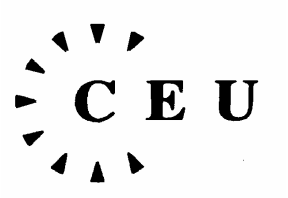

LIMITATIONS ON EXTREMIST MOVEMENTS' POLITICAL ACTIVITY IN THE JURISPRUDENCE OF THE US SUPREME COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

The aim of this paper is to compare the jurisprudence of the US Supreme Court and the European Court of Human Rights in the field of states' reactions to the activity of extremist political movements and to determine the factors that influenced different development of the case law in the two systems, linking them to the historical experiences of the US and Europe. In the first part it briefly examines the historical background of the protection of political rights of extremist political organizations both in US and in Europe. In the second part it describes the relevant provisions of the US Constitution and the European Convention on Human Rights. Finally, the third part presents the development of the jurisprudence of the two Courts with emphasizing the different visions of democracy reflected in their reasoning.

INTRODUCTION

The issue of the possibility to limit the rights of political movements, which do not accept the current political system in which they function is, at least in democratic countries, a very controversial one. It embodies a paradox of democracy which on the one hand side is based on pluralism and free competition of political ideas and the guarantees of political rights necessary to assure that everyone can take part in this competition, but on the other, taking into consideration historical experience, does not want to allow antidemocratic groups to seize power and abandon the democratic political system and the human rights, which became part of the very notion of democracy. The tension between these two considerations is present in almost any jurisdiction and the way in which it is solved often says a lot about the vision of democracy that certain system promotes.[1]

From this perspective it is especially interesting to see whether there are significant differences between the approaches towards political extremism taken by the United States and the European countries. Of course the latter are not uniform. They face different problems, have different experiences and law governing political participation. However, almost all democratic countries in Europe are nowadays members of the Council of Europe and signatories of the European Convention on Human Rights and its additional protocols,[2] which embody a lot of political rights. That means that they agreed at least on some elements of their vision of democracy. Since the ratification of the Convention they have been subjected to the jurisdiction of the European Court of Human Rights – the body that has enormous influence on shaping the common European understanding of human rights and

[1] See for example Gregory H. Fox and Georg Nolte, "Intolerant democracies", *Harvard International Law Journal* 37 (1995): 1; where the authors classify the types of democracy in certain countries on the basis of their approach to anti-democratic actors.

[2] The dates of adoption and ratification of the Convention and its protocols, as well as the texts of all those documents are available at: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG (accessed March 26, 2009).

their limits. In this respect, though it is an international body, not the constitutional court in traditional meaning, it can be seen as a counterpart of the Supreme Court, which plays the similar role for the US.

However, only recently the two Courts started to be compared in the literature[3] and although literature concerning jurisprudences of both of them is numerous, there are very few works comparing them with each ether. The subject of limitation of political movements' rights appears only briefly in the general works on free speech in the two jurisdictions,[4] works dealing with the very specific aspects of the subject[5] or even articles commenting one judgment.[6]

That is why in this paper I would like to compare the jurisprudence of the two Courts, as well as the European Commission of Human Rights, which was the part of Strasburg system of human rights protection till 1998 and in the cases concerning political movements is should be treated as a predecessor of the Court, in order to see whether the approach to the extremist political movements is different in the two jurisdictions, and what are the main factors that influence this differences. I will argue that the visions of permissible political activities of groups, which question given political system, are different in the two jurisdictions and that reasons for that, at least to certain extend, can be found in the history of the American democracy and the European experiences. In this context I will also claim that

[3] Before that a lot works were written on the similarities and differences between the US jurisprudence and the German Constitutional Court, (in the field of the suppression of extremist political movements' activity see e.g. Paul Franz, "Unconstitutional and Outlawed Political Parties: A German-American Comparison", *Boston College International and Comparative Law Review* 5 (1982) 51).

[4] For a very interesting general overview of the differences in the free speech jurisprudence of the two Courts see: Pierre-François Docquir, *Variables et variations de la liberté d'expression en Europe et aux États-Unis* (Bruyland, Nemessis: Bruxelles 2007).

[5] As a quite recent book by Stefan Sottiaux focusing on the way the two courts deal with terrorism. Although oriented in this specific issue it present probably the most thorough comparison of the two jurisprudences in the subject (Stefan Sottiaux, *Terrorism and the Limitation of Rights The ECHR and the US Constitution* (Hart Publishing: Oxford and Portland, 2008)).

[6] For example: Stefan Sottiaux, "Anti-democratic Associations: Content and Consequences in Article 11 Adjudication", *Netherlands Quarterly of Human Rights* 22 (2004) 585, dealing mainly with the decision in Refah case (see section 3.4.2).

though in practice outcomes of the cases decided by the two Courts were often very similar, their argumentations show different visions of democracy they try to secure.

The title of this paper refers to the activities of extremist movements. The other word often used in this context is antidemocratic. However, because the word extremist has less clear content, paradoxically it better reflects the aim of this research. In my understanding, extremism is a kind of label given by a certain system or society to the ideas and actions that this particular system considers to be dangerous or incompatible with its vision of social or political order. In this way naming some group extremist, especially when results in its exclusion from the political scene, says more about the convictions and values shared by the mainstream of legal, social or political system than about the group itself. That is why for the purpose of this research I would focus on the political groups, the activities of which were suppressed on the basis of the argument that they were dangerous or antidemocratic, even if this conclusion in some cases was controversial.

The scope of this research does not allow to consider all the issues that arise under the suppression of political ideas. Its aim is to look at the cases connected to political movements as such and their possibility to advance their programs, for example by having the right to establish themselves as legal entity (and not being banned as an organization), to have members, who can publicly advocate their ideas (without being prosecuted for that), or to run in elections.[7] The paper does not deal with the other important issue of the duty of loyalty of civil servants and its relation to their political affiliation with some groups, which was an important issue especially in the US[8], but appeared also in the European jurisprudence[9], as

[7] In this respect the European and American jurisdictions usually produce cases with different fact patterns, as in most European countries organizations are banned and those are them or their leaders who question the possibility to outlaw the sole party or association. In the US most cases concerns criminal prosecutions of an individual for his or her activity in the organization.

[8] On regulations concerning civil servants in the mccartism era see: e.g. Marc Rohr, "Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era", *San Diego Law Review* 28 (1991): 1 and the literature there cited.

this problem is much more concentrated on the rights of the persons employed by the state than the sole possibility of political movements to exist on the political scene.

The first two chapters of this paper have an introductory character. The first one briefly indicates some important events in the history of the US and Europe in order to show what experiences could most significantly influence the later development of the jurisprudence. The second describes legal texts relevant for the Court's jurisprudence. Finally, the most extensive third chapter, deals with the development of the jurisprudence of the US Supreme Court and the Strasburg bodies in the field of limitations on extremist movements' political activity.

[9] See e.g. judgment of September 2, 1995, *Vogt v. Germany*, application no 17851/91 (if not indicated otherwise, all the decisions and judgments issued by Strasburg bodies are cited as in the Court's database, available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en)

CHAPTER 1: THE HISTORICAL EXPERIENCE BEHIND US AND EUROPEAN REGULATION ON POLITICAL MOVEMENTS' ACTIVITIES

Every human rights document is a product of the period in which it was created. It reflects experiences that preceded its adoption and conveys ideas characteristic for its époque. The circumstances in which it was adopted and the intentions of its framers are also seen as an important factor in the understanding of the text itself and its theoretical background, even after many years of its functioning in the legal system.[10] That is why very often it is difficult to understand the current state of the law in a particular field without examining to what historical experience it answered and what visions of the legal system it reflects. In this respect the US and European systems of the protection of fundamental rights seem to be very different.

1.1. Historical background of the American Bill of Rights

The American Bill of Rights emerged as a result of the colonies' struggle for independence and the creation of a new state and its Constitution. It was a product of the Enlightenment and the answer to negative experiences with monarchy. When in 1776 the thirteen colonies declared independence, they were both deeply rooted in the traditions of English law and seeking for a change, based on the eighteen century theories of liberty and democracy. This tension was very well reflected in the early discussions on freedom of speech connected to the controversy over Alien and Sedition Act, adopted in 1798. This controversy, taking place a few years after the adoption of the First Amendment, is seen as the one that

[10] For example the European Court of Human Rights, even nowadays, refers to the "travaux préparatoires" of the Convention in the interpretation of its provisions, see e.g. Judgment of January 11, 2006, *Sørensen and Rasmussen v. Denmark*, application nos. 52562/99 and 52620/99; or Judgment of March 16, 2006 (Grand Chamber), *Ždanoka v. Latvia*, application no. 58278/00. The original intent of the Framers is also and argument used in the interpretation of the US Constitution by Supreme Court Justices, see: e.g. *District of Columbia v. Heller*, 554 U.S. __ (2008).

actually shaped the understanding of free speech in United States, especially in the context of expression of political opinion.[11] As such it constitutes a good place to start from when reflecting on the background of modern attitude towards suppression of the rights of political movements.

1.1.1. The notion of free speech in English Law

First Amendment, ratified in 1791[12] prohibits Congress to make any law "abridging the freedom of speech, or of the press". Although its text sounds quite simply, it is not obvious what its Framers meant by the freedom of the speech and press.

According to classical commentator – Blackstone – in English law, freedom of press was understood as the lack of any previous restrains on the publication.[13] It meant that there could be no licensing of the press or any procedure of governmental control over any texts to be published. However, such understanding of free press did not exclude the possibility to persecute any person for what he or she has already published.[14] On the contrary – law provided for a number of crimes concerning expression of opinion, especially for seditious libel, which can be most easily defined as criticizing the government.[15]

1.1.2. Colonial period and the Framers

Though the law of seditious libel was not often used in colonies,[16] it raised opposition in society. The best known example of that was the trial of Peter Zenger, editor of the New

[11] Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson* (Carolina Academic Press: Durham 1996), viii, lxx.
[12] Alan J. Koshner, "The Founding Fathers and Political Speech: The First Amendment, The Press and the Sedition Act of 1798", *Saint Louis University Public Law Review* 6 (1987): 395.
[13] William Blackstone, "Commentaries on the Laws of England", in: Levy, ed., *Freedom of the Press*, 104.
[14] Blackstone, "Commentaries,", 104-105.
[15] Koshner, "The Founding Fathers,", 397, on history of seditious libel in England see there at 400-404 and David Jenkins, "The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence", *American Journal of Legal History* 45 (2001): 154, 161-164.
[16] During the whole colonial era there were only nine trials for this particular crime – Koshner, "The Founding Fathers," 404; for the review of some cases involving seditious libel in the colonial period see: David A. Anderson, "The Origins of the Press Clause", *UCLA Law Review* 30 (1982-1983): 510-515.

York Weekly Journal, acquitted by the jury of seditious libel, he was charged with after the publications of a few articles critical towards the royal governor – William Cosby. His trial, which took place in 1735, involved substantial discussions over the freedom to criticize the government and became symbol of Americans' resistance towards persecutions for such critique.[17] This resistance and the failure to convict Zenger contributed to the fact that after his trial the law of seditious libel remained practically dead.[18]

However it was not overruled and the sole fact that in particular cases governmental attempts to persecute journalists met with public outrage does not prove that the American legal understanding of the free speech significantly changed in comparison to the Blackstonian understanding of thereof. In fact there is a lot of controversy over whether the Framers of the First Amendment understood it in the narrow – Blackstonian – sense, or whether their views on free speech were wider.[19] Moreover, controversy over the Sedition Act shows that that they were far from unanimous on this issue.

1.1.3. Aliens and Sedition Laws controversy

Paradoxically persecutions for sedition came back after the American Revolution and the adoption of the First Amendment. Already seven years after the ratification of the Bill of Rights Congress adopted one of the most criticized law in the history of American free speech – the Sedition Act.[20] Together with the Alien Act, it was claimed to be a reaction to the

[17] More on the trial and its significance see: Doug Linder, *The Trial of John Peter Zenger: An Account*, http://www.law.umkc.edu/faculty/projects/ftrials/zenger/zengeraccount.html (accessed March 21, 2009).
[18] See: Anderson, "The Origins," 510. For other examples of the trials that were blocked by the juries see *ibid.* 510-511.
[19] See for example: Anderson, "The Origins," 509ff. On the changes in Prof. Levy's view see: Leonard W. Levy, "On the Origins of the Free Press Clause", *UCLA Law Review* 32 (1984): 177, 202-206 and Leonard W. Levy, *Emergence of a Free Press* (Oxford University Press: Oxford, New York 1985), xi-xii, 220ff. For more discussion on the historical background of the First Amendment and its meaning see: David S. Bogen, "The Origins of Freedom of Speech and Press", *Maryland Law Review* 42 (1983): 429.
[20] Text available at: http://avalon.law.yale.edu/18th_century/sedact.asp (accessed March 21, 2009).

danger of war with France.[21] However in practice it was adopted upon the emergence of the two opposite political parties and was used for the sake of internal political struggle. The Act was an important part of the political program of the Federalists, led by Alexander Hamilton. It was adopted during John Adams' presidency and targeted at the criticism of his administration, pursued mainly by the Republicans, led by Thomas Jefferson and James Madison.[22] It was also a part of wider conflict between the two distinct visions of the democracy proposed by the two groups.

The Federalists had much more elitist view of the political system. They were anxious about too much emphasis on the popular government as potentially leading to anarchy, and assumed that once elected, officials should bear responsibility for public affairs without strong control and criticism from the population. They did not valued public debate too much as they were afraid that common citizens might have been easily manipulated.[23] The Republicans on the contrary had much more trust in democracy and feared tyranny much more than anarchy. They were much more inclined to risk public safety in order to preserve freedom.[24] The danger of war with France and proposals of some defense legislation made tension between the two parties grow.[25]

In 1786, Federalist majority in Congress enacted two Aliens Acts. The first one (The Alien Enemies Act) provided for the possibility to detain, confine or deport, at the direction of the president, any citizen of the country which was in a state of declared war with the US.[26] The second one (the Alien Friends Act) gave the President power to seize, detain and deport any foreigner that he considered to be dangerous to the US, notwithstanding whether the US

[21] Geoffrey R. Stone, *Perilous Times Free Speech in Wartime* (New York, London: W.W. Norton and Company, 2004), 16.
[22] Stone, *Perilous Times*, 25, 36.
[23] Stone, *Perilous Times*, 34.
[24] Stone, *Perilous Times*, 25.
[25] Stone, *Perilous Times*, 26.
[26] Text available at http://avalon.law.yale.edu/18th_century/alien.asp (accessed March 21, 2009).

were at war with his or her country of origin.[27] Such a broad scope of presidential discretion and limitation of the rights of foreigners, having no basis in the Constitution, met with very strong criticism from Republican politicians.[28] However, though Alien Acts had a significant influence on the immigrants, some of whom decided to flee the country or not to come to US, it was not actually applied by the administration.[29]

It was not the case with Sedition Act, adopted a few days later on July 14, 1978. The Act prohibited to write or publish:

> "any false, scandalous, malicious writings (…) against the government of the United States, or either house of the Congress of the United States or the President of the United States, with intent to defame the said government (…) or to bring them or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition (…), for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against United States, their people or government (…)".[30]

Violation of this provision could be punished with a fine and up to two years imprisonment. The Act's provisions were to expire on the last day of the President Adams' term in office (March 3, 1801), which additionally strengthen the argument that it was aimed at political rivals of the current administration.[31] Not surprisingly this Act was also severely criticized by the Republicans. In two states – Kentucky and Virginia – legislatures adopted resolutions opposing its adoption and declaring that it violates the First Amendment.[32] Both states

[27] Stone, *Perilous Times*, 30-31; text of the act: Statutes at Large, 5th Congress, 2nd Session, 570 available at: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=693 (accessed March 21, 2009).
[28] Stone, *Perilous Times*, 32.
[29] Stone, *Perilous Times*, 33.
[30] Sec. 2 of the Sedition Act.
[31] Stone, *Perilous Times*, 67.
[32] Texts of the resolutions available at: http://avalon.law.yale.edu/18th_century/virres.asp and http://avalon.law.yale.edu/18th_century/kenres.asp (accessed March 21, 2009).The other important argument raised against the validity of the Act was that it goes beyond the scope of power of Congress and that legislating on the press is a competence reserved for states (see e.g.: Walter Berns, 'Freedom of the Press and the Alien and Sedition Laws: A Reappraisal', *Supreme Court Review* (1970): 109).

declared the Act "void, and of no force". However, federal courts, which applied it against republican politicians, did not share this opinion.

