The "Clear and Present Danger" Test in the Case Law of the European Court of Human Rights

*Stefan Sottiaux**

Introduction

More than two years after September 11 the "war" against terrorism is still high on the political agenda. Subsequent to the terrorist attacks in New York and Washington DC, both the European Union and the United States adopted stringent anti-terrorism legislation. The Bush Administration thereby eviscerated the longstanding legal distinction between terrorism and war to invoke executive and warpowers. The European Commission, on its behalf, adopted a proposal for a Council framework decision on combating terrorism, containing a very broad definition of the notion of "terrorism"[1]. These efforts were met with scepticism. Various human rights lawyers and organisations have raised concern over the impact the new legislation may have on international human rights standards.

It is a well-known truism that freedom of speech is one of the first casualties during time of war. Counter-terrorist action certainly raises a number of free speech issues. Terrorism, after all, is a specific kind of (political) expression: terrorists intend to inform the public about their political ideals and motives[2]. As Brian Jenkins once wrote, "Terrorists want a lot of people watching and a lot of people listening ... Terrorists choreograph incidents to achieve maximum publicity, and in that sense, terrorism is theater."[3] So the question arises as to what extent terrorists, and those who support their political ideals in a non-violent way, can invoke free speech guarantees. Is the advocacy, the teaching or the glorification of terrorist crimes protected by the right to freedom of expression?

These problems recall the controversy over the permissibility of subversive and otherwise dangerous speech, which has divided lawyers for almost a century. In light of the new challenges counter-terrorism presents to freedom of speech, this article, more generally, considers the scope of protection afforded to subversive speech under the European Convention for the Protection of Human Rights[4]. The

* BA Phil. (Antwerp), Lic. Law (Antwerp) and M.Jur. (Oxford). Doctoral candidate at the University of Antwerp. I am grateful to Gerhard van der Schyff and Dajo De Prins for helpful comments.

[1] Proposal for a Council framework decision on combating terrorism (2001/0217 (CNS)).

[2] See e.g. J. Velaers, De informatievrijheid en de strijd tegen het terrorisme, in: R. Ergec/J. Velaers/J. Spreutels/L. Dupont/R. Andersen (eds.), Maintien de l'ordre et droits de l'homme, 1987, 38.

[3] B. M. Jenkins, International Terrorism: a New Mode of Conflict, in: D. Carlton/C. Schaerf (eds.), International Terrorism and World Security, 1975, 15.

[4] This paper does not consider the free speech implications of "informal" government censorship and media self-censorship in response to international terrorism. For a discussion of these issues see J.P. Marthoz, L'impact du 11 septembre sur la liberté de la presse: la presse américaine poussée à

© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

focus of the inquiry is on the well-known "clear and present danger" test, developed in the United States Supreme Court's First Amendment jurisprudence. Ever since its inception, the "clear and present danger" test has played an important role in American constitutional law as a standard to draw the line between constitutionally protected and unprotected speech. This paper attempts to discover whether or not, and if so, to what extent, the "clear and present danger" test is present in the case law of the European Commission and European Court of Human Rights. It consists of three parts. I first outline some of the arguments in favour and against a similar approach in dealing with subversive expression in Europe and in the United States. The following section briefly provides an overview of the American case law on the "clear and present danger" test. The third part analyses the relevant cases decided by the Strasbourg institutions. I conclude that, although the European Court never adopted a "clear and present danger" test, certain elements of the Supreme Court's doctrine figure in the European case law.

I. Article 10 and the First Amendment: Differences and Similarities

1. A Different Constitutional and Historical Background

The American conception of freedom of speech stands in contrast to that of most European countries. This is at least the conclusion of most comparative studies of the subject[5]. A common example of the dissimilarities between the two continents is the treatment of hate speech. The American constitutional model leaves little room for hate speech regulations, whereas, under the European Convention, criminal legislation outlawing such expressions is permitted[6].

Several factors were put forward to understand the different approach. A simple explanation can be found in the relevant constitutional texts. The First Amendment to the American Constitution speaks in absolutist terms: "Congress shall make no law ... abridging the freedom of speech, or of the press". Article 10 § 2 of the European Convention, on the other hand, declares that the exercise of the right to freedom of expression also carries with it duties and responsibilities[7]. It may, for that

l'auto-censure, in: E. Bribosia/A. Weyembergh (eds.), Lutte contre le terrorisme et droits fondamentaux, 2002, 289-305.

[5] See e.g. E. Barendt, Freedom of Speech in an Era of Mass Communication, in: P.B.H. Birks (ed.), Pressing Problems in the Law, Volume 1, 1995, 109-116; D. Feldman, Content Neutrality, in: I. Loveland (ed.), Importing the First Amendment: Freedom of Expression in American, English and European Law, 1998, 139-171; P. Mahoney, Emergence of a European Conception of Freedom of Speech, in: P.B.H. Birks (ed.), Pressing Problems in the Law, Volume 1, 1995, 149-155; C. McCrudden, Freedom of Speech and Racial Equality, in: P.B.H. Birks (ed.), Pressing Problems in the Law, Volume 1, 1995, 125-148 and A. Niewenhuis, Freedom of Speech: USA vs Gemany and Europe, 18 NQHR (2000), 195-214.

[6] Compare *Jersild v. Denmark*, 23 September 1994, Series A, no. 298, and *R.A.V. v. City of Saint Paul*, 505 U.S. (1992), 377.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

reason, be "subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

The dissimilar constitutional framework and jurisprudence that has originated from it, should be read in view of a number of historical, social and economical factors that characterise both societies. The American free speech guarantees, as it is often noted, evolved against the background of a different political and philosophical inheritance. Compared to the European Convention, the American Bill of Rights is said to reflect a much more individualistic conception of rights. Whereas the dominant First Amendment perspective focuses on individual autonomy and self-determination, underlying Article 10 would be a much more "community-oriented" view of freedom of expression. As Paul Mahoney put it: "the Strasbourg Court has recognised that freedom of expression (...) involves a balance of interests between the liberty of the individual to impart and receive information, on the one hand, and the need to protect the community and other individuals against the perceived harm that can be inflicted by speech on the other hand"[8]. Some commentators see a relationship between the degree of protection afforded to speech rights and the prevailing conception of democracy. The "procedural" nature of American democracy, as they argue, results in a stronger protection of freedom of speech than its more "militant" European counterpart[9]. Another argument sometimes relied upon to explain why First Amendment concepts should not be transplanted to Europe, is the widespread American distrust in government intervention, which would not be so prevalent in European thinking.

2. Recurring Rationales of Freedom of Speech

Despite the different textual and historical background, a comparative approach with regard to subversive speech may be instructive for a number of reasons. In his article "A Common Law of Human Rights?", Christopher McCrudden questions the popular idea that there are no rules of relevance for the use of foreign material in human rights cases, and that the jurisdictions chosen will be those which are expected to support the conclusions sought[10]. The author identifies a number

[7] This reference does not appear in any other Convention article. Also, Article 17 of the Convention declares that no Convention guarantee may be interpreted as implying a right to engage in any activity, or perform any act, aimed at the destruction of the rights and freedoms set forth in the Convention. Both provisions are inspired by the historical experience of the inter-war period in Europe. See e.g. J.A. Frowein, Incitement against Democracy as a Limitation of Freedom of Speech, in: D. Kretzmer/F. K. Hazan (eds.), Freedom of Speech and Incitement against Democracy, 2000, 33-40.

[8] Mahoney, *supra* note 5, at 150.

[9] Niewenhuis, *supra* note 5, at 212.

© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

of factors that lead judges to engage in a comparative study. One of the relevant criteria, he writes, is the existence of a "common alliance" between the nations involved. Anne-Marie Slaughter equally believes that, in dealing with generic legal problems such as the balancing of individual and community interests, the awareness of a "common enterprise" may transcend cultural differences[11]. As noted, the United States and the European Union consider the eradication of terrorism as a common goal of overriding importance. Moreover, they see themselves as "allies" in a new "war". Therefore alone, a comparative study of the relevant case law of both jurisdictions may be useful.

