity of benefits, for instance salary increases, resulting from a new collective agreement. Such a right, which is enunciated neither in Article 11 para. 1...nor even in the Social Charter of 18 October 1961, is not indispensable for the effective enjoyment of trade union freedom and in no way constitutes an element necessarily inherent in a right guaranteed by the Convention.

Sanchez Navajas v Spain (2001)

...Article 11 § 1...does not secure any particular treatment of trade union members by the State, such as the right to enjoy certain benefits, for example, in matters of remuneration. ...The Court nevertheless considers that it may infer from Article 11 of the Convention, read in the light of Article 28 of the European Social Charter (Revised), that workers' representatives should as a rule, and within certain limits, enjoy appropriate facilities to enable them to perform their trade-union functions rapidly and effectively. ...The Court notes that the applicant has not shown why it was imperative for him to study the new legislation in order to be able to perform his duties as a trade-union representative of the council employees effectively. It therefore considers that the decision challenged by the applicant cannot be regarded as constituting an interference in the exercise of his right to trade-union freedom; the contested measure did not attain such a degree of gravity as to affect the right guaranteed by Article 11 § 1 of the Convention substantially.

6.3.6.3 Right to collective bargaining

Swedish Engine Drivers' Union v Sweden (1976)

In addition, trade union matters are dealt with in detail in another Convention, also drawn up within the framework of the Council of Europe, namely the Social Charter of 18 October 1961. Under Article 6 para. 2 of the Charter, the Contracting States "undertake ... to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements". As the Government and the Commission rightly emphasised, the Charter thus affirms the voluntary nature of collective bargaining and collective agreements. The prudence of the wording of Article 6 para. 2 demonstrates that the Charter does not provide for a real right to have any such agreement concluded, even assuming that the negotiations disclose no disagreement on the issue to be settled. Besides, Article 20 permits a ratifying State not to accept the undertaking in Article 6 para. 2. Thus, it cannot be supposed that such a right derives by implication from Article 11 para. 1 (art. 11-1) of the 1950 Convention, which incidentally would amount to admitting that the 1961 Charter took a retrograde step in this domain...

Gustafsson v Sweden (1996)

52. ...The positive obligation incumbent on the State under Article 11..., including the aspect of protection of personal opinion, may well extend to treatment connected with the operation of a collective-bargaining system, but only where such treatment impinges on freedom of association. Compulsion which, as here, does not significantly affect the enjoyment of that freedom, even if it causes economic damage, cannot give rise to any positive obligation under Article 11...

Wilson and Others v United Kingdom (2002)

44. However, the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured (**[citing Swedish Engine Drivers' Union**, § 39; **Gustafsson**, § 45; and **Schettini and Others v Italy** (dec.), no. 29529/95, 9 November 2000**]**)...

46. The Court agrees with the Government that the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests. Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.

Demir and Baykara v Turkey (2008)

145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar*, cited above), the prohibition of closed-shop agreements (see, for example, *Sørensen and Rasmussen*, cited above) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

146. This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention

is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003-II; and *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

153. In the light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (*Swedish Engine Drivers' Union*, cited above, § 39, and *Schmidt and Dahlström*, cited above, § 34) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Vilho Eskelinen and Others*, cited above, § 56).

6.3.6.4 The right to strike

Schmidt and Dahlström v Sweden (1976)

36. ...[Article 11]...leaves each State a free choice of the means to be used towards this end. The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11..., may be subject under national law to regulation of a kind that limits its exercise in certain instances. The Social Charter of 18 October 1961 only guarantees the right to strike subject to such regulation, as well as to "further restrictions" compatible with its Article 31, while at the same time recognising for employers too the right to resort to collective action (Article 6 para. 4 and Appendix). For its part, the 1950 Convention requires that under national law trade unionists should be enabled, in conditions not at variance with Article 11..., to strive through the medium of their organisations for the protection of their occupational interests. Examination of the file in this case does not disclose that the applicants have been deprived of this capacity.

Wilson and Others v United Kingdom (2002)

45. The Court observes that there were other measures available to the applicant trade unions by which they could further their members' interests. In particular, domestic law conferred protection on a trade union which called for or supported strike action "in contemplation or furtherance of a trade dispute"... The grant of the right to strike, while it may be subject to regulation, represents one of the most important of the means by which the State may secure a trade union's freedom to protect its members' occupational interests... Against this background, the Court does not consider that the absence, under United Kingdom law, of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation of Article 11 of the Convention.