The first person convicted under the Act was a congressman, Matthew Lyon. He was jailed for four months and had to pay a substantial fine,[33] however he did not lose his voters' support. On the contrary, when still in jail, he was reelected with a vast majority of votes, which was seen not only as a sign of support for him but also as an opposition against Federalists' policy and the Act itself.[34] Nonetheless the convictions of a number of other prominent Republican politicians and journalists followed.[35] Till the Sedition Act's expiry approximately twenty five well known Republicans were arrested, fifteen tried and ten convicted for its violation.[36] However the "moral victory" of the Republicans was still to come.

1.1.4. The triumph of the Republican's vision of free speech

In 1800 Thomas Jefferson won the presidential election. He took office on March 4, 1801 – a day after the Sedition Act's expiry. During his inaugural address he advocated freedom of opinion and the responsibility of the government before the people. He emphasized that freedom of the press and diffusion of information were "the essential principles of (…) government". It was also in this speech when he formulated a famous sentence "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, when reason is left free to combat it".[37]

[33] See more: Stone, *Perilous Times*, 53; Jenkins, "The Sedition Act of 1798," 189.
[34] Stone, *Perilous Times*, 52.
[35] See more: Stone, *Perilous Times*, 54-66; Jenkins, "The Sedition Act of 1798," 190-195.
[36] Stone, *Perilous Times*, 63; William J. Brennan, "The American experience: Free Speech and National Security", in Shimon Shetreet, ed., *Free Speech and National Security* (Martinus Nijhoff Publishers: Dordrecht, Boston, London 1990), 11.
[37] Thomas Jefferson, "First Inaugural Address", in: Levy, ed., *Freedom of the Press*, 358; see also: Stone, *Perilous Times*, 71-73.

As one of his first decisions in the office, Jefferson, who three years later together with Madison, had drafted the Virginia and Kentucky resolutions,[38] pardoned all the convicts under the Sedition Act. In 1840, the Congress repaid with interest all the fines collected under the Act, declaring it unconstitutional and, as such, null and void.[39] Interestingly the US Supreme Court never decided upon the constitutionality of the act,[40] but it referred to it in one of the landmark free speech cases decided more than a century and a half, in 1964, clearly treating the Act as unconstitutional and stating that it "first crystallized a national awareness of the central meaning of the First Amendment".[41] It is not alone in this opinion.

Many scholars emphasize that though the controversy over the Sedition Act was finished, its significance trespassed its era. It stayed to be a reference point in any discussion about the origins of free speech in US and the threat of suppressing political opinion by those in power.[42] It is also seen as the moment in which it became clear that the American concept of free speech goes beyond the traditional Blackstonian understanding of it as the lack of previous restrains.[43]

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[38] See more: Berns, "Freedom of the Press," 125-128.

[39] Stone, *Perilous Times*, 73. Republican presidents were in power till 1825 (Stone, *Perilous Times*, 71n.) and never proposed similar legislation (Compare however the controversy in 1830s. over suppressing speech connected to the issue of slavery in the times of the presidency of Andrew Jackson, who is considered to be Jeffersonian: Berns, "Freedom of the Press," 142-150).

[40] Despite the fact that Republicans tried under the Act commonly raised the issue of it constitutionality, none of them decided to bring their case to the Supreme Court. As some Supreme Court judges, when presiding circuit court actually took part in conviction under the Act, Republican considered it very unlikely for the Court to rule in their favor. (Jenkins, "The Sedition Act of 1798," 195-196).

[41] *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964). Earlier, in 1919, Justice Holmes used the fact that the Court repaid all the fines collected under the Sedition Act as an argument proving that it was considered unconstitutional and that it proves that the First Amendment should not be understood as leaving space for the common law understanding of seditious libel (dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919)).

[42] See e.g. Levy, ed., *Freedom of the Press*, viii. Jenkins underlined that the Sedition Act controversy was the first serious debate at national level about the meaning of the freedom of speech (Jenkins, "The Sedition Act of 1798," 212). Nowadays even very brief overviews of the free speech in the US sometimes start with the reference to the Sedition Act (see e.g. András Sajó, *Freedom of Expression* (Institute of Public Affairs: Warsaw, 2004), 27, 31).

[43] See however, *Patterson v. Colorado* 205 U.S. 454, 462 (1907), where the Supreme Court still claimed that the main purpose of the First Amendment is to prohibit any previous restrains on publication and that this provision does not exclude the possibility to subsequently punish publications contrary to the public welfare (205 U.S. 454, 462 (1907); see also: Jenkins, "The Sedition Act of 1798," 204-205). On the contrary, in *Grosjean v. America Press Corporation* the Court held that it is impossible to assume that the Framers understood freedom of the press so narrowly. Quite the opposite, already when drafting the First Amendment they understood it in a wider way (297 U.S. 233, 248 (1936)).

The basic argument for the claim that English and American law should be different in this respect was based on the difference between the form of government in the two countries. As "American Blackstone", St. George Tucker noted, in United States freedom of speech and press stem from the assumption that it is the people who are sovereign and, consequently the government is responsible before the people, which was not the case in Britain when monarch was vested with sovereign power. This responsibility, being a core of American democracy, demands an "absolute freedom of enquiry" into the public matters, as opposite of the colonial experience.[44]

In this way, the theories that lay under the understanding of the First Amendment in the US showed that, understood as both lack of previous restrains and of the fear of subsequent persecution, it is a necessary element of democracy.[45] Its abridgement can lead to tyranny, that Americans fought against, when they declared their independence[46] and abuse that they witnessed during Adams' presidency. To prevent that, as Jefferson underlined, they were ready to take risks and face every dissent to their visions of state and politics, having a very idealistic vision of human reason and its ability to resist opponents of democracy, they were building. This vision and readiness to face political dissent will come back in the rhetoric of some justices of the US Supreme Court more than a century later.[47]

1.2. Historical background of the European Convention on Human Rights

The circumstances in which the system of political rights' protection under the Council of Europe was created were very different. The European Convention on Human

[44] St. George Tucker, *Blackstone's Commentaries*, http://press-pubs.uchicago.edu/founders/documents/amendI_speechs27.html (accessed March 21, 2009); The same argument was raised in the discussion on Sedition Act by James Madison (J. Madison, "The Virginia Report of 1799-1800" in Levy, ed., *Freedom of the Press*, 213).

[45] Later, very influential theory was formulated by John Stuart Mill in the second chapter of his *On liberty* (http://www.utilitarianism.com/ol/two.html, (accessed March 21, 2009)), where he was proving the essential value of freedom for the advance of truth.

[46] Compare: Declaration of Independence (available at: http://avalon.law.yale.edu/18th_century/declare.asp, (accessed March 21, 2009)).

[47] See especially section 3.1.2. below.

Rights, adopted in 1950 was first of all the product of the experience with authoritarian and totalitarian movements, which, often using democratic institutions, seized power in previously democratic states. To understand the rationale behind provisions of the Convention and the way they were applied to some antidemocratic movements, it is necessary to understand what had happened in some European democracies in 1920s and 1930s.

1.2.1. Fall of European democracies in 1920s and 1930s

Immediately after the World War I, most European states were parliamentary democracies, many newly established.[48] In all of them there were variety of political movements, some of which did not approve of the democratic system. At the very beginning of the inter-war period, those were mainly communist parties, advocating revolution as took place in Russia in 1917. Later fascist and Nazi groups emerged. With the deterioration of economic situation, they gained more and more support in respective societies.

1.2.1.1. Italy

In Italy the fascist movement, propagating national and revolutionary ideas, arose in 1920s around Benito Mussolini. At the beginning it did not have substantial social support, but with the difficult economical situation it became more popular. In 1921 Fascists gain seats in the Parliament and established a political party, which had its own military groups.[49] In October 1922 they performed the March on Rome, a coup d'état, which, not resisted to by the governmental forces and King Victor Emmanuel, led Mussolini to became Prime Minister.[50]

This started a number of changes in the law and structure of government, which transformed the country into a dictatorship. Mussolini changed the electoral system, which now gave the overwhelming majority in the parliament to party that gained minimum 25% of

[48] For example Germany introduced parliamentary democracy in 1918 Weimar Constitution, in the same period countries emerged from dissolution of Austro-Hungarian monarchy (such as Austria or Czechoslovakia) or other territorial changes (as Poland) adopted this system. "Older" parliamentary democracies included France or Italy.
[49] Marek Bankowicz, ed., *Historia polityczna świata XX wieku 1901-1945* (Wydawnictwo Uniwersytetu Jagiellońskiego: Cracow 2004), 195-198.
[50] See more: Denis Mack Smith, *Italy A Modern History* (The University of Michigan Press: 1959), 365-372.

the voted, providing it won elections[51]. After the 1924 elections, which gave fascists 65% of the votes,[52] he eliminated political opposition and abandoned freedom of the press. In 1925 he officially proclaimed the end of liberal democracy and constitutional freedoms and the beginning of political changes leading to the realization of fascist program.[53] Executive power, together with corporations such as trade unions and employers organizations were strengthened, all political parties except the National Fascist Party, were banned.[54] Next electoral reform, introduced in 1928 provided that there would be only one list of the candidates in elections, presented by the National Fascist Council - the advisory body created by Mussolini, and restricted voting rights.[55] Democracy was finally abandoned and the first fascist state in Europe was created. However, it was not the last one.

1.2.1.2. Germany

Germany had been parliamentary democracy and a republic since 1918. Its political scene was to a huge extent shaped by the frustration after the defeat in I World War and harsh conditions of peace treaty, as well as by huge economic problems that arose soon after the war.[56] Extremist movements gained significant popularity. At the beginning it included mainly communists, later also National Socialist Workers' Party (NSDAP) led since 1921 by Adolf Hitler. Under his leadership the party gained more popularity and created its own military groups. In October 1923 they tried to perform a coup d'état in Bavaria. The attempt was not successful and led to Hitler's arrest, though he spend in a jail less than a year[57] In this period he wrote *Mein Kampf*, a book that was to become an ideological manifesto of Nazism, German version of fascism. It advocated the need to revise post World War I treaties,

[51] Christopher Duggan, *A Concise History of Italy* (Cambridge University Press: Cambridge 1994) 208, Mack Smith, *Italy*, 378.
[52] Mack Smith, *Italy*, 380.
[53] Bankowicz, ed., *Historia polityczna*, s. 201-202.
[54] Andrzej Garlicki, *Historia 1815-2004 Polska i świat*, (Scholar: Warsaw 2005), 263.
[55] Bankowicz, ed., *Historia polityczna*, s. 204.
[56] See generally: Mary Fulbrook, *A Concise History of Germany* (Cambridge University Press: Cambridge et al. 1990), 160-167.
[57] Garlicki, *Historia 1815-2004.*, 265, Bankowicz, ed., *Historia polityczna*, s. 190-191

superiority of the Aryan race over other human beings and the necessity to seek life space for Germans in the Easter parts of Europe and to eliminate Jewish nation.

In 1928, with 2.8% of support the NSDAP gained seats in the German parliament.[58] In 1930 its support reached 18% and gave it 107 members of the federal parliament.[59] Nazis were also elected members of state legislatures and became members of some state governments.[60] In 1932 Hitler run for the presidency, though not elected, he got 37% of votes.[61] His party achieved a great success in two 1932 elections, receiving 37 and 33% of votes, it became one of the most important parties in German politics.

On January 30, 1933 President Hindenburg appointed Hitler chancellor.[62] Although the NSDAP had only three ministers in the government, the scope of its influence widened quickly. The scope of Hitler's power was widening, due to the emergency decrees issued by the President and statutes enacted by the Parliament that gave him new competences, including suspension of civil liberties and changes in the political system[63] Hitler liquidated all the political parties, except NSDAP and prohibited creations of new ones.[64] Also other organizations of citizens were dissolved and replaced by the Nazi equivalents. In November 1933, the next elections took place, in which only voting for one list of candidates, created by the NSDAP, was allowed.[65] The democracy in Germany seized to exist.

1.2.1.3. Characteristic features of seizure of power by Fascists and Nazis

The seizure of power by fascists in both countries has some common features that can be striking. First of all in both cases it did not meet with strong opposition from the

[58] All results of German parliamentary elections held between 1921 and 1933 from: Jerzy Krasuski, *Historia Niemiec*, (Zakład Narodowy im. Ossolińskich, Wrocław 2004), 350.
[59] Fulbrook, *A Concise History of Germany*, 174.
[60] Till the end of 1931 Nazi politicians were members of four out of seventeen state governments, till the beginning of 1933 this number rose to seven (Bankowicz, ed., *Historia polityczna*, 294).
[61] See: Bankowicz, ed., *Historia polityczna*, s. 294, Krasuski, *Historia*, 393.
[62] Fulbrook, *A Concise History of Germany*, 176.
[63] Bankowicz, ed., *Historia polityczna*, 297.
[64] Fulbrook, *A Concise History of Germany*, 180.
[65] Bankowicz, ed., *Historia polityczna*, 297.

constitutional bodies of state power. Second, in both cases extremist groups had considerable social support.