However, a comparative survey is also justified for more fundamental reasons. It has convincingly been maintained that abstract human rights such as the right to freedom of expression, cannot be applied to concrete cases except by assigning some overall point or purpose to them[12]. Therefore, the "point" or "purpose" that national courts assign to freedom of expression certainly is a relevant factor in judging the relevance of comparative material in free speech cases. In most textbooks the functions and values of freedom of expression are placed in two categories[13]. The first one treats freedom of speech as important instrumentally. Free speech should be protected because of the good effects it produces for society. This instrumental conception of freedom of expression has been associated with two particular further objectives, namely the discovery of truth and the functioning of democracy. The second category of justifications, by contrast, turns on the idea that free speech is valuable intrinsically, not just in virtue of the consequences it has (the self-fulfilment and autonomy rationales). Both types of justifications are evidenced in the European and in the American jurisprudence. In *Handyside v. United Kingdom*, the European Court described the purpose of Article 10 as follows: "Freedom of expression constitutes one of the essential foundations of (...) a [democratic] society, one of the basic conditions for its progress and for the development of every man."[14] In subsequent cases such as *Lingens v. Austria*, the Court reiterated that freedom of expression is significant for "each individual's self-fulfilment" and that "freedom of political debate is at the very core of the concept of a democratic society"[15]. According to the United States Supreme Court, the First Amendment "presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole"[16]. Free speech pro-

[10] C. McCrudden, A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights in: K. O'Donovan/G.R. Rubin/A.W.B. Simpson, Human Rights and Legal History: Essays in Honour of Brian Simpson, 2000, 29-65.

[11] A.M. Slaughter, A Typology of Transjudicial Comminication, 29 U. Rich. L. Rev. (1994), 127, quoted in McCrudden, *supra* note 10, at 55.

[12] See R. Dworkin, Freedom's Law, 1999, 199.

[13] See e.g. F. Feldman, Civil Liberties and Human Rights in England and Wales, 1993, 547-552; F. Jacobs/R. White, The European Convention on Human Rights, 1996, 222-223 and M. Janis/R. Kay/A. Bradley, European Human Rights Law, 2000, 139.

[14] *Handyside v. the United Kingdom*, 7 December 1976, Series A, no. 24, para. 49.

[15] *Lingens v. Austria*, 8 July 1986, Series A, no. 103, paras 41-42.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

tection is essential to the very existence of American democracy[17]. Or, as Justice Brandeis put it in his famous concurrence in *Whitney v. California*: free expression is valuable "both as an end and as a means"[18]. Thus, apart from differences in emphasis, the protection of freedom of speech rests on the same general principles in the two systems studied[19]. While such similarities do not necessarily justify the adoption of American concepts by the European Court, they certainly make a comparative analysis a meaningful enterprise.

3. Justifications of the Protection of Subversive Speech

Before turning to the relevant case law, it is useful to sketch some of the arguments that may justify the protection of subversive speech. Why, if at all, should the advocacy of illegal conduct be covered by freedom of expression? To defend a certain level of toleration of "dangerous" speech, intrinsic as well as instrumental rationales of freedom of expression have been advanced. The concept of moral responsibility can serve as example of the former. According to Ronald Dworkin, a contemporary advocate of this idea, a society should treat all its adult members, except those who are incompetent, as responsible moral agents[20]. He writes that we retain our dignity, as individuals, "by insisting that no official and no majority has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it"[21]. Government insults its citizens and denies their moral responsibility, he follows, "when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions".[22] The concept of moral responsibility is referred to in numerous concurring and dissenting opinions in speech cases. Several Justices of the Supreme Court forcefully condemned state-paternalism. In his separate opinion in *Whitney*, Justice Brandeis portrayed the American founders as "courageous, self-reliant men, with confidence in the power of free and fearless reasoning"[23]. Justice Douglas, in his dissenting opinion in *Dennis v. United States*, expressed the belief that the American people can be trusted to hear "dangerous" communist propaganda: "Our faith should be

---

16 *Bose Corporation v. Consumers Union*, 466 U.S. 485 (1984).

17 *Dennis v. United States*, 341 U.S. (1951), 494, 584. J. Douglas dissenting.

18 *Whitney v. California*, 247 U.S. (1927), 357, 375.

19 One of the differences is the strong influence of the "free market-place of ideas" rationale in the United States jurisprudence, a concept which would be less prevalent in European thinking. The "market place of ideas" doctrine, namely the conviction that true ideas will drive out false ones, was famously enunciated by Justice Holmes in *Abrams v. United States*, 250 U.S. (1919), 616, 630: "(...) when men have come to realize that time has upset many fighting faiths, they may come to believe even more than the foundation 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 markets (...)."

20 Dworkin, *supra* note 12, at 200.

21 Id.

22 Id.

23 *Whitney v. California*, *supra* note 18, at 377.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

that our people will never give support to these advocates of revolution, so long as we remain loyal to the purpose for which our Nation was found." In *Scales v. United States* Douglas strongly denounced the federal government's "mission to save grown men from objectionable ideas by putting them under the care of official nursemaids"[24]. In the same vein, Mr Opsahl, a former member of the European Commission, observed in his dissenting opinion in *Arrowsmith v. the United Kingdom*, that "the aim of influencing others who are themselves responsible for their actions is an essential and legitimate aspect of the exercise of freedom of expression and opinion, in political and other matters".[25] In a second dissenting opinion in the same case, Mr Klecker held that "those who are persuaded to accept the views expressed must carry their own burden of responsibility"[26].

In addition to the constitutive justifications of subversive speech protections, other, more instrumental ones were put forward. One of them, the so-called safety-valve rationale, holds that the suppression of dangerous speech is far more detrimental to national security than the toleration of it. The punishment for unwanted speech does not discourage the unwanted ideas but rather drives them underground. According to Justice Brandeis in *Whitney*, for example, the American founders "knew that order cannot be secured merely through fear of punishment for its infraction; (...) that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies (...)"[27]. In *Terminiello v. Chicago* Justice Jackson warned that suppression has never been a successful permanent policy: "any surface serenity that it creates is a false security, while conspiratorial forces go underground".[28] The airing of ideas, as Justice Douglas observed in *Dennis*, "releases pressure which otherwise might become destructive".[29]

II. The "Clear and Present Danger" Test in the Case Law of the United States Supreme Court

Since its genesis in the early part of the twentieth century, the original "clear and present danger" formula has more than once been revised. Its history is usually sketched against the background of the historical events that led to the adoption of criminal legislation outlawing certain categories of speech[30].

---

[24] *Scales v. United States*, 367 U.S. (1961), 203, 270.
[25] *Arrowsmith v. the United Kingdom*, 12 October 1978, Application No. 7075/75, 19 DR 28.
[26] Id., at 34.
[27] *Whitney v. California*, *supra* note 18, at 375.
[28] *Terminiello v. Chicago*, 337 U.S. (1949), 1, 36.
[29] *Dennis v. United States*, *supra* note 17, at 584.
[30] See e.g. G. Gunther/K.M. Sullivan, Constitutional Law, 1997, 1034-1076; J.E. Nowak/J.R. Rotunda, Constitutional Law, 1995, 1007-1019 and G.R. Stone/L.M. Seidman/C.R. Sunstein/M.V. Tushnet, The First Amendment, 1999, 19-61.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

1. First World War Cases

The first cases arose under the Espionage Act of 1917, which was adopted in an intensely patriotic war atmosphere to protect the American war interests and prevent agitation against the draft. The Espionage Act made it a crime to "willfully cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States".