6.4 State responsibility

6.4.1 Positive obligations

Wilson and Others v United Kingdom (2002)

41. The Court observes at the outset that although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights. In the present case, the matters about which the applicants complain – principally, the employers' derecognition of the unions for collective-bargaining purposes and offers of more favourable conditions of employment to employees agreeing not to be represented by the unions – did not involve direct intervention by the State. The responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention (see Gustafsson v Sweden... § 45).

6.4.2 State as employer

Swedish Engine Drivers' Union v Sweden (1976)

37. The Convention nowhere makes an express distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer. In this respect, Article 11...is no exception. What is more, paragraph 2...in fine of this provision clearly indicates that the State is bound to respect the freedom of assembly and association of its employees, subject to the possible imposition of "lawful restrictions" in the case of members of its armed forces, police or administration.

Article 11...is accordingly binding upon the "State as employer", whether the latter's relations with its employees are governed by public or private law. Consequently, the Court does not feel constrained to take into account the circumstance that in any event certain of the applicant's complaints appear to be directed against both the Office and the Swedish State as holder of public power. Neither does the Court consider that it has to rule on the applicability, whether direct or indirect, of Article 11...to relations between individuals *stricto sensu*.

6.5 Restrictions on the rights to freedom of association and assembly

6.5.1 Introduction

Young, James and Webster v United Kingdom (1981)

59. An interference with the exercise of an Article 11...right will not be compatible with paragraph 2...unless it was "prescribed by law", had an aim or aims that is or are legitimate under that paragraph and was "necessary in a democratic society" for the aforesaid aim or aims (see...the Sunday Times judgment of 26 April 1979...par. 45).

6.5.2 Margin of appreciation / role of the Court

United Communist Party and Others v Turkey (1998)

46. Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The Court has already held that such scrutiny was necessary in a case concerning a Member of Parliament who had been convicted of proffering insults (see the Castells judgment cited above, pp. 22–23, § 42); such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.

47. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, mutatis mutandis, the Jersild v Denmark judgment of 23 September 1994...§ 31).

Freedom and Democracy Party (ÖZDEP) v Turkey (1999)

44. ...Further, the Court has previously held that one of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned (see the Socialist Party and Others judgment...§ 45). **[Note:** see also **Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001),** at para. 88**]**

Refah Partisi (The Welfare Party) and Others v Turkey (2003)

100. ...Although it is not for the Court to take the place of the national authorities, which are better placed than an international court to decide, for example, the appropriate timing for interference, it must exercise rigorous supervision embracing both the law and the decisions applying it, including those given by independent courts. Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases (**[citing United Communist Party**, § 46; **Socialist Party**,

§ 50; and **Freedom and Democracy Party**, § 45]). Provided that it satisfies the conditions set out in paragraph 98 above, a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention.

Gorzelik and Others v Poland (2004)

94. Freedom of association is not absolute, however, and it must be accepted that where an association, through its activities or the intentions it has expressly or impliedly declared in its programme, jeopardises the State's institutions or the rights and freedoms of others, Article 11 does not deprive the State of the power to protect those institutions and persons. This follows both from paragraph 2 of Article 11 and from the State's positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within its jurisdiction (**[citing Refah Partisi**, §§ 96-103]).

95. Nonetheless, that power 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. Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable" (**[citing Young, James**, etc. and **Chassagnou]**).

96. It is in the first place for the national authorities to assess whether there is a "pressing social need" to impose a given restriction in the general interest. While the Convention leaves those authorities a margin of appreciation in this connection, their assessment is subject to supervision by the Court, going both to the law and to the decisions applying it, including decisions given by independent courts.

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the national authorities, which are better placed than an international court to decide both on legislative policy and measures of implementation, but to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (**[citing United Communist Party**, §§ 46-47, and **Refah Partisi**, § 100).

