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Populist parties in Europe, from propaganda to legal reforms: whether freedoms of expression, association and religion are under threat?

MASTER'S THESIS

Author: Matteo Mastracci
LL.M 2017/2018 year student
student number M017039

SUPERVISOR: *Ieva Miluna*
(LL.M., PhD)

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed).....

RIGA, 2018

Summary

The shortcomings triggered by a more globalized, and in some respects uncontrolled scenario, together with a too weak response in terms of general strategy of European Union's institutions, seem to have pushed forward to new proto-nationalist approaches in a considerable number of European Member States. performed by new and emerging political actors classified under the very broad labels of "populist parties" or "far-right wing parties".

At the same time, the persuasive and widespread power gained by these new rising political subjects could represent a worrying development on a double and interconnected terrain, which should neither be underestimated: a domestic one, concerning a potential conflict with the traditional liberal-democratic values, which underpin the EU legal framework, particularly, the European Convention on Human Rights and, a cross-border one, represented by the potential risk for the proper balance between international community and national orders, especially concerning the consistency with the area of the fundamental rights.

Starting from the understanding of the broad definition of the term "populism", a very fluid scheme capable of multiple and manifold meanings, the thesis will briefly analyse, preliminary, a double component on the back of the populism argument, economic and social, which seems to be significant to grasp and address the reasons of the ever-increasing appeal of radical parties amongst the European electorate. Afterwards, the dissertation should turn the attention to the primary and central theme concerning the impact of populist policies on the European legal framework, and more specifically on the consistency with the European Convention on Human Rights, narrowing down the inquiry on the potential attempts to limit three fundamental rights enshrined in the Convention: freedom of expression (Art. 10), freedom of association and assembly (Art. 11) and, lastly, freedom of thought, conscience and religion (Art. 9).

Therefore, the leading research questions of this thesis are the following: 1) analysing and discussing whether the recent activities and programmes of populist/movements, especially those in Hungary and Poland, are consistent with the freedom of expression outlined by Article 10 of the Convention; 2) analysing and discussing whether "Stop Soros", the latest populist outcome in Hungary, is consistent within the meaning of the right of freedom of association and assembly as arranged by Article 11 of the Convention; 3) analysing and discussing whether some prolematic populist legal reforms and, above all, the general tendency amongst the European States to ban religious garments and the Swiss referendum pertaining the prohibition to erect new minarets, are consistent with the spirit of Article 9 of the Convention which establishes the core elements of freedom of thought, conscience and religion.

In order to perceive whether these three fundamental rights should be considered at stake by some of the new arising populist tendencies, it will be crucial to refer the research to the developing case-law of the European Court of Human Rights (ECHtR) as well as to the soft law instruments of the most relevant international institutions in interpreting the meaning and the extensions of the rights protected by the Convention and the duty of States of performing their actions by means of positive obligations that the national authorities should fulfil for protecting and respecting the European legal obligations.

Firstly, the research will address the fundamental right of freedom of expression as portrayed by Article 10 of the Convention, intended by the Court as one of the essential foundations for a democratic society, which, however, may be limited on the basis of specific grounds enshrined in Article 10 (2) of the Convention, after it is worth to analyse, albeit briefly, a peculiar limitation of the freedom consisted in the prohibition of hate speeches and subsequently, above all, to focus the attention on the relevant issue of pluralism and independence of the media outlets; later on, the inquiry will shift to some contemporary populist threats, in particular on the new legal reforms drafted by Hungary and Poland where populist parties are in power, which could in some way threaten and reduce the meaning of the scope of the right and, finally, it is worthwhile to consider what could be a conceivable strategy for the future with the purpose of advance the enforcement of the specific right at issue.

Secondly, the investigation will shift to the scrutiny of the right of freedom of association and assembly as outlined by Article 11 of the Convention, highlighting, beforehand, the Court's most relevant judgments describing the main traits of the legal provision, and a closer look should involve the engagement between freedom of association and the rights of non-governmental organizations as expression of civil society needs; afterwards, the analysis and the discussion will move into the main populist threats and, in particular, the most controversial one that apparently is the "Stop Soros bill" presented to the Hungarian parliament by the populist party Fidesz, later on, the thesis will try address whether this questionable populist outcome could clash with the scope and the significance of freedom of assembly and association; ultimately, the examination will try to respond to the critical question of the enforcement of the right, trying to outline some feasible and concrete paths to follow and, among them, a stronger and more incisive role of national authorities to ensure the conformity between international and national law expressed along the lines of the *Csullog* judgment.

Thirdly and finally, the present investigation will deal with the populist parties' attempts to limit the freedom of thought, conscience, and religion, right bordered by Article 9 of the Convention, discussing, first of all, the European legal basis and the various relevant interpretation provided by the European Court of Human Rights, after that, it might be significant to consider the sensitive and discussed issue of the prohibition of religious symbols, underlining, at the same time, the contrast between some recent international judgments; subsequently, it will be necessary to mentioning and discussing the main populist threats and amongst them, the recent constitutional reform passed in Switzerland on the ban on the construction of new minarets and, latterly, the succeeding question to cope with should be the argument of the enforcement of the right, considering the prominent role that other actors, especially non legal, must play with more vigour into the international scenario.

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1. INTRODUCTION

The gradual advent of an ever-widening scenario of populist politics could be a particularly worrying development throughout the European Union for several reasons and, among the many, the contemporary relationship between the national and international law which often results in boosting, old and new, tensions.

Since the mid-20th century it has been widely recognized that constitutional and parliamentary democratic systems are necessary to limit the notion of absolute sovereignty of the people; the latter, however, in the current populist scenario always prevails over any other right or value in the populist discourse with the aim of further affirming their legitimacy which derives from the assumption that populist parties are the only subject able to stand for the pure people in the fight against the corrupted elite represented by the old and outdated previous order; hence, in this new scenario, the will of the people turned into the fundamental value with regard to which all the other values are subordinated.

The liberal-democratic mantra, which traces its genesis to the 18th century, birth of the season of the Enlightenment, was that values, such as pluralism, inclusive debate and the protection of minority interests against aggressive form of majoritarianism were essential tools for maintaining a more stable and inclusive society, as well as for the promotion of a wealthier democratic environment indispensable for the progress of the people and, at the same time, to the betterment of humankind.

The populist parties, however, seem to approach to the validity of liberal-democratic values with great caution and skepticism due to the fact that they consider them as latent threats capable of undermining the stability of national legal orders, as a result, they tend to expand a wide range of protectionist policies and conceive an ever-growing popping up of legal reforms aiming to exclude from political life and social debates an increasing number of actors and, amongst them, media and non governmental organisations, in particular.

Consequently, the populism argument gives rise to many meaningful concerns; first and foremost, the potential fracture with these rights, especially those expressed in the European Convention on Human Rights, which are the concrete manifestation of the liberal-democratic values, mainly freedom of expression, freedom of assembly and association and freedom of thought, conscience and religion; moreover, and as a predictable effect in all the cases where an infringement could occur, populism represents a really harduous challenge for the international community as a whole on the issue of the implementation or enforcement of the rights violated.

The effect of these frictions could threaten the very essence of the European Union's values, as treasured in the European Convention on Human Rights' body, which in its preamble affirmed with extraordinary vigor that "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".

1.1 The manifold meaning of the term populism

The adjective populism is not the clearest, it is a really nebulous concept, and the term is often abused in political discourses, since calling someone a populist is to express a negative evaluation of the actor or his/her political program¹; in fact, many scholars have suggested a long list of multiple definitions with the attempt to describe a very complex and often varied phenomenon.

In fact, the adjective “populism” has become a fashionable term, and it is increasingly used as a very general and broad label for political parties which challenge the *status quo* and the establishment elite; this excessive use is indeed problematic: as a matter of fact, using the populism adjective too widely dilutes its meaning, making it difficult to identify the real populist threat that afflicts our democracies; therefore, it is essential to be precise about what it does and what does not constitute a populism matter.

As a result, while it has many different forms, populist acts, individuals, and movements show some common characteristics: they tend to be anti-establishment, to respond to widespread public grievances and appeal to people’s emotions, to invoke the will of the people in order to put themselves above democratic institutions and overcome obstacles which stand along the way. The people are presented as a single, monolithic entity with one coherent view, by claiming exclusive moral authority to act on their behalf, populism seeks to delegitimize all other opposition and courses of action.

All actions are justified by this exclusive so-called “moral authority.”

In Europe, since the end of the Cold War², we are witnessing the massive emergence of an ever-increasing number of atypical political parties within a long list of European Member States; scholars tend to classify them under the label “populist party” or the more general “populism trend”; however, any attempts at classification seems not to be accurate enough because the populist phenomenon is less homogenous than it appears at first sight.

Indeed, there is an ongoing and lively debate on the definitions of populism, which means political ideas and activities that aim to gain the support of the ordinary people by giving them what they literally want³.

There are several schools of thought on it, amongst them the following: populism should be viewed as both a discourse and a form of government⁴, or a moralistic imagination and fantasy of politics, a way of perceiving the world that sets a morally pure and fully unified, populist leaders don’t like mediating institutions at all, that is, institutions standing between them and the people, be those the mass media or other parties, they deal with the real people directly, they establish their megaphones⁵.

¹ Smilov, “Populism, Courts and the Rule of Law: Eastern European Perspectives,” p. 2.

² See, OSCE, *Strengthening Dialogue, Trust and Security in the OSCE Region at the Heart of German Chairmanship in 2016* (2016).

³ Definition of Cambridge Dictionary.

⁴ De la Torre, “The Promise and Perils of Populism, University Press of Kentucky,” p. 32.

⁵ See, Muller, *What is Populism?*, p. 25.

Cas Mudde, one of the leading scholar on the populism phenomenon, suggests that a minimal definition of populism is to be preferred as a “thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, the pure people versus the corrupt elite, and which argues that politics should be an expression of the *volonté générale* of the people”⁶; on the other hand, other scholars⁷ proposed a refutation of the ideological theory suggested by Mudde, citing the works of Ernesto Laclau⁸, which emphasized the exacerbation of personalistic leaderships and the role of the leader as a representation of the nations’ interests against its conceptual enemies, and the proponents of the frame theory, which combine a research focused on empirical approach and cooperation with other fields of study such as social sciences.

However, describing populism in a purely theoretical way could be extremely misleading and sometimes inappropriate because of the multiple appearances and manifestations of populist parties that, for their part, are hostile to being categorized or even just described by scholars, political scientists, sociologists: in one word they do not want to be portrayed by the “corrupted elites”.

Therefore, according to this preliminary empirical explanation, we can contemplate as populist parties, the pursuing European parties⁹: Fidesz and Jobbik in Hungary, Law & Justice in Poland, Five star movement and North League in Italy, Freedom Party of Austria in Austria, Swiss People’s Party in Switzerland, Front National in France, National Front for the Salvation of Bulgaria and IMRO in Bulgaria, ANO 2011 in Czech Republic, Danish People’s Party in Denmark, Finns Party in Finland, Kotleba in Slovakia, National Alliance in Latvia, Conservative People’s Party of Estonia in Estonia, UKIP in United Kingdom, New Flemish Alliance in Belgium, VMRO-DPMNE in Macedonia, Progress Party in Norway, Sinn Féin in Ireland, Party for Freedom in the Netherlands, Sweden Democrats in Sweden, Alternative for Germany in Germany and others minor parties.

1.2 The twofold component

Real issues lie behind the surge of populism: economic dislocation and inequality caused by globalization, automation and, technological changes; the attempt to address these complex issues is not simple, but populists tend to respond less by proposing positive solutions. The result has been a frontal assault on the values of inclusivity, tolerance, and respect that lie at the heart of human rights¹⁰.

A crucial factor that increases the fashion of populist parties is the concept of instability, both in term of economy and concerning values and identity.

⁶ Mudde, “Are Populists Friends or Foes of Constitutionalism?”, p. 3.

⁷ Cf., Aslanidis, “Is populism an Ideology? A Refutation and a New Perspective”.

⁸ See, Laclau, *On Populist Reason*.

⁹ See, *Annex 3*.

¹⁰ Roth, “The pushback Against the Populist Challenge”.

1.2.1 The economic component¹¹

Another element that pushes the populist parties forward is the one expressed by K. Roth when he states that people “feel left behind by technological change, the global economy, and growing inequality.”¹²

A study by Gallup (World Poll, 2016) also claims that populist votes, in 18 out of 27 countries in the European Union, tend to increase when people are discouraged by their future; for this purpose, the study takes into account three variables: no confidence in national government, future life poorly viewed relative to current life and disaffection and discouragement. The analysis reveals that people in countries with recent populist trends tend to have a combination of low trust in government and low or static expectations for their future lives because of financial reasons.¹³

In particular, France, the UK and Slovenia rank in the top 10 EU countries with the highest percentage of disaffected and discouraged residents and Germany and the Netherlands as well have a high rate of disaffected and discouraged people, respectively 27% and 28%¹⁴; overall, the findings of the report suggest that growing deficits of hope and trust are more likely to be prevalent in countries experiencing a rise in populism support and if they earn enough to make their living and provide a good future for their children, this situation will most likely change¹⁵.

Capitalism and the free market economy are widespread throughout the world. However, capitalism causes inequality, which triggers the wick of disorder, although capitalism promotes the idea of equal rights and opportunities, inequality is rooted in the capitalism itself. In the capitalist system, the rich are becoming richer, while the poor are getting increasingly poor.

Low wages, minimal job security, and vulnerability to social risks make people vulnerable to the appeals of radical right parties¹⁶; economic inequality has been exacerbated by increasing automation and outsourcing, globalization and growing mobility of capital and labour, the erosion of workers’ unions, neoliberal austerity policies, the growth of the knowledge economy and the limited capacity of democratic governments to regulate investments made by multinational companies or to stem migratory flows¹⁷.

According to many studies, economic inequality is increasing (CBO, 2011¹⁸, OECD, 2008¹⁹, Piketty, 2014²⁰, UNDP, 2016). The OECD Report confirms the argument: “Overall, over the entire period from the mid-1980s to the mid-2000s, the dominant pattern is one of a fairly

¹¹ On this argument see, O’Connor, “Three Connections between Rising Economic Inequality and the Rise of Populism”.

¹² Roth, “The Dangerous Rise of Populism”; cf., Giulio Tremonti, “Mundus Furiosus: Il riscatto degli Stati e la fine della lunga incertezza,” p. 15.

¹³ Zapryanova and Christiansen, “Hope, Trust Deficits may help fuel populism” *Gallup*, April 7, 2017.

¹⁴ See *Annex 1*.

¹⁵ See, Zapryanova and Christiansen, *supra* note 13.

¹⁶ See, e.g., Betz, “Radical Rightwing Populism in Western Europe”; Ignazi, “Extreme right parties in Western Europe”.

¹⁷ Inglehart and Norris, “Trump, Brexit and the Rise of Populism: Economic Have-Nots and Cultural Backlash”.

¹⁸ Congress of the United States, Congressional Budget Office. *Trends in the Distribution of Household Income Between 1979 and 2007*.

¹⁹ OECD, *Are we growing unequal? New evidence on changes in poverty and incomes over the past 20 years*.

²⁰ Piketty, *Capital*.

widespread increase in inequality”; the Human Development Report 2016 of UNDP²¹, confirms that the absolute inequality is increasing since 1975.

A World Bank report²², furthermore, linked the rise of populist parties to the deepening of economic inequalities and poverty; the earnings of the poorest 10% of European citizens fell by 7% decades, while the profits of the EU’s wealthiest 10% grew by 66%. The impoverished regions of Eastern Europe, such as Hungary and Poland, still have less than 50% of the EU average GDP per capita, even if the national economies in the east have prospered; other countries such as Greece and Italy have low productivity and low wage growth; moreover, technological change has wiped out 15% of manual jobs in Europe over the past 15 years, especially in countries like Austria, Bulgaria, Greece, Hungary, Italy, Latvia, Romania, and Slovenia.

Drawing on these arguments, the thesis of economic insecurity explains populism as a product of stagnant or falling real income, due to global markets, the growing income disparity and the loss of faith that the main parties, traditional parties, will respond to these concerns; if this thesis is right, the logic is that mass support for populism should be concentrated among the economically marginalized sectors that are the main losers from global markets and technological advances, so populist votes should be the strongest chimera among the following categories: unskilled workers, the unemployed and families’ dependent on social benefits.

For instance, following this path, a report shows that individual-level radical right support in Western Europe was significantly stronger among the unemployed, the less educated workers and men²³; at the same time, however, some other researchers suggest reasons for doubting on that argument. For example, one study argues that “we should look sceptically upon the idea that the radical right is purely a phenomenon of the politics of resentment among the new social cleavage of low-skilled and low-qualified workers in inner-city areas, or that their rise can be attributed in any mechanical fashion to growing levels of unemployment and job insecurity in Europe. The social profile is more complex than popular stereotypes suggest”²⁴.