The case that gave birth to the "clear and present danger" test was *Schenck v. United States*[31]. It concerned the criminal conviction of a member of the Socialist Party who had distributed leaflets, critical of the United States' involvement in the war. In "impassioned" language, the document intimated that conscription was "despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few"[32]. Justice Oliver Wendell Holmes delivered the opinion of the Court. He conceded that the circular called for only peaceful measures against the draft, but nevertheless upheld the convictions. In "many places and ordinary" times, Holmes wrote, the document would have been protected under the First Amendment. But the character of every act, he continued, depends upon the circumstances in which it is done:

> "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. It is a question of proximity and degree."[33]

According to Holmes, the fact that a nation is at war may justify restraints on freedom of expression to prevent "grave and immediate threats" to its security. *Schenck* was followed by two other Holmes decisions: *Debs v. United States*[34] and *Frohwerk v. United States*[35]. The former affirmed the conviction of Eugene Debs, a popular socialist leader who had expressed sympathy for men who were in jail for helping others who had refused to register for the draft. The latter involved anti-war propaganda published in a German language newspaper. In both cases, the convictions were again upheld, but the Court did not explicitly refer to the "clear and present danger" test. In *Frohwerk*, Holmes observed that "the circulation of the paper was in quarters where a little breath would have been enough to kindle a flame"[36].

The application of the "clear and present danger" test in these early cases resulted in the suppression of fairly moderate political speech. The change began later in the same year when *Abrams v. United States* was decided[37]. The defendants were anarchists charged with unlawfully writing and publishing language intended

---

31 *Schenck v. United States*, 249 U.S. (1919), 47.
32 Id., at 51.
33 Id., at 52.
34 *Debs v. United States*, 249 U.S. (1919), 211.
35 *Frohwerk v. United States*, 249 U.S. (1919), 204.
36 Id., at 209.
37 *Abrams v. United States*, 250 U.S. (1919), 616.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

to incite, provoke and encourage resistance to the American war-policy. The Court noted that the words used were of an "inflammatory" nature and of a "bitter" tone. One of the sentences contained a "threat of armed rebellion"[38]. The majority affirmed the convictions applying the so-called "bad tendency" test. Under this test, at the time widely applied by lower courts, a reasonable tendency in speech to produce dangerous acts, no matter how remote, is sufficient to make the regulation of speech constitutional[39]. Holmes, however, this time dissenting, again applied the "clear and present danger" test, which he restated as follows:

> "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."[40]

According to Holmes these strict conditions were not met. Nobody could suppose that the "surreptitious publishing" of a "silly leaflet" by an "unknown man", without more, would present any immediate danger to national security[41].

2. The "Red Scare" Cases

After the First World War and the Russian Revolution, the United States entered the "Red Scare" era. Most states enacted laws prohibiting the advocacy of "criminal anarchy" and "criminal syndicalism", which were soon challenged before the Supreme Court. In 1925 the Court upheld the conviction of Benjamin Gitlow for publishing a manifesto that called for mass action to bring about a revolutionary dictatorship of the proletariat[42]. The manifesto, the Court observed, was not a statement of abstract doctrine. It contained language of "direct incitement", tending to destroy organised society[43]. To the majority of the Court it was clear that such utterances presented a sufficient danger of a substantive evil to bring their punishment within the range of legislative discretion:

> "It [the State] cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."[44]

Applying the "clear and present danger" test, Holmes again dissented. Given the small minority who shared the defendant's views, they could not be considered to present a sufficient danger. Holmes also rejected the Court's "incitement" approach (see section 5 *infra*), emphasising that "every idea is an incitement" and that

[38] Id., at 620, 621 and 623.
[39] See Stone/Seidman/Sunstein/Tushnet, *supra* note 30, at 25.
[40] *Abrams v. United States*, *supra* note 37, at 630.
[41] Id., at 628.
[42] *Gitlow v. People*, 268 U.S. (1923), 652.
[43] Id., at 665.
[44] Id., at 669.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

"the only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result"[45].

A second important case of the "Red Scare" era is *Whitney v. California*[46]. The "clear and present danger" test once again made its appearance, this time in the famous concurring opinion of Justice Louis Brandeis (joined by Holmes). The defendant was convicted for assisting in the organisation of the Communist Labor Party of California. The majority recalled that states may punish the abuse of freedom of speech by utterances inimical to public welfare and "tending to incite" to crime. Justice Brandeis on the other hand, who concurred solely on procedural grounds, reaffirmed that the proper standard to be applied was the "clear and present danger" test, which he framed as follows:

> "[N]o 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."[47]

For Brandeis the proper test sets two conditions to justify suppression of free speech: (I) there must be reasonable ground to believe that the danger apprehended is imminent and (II) there must be reasonable ground to believe that the evil to be prevented is a serious one[48]. Brandeis replaced the word "present" by the word "imminent", which would have revealed his intention to impose strict requirements concerning both the likelihood and timing of harm that might flow from speech[49]. He wrote that advocacy of law violation, however reprehensible morally, is not a justification for denying free speech, "where there is nothing to indicate that the advocacy would be immediately acted on"[50].

3. The Cold War Period

In the wake of the Second World War, in a time when many Americans experienced the growing influence of the Soviet Union and China as a serious threat to (inter)national security, the Supreme Court reinterpreted the Holmes-Brandeis doctrine. The leading case of that period, *Dennis v. United States*, arose under the Smith Act of 1940, a federal law prohibiting, *inter alia*, the advocacy and teaching of the duty of overthrowing or destroying the government by force or violence[51]. The defendants were convicted of violating the Smith Act by conspiring to organise the Communist Party of the United States. Chief Justice Vinson delivered

---

[45] Id., at 673. District Judge Learend Hand first adopted the "incitement" approach in *Masses Publishing Co. v. Patten* (244 Fed. 535 (SDNY 1917), reversed, 246 Fed 24 (2d Cir 1917)).

[46] *Whitney v. California*, *supra* note 18.

[47] Id., at 377.

[48] Id., at 376.

[49] See M.H. Redish, Advocacy of Unlawful Conduct and the First Amendment: in Defense of Clear and Present Danger, 70 Cal. L. Rev. (1982), 1159, 1170.

[50] Id.

[51] *Dennis v. United States*, *supra* note 17.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

the lead opinion. At the outset of his judgement, he observed that it is within the power of Congress to prohibit political change by violence, revolution and terrorism[52]. Vinson regarded the "clear and present danger" test as the proper one to apply in cases involving subversive speech. But he immediately added that the test should be interpreted flexibly with regard to the circumstances of each case. To this end he reformulated the Holmes-Brandeis rule adopting a formula originally formulated by Chief Judge Learned Hand:

> "In each case, [the 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."[53]

The *Dennis* test contains two elements: the gravity of the evil and the probability of its success. However, as Redish observed, the Court made the two separate variables of the Holmes-Brandeis doctrine mutually dependent: the graver the evil of the act advocated, the less probable the danger need to be to justify governmental intrusion[54]. Accordingly, Vinson rejected the idea that success or probability of success is the only deciding criterion. Despite the fact that the Communist Party had not used force or violence, he concluded that "the formation (...) of such a highly organised conspiracy, with rigidly disciplined members subject to call when the leaders [...] felt that the time had come for action, coupled with the inflammable nature of world conditions [and] similar uprisings in other countries" posed a sufficiently grave danger to justify an interference with the petitioners' rights[55]. In his concurring opinion Justice Frankfurter equally referred to the structure of the American Communist Party as a relevant factor in assessing its danger to national security. The party was of significant size, well organised and well disciplined. Moreover, evidence supported the conclusion that members of the Party occupied positions of importance in political and labour organisations. Justice Douglas, on the contrary, questioned the strength and tactical position of communists in the United States. He believed that, as "miserable merchants of unwanted ideas", the communists' "wares remain unsold", and therefore doubted that the conditions of the "clear and present danger" test were met[56].

After *Dennis*, the government prosecuted numerous communists for Smith Act violations. Some of these cases reached the Supreme Court. In *Yates v. United States*, for instance, the Court set aside the convictions of several Communist Party officials who were convicted for advocating the necessity of overthrowing the federal government by violence[57]. The Court found that the trial court's instructions to the jury gave inadequate guidance on the distinction between advocacy of abstract doctrine and advocacy of action. According to Justice Harlan's majority opinion, "the essential distinction is that those to whom the advocacy is addressed

---

52 Id., at 503.
53 Id., at 510.
54 Redish, *supra* note 49, at 1172.
55 *Dennis v. United States*, *supra* note 17, at 511.
56 Id., at 589.
57 *Yates v. United States*, 354 U.S. (1957), 298.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

must be urged to do something, now or in the future, rather than merely to believe something"[58].