6.5.3 Prescribed by law

Ezelin v France (1991)

45. According to the Court's case-law, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...

Experience shows, however, that it is impossible to attain absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society (ibid.). **[Note:** see also **Vogt v Germany (1995)** at §48]

Rekvényi v Hungary (1999)

34. According to the Court's well-established case-law, one of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (**[citing Sunday Times (no. 1)** judgment of 26 April 1979, § 49, and the **Kokkinakis v Greece** judgment of 25 May 1993, § 40**]**). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, mutatis mutandis, the Cantoni v France judgment of 15 November 1996...§ 32). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see...Vogt, § 48). Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation. **[Note:** see also **N.F. v Italy (2001),** §§26 and 29; and **Hasan and Chaush**, §84**]**

Refah Partisi (The Welfare Party) and Others v Turkey (2003)

57. ...A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (**[citing Müller and Others v Switzerland**, judgment of 24 May 1988..., § 29; **Ezelin**, § 45; and **Margareta and Roger Andersson v Sweden**, judgment of 25 February 1992, § 75). The Court also accepts that the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the status of those to whom it is addressed. It is, moreover, primarily for the national authorities to interpret and apply domestic law (see Vogt...§ 48).

Gorzelik and Others v Poland (2004)

64. The Court reiterates that the expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.
However, it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a

greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice (**[citing Rekvényi**, § 34; **Refah Partisi**, § 57).

65. The scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.

It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (**[citing Refah Partisi** and **Rekvényi**]).

6.5.4 Legitimate aim

6.5.4.1 Civil servants

Vogt v Germany (1995)

53. ...Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10...of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 para. 2... In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10 para. 2 ...assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.

Ahmed and Others v United Kingdom (1998)

52. The Court does not accept the applicants' argument that the protection of effective democracy can only be invoked as a justification for limitations on the rights guaranteed under Article 10 in circumstances where there is a threat to the stability of the constitutional or political order. To limit this notion to that context would be to overlook both the interests served by democratic institutions such as local authorities and the need to make provision to secure their proper functioning where this is considered necessary to safeguard those interests. The Court recalls in this respect that democracy is a fundamental feature of the European public order. That is apparent from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common

understanding and observance of human rights (see United Communist Party...§ 45). For the Court this notion of effective political democracy is just as applicable to the local level as it is to the national level bearing in mind the extent of decision-making entrusted to local authorities and the proximity of the local electorate to the policies which their local politicians adopt. It also notes in this respect that the Preamble to the Council of Europe's European Charter of Local Self-Government (European Treaty Series no. 122) proclaims that "local authorities are one of the main foundations of any democratic regime". **[Note:** see also **Rekvenyi v Hungary (1999)**, §43**]**

6.5.4.2 Rights and freedoms of others

Chassagnou and Others v France (1999)

112. The Court reiterates that in assessing the necessity of a given measure a number of principles must be observed. The term "necessary" does not have the flexibility of such expressions as "useful" or "desirable". In addition, pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Lastly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued (see the Young, James and Webster v the United Kingdom...§ 63).

113. In the present case the only aim invoked by the Government to justify the interference complained of was "protection of the rights and freedoms of others". Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society". The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention.

It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right...

6.5.5 Necessary in a democratic society

Young, James and Webster v United Kingdom (1981)

63. A number of principles relevant to the assessment of the "necessity" of a given measure have been stated by the Court in its Handyside judgment of 7 December 1976... Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful" or "desirable" (...par. 48). The fact that British Rail's closed shop agreement may in a general way have produced certain advantages is therefore not of itself conclusive as to the necessity of the interference complained of. Secondly, pluralism,

tolerance and broadmindedness are hallmarks of a "democratic society" (...par. 49). Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants' standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court. Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued (...par. 49).

Ahmed and Others v United Kingdom (1998)

55. The Court recalls that in its above-mentioned Vogt judgment (pp. 25–26, § 52) it articulated as follows the basic principles laid down in its judgments concerning Article 10:
(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any exceptions must be convincingly established.
(ii) The adjective "necessary", within the meaning of Article 10 § 2 implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.
(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it is "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

56. In the same judgment the Court declared that these principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention (p. 26, § 53). **[Note:** see also **Rekvenyi v Hungary (1999)** at paragraph 42 and **Vogt v Germany (1995)** at paragraph 52**]**

Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)

87. The expression "necessary in a democratic society" implies that the interference corresponds to a "pressing social need" and, in particular, that it is proportionate to the legitimate aim pursued...

