3 Freedom of Forming Political Parties and its Restrictions*

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The Court's jurisprudence on the dissolution of political parties is not a very large one. It contains only four cases with Refah Partisi (RP) case not being definitive yet. However, the importance of the Court's judgements is not proportionate with the number of cases as they address to fundamental issues such as relationship between democracy and human rights and clarifies the Court's understanding about democracy.

On the other hand, the Court's judgements on political parties bear a special importance in respect of the respondent States. In view of the serious implications of dissolution of a political party, almost all the member States adopted special procedures for such an act. In fact in all four cases the Court has decided the political parties are dissolved by the Constitutional Court of the respondent State. The Court's judgements have inevitable consequences for the Constitution of the respondent State and constitute a ruling on the compatibility of its constitution with the democratic principles which the Court upholds.

Let us briefly examine the Strasburg organs' decisions regarding dissolution of political parties.

1. German Communist Party (KPD) v. Germany (1957)

The Constitutional Court of the FRG by its decision of 17 August 1956 dissolved the German Communist Party (KPD) and declared it a prohibited party.

The party applied to the Commission of Human Rights against this decision. The Commission in its report expressed the view that the aim of the KPD was to establish a communist system by means of a proletarian revolution and to establish the dictatorship of the proletariat. In the proceedings before the Constitutional Court it had shown that it still adhered to these principles. Even if it should be found that KPD was trying to seize power only through constitutional methods, this did not mean that it had renounced these principles.[1] The Commission then decided that Article 17 of the Convention (engaging in any activity aimed at the destruction of the rights and freedoms set forth in the Convention) was applicable and that the application was inadmissible.

It is clear from the above-mentioned words, that the Commission's decision was based on the aims pursued by the KPD rather than its actual activities.

The Commission ex officio examined applicability of Article 17 and did not join it to the merits. This gave way to a number of criticisms.

One criticism is that Article 17 does not have an independent character. It should have been examined only in conjunction with another article of the Convention.

Another criticism is that the Commission by not joining decision of admissibility to the merits avoided the examination of the facts. However, the question of applicability of Article 17 is in fact a decision on the merits of the case which requires an examination of the facts.[2]

2. United Communist Party of Turkey (TBKP) v. Turkey

(Court's judgement of 30 January 1998)

The Constitutional court of Turkey dissolved TBKP on two grounds: the word 'Communist' in the name of the Party and reference in its programme to two nations in Turkey that is, Turkish and Kurdish nations. The Constitutional Court reached the conclusion that by referring to two separate nations, TBKP sought to promote division of the Turkish nation and to create minorities thus posing a threat to the territorial integrity of the State.

The Strasburg Court in its judgement, first elaborated on the principles of democracy and the importance of political

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1 *KPD v. FRG*, No. 250/57, 1YB 222 (1957).

2 P. van Dijk & G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1998, Kluwer Law International, The Hague, pp. 751-2.

parties in a democracy; It started by saying that 'there can be no democracy without pluralism' and goes on '(free expression of the opinion of the people) is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population'.

'Democracy is without doubt a fundamental feature of the European public order... Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it'.[3] The Court then examined TBKP's case and applied its principles to this case.

1. The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. To judge by its programme, that was indeed the TBKP's objective in this area. That distinguishes the present case from those referred to by the Government.
2. Admittedly, it cannot be ruled out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the party's actions and the positions it defends. In the present case, the TBKP's programme could hardly have been belied by any practical action it took, since it was dissolved immediately after being formed and accordingly did not even have time to take any action. It was thus penalized for conduct relating solely to the exercise of freedom of expression.[4]

With these considerations, the Court found there is a violation of Article 11 of the Convention.

3. Socialist Party (SP) v. Turkey (25 May 1998)

The Constitutional Court of Turkey in 1998 dismissed the first application of the Public Prosecutor to dissolve the party as unfounded. However in 1991, the Public Prosecutor applied to the Constitutional Court for a second time for an order dissolving the SP. The request was based on SP's election publications as well as oral statements of its chairman. The Constitutional Court found that the SP's statements concerning Kurdish national and cultural rights were intended to create minorities and ultimately, the establishment of Kurdish-Turkish federation and this would be to the detriment of the unity of the Turkish nation and the territorial integrity of the Turkish State.