4. The Application of the "Clear and Present Danger" Test in 1960's

In *Watts v. United States*, a case decided in the late 1960's, the Supreme Court decided that the First Amendment permits the banning of "true threats" (as opposed to hyperbole)[59]. The defendant was convicted for violating a statute prohibiting persons from threatening to take the life of or to inflict bodily harm upon the president. During a political debate at a small public gathering, Watts made the remark that if he were made to carry a rifle, the president would be the first man he would shoot. The Supreme Court unanimously reversed the lower court's judgement. It considered the defendant's statement as "crude political hyperbole" which, in the light of its context and conditional nature (the listeners had laughed at the statement), did not constitute a wilful threat against the president. The language of the political arena, the Court emphasised, is often "vituperative", "abusive", and "inexact" [60]. In the recent case of *Virginia v. Black*, the Supreme Court defined "true threats" as those statements where the speaker means to communicate "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individual"[61].

The last important step in the history of the "clear and present danger" test is the case of *Brandenburg v. Ohio*[62]. In another unanimous opinion the Court reversed a conviction of a leader of the Ku Klux Klan under the Ohio Criminal Syndicalism statute, for advocating crime, sabotage, violence, and unlawful methods of terrorism as a means to accomplish industrial and political reform. The evidence was a film of a Klan meeting. In one scene the applicant spoke the following words: "We [the Klan] are not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[63] No one else was present at the scene except the participants and some journalists. Without explicit reference to the "clear and present danger" test, the Court applied the following standard:

> "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[64]

---

[58] Id., at 324.
[59] *Watts v. United States*, 394 U.S. (1969), 750.
[60] Id., at 708.
[61] *Virginia v. Black et al.*, 7 April 2003.
[62] *Brandenburg v. Ohio*, 395 U.S. (1969), 444.
[63] Id., at 446.
[64] Id., at 447.

© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Thus, the *Brandenburg* Court laid down very strict criteria to justify state interference with free speech guarantees. The *Brandenburg* test requires the state to prove that: (I) the speaker subjectively intended incitement; (II) in context, the words used were likely to produce imminent, lawless action[65]. A few years later, in *Hess v. Indiana*, the Court added a third condition: the words used by the speaker must objectively encourage incitement[66]. During an anti-war demonstration on a college campus the applicant had loudly shouted "we'll take the fucking street later". The Court unanimously concluded that since Hess' statement was not directed to any person or group of persons, it could not be said that he was advocating, in the normal sense, any action[67]. Although there has been some discussion about its exact sphere of application, the *Brandenburg* standard has not changed since its adoption and still is the law today.

5. Conclusion

Before turning to the European case law, it is useful to summarise the First Amendment subversive speech jurisprudence. It will be clear by now that the meaning of the "clear and present danger" test has considerably changed over time. At least three interpretations of the formula must be distinguished: (I) the Holmes-Brandeis doctrine; (II) the *Dennis* balancing approach and (III) the modern "incitement to imminent lawless action" test.

In Holmes' original standard both the nature of the words used and the circumstances of the impugned expressions played an important role ("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..."[68]). Holmes recognised that not only the content of the expression but also its probable consequences had to be considered. Therefore, great emphasis was put on the contextual setting in which the words were uttered: the national and international security situation, the place and range of distribution of the articles, the authority of its author(s), the (potential) popularity of the "dangerous" ideas, the size of the organisations involved *et cetera*. It should not be forgotten that albeit its rigorous appearance, Holmes' test resulted in the suppression of fairly moderate speech. His standard of proximity and degree, as Frederick Lawrence noted, was narrow in its protection of unpopular messages: "the proximity could be quite distant, if not hypothetical, and degree could be quite minor (...)"[69]. In *Schenck*, for example, a call for peaceful measures against the draft – there was indeed no incitement to law violation or to violence – was held to present a clear and present danger.

---

65 Nowak/Rotunda, *supra* note 30, at 1018.

66 Id., at 1018.

67 *Hess v. Indiana*, 414 U.S. (1973), 105, 109.

68 *Schenck v. United States*, *supra* note 31, at 52.

69 F.M. Lawrenze, Violence-Conductive Speech: Punishable Verbal Assault or Protected or Protected Political Speech, in: D. Kretzmer/F. K. Hazan (eds.), *supra* note 7, at 16.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Justice Holmes' theory invited a lot of dispute. Judge Learned Hand, his most famous opponent, proposed as an alternative his own "direct incitement" approach[70]. Hand had articulated this doctrine in the case of *Masses Publishing Co. v. Patten*[71]. The Masses was a monthly revolutionary journal, which the postmaster of New York had refused to accept in the mails. To determine whether it might be prohibited, Hand proposed the following formula: "Could any reasonable man say, not that the indirect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft?"[72] This test concentrates exclusively on the content or the nature of the words used[73]. Hand's approach was thus more speaker-centred, focussing less on probable consequences of the expression than Holmes' standard[74].

Holmes stuck to his "clear and present danger" formula. However, in later cases such as *Abrams* and in Brandeis' dissenting opinion in *Whitney*, the criteria of the test were set more strictly, emphasising very much the imminence of the danger ("the incidence of the evil apprehended [must be] so imminent that it may befall before there is opportunity for full discussion"[75]). In the "cold war" period the majority of the Court readopted the "clear and present danger" test as the proper standard in subversive speech cases. Yet its scope of protection had become very limited. In *Dennis* Chief Justice Vinson rejected the idea that the proximity of the evil was the only relevant criterion of the test. To attain an equilibrium between freedom of expression and national security, Vinson believed the "nature of the evil" to be equally important. So, in order to avoid a serious threat to national security, the government could interfere with freedom of expression at some early stage: "it must not wait until the putsch is about to be executed, the plans have been laid and the signal is awaited"[76].

Finally, with *Brandenburg*, a formula much more protective of freedom of speech became the new standard. According to Gerald Gunther, the *Brandenburg* test combines "the most protective ingredients of the Masses emphasis with the most useful element of the clear and present danger heritage"[77]. Today, government interference is only justified under the strict conditions that the expression is (I) directed to inciting or producing lawlessness and (II) that it is imminent and likely to succeed. The first requirement would resemble Hand's content- and

[70] For a discussion of the differences see B. Schwartz, Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?, 1994 Sup. Ct. Rev., 209.

[71] *Masses Publishing Co. v. Patten*, 244 Fed. 535 (SDNY 1917), reversed, 246 Fed 24 (2d Cir 1917).

[72] Id., at 542.

[73] Schwartz, *supra* note 70, at 212.

[74] Lawrenze, *supra* note 69, at 19.

[75] *Whitney v. California*, supra note 18, at 377.

[76] *Dennis v. United States*, supra note 17, at 509.

[77] G. Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. (1975), 719, 754.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

speaker-focused inquiry. The second requirement would go back to Holmes' conditions of likelihood and imminence[78].

III. The "Clear and Present Danger" Test in the Case Law of the European Court of Human Rights

1. Introduction

Little has been written or said about the application of the "clear and present danger" test by the Strasbourg organs. Some specialists in the field deny that the European Convention institutions rely on such a test. In his book "National Security and the European Convention on Human Rights", Iain Cameron maintains that the European Court, in its recent case law, does not employ the "clear and present danger" test[79]. Mark Janis, Richard Kay and Anthony Bradley come to the same conclusion in their general introduction to European human rights law[80]. The authors argue that the Court's interpretation of Article 10 of the Convention rather resembles Judge Hand's "direct incitement" approach as applied by the Supreme Court in *Gitlow*.

At first sight this conclusion seems to be supported by the fact that the only explicit reference to the Supreme Court's "clear and present danger" theory, appears in a separate opinion drafted by a single judge. In thirteen speech cases decided against Turkey in 1999, Judge G. Bonello criticised the test he believed to be applied by the majority. Citing the cases *Schenck*, *Abrams*, *Whitney* and *Brandenburg*, he suggested the "clear and present danger" test as an alternative[81].