...When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a "legitimate aim", whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see United Communist Party...§ 47). **[Note:** see also **Yazar, Karatas, Aksoy and the People's Labour Party (HEP) v Turkey (2002)**, at §51 and **Sidiropoulos v Greece (1998)**, at §40].

6.5.5.1 Pressing social need

Refah Partisi (The Welfare Party) and Others v Turkey (2003)

104. In the light of the above considerations, the Court's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" (see, for example, Socialist Party and Others...§ 49) must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; 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".

Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania (2005)

47. Moreover, for the purpose of determining whether an interference is necessary in a democratic society, the adjective "necessary", within the meaning of Article 11 § 2, implies the existence of a "pressing social need".

48. The Court reiterates that its examination of whether the refusal to register a political party met a "pressing social need" must concentrate on 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". Its overall examination of the above points must also take account of the historical context in which the refusal to register the party concerned took place (see Refah Partisi and Others, cited above, § 104).

Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan (2008)

78. ...The Court considers that it should be up to an association itself to determine the manner in which its branches or individual members are represented in its central governing bodies. Likewise,

it should be primarily up to the association itself and its members, and not the public authorities, to ensure that formalities of this type are observed in the manner specified in the association's charter. The Court considers that, while the State may introduce certain minimum requirements as to the role and structure of associations' governing bodies (see paragraph 73 above), the authorities should not intervene in the internal organisational functioning of associations to such a far-reaching extent as to ensure observance by an association of every single formality provided by its own charter.

6.5.5.2 Proportionality

Ezelin v France (1991)

52. The proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2...and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The pursuit of a just balance must not result in avocats being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions.

6.5.6 Administration of the State exception

Vogt v Germany (1995)

67. In this respect the Court agrees with the Commission that the notion of "administration of the State" should be interpreted narrowly, in the light of the post held by the official concerned.

6.5.6.1 Meaning of 'lawful'

Grande Oriente d'Italia di Palazzo Giustiniani v Italy (2001)

30. The Court reiterates that the term "lawful" in the second sentence of Article 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 (see Rekvényi ....§ 59).

In so far as the applicant association criticised the basis of the impugned restriction in domestic law, the Court reiterates that it is primarily for the national authorities to interpret and apply domestic law, especially if there is a need to elucidate doubtful points (see S.W. v the United Kingdom, judgment of 22 November 1995, ...§ 36).

7 KEY UNIVERSAL AND REGIONAL INSTRUMENTS

Universal Instruments

- International Covenant on Civil and Political Rights – Articles 22 and 21
- International Covenant on Economic, Social and Cultural Rights – Article 8
- International Convention on the Elimination of All Forms of Racial Discrimination – Articles 5(d)(ix) and 5(e)(iii)
- Convention on the Elimination of All Forms of Discrimination against Women - Articles 7 and 14(2)
- Convention on the Rights of the Child – Article 15
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families – Articles 26, 36 and 40
- Convention on the Rights of Persons with Disabilities – Article 29
- ILO Convention No. 87 concerning freedom of association and protection of the right to organise – Articles 3, 5 and 11
- Right to Organise and Collective Bargaining Convention – Article 1
- Workers' Representatives Convention – Article 1
- Convention relating to the Status of Refugees – Article 15
- Convention relating to the Status of Stateless Persons – Article 15

Regional Instruments

- African Charter on the Rights and Welfare of the Child – Article 8
- African Charter for Human and Peoples' Rights – Articles 10 and 11
- American Convention on Human Rights – Articles 15 and 16
  - Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – Article 8
- Inter-American Convention on Violence against Women – Article 4
- European Social Charter – Articles 5 and 6
- The Charter of Fundamental Rights of the European Union – Article 12
- European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations
- Framework Convention for the Protection of National Minorities – Articles 3, 7, 8, 15, 17 and 18
- Convention on the Participation of Foreigners in Public Life at Local Level

Declarations

- Universal Declaration on Human Rights – Article 20
- Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms – Articles 1 and 5
- Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities – Article 2
- American Declaration of the Rights and Duties of Man – Articles XXI and XXII
- Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe

Others

- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials – Article 12, 13, 14
- UN Basic Principles on the Role of Lawyers – Article 23

Index of Cases