Cas Mudde is equally dubious about a purely economic explanation for the rise of populism²⁵; besides, populist parties have also arisen in some of the more egalitarian European societies, with cradle-to-grave welfare states, which contain some of the most educated and safest populations in the world, such as Sweden and Denmark.²⁶

The contemporary version of the economic vulnerability argument links these developments directly with rising mass support for populism, which is understood to reflect divisions between the winners and losers from global markets, and thus whether one’s life is secure or insecure²⁷.

²¹ UNDP (United Nation Development Programme), *Human Development Report 2016, Human Development for Everyone*.

²² World Bank, *Growing United: Upgrading Europe’s Convergence Machine*.

²³ Lubbers, Gijssberts, and Scheepers, “Extreme right-wing voting in Western Europe,” p. 350.

²⁴ Kitschelt and McGann, “The Radical Right in Western Europe: A Comparative Analysis,” p. 147.

²⁵ Mudde, “Populist Radical Right Parties in Europe,” Chapter 5.

²⁶ *Ibid.*, p. 9.

²⁷ Bornschier, “Cleavage Politics and the Populist Right: the New Cultural Conflict in Western Europe”, p. 171.

1.2.2 The social component

The other decisive factor behind the rise of populist parties is the question of identity, which is for populist parties an intense propaganda argument based on the distinction “*us-them*,” to construct the native identity because the people need to delineate their boundaries with other different identities, i.e., those of the non-natives; in other words, to build the *in-group* (“us”) it is necessary to form the *out-groups* (“them”), populist parties seek the salvation of people (“the pure people”), promising them a clear identity and protection against the unsteady world²⁸.

According to Bronislaw Misztal, identity is a kind of gathering of knowledge and skills, that lets us know our separateness or similarities, our cognitive, emotional, moral, and political qualifications that define our role and place in the world²⁹ and one of the processes that intensify the search of identity is the phenomenon of the globalization³⁰; indeed, economic and cultural globalization has increased the uncertainty about a vague identity that is not based on a traditional pattern; therefore, people seek vigorously, even hysterically, their identities all over the world³¹.

In this extraordinarily intricate and tortuous context, another component adds more complexity to the matter: the question of a European identity; indeed, the identity issue has seen as a crucial element in Europe: European citizens face a substantial identity problem in the context of modern EU democracy in a scenario characterized by various language, religion, customs, traditions, and history.

In fact, it is quite debated that European identity can be defined as a concept of civilization based on religion, on shared history and on values that pertain only Western Europe, an approach that seems to be inaccurate and slightly more than problematic. If we define the European identity taking into consideration just the Christian religion, therefore we eliminate a large and growing number of Muslims born and resident in Europe; however, the notion of common history in the European context should be instead defined as everyday learning of mistakes that should not be repeated in the future.

Most importantly, the notion or the need of a particular and specific identity suffers this critical paradoxically leak: identities are always built against others; it makes no sense to say: I am European if it does not imply differences between being African, Asian or American.

So, in this perspective, the clash with globalization is impressive and majestic: globalization draws its strength from the concept that everyone, each person, every customer or client, should be the same as the others, without differences of identity, only different tastes or preferences for goods that need to be sold in the global market to as many people as possible.

²⁸ Mudde, *supra* note 25, p. 63.

²⁹ Misztal, “Identity and the future of Nation States,” p. 24.

³⁰ Szatlach, “European Identity and Populism,” p. 70.

³¹ *Ibidem*.

2. MAIN FEATURES

However, leaving aside the ideological and social features, the principal populist parties across Europe show a sort of common agendas on future political plans regarding some crucial issues, such as: the attack on the independence of the judiciary, the erosion of the checks and balances mechanisms, the anti-refugee policies, the discredit of the international institutions including the role of the Courts and the weakening of the authority of international law and of the human rights regulatory framework.

In any case, in this research, given the enormous amount of criticisms triggered by the populist argumentation, we must confine the field only on some of them, probably the least developed by scholars, and more precisely on the following three domains: the various attempts to undermine the freedom of expression, in particular as regards the general role of media and their impartiality and independence, the efforts to erode the freedom of association and assembly, and finally the attempts, primarily by prospering and fostering hate speeches and hatred propaganda to weaken and discredit the other religious beliefs and, therefore, the specific potential threats to the freedom of thought, conscience and religion.

Importantly, it is significant also to underline that the three aforementioned freedoms are extremely linked to each other so, as a consequence, a potential populist approach could be worrying on several legal grounds and a violation of one of those three rights could involve another violation with a really problematic “domino effect”, especially, in relation to freedom of expression and freedom of assembly and association due to the fact that the latter protect in an indirect way also the first one; therefore, from the same populist behaviour could come up an extremely complexed effect in terms of relationship between different rights.

Philip Alston advises, in a very far-sighted way, the international community on the complexity of the anti-human rights agenda that characterized many populist political leaders:

“The nationalistic, xenophobic, misogynistic, and explicitly anti-human rights agenda of many populist political leaders requires human rights proponents to rethink many longstanding assumptions. There is a need to re-evaluate strategies and broaden outreach while reaffirming the basic principles on which the human rights movement is founded. Amongst the challenges are the need to achieve more effective synergies between international and local human rights movements and to embrace and assert economic and social rights as human rights rather than as welfare or development objectives. It will be crucial to engage with issues of resources and redistribution, including budgets, tax policy, and fiscal policies. There is a need for collaboration with a broader range of actors, to be more persuasive and less didactic, and to be prepared to break with some of the old certainties. Academics should pay attention to the unintended consequences of their scholarship, and everyone in the human rights movement needs to reflect on the contributions each can make”³²

³² Alston, “The Populist Challenge to Human Rights,” p. 1.

2.1 Attempts to limit freedom of expression

2.1.1 European legal basis

Freedom of expression is a precondition for healthy democracies, in the context of an effective democracy and respect for human rights mentioned in the preamble of the Convention; furthermore, it is not only valuable in itself, but it also plays a central role in the protection of the other rights established by the Convention, such as the freedom of association and assembly and the freedom of thought, conscience and religion.

There can not be a democratic society without the fundamental right to freedom of expression: the progress of society and the development of each depend on the possibility of receiving and imparting information and ideas³³.

The primary provision that defines “freedom of expression” within the European framework is Article 10 of the European Convention on Human Rights; moreover, the Charter of Fundamental Rights of the European Union provides an identical guarantee laid down in the structure of Article 11.

Article 10 of the Convention prescribes as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

“2. The exercise of these freedoms, since it carries with it duties and responsibilities, may 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 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”³⁴

As we can see, Article 10 of the Convention is structured in two different paragraphs: the first defines the protected freedoms (freedom to hold opinions, freedom to receive information and ideas, freedom to impart information and ideas); the second part describes the circumstances in which a State can legitimately interfere with the exercise of freedom of expression.

Freedom of expression is said to be “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-

³³ Council of Europe, Parliamentary Assembly, Resolution 1510, *Freedom of Expression and Respect for Religious beliefs in Blasphemy* (2006).

³⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR), Art. 10, 1950; the other relevant European legal provision expressing the right of freedom of expression is the EU Charter of Fundamental Rights, which in the Article 11 under the Title II, Freedoms, describes that: “1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance”, “2. The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right”.

fulfillment,”³⁵; moreover, this is a requirement of pluralism, tolerance, and broadmindedness “without there being no democratic society.”³⁶

The Court also stated in the *Ekin Association* case that the rights recognized in Article 10 of the Convention are valid “regardless of frontiers”.³⁷

First of all, we should clarify what the scope of the legal provision is.

The very essence of the right of freedom of expression is broader with respect to criticism of the government than it could be when some particular actors became the target of the restriction. Democracy, generally speaking, requires that government acts or omissions should be carefully scrutinized and examined, not only by the legislative and judicial bodies of the State but also by the citizens through the very special subject named public opinion³⁸.

This is necessary for the reason that “thought and opinions on public matters are of a vulnerable nature”, the mere possibility that the authorities will interfere, or that there will be interference from private parties who are not subject to proper control or who have the support of the authorities, is able to impose “a serious burden on the free formation of ideas and democratic debate and have an effect on that”³⁹.

Regarding the types of protected speech, the provision is not limited only to words, spoken or written, but also extends to images⁴⁰, actions⁴¹, pictures⁴², cultural heritage and the display of symbols, such as the use of the red star in Hungary⁴³.

Article 10 protects the freedom of communication; this notion comprises the real and genuine freedom of expression, the freedom of information, the freedom of communication via mass media and specific parts of the freedom of artistic and academic expression⁴⁴; contrary to the numerous national guarantees to this effect, Article 10 does not refer to any particular way or modalities of expressing one’s opinion that, as a consequence, should assume a broad range of different modalities.

Since the exercise of these freedoms “carries with it duties and responsibilities,” Article 10 (2), provides a list of legitimate grounds or reasons for the imposition of “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”; these conditions are as follows: the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of disclosure of information

³⁵ See, e.g. *Lingens v. Austria*, no. 9815/82, §41, 8 July 1986, Series A no. 103; *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, §53, ECHR 2011.

³⁶ *Handyside v. United Kingdom*, no. 5493/72, §47, 7 December 1976, Series A no. 24.

³⁷ *Association Ekin v. France*, no. 39288/98, §62, ECHR 2001-VIII.

³⁸ Schabas, *The European Convention on Human Rights*, p. 452.

³⁹ *Altuğ Taner Akçam v. Turkey*, no. 27520/07, §81, 25 October 2011.

⁴⁰ See, e.g., *Chorherr v. Austria*, no. 13308/87, 25 August 1993, Series A no. 266-B.

⁴¹ See, e.g., *Steel and Others v. the United Kingdom*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII.

⁴² See, e.g., *Müller and Others v. Switzerland*, 24 May 1988, Series A no. 133.

⁴³ *Vajnai v. Hungary*, no. 33629/06, ECHR 2008.

⁴⁴ Grabenwarter, *European Convention on Human Rights: Commentary*, p. 113-116.

received in confidence and, lastly, the maintenance of the authority and impartiality of the judiciary.

However, to be valid under Article 10, par. 2, these “formalities, conditions, restrictions or penalties” must cumulatively comply with the principle of legality, the condition of a legitimate purpose and the principle of necessity in a democratic society.

Therefore, the principle of freedom of expression could be limited in an enormous number of circumstances, for example in a recent case⁴⁵ concerning the protection and responsibilities of non-governmental organisations when they take a social watchdog function, playing a role of similar importance to that of the press or media, the Grand Chamber found no violation of Article 10 after balancing the right of freedom of expression with the right to privacy and private life and with the reputation of the others because the NGOs had acted negligently merely by reporting the alleged misconduct of the editor of the newspaper without making a reasonable effort to verify its accuracy.

The first prerequisite for limiting or restricting or again disregarding the legal provision related to the freedom of expression is that the law must prescribe the interference performed by the State; however, it is necessary to underline whether this circumstance may occur.

First of all, an interference must be prescribed by law; the primary assessment to be taken into consideration is the “accessibility,” the Court, in this regard, spelled out its meaning in the case *Sunday Times v. UK* and clarified that accessibility means that the citizen must be able to have an indication that is appropriate in the circumstances of the legal rules applicable to a particular case; secondly, a law must be formulated with sufficient precision because the citizen must be able to predict the consequences that a certain action may entail⁴⁶.

As a consequence, where an interference with one’s freedom of expression is based on a provision which is formulated too broadly or in a really vague way and therefore constitutes a constant threat to the concrete exercise of freedom of expression, then the interference is not considered as “prescribed by law” and, consequently, it is in violation of Article 10⁴⁷.

On this point, the Court, in the *Hashman and Harrup* case, observed that the expression “to be of good behaviour” was particularly imprecise and, therefore, did not provide to the applicants a sufficiently clear indication on how to behave in the future; therefore, the interference of the State was not regarded as covered by law.

Furthermore, interference is not “accessible” within the meaning of predictability even if the laws themselves are sufficiently precise where can be found different national decisions concerning the same legal situation, thus, following the main principles of cohesion and coherence between legal provisions⁴⁸.

The second, and subsequent, prerequisite that the Court need to assess and prove in a case by case approach is a more complex and nebulous one: the existence of a legitimate aim.

For instance, in the case *Aydin v. Germany* in which a sympathizer of Kurdish activist,

⁴⁵ *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no.17224/11, ECHR 2017.

⁴⁶ *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, §49, Series A no. 30

⁴⁷ *Altuğ Taner Akçam v. Turkey, op.cit.*, §93.

⁴⁸ *Goussev and Marenk v. Finland*, no. 35083/97, §54, 17 January 2006.

Abdullah Ocalan, was prosecuted under the Law on Associations for signing a declaration in 2001 in support the abolition of the activities of PKK imposed by order of the Minister of the Interior, the Court recognized a legitimate aim which was said to belong “to protect public order and safety”⁴⁹.

Nevertheless, it is worth to point out the existence of a distortion in the methodology process of the Court; in fact, a legitimate aim could be the one invokes many circumstances recalled by the Convention; however, it is not uncommon for the Court to just pass over the issue entirely and move to the heart of the debate which takes place under the rubric of “necessary in a democratic society”⁵⁰.

Therefore, and as a last resort of methodology, any restriction on freedom of expression must be “necessary in a democratic society”, this adjective implies as well the existence of another critic notion which needs to be assessed by the Court, that is the presence of a “pressing social need”; member states have some degree of interpretation (margin of appreciation) in assessing the existence of such necessity.

The first step, therefore, implies the analysis of the existence of a “pressing social need,”⁵¹ the pressing social need itself must be appreciated in the context of the interests of a democratic society.

For example, when press freedom is at stake, the importance of a democratic society in ensuring and maintaining a free press must be weighed in balance⁵² and where freedom of the media is at risk, the national authorities have only a limited margin of appreciation to decide whether there is a “pressing social need” to take such measures⁵³.

The Court in many cases clarified that “where there has been an interference in the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established”⁵⁴.

In exercising its power of review and control, the Court assesses the proportionality of a restriction on freedom of expression concerning the aim pursued, any interference disproportionate to the legitimate aim pursued will not be deemed “necessary in a democratic society” and will, therefore, contravene Article 10 of the Convention⁵⁵.

On the other side, the Court in another case *Bayev and Others v. Russia*⁵⁶, a dispute concerning a protest against laws that prohibit the promotion of homosexuality among minors, found a violation of the right to freedom of expression after discussing and arguing the standards of the protection of moral rules, protection of health and the rights of the others.

⁴⁹ *Aydin v. Germany*, no. 16637/07, §58, 27 January 2011.

⁵⁰ Schabas, *op. cit.*, p. 471.

⁵¹ See, *i.a.*, *Otegi Mondragon v Spain*, no. 2034/07, ECHR 2011.

⁵² *Fatullayev v Azerbaijan*, no. 40984/07, 22 April 2010.

⁵³ *Wizerkaniuk v Poland*, no. 18990/05, 5 July 2011.

⁵⁴ *Autronic AG v Switzerland*, 22 May 1990, §61, Series A no.; *Worm v Austria*, 29 August 1997, §47, *Reports of Judgments and Decisions* 1997-V.

⁵⁵ Council of Europe, *Freedom of Expression in Europe*, p. 9.

⁵⁶ See, *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, ECHR 2017.

Further, it is important to stress that the Article 10 of the Convention it is not only designed to prevent people from the unlawful interference by the public authorities but, also, and indirectly it addresses the States to act in a certain way through performing specific actions called positive obligations.

Indeed, although the essential objective of Article 10 of the Convention is to protect the individual against arbitrary interference by public authorities, the European Member States must fulfil a various range of positive obligations, as identified in the relevant judgements of the European Court of Human Rights and the other significant instruments of the Council of Europe⁵⁷.

These obligations should include legal, administrative and practical measures aiming to ensure the safety of journalists and to create an environment conducive to freedom of expression; all State authorities must meet positive obligations – executive, legislative and judicial branches – and at all levels, national, regional and local; however, such obligations should not impose an unreasonable or disproportionate burden on the national and domestic authorities.

The States must act, for example, to protect media workers in the case of a campaign of violence and intimidation⁵⁸, or in the event of an unlawful fire or unjustified dismissal of journalists⁵⁹.

In March 2000 the Court issued the ruling in the *Ozgur Gundem* case, which concerned various allegations, stating that, in view of the crucial importance of freedom of expression as one of the preconditions for a functioning democracy, “the exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interest of the individual”⁶⁰.

2.1.2 Freedom of expression and hate speech

A very peculiar limitation to the freedom of expression is the “prohibition of hate speech or racial hatred,”⁶¹ and this argument takes on particular importance with populist parties which often rely on “borderline speeches” for making strong propaganda campaigns amongst people.

A speech, first of all, is qualified as a hate speech when it addresses a person or a specific group of persons on the ground of somewhat classification, of ethnics or religious nature.

The Court dealt with hate speech in several cases, for example when the expression could lead to ethnic hate, to negationism or revisionism, racial hate, religious hate, threat to the democratic order, apology of violence and incitement to hostility, circulating of homophobic

⁵⁷ See, Council of Europe, Committee of Ministers, Recommendation CM/Rec (2016)4 on the protection of journalism and safety of journalists and other media actors (2016).

⁵⁸ See, *Özgür Gündem v. Turkey*, no. 23144/93, ECHR 2000-III.