The present part attempts to find out whether there is indeed no relationship between the current European standard and the "clear and present danger" test. Before analysing the Court's case law, the next section discusses a number of early Commission decisions. Some of these decisions may have had a significant impact on the Court's jurisprudence.

2. Early Commission Decisions

The first Commission decision regarding the tension between freedom of speech and national security dates from 1963. In *X. v. Austria*, the Commission found the conviction of an Austrian citizen on charges of neo-Nazi activities to be in accordance with Article 10 of the Convention[82]. The applicant argued that the writing

---

[78] Lawrenze, *supra* note 69, at 21.
[79] I. Cameron, National Security and the European Convention on Human Rights, 2000, 392.
[80] Janis/Kay/Bradley, *supra* note 13, at 187.
[81] See *infra* notes 106, 118 and 120.
[82] *X. v. Austria*, 13 December 1963, Application No. 1747/62, Annuaire, Vol. VI, 425.

© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

of an article, which contained no incitement to violence, and the training of youth groups on the bases of a nationalistic philosophy, were in no respect "dangerous" activities as proscribed by Austrian law. His appeal was dismissed. According to the Commission the prohibition of activities aimed at the re-introduction of National Socialism can, in any event, be considered as necessary in a democratic society in the interest of public safety and national security. In 1976, in the case of *X. v. Italy*, the Commission came to a similar conclusion with regard to an Italian political movement whose doctrine and platform were inspired by those of the fascist party[83].

The subsequent Commission decisions dealt with the offence of "incitement to disaffection". *X. v. United Kingdom*, decided in 1975, concerned the violation of the British Incitement to Disaffection Act of 1934[84]. The applicant had been sentenced to two years of imprisonment for the possession of letters that persuaded soldiers to disobey orders and deviate from their duty in active military service. In so far as one of the impugned letters "urged disobedience to orders to fire, even though these could have been necessary in self-defence or the control of crime", the Commission concluded that the suppression was necessary in the interest of public safety, taking, *inter alia*, into account the state of public emergency in Northern Ireland.

Three years later the case of *Arrowsmith v. United Kingdom* was decided. Ms Pat Arrowsmith had been sentenced to eighteen months of imprisonment, primarily on the ground that she had distributed leaflets to troops stationed at an army camp, trying to keep them from their duty in Northern Ireland[85]. At the outset of its judgement, the Commission observed that the situation prevailing in Northern Ireland was of "utmost gravity". The army was almost daily under attack from the IRA, with an alarmingly large casualty rate[86]. The Commission first considered the content of the impugned leaflets. Those did not simply express a political opinion, but could have been interpreted by soldiers as an "encouragement" or "incitement" to disaffection. Because desertion of soldiers creates a threat to national security even in peacetime, the Commission concluded that the applicant's conviction served an aim consistent with Article 10, § 2.

Yet the question remained to be solved whether the interference with the applicant's freedom of expression was "necessary in a democratic society". In that connection, Ms Arrowsmith's suggested that the Supreme Court's "clear and present danger" doctrine be applied. Important to notice is that the Commission did not reject this idea. On the contrary, it regarded the "clear and present danger" doctrine relevant to the interpretation of Article 10, § 2:

> "The notion 'necessary' implies a 'pressing social need' which may include the clear and present danger test and must be assessed in the light of the circumstance of a given case."[87]

[83] *X. v. Italy*, Application No. 6741/74, 5 DR 83.

[84] *X. v. United Kingdom*, Application No. 6084/73, 3 DR 62.

[85] *Arrowsmith v. the United Kingdom*, *supra* note 25.

[86] Id., para. 17.

© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

In a footnote to this paragraph the Commission referred to the margin of appreciation doctrine established in *Handyside v. United Kingdom*[88]. In *Handyside*, the Court held that the national authorities are in principle in a better position to make the initial assessment of the reality of the "pressing social need" implied by the notion of "necessity" in Article 10, § 2[89]. The Commission went on to apply the principles underlying Article 10 to Ms Arrowsmith's conviction. It attached a lot of weight to the fact that the national authorities had taken into account the difficult situation in Northern Ireland and "the possible effect" of her campaign, which she supported by distributing the impugned leaflets[90]. Given these circumstances, it regarded the applicant's prosecution as constituting a pressing social need. Two members of the Commission filed a dissenting opinion. Mr Opsahl distinguished the case from *X. v. United Kingdom*, where there had been "direct incitement" to disobey orders under actual service in Northern Ireland. He believed that Ms Arrowsmith's action had been to remote to actually endanger national security. In his view,

> "(...) tolerance for the views of dissidents which we expect of other countries should not be abandoned in Western Europe even in times of crisis. Although the applicant's action remotely threatened public policy, this is not in my opinion a sufficient justification for interference under the system of the European Convention whose claim to credibility it is very important to preserve in the world-wide debate on human rights."[91]

Mr Klecker, on his behalf, observed that the tone of the pamphlet was rather moderate and that its language was "neither threatening nor abusive nor insulting"[92]. He believed the central question to be about the "nature of the threat" and not about the narrower issue of whether the leaflet could be regarded as incitement[93]. An institution as solidly rooted in discipline as the army, he noted, could not be seriously threatened by an "ineffectual troop of leafleteers"[94].

What conclusions can be drawn from these decisions? In the earliest cases the Commission exhibited a rather deferential attitude towards the national authorities in matters involving national security. In *X. v. Austria* for instance, the Commission affirmed a criminal conviction for activities aimed at the re-introduction of National Socialism, without actually considering the circumstances of the case. However, in *X. v. United Kingdom* and more clearly in *Arrowsmith v. United Kingdom*, the Commission took a more activist stand. Although it found no violation of the applicants' freedom of expression in these cases, the Commission carefully scrutinised both the content and the context of the expressions involved. As regards the latter, its approach may have been influenced by the First Amendment jurisprudence, invoked by the applicant in *Arrowsmith*. In *Arrowsmith* the Com-

[87] Id., para. 95.
[88] *Handyside v. the United Kingdom*, *supra* note 14.
[89] Id., para. 48.
[90] *Arrowsmith v. the United Kingdom*, *supra* note 25, at para. 96.
[91] Id., para. 12.
[92] Id., para. 7.
[93] Id., para. 9.
[94] Id., para. 12.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

mission declared that the notion pressing social need must be "assessed in the light of the circumstances of a given case", which "may include the clear and present danger test"[95]. So, even though the Commission did not fully endorse the American test, it adopted an important aspect of Holmes' original theory, namely that beside the content or nature of an expression its context is equally relevant. It should immediately be added that the Commission allowed a large margin of appreciation to the national authorities to assess the circumstances, which may explain the two dissenting opinions.

3. The Court's Case Law

It was not until 1997 that the European Court started to develop a full-scale theory of subversive speech. By then it had already considered a number of related issues such as the prosecutions for insulting or criticising the army and the government[96].

a) *Zana v. Turkey*

All of the relevant judgements concern Turkish speech crimes. In November 1997 the first of them was decided. The applicant, Mr Zana, was a former mayor of an important Turkish city. While serving several sentences in military prison, he had made the following remarks in an interview with journalists: "I support the PKK [Workers Party of Kurdistan] national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake." After the publication of this statement in a national daily newspaper, Mr Zana was convicted under Article 312 of the Turkish Criminal Code. Article 312 made it an offence to "publicly praise or defend a serious crime" and to "publicly incite hatred or hostility".

In Strasbourg Mr Zana argued that his conviction infringed his right to freedom of expression. The Court did not share this view. The majority first observed that the impugned interference with Mr Zana's right to freedom of expression was prescribed by law and pursued a legitimate aim, namely the protection of national security and public safety. In this respect the Court took into account the sensitivity of the security situation in south-east Turkey where, at the time, serious disturbances were raging between the security forces and members of the PKK. According to the Turkish government this confrontation had claimed the lives of 4.036 civilians and 3.884 members of the security forces.

[95] Id., para. 95.

[96] See e.g. *Castells v. Spain*, 23 April 1992, Series A, no. 236; *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, Series A, no. 302 and *Grigoriades v. Greece*, 25 November 1997, Reports, 1997-VII 2575.

© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

The question remained to be solved whether the conviction was necessary in a democratic society. To that purpose the Court reiterated a number of the fundamental principals underlying Article 10 of the Convention. It recalled that, subject to paragraph 2, Article 10 is applicable "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb"[97]. The word "necessary" in paragraph 2 implies the existence of a "pressing social need". Although the Contracting States have a certain margin of appreciation in assessing whether such a need exists, it goes hand in hand with European supervision[98]. In exercising this supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the statements and the context in which they were made[99]. In particular, it must determine whether the interference in issue is proportionate to the legitimate aims pursued and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

According to the Court in *Zana*, the principles underlying Article 10 of the Convention also apply to measures taken by national authorities as part of their fight against terrorism[100]. The majority first analysed the content of the words used by Mr Zana, which it found to be both contradictory and ambiguous. The applicant expressed his support for the PKK, a terrorist organisation which resorts to violence to achieve its ends, but at the same time disapproved of massacres. Yet, as the majority went on, the content of the applicant's remarks had to be seen in light of the situation prevailing in south-east Turkey at the time[101]. The impugned statement was made by a former mayor of an important city and was published in a major national daily newspaper. Moreover, its publication coincided with the murders of civilians by PKK militants. As a result, the words were "likely to exacerbate an already explosive situation in that region".[102] Several judges filed dissenting opinions questioning the Court's assessment of the context of the case. Judge van Dijk, joined by five other Judges, noticed that the interview was with a former mayor who was in prison at the relevant time. This may have limited the possible effect of his statement. Similarly, Judge Vilhjálmsson believed that words published in a newspaper in Istanbul – far away form the zone of conflict – could hardly be taken as a danger to national security.

Zana v. Turkey has become a European landmark judgement in relation to subversive speech. Although neither the majority nor the dissenting judges referred to the United States' case law, *Zana* clearly resembles certain aspects of the "clear and present danger" test. As in *Arrowsmith*, the Court put great emphasis on the circumstances of the impugned statement. In order to judge the necessity of an in-

[97] The Court referred to *Handyside v. United Kingdom*, *supra* note 14, at para. 49.
[98] The Court referred to *Lingens v. Austria*, *supra* note 15, at para. 41.
[99] Id., para. 40.
[100] *Zana v. Turkey*, 25 November 1997, Reports 1997-VII, 2539, para 55.
[101] Id., para 56.
[102] Id., para. 60.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

terference, the Court said that it must "look at the light of the case as a whole, including the content of the impugned statements and the context in which they were made". While in footnote to this sentence the Court referred to *Handyside v. United Kingdom* and *Lingens v. Austria*, it should be noted that the second part of this sentence for the first time appeared in the Commission's decision in *Arrowsmith* in relation to the "clear and present danger" test. Regarding the actual assessment of the context, the majority in *Zana*, similar to Holmes' dissenting opinions in *Debs* and *Abrams*, attached much weight to the authority of the speaker and the range and place of distribution of the text. Albeit indirectly, the *Zana* Court looked at an important aspect of the Holmes-Brandeis doctrine, namely the likelihood of the danger. The applicant's statement coincided with the murders of civilians by the PKK, which made it "likely to exacerbate" an already explosive situation. This was no doubt a decisive factor in the Court's final assessment.

b) *Incal v. Turkey*

The second Turkish case to reach the Court was *Incal v. Turkey* decided in 1998. The applicant, a former member of the Turkish People's Labour Party, was convicted for the distribution of a leaflet criticising measures taken by the local authorities, in particular against squatters' camps around the city of Izmir. It referred to "state terror against Turkish and Kurdish proletarians" and called on all "democratic patriots" to oppose the "special war being waged against the proletarian people"[103]. The pamphlet was confiscated and Mr Incal was found guilty of "incitement to commit an offence" under Article 312 of the Criminal Code.

According to the Court, Mr Incal's conviction violated Article 10 of the Convention. His "virulent" remarks about the policy of the local authorities, if read in context, could not be interpreted as "incitement to the use of violence, hostility or hatred between citizens"[104]. In addition, the Court emphasised that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. Finally, the circumstances of the case had to be distinguished from those found in *Zana*, as nothing indicated that Mr Incal was in any way responsible for the problems of terrorism in Turkey.

In *Incal* the Court confirmed the principles it set out in *Zana*, including the relevance of the contextual setting, particularly the problems linked to the prevention of terrorism[105]. What seems to distinguish both cases is the Court's appreciation of the actual threat posed by the expressions involved. Contrary to *Zana*, the circumstances in *Incal* could not be considered as likely to exacerbate an already explosive situation.

103 *Incal v. Turkey*, 9 June 1998, Reports 1998-IV, 1567, para. 10.
104 Id., para. 50.
105 Id., para. 58.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

c) The July 1999 Cases

On 8 July 1999 the Court delivered thirteen judgements dealing with language critical of the Turkish government's Kurdish policy. In eleven of them it held that there had been a violation of Article 10 of the Convention[106]. Only in two cases, *Sürek v. Turkey (No. 1)* and *Sürek v. Turkey (No. 3)*, the majority of judges declined to find a violation of the applicant's freedom of expression. Most judgements concerned charges under article 312 of the Turkish Criminal Code and section 8 of the Prevention of Terrorism Act 1991, which prohibited every attempt to undermine the "territorial integrity of the Republic of Turkey" or the "indivisible union of the nation" through written and spoken propaganda.

The Majority Opinions

Relying on *Zana* the Court first observed that the security problems in southeast Turkey could justify measures in furtherance of the protection of national security and territorial integrity. In eleven cases, however, the Turkish measures were considered to be neither necessary nor proportionate. These include the convictions for a publication of an interview with a scientist, analysing the Kurdish situation mainly from a sociological perspective, without expressly advocating the PKK's role in the Kurdish struggle for independence[107]; a book describing the ill-treatment of political prisoners in Diyarbakir prison and criticising the "bloody repression" of the Kurds by the "fundamentalist dictatorship of the bourgeoisie"[108]; a "virulent" speech at a ceremony criticising the local authorities[109]; an article accusing the government of "state terrorism" and "genocide"[110]; a historical book written in a "hostile" tone[111] and a news commentary proclaiming that it was "time to settle accounts"[112].

In several of these cases the Court conceded that the circumstances of an expression may reduce its potential impact on national security and public order. Important in this respect is the medium used to convey the message: views made public by means of a literary work[113], in a periodical whose circulation is low[114], through poetry[115] or to a limited group of people attending a commemorative ceremony[116],

[106] *Erdogu and Ince v. Turkey, Karatas v. Turkey, Polat v. Turkey, Gerger v. Turkey, Ceylan v. Turkey, Arslan v. Turkey, Sürek and Özdemir v. Turkey, Sürek v. Turkey (No. 2), Sürek v. Turkey (No. 4), Okçuoglu v. Turkey and Baskaya and Okçuoglu v. Turkey.*

[107] *Erdogdu and Ince v. Turkey*, 8 July 1999, para 51.

[108] *Polat v. Turkey*, 8 July 1999, para 44.

[109] *Greger v. Turkey*, 8 July 1999, para 47.

[110] *Ceylan v. Turkey*, 8 July 1999, para. 33.

[111] *Arslan v. Turkey*, 8 July 1999, para. 45.

[112] *Sürek v. Turkey (No. 4)*, 8 July 1999, para. 58.

[113] *Polat v. Turkey*, para. 47 and *Arslan v. Turkey*, 8 July 1999, para. 48.

[114] *Okçuoglu v. Turkey*, 8 July 1999, para. 48.

[115] *Karatas v. Turkey*, 8 July 1999, para. 52.