The Strasburg Court, in its judgement, first of all, found no trace of any incitement to use violence or infringe the rules of democracy.

Then, the Court noted that, the statement put forward a political programme with the essential aim being the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis. In the Court's view, the fact that such a programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.[5]

The Court, in conclusion, decided that there was a violation of Article 11 of the Convention.

4. Freedom and Democracy Party (ÖZDEP) v. Turkey (8 December 1999)

In 1993, the Public Prosecutor of the Court of Cassation applied to the Turkish Constitutional Court for the dissolution of ÖZDEP. While the Constitutional Court proceedings were still pending, founding members decided to dissolve the party.

Nevertheless, the Constitutional Court went on with its examination of the case. The Constitutional Court observed that ÖZDEP's programme was based on the assumption that there was a separate Kurdish people in Turkey. In its programme it was also called for a right of self-determination for the Kurds and supported their right to wage a war of independence. This stance was similar to that of a terrorist organization and constituted in itself an incitement to insurrection.

The Constitutional Court dissolved the party on the ground that the Party' programme undermined the territorial integrity of the State and unity of the nation.

The Strasburg Court, in its judgement, found nothing in ÖZDEP's programme that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. The Court noted that the Party's programme presented a political project whose aim is in essence the establishment – in accordance with democratic rules of 'a social order encompassing the Turkish and Kurdish peoples'. The Court, then reiterated the principles contained in its two previous judgements and then went on saying:

3 *The United Communist Party of Turkey and Others v. Turkey*, judgement of 30 January 1998, *Reports of Judgements and Decisions*, 1998-I, paras. 43, 45.
4 Ibid., paras. 57, 58.
5 *Socialist Party and Others v. Turkey*, judgement of 25 May 1998, *Reports of Judgements and Decisions*, 1998-III, paras. 46, 47.

> The Court has already noted that the relevant passages in ÖZDEP's programme, though voicing criticism and demands, do not in its view call into question the need to comply with the principles and rules of democracy.
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> The Court takes into account the background of cases before it, in particular the difficulties associated with the fight against terrorism. In that connection, the Government have affirmed that ÖZDEP bears a share of the responsibility for the problems caused by terrorism in Turkey. The Government nonetheless fail to explain how that could be so as ÖZDEP scarcely had time to take any significant action. It was formed on 19 October 1992, the first application for it to be dissolved was made on 29 January 1993 and it was dissolved, initially at a meeting of its founding members on 30 April 1993 and then by the Constitutional Court on 14 July 1993. Any danger there may have been could have come only from ÖZDEP's programme, but there, too, the Government have not established in any convincing manner how, despite their declared attachment to democracy and peaceful solutions, the passages in issue in ÖZDEP's programme could be regarded as having exacerbated terrorism in Turkey.'[6]

With these views the Court found a violation of Article 11.

5. *Welfare Party (RP) v. Turkey (31 July 2001)*

This case is not conclusive. On 10 July 2001 the former section 4 of the Court decided by 4 votes to 3 that the dissolution of RP by the Turkish Constitutional Court does not constitute a violation of the Convention (Article 11).

The applicant requested that the case be referred to the Grand Chamber of the Court in accordance with Article 43 of the Convention. This request was accepted by the panel of five judges. Consequently, the case will now be examined by the Grand Chamber of the Court.

RP case can be distinguished from three other Turkish political party cases in a number of respects: First, three political parties which were dissolved were all marginal parties not represented in the Turkish Parliament and with little or no influence on the Turkish public opinion in general. RP became the largest political Party in the 1995 general elections receiving 20% of the votes and winning 158 seats in the Grand National Assembly. In June 1996, RP came to power by forming a coalition Government.

Secondly, the time span between the establishment and dissolution of the three political parties was very short.

TBKP formed on 4 June 1990, dissolved on 16 July 1991. The Socialist Party formed on 1 February 1988, dissolved on 10 July 1992. ÖZDEP formed on 10 October 1992, dissolved on 30 April 1993.

Whereas RP existed for a long time. It was founded on 19 July 1983 and was dissolved on 16 January 1998, after almost 15 years of existence.

So, it was possible to make a better assessment of RP's activities compared to other three parties.

Thirdly, the three parties were dissolved by the Turkish Constitutional Court on the ground that they constituted a threat to the territorial integrity of the country. In RP case, it was dissolved because it was found to be not in compliance with the principles of laicism and democracy.

Fourthly, all three political parties were dissolved mainly on the basis of their programmes. An exception is Socialist Party which was dissolved for its election publications and oral statements of its chairman at public meeting. RP on the other hand, was dissolved for the 13 statements made by its chairman, Mr Erbakan or by its vice chairmen or by its members of Parliament.

The Constitutional Court decided that the impugned speeches demonstrated that RP had become 'centre of activities contrary to the principles of laicism' – a condition of dissolution in Articles 101 and 103 of the Law on Political Parties.

The former Fourth Section of the Court, in its judgement of 31 July 2001, expressed its basic approach to the case in the following manner:

> The Court takes the view that a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons.[7]

Then the Court examined the grounds for dissolution contained in the Constitutional Court's decision, in three main categories.

a. Statements concerning plurality of legal systems.

According to this point of view, as advocated by RP's leaders, the society would be divided into religious communities and each community would be governed by its own religious laws. Each individual would have to choose his or her community. The Court found out that such a model of the society is not compatible with the Convention system for two reasons:

6 *Freedom and Democracy Party v. Turkey*, judgement of 8 December 1999, *Reports*, 1999 VIII, para. 46.
7 *Refah Partisi (The Welfare Party) and Others v. Turkey*, (not published), p. 16, para. 47.

Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organizer of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its abovementioned functions, but static rules of law imposed by the religion concerned.

Secondly, such a system would infringe the principle of non-discrimination. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention.

b. Statements concerning introduction of sharia (Islamic law)

The Court found that Sharia, which reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism or constant evolution of public freedoms have no place in it. As such, it is difficult to reconcile Sharia with the fundamental principles of democracy. It particularly diverges from Convention values with regard to criminal law, legal status of women and the way it intervenes in all spheres of private and public life.

c. Statements concerning Jihad (Holy war)

The RP leadership in their statements alluded to the possibility of recourse to force in order to overcome various obstacles for gaining power. The Court expressed the opinion that while it is true that RP did not, in government documents, calls for the use of force, they did not take prompt practical steps to distance themselves from those members of the party, who had publicly referred to the possibility of using force to achieve their aims.

The Court concluded that these remarks of RP leaders formed a whole and gave a fairly clear picture of a model of State and society organized according to religious rules.[8]

Then the Court examined the nature of the threat posed by RP. It took into consideration that RP's aims were not illusory but achievable, because its chances of coming to power by itself were quite high as it was the largest political party.

The Court finally reached the conclusion that, in view of the expressed intention of RP's leadership of setting up a plurality of legal systems and introducing sharia and its ambiguous stance with regard to the use of force to gain power, a State may reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime.[9]

Consequently, the Court found no violation of Article 11 of the Convention.

Three judges who did not agree with the majority, wrote a dissenting opinion. Their main points of disagreement can be summarized as follows:

a. The principles underlined in the previous three judgements on the dissolution of political parties in Turkey are not fully brought out in the RP judgement.
b. There was nothing in the programme of the RP to indicate that it was other than democratic or that it was seeking to achieve its objectives by undemocratic means.
c. There is no compelling or convincing evidence to suggest that RP took any steps to realize political aims incompatible with the Convention or to pose a threat to the legal and democratic order.

Conclusion

The findings of the Human Rights Court common in all these cases can be summarized in four main areas.

Firstly, the Human Rights Court rejected the Turkish Government's argument that Article 11 did not apply to political parties. In the view of the Curt, 'political parties are a form of association essential to the proper functioning of democracy.' Bearing in mind the importance of democracy in the Convention system, the Court held 'there can be no doubt that political parties come within the scope of Article 11.' As the Court observed in the TBKP case, the dissolution of political parties 'affect both freedom of association and, consequently, democracy in the State concerned.'

Secondly, the Human Rights Court ruled that in political party cases, the exceptions set out in the second paragraph of Article 11 are 'to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association.' In this regard, the contracting parties have only a limited margin of appreciation which is ultimately subject to rigorous supervision of the Human Rights Court; Radical measures, such as dissolving a party may only be applied in most serious cases.

Thirdly, the Court emphasized the pluralistic nature of democracy. According to the Court, the fact that the programme or political projects of a political party are deemed

> incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy.

The Court concluded that

> it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.

[8] Ibid., pp. 20-3.
[9] Ibid, pp. 24-5.

Fourthly, the Court is of the opinion that the programme of a political party or the statements of its leaders may conceal objectives and intentions different from those they proclaim. To verify that, the content of the programme or statements must be compared with the actions of the party and its leaders and the positions they defend taken as a whole.

It is to be noted that in five cases (German Communist Party and four cases of Turkish political parties) of political parties decided by the Strasburg organs, the common guiding principle is democracy.

In the United Communist Party judgement, the Court expresses the view that 'Democracy is without doubt a fundamental feature of the European public order'.

> The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it (para. 45).

In the Socialist Party judgement, the Court expresses the opinion that 'having analyzed Mr Perincek's (Party chairman) statements, the Court finds nothing in them that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles (para. 46).

> It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself (para. 47).
>
> In the German Communist Party case, the Commission in its report declared that the objective of the party (to establish a Communist society by means of a proletarian revolution)' was incompatible with the Convention because it would involve the suppression of a number of rights and freedoms that the Convention guaranteed.

The Welfare Party (RP) judgement is also based on the same principle. The Court, in its judgement, concluded that the overall project that RP proposes is not compatible with the principles of democracy (para. 81).

In conclusion, in all five cases the principle that is applied by the Strasburg organs is the same. However, results are different due to different circumstances. In the TBKP judgement, the Court underlines this fact. 'TBKP was clearly different from the German Communist Party' because 'it satisfied the requirements of democracy'. Similarly, in the RP case, one can draw the conclusion that RP was different from three other Turkish political parties, because it did not satisfy the requirements of democracy.

In Article 10 (freedom of expression) and Article 11 (freedom of assembly and association), the Strasburg organs examine the case, from the point of means and aims. The means must be peaceful that is, should not constitute a call for the use of violence, and also the aim must be compatible with democratic principles.

However, a distinction should be made in this respect between freedom of establishing a political party and other freedoms. With regard to the political parties, the aim of the party carries more weight. than the means, since once a political party comes to power either by democratic elections or by other means, it has the possibility to achieve its goals. History has taught us the lesson that a political party that wins the votes of the majority, may use or rather abuse its power to destroy democracy.

The Strasburg organs are also aware of this danger. In the German Communist Party case, the Commission stated that 'even if it (the Communist Party) sought power by solely constitutional methods, recourse to a dictatorship was incompatible with the Convention'.

In the three Turkish political parties cases, this question did not arise as the Court found that both the means and aims of the parties were compatible with the Convention.

However, in the RP case, this distinction plays an important role. In respect of whether RP leadership has called for violence or not, the judgement is rather ambiguous. It does not clearly state that the Party leadership advocated violence, in spite of the fact that its President, Mr Erbakan, said in one of his statements that they would come to power anyway. The question is whether it will be realized with or without blood. The distinction between means and aim becomes clearer when the judgement expresses the view that RP constitutes a serious threat to democracy in Turkey because it was the largest political party and had the possibility to come to power whereby it would be able to fulfil its objectives which, as the Court determined, were not compatible with democracy.

RP case, when it becomes decisive, together with other decisions of the Strasburg organs on the dissolution of the political parties, will be important to determine the parameter of democracy on which the Court's judgements are based.