⁵⁹ See, *Fuentes Bobo v. Spain*, no. 39293/98, 29 February 2000.

⁶⁰ *Özgür Gündem v. Turkey*, *op.cit.*, §43.

⁶¹ Schabas, *op.cit.*, p. 478; European Court of Human Rights, Press Unit. *Factsheet on Hate speech*.

tendencies, condoning war crimes, denigrating national identity, display flag with controversial connotations, incitement to ethnic, national or racial discrimination hatred, incitement to religious intolerance.

For instance, in the case *Gunduz v. Turkey*, the Court concluded that an application filed by the leader of an Islamic sect, convicted of inciting others to commit crimes and incitement to religious hatred by publishing his views in the press was inadmissible. Due to their content and their violent tone, the applicant's statements amounted to hate speech and glorification of violence and were thus incompatible with the fundamental values of justice and peace to which the preamble to the Convention referred.

In the report in question, the applicant had also named one of the victims alluded to, a reasonably well-known writer who was easily recognizable by the general public and who had therefore been placed at risk of physical violence. The severity of the sentence (four years and two months in prison, together with a fine) was justified as a deterrent that could be considered necessary in the context of preventing public incitement from committing offences.⁶²

Furthermore, the Court has addressed the issue of incitement to racial discrimination or hatred in several cases; first and foremost, in the case *Le Pen v. France*⁶³, concerning an interview with a newspaper released by the presidential candidate in which she asserted, among other things, that “the day there are no longer 5 million but 25 million Muslims in France, they will be in charge”, declaring that the comments could arouse feelings of rejection and hostility towards the Muslim community and, therefore, the interference was relevant, sufficient, proportionate and necessary in a democratic society.

Likewise, in the case *Féret v. Belgium*⁶⁴, where the applicant, a Belgian member of Parliament and president of the Front National in Belgium, issued slogans during the election campaign as “Stand up against the Islamification of Belgium”, “Stop the sham integration policy”, “Send non-European job-seekers home”, the Court affirmed that it was essential for politicians to avoid comments that could promote intolerance and provoke social tensions, therefore, the applicant could not rely on freedom of expression and the interference was justified in order to prevent disorder and protect the rights of others.

In two cases, *Norwood v. the United Kingdom*⁶⁵ and *Belkacem v. Belgium*⁶⁶, the Court dealt with the issue of the religious hate; in the first, the applicant showed in a poster the words “Islam out of Britain – Protect the British People”, in the second, the applicant was the leader of the organization “Sharia4Belgium” and he published some videos on YouTube concerning the promotion of the Sharia law amongst non-Muslim groups; as a result, in both cases the application was declared inadmissible on the basis of the incompatibility of freedom of expression with hate speech, which is contrary to the values of tolerance, social peace and non-discrimination underlined by the European Convention on Human Rights.

It is interesting to note that in all the cases cited, the Court has often pointed out the

⁶² See, *Gündüz v. Turkey* (dec.), no. 59475/00, §23, ECtHR 2003-XI (extracts)

⁶³ *Le Pen v. France*, no. 18788/09 (ECtHR, 20 April 2010)

⁶⁴ *Féret v. Belgium*, no. 15615/07, 16 July 2009

⁶⁵ *Norwood v. The United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI

⁶⁶ *Belkacem v. Belgium*, no. 34367/14 (ECtHR, 27 June 2017)

applicability of the institutions concerning the “abuse of the right”, defined by Article 17 of the Convention⁶⁷, according to freedom of expression may not be used to lead to the destruction of other rights and freedoms granted by the Convention.

Therefore, when freedom of expression implies a case which could be considered as a “hate speech, or incitement to religious hatred,” the freedom itself fails and can not be considered guaranteed or protected by the European Convention on Human Rights.

Finally, the Committee of Ministers of the Council of Europe has addressed the issue in the Recommendation 1805 of 2007, “Blasphemy, religious insults and hate speech against persons on grounds of their religion.”⁶⁸

In multicultural societies it is often necessary to reconcile freedom of expression and freedom of thought, conscience, and religion; about hate speech, the State is primarily responsible for determining what should count as criminal offenses within limits imposed by the case law of the European Court of Human Rights⁶⁹.

The Council of Europe after recalling the preliminary report adopted on March 16 and 17, 2007 by the Venice Commission, on the basis that in a democratic society, religious groups must tolerate, as much other groups, critical public statements and debates on their activities, teaching and beliefs, provided that such criticisms do not amount to intentional and gratuitous insults or hate speech and do not constitute an incitement to disturb the peace or to violence and discrimination against members of a particular religion; public debate, dialogue and the improvement of communication skills of religious groups and media should be used in order to reduce sensitivity when it exceeds reasonable levels.

On this multiple grounds, the Council of Europe has highlighted some helpful recommendations and among these the following:

“17.2.1. Permit open debate on matters relating to religion and beliefs and do not privilege a particular religion, which would be incompatible with Articles 10 and 14 of the Convention;

17.2.2. Penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on the grounds of their religion as on any other grounds;

17.2.3. Prohibit acts which intentionally and severely disturb the public order and call for public violence by references to religious matters, as far it is necessary in a democratic society in accordance with Article 10, par. 2, of the Convention;

17.3. Encourage member states to sign and ratify Protocol No. 12 of the ECHR.”⁷⁰

⁶⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR), Art. 17, 1950

⁶⁸ Council of Europe, Parliamentary Assembly, Recommendation 1805, *Blasphemy, religious insults and hate speech against persons on grounds of their religion* (2007).

⁶⁹ *Ibidem*, §3.

⁷⁰ *Ibid.*

2.1.3 Pluralism and independence of media

“Freedom of the press is essential to a democratic society. To uphold and protect it, and to respect its diversity and its political, social and cultural missions, is the mandate of all governments.”⁷¹

Freedom of the press is a crucial topic in almost all populist debates throughout the European States⁷².

The importance of the issue relies on the qualification of the press; in fact, media have a particular status because press freedom implies a corresponding public right to be informed on specific relevant facts⁷³.

Preliminary, it is relevant to clarify one apparent textual ambiguity, indeed, although the Article 10 does not explicitly mention the freedom of the press⁷⁴, the European Court has elaborated a voluminous case law jurisprudence that gives to the media actors a *special status* and it is sufficient to consider that the victims of the violation of this right to are in the most of the cases journalists rather than other private individuals.

Freedom of press and media, which is part of the more general freedom of expression, has a two-fold or dual character: on the one hand it provides people active in the journalism field with the individual right to inform and express opinions on relevant facts; on the other hand, press freedom gives to the press the guarantees recognized to an institution which could be considered closely linked to the democratic process flux⁷⁵.

This utmost significance is inherent to the freedom of the press, the democratic function, making it a fundamental constitutional value that should lead to very high requirements before the public authorities can impose any restrictions.

The intimate scope of the provision is as follows: freedom of the press, on the one hand, seeks to protect the content delivered by the media and, on the other hand, to ensure that structural issues do not make it impossible to exercise or even too difficult to put in practice.

These and such structural problems may be in the form of legal requirements or other circumstances, such as administrative obstacles to the media, including excessive registration, licensing and accreditation requirements; unjustified denial of access to information held by

⁷¹ European Commission. *European Charter on Freedom of the Press*, 9 June 2009.

⁷² Grabenwater, *op.cit.*, p. 276; see Moffitt, “The Stage I: Populism and the Media,” p. 70.

⁷³ Grabenwater, *op.cit.*, p. 279.

⁷⁴ Indeed, the press is explicitly mentioned only in the Article 6 (1) in connection with the exclusion of the press and public from a trial.

⁷⁵ European Parliament. *Press Freedom in the EU, Legal framework and challenges*, 2015, p. 2.

government agencies; harassment, intimidation, incarceration and physical attacks, including murder of members of the press; restrictions on media pluralism, especially in broadcasting, through undue governmental control and pressure over broadcasters of favouritism toward state-owned media⁷⁶.

A study commissioned by the Department of Information Society of the Council of Europe, *Journalists under pressure – Unwarranted Interference*⁷⁷, shows that fear and self-censorship in Europe is particularly meaningful to consider what kind of obstacles the media sector is facing in the current environment.

The European Court of Human Rights has made it clear in many cases⁷⁸ that any attempt to remove journalists from the scene of demonstrations must undergo rigorous and strict scrutiny, especially in those cases where the media or journalists express their opinion on political matters.

In fact, it is worth to mention that the Court underlined the overriding importance of the freedom of the press in political debates in two pivotal judgements, *Lingens v. Austria*⁷⁹ and *Castells v. Spain*⁸⁰, explaining in the first that “whilst the press must not overstep the bounds set, inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them”⁸¹, and in the second one that “the pre-eminent role of the press in a State governed by the rule of law must not be forgotten...Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society”⁸².

Having so far clarified the overall importance of the media sectors in a democratic society, another critical area to discuss, probably the most critical one, particularly with regards to the recent populist tendencies (e.g. Hungary and Poland), is what refers to the political control on public media or broadcasters, the limits on the political control on them and all the guarantees necessary to preserve the democratic process “flux”.

In its jurisprudence, the Court has developed special rules concerning public broadcasters, particularly on guarantee their independence from any political influence or similar interference. In the case of *Manole and Others v. Moldova*⁸³, the public broadcasting company, Teleradio-Moldova (TRM), was subject to political control by the government and the ruling political party.

⁷⁶ OSCE (Organization for Security and Co-operation in Europe). *Why free media matters*, Factsheet (2012), p. 3.

⁷⁷ See, Council of Europe. *Journalists Under Pressure, unwarranted interference, fear and self censorship in Europe*.

⁷⁸ See, *i.a.* *Pentikäinen v. Finland* [GC], no. 11882/10, ECHR 2015; *Selmani and Others v. The Former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017

⁷⁹ *Lingens v. Austria*, *op.cit.*, 8 July 1986, Series A no. 103

⁸⁰ *Castells v. Spain*, 23 April 1992, Series A no. 236

⁸¹ *Lingens v. Austria*, *op.cit.*, §14.

⁸² *Castells v. Spain*, *op.cit.*, §26.

⁸³ *Manole and Others v. Moldova*, no. 13936/02, ECHR 2009 (extracts)

No guarantees of pluralism were present in its editorial policy and news and information programmes; furthermore, many journalists of the company complained that they had been subjected to a regime of censorship and that their dismissal from the company had been based mainly on political grounds.

In this case, the Court confirmed that the State must be the ultimate guarantor of the value of “pluralism” and that this requires that the State need to ensure that the public has access through television and radio to impartial and accurate information and a range of opinions and comments, reflecting the diversity of political outlook within the country, journalists and other professionals in the audio-visual media should not be prevented from imparting this information and commentary. Furthermore, it is essential for the proper functioning of the democracy that the public broadcaster transmits impartial, independent and balanced news, information and comment and, also, provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed⁸⁴.

In another fundamental ruling delivered in November 1993, for the first time, the Court examined a public monopoly on broadcasting and transmission in the case of *Informationsverein Lentia and others*⁸⁵, which concerned Austria and found on it a violation of Article 10.

In a case in point, the Court recognized that the Austrian monopolistic system was able to contribute to the quality and balance of program production through the powers of control over the media which it conferred on the national regulatory authorities. The system, therefore, had a purpose consistent with the third sentence of Article 10 (1)⁸⁶; however, the Court held that the interference that the monopoly had caused to the applicants was “not necessary in a democratic society” for the following reasons:

- First, the Court stressed the fundamental role of freedom of expression in a democratic society, in particular, when, through the press, it provided information and ideas of general interest, which the public also had the right to receive⁸⁷;
- Secondly, pluralism, of which the State was the highest guarantor, was a particularly important principle concerning the audio-visual media, whose programs were often broadcast very broadly⁸⁸;
- Finally, the far-reaching nature of the restrictions that a public monopoly imposed on freedom of expression meant that they could only be justified if they met a pressing social need and above all, it cannot be argued that there be no less restrictive equivalent solutions to put in practice⁸⁹.

⁸⁴ *Ibidem*, §51, p. 13.

⁸⁵ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276.

⁸⁶ *Ibidem*, §33, p. 8.

⁸⁷ *Ibidem*, §38, p. 9.

⁸⁸ *Ibidem*.

⁸⁹ *Ibidem*, §39, p. 9-10.

2.1.4 Populist threats

In the last few years it has become even more evident that we experienced a decline in protections for the class of the journalists and this trend is still ongoing; numerous reports show that in the many European Member States (especially in the so-called Eastern block), there is an increasing trend of physical attacks, threats, excessive use of the criminal law instrument and a sharp decline of the editorial independence that led to a drastic limitation of the pluralistic values of the media outlets.

Media pluralism is a crucial indicator denoting how the many Member States are failing in their positive obligation to foster a variety of media and a plurality of sources of information; in this regard, the concentration of ownership remains a widespread feature of media markets, and this hinders a diversified and independent media environment.

Populist governments often restrict freedom of expression, increasing the costs of being in the opposition or just becoming a dissident voice, members of populist government now regularly smear the independence of media as agents that serve foreign interest and harm the nation⁹⁰, this trend in Europe is particularly worrying especially when it comes to the role of the media⁹¹.

To this end, it may be useful to recall some recent findings from various reports focused on the populist issue.

According to the Report, Freedom of the Press (Freedom House, 2017)⁹², many European countries have declined in the global ranking, mainly country like Slovakia, where the prime minister continually attacks journalists and calls them “dirty” or “anti-Slovak”; in the Netherlands, where the populist leader Geert Wilders is openly opposed to some media and journals; in Austria, where the new government included the far-right Freedom Party always includes in its rhetoric the defence of “Christian Europe against Muslim migrants”.

These type of propaganda messages could amount to the hate speech qualification, as defined by the relevant mentioned case law of the Court⁹³ and, as a result, they cannot rely on the guarantees offered by Article 10 of Convention.

A new report by the Freedom House, Attacks on the Record: The State of Global Press Freedom, 2017-2018⁹⁴, shows that a drastic decline of the freedom of expression in the many European States is still ongoing and still problematic, especially in those States where populist parties are in power.

⁹⁰ Freedom House. *Nations in Transit 2018, Confronting Illiberalism*.

⁹¹ Cf. University of Vienna, Media Governance and Industries Research Lab. *Far-right Nationalism and Populism in Europe: Assaults on Press Freedom*.

⁹² Freedom House. *Freedom of the Press* (2017).

⁹³ See, *i.a.*, *Le Pen v. France*, *op.cit.*; *Féret v. Belgium*, *op.cit.*; *Norwood v. The United Kingdom*, *op.cit.*; *Belkacem v. Belgium*, *op.cit.*

⁹⁴ Freedom House. *Attacks on the Record: The State of Global Press Freedom* (2017-2018).

The following concerning statement introduces the report:

“Press freedom is facing new threats in major democracies as well as in repressive states, where authorities are focusing their efforts on social media and other online platforms after subduing the independence of major print and broadcast outlets.”

As the report emphasizes from the beginning, the chief political shifts that have triggered this “*race to the bottom*” is the populist component of several governments; in fact, populist leaders pose a serious threat to freedom of expression for many reasons, intentionally denounce in a critical way the media and the factual information are labelled as “fake news”, weakening their credibility and exposing their narrative of the facts.

The major populist threats exposed in the findings of the report are identified in the following European States:

- Poland, where the National Broadcasting Council fined the leading station TVN24 of the equivalent of \$430,000 in December 2017 for “promoting illegal activities” through its reporting of anti-government protests;
- France, where when a journalist in a conference in May 2017 asked the far-right presidential Marine Le Pen about her involvement in a parliamentary funds scandal, her private bodyguard pinned the journalist’s arms behind his back and hustled him out of the room;
- Hungary, where the wealthy businesspeople associated with the ruling Fidesz party acquired most of the last bastions of independent journalism, including the leading online newspaper and all remaining regional newspaper and the purchases went forward without objections from the Hungarian Competition Authority or the Media Council;
- Turkey, where many journalists suffered from criminal proceedings with 73 behind bars as of December, according to the Committee to Protect Journalists, permanently blocked of Wikipedia and 17 journalists from an opposition newspaper were tried on charges of aiding a terrorist organization;
- Serbia, where the newspaper Danas suffered a rapid cancelation of advertising contracts after it failed to support Aleksandar Vučić’s successful candidacy in the 2017 presidential election, while pro-government media were bolstered by front-page advertisements purchased by the ruling party⁹⁵.

⁹⁵ *Ibidem*, p. 3.

Furthermore, according to the Report “Press Freedom Index for 2018,”⁹⁶ presented by the NGO Reporters Without Borders (RSF) the state of media freedom is described as “really problematic” in many European countries, in Hungary, for example, the country was ranked 73rd out of 180 countries and the current situation is outlined as a “problematic” one.⁹⁷

The reduced viability of media markets challenges editorial independence; the recent case of the Hungarian newspaper *Népszabadság* could be represented in this regard: the press, one of the most critical opposition outlets in Hungary, was forced to close, officially for economic reasons on the back, but there are many suspects on the pressure exerted by the Hungarian populist party Fidesz on this decision, in particular, the suspicions are exacerbated after the acquisition of Mediaworks, publisher of the magazine, from a company with ties with the Fidesz party⁹⁸.