[116] *Gerger v. Turkey*, 8 July 1999, para. 50.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

have a lesser effect than views dispersed trough the mass media. Yet the decisive factor in the majority's assessment appears to be the nature of the message. In this regard, it adopted the following principle:

> "Where [...] remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression."[117]

In the cases in which the communications contained "incitement to violence", the state restrictions were held to be compatible with Article 10. This conclusion was reached in *Sürek (No. 1)* and *Sürek (No. 3)*. The former concerned the publication of two reader's letters in a weekly review, entitled "Weapons cannot win against freedom" and "It is our fault". Both letters strongly condemned the military action in south-east Turkey and the suppression of the Kurdish people in their struggle for independence. The owner of the review was found guilty of disseminating propaganda against the indivisibility of the State. The European Court noted that there had been "a clear intention to stigmatise the other side to the conflict by the use of labels such as 'the fascist Turkish army', 'the TC murder gang' and 'the hired killers of imperialism' alongside references to 'massacres', 'brutalities' and 'slaughter'"[118]. It believed that both letters "amounted to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence"[119]. Thus, given the already sensitive security context in the region, the content of the letters was "capable of inciting to further violence". Moreover, one of the letters identified some persons by name, stirred up hatred against them and exposed them to the risk of physical violence. Comparable circumstances were found in *Sürek (No. 3)*. The applicant had been convicted for publishing a news comment describing the Kurdish liberation struggle as a "war directed against the forces of the Republic of Turkey" and calling for "a total liberation struggle"[120]. To the majority it was clear that the author associated himself with the PKK. The message which was communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor[121]. Bearing in mind the security context the publication was again considered to be capable of inciting further violence in the region.

The Dissenting Opinions

In all thirteen cases Judge G. Bonello filed concurring and dissenting opinions criticising the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was

---

[117] E.g. *Sürek and Özdemir v. Turkey*, 8 July 1999, para. 61.
[118] *Sürek v. Turkey (No. 1)*, 8 July 1999, para. 62.
[119] Id., para. 62.
[120] *Sürek v. Turkey (No. 3)*, 8 July 1999, para. 40.
[121] Id., para. 40.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

justifiable in a democratic society. He summarised that test as follows: if the writing published by the applicant supports or instigates the use of violence, then his conviction is justifiable in a democratic society. As an alternative Bonello endorsed the Supreme Court's "clear and present danger" test. He wrote that "when the invitation to the use of violence is intellectualised, abstract, and removed in time and space from the loci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail".

In several other dissenting opinions the conditions in *Sürek (No. 1)* and *Sürek (No. 3)* were distinguished from those found in *Zana*. Judge M. Fischbach subscribed to the majority's point of view that states enjoy a wider margin of appreciation in cases concerning comments inciting people to the use of violence. However, according to Fischbach an interference can be justified only in circumstances that are "clear" and, in any event sufficiently "unambiguous". He further held that the medium used should cover an audience wide enough to give rise to the fear that remarks of a violent nature "will trigger serious and unforeseeable consequence for national security and democratic order". A similar approach was taken by Judge Palm. She believed that the majority attached too much weight to the language used and paid insufficient attention to the general context in which the words were used and to their likely impact. In this respect, both *Sürek (No. 1)* and *Sürek (No. 3)* had to be distinguished from *Zana*. In the first place, as Palm observed, the applicant was not punished for the offence of incitement to hatred but for the offence of disseminating separatist propaganda. Secondly, Mr Sürek was merely the major shareholder of the review and not the author of the impugned letters. Nor was he (or one of the authors) a prominent figure in Turkish life capable, as in *Zana*, of exercising influence on public opinion. Thirdly, the review was published in Istanbul far away from the zone of conflict in south-east Turkey. Finally, Palm stressed that letter-writing by readers does not occupy a central or headline position in a review and is by its very nature of limited influence.

In the cases in which the majority found a violation of Article 10 Judge Palm – joined by Judges F. Tulkens, M. Fischbach, J. Casadevall and H.S. Greve – wrote a concurring opinion defending an approach that would focus less on the "inflammatory nature" of the words employed and more on the different elements of the "contextual setting" in which the speech was uttered. Hence, the following questions should have been asked: "Was the language intended to inflame or incite to violence?" and "Was there a real and genuine risk that it might actually do so?".

The Impact of the July 1999 Cases

What are the consequences of the July 1999 cases? Was the authority of *Zana* overruled? As evidenced in the separate opinions, the majority moved away from the primarily context-based approach in *Zana* to focus on the question of incitement, which is more speaker-based. Accordingly, the majority's new standard shows fewer similarities to Holmes' "clear and present danger" test than *Zana*.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

The Court's interpretation of Article 10 in these cases rather resembles the Supreme Court's "direct incitement" doctrine as applied in *Gitlow*[122]. As has been seen, the *Gitlow* Court upheld a conviction for the publication of a revolutionary manifesto, which contained language of direct incitement tending to destroy organised society.

However, the impact of July 1999 cases should be qualified for a number of reasons. Firstly, the Court was rather reluctant to interpret the applicant's communications as incitement to violence. In most cases the speakers had employed highly hostile language while the majority found no violation of Article 10. In their partly dissenting opinion, Judges Tulkens, Casadevall and Greve rightly asked why the majority in *Sürek (No.1)* and *Sürek (No. 3)*, but not in the other cases, interpreted the messages as incitement to violence. A possible explanation can be found in a different appreciation of the circumstances in those cases. As a matter of fact, the majority never made a clear distinction between context and content. On the contrary, the Court's interpretation of the content of an expression seems to depend very much on the assessment of the circumstances in which it took place (cf. the words "in such a context the content of the letters must be seen as capable to inciting to further violence (...)."[123]).

It follows that the Court's notion of the concept of incitement is not restricted to the use of particular words. Expressions that, taken literally, do not invite the audience to act in a certain way, may, depending on the circumstances, be interpreted as incitement. But, the opposite holds true as well: words that conventionally denote that the speaker is advocating certain conduct, may, given the context, not be considered as incitement. In the case of *Karatas v. Turkey*, for instance, the Court observed that, taken literally, "the poems might be constructed as inciting readers to hatred, revolt and the use of violence". However, the Court continued that "in deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers".[124]

In the second place, the Court's principle is confined to incitement to violence, which means that advocacy of non-violent lawless action (e.g. civil disobedience) remains permitted. The situation is quite different under the American direct incitement standard. Both in Hand's original formula and in the Supreme Court's test in *Brandenburg*, the object of illegal advocacy is lawless action, a category much broader than violence.

Thirdly, it should be noted that incitement to violence does not automatically justify an interference with the applicant's right to freedom of expression. According to the rule put forward by the majority, the state authorities merely enjoy a wider margin of appreciation in cases involving incitement to violence. Moreover, the rule only applies to remarks that incite to violence "against an individual, a

---

[122] Janis/Kay/Bradley, *supra* note 13, at 187.
[123] E.g. *Sürek v. Turkey (No. 1)*, *supra* note 118, at para. 62.
[124] *Karatas v. Turkey*, *supra* note 115, at para. 49.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

public official or a sector of the population". Important in *Sürek (No. 1)* was indeed the fact that the letters identified some persons by name, thus exposing them to the possible risk of physical violence.

d) *Özturk v. Turkey*

Less then three months later the Court was again asked to pass judgement in a Turkish speech case. Mr Öztürk, the applicant, had published a book by N. Behram entitled "A Testimony of Life – Diary of a Death Under Torture". The book, by the Turkish government portrayed as a biography of the "terrorist" I. Kaypakkaya, gave an account of the life of this man who was a founding member of the "Communist Party of Turkey – Marxist-Leninist" (TKP-ML). According to the Turkish National Security Court the book, by venerating communism and the "terrorist" I. Kaypakkaya, had expressly incited to hatred and hostility.

The European Court, this time unanimously, held that the interference was not necessary in a democratic society. Important to notice is that the Grand Chamber was composed of the same judges – except for E. Palm and J. Makarczyk – as in the July 1999 cases. The Court first observed that, given its epic style, the book could be seen as an apologia of I. Kaypakkaya, his thoughts and his deeds. Albeit indirectly "the book gave moral support to the ideology which he had espoused"[125]. The Court went on to apply the principles relating to subversive speech as set out by the majority in the July 1999 judgements[126]. Those were summarized as follows: (I) there is little scope under Article 10, § 2 of the Convention for restrictions on political speech or on debate on matters of public interest; (II) the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician; (III) nevertheless, it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to critical remarks; (IV) finally, where such remarks incite to violence against an individual, a public official or a sector of the population, the national authorities enjoy a wider margin of appreciation when examining the need for an interference with the exercise of freedom of expression.

