

Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights' Case Law on Freedom of Expression and Freedom of Association

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Introduction

The close relationship between the rights to freedom of expression (Article 10 ECHR) and freedom of association (Article 11 ECHR) is a recurring theme in the case law of the European Court of Human Rights. For almost three decades, the refrain has been that “the protection of opinions and the freedom to express them is one of the objectives of the freedom (...) of association.”¹ The nexus between expression and association becomes particularly visible in the Convention jurisprudence on political parties. The Court considers the activities of political parties as part of a collective exercise of freedom of expression.² Moreover, individual and collective political expression serve the same purpose, namely to ensure the proper functioning of democracy.³ This common rationale is mirrored in the Court’s general approach to assessing limitations on political speech and political association. In view of their specific role in the democratic process, both are said to enjoy heightened protection. Only “very strong”⁴ or “convincing and compelling”⁵ reasons can justify restrictions on political debate and the activities of political parties respectively.

Although the correspondence between political speech and association is well-known, the practical consequences of this relationship have received surprisingly little attention from courts and scholars. The common theoretical background would suggest an analogous, or at least a consistent, approach to the treatment of the different types of interference with Articles 10 and 11 in the context of the democratic process. However, when one takes a closer look at the actual doctrinal standards developed to assess restrictions on the expressive activities of politicians and political parties, it becomes clear that such a coherent

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¹ See e.g. *Young, James and Webster v United Kingdom*, 13 August 1981, Series A, No. 44, para. 57.

² *United Communist Party v Turkey*, 30 January 1998, Reports 1998-I, para. 43.

³ See in the context of Article 11 e.g. *United Communist Party v Turkey*, paras. 24-25; in the context of Article 10 e.g. *Lingens v. Austria*, 8 July 1986, Series A, No. 103, para. 42.

⁴ *Feldek v. Slovakia*, 12 July 2001, Reports 2001-VIII, para. 83.

⁵ *United Communist Party v Turkey*, *supra* note 2 at para. 46.

approach is currently lacking. The Court's review of the limitations on antidemocratic speech and association differs both from a substantive and the methodological point of view. Whereas the approach under Article 11 can be described as an 'intermediate scrutiny' structured balancing test, interferences with Article 10 interests are still often decided in a purely ad hoc manner. Moreover, while the Article 11 inquiry focuses both on the content and the consequences of a political party's program and activities, the Court's free speech jurisprudence allows for the regulation of speech based merely on the "incompatibility" of its content with certain Convention values. Hence, the Court appears to give more protection to political parties than individual participants in the democratic process.

It is the purpose of the present article to analyse the democratic function of freedom of expression and freedom of association and its consequences for the relationship between both rights. We shall demonstrate that political parties indeed occupy a preferred position in the Court's Article 11 jurisprudence and argue, subsequently, that the special protection of the expressive liberties of political parties over the expressive liberties of other associations or individuals is unjustified. Building on a concentric model of democracy we argue, to the contrary, that in view of their closeness to the centre of actual political decision-making, restrictions on political parties can be more readily justified than those on other associations or individuals. This does not mean, however, that the current Article 11 standards should become less protective. Instead, we argue that democracy requires that the protection of the right to freedom of expression under Article 10 should further be strengthened.

The paper starts with a closer look at the Strasbourg Court's current practice with regard to Articles 10 and 11 (I). Following that, we turn to the account of democracy underlying the Court's decisions and argue that this account, in spite of its virtues, is not fully adequate because it fails to fully overcome the opposition between procedural and substantive views of democracy (II). In the next section, we provide a more comprehensive, concentric model of democracy (III) and subsequently explain how this model generates a more coherent vision of the roles of freedom of expression (IV) and freedom of association (V) in maintaining and defending a dynamic and robustly democratic political system.

I. The ECtHR's Current Articles 10 and 11 Practice: the Privileged Status of Political Parties

On the abstract level, the approach to the limitation of the rights protected in Articles 10 and 11 is very similar. For an interference with freedom of expression or association to be

justified under the second paragraph of these provisions, the Court examines whether it is ‘prescribed by law’, pursues a ‘legitimate aim’ and is ‘necessary in a democratic society’. As noted, the necessity standard is to be interpreted strictly where political speech and association is concerned, in view of the essential role they perform in ensuring the proper functioning of democracy. However, when one looks beyond the official rhetoric, it becomes clear that the case law is characterised by a great diversity of approaches. This section provides an overview of some of the doctrinal standards developed to address measures aimed at the suppression of what might loosely be called ‘antidemocratic expressive activity’.

1. “Drastic Measures” Against Political Parties: the *Refah*-Test

The Article 11 standard to assess restrictions on antidemocratic political parties is well settled. It was developed in a series of cases against Turkey, a process which ultimately culminated in the landmark judgement of *Refah Partisi (the Welfare Party) and Others v. Turkey*.⁶ The Court in this case upheld the dissolution of the political party Refah by the Turkish Constitutional Court. It agreed with the Turkish Government that the political plans of Refah were incompatible with the concept of a secular democratic society, since the acts and speeches of its members and leaders revealed the party’s long-term policy of setting up a regime based on Islamic law. The Court also accepted the contention that some of Refah’s leaders did not exclude recourse to violence in order to implement its policy. The case is important in that the Grand Chamber for the first time adopted a full-scale test to review far-reaching interferences with the right to freedom of association of anti-democratic political parties. This test can best be characterised as a structured balancing method: it translates the open-ended democratic necessity test into a more or less fixed sequence of questions.⁷ What is important to note is that the *Refah*-test requires courts to look both at the *content* and the *consequences* of a political party’s program and activities in order to decide whether drastic measures, such as dissolution, can be justified.

At the outset of its opinion, the Court took a rather ‘militant’ approach, pointing out that “no-one must be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society”.⁸ A political party may campaign for a change in the law and the constitutional basis of the state, the Court continued, if two conditions are met: (i) the means used to that end must be legal and democratic and

⁶ *Refah Partisi (the Welfare Party) and others v. Turkey*, 31 July 2001 (Third Section); *Refah Partisi (the Welfare Party) and others v. Turkey*, 13 February 2003, Reports 2003-II (2003) (Grand Chamber).

⁷ Stefan Sottiaux and Gerhard van der Schyff, “Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights”, 31 *Hastings Int’l & Comp. L. Rev.* 115, 155 (2008).

⁸ *Refah Partisi (the Welfare Party) and others v. Turkey* (Grand Chamber), *supra* note 6 at para. 99.

(ii) the change proposed must itself be compatible with fundamental democratic principles.⁹ This inquiry is to a large extent content-based, as it focuses on the nature of a political party's programme. If a party puts forward "a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy", the second requirement is not met.¹⁰ However, in a second step, the Court went on to stress that its supervision must be rigorous where political parties are concerned. Drastic measures may be taken only in the most serious cases.¹¹ In this connection, the Court reflected on what it called "the appropriate timing for dissolution": "a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent".¹² In light of these considerations, the Court articulated a new overall standard for deciding whether the dissolution of a political party can be justified under Article 11. The test asks the following three questions: "(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".¹³

What conclusions can be drawn from the *Refah* case? As noted, the ultimate test put forward by the Grand Chamber is both content- and consequence-based: not only need the model of society advocated by the party be incompatible with the concept of democracy; it must also present a tangible and immediate danger to the democratic regime. There is no room for drastic measures against political parties for the sole reason that the ideas they promote are undemocratic. According to the first prong, the national authorities must provide evidence that the "risk to democracy" is "sufficiently imminent".¹⁴ This terminology is reminiscent of the United States Supreme Court's context-sensitive 'clear and present danger' formula.¹⁵ The consequentialist nature of this inquiry is illustrated by the European Court's application of the general principles to the dissolution of the Welfare Party. To reach the conclusion that the measure had been justified, the Court took into

⁹ *Refah Partisi (the Welfare Party) and others v. Turkey* (Grand Chamber), *supra* note 6 at para. 98.

¹⁰ *Id.* para 98.

¹¹ *Id.* para. 100.

¹² *Id.* para. 102.

¹³ *Id.* para 104.

¹⁴ *Id.* para 104.

¹⁵ See *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). For a comparison, see Stefan Sottiaux, "Anti-democratic associations: content and consequences in article 11 adjudication", 22 *Netherlands Quarterly of Human Rights* 585, 596 (2004).

account the specific historical context of Turkey, the actual election results of the party and the forecast of opinion polls.¹⁶ The *Refah* principles have been confirmed in subsequent cases, but their application by the different Sections of the Court has not always been rigorous and consistent.¹⁷ For instance, in *Herri Batasuna v. Spain*, a case in which the Fifth Section upheld the dissolution of a Spanish political party for its implicit support of terrorism, the Court did little to explain why the existence of Batasuna amounted to a sufficiently imminent threat to Spanish democracy. It contented itself with the observation that, given the sensitive situation in the Basque region, the link between Batasuna and the terrorist organisation ETA could be considered as an objective threat to democracy.¹⁸

2. Restricting Political Speech: Ad Hoc Balancing and Bad Tendency

As noted, the European Court's review of restrictions on antidemocratic speech under Article 10 differs from the *Refah* approach both from a substantive and methodological perspective. An important feature of the Article 10 decisions is that content-based restrictions are not regarded as *a priori* suspicious. On the contrary, the Court has permitted the regulation of speech on the basis of content in many different areas. Sometimes the Court even goes as far as to say that certain ideas or proposals are "incompatible" with the "spirit" of the Convention and therefore beyond the pale of protection. This approach is most visible in the Article 17 inadmissibility decisions,¹⁹ but also penetrates the Court's necessity analysis under Article 10, § 2. The major methodological difference lies in the Court's reliance on overly vague concepts, allowing it to adjudicate free speech cases in a purely ad hoc fashion.²⁰ A good illustration of both these features can be found in the treatment of hate speech. We have chosen to focus on this category because in Europe to-

¹⁶ The Welfare Party obtained about 22 per cent of the votes in the 1995 general elections and about 35 per cent of the votes in the 1996 local elections. The forecast of the opinion polls indicated that the party could have obtained 67 per cent in the next general elections. See *Refah Partisi (the Welfare Party) and others v. Turkey* (Grand Chamber), *supra* note 6 at para. 107.

¹⁷ See e.g. *Parti Nationaliste Basque – Organisation Régionale D'Iparralde v. France*, 7 June 2007, para. 49; *Herri Batasuna and Batasuna v. Spain*, 30 June 2009, para. 83.

¹⁸ *Herri Batasuna and Batasuna v. Spain*, *supra* note 17 at para. 89.

¹⁹ See e.g. *Garaudy v. France*, 24 June 2003, Reports 2003-IX ("The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention.").

²⁰ One notable exception to the ad hoc approach is the Court's incitement standard for the assessment of restrictions on subversive or violence-conducive speech. See e.g. *Sürek v. Turkey (No. 1)*, 8 July 1999, Reports 1999-IV, para. 61. However, recent cases reveal a lack of consistency in the application of the standard. See Stefan Sottiaux, "Leroy v. France: Apology of Terrorism and the Malaise of the European Court of Human Rights' Free Speech Jurisprudence", *European Human Rights Law Review* 413 (2009).

day hate speech laws are among the prime tools with which prosecutors may target political speech.²¹

The Strasbourg Court has consistently held that hate speech is a category of speech unworthy of Article 10 protection. This position is, of course, far from unique. It reflects the approach taken in numerous international instruments and national jurisdictions. However, what distinguishes the Court's approach from many other efforts to review hate speech bans, most notably that of the Canadian Supreme Court, is that it makes no attempt whatsoever to define the notion of 'hate speech' or to set out conditions for its application.²² Thus, in *Jersild v. Denmark* the Court held that "expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention".²³ According to the Court in *Gündüz v. Turkey*, "like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention".²⁴ In the most recent case of *Féret v. Belgium* the Court considered it necessary "to prohibit or prevent all types of expression which advocate, incite, promote or justify hate based on intolerance".²⁵

The problem with these observations is that they fail to provide a clear and predictable standard for the assessment of hate speech regulations. What is, for instance, meant by "hate based on intolerance"? When is speech sufficiently "offensive" to permit its proscription? The Court does not say. A related problem is that the Court takes a very generous perspective as to the justifications for hate speech laws. It cites a great variety of social harms which may be caused by hate speech, without indicating how they will ultimately affect its proportionality analysis. For example, in *Féret*, the Court not only argued that hate speech may be insulting to the members of the target group or result in violence or discrimination, but also that it presents a danger to "social peace" and "political stability", even that it may provoke reactions which are "incompatible with a serene social climate".²⁶ As regards the causal link between these harms and the impugned expression, the Court seems to apply a very low threshold, asking whether a statement risks or has a tendency to instil certain attitudes of hostility among the public.²⁷ All in all, the

²¹ For a characterisation of hate speech as political speech, see the majority and minority opinions of the Canadian Supreme Court in *R v. Keegstra*, [1990] 3 S.C.R. 697.

²² See *infra* Title V.

²³ *Jersild v. Denmark*, 23 September 1994, Series A, No. 298, para. 35.

²⁴ *Gündüz v. Turkey*, 4 December 2003, Reports 2003-XI, para. 51.

²⁵ *Féret v. Belgium*, 16 July 2009, para. 64.

²⁶ *Id.* para. 77.

²⁷ See e.g. *Féret v. Belgium*, *supra* note 25, para. 69 ("de nature à susciter") and para 77 ("risque de susciter"); *Le Pen v. France*, 7 May 2010 ("susceptibles de susciter un sentiment de rejet et d'hostilité").

Court has so far refused to formulate a more or less fixed test to structure its inquiry in hate speech cases and to limit the reach of the concept. The result is a concept of hate speech which is so broad and vague that it cannot be excluded that legitimate instances of political expressions will be caught by it. When one takes a closer look at some of the recent decisions in this area, one may indeed wonder whether the Court has not gone too far in protecting against the harms caused by hate speech at the expense of the right to freedom of expression. Thus, in *Féret*, the Court upheld the far-reaching sanctions against the chairman of the Belgian Front National, including a 10-month suspended prison sentence and a 10-year period of ineligibility to stand as a candidate for parliament. Mr. Féret was convicted as author and editor-in-chief of a series of political leaflets, which were primarily aimed at criticising the government's immigration policy. Although the leaflets contained some offensive and Islamophobic language,²⁸ to many their classification as "clearly inciting to discrimination and racial hatred" was exaggerated.²⁹ In *Willem v. France* the Court saw no reason to call into question the conviction of the mayor of a French town who had openly called for a boycott of Israeli products to protest the anti-Palestinian policies of Israel.³⁰ Again, one may wonder whether hate speech laws should properly be aimed at this type of political statements. Finally, in *Le Pen v. France*, the application of the French right-wing politician against his conviction for the 'provocation of discrimination' was summarily declared inadmissible.³¹ In a newspaper, Mr. Le Pen had used vexatious language to describe the dangers of the growing Muslim population in France.

3. Conclusion

In this section, an attempt was made to compare the European Court's approach to anti-democratic expressive activity under Articles 10 and 11. As regards the latter, the Court seems to require a minimum level of potential harm to the democratic regime in order to justify drastic freedom limiting measures. Through the incorporation of the condition of a 'sufficiently imminent risk to democracy' in the *Refah*-test, the Court guards against restricting political parties on the basis of words or ideas alone. The result is that smaller or insignificant parties may not be subject to drastic measures, however repugnant their proclaimed goals may be. A similar inquiry into context and consequences is largely absent in the Article 10 hate speech cases, where the focus is very much on the offensive, dis-

²⁸ For instance, in one leaflet refugees were held responsible for poisoning the life of local habitants. Another leaflet contained language assimilating Muslims with terrorism. For the Court's analysis of the leaflets, see *Féret v. Belgium*, *supra* note 25 at para. 71.

²⁹ See the lengthy dissenting opinion by Judges Sajó, Zagrebelsky and Tsotsoria in *Féret*. The case was decided by a narrow 4-3 majority. For a critical account of the Court's recent hate speech decisions, see D. VOORHOOF, case note: *Féret v. Belgium*, 11 *Mediaforum* 10 (2009).

³⁰ *Willem v. France*, 16 July 2009.

³¹ *Le Pen v. France*, *supra* note 27.

criminary or otherwise antidemocratic tenor of the impugned expressions. The actual effects an expression produces seem of minor importance in the Court's overall assessment. It suffices that a proposal has some tendency to cause social evils for the national authorities to have the right to intervene. Thus, in *Féret*, the Court was unwilling to protect a political discourse which had the tendency of arousing, "particularly among the least informed members of the public, feelings of distrust, rejection or even hatred towards foreigners".³² This is an approach that reminds us of the First Amendment 'bad tendency' test,³³ a test which has been discredited for its failure to protect political speech and which was replaced by the 'clear and present danger' formula.³⁴ The result is that the expressive activities of individuals appear to receive a lower level of protection than the collective efforts of political parties. Thus, for instance, a discriminatory policy proposal, though unprotected under Article 10, does not necessarily justify interference with Article 11 interests.

II. The Court's Account of Democracy: Dealing with the Paradox of Tolerance?

How can the difference in approach under Articles 10 and 11 be explained? Why would the European Court concentrate on the "tangible" and "immediate" danger an association poses to the democratic regime, while in the context of Article 10 the content of an expression or its mere tendency of producing social harm, may suffice to justify speech restriction? An answer can be found in the essential role political parties perform in the functioning of democracy. The case law is categorical on this point: political parties make an "irreplaceable contribution" to political debate to the extent that democracy would be "inconceivable" without the participation of a plurality of parties representing different opinions.³⁵

Although the arguments developed by the Court in favour of the special protection of political parties have a *prima facie* plausibility, they remain problematic. They succeed indeed in pointing out the central importance of political parties in the democratic process and they do provide sufficient grounds to take the protection of their freedom of association fully seriously. The arguments fail, however, to explain why the elevated level of protection should be limited to political parties and why it should not be extended to also cover the abilities of other groups as well as individuals to freely express themselves on issues of public interest. Although the Court develops two main lines of reasoning in favour of the exceptional position of political parties, both fail to convincingly justify a dis-

³² *Féret v. Belgium*, *supra* note 25 at para. 69.

³³ See Geoffrey R. Stone, "The Origins of the 'Bad Tendency' Test: Free Speech in Wartime", *Supreme Court Review* 411 (2002).

³⁴ See the cases cited *supra* note 15.

³⁵ *United Communist Party v Turkey*, *supra* note 2 at para. 44.

tinctive treatment of political parties on the one hand and other participants in the public debate on the other.

The first line of argumentation focuses on the irreplaceable role of political parties as contributors to the *public debate*.³⁶ Here, political parties seem to have what has been called a *multiplier effect*, in the sense that they give voice to the opinions of thousands or even millions of voters at once.³⁷ This argument is unconvincing for two reasons. First of all, depending on the situation, non-political associations or even individuals can take on a similar role as well. Civil society organisations often represent the interests of large groups of people and speak on their behalf when certain public or political issues of concern to them have or should become the topic of public debate. Similarly, victims of certain crimes, members of minority groups or people with certain illnesses – to give some random examples – can, on the basis of their life story, become symbolic representatives of a larger group of people and as such the spokesmen or spokeswomen of these larger groups when certain issues or problems in society are put on the public agenda. Secondly, the multiplier effect works both ways. To the extent that the expression of certain ideas causes harm or offense to others, the harm or offense caused will be multiplied if these ideas are expressed on behalf of a larger group of people. Therefore, in so far as these harms are a possible ground for the restriction of the expressive rights of individuals or other associations, they will provide an even stronger ground for the restriction of the rights of political parties expressing the same ideas. What both these counterarguments illustrate is that an argument based on the essential role of political debate in a democratic society and a concern for the diversity of opinions expressed in that debate, cannot be used to confine the elevated level of protection to political parties only. Instead, a consistent elaboration of this argument should result in a claim for the special protection of all contributions to the political debate and thus in a claim for the protection of political speech generally, irrespective of its origin or the amount of people represented by the speaker.

The second main line of reasoning seems to focus on the *political power* of parties and their ability to actually shape policies and to change society.³⁸ Although it is indeed true that political parties have a unique role to play in this regard, it remains unclear why this should be a ground to offer them more leeway than other political actors to freely express, advocate and pursue their ideas and goals. Indeed, an argument concerning the special *leverage* of political parties easily works the other way around as well.³⁹ Precisely

³⁶ *Id.*

³⁷ Eva Brems, “Freedom of political association and the question of party closures” in Wojciech Sadurski (ed.), *Political Rights under Stress in 21st Century Europe* 120, 148 (Oxford University Press, 2006).

³⁸ See *Refah Partisi (the Welfare Party) and others v. Turkey* (Grand Chamber), *supra* note 6 at para. 87.

³⁹ Eva Brems, *supra* note 37 at 148-149.

because of their potential impact on policies and future legislation, one should be more concerned rather than less about the ideas such parties are proliferating. If a concern for the preservation of the democratic regime could indeed be, as the Court explicitly concedes, a sufficient ground for the regulation and restriction of certain basic liberties, and if it is agreed that political parties are indeed the main power players able to reshape society, then restrictions on what these parties are allowed to say or do seem *prima facie* more justifiable than similar restrictions on other less powerful contributors to the political process.

In order to get a better grasp of the reasoning of the Court and its potential shortcomings, it is instructive to broaden our scope and look at the conception of democracy underlying the Court's opinions. The question as to what extent political parties may be regulated provides an instance of the more general *paradox of tolerance*. The problem is well-known: if a democratic society takes action against its enemies, it risks violating its foundational principles. However, if it fails to take action, it becomes vulnerable to attempts by its challengers to undermine its proper existence. The different solutions to this problem are traditionally associated with two competing conceptions of democracy.⁴⁰ The *procedural* view of democracy conceives of democracy first and foremost as a basic set of procedures – such as elections and voting schemes – which regulate political decision making.⁴¹ In this view, the legitimacy of political decisions derives from the legitimacy of the procedures through which they are reached, irrespective of the content of the outcomes. Consequently, this view rejects content-based regulations of the ideas that are expressed and advocated throughout the democratic process as inappropriate government interference.⁴² The *substantive* notion of democracy, by contrast, understands democracy essentially in terms of a set of core values such as liberty and equality. In an effort to protect the system, political actors advocating ideas that are at odds with these values may be subject to restrictive measures.⁴³ Interestingly, the Strasbourg Court refuses to accept the dichotomous choice between these two options. Instead, the Court emphasises both the substantive *and* the procedural nature of democracy. As noted, the militant, substantive view is clearly mirrored in the Court's observation in *Refah* that parties campaigning for a constitutional change can do so only if the changes aspired to are compatible with basic democratic principles. However, the Court also emphasises the central role of the democratic process and considers the preservation of a dynamic political culture, in which a

⁴⁰ Gregory Fox and Georg Nolte, "Intolerant democracies", in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* 389 (Cambridge University Press, 2000).

⁴¹ Robert Dahl, *Democracy and its Critics* (Yale University Press, 1989); Joseph Schumpeter, *Capitalism, Socialism and Democracy* (George Allen and Unwin, 1943).

⁴² Meindert Fennema and Marcel Maussen, "Dealing with Extremists in Public Discussion: Front National and "Republican Front" in France", 8 *The Journal of Political Philosophy* 379 (2000).

⁴³ Karl Loewenstein, "Militant democracy and fundamental rights, I and II", *American Political Science Review*, 31 (3), 417-432 and 31 (4), 638-658 (1937).

wide variety of voices can be heard, as one of its central concerns. As mentioned, the special position of political parties and the inclination of the Court to accept drastic measures only in the case of a “sufficiently imminent danger” to the system is justified in more proceduralistic terms as a concern for the open and pluralistic nature of the democratic process.

Although this dual stance of the European Court, emphasising both the procedural and the substantive nature of democracy, is generally convincing, it remains problematic in the sense that the Court has failed, until now, to provide a more complete account of its conception of democracy, one that is able to explain how these potentially conflicting commitments to both substance and procedure can be adequately reconciled. That the relationship between substance and procedure is in need of a more elaborate articulation becomes particularly clear in the argumentation concerning the privileged protection enjoyed by political parties as compared to other associations or individuals. In its justification of this preferred position, the Court seems to switch in an ad hoc and, therefore, unconvincing manner between procedural and more substantive arguments. As has been seen, the Article 10 cases seem to be more in line with a substantive view, allowing content-based restrictions on the right to freedom of expression, whereas the Court’s Article 11 adjudication seems to give more weight to the procedural aspects of democracy and therefore aims to provide the fullest protection possible to political parties in order to preserve the openness of the democratic process. As argued above, the proposed justification for this difference in approach fails to convince and, as it stands, the Court still owes us a coherent and more encompassing account of democracy, which can convincingly and simultaneously explain and justify its approach in the free speech and freedom of association cases.

III. A Concentric Model of Democracy and the Guideline of Decreasing Tolerance

In response to the current deficiencies in the Strasbourg Court’s account of democracy, this paper defends a concentric model of democracy. It is submitted that this model provides a better explanation of the relationship between the procedural and substantive aspects of democracy and can serve as a framework for a readjusted and more coherent approach to the relationship between freedom of expression and freedom of association. The concentric model of democracy is generally in line with the deliberative model of democracy, which attaches special importance to the role of public debate and which has gained prominence amongst political theorists over the last couple of decades.⁴⁴ It is not

⁴⁴ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996); James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997); Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free

the purpose of this paper to defend a specific version of the concentric model. The argument we wish to develop concerning the relationship between freedom of expression and freedom of association does not depend on these specifics, but only builds on three basic claims, which we believe any normatively adequate model of democracy should endorse.⁴⁵

Firstly, democracy is concerned with certain *basic normative ideals such as liberty and equality*. Concentric democracy recognises these substantive elements of democracy and presents itself as a model of liberal or constitutional democracy which aims to protect the individual rights and liberties of all citizens indiscriminately. As argued by, for instance, Jürgen Habermas, liberal democracy should be understood as a constitutional project in which constitutional lawmaking as well as ordinary legislation is geared towards the impartial realisation of the equal liberty of all citizens.⁴⁶ Therefore, outcomes of the democratic process that are manifestly at odds with the basic values of liberty and equality are unacceptable and should accordingly be held unconstitutional. Although the concentric model thus recognises the normatively substantive core values of democracy, it also emphasizes, secondly, that the precise meaning of liberty and equality and the specific ways in which these ideals should be realised cannot be determined in an a priori manner by experts, philosophers or policy-makers. Since the requirements of liberty and equality depend on the particular circumstances of every specific society and on the interests, values and worldviews held by the citizens concerned, the impartial realisation of these ideals should be the outcome of an actual democratic process in which all the citizens affected can participate as equals. Citizen participation is thereby needed because only citizens themselves have adequate knowledge of their own needs and interests and any legislative process that bypasses actual citizens' participation takes the risk of ignoring or misunderstanding their concerns and expectations. In this sense, the *democratic process* is not simply an instrumental means of discovering independent 'truths' about liberty and equality, but is, rather, a constructive process in which the precise content of these ideas is determined through an inclusive democratic procedure.⁴⁷ If the need for actual citizen participation is recognised, the question arises, thirdly, as to how this can best be organised in the complex and large-scale societies of today. Here, we endorse the *concentric*

Press, 1995); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996).

⁴⁵ Compare Stefan Rummens and Koen Abts, "Defending democracy: the concentric containment of political extremism", *Political Studies* (forthcoming). A fuller elaboration of the model used here can be found in Stefan Rummens "Debate: the co-originality of private and public autonomy in deliberative democracy", 14 *Journal of Political Philosophy* 469 (2006); "Democratic deliberation as the open-ended construction of justice", 20 *Ratio Juris* 335 (2007); "Deliberation Interrupted. Confronting Jürgen Habermas with Claude Lefort", 34 *Philosophy & Social Criticism* 383 (2008).

⁴⁶ Jürgen Habermas, *supra* note 44.

⁴⁷ Stefan Rummens, "Democratic deliberation as the open-ended construction of justice", *supra* note 45.

model of the democratic process.⁴⁸ According to this model, decisions should be made in the formal and institutionalised core of the democratic system, which consists of, paradigmatically, parliament and the executive. However, deliberations in the political core should be influenced by arguments generated in the informal public sphere, which surrounds and ‘besieges’ the formal decision-making institutions. In this informal sphere, civil society organisations, individual citizens and media organisations all play a crucial role in putting issues on the agenda and in sustaining a public exchange of ideas and arguments.

If the concentric institutionalisation of democracy works properly, it is able to overcome the tension between the procedural and the substantive aspects of democracy in a satisfactory manner. In this regard, it is important to point out that a concentric democratic system is able to fulfil two crucial *epistemic functions*. On the *procedural* level, the concentric system is able to allow a fully open input of ideas and concerns at the periphery of the system. Individuals and groups should be able to raise their voices and to put forward concerns, ideas, policy proposals and arguments without many if any restrictions. In order to arrive at policies and legislation which take into account the concerns of all citizens involved, a fully open political debate is needed to ensure that these concerns are effectively discovered by the democratic system (*tracking*). On the *substantive* level, however, it is clear that not all concerns and desires voiced by citizens can be heeded in a straightforward manner. Interests and values of citizens will often clash with the legitimate interests and values of other citizens and will, therefore, have to be rejected as adequate grounds for public decision-making. The impartial realisation of liberty and equality is clearly at odds with, for instance, racist or sexist policy proposals. Therefore, the democratic system should not only track the concerns and ideas of citizens, but it should also transform them into proposals that are generally acceptable and give equal consideration to the interests and values of all people concerned. As ideas and concerns progress through the democratic system from the periphery of the informal public sphere to the core of actual parliamentary and executive decision-making, they should be filtered so as to provide a legitimate interpretation of the requirements of liberty and equality (*filtering*). It is precisely this distance between the original emergence of ideas at the periphery and the final decision-making in the core that allows for the reconciliation of procedural and substantive concerns in the shaping of a democratic process, which is open and inclusive as well as transformative and geared towards the substantive values of liberty and equality.

⁴⁸ Jürgen Habermas, *supra* note 44 at 306-308, 352-359; Bernhard Peters *Die Integration moderner Gesellschaften* 327-352 (Suhrkamp, 1993); Carolyn Hendriks, “Integrated deliberation: Reconciling civil society’s dual role in deliberative democracy”, 54 *Political Studies* 486 (2006).

The fact that the concentric model is able to overcome, or at least strongly mitigate, the tension between procedure and substance, also explains why it provides a more satisfactory way of dealing with the paradox of tolerance.⁴⁹ In order to guarantee that all relevant social, economical, cultural or other grievances amongst citizens are detected, it is important that political actors in the periphery of the system enjoy as much freedom as possible to express their ideas. Here, even radical or antidemocratic ideas should be allowed to enter the debate because they can articulate and provide an outlet for important feelings of dissatisfaction of certain groups of the population. At the same time, however, if the democratic system is to preserve its core values and is to be able to fight off extremist challengers of the democratic regime, tolerance for extremist ideas should diminish as the political actors expressing them find themselves closer to the actual centres of decision-making. This *guideline of decreasing tolerance* helps to ensure that the transformative function of the democratic process operates adequately and that extremist or antidemocratic ideas are filtered out before they are translated into actual political decisions. Indeed, even though the expression of such ideas can fulfil an important signalling function that should be taken fully seriously, it is obvious that the solutions that are ultimately offered for the underlying grievances may not themselves be antidemocratic in nature but should, rather, be interpretable as compatible with the core values of a liberal democratic regime.

If a democratic state is to defend itself against antidemocratic forces and chooses to implement the guideline of decreasing tolerance, it should follow a comprehensive strategy including a whole set of measures, ranging from administrative regulations to intelligence controls, educational tools and political strategies such as, for instance, a *cordon sanitaire*.⁵⁰ In what follows we restrict ourselves to the legal measures that are appropriately part of such an approach and directly interfere with the expressive and associational rights of individuals and political parties. It will be clear by now that the guideline of decreasing tolerance suggests that it will be easier to justify such measures as the actor concerned moves closer to the actual power centres. In the next two sections we argue that the concentric model of democracy provides good grounds to reconsider the relationship between Articles 10 and 11 adjudication and explains why the Court's Article 10 scrutiny should be stricter rather than more permissive as compared to its approach under Article 11.

⁴⁹ Stefan Rummens and Koen Abts, *supra* note 45; Maleiha Malik, "Engaging with Extremists", 22 *International Relations* 85 (2008).

⁵⁰ Rummens and Abts, *supra* note 45; Ami Pedahzur, "The Defending Democracy and the Extreme Right: A Comparative Analysis", in R. Eatwell and C. Mudde (eds.), *Democracy and the New Extreme Right Challenge* 108 (Routledge, 2004); Giovanni Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (John Hopkins University Press, 2007)

IV. Freedom of Expression: Tracking All Relevant Concerns

Of course, the emphasis the concentric model of democracy places on the political role of freedom of speech is not new. Alexander Meiklejohn, one of the earliest proponents of the democracy-free-speech-rationale, wrote that “[t]he principle of the freedom of speech springs from the necessities of the program of self-government”.⁵¹ Freedom of expression thereby serves the purpose of providing all the facts and opinions that are relevant in determining the political outcomes that best further the general interest: “The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting”.⁵² More recently, Cass Sunstein advocated what he calls a ‘Madisonian’ conception of freedom of speech, in which political speech enjoys a higher level of protection than non-political speech. The fact that political speech lies “at the heart of constitutional concern”⁵³ is thereby closely connected to the “central constitutional goal of creating a deliberative democracy”, in which “new information and perspectives influence social judgments about possible courses of action”.⁵⁴ Even those who criticise authors as Meiklejohn and Sunstein for their one-sided emphasis on political speech and insist that political speech should not be identified as the primary concern underlying free speech provisions, generally recognise that it is a “main function of a system of freedom of expression (...) to provide for participation in decision-making through a process of open discussion which is available to all members of the community”⁵⁵ or that “the argument from democracy may constitute, then, a principled reason for giving pride of place to political speech (...)”.⁵⁶

Whether political speech should be singled out as the primary concern for the protection of freedom of speech, or whether democracy is but one among the many justifications of the expressive freedoms, is not at issue in this paper. It suffices to indicate that the concentric model of democracy not only endorses the special place given to political speech, but also provides a theoretical explanation for this concern. As argued, if the democratic process is understood as an epistemic undertaking in which the needs, values and concerns of all citizens are taken seriously, and if it is accepted that citizens are themselves the best judges of what their own interests and concerns are, it follows that they should be given the widest possibilities to actually express themselves in the public sphere. Only if the law guarantees the fullest protection of political speech, will it become possible to

⁵¹ Alexander Meiklejohn, *Free Speech. And Its Relation to Self-Government* 26 (Harper & Brothers, 1948).

⁵² *Id.* at 25.

⁵³ Cass R. Sunstein, *Democracy and the Problem of Free Speech* 122 (The Free Press, 1995).

⁵⁴ *Id.* at 18-19.

⁵⁵ Thomas I. Emerson, *Toward a General Theory of the First Amendment* 8-9 (Vintage Books, 1963).

⁵⁶ Frederick Schauer, *Free Speech: A Philosophical Inquiry* 42 (Cambridge University Press, 1982).

track through public debate the real needs and concerns of citizens and to determine how these concerns could be legitimately taken into account in actual legislation or policy-making.

If the protection of political speech is identified as a primary constitutional concern, it is, of course, important to clarify the scope of this category of speech. In this regard, we subscribe to the broad definition proposed by Cass Sunstein, who identifies political speech as speech “both intended and received as a contribution to public deliberation about some issue”.⁵⁷ Such a broad definition is in line with the concentric model of democracy for at least three reasons. In terms of its *origin*, political expression should, first of all, not be restricted to speech by politicians. As mentioned, the fact that politicians represent a large number of people is not a distinctive feature of politicians. Also members of non-political associations or non-affiliated individuals can speak on behalf of larger groups and voice their concerns or arguments. More fundamentally, the number of people subscribing to a specific contribution to the public debate is not a determining factor for its political relevance. In public deliberation, predominance should be given to the force of the better argument over the force of number. Whether an argument is convincing should be tested in the course of the public debate itself, it should not depend on the number of citizens already endorsing it prior to that debate. On the contrary, to make sure that all potentially relevant arguments are heard, public debate should pay attention to the widest possible range of voices and ensure that minority positions are considered as well. Therefore, political speech is not the privilege of a specific class of citizens, but encompasses any genuine contribution to the public debate about some issue of social or political importance.

Political speech comes, secondly, in many different *forms*, and should not be restricted to clearly articulated arguments raised in specific discursive settings set up for political argumentation. Political speech is not limited to the opinion pages of newspapers or to interventions at town hall meetings, but occurs in all kinds of public places such as parks, bars, streets or the internet. Political speech is also not limited to political argumentation in the strict sense but can include symbolic acts, public manifestations or artistic forms of expression.⁵⁸ Thirdly, and perhaps most importantly in the present context, political speech should be widely protected in terms of its *content*. Even speech that is manifestly at odds with core democratic values may still contain a politically relevant message and should therefore be protected, at least at the periphery of the democratic system. In this

⁵⁷ Cass R. Sunstein, *supra* note 53 at 130 (Sunstein emphasises that many works of art also convey politically relevant messages and that these works should, in that regard, enjoy heightened constitutional protection, even if the political relevance of the work is not the primary concern or the primary intention of the artist.)

⁵⁸ *Id.* at 152-153.

regard, the European Court's current approach in, for instance, the hate speech cases, in particular its concern for the offensive or destabilising tendency of an expression is problematic from a democratic point of view. Using the example of racially inspired speech, Sunstein is correct to point out that "a great deal of public debate produces anger or resentment on the basis of race. If we were to excise all such speech from political debate, we would have severely truncated our discussion of such important matters as civil rights, foreign policy, crime, conscription, abortion and social welfare policy. Even if speech produces anger or resentment on the basis of race, it might well be thought a legitimate part of the deliberative process".⁵⁹ Similarly, Jane Mansbridge, one of the leading scholars of the deliberative democracy paradigm, contends that "in a public forum and in everyday talk, there are justifiable places for offensiveness, noncooperation and the threat of retaliation – even for raucous, angry, self-centred, bitter talk, aiming at nothing but hurt. These forms of talk are sometimes necessary (...) to achieve authenticity, to reveal (...) the pain and anger, hate, or delight in another's pain, that someone actually feels, when expression or knowledge of those feelings furthers the understanding that is the goal of deliberation."⁶⁰

This is not to say, of course, that hate speech laws can never be justified. What the argument shows is that such legislation is to be crafted and applied carefully so as not to unnecessarily impede the tracking function which is central to the concentric model of democracy. When feelings of anger or disappointment in some parts of the citizenry about certain problems in society can no longer be aired, public debate is stifled and political attention for the underlying concerns may unduly diminish. As a result, these feelings of resentment might very well turn into anti-political sentiments. In this regard, several authors suggest that the sometimes (but not necessarily) legally supported silencing of problems related to the increasingly multicultural nature of western European societies under the banner of misguided political correctness, has only reinforced electoral support for populist, radical right wing or even extremist political parties in countries such as Belgium, Austria, France or The Netherlands.⁶¹ Again, this does not mean that racist feelings should be tracked in order to simply translate them into racist policies. It means simply that the signalling function of these feelings should be taken seriously, that the voters expressing them should be taken seriously, that these issues should be discussed openly in the public sphere and that the policies eventually decided upon should, while remaining fully within the scope of what adherence to the substantive democratic values of liberty

⁵⁹ *Id.* at 186. Compare *id.* at 122, 154 and 163.

⁶⁰ Jane Mansbridge, "Everyday talk in the deliberative system", in S. Macedo (ed.), *Deliberative Politics. Essays on Democracy and Disagreement* 211, 223 (Oxford University Press, 1999).

⁶¹ Chantal Mouffe, "The 'end of politics' and the challenge of right-wing populism", in Francisco Panizza (ed.), *Populism and the Mirror of Democracy* 50 (Verso, 2005); Chantal Mouffe, *On the Political* 64-76 (Routledge, 2005); Stefan Rummens and Koen Abts, *supra* note 45.

and equality allows, attempt to address the problems underlying these feelings or concerns.

V. Freedom of Expression and Freedom of Association: Filtering Extremist Views

Although the concentric model advocates wide-ranging protection of political expression in order to enable the tracking of all the information possibly relevant for the process of democratic self-government, the level of protection diminishes as the actor moves from the periphery to the centre of the system. As argued, the substantive nature of the concentric view implies that the state is allowed and even required to prevent unfiltered, anti-democratic ideas from progressing to the core of the political system and to directly influence actual legislation. Here again, the idea that public debate may properly be limited is not new. Some of the main advocates of the heightened protection for political speech emphasise that the quality of that speech matters. It is interesting to note, for instance, that both Meiklejohn and Sunstein strongly criticised Justice Holmes's metaphor of the public debate as a 'competition of the market' in which the free trade of ideas guarantees that the best ideas survive.⁶² This metaphor suggests that, as in a free market, individual contributors to the public debate can simply advocate their own ideas and pursue their own interests without taking into account the ideas and preferences of others. Unlike what happens in the market, however, there is, in the context of the public debate, no invisible hand which guarantees that private vices turn into public virtues. If democracy is simply a power struggle between interest-groups, the will of the majority is merely the will of the most powerful citizens in society, but not necessarily an adequate interpretation of the common good as compatible with the core ideas of equality and freedom. Out of concern for the protection of these basic values, the deliberative model therefore argues that public debate should ideally operate as a transformative process in which participants are prepared to readjust their proper interests in the light of the legitimate interests of others.⁶³ Of course, the process of transforming preferences and filtering anti-democratic ideas is part and parcel of the public debate itself and should not be imposed or directed from the outside through government intervention. Nevertheless, the state has an active role to play in providing sufficient legal controls to ensure that the outcomes of the political process are not manifestly at odds with substantive democratic values. Inevitably, such measures will interfere with the rights to freedom of expression and association.

⁶² *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); Alexander Meiklejohn, *supra* note 51 at 82-89; Cass R. Sunstein, *supra* note 53 at 23-28

⁶³ *Id.* at 18-20; Stefan Rummens, "Democratic deliberation as the open-ended construction of justice", *supra* note 45.

When are the authorities justified in taking action against antidemocratic activities? It follows from the concentric model that restrictive measures will be acceptable only where there is a real risk that political actors closer to the centre of the political system will be able to influence or enforce policies or legislation that are at odds with the basic democratic principles. In a modern State, this threat will primarily come from groups rather than individuals. Hence, the government's efforts to protect democracy should first and foremost focus on collective activities, most notably those of political parties. In this respect, three remarks are in order. First, it should be kept in mind that the dissolution of an association is not the only measure available and that other possibilities include the disqualification of lists submitted for elections and the exclusion of the party from public funding. An actual party ban is a serious measure and should only be enforced if other measures are or would be inadequate to protect the integrity of the democratic system. Secondly, when considering the legitimacy of an actual ban, the mere antidemocratic nature of a political party's programme or its proposals is insufficient to justify restrictive measures. Interference requires a minimum level of potential harm. Indeed, the concentric model suggests that associations at the periphery of the democratic system should enjoy more leeway in terms of the ideas they propagate and the actions they undertake than associations closer to the core. The tolerance of smaller antidemocratic movements and the ideologies they represent in the political arena is important if the concentric model is to function properly. Political parties with a hostile view towards the existing regime usually also advocate ideas that may be relevant within the democratic framework.⁶⁴ Although the solutions they propose may be questionable from a democratic point of view, such movements often put on the political agenda real societal grievances that should be taken seriously. Here, the concentric model may serve to justify the European Court's current approach. As mentioned, the potential decision-making power of political parties is a factor taken into account by the Strasbourg Court in its Article 11 cases.⁶⁵ More generally, the *Refah* standard requires evidence of a 'sufficiently imminent' risk to democracy to justify drastic measures such as a party ban. Hence, the suppression of smaller parties, with no immediate opportunities to gain access to government power, will generally not be justified. Of course, the concept of a 'sufficiently imminent risk' is a flexible one. Elements such as a party's size, its election results, its opportunities for actual government participation, but also its power to influence public opinion may be relevant. Thirdly, it should be noted that an organisation may be subject to sanctions for reasons other than its potential threat to the democratic regime. For instance, the organised actions of an association may qualify as incitement to violence or violate other criminal law provisions. Nevertheless, when an association also proclaims to express political ideas, it might be prudent to preferentially incriminate the individual members or leaders respon-

⁶⁴ See Thomas I. Emerson, *supra* note 55 at 51-52.

⁶⁵ *Supra* Title II.

sible for these actions rather than the organisation itself. Such an approach may be important in order to prevent the premature silencing of a potentially politically relevant message.

What about the interference with an individual's right to freedom of expression? It will be clear by now that restrictions against individual participants in the public debate will be more difficult to justify under the concentric model, as they typically pose less of a threat to the democratic system. Even politicians will normally not be in a position to alter the system of government or to impose legislation that is incompatible with substantive democratic values. The mere antidemocratic content of a political message should therefore not be a sufficient ground to deny free speech protection. This is not to say that political speech should receive absolute protection. As with associations, limitations may be justified to protect the integrity of the democratic system or to protect individuals from harm. However, as mentioned, such restrictions should be narrowly tailored so as not to over-broadly restrain public opinion and impede the tracking function of the concentric model. In this respect, the current approach of the Court in Strasbourg fails because it makes no attempt whatsoever to set out conditions that would allow it to narrow the reach of notions such as hate speech. What is required is that the Court adopts a meaningful standard of review in hate speech cases, allowing it to censure convictions for what is essentially political speech as well as disproportionate sanctions against participants in the public debate.

Such an alternative standard for assessing hate speech regulations should contain two elements. First, it is crucial that the Court is clear and consistent about the types of harm that may justify a criminal law intervention in this area. The prevention of psychological damage to the members of the target group or the foreseeable occurrence of hate-based violence or discrimination, are more or less well-defined goals that may be legitimate grounds for interfering with freedom of expression. Efforts to punish speech that is "incompatible" with the "spirit" of the Convention or may "risk" or have a "tendency" to threaten "social peace", "political stability" or a "serene social climate", are much more problematic in this respect. Being more precise about the harms justifying speech restrictions, would allow the Court to draw the necessary distinctions between different categories of expression, for instance between hate speech in a private as opposed to a public setting,⁶⁶ between threatening language as opposed to mere offensive language and between incitement to hatred or discrimination as opposed to mere discriminatory or hateful statements. Secondly, in order to avoid the punishment of speech that presents no direct risk of causing the harms hate speech bans are legitimately aimed at, the Court should formulate a fixed standard containing a number of limiting conditions. This point was

⁶⁶ Cass R. Sunstein, *supra* note 53 at 187.

rightly emphasised by Jude Sajó in his important dissenting opinion in *Féret*.⁶⁷ The components of such a test typically relate to such issues as the content of the message, the speaker's intention and context and possible consequences of an expression. To the extent that a hate speech regulation is based on its potential harm to the democratic system, the guideline of decreasing tolerance implies, for instance, that the legitimacy of such measures will be a function of the degree of risk the impugned expression poses to democracy and its core values. The mere tendency of speech to threaten social peace or to create a certain antisocial 'climate' is not sufficient to justify restrictive measures. The concentric model implies, as a limiting condition, the presence of a more tangible danger, for instance the real prospect that unfiltered antidemocratic ideas will infiltrate the core of the democratic system and influence public decision-making. In this regard, inspiration can be found in the European Court's incitement to violence cases. The current incitement standard not only looks at the content of the message and the intent of the speaker, but also at the likelihood and seriousness of the consequences of subversive or violence-conductive speech.⁶⁸

Critics of such an approach are often quick to point out that adopting a test containing a number of limiting conditions would amount to an 'Americanisation' of Article 10 hate speech adjudication, something to be rejected given the apparent difference between the constitutional cultures of both continents. It is important to observe, however, that a European hate speech test should not necessarily be a copy of the highly protective *Brandenburg* formula.⁶⁹ There is a wide range of alternatives between a modern European version of the discredited 'bad tendency' test and current First Amendment doctrine. For instance, the European Court could look at the approach taken in the Canadian case *R. v. Keegstra*, in which the Canadian Supreme Court upheld a hate speech ban under the condition that it was limited to the public, intentional promotion of hatred.⁷⁰ To avoid that the provision under review would over-broadly target political expression, the Supreme Court put forward a restrictive interpretation. The word 'promotion' was to be read as requiring "active support" or "instigation" and the word 'hatred' covered only the "most intense forms of dislike".⁷¹ Finally, the mental element was satisfied only where an accused subjectively desires the promotion of hatred, thus requiring more than negligence or recklessness. In the Court's opinion, these conditions were a means of avoiding the punishment of acceptable though perhaps offensive and controversial political speech. Other jurisdictions have taken a similar approach in adopting a rights-consistent interpretation of

⁶⁷ *Féret v. Belgium*, *supra* note 25.

⁶⁸ See Stefan Sottiaux, *Terrorism and the Limitation of Rights, the ECHR and the US Constitution* 96-100 (Hart Publishing, 2008).

⁶⁹ *Brandenburg v. Ohio*, *supra* note 15 at 447 (speech cannot be punished unless it is directed to inciting and likely to incite imminent lawless action).

⁷⁰ *R v. Keegstra*, [1990] 3 S.C.R. 697.

⁷¹ *Id.*

overbroad hate speech laws. The Belgian Constitutional Court, for instance, narrowed the reach of the Belgian hate speech ban to expressions publically and intentionally inciting certain conduct.⁷²

To conclude this section, we briefly turn to the contested issue of whether individual politicians should enjoy more protection in terms of freedom of expression as compared to ordinary citizens. In this debate, opinions diverge. It is interesting to see how the same arguments concerning the *leverage* and *multiplier* effects of political parties remerge in this debate and result in the same undecided outcome (cf. section II). This is clearly reflected in the case law. While in some cases the European Court states that freedom of speech is “especially [important] for an elected representative of the people”,⁷³ in other cases the emphasis is placed on the responsibility of politicians to refrain from statements that may breed intolerance.⁷⁴ Admittedly, the proposed model of concentric democracy equally fails to provide a clear-cut answer in this matter. On the one hand, the guideline of decreasing tolerance seems to justify the imposition of stricter requirements on the expressions of politicians. Here again, the Article 10 incitement standard may serve as an example in the sense that one of the contextual factors taken into account in assessing the potential impact of an expression is the authority of the speaker.⁷⁵ The statements of politicians may carry more weight and may therefore produce more harm than the statements of other individuals.⁷⁶ On the other hand, the multiplier argument rightly points to the special role of politicians in giving voice to voters and, thus, to their particular role in tracking voters’ concerns. In this regard, we have argued that the filtering of extremist influences on legislation should be targeted primarily at groups rather than individuals. Indeed, the potential harm to the democratic system derives not so much from the statements of politicians as individual speakers but rather as members or leaders of political parties aiming to gain access to power and to translate antidemocratic ideas into policy or legislation. Consequently, as a *prima facie* rule, politicians should enjoy the same level of free speech protection as ordinary citizens. The containment of systemic harm – contrary to the direct harm speech may cause to individuals or targeted groups –, should primarily be directed at the organisations which pose a threat rather than at their individual members.

⁷² GWH, 6 oktober 2004, nr. 157/2004, B.49.

⁷³ *Castells v. Spain*, 23 April 1992, para. 42.

⁷⁴ *Erbakan v. Turkey*, 6 July 2006, para. 64.

⁷⁵ *E.g. Polat v. Turkey*, 8 July 1999, para. 47.

⁷⁶ *E.g. Zana v. Turkey*, 25 November 1997, *Reports* 1997-VII.