Recently, the OSCE Representative on Freedom of the Media⁹⁹, Harlem Désir, condemned the publication of a list of more than 200 people by a Hungarian press release which claimed that over 2.000 people, including those listed by name, are allegedly working to “topple or overthrow the government”. The Hungarian magazine *Figyelo* published the list on 11 April and includes many journalists as well as other citizens; the magazine claimed that the people on the list were “mercenaries” paid by US-Hungarian investor and philanthropist George Soros.

More specifically, the Representative said that “Such blacklisting and vilification of journalists and others is unacceptable, dangerous and ignominious. Not only does it stigmatize those on the list, but it also puts their safety at risk. Journalists should not be harassed or intimidated for their work; therefore, I call for the full respect of the diversity of viewpoints and of pluralism in society by all actors”¹⁰⁰.

Another “problematic” context is the one in Poland, which, similarly to Hungary, the current situation of media is labeled as “critical,” and the country has positioned itself in 58th place out of 180 countries, losing four positions in compared to the previous report of 2017¹⁰¹.

In any case, the most worrying situation and the most significant decline in guaranteeing and safeguarding the right to freedom of expression involved both Hungary and Poland, where the populist parties are effectively in power.

The Hungarian and Polish governments have both developed strategies to reduce the impact of independent media under cover to reduce foreign influence or to offer to the public more balanced coverage. Poland, in particular, recorded the biggest drop in the protection of the freedom of media in the world in 2016, according to the Freedom House report¹⁰².

⁹⁶ Reporters Without Borders. *Data of press freedom ranking 2018*; see *Annex 3*.

⁹⁷ *Ibidem*, focus on Hungary.

⁹⁸ Hungarian Free Press. “Hungary’s largest opposition daily shut down” and “Company with this to Fidesz party buys *Népszabadság*’s publisher”.

⁹⁹ The Representative on Freedom of the Media is an independent OSCE institution with a unique mandate to protect and promote media freedom in all 57 OSCE participating States. The activities include observing media developments as part of an early warning function and helping participating States abide by their commitments to freedom of expression and free media.

¹⁰⁰ OSCE. *OSCE media freedom representative Désir condemns blacklisting of journalists in Hungary*.

¹⁰¹ Reporters Without Borders. *Data of press freedom ranking 2018*, focus on Poland.

¹⁰² Freedom House, *op.cit.*, *supra* note 94.

In fact, Poland has recently approved the controversial “Reform of the Media Law.”¹⁰³

In December 2015 the Polish government passed a law that allowed the treasury minister to appoint the heads of public radio and TV directly; moreover, according to the Journalist’s Association in Poland, around 163 journalists (like Piotr Maslak) and media professionals have been fired or dismissed by the state media since the election of the Law & Justice party¹⁰⁴.

The new law, in more detail, proposes the removal of guarantees for the independence of public service TV (TVP) and Radio (PR), giving to the government minister the exclusive power to appoint and dismiss all members of the Supervisory and Management Boards of TVP and PR, making them entirely dependent on the goodwill and favour of the government in charge. The plans of the Polish government contradict the commitments made by the Committee of Ministers of the Council of Europe in its 2012 Declaration on Public Service Media Governance¹⁰⁵, which stated that the Public Service Media must remain independent of political or economic interference and achieve high editorial standards of impartiality, objectivity, and fairness¹⁰⁶, and should be accountable and transparent as they have made the obligation to serve the public in all its diversity, including minority communities¹⁰⁷.

Council of Europe experts, Mrs. Eve Salomon and Mr. Jean-Francois Frunemont¹⁰⁸, expressed concerns about the legislative texts and amongst them, on the following critical points:

- Governance, because the procedure for the selection and appointment of members of the National Media Council should be more transparent, setting out in law and should ensure that those appointed are adequately qualified for the job, are independent from political influence, and represent the diversity of Polish society;
- Protection of Journalists, because the current proposal for collective dismissal of middle management employees should be abandoned;
- Content and public mission, a number of provisions in the new legislation affect media content and may result in reduced pluralism and editorial independence, and editorial control should be the responsibility of the directors and editors-in-chief, content issued by public service media must reflect the diversity of Polish society and should remain impartial and balanced;
- The license fee system, because greater certainty should be provided over funding, but the reforms to the system should be more proportionate, with greater clarity given to the provisions relating to enforcement and the assessed adequacy of the funding and to realize the remit a full impact assessment is recommended¹⁰⁹.

Another potential threat to European democracy standards in terms of breach of the right to freedom of expression could be seen in the so-called “Holocaust Law”.

¹⁰³ For a comprehensive and exhaustive explanation of the Polish draft reform, see, Glowacka, “Public Media reform in Poland – undermining political independence of regulatory and supervisory bodies”; Yifei, Lixiong, Bowen, Wu, Hao and Yinghua, “Current challenges to media freedom in Poland”.

¹⁰⁴ Smale and Berendt, “Poland’s Conservative Government Puts Curbs on State TV News”.

¹⁰⁵ Council of Europe, Declaration of the Committee of Ministers on Public Service Media Governance.

¹⁰⁶ *Ibidem*, §3.

¹⁰⁷ *Ibidem*, §4.

¹⁰⁸ Council of Europe, Opinion on the three draft acts regarding Polish public service media.

¹⁰⁹ *Ibidem*.

Under the Holocaust Law, which was led primarily by the ruling populist party, Law and Justice, it is considered a crime (and requires up to three years in prison) for anyone, in any part of the world (so, with an impressive and risky extraterritorial effect), to accuse “the Polish Nation” of complicity in the crimes committed by the Nazis during the Second World War; moreover, the law, as we already underlined above, also allows the authorities to prosecute these crimes outside the territory of Poland.

This was the case, for example, of the complain filed by the Polish Anti-Defamation League (PDL) against an Argentinian newspaper, the news *Página 12*, which had used a 1950 photograph of anti-communist Polish fighters alongside an article on the pogrom in the city of Jedwabne, where hundreds of Jews were killed by their Polish neighbours during the Second World War, according to the PDL, this was equivalent to a “manipulation aiming to harm the Polish nation”¹¹⁰.

Therefore, we must ask ourselves to what extent these populist tendencies are consistent with the current European framework on the necessary guarantees needed for the respect of the right to freedom of expression.

The primary duty of the States must be the protection of media and journalists from any interference that could lead to a violation of the fundamental role of the media in the democratic societies.

In Turkey, in particular, as the previous reports clearly show, there is a growing tendency to resort to criminal proceedings to de-legitimize the role of journalists and, as a consequence, the threats to freedom of expression are particularly worrying and certainly not compatible with the framework outlined by the Convention.

It is sufficient to recall the principle that the Court has emphasized in the judgment delivered in the case *Cumpăna and Mazăre v. Romania*¹¹¹, where, considering the use of criminal tools as the last resort, the Court declared that prison sentences were compatible with journalists’ freedom of expression, only in exceptional circumstances, the most serious, and not in cases of defamation in which the imposition of such severe penalty could lead to a “chilling effect which works to the detriment of society as a whole”¹¹² and towards the media outlets; therefore, the interference by the State can not be considered proportionate and supported by a legitimate aim.

For this reason, any severe interference, such as the recourse to the imprisonment, must be based on strict control over the rights violated by journalists, which should be particularly severe; otherwise, the interference is only an attempt to break the legal provisions prescribed by the Convention.

About France, where the Front National is gaining an even more widespread consensus among the electorate, and about the episode of the journalist forced to leave a political

¹¹⁰ Cernusakova, “Poland’s Holocaust Law is a Dangerous Threat to Free Speech”.

¹¹¹ *Cumpăna and Mazăre v. Romania* [GC], no. 33348/96, ECHR 2004-XI.

¹¹² *Ibidem*, §114.

conference, it is sufficient to recall the abovementioned unanimous case law of the Court¹¹³ on the matter of protecting the journalists in political debates.

The attempt to remove journalists from public spaces must follow a rigorous and strict scrutiny, in particular in the events where they express their opinion on political issues, which engage the fundamental right of the citizens to receive the information even if critical or opposite, because a public interest is involved, and the free political debate is a very core concept of a democratic society; therefore, any attempt to erode this fundamental and primordial value is in violation of the scope and provisions of the Convention.

Concerning the populist inclinations in Hungary, Serbia and particularly in Poland, it seems to be at stake, with a higher degree in Poland after the media reform law, the value of pluralism and independence of the media.

First and foremost, it is important to emphasize what the Court clarified in the case of *Fuentes Bobo v. Spain*¹¹⁴ with the regard of State's positive obligations; in fact, the State has a positive obligation to protect the right to freedom of expression against any interference and from even private individuals acts.

Primary scope of the freedom of expression is the safeguard, promotion, and protection of the fundamental value of "pluralism", the very essence of a democratic society, and any attempts to limit or restrict it must be interpreted in a rigorous and strict way according to the requisites prescribed by the legal provisions (prescribed by law, necessary in a democratic society, proportional) because otherwise the democratic asset itself could be reduced as well and, therefore, at stake.

All the aforementioned international recommendations, guidelines and the Council of Europe standards have to be interpreted in this scope and precise meaning.

As a consequence, the recent developments in Hungary, Serbia, and Poland seem to undermine the pluralistic and independent attitude that a democratic society must recognize to the media actors and, for that reason, now and shortly could arise several and problematic concerns of consistency with the European legal framework.

On a final note, dealing with the matter of consistency with the Convention right of the so-called "holocaust law" is a more complicated question, due to the fact that it touches on a really sensitive issue, a historical one, which the Court usually tends to leave to the margin of appreciation of the States for understandable reasons of precaution.

As a preliminary matter, it is worth mentioning the object of protection under Article 10 of the Convention, which according to the polar case *Handyside v. the United Kingdom*, should not be limited to information or neutral ideas, but also "to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society"¹¹⁵; however, the attribute of

¹¹³ See, e.g., *Pentikäinen v. Finland*, *op.cit.*; *Selmani and Ors v. The Former Yugoslav Republic of Macedonia*, *op.cit.*; *Lingens v. Austria*, *op.cit.*; *Castells v. Spain*, *op.cit.*

¹¹⁴ *Fuentes Bobo v. Spain*, *op.cit.*, §38.

¹¹⁵ *Handyside v. United Kingdom*, *op.cit.*, §49.

offending, shocking or disturbing must not reach the qualification of “hate speech,” otherwise, the right cannot be claimed.

The Court has already dealt with cases concerning the Holocaust¹¹⁶ but those regarding the offense of denying it in its entirety, as in the cases of *Garaudy v. France*¹¹⁷ and *M’Bala M’Bala v. France*¹¹⁸, where the Court started its reasoning with the clarification that it is forbidden to abuse of the rights prescribed by the Convention according to Article 17, because denying a historical facts could undermine the value of the fight against anti-Semitism that could pose a serious threat to the public order. In particular, the Court stated, in the first case, that the application was to be considered inadmissible because denying the Holocaust is equivalent to denying crimes against humanity and, therefore, was one of the most serious forms of racial defamation of Jews as well as incitement to hatred of them; in the second case, the Court emphasized that the denial could provide a platform for an ideology contrary to the values of the European Convention and, therefore, “the applicant has attempted to deflect Article 10 from its real purpose by seeking to use his right to freedom of expression for ends which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention”¹¹⁹.

As a result, it appears that the potential violation of freedom of expression could be underlined as follows: if the declaration of the involvement of Poland in Nazi crimes could be qualified as a denial of the Holocaust, then, a violation of the right of freedom of expression could emerge on the floor, on the contrary, if the involvement does not reach the “denial threshold” a violation could not occur.

2.1.5 The enforcement of the right

The enforcement mechanisms to implement the effects of the European legal provisions relies mainly on the role assigned to the European Court of Human Rights, which is the judicial body of the European Convention on Human Rights.

However, according to the principle of subsidiarity, the main actors that should play a central role in enforcing the decision of the Court are the States Parties that have to comply and implement the judgments by amending national laws or developing positive practices, as well as respect the penalties disposed of by the decisions.

The scenario became even more complex in relation to populist parties and States in which populist parties are in power for the apparent reason that, as previously pointed out, populism takes their force, among other things, on discredit and oppose the international order, including the international tribunals; therefore, populist actors intentionally and willingly do not want to comply to the rules given from abroad their borders.

¹¹⁶ See, Lobba, “Holocaust denial before the European Court of Human Rights: evolution of an exceptional regime”.

¹¹⁷ *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts).

¹¹⁸ *Dieudonné M’Bala M’Bala v. France* (dec.), no. 25239/13 (ECHR, 20 October 2015)

¹¹⁹ *Ibidem*, §41

An example could clarify better the complexity of the matter, the recent decision No. 22/2016 (XII.6.) held by the Hungarian Constitutional Court¹²⁰ on the questionable subject of the share of refugee quota, where the Supreme Hungarian Court declared that Hungary's constitutional identity is rooted in its alleged historical traditions and fundamental values recognized merely by the Fundamental Law and, therefore, the constitutional identity cannot be waived by way of an international treaty because Hungary can be deprived of its constitutional identity only through the final end of its sovereignty, its independent statehood; therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State¹²¹.

As a consequence, the enforcement could follow two different and antithetical directions; a strong one, by mean of imposing exceptional sanctions on a Member States or, a light and collaborative one, by proposing or recommending measures through the soft law instruments as a means to persuade States to comply with the European Convention on Human Rights.

Preliminary, it is important to underline that media freedom and pluralism of media outlets are rights enshrined in the European Charter of Fundamental Rights and the European Convention on Human Rights, and, therefore, they become relevant as part of the Copenhagen criteria for gain the EU membership in terms of respect of democracy and human rights.

The issue of media freedom, in fact, is an essential challenge for any country that aspires to join the EU community, not only because freedom of the press is a fundamental right and one of the values of the European Union, but also because freedom of the media is considered a clear indicator of a country's democracy and rule of law; the media play a pivotal role in the functioning of democracy in providing the right information, creating transparency and making the public "the supervisor" of the work of the government and political institutions, in particular by fulfilling the role of journalism as a "watchdog" and, above all, through what is called investigative journalism¹²².

The first one rely on the interpretation of Article 7 TEU¹²³, which aims to ensure that an European State respects the shared values of the EU and could be activated only in cases of "clear risk of a serious breach" or "serious and persistent breach by a Member States" with the consequence that if a serious breach is proved the Council may decide to suspend individual rights deriving from the application of the Treaties to the Member States, including the right to vote¹²⁴.

However, it is desirable to pursue by other instruments, less intrusive and more inclusive, the way forward.

For example, the Court in the case of *Manole and Others v. Moldova*, recall the attention on a number of reports presented by the Council of Europe, the OSCE and the Moldovan Centre for

¹²⁰ See, Decision 22/2016 (XII.5), AB on the Interpretation of Article E) (2) of the Fundamental Law (Const. Ct. Hung. Nov. 30, 2016).

¹²¹ Cf. Furedi, *Populism and the European Culture Wars, The Conflict of Values between Hungary and the EU*, p. 68.

¹²² Hoti and Gërguri, "Media Freedom, a challenge in Kosovo's European Integration Process," p. 30.

¹²³ Consolidated version of the Treaty on European Union, Article 7 (ex Article 7 TEU), OJ C 326, 26.10.2012, p. 19–20.

¹²⁴ This mechanism was used in relation to Poland and there is a draft of the European Parliament in relation to Hungary, both refer to the rule of law and judicial independence issues.

Independent Journalism (IJC) on the issue of the guarantee of media pluralism and independence, the Committee of Ministers has published a conspicuous number of recommendations, and amongst them, it could be meaningful to recall the Recommendations of 1996 and 2007¹²⁵.

The first of the two, after affirming in the preamble that “the independence of the media, including broadcasting, is essential for the functioning of a democratic society and stressing the importance which it attaches to respect for media independence, especially by governments”¹²⁶, provides various guidelines on the guarantee of the independence of public service broadcasting, including the role of the boards of management and their responsibilities, competences of supervisory bodies of public service broadcasting organisations, rules on funding of public services broadcasting and the programming policy.

The Recommendation of 2007¹²⁷, instead, addresses the issue of media pluralism and diversity of media content. In its preamble, interestingly, made a reference to the importance of the Article 10 of the European Convention on Human Rights that should be respected “only if each person is given the possibility to form his or her own opinion from diverse sources of information”¹²⁸ and, as a result prescribes several recommendations to States for promoting structural pluralism of the media, limiting the influence of a single person, guaranteeing specific ownership regulations and raising awareness of the role of media in the society.

Furthermore, the Resolution number 1535 of 2007 issued by the Council of Europe on the Threats to the lives and freedom of expression of journalists¹²⁹, where after recalling the overriding importance of the freedom of expression, which “includes the right to express political opinions and criticize the authorities and society, expose governmental mistakes, corruption and organized crime, and question religious dogmas and practices” because “Freedom of expression is one of the cornerstones of democracy in Europe”; addressed the national parliaments of a twofold recommendation, consisting in: “10.1. Closely monitor the progress of such criminal investigations and hold the authorities accountable for any failures to investigate or prosecute; for example, the Russian Parliament as regards the murder of Anna Politkovskaya; 10.2. Abolish laws which place disproportionate limits on freedom of expression and are liable to be abused to incite extreme nationalism and intolerance; for example, the Turkish Parliament as regards Article 301 of the Turkish Penal Code on the denigration of Turkishness”¹³⁰.