Applying these principles the Court first analysed the words used in the relevant edition of the book, which could not be considered as inciting to violence. Nor was there any evidence that the book concealed objectives and intentions different from the ones it proclaimed. The Court then considered the background to the case, in particular the problems linked to the prevention of terrorism. In this respect it concluded that there were no reasons to believe that in the long term the book could have had "a harmful effect on the prevention of disorder and crime in Turkey"[127].

---

[125] *Özturk v. Turkey*, 28 September 1999, para. 64.
[126] Id., para. 66.
[127] Id., para. 69.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

It had been for sale since 1991 and had not apparently aggravated the so-called "separatist threat". Therefore, the case had to be distinguished from *Zana*.

Özturk v. Turkey is important as the Court for the first time unanimously adopted the general principles governing subversive speech. On the one hand, it confirmed the rule that state authorities enjoy a wider margin of appreciation in cases in which there has been incitement to violence. On the other hand, the Court clearly distinguished the circumstances from those found in *Zana*, thus confirming its authority.

e) Subsequent Chamber Judgements

In all the chamber judgements so far, the Court applied the principles it set out in *Özturk v. Turkey* and in the previous authorities. In 2000 the fourth section of the Court delivered two judgements relating to subversive speech. In *Özgür Gündem v. Turkey* the Court found that the Turkish State had refrained from taking adequate measures to protect the daily newspaper Özgür Gündem, and accordingly had failed to comply with its positive obligations under Article 10 of the Convention (the newspaper had been the subject of serious attacks and harassment which had forced its eventual closure). In its assessment of the facts, the Court reviewed a number of articles reporting statements of the PKK (declarations, speeches and an interview with Abdullah Öcalan, the PKK leader). Three of them were found to contain passages that advocated violence[128]. The case of *Erdogdu v. Turkey* concerned a conviction for the dissemination of separatist propaganda through a periodical. In one of the impugned articles words such as "war", "armed conflict", "massacre", "violence" and "fascist" were used to describe the confrontations relating to the fight against terrorism and to stigmatise the domestic policies of the Turkish authorities. However, the article had to be distinguished, in respect of its tone, from the publications examined in *Sürek (No. 1)*. The words could not be interpreted "as an appeal to bloody revenge", nor did they communicate to the reader "the message that resource to violence is a necessary and justified measure of self-defence"[129].

Later the same year the third section of the Court was asked to consider two cases relating to Turkish convictions for separatist propaganda[130]. In both cases Turkey was once more convicted for violating Article 10 of the Convention. In 2002 the third section delivered a similar judgement in *Yalçin Küçük v. Turkey*[131]. In this case, the Court recalled that in dealing with subversive speech matters, it will consider the nature of the terms used as well as the context of their publication[132].

---

[128] *Özgür Gündem v. Turkey*, 16 March 2000, para. 65.
[129] *Erdogdu v. Turkey*, 15 June 2000, para. 67.
[130] *Sener v. Turkey*, 18 July 2000 and *Ibrahim Aksoy v. Turkey*, 10 October 2000.
[131] *Yalçin Küçük v. Turkey*, 5 December 2002.
[132] Id., at 39.

© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Finally, in 2002 and 2003 the second section of the Court considered several cases concerning the dissemination of separatist propaganda and incitement to hatred[133]. In none of them the Court found a violation of Article 10. In *Ayse Öztürk v. Turkey*, for instance, the Court reviewed a number of articles published in a magazine called "Le drapeau rouge". The majority concluded that "les articles en question ne peuvent pas être tenus pour inciter à la violence, eu égard à leurs contenu, tonalité et contexte"[134].

IV. Conclusion

It is difficult to say to what extent the European Court's interpretation of Article 10 of the Convention has been influenced by the First Amendment experience. Unlike in other Article 10 cases, there has not been a single subversive speech judgement in which the majority of the European Court explicitly referred to the United States jurisprudence[135].

In the context of Article 10, the European Court has never adopted a "clear and present danger" test nor anything like it[136]. As noted, the only explicit reference to the test is found in a minority opinion drafted by a single judge. One would wrongly conclude, however, that no similarities between the European and the American attitude towards subversive speech exist. The above analysis clearly illustrates that certain aspects of the "clear and present danger" test form part of the settled case law of the European Court.

The case that resembles the "clear and present danger" test the most is *Zana v. Turkey*. Comparable to Justice Holmes' original inquiry, the Court in *Zana* considered the circumstances of the expression – namely the sensitive security situation in south-east Turkey, the authority of the speaker and the range and place of distribution of the text – to justify the interference with the applicant's freedom of expression. By reviewing these aspects, the Court seems to have made an attempt to measure the likelihood of the expected harm posed by Mr Zana's statements. Such a consequentialist stand reminds of the Holmes-Brandeis doctrine, although without the additional "imminence" requirement.

---

133 *Yagmurdereli v. Turkey*, 4 June 2002; *Seher Karatas v. Turkey*, 9 July 2002; *Ayse Öztürk v. Turkey*, 15 October 2002; *C.S.Y. v. Turkey*, 4 March 2003 and *Yasar Kemal Gökçeli v. Turkey*, 4 March 2003.

134 *Ayse Öztürk v. Turkey, supra* note 133, at para. 80.

135 In *Appleby and Others v. United Kingdom*, 6 May 2003, para. 47, a recent case concerning the accommodation of freedom of expression to privately-owned property open to the public, the European Court had, *int. al.*, regard to the relevant First Amendment jurisprudence.

136 As regard the Court's Article 11 adjudication, see S. Sottiaux/D. De Prins, La Cour européenne et les organisations antidémocratiques, 52 Revue trimestrielle des droits de l'homme (2002), 1008, 1032-1034. In *Refah Partisi (The Welfare Party) and Others v. Turkey*, 13 February 2003, para. 104, the Court adopted a three-step rule for assessing whether the dissolution of a political party meets a pressing social need, which clearly resembles certain aspect of the "clear and present danger" test.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

In later cases such as *Sürek (No. 1)* and *Sürek (No. 2)* the Court shifted more towards a speaker-based approach, attaching much weight to the question of incitement. However, it would be incorrect to conclude that content has become the only decisive criterion in the European test. Firstly, the Court seems rather reluctant to interpret an expression as inciting violence. The final conclusion in this matter very much depends on the assessment of the contextual setting. Secondly, the authority of *Zana* was never overruled but, on the contrary, confirmed in recent judgements such as *Öztürk*. Finally, incitement to violence does not automatically justify an interference with freedom of expression. The national authorities merely enjoy a wider margin of appreciation in cases involving such incitement.

Compared to the American jurisprudence, the European Court's test gives little guidance to the Contracting States and their citizens. In *Brandenburg,* the Supreme Court articulated clear – and, for Article 10 standards, arguably too strict – criteria to judge the constitutionality of legislation outlawing subversive speech. No such criteria figures in European case law. On the contrary, the European Court employs a rather broad standard – incitement to violence – the meaning of which, in the end, always depends on the majority's appreciation of the nature of the words and the context in which they were uttered. It is, therefore, difficult to predict whether the Court will read a specific expression as "incitement to violence". An illustration of this can be found in *Karatas v. Turkey,* a case in which the Court, by twelve votes to five, held that there had been a violation of Article 10. Six judges found that the applicant's "songs of rebellion" did not incite violent action. The five dissenting judges, while applying the same test, came to the opposite conclusion. The six remaining judges concurred in the result but declined to apply the "incitement" standard.

A more attractive alternative would consist of a European test with clear and unambiguous criteria regarding both content and context. Under such a system a certain margin of appreciation could be left to the national authorities to assess whether in a given case these criteria are met. The local authorities may indeed be in a better position to make the initial factual assessment of the threat posed by the expressions involved. Today, however, the situation seems to be the other way around: when an expression satisfies the standards of a vague test, the national authorities enjoy a wide margin of appreciation to moderate it.

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

http://www.zaoerv.de
© 2003, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht