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## Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties

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Olgun Akbulut

## Abstract

While there seems to be a consensus that political parties remain the sine qua non of western democracies, the question of under which conditions political parties could be dissolved has also been gaining significance in European human rights law since the 1990s. An overall assessment of the cases decided by the European Court of Human Rights ("ECtHR") and domestic courts of the member of the Council of Europe suggests there are three categories of political parties faced with the prospect of dissolution. Part I of this Article describes the first category, the political parties that have criticized state policies on certain sensitive domestic issues, such as the problems faced by minority groups ("pro-minority political parties"). Part II deals with the second category, the so-called anti-secular political parties, which have found no support at the ECtHR. Part III describes the third category, the parties that had proven links with terrorist organizations and, like anti-secular parties, were not protected by the ECtHR under the Convention.

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## CRITERIA DEVELOPED BY THE EUROPEAN COURT OF HUMAN RIGHTS ON THE DISSOLUTION OF POLITICAL PARTIES

*Olgun Akbulut\**

### INTRODUCTION

While there seems to be a consensus that political parties remain the *sine qua non* of western democracies, the question of under which conditions political parties could be dissolved has also been gaining significance in European human rights law since the 1990s. Before the 1990s, dissolution of a political party was known as a Cold-War phenomenon. When the German Communist Party submitted an application to the European Commission of Human Rights (“Commission”) in 1957, the Commission found no difficulty in turning down the application on the basis of Article 17 (abuse of right of individual petition) of the European Convention on Human Rights (“ECHR” or “Convention”).<sup>1</sup> According to the Commission, the party’s commitment to social and communist order established by proletarian revolution and dictatorship placed itself in contradiction with democratic ideals.<sup>2</sup> Similarly, in the case of *X. v. Italy*, where the applicant sought protection for a fascist political movement, the Commission, by referring to the legitimate aim to protect democracy, found the application inadmissible.<sup>3</sup>

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1. Convention for the Protection of Human Rights and Fundamental Freedoms art. 17, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

2. See *German Communist Party v. Germany*, App. No. 250/57, European Commission of Human Rights: Documents and Decisions: 1955–1957, 222–25 (Eur. Comm’n H.R. 1957).

3. See *X. v. Italy*, App. No. 6741/74, 5 Eur. Comm’n H.R. Dec. & Rep. 83, 83–85 (1976).

Apart from these two political party applications, European human rights monitoring has dealt mainly with political speeches of individual applicants seeking protection under Article 10 ECHR (freedom of expression).<sup>4</sup> It has been the common understanding in Europe that political parties are not prohibited in democracies; only criminal behaviors of individual members are punished. Therefore, there has not been a common European model for the dissolution of political parties.<sup>5</sup> However, the 1990s marked another turning point in European human rights law. For the first time in its history, the European Court of Human Rights (“ECtHR” or “Court”) had to decide a case on the dissolution of a political party in *United Communist Party v. Turkey*.<sup>6</sup> Since then, the Court has dealt with twelve cases that directly concern the dissolution of political parties.<sup>7</sup>

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4. European Convention on Human Rights, *supra* note 1, art. 10.

5. See European Commission for Democracy Through Law (Venice Commission), *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 4–5, Op. No. 489/2008, CDL-AD(2009)006 [hereinafter *Opinion on Turkey*].

6. *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1 (1998).

7. *Herri Batasuna v. Spain*, App. Nos. 25803/04 & 25817/04 (Eur. Ct. H.R. June 30, 2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=25817/04&sessionid=59748173&skin=hudoc-en>; *Fazilet Partisi v. Turkey (Virtue Party)*, App. No. 1444/02 (Eur. Ct. H.R. Apr. 27, 2006), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=1444/02&sessionid=59748173&skin=hudoc-en>; *United Macedonian Org. Ilinden-PIRIN v. Bulgaria*, 43 Eur. H.R. Rep. 1119 (2005); *Emek Partisi v. Turkey*, App. No. 39434/98 (Eur. Ct. H.R. May 31, 2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=39434/98&sessionid=59748173&skin=hudoc-en>; *Democracy and Change Party v. Turkey*, App. Nos. 39210/98 & 39974/98 (Eur. Ct. H.R. Apr. 26, 2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=39974/98&sessionid=59748173&skin=hudoc-en>; *Socialist Party of Turkey (STP) v. Turkey*, App. No. 26482/95 (Eur. Ct. H.R. Nov. 12, 2003), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=26482/95&sessionid=59748173&skin=hudoc-en>; *Refah Partisi v. Turkey (Welfare Party)*, 2003-II Eur. Ct. H.R. 269 (2003); *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, App. No. 25141/94 (Eur. Ct. H.R. Dec. 10, 2002), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=25141/94&sessionid=59747964&skin=hudoc-en>; *Yazar v. Turkey*, 2002-II Eur. Ct. H.R. 395 (2002); *Freedom and Democracy Party (OZDEP) v. Turkey*, 1999-VIII Eur. Ct. H.R. 293 (1999); *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1 (1998); *Socialist Party v. Turkey*, 1998-III Eur. Ct. H.R. 1233 (1998). In nine of these cases, the European Court of Human Rights (“ECtHR” or “Court”) found a violation, and in two (*Welfare Party* and *Batasuna v. Spain*) the Court found the dissolution justified. In *Virtue Party*, the applicants withdrew the case. The ECtHR also had to deal with refusal of registration to political parties, ban on political party

An overall assessment of the cases decided by the ECtHR and domestic courts of the member of the Council of Europe suggests there are three categories of political parties faced with the prospect of dissolution. Part I of this Article describes the first category, the political parties that have criticized state policies on certain sensitive domestic issues, such as the problems faced by minority groups (“pro-minority political parties”). Part II deals with the second category, the so-called anti-secular political parties, which have found no support at the ECtHR. Part III describes the third category, the parties that had proven links with terrorist organizations and, like anti-secular parties, were not protected by the ECtHR under the Convention.

### I.    *PRO-MINORITY POLITICAL PARTIES*

The first political party case that fits into the category of pro-minority political parties is *United Communist Party v. Turkey*.<sup>8</sup> The United Communist Party in Turkey (“UCP”) was formed as a political party on June 4, 1990.<sup>9</sup> Just ten days later, when the UCP was preparing to participate in general elections, the Chief Prosecutor of the Republic of Turkey applied to the Turkish Constitutional Court (“TCC”) for an order dissolving the UCP.<sup>10</sup> Among others things, the prosecutor accused the party of having “carried on activities likely to undermine the territorial integrity of the [Turkish] State and the unity of the [Turkish] nation.”<sup>11</sup> The prosecutor mainly cited a chapter of the party’s program entitled, “Towards a peaceful, democratic and fair solution for the Kurdish problem.”<sup>12</sup> A year later, the Constitutional Court ordered the dissolution of the UCP on account of the views expressed in its program.<sup>13</sup>

The 1990s marked the collapse of the Eastern bloc and the emergence of new states and, as a result, new minorities in

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activities, and cut of financial support for political parties. These three areas do not fall under the scope of this Article.

8. *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1 (1998).

9. *See id.* at 7.

10. *See id.* at 7–8.

11. *See id.* at 8.

12. *See id.* at 8–9.

13. *See id.* at 9–10. Although other grounds were also invoked by the Turkish Constitutional Court (“TCC”) in this case, it was the aim to protect national and territorial integrity that provoked the decision for a dissolution. *See id.*

Europe. Encouraged by the political discussions in Europe on better protection of minorities, the UCP referred to Kurds as “people” and argued against the denial of the rights of, and discrimination against, Kurds in Turkey, all of which were thought of as awakening Kurdish national consciousness.<sup>14</sup> According to the Turkish Constitutional Court, the party also encouraged separatism by describing the state authorities’ reaction towards the Kurdish issue as “terror” and by requesting constitutional recognition of “the existence of the Kurds,” which were considered illegal activities.<sup>15</sup> In its judgment, the ECtHR noted that the Turkish Constitutional Court had a well-established jurisprudence, which holds:

[S]elf-determination and regional autonomy were prohibited by the Constitution. . . . In Turkey there were no “minorities” or “national minorities”, other than those referred to in the Treaty of Lausanne and the friendship treaty between Turkey and Bulgaria. . . . Like all nationals of foreign descent, nationals of Kurdish origin could express their identity, but the Constitution and the law precluded them from forming a nation or a minority distinct from the Turkish nation.<sup>16</sup>

The UCP sued Turkey in Strasbourg upon its dissolution, asking the ECtHR to declare that the dissolution of the party violated, among others, Articles 10 (freedom of expression) and 11 (freedom of association) of the ECHR.<sup>17</sup>

The Turkish government argued in the case that since the ECHR made no mention of political parties, Article 11 on

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14. *See id.* at 8.