On the issue of “media pluralism,” the European Parliament also raised its concerns by

¹²⁵ *Ibidem*, §77, p. 52-53; see also, Council of Europe, Committee of Ministers, Recommendation 10 on the guarantee of the independence of public service broadcasting (1996) and Recommendation (2007) 2 on media pluralism and diversity of media content, 31 January 2007.

¹²⁶ Recommendation No. R (1996), *supra* note 125, p. 6.

¹²⁷ Council of Europe, Committee of Ministers, Recommendation CM/Rec (2007)2 on media pluralism and diversity of media content (2007).

¹²⁸ *Ibidem*, preamble.

¹²⁹ Council of Europe, Parliamentary Assembly, Resolution 1535, Threats to the lives and freedom of expression of journalists (2007).

¹³⁰ *Ibidem*, §10.

repeatedly referring¹³¹, most recently in its resolution of 21 May 2013, to the Commission's awareness of proposing concrete measures to safeguard media pluralism, including a legislative framework for media ownership rules introducing minimum standards for the Member States. In particular, it expresses concern about the lack of transparency in media ownership in Europe and calls on the Commission and Member States to require media to submit to various actors, including national media authorities, company registers and public, accurate and up-to-date ownership information so as to allow identification of the beneficial and ultimate owners and co-owners of media outlets suggesting, at the same time, to follow the model of the Mavise database.

The Parliament, in more details, has addressed to the Commission the need of proposing new legally binding procedures and mechanisms to safeguard media pluralism, including ensuring that the Member States guarantee proper implementation of the Charter of Fundamental Rights, concrete measures to prevent excessive media concentration and a legislative framework on media ownership rules introducing minimum standards for the Member States. Furthermore, it suggests to make up an instrument to ensure that the Member States invite the media sector to develop professional standards and ethical codes.

Similarly, the European Parliament in its last Resolution of 10 June 2015¹³² on the general situation in Hungary called for the annual monitoring of compliance with democratic values, the rule of law and the fundamental rights in all the EU Member States through a Scoreboard; the latter was discussed on a study of 2016¹³³ submitted to the European Parliament which proposed to establish an "EU Rule of Law Commission" as an independent body of scholars called upon to carry out a specific assessment of the democratic context in the light of available data or calls for extra information and draw up an Annual Report on the evolution of the status of the media actors; if the EU Rule of Law Commission establishes that there are systematic deficiencies or weaknesses, consideration could be given to asking the European Court of Justice to intervene and conduct a substantive assessment.

Another initiative managed by the European Parliament and the Commission, the Media Pluralism Monitor (MPM), conducted by the Centre for Media Pluralism and Media Freedom at the European University Institute, appears to be useful for the development of new strategies on the subject matter, in which the data are collected scientifically and transparently, and the reports include quantitative section that shows trends and demonstrating the effects of policy decisions and a qualitative analytical section.

Furthermore, the concentration of media ownership has been identified as a major concern in terms of media pluralism based on the motto "A free and pluralistic media landscape can sustain European democracy" by the High-level Group on Media Freedom and Pluralism, a group established in October 2011 with a mandate to draw up reports to be presented to the Commission for the respect, protection, support and promotion of pluralism and freedom of the

¹³¹ See, e.g. European Parliament, Resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU; European Parliament, Draft Report on media pluralism and media freedom in the European Union; European Parliament, Media pluralism and media freedom in the European Union (procedure).

¹³² European Parliament, Resolution of 10 June on the situation in Hungary.

¹³³ Bård, Carrera, Guild and Kochenov, "An EU mechanism on Democracy, the Rule of Law and Fundamental Rights".

media in Europe.

On 21 January 2013, the High Level Group presented its final report¹³⁴ to the Commission, which, emphasized, first of all, that a free and pluralist media environment must be a precondition for EU membership, contains around 30 recommendations addressed to both national and supranational authorities with the aim of improving the role, firstly, of the EU in terms of competences and harmonization of EU legislation and with the purpose of designating a European fundamental rights agency as a monitoring role of national-level freedom and pluralism of the media.; and secondly within the national legal frameworks starting to teaching from the high-school level the importance of the media.

2.2 Attempts to limit freedom of association and assembly

2.2.1 European legal basis

The main provisions that define “freedom of association and assembly” within the European framework are the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Both freedoms are included in the Article 11 of the European Convention on Human Rights, which reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”¹³⁵

The freedoms prescribed in Article 11 are intimately linked to democracy and democratic values and, the Court stressed out in several judgments the importance of safeguarding the minorities also by way of promoting the associations amongst individuals, for example, it

¹³⁴ European Commission, High Level Group on Media Freedom and Pluralism. *A free and pluralistic media to sustain European democracy* (2013).

¹³⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR), Art. 11, 1950; likewise the EU Charter of Fundamental Rights, in the Article 12 provides:“1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests;2. Political parties at Union level contribute to expressing the political will of the citizens of the Union”.

declared that “individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority should always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of dominant position”¹³⁶; therefore, the importance of this specific right is due to a pluralistic essence of the contemporary societies that must create appropriate conditions enabling the expression and the development of the identity of the individuals.

A feature of the right to freedom of assembly and association is its close relationship with the right to freedom of expression, for the reason that expresses an opinion should be guaranteed and protected even on a more collective level; therefore, one of the scopes of the provision is to protect the expression of opinion, including protest and dissenting opinion (crucial on democratic societies).

For instance, in the case *Eva Molnár v. Hungary*, the Court stated that “The Court also emphasizes that one of the aims of freedom of assembly is to secure a forum for public debate and the open expression of protest. The protection of the expression of personal opinions, secured by Article 10, is one of the objectives of the freedom of peaceful assembly enshrined in Article 11”¹³⁷.

As we can see, paragraph 2 of Article 11 contains a truly vague list of conditions that may potentially allow for the limitation, restriction or prohibition the right of freedom of association and assembly; therefore, an interference by the State to be considered lawful should respect the following parameters (similarly to the freedom of expression): prescribed by law, necessary in a democratic society, pursue the interests of national security or public safety; pursue to prevent a disorder or crime; pursue to protect health, morals or the right of others.

For that reason, it is essential to stress out that the right enshrined in Article 11 could not be interpreted as an absolute right; however, the restrictions on the exercise of the right, according to the interpretation of the European Court of Human Rights must be interpreted narrowly and in a restrictive way, with only convincing and compelling reasons being able to justify them because the right involves the fundamental democratic values, indeed, the Court confirmed this uniform interpretation in several cases submitted to its jurisdiction¹³⁸.

Preliminarily, any restrictions, in the same way of the other rights, must be prescribed by law, the latter is interpreted in a very broad and manifold meaning, if the Court determines that there is no legal prescription for a restriction, it will conclude that there has been a breach of Article 11 without further consideration of the other requirements.

Afterwards, the Court must take into account the second component consisting in the existence of a legitimate aim pursue one of the listed conditions, first of all, national security or public safety, in which the Court has been strict in admitting¹³⁹, then the concept of prevention of disorder and crime and finally the other circumstances of the protection of health, morals or right

¹³⁶ *Chassagnou and Others v. France* [GC], nos 25088/94 and 2 others, §112, ECHR 1999-III

¹³⁷ *Éva Molnár v. Hungary*, no. 10346/05, §42, 7 October 2008.

¹³⁸ See, *i.a.* *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria (no. 2)*, nos. 41561/07 and 20972/08, 18 October 2011; *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (no. 2)*, no. 37586/04, 18 October 2011.

¹³⁹ Schabas, *op.cit.*, p. 512.

and freedoms of the others.

For example, in the case of *Vona v Hungary*, the Court held that the freedom of association and assembly could be limited to protect the rights of minorities.

In its judgement, the Court found that the dissolution of the Hungarian Guard Association (Magyar Garda) by domestic courts was a lawful and legitimate restriction of the applicant's rights under Article 11 of the Convention on the basis that the activities of the Movement, which include paramilitary operations in several villages of the Roma population, has violated their fundamental rights; therefore, the Hungarian authorities had the right to take preventive measures to protect democracy and to ban the activity of the association.

Lastly, the Court has to deal with the requisite of "necessity in a democratic society"; however, first of all, should be met the condition of the pressing social need in which the national authorities have a priority assessment but always under the supervision of the Court; after that the reasons given by the local authorities must be "relevant and sufficient", that is a condition under which the States must "applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decision on an acceptable assessment of the relevant facts"¹⁴⁰; furthermore, the Court should determine in assessing properly the proportionality if there could exist a chance of "effective and less intrusive measures"¹⁴¹ and, lastly and most significantly, in evaluating the proportionality test, the nature and severity of the sanctions imposed are important factors to be considered; for instance, a dissolution of an association is a drastic measure that could fail the proportionality test¹⁴².

If the Court acknowledges the existence in the case of these requirements, it should allow the States to perform the interference within a certain margin of appreciation, especially in the sensitive matters or in issues where there is no consensus.

Furthermore, and most importantly, from that right arise the obligation for the States party to perform such rights by means of positive obligation.

Indeed, as the Court pointed out, "although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may be, in addition, positive obligations on the State to secure the effective enjoyment of such rights"¹⁴³; furthermore, and most importantly, the positive obligations of the State reach a particular level of relevance when a right of minority groups is at stake, in this sense the Court added that "particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimization"¹⁴⁴, such as cases involving demonstration concerning Lgbt rights¹⁴⁵ and national minorities in general.

¹⁴⁰ *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, no. 46626/99, §49, ECHR 2005-I.

¹⁴¹ *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, §118, ECHR 2011 (extracts)

¹⁴² *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, §60, 12 June 2014.

¹⁴³ *Demir and Baykara v. Turkey* [GC], no. 34503/97, §42, ECHR 2008.

¹⁴⁴ *Bączkowski and Others v. Poland*, no. 1543/06, §64, 3 May 2007.

¹⁴⁵ See, e.g., *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, ECHR 2001-IX.

2.2.2 Freedom of association and NGOs

The existence and the promotion of the civil society and, more in particular, of non-governmental organizations, is vital for a democratic society; as it was already mentioned NGOs could play, along the media outlets, a role of “watchdogs” over specific social issues and fostering positive changes within the social and political contexts.

One of the primary debate that the European Court of Human Rights was called to address concerned the legal personality of the associations, which, firstly, should be facilitated in the administrative process by the national authorities and, secondly, it can not be considered discriminatory in order to access to the protection prescribed by the European Convention on Human Rights.

A typical interference is the one concerning issue on registration of the association; therefore, for instance, a refusal of national authorities to recognize an association as a legal entity could be seen as interference, similarly, is interference when the government imposed further and additional administrative requirements for the registration.

The fundamental importance of acquire legal personality in order to exercise properly the associational rights was highlighted in several cases by the Court, which declared that “The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest; without this, that right would have no practical meaning”¹⁴⁶; however, legal personality can be refused where the applicants fail to comply with a legal requirement that is compatible with the European Convention¹⁴⁷ or in other exceptional circumstances such as when the name of the association belonged to others or could be easily confused or in some way could generate a misleading to the public¹⁴⁸.

In *Sideropoulos v. Greece*¹⁴⁹ the applicants lodged an application against Greece based on its refusal to allow the registration of a non-profit association, Home of Macedonian Civilisation; the Greek courts had justified the refusal on the grounds that the purpose of the use of the term “Macedonian” was to challenge the Greek identity of Macedonia and its inhabitants and from which they drew an intention on the part of the organisation’s founders to undermine the territorial integrity of Greece¹⁵⁰. The ECtHR found a violation of the Article 11 and stated in its judgment that: “Territorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region’s culture, even supposing that it also aimed partly to promote the culture of a minority; the existence of minorities and different cultures in a country was a historical fact that a “democratic society” had to tolerate and even protect and support according to the principles of international law”¹⁵¹.

Given the importance of legal personality for the pursuit of common objectives, the Court concluded that the refusal to register the applicants’ association, with the result that it was denied even legal personality, was an apparent interference with freedom of association.

¹⁴⁶ See, *Sidiropoulos and Others v. Greece*, 10 July 1998, §40, *Reports of Judgments and Decisions* 1998-IV.

¹⁴⁷ *W.P. and Others v. Poland (dec.)*, no. 42264/98, ECHR 2004-VII (extracts), p. 9.

¹⁴⁸ *Gorzelik and Others v. Poland [GC]*, no. 44158/98, §103, ECHR 2004-I.

¹⁴⁹ *Sidiropoulos and Others v. Greece*, *op.cit.*, *supra* note 146.

¹⁵⁰ See on this issue, Kyriakou, *Minority participation in public life: The Case of Greece*.

¹⁵¹ *Sidiropoulos and Others v. Greece*, *op.cit. supra* note 146, §41.

In the case of *National Turkish Union v. Bulgaria*¹⁵², in 2006 Mr. Kungyun announced his intention to form an association dedicated to promoting the rights of the Muslim minority in Bulgaria, the Regional Court refused the registration of the association on the ground that “the development of political pluralism with a view to the democratization and demonopolization of the Turkish community” was political in nature and not allowed to be aimed by a non-political party.

It also observed that the primary aims of a non-profit association could not include commercial activities.

The Court judgement was the following, noted, firstly, that freedom of association is not absolute, and States had the right to control the conformity of the purpose and activities of an association with the rules laid down by law, but that right had to be exercised in a manner consistent with obligations under the Convention and subject to the control of the treaty bodies, consequently, the exceptions under Article 11 had to be interpreted strictly and the interference was in any event not necessary in a democratic society.

The Court had already held in previous cases against Bulgaria (*Cf. United Macedonian Organization Ilinden and Others v Bulgaria*, 2006¹⁵³ and *Zechev v. Bulgaria*, 2007¹⁵⁴) that the political nature of the aims of an association could not justify a refusal to register.

In *Zechev v. Bulgaria*, more in details, the fact that an NGO’s objectives might be seen as “political” should not necessitate its seeking the status of a political party; therefore, for these reasons the Court found a violation of Article 11 of the Convention because a refusal of NGO registration was not allowed on any grounds, there was no pressing social need, proportion, and necessity in a democratic society¹⁵⁵.

¹⁵² *National Turkish Union Kungyun v. Bulgaria*, no. 4776/08, 8 June 2017; See, moreover, Cranmer, "Another registration case: National Turkish Union v Bulgaria."

¹⁵³ *The United Macedonian Organisation Ilinden - PIRIN and Others v. Bulgaria (No. 2)*, *op.cit.*, *supra* note 138.

¹⁵⁴ *Zechev v. Bulgaria*, no. 57045/00, 21 June 2007.

¹⁵⁵ In the case, particularly, the European Court found a violation of Article 11 where the NGO was refused registration because some of its aims, the restoration of the Constitution of 1897 and of the monarchy, were political goals within the meaning of Article 12 of the Constitution of 1991 and could hence be pursued solely by a political party.

2.2.3 Populist threats

In some Member States of the Council of Europe there is currently a growing tendency to limit the activities of NGOs through the introduction of restrictive legal frameworks and the running of defamation campaigns with a view to stifling any form of criticism¹⁵⁶, the NGOs most frequently affected by these restrictions are those that carry out activities in the field of human rights protection or promotion¹⁵⁷.

In this regard, the main populist threat could be the reform presented by the populist party Fidesz in Hungary known as “*Stop Soros*.”

The legislative draft, which could pass in the next few months after the re-election of the populist leader Viktor Orbán, clearly addresses these branches of civil society and, in particular, the NGOs actors, imposing additional administrative requirements for their official registration and a 25% tax for NGOs who receive funding from abroad¹⁵⁸.

In particular, the so-called “*Stop Soros bill*”, presented to the Hungarian parliament by Fidesz, is divided into three main points: first, all NGOs that are accused or only suspected to support illegal immigration routes need to be registered and must submit data on their overall activities; secondly, if an NGO receives funding from abroad, it must pay 25% of taxes to the Hungarian government and, finally, foreign citizens and Hungarian activists who support illegal immigration may be subject to a restraining order which would keep them away from the border¹⁵⁹.

An impressive number of international actors, for instance, the Expert Council on NGO Law¹⁶⁰, the Parliamentary Assembly of the Council of Europe¹⁶¹, the European Parliament¹⁶², the Venice Commission¹⁶³, the European Commission¹⁶⁴ have shown their concerns on the substantive rights potentially threatened by the new reform pushed by Fidesz.

The Special Commissioner for Human Rights, Janos Lazar, after a visit in Hungary regarding the monitoring of the situation of non-governmental organisations and after a considerable number of audits, 58 NGOs beneficiaries from the Norwegian Civil Fund (the so-called NGO Fund), carried out by the Hungarian Government Control Office (Kormanyzati Ellenorzesi Hivatal), in a letter addressed to the Hungarian government expressed all of his doubts on the

¹⁵⁶ See, OBS (The Observatory for the Protection of Human Rights Defenders). *Violations of the right of NGOs to funding: from harassment to criminalization*.

¹⁵⁷ See, Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on How to prevent inappropriate restrictions on NGO activities in Europe (2014).

¹⁵⁸ Hungarian Helsinki Committee, *Short Analysis of the Proposed Hungarian Bill on Foreign Funded Non-Governmental Organizations*.

¹⁵⁹ RT, “Stop Soros: Hungary’s plan to curb pro-immigration NGOs explained”.

¹⁶⁰ Council of Europe, Conference of INGOs of the Council of Europe. *Opinion on the Hungarian Draft Act on the Transparency of Organisations supported from abroad*.

¹⁶¹ Council of Europe, Parliamentary Assembly, Resolution 2162, Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University (2017).

¹⁶² European Parliament, Resolution of 17 May 2017 on the situation in Hungary.

¹⁶³ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion 889/2017 on the draft law on the transparency of organisations receiving support from abroad (2017).

¹⁶⁴ European Commission. “Commission launches infringement procedure for law on foreign-funded NGOs” (13 July, 2017).

reform, stating that: “NGOs play a central role in a democratic society. They should be able to pursue their public watchdog function in an environment conducive to their work, without undue interference in their internal functioning, unless there are objective reasons for doing so and the stigmatizing rhetoric used in that context, with politicians questioning the legitimacy of NGO work, is of great concern to me”¹⁶⁵.

Likewise, many reports presented by the United Nations Special Rapporteurs expressed concerns on the Hungarian development; for instance, the report on “Comparative study of enabling environments for association and businesses,”¹⁶⁶ where the Special Rapporteur, Maina Kiai, argues in favor of “sectorial equity,” which it means a fair, transparent and impartial approach to regulating each sector.

More specifically, in this report was pointed out that “There is no basis in international human rights law for imposing more burdensome auditing and reporting requirements upon associations than for businesses. Justification such as protecting State sovereignty or ensuring aid effectiveness are not legitimate bases under the ICCPR. Even legitimate interests, such as protecting national security, can’t be used to justify excessive intrusion. Restrictions on association rights must be based on individualized and identifiable suspicion, not a pre-emptive suspicion of an entire sector. Most importantly, States can only impose restrictions that are prescribed by law, and necessary and proportionate to the aim pursued.”¹⁶⁷

Germany’s Europe minister, Michael Roth, also expressed his concern about the Hungarian reform by stating that “A common European Union commits us to respect and protect all four fundamental freedoms beyond borders. Only with a vibrant and critical civil society can we maintain our common Europe of values, the bill submitted by the Hungarian Government in parliament make the work of civil society organizations difficult or even impossible”¹⁶⁸; and also the Human Rights Commissioner at the Council of Europe, Nils Muiznieks, raised his worries on the reform that could further aggravate the situation of freedom of association in Hungary, due to the fact that NGOs that do not meet the new administrative requirements could be subject to sanctions and penalties, including a fine and ultimately the dissolution of the asset¹⁶⁹.

Another harsh criticism of the reform was presented by the Human Rights organization “Hungarian Helsinki Committee,”¹⁷⁰ which expressed concerns based on several grounds and, more precisely regarding the proper guarantee of the freedom of association, exposed two main criticisms:

- Firstly, the penalties imposed by the new law (fines between 10.000 – 900.000 HUF), which may lead to a procedure of termination or appointment of a trustee, are incredibly harsh, therefore not proportionate and to be considered as an unlawful restriction of

¹⁶⁵ Council of Europe, Commissioner for Human Rights. *Report by Nils Muiznieks*.

¹⁶⁶ United Nations, General Assembly. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, A/70/266 (4 August 2015).

¹⁶⁷ *Ibidem*.

¹⁶⁸ Zalan, “Germany raises concerns over Hungary’s “Stop Soros” bills”.

¹⁶⁹ Council of Europe. “Commissioner concerned about proposed additional restrictions to the work of NGOs in Hungary” (15 February 2018).

¹⁷⁰ See, Hungarian Helsinki Committee. *What is the problem with the Hungarian Law on Foreign Funded NGOs?*.

freedom of association that would not satisfy the Court standards of legitimate aim, pressing social need and proportionality¹⁷¹;

- Secondly, the infringement of the general prohibition of discrimination about the freedom of association by discriminating NGOs by the sources of funding they receive, treating NGOs with legal personality differently from other entities without any reasonable justification and, excluding from the application other organizations, such as sports and religious organizations¹⁷².

More recently, 14 Hungarian NGOs have submitted a complain to the European Court of Human Rights, which is still pending¹⁷³, stressing out the importance of the Article 11 on the specific context of the reform, invoking that the freedom of assembly and association is highly compromised because, firstly, the administrative requirements imposed by the new law are too onerous and, secondly, for the reason that the penalties are to be considered as too severe and, therefore, having a chilling effect on the NGOs activities threatened in a non proportionate and justifiable way.

After all, the draft proposal does not seem to be consistent with the right of freedom of assembly and association, established in Art. 11 of the Convention, by several grounds.

First of all, the reform seems not to consider the cardinal role that NGOs, the same watchdog role as the media, should play in a democratic society because requiring additional administrative procedures express the desire of non-compliance with the positive obligations that a State must carry out in order to facilitate and promote the outcomes of civil society actors.

Secondly, starting from the assumption that this reform is a classical example of “interference” by national authorities, several doubts may emerge with regard to the requirements of proportionality and necessity in a democratic society; in particular, the penalties seem to clash against the proportionality test (making, therefore, unnecessary to assess the additional condition of necessity in a democratic society) due to the nature and severity of the sanctions imposed which, as specified by the Court, should be the “less intrusive”¹⁷⁴ one and, the severe amount of the fine prescribed but, above all, the penalty of the dissolution seems to be, on the contrary, the “most intrusive”.

In truth, regarding the penalties of the dissolution, which following the case law of the Court¹⁷⁵ constitutes an apparent interference with the right of association, it seems to be not proportionate and, most importantly, contrary to the previous standards introduced by the case law of the European Court of Human Rights.

The European Court of Human Rights, in this meaning, has found that in order to consider a dissolution of an association as “proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously”¹⁷⁶ and such a

¹⁷¹ *Ibidem*, p. 4.

¹⁷² *Ibidem*, p. 5.

¹⁷³ The Complaint was filed by 14 Hungarian NGOs to the European Court of Human Rights over the law on foreign-funded NGOs, https://drive.google.com/file/d/1HhLHEeJd2UJHOs_OWbak_DmNmQxO0cqv/view

¹⁷⁴ *Schwabe and M.G. v. Germany, op.cit.*, §85.

¹⁷⁵ *Association Rhino and Others v. Switzerland*, no. 48848/07, §44-45, 11 October 2011.

¹⁷⁶ *Ibidem*, §65.

“drastic measure requires very serious reasons by way of justification before it can be considered proportionate and warranted only in the most serious of cases”¹⁷⁷.

In fact, as already pointed by the Venice Commission¹⁷⁸, the dissolution of an association should only be used as a measure of last resort in all the cases when the organization engages in serious misconduct or lends itself to bankruptcy or long-term inactivity¹⁷⁹ and, furthermore, this is not the case of mere failure to respect specific legal requirements which the Court has already addressed in the case *Tebieti Muhafize Cemiyyeti and Israilof v. Azerbaijan*, when was stated that “a mere failure to respect certain legal requirements or internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution”¹⁸⁰.

Furthermore, the penalty of the dissolution, as suggested by the Council of Europe Commissioner for Human Rights, Nils Muiznieks¹⁸¹, should be strictly limited to the three recognized by international standards: bankruptcy, prolonged inactivity, other serious misconduct and, so, not more.

2.2.4 The enforcement of the right

In the same way as other rights, the enforcement of the right of freedom of assembly faces many criticisms due to the tensions between populist parties in power and international institutions, but in any case, with regard to the specific right concerned, we can show an extraordinary example that could constitute the legal basis of the enforcement process which comes directly from the case law of the European Court of Human Rights; in fact, we are referring to the case of *Baczowski v. Poland*¹⁸².

The cited case represents a landmark decision for the rights of LGBT communities to exercise their freedom of assembly appropriately; the European Court of Human Rights condemned Poland for violating the right to assembly and other related rights emphasizing, in particular, the importance of pluralism, tolerance and broadmindedness, meanwhile affirming the existence of a truly positive obligation of a State to secure genuine and effective respect for freedom of association and assembly.

In this regard, the enforcement of the right to freedom of assembly must be achieved, principally, at the national level because there is a primary duty of a Member State involved; as a consequence, the Europea Convention on Human Rights should be enforced, first and foremost, through the proper exercise of positive obligations by the State.

¹⁷⁷ *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, §32, 12 June 2014.

¹⁷⁸ Council of Europe, European Commission for Democracy Through Law (Venice Commission), *op.cit.*, p. 16.

¹⁷⁹ See, *i.a.*, *Vona v. Hungary*, *op.cit.*

¹⁸⁰ *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, §82, ECHR 2009.

¹⁸¹ Council of Europe, Commissioner concerned about proposed additional restrictions to the work of NGOs in Hungary, *op.cit.*, p. 5.

¹⁸² See, *Baczowski and Others v. Poland*, *op.cit.*

State parties to the European Convention on Human Rights, amongst other things, are obliged to respect and enforce the provisions of the Convention, first of all, by the application of the general principle *pacta sunt servanda* and, at the same time, by Article 27 of the Vienna Convention on the Law of Treaties¹⁸³ which states that “a State party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁸⁴

However, we must acknowledge the existence of a paradox that could lead to a real short-circuit between the international actors involved; indeed, the presence of several problems limit the domestic legal impact which the judgements of the European Court of Human Rights might otherwise have¹⁸⁵ because, firstly, there is “no obligation arising out of the Convention to make judgements of the ECtHR executable within the domestic legal system¹⁸⁶ and, as the aforementioned case of the Hungarian Constitutional Court¹⁸⁷ takes into the limelight of the international arena, many national courts do not accept that judgements of the Courts are binding, in the meaning of the enforcement of these judgments at national level.

Furthermore, the Art. 46 of the Convention, which provides that “High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties” is interpreted in the meaning that each State is obliged to observe only those judgments pronounced directly against it and not others.

This contrast is particularly meaningful in the Hungarian context¹⁸⁸, where exists two antithetical paradigms: a positive one, represented by the *Csullog* judgment¹⁸⁹, where after the decision of the Court, Hungary amended the criminal law in accordance with the findings of the European Court giving the right emphasis to the Article Q (2) of the Fundamental Law of Hungary which prescribed that “Hungary shall ensure the conformity between international law and Hungarian law in order to fulfil its obligation under international law”¹⁹⁰ and a negative one, which dates back to the case *Franatoló*¹⁹¹, in which the Hungarian Parliament explicitly declared its unwillingness to respect the judgment and as a consequence amends the criminal law.

The recent trend, nevertheless, is the growing application of the Strasbourg jurisprudence for interpreting the Hungarian law correctly due to the role of civil society in preparing training and workshop on the importance of the ECHR findings on both the national and international order¹⁹².

¹⁸³ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art. 27.

¹⁸⁴ *Ibidem*.

¹⁸⁵ See, Greer, *The European Convention on Human Rights*, pp. 279 ss.

¹⁸⁶ Ress, “The Effects of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order,” p. 374.

¹⁸⁷ Decision 22/2016 (XII.5), AB on the Interpretation of Article E) (2) of the Fundamental Law (Const. Ct. Hung. Nov. 30, 2016), available at https://hunconcourt.hu/letoltesek/en_22_2016.pdf

¹⁸⁸ See, Bard, “Hungary: the legal order of Hungary and the European Convention on Human Rights,” p. 186.

¹⁸⁹ *Csüllög v. Hungary*, no. 30042/08, 7 June 2011.

¹⁹⁰ Hungary, Fundamental Law of Hungary, Art. Q, par. 2 (25 April 2011).

¹⁹¹ *Franatoló v. Hungary*, no. 29459/10 (ECHR, 3 November 2011).

¹⁹² See, Bard, *op.cit.*, p. 194, who emphasize the works of the Hungarian Academy of Justice and some proactive non-governmental organizations, like the Hungarian Helsinki Committee, Mental Disability Advocacy Center and European Roma Rights Center.

In any case, States, as primary enforcement actors, should be more active in the development of positive practice within their borders, emphasizing the fundamental principle that the rights to freedom of peaceful assembly and association are due to everyone without distinction because this right plays a crucial role in promoting tolerance, broadmindedness, diversity, and pluralism in the societies and democratic assets; they need to draw a fine line in balancing the rights of various groups for ensuring that one group is not favoured, either in policy or practice and such freedom must, therefore, not only be protected but also facilitated in a practical way.

Moreover, they need to establish or strengthen oversight mechanisms, for example through parliament or human rights institutions, to identify and deal with fundamentalist practices that restrict assembly and association rights and become less restrictive in regulating civil society and the rights to freedom of assembly and association, and recall that democracy, tolerance, and inclusiveness are among the most reliable indicators for long-term security, prosperity, and moderation.

Lastly, the role of civil society and civic organizations should be promoted and facilitated by State policies, in order to create and expand initiatives to educate people, particularly youth, on the importance of pluralism, tolerance and diversity in democratic societies and research, monitor and document potential violations of the right in specific contexts, because strengthening the democracy as the best long-term strategy for countering extremism, as people are less likely to act upon extreme or violent views when they feel that they have a stake in their society¹⁹³.

2.3 Attempts to limit freedom of thought, conscience and religion

2.3.1 European legal basis

Among other substantive rights, one of the fundamental freedoms protected by the ECHR, is the freedom of thought, conscience and religion; the relevant European provision is Article 9 of the European Convention on Human Rights, which stated that:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance”

“2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests or public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom for others”¹⁹⁴.

¹⁹³ See, *op.cit.*, Conclusion and Recommendations adopted in the United Nations, General Assembly. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

¹⁹⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR), Art. 9, 1950; substantially the same meaning is given by the EU Charter of Fundamental Rights, which in the Article 10 declared that: “1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right”

One of the main reasons why freedom of thought, conscience and religion was deemed to be a “fundamental and undisputed freedom”¹⁹⁵ was due to the vulnerability of minority religious groups to having their human rights violated, evident in the persecution of the Jews¹⁹⁶.

The overriding importance of the right in question was spelled out, on several occasions, by the Court, which has raised up in this regard the prominence of the safeguard of principle of pluralism and pluralistic views within the society, “the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”¹⁹⁷.

In fact, the European Court of Human Rights, in the case of *Kokkinakis v. Greece*, has clarified the ultimate scope of the article 9 which is “one of the foundations of a democratic society within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”¹⁹⁸.

First of all, in the freedom of thought, conscience and religion, as described in Article 9 of the Convention, there are three components in need of protection: the freedom of thought, conscience, and religion as such; the freedom to change one’s religion or belief; and the freedom to manifest religion or belief¹⁹⁹.

Article 9 (1) includes the positive scope of the article; it expressly includes the right to manifest one’s religion or belief in both private and public sphere; while the sphere of personal beliefs and religious creeds, or the *forum internum*, is free from restrictions, Article 9 (2) provides five broad grounds under in accordance with the freedom to manifest one’s religion (*forum externum*), may be legitimately restricted or limited²⁰⁰.

However, even if the right as such seems to possess an absolute nature, as the Court stated when it declared that “States cannot dictate what a person believes or take coercive steps to make him changes his beliefs”²⁰¹, it is mostly the third component that raises many concerns, for the predictable reason that manifest the religious belief may impact upon other people rights; therefore, paragraph 2 of Article 9 provides that the limitations are imposed by means of a formulation very similar to that of the previous articles of the Convention (Art. 8,10 and 11).

However and, in contrast with the limitations clauses contained in the Articles 8, 10 and 11, this article does not recognize “national security” as a legitimate aim for doing an interference with the freedom to manifest religion or belief and this omission according to the Court, is “far from being an accidental one” because it “reflects the primordial importance of religious

¹⁹⁵ See, Botelho, “Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights”, p. 60.

¹⁹⁶ Kooner, “A Critical Analysis of the French Ban on Religious Symbols in the Context of the Application of Article 9 of the ECHR”, p. 28.

¹⁹⁷ See, *i.a.*, *Bayatyan v. Armenia*, [GC], no. 23459/03, ECHR 2011; *Church of Scientology of St. Petersburg and Others v. Russia*, no. 47191/06, 2 October 2014; *Church of Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99 (ECHR, 12 December 2001).

¹⁹⁸ *Kokkinakis v. Greece*, 25 May 1993, §31, Series A no. 260-A.

¹⁹⁹ Schabas, *op.cit.*, p. 420.

²⁰⁰ *Ibidem*, p. 423.

²⁰¹ *Ivanova v. Bulgaria*, no. 52435/99, §79, 12 April 2007; *Masaev v. Moldova*, no. 6303/05, §23, 12 May 2009.

pluralism as one of the foundations of a democratic society within the meaning of the Convention and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs”²⁰².

The need to balancing the different rights was emphasized by the Court in several judgments when it declared that “In a democratic society, in which several religion coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”²⁰³.

As a consequence, and in the same way of the other discussed rights, the limitations must be: prescribed by law, based on a legitimate aim and necessary in a democratic society.

Firstly, the interference must be prescribed by law, which means that should be authorized by a rule or order recognized in the national legal framework; the law in question could be a written law but even an unwritten one. However, and most importantly, there is also a qualitative requirement: the law must be accessible and foreseeable by the standard or ordinary role model. In effect, however, the words refer to the broad and general notion of the rule of law.

Secondly, the interference should pursue a specific legitimate aim and this investigation, undoubtedly really problematic, concerns the enumeration of the purposes set out in paragraph 2, namely: the interests of public safety, the protection of public order, health, or morals, or the right of others. Anyway, it is important to emphasize that these restrictions are to be interpreted in a very narrow way.²⁰⁴

In the aforementioned case *Leyla Sahin v. Turkey*, concerning the headscarf ban in a public university, the Court made a very superficial reference to the requisite of “public order” and “the rights and freedoms of others”, just noting that these requirements were not invoked, and so in dispute, by the applicants.

In the French full-face veil or burqa case, the Government invoked the public safety as well as respect for the minimum set of values of an open and democratic society, explaining that the second ground was composed of three elements: “respect for equality between men and women, respect for human dignity, and respect for the minimum requirements of life in society,”²⁰⁵ the decision of the Court highlighted, in particular, the third element, when it said that could be linked in some way to the requirement of the “right and freedom of the others”. The latter was again emphasized by the Grand Chamber, which concluded that the interference was justified because of the “breaching of the right of others to live in a space of socialization which makes living together easier.”²⁰⁶

Thirdly, the interference should respect the last demand concerning the necessity in a democratic society and not surprisingly most of the decisions of the Court involving this requirement; in making this final arduous assessment, the Court should decide for the appropriate balance between different rights at stake and consider, first of all, the necessity and the pressing

²⁰² *Nolan and K. v. Russia*, no. 2512/04, §73, 12 February 2009.

²⁰³ See, e.g. *Leyla Şahin v. Turkey [GC]*, no. 44774/98, §106, ECHR 2005-XI; *Kokkinakis v. Greece, op.cit.*, §33.

²⁰⁴ See, e.g. *Nolan and K. v. Russia*, no. 2512/04, 12 February 2009; *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, 14 June 2007.

²⁰⁵ *Leyla Şahin v. Turkey, op.cit.*, §35.

²⁰⁶ *Leyla Şahin v. Turkey [GC]*, no. 44774/98, §43, ECHR 2005-XI.

social need and, later, takes a further step on proportionality which involves the balancing of the individual rights with the interest of the society as a whole.

For example, in the conversed case *Lautsi and Others v. Italy*²⁰⁷, concerning the applicant complained that the display of the crucifix in the State school attended by her children was in breach of Article 9, the Second Section of the Chamber, in the first judgment, began its reasoning stating that the State have a special duty to preserve and respect the pluralism in education, which is part of the contemporary democratic societies, indeed, it expressed that “cannot see how the display in state-school classrooms of a symbol that is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of democratic society within the Convention meaning of that term.”²⁰⁸

Afterward, the Grand Chamber reversed this initial ruling and found no violation on the basis that the question of religious symbols in classrooms was, in principle, a matter falling within the margin of appreciation of the State, where there was no European consensus on it.

Lastly, we should point out that in regard to this specific right the Court has not yet delivered any judgments which spelled out, in a clear and transparent way, that the States have positive obligations to protect the freedom of thought, conscience and religion, even if it has had the opportunity to do so, for example in the case of *Vergos v. Greece*²⁰⁹, where the national authorities were blamed for not having designated an area for the building of a house of prayer²¹⁰ and the Court acknowledged the margin of appreciation of Greece in balancing town and country planning policy objectives with religious need²¹¹.

2.3.2 The ban on religious symbols

In the international scenario, there have been many cases concerning clothing, head-covering, and jewelry²¹²; in fact, even if International Courts have often emphasized the role of the State as a neutral and impartial organizer of public order, religious harmony, and tolerance in a democratic society, States often invoke concerns about health, safety and security in justifying measures that limit the use and the wearing of clothing with religious significance.

A crucial factor in the judgments is the degree of showing: noting that “the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others”, the Court upheld the right of an airline employee to wear a “discrete” cross on a necklace in a context where other forms of religious manifestation, such as the wearing of a hijab or headscarf, had been accommodated²¹³. However, it reached the opposite conclusion where the

²⁰⁷ *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011 (extracts).

²⁰⁸ *Ibidem*, §31.

²⁰⁹ See, e.g. *Vergos v. Greece*, no. 65501/01, 24 June 2004; *Manoussakis and Others v. Greece*, 26 September 1996, *Reports of Judgments and Decisions* 1996-IV.

²¹⁰ Akandji Kombe, “Positive obligations under the European Convention on Human Rights,” p. 50.

²¹¹ Cf. Psychogiopoulou, “The European Court of Human Rights in Greece: Litigation, Rights Protection and Vulnerable Groups,” p. 129.

²¹² Schabas, *op.cit.*, p. 439.

²¹³ *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, §94, ECHR 2013 (extracts).

applicant was a nurse working in a public hospital and where there were safety concerns about the wearing of any chain or necklace²¹⁴.

Concerning the correct interpretation of these legal provisions, it is necessary to investigate the relationship (and tensions) between the case law of the Court of Justice of the European Union and the European Court of Human Rights on the subject matter.

The latter, expressed his view in several cases, for example in *Leyla Sahin v. Turkey*²¹⁵, *Dogru v. France*²¹⁶ and *Dahlab v. Switzerland*²¹⁷.

In *Dahlab v. Switzerland*, concerning a ban of the hijab dressed by a teacher in a public school, the Court considered the interference as a justified measure for the reason that the prohibition to wear a headscarf was not “directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the state primary-education system.”²¹⁸

In the case *Leyla Sahin v. Turkey*, concerned a university student who objected the rules on clothing of a Turkish state university, the Grand Chamber reaffirming the principle that wearing a headscarf is hard to reconcile with the principle of gender equality, tolerance, respect for others and non-discrimination, confirmed that “where questions concerning the relationship between state and religions are concerned, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance,”²¹⁹ therefore, it left a wide margin of appreciation to the Turkish authorities to decide whether it should be considered as “necessary” in the concrete context.

From these and similar judgments, it is interesting to note that the correct meaning of the findings reached is the preference to allowed national authorities to decide or assess the limits on religious manifestation according to their national context; therefore, this could mean that the European Court provides freedom of religion to say something fundamentally different between European countries²²⁰.

On the same issue, the European Court of Justice delivered two twin judgments on 14th March 2017²²¹, one case from Belgium and one from France²²².

In the first case, the Court states that clothing worn for religious reasons is an intrinsic aspect of religious belief; afterward, it concludes that there was no any discrimination on the religious ground because the employer had a general ban of any exposure of religious or political belief of the personnel.

²¹⁴ *Ibidem*, §99.

²¹⁵ *Leyla Şahin v. Turkey [GC], op.cit.*

²¹⁶ *Dogru v. France*, no 27058/05.

²¹⁷ *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V.

²¹⁸ *Ibidem*, §2.

²¹⁹ *Leyla Şahin v. Turkey [GC], op.cit.*, §109.

²²⁰ See, Loenen, “Approaching the intersection of sex, religion and race under the European Convention on Human Rights and EC equality law,” p. 316.

²²¹ Judgment in *Asma Bougnaoui and Association de défense des droits de l’homme (ADDH) v Micropole SA*, Case C-188/15, EU:C:2016:553; Judgment in *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, EU:C:2016:382.

²²² See, Peers, “Headscarf bans at work: explaining the ECJ rulings”.

In the second case, the Court ruled that employers could not discriminate because of a customer request that the employees did not wear the headscarf, this was not a genuine request and capable of determining a further occupational requirement that could justify reserving a job to those who did not wear veils.

In principle, the rulings of the Court imply that employers can prohibit employees from wearing a headscarf, but only in some instances; in the first place, cases only concern customer-facing employees, on the rigid condition that the employer should pursue a non-discriminatory or 'neutrality' policy.

A policy of neutrality means that an employer must also prohibit other religious or political symbols worn by customer-oriented employees; however, on the same issue, the European Court of Human Rights, reached a different conclusion in the case of *Eweida v United Kingdom*²²³, a case concerned a dispute between British Airways and one employee which claim his right to wear a religious necklace while working.

The Court which was called to balance the right to express the religious beliefs and the rights of the others, in particular, the right to maintaining a reputation on a corporate image found a violation of the Article 9 of the European Convention on Human Rights by the following reasoning:

“It is clear, in the view of the Court, that these factors combined to mitigate the extent of the interference suffered by the applicant and must be taken into account. Moreover, in weighing the proportionality of the measures taken by a private company in respect of its employee, the national authorities, in particular the courts, operate within a margin of appreciation. Nonetheless, the Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida’s desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer’s wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.”²²⁴

The repercussions of this and similar judgments on dress code, veils, crucifixes in schools, and so on could be quite powerful across Europe.

²²³ *Eweida and Others v. the United Kingdom*, *op.cit.*

²²⁴ *Ibidem*, §94.

2.3.3 Populist threats

“Europe becomes more and more a province of Islam, a colony of Islam. And Italy is an outpost of that province, a stronghold of that colony, in each of our cities lies a second city: A Muslim city, a city run by the Quran. A stage in the Islamic expansionism”²²⁵

As already mentioned, a threat, real and concrete, is the new tendency to hinder the freedom of religion through several and manifold measures: from the ban on wearing religious clothes to the prohibition of religious symbols in public spaces, to not allow the construction of new religious building (especially minarets), anti-Islam propaganda and constant spread of xenophobia sentiments amongst people, just to name a few.

Anti-immigration sentiments, often based on cultural and new nationalist ideologies, have strengthened the popularity and the appeal of populist parties, especially throughout Europe. Nationalist parties in countries such as Austria, Denmark, Hungary, Switzerland, Italy, France, among others, have attracted significant support in the recent elections also because of their off-limit electoral campaigns (in many cases, a real and frequent resort to the tool of hate speech); in Germany, for example, Frauke Petry, leader of the populist party Alternative for Germany (AfD), referred to a “drastic steps” to prevent Islamist ideology spreading in Germany, including a new ban on the construction of new minarets. She adds that Islam “does not belong to Germany,” even if Muslims who “practice their religion peacefully and privately can be good citizens.”²²⁶

At the same time, in Italy, Matteo Salvini, the leader of the populist party North League, declared that “We are under attack. Our culture, society, traditions and way of life are at risk, the colour of one’s skin has nothing to do with it, but the risk is very real. Centuries of history risk disappearing if Islamization, which up until now has been underestimated, gains the upper hand”²²⁷.

The anti-Muslim arguments are no longer limited to the margins of the society and are now also accepted by some mainstream politicians resulting in a growing xenophobic populist discourse. Islamophobia manifests itself through individual attitudes as well as the policies and practices of institutions which vary among member states and over time. Hostility, fear, hatred of Islam and active discrimination against individuals of this faith often appear through hate speech, violence or ethnic and religious profiling; Muslims, in particular, continue to experience discrimination in various areas of social life and data from most countries suggest that Muslim women wearing visible religious symbols, such as the headscarf, are particularly vulnerable to discrimination due to the intersectionality of gender and religion and this often results in undue restrictions affecting their lives and such negative experiences, as suggested by the annual report

²²⁵ Fallaci, *The Force of Reason*, p. 34.

²²⁶ Noack, “The far-right AfD wants to protect Germany from Islam. Now, one of its politicians has become a Muslim”.

²²⁷ Balmer, “Northern League leader says Italian society threatened by Islam”.

of the Council of Europe, can fuel feelings of isolation within a broader community and hinder inclusive societies²²⁸.

But primarily, this widespread tendency shows, first of all, that the most common populist method used to erode or try to do it, the credibility of the “others group” is the hate speech, in other words, a misuse of the rights derived from the abuse of freedom of expression; in reality, populist leaders use their harsh anti-religious rhetoric only for personal gain, which could be an increase in voters in the general elections or the objective of influencing the electorate in order to obtain a more widespread consensus for future legal reforms, often characterized by more than dubious legal grounds, such as the case occurred in Switzerland.

In Switzerland, in the speech before a referendum, concerning the ultimate ban on the construction of new minarets, the president of the local branch of the Young Swiss People’s Party, the Populist Party of Switzerland, emphasized that it was time to stop the expansion of Islam and the prohibition of minarets, would be an expression of the preservation of one’s own identity; the referendum, which passed with a clear majority of voters, 57.5 percent of the voters in 22 of Switzerland’s 25 cantons, in this meaning was an excellent victory for the populist political forces but, at the same time, it raises many concerns on the respect and consistency with the fundamental right of the freedom of religion.

The Special Rapporteur on Freedom of Religion or Belief, Ms. Asma Jahangir, the following day after the outcome raised up her deep concerns, calling the Swiss authorities to abide by all its international obligations and to take all the necessary measures to adequately protect the right to freedom of religion amongst the members of the Muslim community because the ban on minarets amounted to an undue restriction of the freedom to manifest one’s belief in a democratic context²²⁹.

On the one hand the Swiss Green Party want to challenge the referendum at the Strasbourg Court for violating the freedom of religion²³⁰, simultaneously a private citizen, Hafid Ouairi, on December 15, 2009 lodged a complaint²³¹ to the European Court of Human Rights, claiming that the constitutional amendment in Switzerland prohibiting the building of minarets would amount to a violation of the European Convention on Human Rights and especially on the breach of the right to freedom of thought, conscience and religion as enshrined in the Article 9 of the Convention; however, the Court, surprisingly, concerning the ban, were deemed inadmissible on the ground that the applicant could not claim to be the “victims,” neither direct or indirect, of a violation of the Convention.

²²⁸ See, Council of Europe, European Commission Against Racism and Intolerance (ECRI), *ECRI Report on Armenia*.

²²⁹ See, United Nations, Office of the High Commissioner, “Switzerland: UN expert on religious freedom regrets outcome of vote to ban construction of minarets”.

²³⁰ See, Euronews, “France debates swiss ban on minarets”.

²³¹ *Ouairi v. Switzerland*, no. 65840/09 (ECHR, 30 June 2011); a number of other applications are still pending, *Baechler v. Switzerland*, no. 66270/09, *Koella Naouali v. Switzerland*, no. 1317/10, *Al-Zarka v. Switzerland*, no. 9113/10.

It is interesting to notice the arguments according to which two organizations, Open Society Foundation²³² and ECLJ²³³, intervened as a third party in the case mentioned above have proposed to the attention of the Court.

The European Centre for Law & Justice, more specifically, in a note²³⁴, raised its concerns on a more broader perspective concerning the crisis that religious freedom undergoes. First and foremost, they reaffirmed that the real essence of the freedom of religion, in accordance with the relevant case-law of the Court, is to support a pluralistic, tolerant and multicultural approach and the recognition of the principle of “neutrality” that State must achieve to avoid any discrimination; secondly, they pointed out on the fact that the idea of secularization of a European public space is actually foreign to the spirit of the Council of Europe and that such approach could be a failure or even a betrayal of the European values.

Therefore, they concluded that the new tendencies shown by the cases of the Swiss referendum and the banning of Islamic headscarves, amounts to a disavowal of the pluralistic, tolerant and multicultural conception of religious freedom that could lead to the paradox of protecting religious freedom by a social elimination of the others, of other religious groups, of minority groups.

It remains to be seen how the Court, once the admissibility criteria are fulfilled, might decide on the merits of an application against the Swiss ban on the construction of minarets.

Lastly, in order to determine if the Swiss ban could be considered as consistent with the current European framework in terms of respecting freedom of religion, it is important to noting that the Court in the case *Manoussakis and Others v. Greece*²³⁵, pointed out that the margin of appreciation of the national authorities in order to assess whether there is a real need for the religious community to set up a religious building, in this case, was a church, is not a wider one and, therefore, the interference was delineated as illegitimate because was not met the requirement of necessity in a democratic society.

Several doubts in terms of consistency could arise, first of all, with regard to the proper exercise of positive obligations by States to protect the freedom of thought, conscience and religion, and in particular, to guarantee an effective religious pluralism within a democratic society as stated by the Court in the case of *Vergos v. Greece*²³⁶; secondly, in relation to the requirements of proportionality and necessity in a democratic society due to the fact that a ban on the building of minarets could be considered as the most intrusive interference performed by national authorities and, as a result, should be pursued as *extrema ratio*.

²³² Open Society Foundation is a non-governmental organization network, formerly known as the Open Society Institute (OSI) which provides grants in areas of democracy, good governance, human rights and economic.

²³³ The European Centre for Law and Justice is an international, non-governmental organization dedicated to the promotion and protection of human rights in Europe and worldwide.

²³⁴ ECLJ, “No Victim Status, said the European Court of Human Rights in the minarets cases v. Switzerland”.

²³⁵ *Manoussakis and Others v. Greece, op.cit.*, §45.

²³⁶ *Vergos v. Greece, op.cit.*

Another potential threat is the emerging legal tendency to ban the hijab or other religious clothes, such as in Austria, France, Netherlands²³⁷; and many others European States²³⁸.

Almost all the mentioned reforms are implemented to prevent the danger to the safety of people and property, to fight identity fraud and to promote the principle of gender equality²³⁹ in order to ensure a peaceful “living together” through “the observance of the minimum requirements of life in society”²⁴⁰, the latter refers evidently to the textual exception of the rights of the others.

Several doubts could arise, in particular, with reference to the requirement of proportionality²⁴¹.

The Court in a previous judgment²⁴², stressed the role of national authorities in protecting the values of pluralism, tolerance, and broadmindedness, which should intend “not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other”; religious dressing codes, such as burqa or hijab, could be considered as a frame in order to express the personality and beliefs of a minority group, such as the Muslim women and, therefore, the legislative prohibition could be interpreted as a sign of “selective pluralism and restricted tolerance”²⁴³.

Moreover, as the dissenting opinion of the judges Nussberger and Jaderblom underlined²⁴⁴, those legal reforms, apparently supported by the purpose of reducing gender differences and discriminations, could lead to an evident and worrying dilemma²⁴⁵: women wishing to wear a full-face veil in accordance with their religious faith or culture could be forced to break with their traditions and as a result they could face not only criminal sanctions, but also the familiar reactions with the paradox that it can not be claimed that the restrictive measure has the desired effect of liberating women oppressed, but could exclude them from society and aggravate their already critical social situation²⁴⁶.

Ultimately, it is important to remember that these legal reforms whenever based on national security arguments, are in contrast with the text of the Convention for the reason that Article 9 of the Convention, as already pointed out, does not recognize “national security” as a legitimate aim for interfering with the freedom to manifest religion or belief, and this omission is not fortuitous because it “reflects the primordial importance of religious pluralism as one of the foundations of

²³⁷ See, Hayoun, “In Europe, history and the populist politics over muslim women’s dress, repeats itself”.

²³⁸ See, for further consideration, Kalantry and Pradhan, “Veil Bans in the European Court of Human Rights”.

²³⁹ See, e.g. *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014 (extracts).

²⁴⁰ *Ibidem*, §140.

²⁴¹ *Ibidem*, Joint Partly Dissenting Opinion of judges Nussberger and Jaderblom, p. 61 ss.

²⁴² *Serif v. Greece*, no. 38178/97, §53, ECHR 1999-IX.

²⁴³ *Ibidem*, Joint Partly Dissenting Opinion of judges Nussberger and Jaderblom, §14.

²⁴⁴ *Ibidem*, §21.

²⁴⁵ See, the criticism exposed in Rizvi, “Banning the burqa does nothin to help Muslim women”.

²⁴⁶ *Ibidem*.

a democratic society within the meaning of the Convention and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs”²⁴⁷.

2.3.4 The enforcement of the right

First of all, we must stress that freedom of thought, conscience, religious as a very delicate matter, implies that any attempt to enforce or strengthen the legal provision through the legislative process is probably not a proper strategy to be followed; at the same time, the argument, as a global issue, can not be addressed with a local or national approach.

The desirable path forward is to considering as enforcement mechanisms the several recommendations stemming from the full understanding of soft law instruments and, above all, the EU Guidelines on the promotion and protection of freedom of religion or belief²⁴⁸.

Beginning with the fundamental principle according with the EU and its Member States are committed to respecting, protecting and promoting freedom of religion or belief within their border²⁴⁹, it is reaffirmed the primary role of States in ensuring the freedom of religion or belief by guaranteeing that the internal legal systems are established in order to provide adequate and effective protection of the right; treating all individuals equally without any form of discrimination based on religion; putting in place effective and adequate measures in order to prevent or sanction violations of freedom of religion or belief and ensure accountability in case of violations²⁵⁰.

On the same matter, the Parliamentary Assembly of the Council of Europe also played a really active role in terms of recommending the way forward; firstly, with the Recommendation 1962 (2011) on “The religious dimension of intercultural dialogue”²⁵¹ addressed, among other things, to religious institutions and religious leaders in order to fostering a better understanding of each others, opening a more collaborative and intercultural dialogue and respecting the fundamental rights, democratic principles and the rule of law²⁵²; the Resolution 2036 (2015) on “Tackling intolerance and discrimination in Europe with a special focus on Christians”²⁵³ which called upon the Member States to “promote reasonable accommodation within the principle of indirect discrimination so as to ensure that the right of all individuals under their jurisdiction to freedom of religion and belief is respected”²⁵⁴; the Recommendation 1804 (2007) on “State, religion, secularity and human rights”²⁵⁵, which draws some important strategies to pursue by

²⁴⁷ *Nolan and K. v. Russia, op.cit.*, §73.

²⁴⁸ Council of the European Union, *EU Guidelines on the promotion and protection of freedom of religion or belief*.

²⁴⁹ *Ibidem*, §5.

²⁵⁰ *Ibidem*, §21 ss.

²⁵¹ Council of Europe, Parliamentary Assembly, Recommendation 1962, The religious dimension of intercultural dialogue (2011).

²⁵² *Ibidem*, §16.

²⁵³ Council of Europe, Parliamentary Assembly, Recommendation 2036, Tackling intolerance and discrimination in Europe with a special focus on Christians (2015).

²⁵⁴ *Ibidem*, §6.

²⁵⁵ Council of Europe, Parliamentary Assembly, Recommendation 1804, State, religion, secularity and human rights (2007).

jointly States and Religious Leaders with the aim of standing against human rights violations²⁵⁶ and, finally, the Recommendation 2080 (2015) on “Freedom of religion and living together in a democratic society”²⁵⁷, which further encourages the dialogue on the religious dimension of an intercultural dialogue.

As a consequence, the actors that should play a major and significant role are, first and foremost, the religious leaders, who should make a substantial effort pursuing a global approach on a more collaborative and strategic plan of action; in fact, the religious leader, in particular, must make greater attempts to foster a more inclusive dialogue and tolerance with other religious and non-religious communities; they should unequivocally condemn the use of violence, physical and verbal, and make clear that those who use or advocate violence or exclusion do not legitimately act in the name of their faith²⁵⁸.

An excellent initiative in this meaning is the one, launched in March 2017, after the 2012 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred²⁵⁹ that constitutes incitement to discrimination, hostility or violence, by the Office of the UN High Commissioner for Human Rights (OHCHR), called “Faith for Rights”²⁶⁰, an outstanding example of how the religious leader can and should collaborate in the promotion of human rights; the initiative provides a cross-disciplinary reflection on the deep, and mutually enriching, connections between religions and human rights and it is connected to the Beirut Declaration by the establishment of 18 commitments launched to uphold human rights, including pledges to avoid invoking “State religion” in order to justify discrimination against any individual or group, to ensure gender equality and minority rights, to refrain from oppressing critical voices and to engage with children and youth as well.

The Beirut Declaration, in particular, considers that all believers should join “hands and hearts” in articulating ways in which “*Faith*” can stand up for “*Rights*” more effectively to strengthen each other rights in a model of peaceful coexistence.

Assuming that religions or beliefs are a precious source for the protection of the whole spectrum of inalienable human entitlements and that religious, ethical and philosophical texts preceded international law in upholding the fundamental rights, the religious leaders have agreed on the following crucial points: freedom of religion does not exist without the freedom of thought and conscience which precede all freedoms; open a multi-level coalition; avoid theological and

²⁵⁶ *Ibidem*, §17.

²⁵⁷ Council of Europe, Parliamentary Assembly, Recommendation 2080, Freedom of religion and living together in a democratic society (2015).

²⁵⁸ See, United Nations, General Assembly. *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, *op.cit.*, §96, p. 22.

²⁵⁹ The Rabat Plan of Action identifies three specific responsibilities of religious leaders: Religious leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination; Religious leaders have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech; Religious leaders should be clear that violence can never be tolerated as a response to incitement to hatred, see United Nations, General Assembly. Annual Report of the United Nations High Commissioner for Human Rights, Appendix, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, 11 January 2013, available at http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

²⁶⁰ United Nations Human Rights, Office of the High Commissioner, *The Beirut Declaration and its 18 commitments on Faith for Rights*.

doctrinal divides; speak against any advocacy of hatred that could amount to inciting violence, discrimination or any other violations and denounce any form of religious intolerance²⁶¹.

Therefore, the role that Religious Leader should play could be seen as a global mechanism to enforce freedom of thought, conscience, religious by stimulating the initiative of the States to implement and enforce the current European legal framework effectively; in Switzerland, in particular, Muslims leaders should play a more active role stimulating, on one hand, dialogues, debates, conferences with the local non-Muslim community and the politics and, on the other hand, speaking out openly against extremism and radicalization processes, The Forum for a Progressive Islam, in this regard, could be an excellent example for the way forward²⁶².

3. CONCLUSION

The effect of the recent populist legislative tendencies results in sharpening new and old tensions between national and international legal orders and, in the European Union scenario, in particular, the most alarming outcome could be a potential and systematic breach of the European Convention on Human Rights and the liberal democratic values expressed in it.

A first plausible jeopardy could indeed involve the foundation of freedom of expression, one of the essential pillars of democratic orders, the attack by populism, which often resorts to the concerning tool of hate speech, could come from several perspectives with greater emphasis on the field of pluralism and independence of the media and journalists' activity, especially in Hungary, Poland, Serbia, France and Turkey; moreover, several concerns could come up from the analysis of the Holocaust Law in terms of consistency with the European standards.

The enforcement mechanism, at the same time, gives rise to many problematic issues as a result of the intricate relationship between supranational and national bodies, as expressed clearly by the recent ruling, no. 22/2016 of the Hungarian Constitutional Court and, it could pursue two different and antithetical directions, a strong one, by mean of sanctioning through the scheme of Article 7 TEU and, a light one, by suggesting the adoption of all the necessary measures by soft law recommendations based on a more collaborative and open dialogue approach and, surely the latter is desirable by far.

A second potentially threat could imply the essence of freedom of association and assembly, another crucial feature of democracy because is the primary tool for fostering pluralism within civil society, and in particular the role of NGOs could be highly at stake. The most worrying populist development is undoubtedly the recent “*Stop Soros*” reform proposed by Fidesz in Hungary which raises a large number of criticisms especially about the requirements of proportionality and necessity in a democratic society as interpreted by the relevant judgments of the European Court of Human Rights.

²⁶¹ *Ibidem*.

²⁶² See, e.g., the suggestion presented in Mirza, “Moderate Muslims in Switzerland speak out”.

Further, in order to understand how the enforcement could be pursued, it is meaningful, firstly, to affirm that States must fulfill a positive obligation to improve the values of pluralism and tolerance; as a consequence, with regard to the Hungarian context in particular, nevertheless it could be traced the existence of two conflicting paradigms within the national order, and between them should be stressed the importance of the role of the national States in order to implement the framework of the Convention as successfully performed in the *Csullog* judgment.

Thirdly, a conflictual impact could entail the consistency with freedom of thought, conscience and religion, which as stated by the Court in the case *Kokkinakis v. Greece* is intimately connected with the foundation of pluralism that depends on it, and particularly with regard to the emerging tendencies of banning the religious manifestation, including the construction of minarets, by means of law; in particular, the most troubling cases of the Swiss referendum banning the new minarets and the emerging legal tendency to ban religious clothes in Austria, France and Netherlands; indeed, they pose many criticisms on the respect of the values of pluralism, tolerance and multicultural acceptance and, therefore, they seem to conflict with the requirement of the necessity in a democratic society.

Regarding the argument of the enforcement, nevertheless, besides the importance of the international recommendations and soft law instruments, above all the EU Guidelines on the promotion and protection of freedom of religion or belief, it could be crucial the role that the religious leaders should perform towards a more inclusive intrareligious dialogue and within States, pushing and persuading national authorities to take further steps in order to comply with the fundamental scope of “*living together*”.

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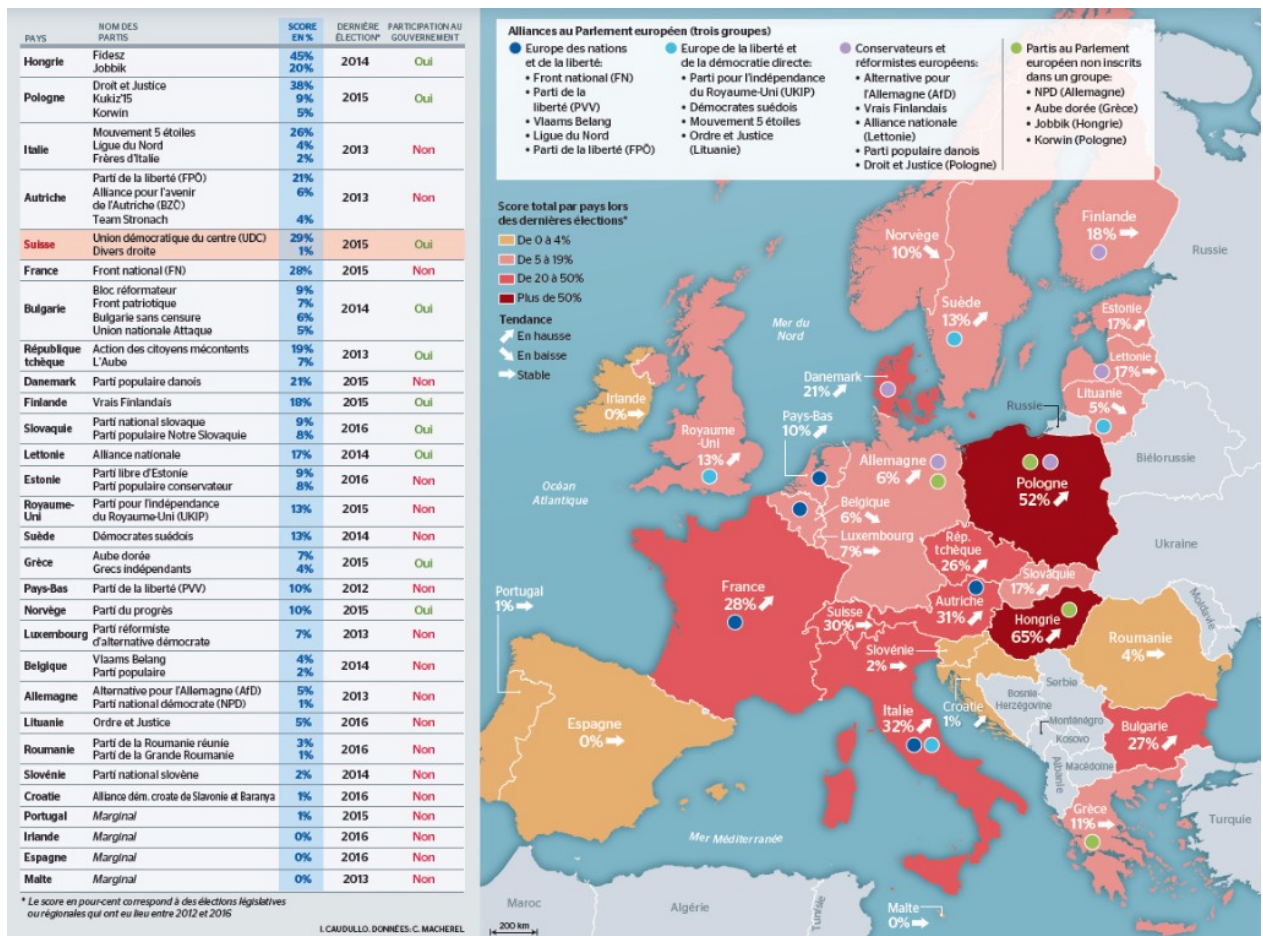
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ANNEXES

Annex 1 – Disaffected and Discouraged Citizens in the EU, 2016, Gallup World Poll

	No Confidence in National Government (Disaffected)	Future Life Poorly Viewed Relative to Current Life (Discouraged)	Disaffected and Discouraged
	%	%	%
Greece	81	67	54
Italy	75	62	46
Slovenia	75	60	45
France	70	64	43
Romania	76	51	40
Bulgaria	67	53	36
Spain	69	52	34
Belgium	57	62	34
Hungary	55	58	33
United Kingdom	56	57	32
Austria	55	56	31
Slovakia	51	61	31
Estonia	57	51	29
Finland	48	60	28
Netherlands	42	67	28
Lithuania	65	44	28
Czech Republic	45	60	27
Germany	43	60	27
United States	69	38	26
Portugal	57	44	25
Denmark	53	51	25
Cyprus	60	39	23
Poland	49	47	23
Sweden	49	50	23
Luxembourg	30	67	22
Ireland	38	58	21
Latvia	57	38	21
Malta	37	45	17

Annex 2 – La force des partis nationalistes en Europe. Infographie: I. Caudullo, données: C. Macherel



Annex 3 – Reporters Without Borders, for freedom of information, 2018 World Press Freedom Index