At the time when Italian fascists held March on Rome, in October 1922, the number of soldiers serving in the army stationing in the city and their equipment significantly exceeded those of Mussolini's supporters. Despite that, King Victor Emmanuel refused to use the army and decided to nominate fascist's leader prime minister.[66] Also a year later, during political crisis caused by the murder of Giacomo Matteotti – socialist politician, the king supported Mussolini and saved his government from falling.[67] Hitler also got his post of the chancellor legally from the president of Weimar Republic – Paul von Hindenburg. The latter previously refused to take actions in order to ban NSDAP and the communist party, which was suggested to him by a then-chancellor – Kurt von Schleicher.[68] Essentially, the way both leaders obtained their offices was legal.[69]

In addition to that both parties – Italian National Fascist Party and NSDAP won considerable number of votes in popular elections. Admittedly, especially after they gained power, their electoral results were to a huge extent the result of terror exercised by their military groups. However even in previous periods, the genuine support they had was sufficient to exist in the countries' politics. If we add to that that in both countries also other political parties seeking to abolish democracy had substantial support, it becomes clear that both Italian and German democracy lacked the support of its citizens. In many cases they were convinced by the slogans of the extremist ideologies proposing radical changes in political and economic system or at least intimidate by their terror, while the sole political system was not capable of preventing the seizure of power by those movements and the events that followed.

[66] Bankowicz, ed., *Historia polityczna*, s. 198-199 and Italy, p. 368.
[67] Duggan, *A Concise History of Italy*, 208.
[68] Bankowicz, ed., *Historia polityczna*, s. 296.
[69] Duggan, *A Concise History of Italy*, 205.

1.2.2. Situation in post-war Europe

The experience of abandoning democracy in those two and many other European countries,[70] seriously undermined European's faith that, as Jefferson argued, democracy can be protected just by human reason. After the practice of denial of basic rights in totalitarian systems and the experience of World War II, the conviction arose that both democracy and human rights have to be protected against extremism, also on the international level. In addition to that, the framers-to be of the Council of Europe human rights protection system witnessed the seizure of power by communists in Central and Eastern European countries.

The pattern of importing communism to those countries was different than in case of 1920s and 1930s fascism. Since the Russian Revolution in 1917, the Soviet Union had tried to "export" communism to neighboring countries and supported communist parties throughout Europe.[71] As a result of World War II, countries in Eastern part of the Continent became a sphere of interests and influence of Soviet Union. Initially communist parties came into wide political coalitions, aimed at the reconstruction of their countries after the war. Later on, supported by Soviet Union and having at their disposal developed security services, they eliminated political opponents and organized elections in which only their candidates could be voted for.[72]

In all countries of the region, the political order was construed in a very similar way – based on the Soviet 1936 Constitution it did not follow separation of powers and gave the highest authority to the parliament, which was theoretically popularly elected. However the only political groups that could legally exist were communist parties, sometimes with some

[70] On changes in other countries that abandoned democratic system in 1920s and 1930s see e.g. Bankowicz, ed., *Historia polityczna*, 371-379.
[71] Bankowicz, ed., *Historia polityczna*, 183-184. See also: Geoffrey Hosking, *Russia and the Russians. A History* (Allen Lane The Penguin Press: 2001), 486-488.
[72] See: Wojciech Roszkowski, *Półwiecze Historia polityczna świata po 1945 roku*, (PWN: Warszawa 2002), 42-49.

satellite organizations. In practice all the important decisions were taken by the bodies of communist party and the basic rights of citizens remained only empty declarations. Witnessing those changes Western European countries were also becoming anxious about communist parties in their political systems.

1.2. 3. Visions of democracy of the framers of the European Convention

In those circumstances the leaders of the Western European democratic states, who were creating the Council of Europe and the system of human rights protection under the European Convention on Human Rights were in a much different situation than the American Framers. They were also afraid of tyranny, which they experienced in previous two decades, and committed to the protection of fundamental rights. It was also obvious for them that freedom of speech is a part of democratic values. However, they were also aware that tyranny can arise from malfunctioning democracy and be supported by a considerable part of society. They had in their minds the words of one of the main Nazi criminals – Joseph Goebbels, who claimed that "This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."[73] In this respect they were disappoint with the first attempts with democracy after the fall of 19th century monarchies and were determined not to allow democracy in their countries to fall again.[74]

This difference is the view on political right is reflected in the formulation of the norms of Convention as compared to the US Constitution. Different background of those documents is also explored in the decisions taken by the two courts safeguarding observance of those acts. This is a matter considered in two following chapters.

[73] Joseph Goebbels, in: Gregory H. Fox and Georg Nolte, "Intolerant," 1.
[74] On the role of an idea that we need to prevent the possibility of seizure of power by antidemocratic group (again) in the drafting process of the Convention see for example: Susan Marks, "The European Convention on Human Rights and its 'Democratic Society'", *The British Year Book of International Law* 66 (1995), 210 and 222.

CHAPTER 2: LEGAL BASIS FOR THE PROTECTION OF POLITICAL MOVEMENT'S RIGHTS IN THE US CONSTITUTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Not only do the two acts, on which the jurisprudences of US Supreme Court and European Court of Human Rights are based, have different histories, but they are also framed in a very different way. The European Court has much more textual basis for the assessment of political activity of extremist movements, which can be easily systematized. The Supreme Court on the contrary deals with very brief provisions of the US Constitution and its Amendments. Naturally the text of the relevant provisions sets the framework for the courts to deal with cases presented to them. It is then necessary to examine the differences between the two texts in order to be able to understand the ways of reasoning in the American and European case law. Simultaneously, especially the comparison of the text of Convention with the earlier phrasing of the US Constitution very well reflects different historical moments in which the two acts emerged and is a good starting point to reflect what influence this experience has on the scope of protection of political rights in the two systems.

2.1. The US Constitution and the First Amendment

The original text of the US Constitution practically does not refer to political rights of the citizens. It creates a democratic system of government with an elected Congress and President, and sets minimum age and residence requirements for candidates for major offices.[75] As to voting rights in the federal elections, the Constitution links it to the rights granted in particular states[76] and does not set any more guarantees for the right to political participation, apart from the prohibition of using religious test as a qualification for any public

[75] Art. I Sec 2 (2); Art. I Sec 3 (3); Art. II Sec 1 (4).
[76] Art. I Sec 2 (1).

office.[77] The guarantees of voting rights came later, with the amendments that prohibited discrimination in voting rights based on race,[78] sex,[79] taxation[80] or age, when over 18.[81]

However, the basic guarantee of free participation in a political discourse was introduced to the Constitution by the First Amendment, adopted together with whole Bill of Rights in 1789 and ratified in 1791.[82] It states: "Congress shall make no law (…) abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" and is a basic provision applied in cases connected to the suppression of political movements because of their unpopular programs or ideologies.

2.1.1. Rights protected

The First Amendment guarantees a number of rights connected to expression of opinion (freedom of speech, of the press, the right to assemble and to petition).[83] Whereas the right to assemble and to petition the government seem to have quite clear content distinguishable from freedom of the speech and press, though closely connected to them, the latter two are sometimes difficult to tell apart. Generally it may be claimed that the press clause refers to the process of dissemination of opinion through press, and by that protects the institution of the press as such[84], granting it "a special status as an unofficial fourth branch of government"[85], whereas freedom of speech is a liberty vested in every individual.[86] Freedom

[77] Art. VI (3).
[78] Amendment XV, passed in 1869, ratified in 1870.
[79] Amendment XIX, passed in 1919. ratified in 1920.
[80] Amendment XXIV, passed in 1962. ratified in 1964.
[81] Amendment XXVI, passed and ratified in 1971.
[82] On the adoption and ratification of Bill of Rights see more: Leonard W. Levy, *Emergence*, 220-266.
[83] I omit here problems connected to freedom of religion and the establishment clause as they are a separate issue, not connected to the jurisprudence on political movements as presented in chapter 3.
[84] Justice Steward quoted in: William Cohen, Jonathan D. Varat, Vikram Amar, eds., *Constitutional Law Cases and Materials* (Foundation Press: New York, 2005), 1678.
[85] Levy, *Emergence*, xii.
[86] Steward, in Cohen, Varat, Amar, *Constitutional Law*, 1678.

of the press can be also treated as an instrument serving protection of free speech, which is then seen as a main substantial value promoted by the First Amendment.[87]

Moreover, though the text of the Amendment does not mention freedom of association, which is the basic right political organizations are based on in the European system, the Supreme Court held that freedom of speech as guaranteed by First Amendment encompasses the right to engage into associations in order to advance one's beliefs and ideas.[88] However, this right did not play such an important role in the jurisprudence concerning political extremism in US. In fact all the important cases concerning limitations posed on the activities of members of extremist movements, which will be analyzed in chapter 3, were decided on the basis of freedom of speech as such.

2.1.2. Limitations

Apart from its simplicity, the First Amendment surprises with the very categorical wording. It does not explicitly provide for any limitations of rights guaranteed in it. Nonetheless, very few justices and scholars take the absolutist view of First Amendment, claiming it does not allow any limitations on expression,[89] though the visions of possible limitations and test applied to balance free speech with other legitimate interests that justify its limitations vary both in different periods of US constitutional history and in different fields. [90] The main tests emerged in the contexts of political extremism will be analyzed in chapter 3.

[87] Pierre-François Docquir, *Variables et variations,* (Bruyland, Nemessis: Bruxelles 2007), 76-80.
[88] *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).
[89] A remarkable exception was Justice Hugo Black (see for example his dissent in: *Konigsberg v. State Bar of California* 366 U.S. 36, 61-70 (1961). However he dealt with the problem caused by such an a radical vision on the First Amendment by distinguishing speech from conduct (see: Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers: New York, 2005) 1047; and Stefan Sottiaux, *Terrorism,* (Hart Publishing: Oxford and Portland, 2008), 71-72).
[90] Limitations of other "types" of the speech remain outside the scope of this thesis. For the thorough analysis of different issues connected to free speech see e.g. Kathleen M. Sullivan and Gerald Gunther, *First Amendment Law* (Foundation Press: New York 1999) and case law and literature quoted there.

2.1.3. Application against states

The other characteristic feature of the phrasing of the First Amendment is that it explicitly refers to the Congress. Consequently, till the adoption of the Fourteen Amendment it protected free speech only against federal legislation and could not be applied against states.[91] The situation changed with the adoption of the Fourteenth Amendment, in 1866, and the emergence of the incorporation doctrine. It made it possible to apply the provisions of the Bill of Rights against states, arguing that they are part of rights and liberty protected by the due process clause.[92] The First Amendment was applied against a state for the first time in 1925, in *Gitlow v. New York.*[93]

2.2. The European Convention on Human Rights

2.2.1. The role of democracy in the Convention

The role of the rights connected to the activity of political movements' in the European Convention on Human Rights and its additional protocols has to be seen in context of those movements' role in democracy, on which the Convention puts strong emphasis. Unlike the US Constitution, the Convention contains a lot of explicit references to the idea of democracy and its protection. It states that shaping political system according to the rules of democracy is a basis maintaining of human rights[94] and extensively refers to the concept of democratic society.[95]

[91] On the nonapplicability of the Constitution and the Bill of Rights against states see: *Barron v. City of Baltimore*, 32 U.S. 243, 248-251 (1833).
[92] On the incorporation doctrine see e.g. Congressional Research Service, *The Constitution of the United States of America Analysis and Interpretation* (U.S. Government Printing Office: Washington, 2004), 1001-1008, available at: http://www.gpoaccess.gov/constitution/browse2002.html#2002 (accessed March 21, 2009).
[93] *Gitlow v. New York* 268 U.S. 652, 666 (1925). For the earlier discussion on the incorporation of the First Amendment, when however the Court left this issue undecided, see: *Patterson v. Colorado* 205 U.S. 454 (1907).
[94] See Convention's Preamble. Consequently the European Court of Human Rights held that democracy is the only political system compatible with Convention (Judgments of January 30, 1998, *United Communist Party of Turkey v. Turkey*, application no 19392/92, § 45).
[95] See further on Sections 2 of Articles 8 to 11. The concept is also invoked in Art. 6 (1).

It is clear from its text and history that the Convention is aimed at preservation and protection of democracy. This general idea is reflected in the particular provisions guaranteeing political rights such as freedom of expression and association, as well as voting rights. By emphasizing those rights, Convention aims to become a safeguard for the observance of democratic process in the Council of Europe Member States. At the same time, it gives basis for the claim that no private party can invoke Convention rights in order to destroy or weaken the values of democratic society.[96] Moreover the idea of democracy was used by the framers of the Convention as a category that helps to balance interests and rights of the individual with an interest of community. A number of rights, guaranteed in articles 8 to 11 of the Convention (right to privacy and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association), can be limited only when it is "necessary in democratic society".[97]

In this respect the concept of democracy, as embodied in the Convention can be used both for advantage and disadvantage of a particular political movement – guaranteeing its rights of political participation and treating such participation as a core of democratic political system, or setting high standards for the limitation of this participation, but also by clearly setting the boundaries of their activities that have to be compatible with the democracy itself and cannot be aimed at its destruction.

2.2.2. Rights guaranteed

The catalogue of rights that can serve as basis for the political groups' claims for the possibility to participate freely in the political life of state parties to the Convention in its text is more detailed than the one mentioned in the text of US Constitution. It involves freedom of association, freedom of speech, and electoral rights.

[96] Judgment of February 13, 2003 (Grand Chamber), *Refah Partisi v. Turkey*, applications nos. 41340/98, 41342/98, 41344/92, § 99; see also remarks on the art. 17 of the Convention later in this chapter.
[97] Sections 2 of the articles from 8 to 11.

2.2.2.1. Freedom of association

Unlike in the US, before the European Court of Human Rights the most important right invoked in cases connected to the suppression of certain political movements is the freedom of association. Article 1 Section 1 of the Convention guarantees it together with freedom of assembly stating: "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". This freedom embodies the right to create an association and to join the one that already exists. It also has a negative aspect, implying a right not to be compelled to join a particular association. Moreover this provision protects existing associations against dissolution by the state authorities.[98] It is also often considered together with art. 10 as not allowing to impose negative consequences on the individual on the basis of their membership in a particular association.[99]

Although the sole provision of art. 11 mentions only one particular kind of association – trade unions, in its interpretation a lot of attention was given also to political parties. That was connected to the emphasis of their "essential role in the proper functioning of democracy".[100] In fact, cases concerning banning political parties constitute the major part of all the cases that deal with political extremism in Europe, which will be analyzed in chapter 3.

2.2.2.2. Freedom of expression

Though the provision of art. 11 of the Convention is more often directly used in the contexts of organized political extremist movements than article 10, guaranteeing freedom of expression, they are closely connected. As the European Court of Human Rights held, the activities of political parties (and other associations) are the form of a collective exercise of

[98] See e.g. Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Thomson Sweet and Maxwell: London, 2004) 308-310 and case-law quoted there.
[99] See e.g. judgment of September 2, 1995, *Vogt v. Germany*, application no 17851/91.
[100] *United Communist Party of Turkey v. Turkey*, § 25.

the freedom of expression. As such they are protected not only by art. 11 but also by art. 10 of the Convention.[101]

This provision refers widely to freedom of expression, not like the First Amendment only to speech, and specifies that this includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". Although it does not mention explicitly the role of the press, the European Court of Human Rights acknowledged its special role in informing on matters of public interest and enabling open debate on public issues. In this respect press is treated as playing a role of "public watchdog", making it possible to control public authorities especially by informing about the facts connected to politicians and the way they exercise public functions.[102]

2.2.2.3. Right to free elections

The other right that can be relevant to political activity of certain groups is guaranteed by Article 3 of the First Additional Protocol to the European Convention on Human Rights, adopted in 1952. It obliges states to "hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". It is accepted that this provision embodies both the right to vote in parliamentary elections, as well as to stand for election and to hold an office when elected.[103] It also sets a number of conditions that have to be fulfilled in order to say that elections hold in a country were genuinely free.[104]

[101] *United Communist Party of Turkey v. Turkey*, § 43, *Refah Partisi v. Turkey* (Grand Chamber), § 89.
[102] See e.g. judgment of November 26, 1991, *Observer and Guardian v. The United Kingdom*, application no. 13585/88, § 59 (b) and judgment of June 24, 2004, *Von Hannover v. Germany*, application no. 59320/00, § 63. On the ECtHR jurisprudence connected to press and other media see more: Reid, *A Practitioner's Guide*, 319-326 and Docquir, *Variables et variations*, 80-82 and 84-89.
[103] Judgment of June 11, 2002, *Sadak and Others v. Turkey* (no. 2), applications nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, §§ 31-33. More on the rights conferred by this provision see: Reid, *A Practitioner's Guide*, 276-281 and Aleksandra Gołuch, "Zasada wolnych wyborów w orzecznictwie Europejskiego Trybunału Praw Człowieka", *Przegląd Sejmowy* 15, no. 2 (2004): 240, 242-52.
[104] See more Gołuch, "Zasada wolnych wyborów…", 246-247.

It refers to the elections of the legislatures, which in federal states includes both – parliaments on the national level and legislatures of the units of the federation.[105] Moreover in European Union Member States it applies also in elections to the European Parliament.[106] However in case of bicameral systems, in which historically only one chamber is directly elected, this fact it is sufficient to the compliance with this provision.[107]

Though certainly in the context of extremist movements' activity, the provision of Article 3 of the First Protocol is of lesser importance than the provisions guaranteeing freedom of association and speech, it is still applied, especially with respect to the countries where banning political party results in the leaders of the party losing their parliamentary seats[108] its members being banned from running in next elections.[109]

2.2.3. Limitations of the Convention rights

Unlike the US Constitution, the European Convention on Human Rights very clearly provides for a number of limitations of the rights guaranteed by its provisions.

2.2.3.1. Derogation in case of emergency

It specifies the possibility of a state to derogate from the obligations under the Convention in case of emergency. Such derogations are allowed only in case of war or other public emergency, which threatens the life of the nation and only to the extend strictly required by the circumstances.[110] Measures applied cannot be contrary to any other obligations the state has under international law and have to be notified to the Secretary

[105] Decision of June 7, 2001, *Federacion Nacionalista Canaria v. Spain*, application no 56618/00. See also Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press: Oxford, New York, 2005) 366 and the case law quoted there.
[106] Judgment of February 18, 1999 (Grand Chamber), *Matthews v. the United Kingdom*, application no. 24833/94, §§ 36-54.
[107] Judgment of March 2, 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, application no. 9267/81, § 53.
[108] See e.g. *Sadak and Others v. Turkey (no. 2).*
[109] See e.g. *Ždanoka v. Latvia* (Grand Chamber).
[110] Art. 15 Sec. 1 of the Convention.

General of the Council of Europe.[111] They cannot affect some enumerated rights, such as right to life or prohibition of torture. They are however possible with regards to all the political rights mentioned above.[112] In practice European countries referred to this provision rather in case of civil rights,[113] though it is not difficult to imagine situations in which it could be applied to the political rights.[114]

2.2.3.2. Abuse of rights

In the context of limitation of political rights the much more important role is played by art. 17 of the Convention, which prohibits the abuse of rights guaranteed by this document. It states that: "Nothing in this Convention may be interpreted as implying (…) any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein (…)."

This provision, in which some authors see the reminiscence of the revolutionary maxim *pas de liberté pour les ennemis de la liberté* (no freedom for the enemies of the freedom),[115] is a direct response to the totalitarian experience of the European states. It is aimed at the protection of the whole system of fundamental rights guarantees under the Convention against individuals or movements, which would like to invoke those rights in order to protect their activities, seeking to change political and legal system in a way that it would respect those rights.[116] As such this provision can be used only to those rights which

[111] Art. 15 (1 and 3) of the Convention.
[112] Art. 15 (2) of the Convention. On the basis of art. 5 of the First Protocol to the Convention this provision is applicable also to the electoral rights guaranteed by art. 3 of this Protocol.
[113] Mainly right to liberty and the restrictions connected to the possibility to arrest an individual (see case law quoted in Reid, *A Practitioner's Guide*, 250-254 and Leach, *Taking a Case*, 391-393).
[114] In fact such cases happened in some non-European countries and were subject to review by the UN Human Rights Committee on the basis of provision that is an equivalent of art. 15 of the Convention in the International Covenant on Civil and Political Rights (see: Manfred Nowak, *U. N. Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel Publisher, 2005), 104).
[115] See e.g. Pierre Le Mire, "Article 17", in Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert, eds., *La Convention Européenne des Droits de l'Homme Commentaire article par article* (Economica, Paris 1995), 509.
[116] See e.g. decision of October 11, 1979 of the European Commission on Human Rights, *Glimmerveen and Hagenbeek v. the Netherlands*, applications nos. 8348/78 and 8406/78, 195.

can be used for this purpose, such as freedom of speech or association.[117] The application of the abuse clause to the antidemocratic political parties, claiming their freedom of association was confirmed by the European Commission on Human Rights already in the very first decision, in which this provision was applied.[118]

Since then, in cases concerning the rights of political extremists it was applied according to two main patterns. In one group of cases it was held that if the activity in question can be classified as an abuse of right it rests outside the scope of protection by the provisions of the Convention and consequently the application claiming violation of applicant's right was declared inadmissible on the basis of art. 17. In the other, this provision was used in process of interpretation of the standard limitation clause, allowing to limit particular rights, for example art. 10 sec. 2 and art. 11 sec. 2. In this second case the abuse clause just helps to assess whether the measure applied was proportionate.[119]

2.2.3.3. Limitation clauses in art. 11 (2) and 10 (2)

The most cases concerning rights guaranteed by the Convention are decided on the basis of the limitation clauses embodied in the text of respective articles. With respect to freedom of speech and association, similarly as other rights guaranteed by articles from 8 to 11, they are phrased in a very similar way.

According to Sections 2 of the articles 10 and 11, limitations can be imposed only when:

a) they are prescribed by law,

[117] On the contrary it cannot be invoked in order to justify restrictions on the rights which cannot be abused in this way, such as right not to be detained without a lawful order or to fair trial (Judgment of July 1, 1961, *Lawless v. Ireland*, application no. 332/57).

[118] Decision of July 20, 1957, *Communist Party of Germany v. Germany*, application no 250/57, 1 *Yearbook of the European Convention on Human Rights* 222 (1959). English translation of the excerpts available in: *Digest of Strasbourg Case-Law relating to the European Convention on Human Rights Volume 4 (Articles 13-25)* (Carl Heymanns Verlag KN: Kohl et al., 1985) 239-240, 244.

[119] Eva Brems, "Freedom of Political Association and the Question of Party Closures", in Wojciech Sadurski, ed., *Political Rights under Stress in 21st Century Europe* (Oxford University Press: Oxford, 2006), 133. The difference between the two approaches in cases concerning extremists will be discussed in chapter 3. For the wide catalogue of the cases in which art. 17 was applied see: Pierre Le Mire, "Article 17" 512-522.

b) they have a legitimate aim, named by the respective provision, and

c) they are necessary in a democratic society in order to pursue this aim.

The condition of legal basis for a limitation is not purely formal and limited to the existence of any provision of national law that has to be indicated by the state in order to infringe upon individual's rights. It means that the limitation has to have some basis in national law, thought it does not have to be written statutory provision. In the common law countries it may include case law.[120] However, it also requires the law in question to be accessible for the potential addressees and to be formulated in a way that makes it foreseeable for persons who are expected to comply with it.[121]

Moreover the restriction has to pursue one of the aims enumerated in Section 2 of the respective article. In case of limitation on freedom of association it encompasses national security, public safety, prevention of disorder and crime, of health, morals, and of the rights and freedoms of others.[122] With respect to freedom of speech the catalogue is broader. It includes all the mentioned elements and, in addition to that, territorial integrity, reputation of others and prevention of disclosure of confidential information. It also allows restrictions imposed in order to maintain the authority and impartiality of the judiciary.[123] However article 10 does not explicitly allow additional restrictions on the rights of public servants, whereas article 11 clearly states that state can impose additional restrictions in the exercise of freedom of association on the members of armed forces and the police, as well as on person's employed in public administration.[124]

In addition to that the limitation imposed on the right guaranteed by articles 10 and 11 of the Convention has to be "necessary in a democratic society". This clause gives the most flexibility to the court and in fact its interpretation evolved, also in relation to states' reactions

[120] Docquir, *Variables et variations*, 44.
[121] Docquir, *Variables et variations*, 44-45; Sottiaux, *Terrorism*, 42-43.
[122] Art. 11 (2) of the Convention.
[123] Art. 10 (2) of the Convention.
[124] Art. 11 (2) last sentence.

on the activities of political extremists.[125] Basically, the court holds that an interference with individual's right has to correspond to a pressing social need and it has to be proportionate to the aim pursued.[126]

2.2.3.4. Limitations on electoral rights

Article 3 of the First Additional Protocol to the Convention does not explicitly provide for the limitations of the rights derived from the principle of free elections that it formulates. However, as the provision itself formulates the principle addressed to states rather than directly stipulates particular rights, the Court held that it leaves more space for states to shape their electoral law.[127] That is why accessing limitations imposed on electoral rights the Court does not apply standards characteristic for its jurisprudence based on articles 10 and 11 of the Convention, but assesses only, in case of the right to vote, whether the limitation was proportional and, in case of the right to stand for elections, whether the national procedure leading to the disqualification of a candidate was not arbitrary.[128]

Even from the very superficial analysis of the provisions of US Constitution and the European Convention on Human Rights relevant for the assessment of the scope of rights extremist political movements enjoy under the two documents and their possible limitations, it is clear that the Convention provides much more detailed guidelines for the Court to decide controversial issues than US Constitution. At least with reference to freedom of speech and association it also sets a very clear framework for the Court to organize its argument.[129] In case of the US Supreme Court, the First Amendment practically does not give such

[125] See chapter 3.
[126] However the principle of proportionality is not always consequently applied by the Court. See e.g. Sottiaux, *Terrorism*, 44-46.
[127] *Ždanoka v. Latvia* (Grand Chamber), § 103.
[128] *Ždanoka v. Latvia* (Grand Chamber), § 115.
[129] It is visible practically in all contemporary judgments, where the Court analyzes each case concerning freedom of speech or association according to the same pattern, based on the conditions set for the limitation of those rights in sections 2 of art. 10 and 11.

guidelines.[130] However it does not mean that the Convention leaves no space for the jurisprudence to evolve. On the contrary, as it will be shown in the next chapter, in case of both Courts, the attitude towards the way activities of political movements should be assessed changed over time.

[130] Apart from the situation in which we would understand it according to the absolutist view, when it would be enough to determine whether certain behavior can be classified as speech or not, and in case if it was, automatically claim any restrictions imposed on that are unconstitutional.

CHAPTER 3: THE JURISPRUDENCE OF THE US SUPREME COURT AND THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS CONCERNING EXTREMIST POLITICAL MOVEMENTS

As it was shown above the US Constitution and the European Convention on Human Rights differently set the framework for appropriate bodies to assess the possibility to interfere with the political activity of movements contesting given political and constitutional order. However to see whether this background creates significantly different legal situation for political groups, considered at certain point of history as extremists, it is necessary to examine the jurisprudence of the US Supreme Court and the Strasbourg bodies.

The aim of this chapter is to show tendencies in a development of those jurisprudences in a similar periods, showing both the early jurisprudence referring to the subject of extremist political movements and the emergence of the current tests used by the two courts. However the jurisprudence of the two bodies developed in different ways. The American one started much earlier, and it produced the last landmark case, which is considered to have set a current standard at the end of 1960s. The Strasburg approach changed more recently. Consequently it is useful to draw a line between an early jurisprudence and the current developments in different points in history for the two jurisdictions. In the American jurisprudence the development of the jurisprudence concerning extremists can be seen as a history of the "clear and present danger" test, with its origins in the World War I cases and culmination in *Dennis*, though as it will be indicated below it was not the only test used in this period, and the next (and till now the last) turning point in 1969 in *Brandenburg v. Ohio*. In the European jurisprudence, starting with the European Commission on Human Rights' decision in the German Communist Party case issued in 1959, there were no dramatic changes before mid-

1990s, both in term of problems that arose and the ways of reasoning applied,. However since then, both new problems and ways of dealing with them arose.

Consequently I will treat the emerge and evolution of the "clear and present danger" test till Dennis case as a first phase of the development of the American jurisprudence and the emerge and further application of *Brandenburg* test as a road to modern approach, whereas I define early Strasburg jurisprudence as the whole body of decisions issued before mid 1990s.

3.1. The emergence and evolution of the "clear and present danger" test in the American jurisprudence

The Supreme Court jurisprudence on the First Amendment emerged quite late in the US constitutional history. The first wave of cases came with the Espionage Act,[131] the law enacted during World War I and suppressing certain war related speech.[132] Many of those cases did not refer to political movements as such, but dealt with convictions of persons that just criticized the government's war effort as such, not advocating a different form of government or any other political ideas. However they should be mentioned as they set up some standards that were later applied in cases that we would more likely connect to an extremist political activity. That includes persecutions of members of left-wing movements, mainly communists, which appeared in the inter-war period and had its peak in the so-called McCarthy era.

Most of those cases are best known for its approaches to the "clear and present danger" test. They have also laid foundations for some narratives present in the American free speech theory, such as the metaphor of the marketplace of ideas used by Justice Holmes in *Abrams v. US*[133] or the historical argument used by Justice Brandeis in *Whitney v.*

[131] Geoffrey R. Stone et al., *Constitutional Law* (Aspen Publishers: New York, 2005), 1054.
[132] Stone et al., *Constitutional Law*, 1062.
[133] *Abrams v. US*, 250 U.S. 616 (1919).

California.[134] What is interesting, those famous formulations and phrases that are now considered an expression of American view on free speech were actually formulated by dissenters.[135] However, as the further jurisprudence has shown, those were them who had more influence on the emerge of currently applied test. That in fact shows the changes in the approach to free speech in the US over time.

This section will examine the landmark cases from the period from the Espionage Act period till McCarty era in order to show the development of the "clear and present danger" test as applied to the activities of extremist political movements. It will also indicate the vision of democracy and free speech that was implied by the Court or single justices in order to show to what extent they influenced the actual legal situations of the members of extremist political organizations.

3.1.1. The Espionage Act cases – the emerge of the "clear and present danger" test

The Espionage Act, enacted in 1917, was the first law trying to suppress criticism of the government made by the Congress since 1798 Sedition Act.[136] It referred to the time of war and prohibited *inter alia* to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies", to "cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military (…)" and to "obstruct the recruiting or enlistment service".[137] Its adoption[138], caused a number of persecutions which

[134] *Whitney v. California*, 274 U.S. 357 (1927).
[135] Or in case of Brandeis' speech in *Whitney v. California* a concurring opinion.
[136] Bernard Schwartz, "Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?", *Supreme Court Review* (1994): 209, 210; Stone, *Perilous Times*, 145. That does not mean that during the period between 1801 and the World War I there were no controversies over free speech. They however did not result in the sedition laws enacted by Congress, as well as they did not cause any significant jurisprudence of the Supreme Court. For a history of the free speech during Civil War see: Stone, *Perilous Times*, 79-134 and the literature there cited. On the immigration law aimed at the suppression of anarchist movements and related jurisprudence see: William M. Wiecek, "The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States", *Supreme Court Review* (2001): 375, 383.
[137] Section 3 of Title 1 of the 1917 Espionage Act, quoted after: Sullivan and Gunther, *First Amendment*, 14.

were actually the first opportunity for the American courts to set criteria for the constitutionality of the law suppressing the criticism of the government since the end of the eighteenth century.

3.1.1.1. Masses – Hand's direct incitement test

First important cases appeared at the level of lower courts, but thought they did not reach the Supreme Court, they significantly influenced its later jurisprudence. The main of them is *Masses v. Patten*[139] decided by a District Judge Learned Hand. It involved the decision of post officers not to give access to the mails to the revolutionary journal titled *The Masses,* which in their opinion violated provisions of the Espionage Act. Although the case involved only the assessment of materials opposing the draft on the statutory basis and actually the famous Hand's opinion was reversed on appeal,[140] it provided an interesting test for determining what kind of speech can be prohibited that preceded the US Supreme Court "clear and present danger" and actually was to compete with it for the next fifty years.[141]

The test formulated by Judge Hand relied on the assumption that the suppression of hostile criticism of the government contradicts the principles of democracy and therefore the statute he interpreted could not be read as allowing to suppress all the criticism of existing laws and policies. However, as he noted, words can influence actions taken under their influence[142] and therefore should have limits. Consequently the freedom to expression ends when the words are used to counsel the violation of law. The Hand's test did not assess the circumstances in which words were said or published, but it focused on their content and the intent of the speaker. It allowed to suppress the words that "counsel or advice others to violate

[138] On the controversies that arose during the Congress' debates over the Act see: Stone, *Perilous Times,* 146-153.
[139] *Masses Publishing Co. v. Patten,* 244 F. 535.
[140] Stone, *Perilous Times,* 165-166. *Masses Publishing Co. v. Patten,* Decision of the Circuit Court of Appeals, Second Circuit, 246 F. 24.
[141] See further: section 3.3. in this chapter.
[142] *Masses Publishing Co. v. Patten,* 244 F. 535, 540.

the law".[143] Moreover, in Hand's view, it was not enough that the expression of political views might have stimulated someone to the violation of the law. The sole expression, as formulated by the speaker, has to directly incite to unlawful action.[144] Consequently he Hand's test is often referred to as a "direct incitement"[145] or "advocacy of unlawful action"[146] test.

3.1.1.2. *Schenck* – the formulation of the "clear and present danger" test

However the jurisprudence of the US Supreme Court at that time adopted different approach. The first important case before the Court, concerning the Espionage Act, was *Schenck v. US*.[147] The defendant, who was one of the leaders of Socialist Party, was convicted for conspiring to obstruct the draft by circulating a document criticizing the draft and urging men submitted to it to claim their right to refuse to serve in the military. The pamphlet also encouraged readers to join the Socialist Party and to petition for the repeal of the law on conscription. The Court, in an unanimous opinion authored by Justice Holmes, upheld the conviction, referring to the "clear and present danger" test.

The Court stated that though the First Amendment protection does not limit itself to the prohibition of previous restrains, it is also not absolute. As if answering to the Hand's test focused on the content of speech, in *Schenck* the Court underlined that it is not the sole content of the speech, but the circumstances in which it is delivered that decide on its protection. It stressed that, by explicitly stating that in different circumstances the exactly same words published by the defendant could be considered as the lawful exercise of his constitutional rights.[148] To explain that, justice Holmes used a famous metaphor of a man,

[143] *Masses Publishing Co. v. Patten*, 244 F. 535, 540.
[144] *Masses Publishing Co. v. Patten*, 244 F. 535, 540.
[145] See e.g. Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments Of History", Stanford Law Review 27 (1975): 719, 728.
[146] See e.g. Schwartz, "Holmes versus Hand," 209.
[147] *Schenck v. US*, 249 U.S. 47 (1919).
[148] 249 U.S. 47, 52.

who would never be protected when "falsely shouting fire in a theater, and causing a panic".[149] Therefore the court stated that: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".[150] In the given facts the Court held that the distribution of the document opposing the draft by the defendant met this criteria and could be constitutionally suppressed, stressing that the events assessed in the case took place during wartime, when the tolerance for such speech is much lower than in times of peace.[151] However, the sole formulation of the test soon became used for arguing for a more speech-protective approach, though it did not happen immediately after *Schenck* decision.

3.1.1.3. Other context-based decisions – Frohwerk and Debs

Despite the formulation of the "clear and present danger" test in *Schenk*, in the two cases decided on the basis of the Espionage Act a week later,[152] in which the opinion of the Court was also authored by Justice Holmes, there was no direct reference to it. In both *Frohwerk v. US*[153] and *Debs v. US*[154] judgments were issued with reference to the very similar criterion of the circumstances in which the speech was delivered and the results it could have had in this particular circumstances, but the criteria applied in them seem less strict that the formulation from *Schenck*.

Frohwerk concerned publication of a number of articles criticizing in the American involvement in the War, *Debs* involved a speech given by a Socialist Party leader, in which he presented socialist ideology, but also showed sympathy for some persons convicted under the Espionage Act for obstructing the draft. In *Debs* the Court just noted that as the speech was

[149] 249 U.S. 47, 52.
[150] 249 U.S. 47, 52; emphasis mine.
[151] 249 U.S. 47, 52.
[152] *Schenk* was decided on March 3, 1919. *Debs* and *Frohwerk* on March 10, 1919.
[153] *Frohwerk v. US*, 249 U.S. 204 (1919).
[154] *Debs v. US*, 249 U.S. 211 (1919).

intended at the obstruction of the recruiting process and that such obstruction would be its probable effect.[155] So thought the Court did not refer to "clear and present danger" of a particular result, it still assessed at least the probability of some result of the speech, to which it denied protection. In *Frohwerk* this element was even more visible, as the Court's opinion, similarly as in *Schenck* stated that it is possible that publishing the same articles by the defendant in other circumstances would not constitute a crime. However it held that in the particular circumstances of the case, it is impossible to say that the texts published were not addressed to the audience, among which it could incite to violent actions.[156] Consequently in both cases it upheld convictions without using the "clear and present danger" test, but also clearly rejecting Hand's approach focused on an intent of the speaker.

From the perspective of further cases, the most important development of an early jurisprudence based on the Espionage Act was the development of those two tests, and although none of that cases concerned the suppression of political movements as such,[157] the tension between the approaches emerged in *Masses* and *Schenck* would dominate discourse on such suppression in the following years.

3.1.2. Famous separate opinions – interwar period jurisprudence

The period after World War I brought the new wave of jurisprudence in the free speech cases, now some of them explicitly referring to the political movements hostile to the democratic system and advocating its overthrown. In the American free speech history this period has two heroes – the author of the "clear and present danger" test – Justice Oliver

[155] 249 U.S. 211, 215.
[156] Justice Holmes wrote exactly that: "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out" (249 U.S. 204, 209).
[157] Even though some cases included the persecution of Socialist Party leaders, they were based on the issues connected to the draft obstruction, not to the sole advocacy of political ideas of socialism as such. See the very clear distinction made between the two by the Court in *Debs* (249 U.S. 211, 212-213).

Wendell Holmes and Justice Louis D. Brandeis, both known mainly from their opinions in free speech cases, which usually were not the ones of the majority.

3.1.2.1. Justice Holmes' "free marketplace of ideas" and the struggle for the "clear and present danger" test - *Adams* and *Gitlow*

Soon after the cases connected to the draft obstruction, the Court faced the case concerning the group of Russian immigrants, declaring themselves socialists, revolutionists and anarchists, who opposed the American involvement in the international military expedition against the Revolution in Russia and urging workers to join together and rise against capitalism. The leaflets defendants distributed called in particular to the general strike. They were very critical of the American government and showed support for the Russian Revolution.[158] The Court refused to analyze the constitutionality of the Espionage Act, saying it was sufficiently discussed in the previous cases[159] and affirmed the conviction, arguing that the leaflets in question were aimed at provoking resistance to the war effort of the country, especially by urging the workers in ammunition factories to a general strike.[160]

However this time the Court was not unanimous. Justice Holmes wrote a dissenting opinion in which he came back to his "clear and present danger" test from *Schenck*. He added to it the possibility to punish also the intent to bring danger, which in this case he described as clear and imminent (instead of present),[161] so added Hand's element of speaker's intention, though referring it to danger defined in *Schenck* not to any unlawful action. He argued that the possibility to suppress speech is greater in times of war, but it was just the consequence of adoption of this universal test, and the fact that usually during the war dangers assessed as its element are greater. Nonetheless, even applying the test allowing to asses both the danger and

[158] *Abrams v. US*, 250 U.S. 616 (1919).
[159] 250 U.S. 616, 619.
[160] 250 U.S. 616, 624.
[161] The exact formulation of the test advocated by Holmes in this case was: "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent" [emphasis mine] (250 U.S. 616, 627).

the intent to bring it, and taking into consideration the war situation, he did not agree that the conditions were fulfilled in the facts of the case.[162]

However what made Holmes' dissent in *Abrams v. US* famous, and relevant for any discussion on the rights of political dissenters in public forum, was its last paragraph, in which he laid down his theory of free speech, clearly referring to John Stuart Mill's argument from search for the truth.[163] He wrote:

> "(…) when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. (…). Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"[164]

In this words he gave one of the most convincing rationale for the admission of every political idea to the public forum. It is however also a very brave one – it emphasizes openness to ideas and readiness to experiment with them. In this, as it will be shown later it is very different from the idea adopted in the European system, which after the experience of totalitarian regimes was no so prone to experiment. However, even in this rationale Justice Holmes sees very clear boundary of the threatening danger of an unlawful action.

This issue came back in the next case, now explicitly referring to the dissemination of ideas promoted by certain political movement, *Gitlow v. New York*.[165] It concerned the crime of advocacy of criminal anarchy. The defendant, member of left-wing political organization,

[162] 250 U.S. 616, 628-629.
[163] See chapter 1.
[164] 250 U.S. 616, 630-631
[165] *Gitlow v. New York*, 268 U.S. 652 (1925).

was convicted under the state law prohibiting advocating or teaching "the duty, necessity or propriety of overthrowing (…) organized government by force or violence, (…) or by any unlawful means".[166] He published a manifesto urging to proletarian revolution, establishing proletarian dictatorship and the system of communist socialism.[167]

The majority uphold Gitlow's conviction on the basis of distinction between the advocacy of an abstract doctrine or discussion that has no element of incitement to action and the punishable urging to take illegal actions in order to overthrow the government.[168] It also referred to the need to asses danger in case of such advocacy, stating that the incitement to overthrow government by unlawful means "present a sufficient danger of substantive evil"[169] to allow the state to punish them in accordance with the Constitution. The Court also clearly rejected the idea that the state should wait till such advocacy results in "actual disturbances (…) or imminent and immediate danger"[170] of the state destruction.

Justice Holmes did not share this opinion and argued for the application of the "clear and present danger" test, as formulated in *Schenck*.[171] He strongly opposed the distinction between the advocacy of ideas and incitement to action, famously stating that "Every idea is an incitement".[172] Moreover, it seems that in this opinion he showed his determination to stick to his vision of a democratic discourse formulated in *Abrams*, saying that "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way".[173] In this way he showed how he sees free marketplace of ideas

[166] New York Penal Law quoted in 268 U.S. 652, 654.
[167] 268 U.S. 652, 658-658. The full text of the manifesto is available on http://1stam.umn.edu/archive/primary/gitlow.pdf (accessed March 27, 2009).
[168] 268 U.S. 652, 664-665.
[169] 268 U.S. 652, 669.
[170] 268 U.S. 652, 669.
[171] 268 U.S. 652, 672-673. That means he stepped back from the additional element of the intent to bring a danger, that was present in his dissent in *Abrams*.
[172] 268 U.S. 652, 673.
[173] 268 U.S. 652, 673.

and the readiness for experiment in practice, even if it would lead to the lawful change of the political system by the majority of the society.

3.1.2.2. Justice Brandeis' historical narrative in Whitney

In both *Abrams* and *Gitlow* Holmes' opinions were joined by Justice Brandeis. In *Whitney v. California*,[174] the case involving persecution of the member of Communist Party solely on the basis of the membership in the organization, not the ideas advocated by the person themselves, it was him who wrote an opinion for the two justices.

Anita Whitney was convicted on the basis of Criminal Syndicalism Act for membership in the Communist Party and taking part in its organizational meeting on which the doctrine of the party, involving utterance to illegal actions aimed at the change of economic and political system. The Court upheld her conviction. The majority, referring to *Gitlow*, held that the power to punish utterances to overthrow the government by unlawful means was not questionable and stated that conspiracy causes even more serious danger to the public safety than actions taken or speech made by individuals. It declared that only the regulation that would be arbitrary or unreasonable would be held unconstitutional.[175]

That certainly set much lower test that justices Holmes and Brandeis would like to see applied. Because of the procedural reasons both justices concurred in the case's result,[176] but in the opinion wrote by Justice Brandeis they clearly indicated their disagreement with legal principles that were applied. This opinion is interesting not only because it advocates the application of the "clear and present danger" test in its version from *Schenck* and specifies it,[177] but more importantly because of an interesting narrative it uses. It adds to Holmes'

[174] *Whitney v. California*, 274 U.S. 357 (1927).
[175] 274 U.S. 357, 371-372.
[176] However actually their opinion helped the defendant. Soon after the decision of the Court was issued she was pardoned by the governor, who extensively referred to Brandeis' opinion (William Cohen, David J. Danelski, *Constitutional Law Civil Liberty and Individual Rights*, (The Foundation Press: Westbury, 1997), 99-100).
[177] Justice Brandeis wrote that in order to establish that the requirements of the test were met "it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated" (274 U.S. 357, 376; emphasis mine), so though he

universal reflection on the rationale for a very speech-protective approach to the First Amendment an element of American history and identity. Though Holmes in *Abrams* also referred to the American history, namely the controversy over the 1798 Sedition Act and the Congress' condemnation of thereof,[178] his metaphor of the marketplace of ideas was rather an expression of universal vision of the way men seek the truth. Brandeis shows it in the context of somehow mythical vision of the values that constitute the foundation of the United Stated. He wrote:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; (…) that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But (…) Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. (…)
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."

This text obviously corresponds with the above quoted Holmes' dissent in Abrams, especially in term of treating politics as an experiment and the courage to undertake it, or the way of determining the truth in the political community. However, more importantly the opinion authored by Brandeis also shows to what extend the history, or certain vision of history embodied in the national identity,[179] can be used in order to show where the limits to free

previously quoted *Schenck* formula, he was also ready to take into consideration the sole advocacy of an imminent action without obvious danger that it would be realized.

[178] *Abrams v. United States*, 250 U.S. 616, 630 (1919).

[179] Especially in the light of Sedition Act controversy presented in the first chapter it can be questioned whether so general statements about "those who won our independence" are justified or at least precise, though certainly they show certain vision of the history that in practice can be much more influential than the precise account of all facts.

speech are set by its constitutional law. That is worth emphasizing especially in the context of differences between this approach and the European vision of its history and its free speech.

The interesting think about the cases decided in the interwar period in States is that though the adoption of "clear and present danger" test in *Schenk*, the it was not used in the following cases concerning promotion of extremist political ideas.[180] Even after *Whitney*, in a few cases in which the court overturned convictions under the syndicalism law, it referred to the reasonableness approach as stipulated in *Whitney*.[181] However the test was still to come back in the most well known case of McCarthy era – *Dennis* v. *US*[182].

3.1.3. "Clear and present danger" in McCarthy era – *Dennis v. US*.

The McCarthy era and the panic connected to communism in the United States in the times after the second World War is nowadays difficult to understand. Even, assuming the very tense international situation, with the emergence of socialist block in Europe and the beginning of the Cold War, the history of unfounded allegations, tracing of "communists" in every area of social life and congressional investigations seem very emotional and is probably incomparable to anything that was happening at the time in the countries of the newly emerged Council of Europe. This period brought a huge number of decisions concerning communist party members and the party itself as well as issues such as loyalty of public

[180] The test was however used and accepted in other free speech cases, concerning for example criticism of courts or speech delivered to hostile audience. See Erwin Chemerinsky, *Constitutional Law Principles and Policies*, (Aspen Publishers: New York 2006), 994n41. Moreover, already during the Second World War, in the case concerning the obligation to salute to the flag, the Court stated that "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish" (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943)), confirming that the "clear and present danger" test became a part of case law in free speech cases in general.

[181] *Fiske v. Kansas*, 274 U.S. 380 (1927); *DeJonge v. Oregon*, 299 U.S. 353 (1937). See on those cases: Chemerinsky, *Constitutional Law Principles*, 994; Sullivan and Gunther, *First Amendment*, 39.

[182] *Dennis v. United States*, 341 U.S. 494 (1951).

servants.[183] However many of them rested without significant influence on the later jurisprudence and are, together with many events of this period, treated as a dark era in the American constitutional history.[184] In order to compare them with the European cases decided in the similar and later period it is enough to refer to the landmark case of this period – *Dennis v. US* as it is the case that became a symbol of the reformulation of the "clear and present danger" test and an American fight with extremist ideologies. It is also seen as a peek of tendency to suppress left-wing political organizations originating in above mentioned cases of interwar period. After *Dennis*, the American free speech jurisprudence started to became more speech-protective, going towards the modern approach.

Dennis was decided on the basis of Smith Act – the law forbidding to "advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence (…)",[185] to publish or circulate any publications advocating such overthrown or to organize any organization with similar aims. The defendants were convicted for conspiring in order to organize the Communist Party, and to advocate and teach its ideas, including the necessity to overthrow the government.

The conviction was upheld by the divided Court. The plurality opinion, authored by Chief Justice Vinson, extensively referred to the previous cases concerning free speech with regard to the political movements, from *Schenck* to *Whitney*, presenting Holmes' and Brandeis' separate opinions.[186] Referring to the reasonableness approach in *Gitlow* and *Whitney*, which allowed the legislature to declare certain kinds of speech to be unlawful if only it was reasonable, the Court declared that although it had never been expressly overruled,

[183] According to Geoffrey Stone, as a result of the Cold War, the Court issued sixty decisions involving The First Amendment issues (Stone, *Perilous Times*, 395).
[184] Both the political and social history of this period and its law are widely presented in the literature. See e.g. Stone, *Perilous Times*, 311-426; Wiecek, "The Legal Foundations,"; Marc Rohr, "Communists and the First Amendment,"; Geoffrey R. Stone, "Free Speech in the Age of McCarthy: A Cautionary Tale", *California Law Review* 93 (2005): 1387 and the literature there cited.
[185] Section of the Smith Act as quoted in 341 U.S. 494, 496.
[186] 341 U.S. 494, 503-507.

it is no longer a valid law. On the contrary, it is a "clear and present danger" test that should be applied.[187]

However the Court decided to apply reformulated version of the test. It easily established that the overthrow of the government by force as well as the attempt to do so, even if it is obvious that the government would be able to successfully defend itself, was a kind of "substantive evil" that can be prevented under the Holmes' test.[188] The problem occurred with the definition of the "clear and present danger" element. The Court noted that those words cannot limit the possibility for the government to take actions to the situation when "putsch is about to be executed, the plans have been laid and the signal is awaited".[189] On the contrary, the sole fact that the government knows that there is a group that is aiming at its overthrow and attempts to indoctrinate its members allows it to act, because the harm made by such an attempt would be so great that the possibility to prevent it cannot be considered "terms of the probability of success, or the immediacy of a successful attempt".[190] As a consequence the Court decided to adopt the changed formulation of the "clear and present danger" test proposed in this case by the lower court. It held that "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger".[191] In this case the Court decided that the sole existence of conspiracy created danger sufficient to suppress the movement in accordance with the First Amendment.

[187] 341 U.S. 494, 507-508.
[188] 341 U.S. 494, 509.
[189] 341 U.S. 494, 509.
[190] 341 U.S. 494, 510
[191] 341 U.S. 494, 510. What is interesting the above phrasing was taken from the lower court decision issued by Judge Learned Hand, the one who authored the opinion in *Masses*. Judge Hand during whole his career preferred his test from that case over the Holmes' approach. For years he corresponded with Justice Holmes and other figures important for the development of free speech theory in his times, such as Zechariah Chafee and never agreed with the clear and present danger test (On the Hand's views, his correspondence and views on free speech see: Schwartz, "Holmes versus Hand,", Gunther, "Learned Hand,"). Still in 1951 was convinced that the *Masses* approach was more appropriate, however, as lower court judge, he felt bound by the jurisprudence of the Supreme Court (Stone, *Perilous Times*, 401).

The reformulation of the "clear and present danger" test in *Dennis* resulted in much less speech-protective standard that the original phrasing would provide. One of the dissenters in the case, Justice Hugo Black, stated that in fact the Court affirming the convictions in question repudiated from this test.[192] However the Court in Dennis was very divided and this does not mean that all justices writing separate opinions supported more speech protective approach. For the sake of comparison between the Courts' approach and the one represented in the European jurisprudence especially interesting is a concurring opinion written by Justice Jackson. Referring to the techniques of seizure of power by Communists in Central and Eastern Europe,[193] he tried to show that the sudden violent revolution is not the only way in which the democratic government can fall. He appreciated the "clear and present danger" test as traditionally formulated, but found it inapplicable to the cases involving the advocacy or teaching the necessity to overthrow the government by force. In his opinion it was impossible to prevent the impact of extremist propaganda and conspiracy as well as the possibility that the legitimate government will become weaker. He argued that such advocacy is just not protected by the First Amendment and can be penalized without the necessity to assess its danger.[194]

That opinion is especially interesting not only as it departs from the rhetoric used by the Court and the more speech-protective justices, but also because it comes from the only member of the Court, who had direct experience with European approach to totalitarian movements and, most importantly, European experience with them. Justice Jackson was an American judge in the Nuremberg trials,[195] and it is arguable that his views expressed in *Dennis* to a great extend reflects the assumptions that laid foundations for the European

[192] 341 U.S. 494, 580.
[193] Especially on the example of Czechoslovakia (341 U.S. 494, 565).
[194] 341 U.S. 494, 570. For a similar opinion in scholarship see: Carl A. Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech", *The University of Chicago Law Review* 23 (1956): 173, 186ff.
[195] See: Stone et al., *Constitutional Law*, lxix-lxx and the literature quoted there.

exclusion of the totalitarian movements, later visible in the jurisprudence of the Strasburg bodies dealing with human rights protection, that will be discussed in the next section.

3.2. Early Strasbourg jurisprudence

The interesting thing about the early Strasburg jurisprudence on political movements questioning existing political order is that it lacks the considerations on the danger, so important in the US jurisprudence of the same time. At least in cases explicitly referring to the programs of political organizations, the Strasburg bodies seemed to leave out the issue of danger or probability of success and presented much more substance sensitive approach. At this point they also did not focus on formulating certain tests for the assessment of interference into political rights of certain group, but focused on the phrasing of the relevant provisions of the Convention, though sometimes applied them in inconsistent way. In the early period of Strasburg jurisprudence it was visible especially in case of article 17.

3.2.1. *Communist Party of Germany*

The first opportunity to deal with the issue of political rights of extremist political movements on the ground of the Convention appeared very soon after its entry into force in 1953. In 1956, the German Constitutional Court banned German Communist Party (KPD).[196] The party, filled in a complaint under the Convention claiming its rights guaranteed by art. 10 and 11, as well as by art. 9 (freedom of thought) were violated.

The Commission declared the application inadmissible on the basis of abuse clause.[197] In its reasoning it referred to art. 17 as more general norm than articles 9 to 11. It underlined

[196] On the Constitutional Court decision see e.g. Edward McWhinney, "The German Constitutional Court and the Communist Party Decision", *Indiana Law Journal* 32 (1957): 295; Franz, "Unconstitutional and Outlawed," 59ff. English translation of the decision (though abridged) available in: Wolfgang P. von Schmertzing, ed., *Outlawing Communist Party A case History* (The Bookmailer: New York, 1957).

[197] Decision of July 20, 1957, Communist Party of Germany v. Germany, application no 250/57, 1 *Yearbook of the European Convention on Human Rights* 222 (1959). English translation of the excerpts available in: *Digest of Strasbourg Case-Law relating to the European Convention on Human Rights Volume 4 (Articles 13-25)* (Carl Heymanns Verlag KN: Kohl et al., 1985) 239-240, 244.

that in case when the applicants were engaged in an activity that was aimed at the destruction of rights and freedoms provided for in the Convention, it is not necessary to decide whether limitation clauses from articles 9 to 11 are applicable, as it is article 17 that provides more general norm and should be applied against such an activity. The Commission referred also to the legislative history of this provision, clearly indicating that it was designed exactly in order to prevent totalitarian movements from invoking the rights guaranteed by the Convention.[198]

However it is characteristic that the Commission only very briefly characterized communist ideology and the party's activities in order to prove that the latter could be characterized as aimed at destruction of human rights. It emphasized that the party wanted to establish communist social order through the revolution and the dictatorship of the proletariat. It admitted that at the time of dissolution, the party was taking part in the German political process using constitutional means, but found it less relevant than the fact that its ultimate aims rested unchanged. The Commission categorically stated that the sole resource to the establishment of dictatorship in order to advance towards new social order involves destruction of certain rights and freedoms guaranteed by the Convention. It did not however analyze the doctrine more thoroughly,[199] nor in any way assessed the probability of the party's success.

3.2.2. Subsequent cases decided on the basis of art. 17

The *Communist Party case* established a pattern of using article 17 as a filter for cases which can be examined as to the possible violation of the rights under the Convention. According to this reasoning the first test for a political activity was whether it does not constitute the abuse of rights in the meaning of this article. If it did, the applicant was prevented from invoking their rights under the Convention and the application was declared

[198] *Communist Party of Germany v. Germany*, 224.
[199] However, that was made on the state level in the judgment of the German Constitutional Court, see literature cited above.

inadmissible on the grounds of article 17. If it did not, the second part of the examination would take place in order to establish whether the interference with the rights of the applicant, which then could be legitimately claimed, was justified under the criteria set up in the relevant limitation clause, such as sections 2 of the articles 10 and 11.

This pattern of reasoning was used for example in cases of the two members of *Nederlandse Volks Unie* – small political party created in the Netherlands.[200] One of the applicants was convicted for possessing with the view of distribution the leaflets of the party, which were found to incite to the racial discrimination, whereas both of them were banned from running in the local elections, among other reasons due to the fact that the represented the party that was declared by the Dutch court a prohibited association. They complained on the basis of art. 10 of the Convention and art. 3 of the First Protocol.

The Commission restated its view taken in the *Communist Party case*, that article 17 is more general than the provisions referring to particular rights and it prevents certain applicants from relying on the rights guaranteed by the Convention. Unlikely in the previous case it analyzed more carefully ideas advocated by the applicants. It noted that the leaflets in question referred to the white citizens of the Netherlands and contained derogatory statements regarding the immigrant population (namely Surinamers, Turks and other persons of foreign origins). They announced that once in power, the *Nederlandse Volks Unie* would take actions to remove those members of population from the country. As the Commission emphasized, those declarations made no distinction between citizens and noncitizens, nor did it refer to other circumstances such as the length of residence in the country, family and social status.

The Commission indicated that the realization of the declared policy would violate a number of principles embodied in the Convention. It noted in particular the prohibition of discrimination on the basis of race and color (art. 14) and the prohibition of expulsion of

[200] Decision of October 11, 1979 of the European Commission on Human Rights, *Glimmerveen and Hagenbeek v. the Netherlands*, applications nos. 8348/78 and 8406/78.

nationals and collective expulsion of aliens from the state parties to the Fourth Protocol to the Convention. It additionally noted than in certain circumstances the actions proposed by the applicants can amount to the degrading treatment prohibited by art. 3 of the Convention. Consequently, it held that the expression of political ideas by the applicants fall under the abuse clause as established in art. 17[201] and thereof that the applicants are prevented from relying on article 10 of the Convention and on art. 3 of the First Protocol.[202]

However, article 17 was also used by the Commission in the other way. In some cases decided in 1980s and 1990s, involving the advocacy of neo-Nazi ideology, the Commission decided on the basis of limitation clauses in sections 2 of the relevant articles, interpreted together with art. 17. It referred to this provision in order to strengthen the argument that the limitation of rights was necessary in a democratic society in the meaning of art. 10 section 2 or art. 11 section 2.

That was done for example in *Kühnen v. Germany*.[203] The applicant in this case was a leader of an organization aiming at the restitution of NSDAP, convicted for the publications considered by German courts to constitute dissemination of propaganda of the illegal organization. He complained *inter alia* that his rights under art. 10 was violated. The Commission did not share this opinion and declared the application manifestly ill founded, though did so following the analysis provided for in art. 10 section 2 of the Convention. It held that conviction of the applicant was provided by law. It also stated that the German ban on promoting unconstitutional organizations and their ideas, especially in the light of historical experience of the country is directed at legitimate aims enumerated in this provision, namely at the protection of national security and the rights and freedoms of others.

[201] It is characteristic that in such reasoning the Commission treats the sole expression of ideas as an action in the meaning of art. 17 (*Glimmerveen and Hagenbeek v. the Netherlands*, 196).
[202] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, adopted in 1963. Text available at http://conventions.coe.int/Treaty/en/Treaties/Html/046.htm (accessed March 29, 2009).
[203] Decision of May 12, 1988, *Kühnen v. Germany*, application no. 12194/86.

Interestingly at this point of reasoning it referred to art. 17 as to the provision helping to determine whether the limitation was "necessary in a democratic society". The Commission held that the activities carried on by the applicant were "contrary to the text and spirit of the Convention" and aimed at the destruction of the rights and freedoms guaranteed in it. As a result it declared that the limitation of the applicant's freedom of expression by German authorities was justified.[204]

3.2.3. Subsequent cases decided without the reference to art. 17

In the other case concerning the establishment of extremist political organization, very similar to the German Communist Party case, the Commission did not refer to article 17 at all. In *X. v. Italy*,[205] decided in 1976, it dealt with the Italian ban on the reestablishment of the fascist party. The applicant was convicted on the basis of this prohibition for creating an organization inspired by fascist ideology and using symbols of the dissolved fascist party. In a very brief decision, the Commission declared the application manifestly ill founded, therefore inadmissible, but did so at the basis of sections 2 of the articles 9, 10 and 11, stating that the limitation of applicant's rights was "necessary in a democratic society in the interests of public safety and the protection of the rights and freedoms of others".[206] It did not however analyze this clause more carefully.

Notwithstanding the differences between the cases decided by the European Commission of Human Rights before 1990s, it is characteristic that thought they vary in terms of legal basis and reasoning applied, they all in fact rely on the same assumption that some

[204] This way of using art. 17 analysis, not as a reason not to carry on with the examination of conditions justifying an infringement under the limitation clause, but just in order to establish that the last condition in the limitation clause is present also in some other cases dealing with Nazi organizations and publications See e.g. decision of September 2, 1994, *Ochensberger v. Austria*, application no. 21318/93.
[205] Decision of May 21, 1976, *X. v. Italy*, application no. 6741/74.
[206] *X. v. Italy*, 85.

political movements can be legitimately suppressed because of the ideas they advocate, not the real danger they pose in given circumstances. The Commission, deciding on the admissibility level, so even without the full procedure of review of the case by the Court,[207] just denied protection to certain ideologies. At this point, mainly the ones connected to the negative experiences of the European continent – fascists, neo-Nazi, or communist groups.

This approach seems to be much exclusive for extremist movements than any formulation of the American test, as looking mainly at the type of social and political system they want to establish, it allows to suppress also movements that want to achieve a change using legal means. In this way it certainly rejects (or at least limits) Holmes' vision of a marketplace of ideas, on which everyone can win. The European jurisprudence certainly does not agree on any other than democratic system winning this competition. It also seems that the Commission felt that there was no need (or possibility) to reflect on the probability of the certain group's success. In this way it is much closer to Justice Jackson's considerations in *Dennis*. However the further American jurisprudence went in a different direction than Justice Jackson postulated.

3.3. Towards modern American approach – Brandenburg v. Ohio

3.3.1. Cases concerning Communists after *Dennis*

Soon after the Supreme Court decision in *Dennis* the anticommunist feeling in the US was becoming more relaxed. Senator McCarthy compromised himself,[208] the international situation, after the death of Stalin and the end of Korean war as well as the stabilization of political situation in Europe became less tense.[209] That laid down foundations for jurisprudence that undermined the validity of *Dennis*, though none of them overturned it.

[207] That would for example include a hearing before the Court. On this procedure, applied till 1998, see: Marek Antoni Nowicki, *Wokół Konwencji Europejskiej* (Wolters Kluwer: 2006), 23-24.
[208] See e.g. Stone, "Free Speech in the Age of McCarthy," 1401-1405.
[209] See e.g. Stone, *Perilous Times*, 413.

In *Yates v. US*,[210] the case of defendants with very similar charges as in Dennis, the latter decision was distinguished on the statutory basis. Referring to *Gitlow*, the Court emphasized that even in the times of narrower understanding of freedom of speech there was a clear distinction between the mere advocacy of an abstract doctrine and the one of an illegal action.[211] It emphasized that *Dennis* was about the advocacy of building a group that was to keep itself ready to take a revolutionary action if the proper time for that would come.[212] That was to be distinguished from the sole advocacy of a doctrine, which made people to believe in the necessity to overthrow the government, but did not urge them to take any action.[213]

In two other cases *Scales v. US*[214] and *Noto v. US*[215] the Court referred also to the issue of the possibility to punish membership in the Communist Party, holding that such punishment cannot be based on the sole nominal membership in an organization. It has to be an active membership, meaning that it has to be proven that the particular defendant wanted to pursue organization's aims by resort to violence.[216] Although those cases did not overrule *Dennis* or reformulate the "clear and present danger" test as defined in that case, they limited the possibilities to prosecute members of the Communist Party on the basis of Smith Act[217] and put more emphasis on the intent of the person convicted. That was to come back in the formulation of the new test, emerged in *Brandenburg v. Ohio*.[218]

[210] *Yates v. US*, 354 U.S. 298 (1957).
[211] 354 U.S. 298, 318.
[212] 354 U.S. 298, 321.
[213] 354 U.S. 298, 321. According to the Court "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something"(354 U.S. 298, 324-325). For this distinction see also *Noto v. US*, 367 U.S. 290, 297-298 (1961).
[214] *Scales v. US*, 367 U.S. 203 (1961).
[215] *Noto v. US*, 367 U.S. 290 (1961).
[216] *Scales v. US*, 367 U.S. 203, 229.
[217] In practice, though the Yates decision was not formulated as to change the law radically, it ended the persecutions under the Smith Act (Rohr, "Communists and the First,"20-21).
[218] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

3.3.2. *Brandenburg v. Ohio* – the modern test

The leading case that reformulated the test used by the US Supreme Court with regards to free speech cases, especially the ones concerning the advocacy of extremist political ideas, came not in context of the Communists, but of a small rally of the Ku Klux Klan. The meeting, which took place in a remote place and had no other audience apart from 12 members of the Klan and a reporter and a cameramen, invited on the rally by its organizers. During the rally the defendant, the leader of the meeting, gave a speech, which included derogatory remarks concerning Jews and Negroes as well as the statement that if the government would continue "to suppress the white (…) race, it's possible that there might have to be some revengeance taken".[219] He also heralded the march on Congress. He was convicted under the criminal syndicalism law making it illegal to advocate "duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform".[220]

On the basis of this facts, the Court stated that its case law limits the possibility to suppress the advocacy of illegal or violent action to the cases when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".[221] Interestingly, the only previous decision that the court directly overruled in the judgment was *Whitney*, as to which it stated that it was discredited by further cases, including *Dennis*. However, even if the Court did not expressly admit that, the standard of speech protection formulated in the quoted sentence is far different from the one applied to Communists as well in *Dennis* as in the other above mentioned cases. It joins together the two elements of the First Amendment jurisprudence which had been present in the free speech jurisprudence since *Masses* and *Schenck* decisions. From Hand's test it takes the element of the speaker's intent to incite or produce lawless action. From Holmes', it adds that the illegal

[219] 395 U.S. 444, 446.
[220] 395 U.S. 444.
[221] 395 U.S. 444, 447; emphasis mine.

action has to be imminent and likely to occur.[222] In this way, demanding both elements in order to allow to suppress speech, it is far more speech-protective that any of the previous tests taken on their own.

3.3.3 Application of the modern standard

Although the Brandenburg test was formulated in a very specific circumstances, to the small rally with a probably very insignificant possibilities of wider influence, it is considered at the moment to be a valid test for the assessment of the constitutional possibility to prohibit the advocacy of unlawful action.

Interestingly, as a way of confirming that it effectively replaced the Dennis formulation of the "clear and present danger" test, it was applied in 1974 in the case concerning preventing the Communist Party of Indiana and its candidates from the possibility to run in elections in the elections due to the fact that they failed to submit affidavits stating that they do not advocate the violent overthrow of the government.[223] The Court reversed the decision, clearly indicating that it is the Brandenburg formula that should be used to assess the possibility to limit not only speech as such, but also person's possibility to take part in elections and associate in a political party.[224]

It is arguable that the liberalization of the test, especially with regards to left-wing political movements, was a result of a significant change in social and political atmosphere, when communism and communists in the US were not so much afraid of anymore. It is characteristic for the American free speech jurisprudence that it often changed its approaches

[222] About the *Brandenburg* test as the one that joins the two tests applied by Hand and Holmes see: Schwartz, "Holmes versus Hand," 236-241.
[223] *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974). In fact the party submitted a statement containing a statutory formula, with an additional remark that it understands the notion of advocacy in this text in a way in which the Supreme Court defined it in Yates, so that it limits it only to the advocacy of concrete action not the sole principles (414 U.S. 441, 444).
[224] 414 U.S. 441, 449.

in the times of crisis, be it war, a panic caused by the Russian Revolution or the Cold War.[225] That is why some commentators argue that it is very possible that the Brandenburg test will not survive in case of the next crisis of this kind or even of challenges connected to the current struggle with terrorism and religious fundamentalism as well as of the new technologies of communication.[226] That does not however change the fact that the current standard is a very speech protective one, certainly much more permissive than the European approach, which did not undergone so sudden changes but have also evolved in the direction of more speech protective jurisprudence.

3.4. Modern Strasbourg jurisprudence – from United Communist Party of Turkey *towards* Refah

Whereas till the middle of 1990s, most of the cases under the Convention were decided by the Commission on the admissibility level and dealt with bans on certain political parties in Western European countries, from this moment on much more cases were decided by the European Court of Human Rights in a full procedure.[227] Especially important for setting Strasburg standards for the possibility to suppress some political movements were cases from Turkey, some other came from the Central Eastern Europe. Characteristically most of them dealt, not as American cases with the criminal convictions for organizing a movement, but with a formal dissolution of the organization, which prevented it from taking part in official political process.[228] As the reasoning used in those cases is usually very similar

[225] See e.g. Brennan, "The American experience," and the approach of Geoffrey Stone's book *Perilous times*.
[226] See authors cited by Stefan Sottiaux in: Sottiaux, *Terrorism*, 104nn191-196.
[227] That was connected with the reform of the Strasburg human rights protection system introduced by the Protocol 11 to the Convention, which came into force in November 1998. It replaced the two bodies system with the new one based only on the Court. However also this system provides for the Control of the admissibility of an application on the basis of the same criteria as before. Nowadays this control is exercised by the Court (3 judges). On this procedure see: Nowicki, *Wokół Konwencji*, 49-51, on the admissibility criteria *ibidem* 34-49.
[228] The Court faced also some typically free speech cases, in which fact patterns were more similar to some of the American cases mentioned above and the European Court analyzed the meaning of and danger caused by certain speech given or leaflet published. However unlike in the US, where the individual cases shown the approach to the whole political movements, in Europe those cases have more individual focused approach. For

and structured according to the same rules, I will present here only some of them, showing how they lead to the major decision of this period – *Refah Partisi v. Turkey* – and the emerge of the test that was applied there and is standard used by the Court till know.

3.4.1. On the road to *Refah*

Already in the first cases concerning political parties dissolution decided by the European Court of Human Rights, the Court clearly indicated its view on the application of the different provisions of the Convention that was not uniform in cases decided by the Commission. In *United Communist Party of Turkey v. Turkey*[229] - the case concerning party dissolution by the Turkish Constitutional Court on the grounds that, contrary to the law, it incorporated the word "communist" in its name and by referring to the notion of Turkish and Kurdish nations in its program encouraged separatism[230] – the Court had to determine whether to decide the issue of the lack of abuse of right in the meaning of art. 17 of the Convention as a necessary condition to follow with the analysis of the limitation clause embodied in art. 11 section 2. The Court held that thought states have a possibility to defend themselves against associations that jeopardize its institutions, it demands a proper balance between the rights of the association and the public interest that must be measured according to art. 11 section 2. Consequently the Court would exercise a review under this provision and only when this is completed, would decide whether art. 17 is applicable in the given circumstances of the case.[231]

Analyzing consecutive elements of the limitation clause in art. 11 sec. 2, the Court set some general principles guiding the assessment whether the limitation was necessary in

the analysis of those cases and their comparison with the American jurisprudence see: Sottiaux, *Terrorism*, 90-100; Stefan Sottiaux, "The 'Clear and Present Danger' Test in the Case Law of the European Court of Human Rights", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63 (2003): 653.

[229] Judgment of January 30, 1998, *United Communist Party of Turkey v. Turkey*, application no. 19392/92.

[230] *United Communist Party of Turkey v. Turkey*, § 10.

[231] *United Communist Party of Turkey v. Turkey*, § 32.

democratic society,[232] that are repeated in every case concerning dissolution of political parties. It clearly stated that political parties can claim their rights under art. 10 and 11 of the Convention. It emphasized that parties have essential role in the creation of pluralism and assuring the proper functioning of democracy.[233] It clearly indicated the close link between democracy and the Convention and stated that it is the only political system compatible with the document.[234] That is why the exceptions provided for in art. 11, when referred to political parties, should be, according to the Court, constructed strictly. The contracting state, which claims the necessity to limit parties' rights on the basis of Section 2 of this provision has a very narrow margin of appreciation and its decisions are subject to careful scrutiny by the Court.[235]

In this case such scrutiny showed that the dissolution of the United Communist Party was unjustified, as according to the Court the sole name of the party cannot justify its dissolution, especially as the party complied with the democratic principles, and the party's program, though referring to the two nations within the country, did neither encourage separatism nor violence, on the contrary it advocated for a peaceful discussion that would help to solve the Kurdish problem. Such discussion according to the Court constitutes the inherent feature of democracy. The Court admitted that the activities of the party can sometimes depart from its official program, but in this case there was no proof for any activity that would justify so drastic limitation of the applicant rights.[236]

[232] As shown in chapter 2, that is a third step of the analysis of the justification for the infringement of the freedom of association, after holding that the infringement was prescribed by law and had a legitimate aim. However in all the cases mentioned in this section there were no serious controversies over the first two steps. They are also quite uniformly interpreted in case law and as such do not constitute a problem on the basis of prohibition of political parties. Measures taken by states in those cases typically have clear legal basis – most commonly on the constitutional level (see e.g. art. 68, 69 of the Constitution of Turkey, English translation available at: http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm (accessed March 29, 2009)) and are declared by the Court as having the legitimate aim such as protection of public safety or of the rights and freedoms of others. That is why here I will focus only on this last part of the analysis, which is crucial for setting standards for the possibility to suppress certain political movements.

[233] *United Communist Party of Turkey v. Turkey*, § 43.

[234] *United Communist Party of Turkey v. Turkey*, § 45.

[235] *United Communist Party of Turkey v. Turkey*, § 46.

[236] *United Communist Party of Turkey v. Turkey*, § 54-58.

The problem of separatist program however came back in other Turkish cases, though even in case of the direct proposal to change the political system by creating some regulations on minorities and transforming the state into a federation of two nations, the Court rejected states' claim for the right to dissolve the party. In *Socialist Party v. Turkey* it held that the sole fact that the party's program strives for changes in the political system, and as such is not compatible with the existing constitutional principles of the country, does not mean that it is incompatible with democracy, which according to the Court "allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself".[237] That shows that even though, the Court does create a broad protection for the democratic discourse and opposes exclusion of some ideas from this discourse it still demands its participants to agree on the basic principles of democracy.

This was formulated even clearer in the other case concerning dissolution of the other Turkish political party – the People's Labour Party (*Yazar v. Turkey*),[238] which also advocated the rights of Kurdish nation and was dissolved on the basis that it undermined the integrity of the country. In its judgment, holding that the dissolution violated art. 11 of the Convention, the Court reiterated principles established above and clarified some elements of the analysis whether the dissolution meets the criterion of necessity in a democratic society. It clearly stated that the party advocating the change in the political system enjoys protection on the basis of the Convention if it satisfies the following test:

> "a political party may campaign for 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 in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a

[237] Judgment of May 25, 1998, *The Socialist Party and others v. Turkey*, application no. 21237/93, §47.
[238] Judgment of April 9, 2002, *Yazar and Others v. Turkey*, applications nos. 22723/93, 22724/93 and 22725/93.

> democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds"[239]

It is characteristic that, although the language used in this test seems similar to the earlier applications of the art. 17 of the Convention, here it is clearly a part of analysis based on section 2 of the article 11. In addition to that the Court emphasized that the necessity of the limitation includes establishment that the dissolution was caused by a "pressing social need", was "proportionate to the legitimate aims pursued" and reasons for it were "relevant and sufficient".[240] All those elements, as well as the phrasing of the above quoted test were repeated and developed in the most important case involving party dissolution in the recent Court's jurisprudence – *Refah Partisi v. Turkey*[241].

3.4.2. *Refah Partisi v. Turkey*

The *Refah Partisi* (the Welfare Party) *case* is unique for a few reasons. First of all it established a number of current criteria according to which the ways of dealing with a controversial political activity are assessed on the basis of the Convention. Second of all, in this subject it is the most commented and controversial decision.[242] Paradoxically it established a test that is much more difficult for the states to meet than the previous criteria, but at the same time unlike in the above mentioned cases it declared the dissolution of Refah Party justified. But probably most interestingly and controversially, it concerned the party that

[239] *Yazar v. Turkey*, § 49.
[240] *Yazar v. Turkey*, § 51.
[241] Judgment of July 31, 2001 (Third Section), *Refah Partisi* (Welfare Party) v. Turkey, applications nos. 41340/98, 41342/98, 41343/98 and 41344/98; Judgment of February 13, 2003, *Refah Partisi* (Welfare Party) v. Turkey, applications nos. 41340/98, 41342/98, 41343/98 and 41344/98.
[242] See e.g. Alain Bockel, "Le droit constitutionnel turc à l'épreuve européenne. Réflexions à partir d'une décision de la Cour constitutionnelle turque portant dissolution du parti islamique REFAH", *Revue française de droit constitutionnel* 40 (1999): 911; Kevin Boyle, "Human Rights, religion and democracy: The Refah Party Case", *Essex Human Rights Review* 1 (2004): 1; Gilles Lebreton, "L'islam devant la Cour européenne des droits de l'homme", *Revue du droit public et la science politique en France et a l'étranger* (2002): 1493; Michel Levinet, "L'incompatibilité entre l'Etat théocratique et la Convention européenne des droits de l'homme. A propos de l'arrêt rendu le 13 février 2003 par la cour de Strasbourg dans l'affaire Refah Partisi et autres c/Turquie", *Revue française de droit constitutionnel* 57 (2004): 207; Patrick. Macklem, "Militant democracy, legal pluralism, and the paradox of self-determination", *International Journal of Constitutional Law* 4 (2006): 488; Ben Olbourne, "Refah Partisi (Welfare Party) v Turkey", *European Human Rights Law Review* 8 (2003): 437.

had a very significant social support and was an important player on the Turkish political scene, what makes it dissolution not only an interference in the rights of a small group of politicians and their supporters considered as extremist by the rest of the society, but actually infringes upon the political representation of the significant part of the society.

Refah was a political party, which in the last general elections before its dissolution obtained 22% of votes, what made it the largest party in the parliament. In the local elections its support reached 35 %.[243] Its leader Necmettin Erbakan, was for considerable time a Prime Minister of the country.[244] However in 1998, by the decision of the Constitutional Court, the party was dissolved as a "center of activities contrary to the principle of secularism".[245] The European Court of Human Rights reviewed the application of the Party in the two instance procedure. First judgment was issued in 2001 by the Third Section of the Court, the second and final one, by the Grand Chamber in 2003.[246] Both held that there was no violation of art. 11.

The court carefully analyzed the program of the party and the speeches given by its leaders. It established that the party advocated some changes in the legal order in Turkey. It *inter alia* wanted to introduce the plurality of legal systems governing the life of certain communities according to their religion. The special status was to be granted to the law based on Islamic law (sharia) as a legal order binding for Muslims as well as between them and other groups in a society. Moreover the speeches of its leaders referred to the concept of jihad, in a way that according to the Court proved that the party did not exclude the possibility to

[243] *Refah Partisi v. Turkey* (Third Section), § 10.
[244] On the Erbakan's government and the political context of the case see e.g. Bockel, "Le droit constitutionnel turc,", 912-914.
[245] *Refah Partisi v. Turkey* (Third Section), § 22
[246] Procedure of the review of the decisions of the Court issued by its Sections was introduced by the Protocol 11 to the Convention. It provides the possibility to appeal from the decision issued by the Court sitting as a Chamber (7 judges, being part of one Section) to the Grand Chamber (17 judges) when the case "raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance" (art. 43 of the Convention). On this procedure see: Nowicki, *Wokół Konwencji*, 62-63.

use force in order to achieve political goals.[247] In both judgments the Court declared that the legal order proposed by the party was incompatible with democracy, first because treating citizens differently on the basis of their religion was discriminatory and second, because sharia as such was, according to the Court, irreconcilable with democratic principles such as political pluralism and human rights.[248]

Both judgments repeated a lot of principles referring to the status of political parties under the Convention, indicated in previous judgments, especially when clearly indicated that the system proposed by the party was not only incompatible with the current constitutional order in Turkey, but also with democracy and the guarantees of human rights stipulated by the Convention, and that the party did not disapprove of violence as a mean to achieve its goals.

As a new element, the Court emphasized there was a probability that the party would realize its aims. First, because it had considerable social support and having almost one third of the seats in the Parliament had a chance to implement its policy (especially if the support would grow). Second, because experience shows that some political movements based on religious fundamentalism in other countries have seized the power and introduced their visions of social order. In case of the Chamber decision the Court used the argument of the real chance that the party will realize its aim as an additional element in establishing the "pressing social need" for a dissolution, though it seems that it mainly relied on the test applied in Yazar. However the Grand Chamber considered the issue of probability of the party's implementation of its policy more thoroughly. It established that the "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 (…), even though the danger of that policy for

[247] *Refah Partisi v. Turkey* (Third Section),§ 69-76.
[248] *Refah Partisi v. Turkey* (Third Section), § 72; *Refah Partisi v. Turkey* (Grand Chamber), § 125. That is actually the most criticized part of the Court's decisions. Some scholars argue that the court treated Islam in a very superficial and stereotypical way and misunderstand the idea of legal pluralism (Boyle, "Human Rights, religion and democracy," 12-14, Macklem, "Militant democracy," 510-512).

democracy is sufficiently established and imminent".[249] In addition to that it set some points that have to be considered when examining the existence of "pressing social need" for a dissolution, namely:

> "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'"[250]

Whereas the third element of the analysis proposed here is a paraphrase of the already established two-part test from *Yazar* and the second refers to the possibility to determine the real content of the party's program, so actually the procedural issue of evidence, the first one is a new element in the Strasburg jurisprudence and it is arguable that it constitutes an American influence.[251]

3.4.3. The application of *Refah* test in the subsequent jurisprudence

The two part test emerged in Refah case became a standard for an assessment of the justification to suppress some political movements under the European Convention. It was applied in a number of subsequent cases concerning political parties and other organizations with political goals, usually to establish that there has been a violation of art. 11, though it was not always reiterated in its full version. In some cases as already the application of its first part (the compliance of the program with basic principles of democracy and lack of resort

[249] *Refah Partisi v. Turkey* (Grand Chamber), § 102 (emphasis mine).
[250] *Refah Partisi v. Turkey* (Grand Chamber), § 104
[251] See e.g. Stefan Sottiaux, "Anti-democratic Associations: Content and Consequences in Article 11 Adjudication", *Netherlands Quarterly of Human Rights* 22 (2004) 585; Docquir, *Variables et variations*, 56. For an interesting comparison between the American clear and preset danger test with the approach applied in the first judgment in Refah case, before the one by Grand Chamber, see: Stefan Sottiaux and Dajo de Prins, "La Cour européenne des droits de l'homme et les organisations antidémocratiques", *Revue trimestrielle des droits de l'homme* 52 (2002): 1008.

to violence) allowed to establish a violation.[252] For example the Court held that the sole fact that the organization seeks the autonomy for a part of the state or even secession of it does not constitute a justified reason to dissolve it, as territorial changes when executed peacefully are not contrary to the principles of democracy.[253] Similarly, the project to restore a constitutional monarchy by bringing back to force the Constitution that was in effect in a country at the end of the nineteenth and the beginning of twentieth century and provided for the democratic system, is not the one that can justify suppression of the association.[254]

In addition to that, in some cases concerning the approach either to communist parties or the programs of the parties referring to the ways of dealing with the totalitarian past, the Court when quoting the second part of the *Refah* test, showing the elements that have to be taken into consideration when assessing "pressing social need" added that the overall examination of those elements has to take into consideration the historical context of the case.[255]

In this way the jurisprudence of the European Court of Human Rights developed a way of dealing with political movements that are declared by the states, parties to the Convention, illegal, in a more sophisticated and complicated way than it was done under the Commission's jurisprudence. The introduction of the danger element to the test, was certainly inspired by the American jurisprudence and did made it more difficult for the state to ban an organization. However, though the element of sufficiently imminent danger seems to correspond with some formulations of the "clear and present danger" test – either in its

[252] This approach was not taken completely consequently. In one of the admissibility decisions the Court declared an application manifestly ill founded and therefore inadmissible only on the basis that the association in question did advocate a change of political and legal order into the one based on sharia and did not proceed with the assessment of the chances of success. However in this particular case there was more of the evidence for the organization readiness to use violence, especially as it threatened to murder some of their opponents (Decision of December 11, 2006, *Kalifatstaat v. Germany*, application no. 13826/04.

[253] Judgment of October 20, 2005, *United Macedonian Organisation Ilinden – Pirin and others v. Bulgaria*, application no. 59489/00.

[254] Judgment of June 21, 2007, *Zhechev v. Bulgaria*, application no. 57045/00.

[255] Judgment of February 3, 2005, *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, application no. 46626/99, § 48; Judgment of December 7, 2006, *Linkov v. Czech Republic*, application no. 10504/03, § 37.

traditional formulation by Holmes, or in the current version – it is still much less speech-protective. The *Refah* approach do not assume that the actions taken by the party in order to realize its aims have to be illegal. It provides also for the possibility to ban a party that wants to obtain power by democratic means and change the legal system according to its procedural rules (e.g. by amending the constitution), if only there is sufficiently imminent danger that it will succeed. On the contrary, even under the most restrictive formulations of the clear and present danger, it seems unlike that the US Supreme Court would classify the victory of the party in elections and legal changes of the political order as "substantive evils that Congress has a right to prevent".[256] In this sense European approach continues to be much more oriented at the protection of the substantive content of democracy than only on the lawful and peaceful procedures.

[256] *Schenck v. US*, 249 U.S. 47, 52

CONCLUSION

In the light of the above considerations it seems clear that at least with regards to the assessment of the possibility to limit political movements' rights on the basis that they are seen as extremist – either because using methods unaccepted in democracy or because propagating ideas incompatible with it – the American and European approaches are and has always been different. European jurisprudence puts a lot of emphasize on the substantive context of democracy and the rights guaranteed and although it underlines the central role of pluralism and political discourse in democracy, it also demands them to agree on some basic principles. The American approach emphasizes the existence of "free market of ideas" and, at least at the level of rhetoric, is ready to admit to this market every idea. The controversies here start not on the level of idea advocated, but on the level of intent and possibility to resort to illegal means in to realize them.

This difference can be seen as a reflection of the historical background of the two systems. The American one associates its historical oppression with the colonial period, when there was no democratic system and free speech in the modern understanding of the concept, or with the persecution for political speech in the Sedition Act times. The European one, on the contrary, links the darkest period in the modern history with the consequences of the seizure of power by extremist movements in the way that, at least in its main points, was, formally speaking, legal and enjoyed considerable social support, giving it democratic legitimization.

Moreover, the wording of the texts on which the work of the two Courts is based, seems to distance the two approaches even more. The provisions of the European Convention on Human Rights on limitation and especially on abuse of rights seem strikingly limiting the activities of political movements when compared to the absolute phrasing of the First

Amendment. Those different wordings gives more discretion to the American court than to the European Court of Human Rights, which of course also has to deal with very vague notions (like necessity in a democratic society), but still has more guidance in the text that the interpreters of the First Amendment.

However some elements of the jurisprudence, such as a new element in *Refah* test or earlier opinion of Justice Jackson in Dennis, show that the two systems, though based on different assumptions, do stay in some kind of conversation. It is likely that this will continue to develop, especially if the jurisprudence will evolve. That is unfortunately quite probable under current problems with the links between political groups and terrorism or religious fundamentalism. As it was mentioned above some scholars claim that Brandenburg test can fail o survive this challenge. Also in the European Court of Human Rights, the next important decision may concern the issue of terrorism, as currently there is an important case pending before the Court, concerning dissolution of a Spanish political party, which was closely connected to ETA.[257] This further development will certainly be an interesting field for a further research.

[257] Decision on admissibility of December 11, 2007, Herri Batasuna and Batasuna v. Spain, application nos. 25803/04 and 25817/04.

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