15. *See id.* at 8–10.

16. *Id.* at 10. The Lausanne Treaty is a peace treaty signed on July 24, 1923 after the end of World War I between the British Empire, France, Italy, Japan, Greece, Romania, and the Serb Croat Slovene State on the one hand and Turkey on the other. Treaty of Peace Between the Allied Powers and Turkey, July 24, 1923, 28 L.N.T.S. 11. Section III of the treaty is dedicated to the “protection of minorities.” *See id.* arts. 37–45. Only non-Muslim minorities were recognized as a minority and provided protection; in practice this protection only applied to Greek Orthodox, Armenian Christians, and Jews. For further information on the Treaty of Lausanne and its application in the Turkish legal system, see Baskin Oran, *The Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues*, in HUMAN RIGHTS IN TURKEY 35–56 (Zehra F. Kabasakal Arat ed., 2007). With the Treaty of Friendship Between Bulgaria and Turkey, both countries recognized minority rights of each others’ citizens. Treaty of Friendship Between Bulgaria and Turkey, Protocol A, Oct. 18, 1925, 54 L.N.T.S. 127.

17. *See United Communist Party*, 1998-I Eur. Ct. H.R. at 13.

freedom of association did not apply to political parties.<sup>18</sup> According to the government, the case, being an abuse of the right of individual application, should have been declared inadmissible under Article 17 of the ECHR.<sup>19</sup>

The Court dismissed the government's preliminary objections and ruled that Article 11 of the ECHR applied to the present case.<sup>20</sup> Article 11 reads: "Everyone has the right to . . . freedom of association with others, including the right to form and to join trade unions for the protection of his interests."<sup>21</sup> Based on the fact that political parties are "a form of association essential to the proper functioning of democracy" and in view of "the importance of democracy in the Convention system," the Court found no doubt that political parties came within the scope of Article 11.<sup>22</sup> Special reference to trade unions in this formulation, in fact, does not limit the type of association.

Strasbourg organs<sup>23</sup> applied Article 17 only in rare cases in which the aim of the offending actions of the applicants had been to spread violence or hatred.<sup>24</sup> In the present case, the Court found no implication in the UCP program that the party encouraged the use of violence or pursued racist objectives.<sup>25</sup> In the Court's view, political parties cannot be excluded from the protection afforded by the Convention "simply because [their] activities are regarded by the national authorities as undermining the constitutional structures of the State."<sup>26</sup> On the contrary, state parties are under positive obligation to give effect to the rights enshrined in the Convention at the domestic level.<sup>27</sup>

The Court then dealt with the argument of the UCP that the dissolution of the party even before having had any political activity infringed the party's freedom of association.<sup>28</sup> It should be stressed that freedom of association, like freedom of

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18. *See id.* at 14.

19. *See id.* at 14–16.

20. *See id.* at 16–17.

21. European Convention on Human Rights, *supra* note 4, art. 11.

22. *See United Communist Party*, 1998-I Eur. Ct. H.R. at 17.

23. Strasbourg organs consist of the ECtHR and the now-defunct European Commission of Human Rights.

24. *See United Communist Party*, 1998-I Eur. Ct. H.R. at 37–39.

25. *See id.* at 38.

26. *Id.* at 17.

27. *See id.* at 18.

28. *See id.* at 18–19.

expression, is not an absolute right and can be subjected to limitations listed in Article 11.<sup>29</sup> On the other hand, according to the Court, the limitations set out in Article 11, where political parties are concerned, are to be construed strictly, and only “convincing and compelling reasons” may justify restrictions on the freedom of association of political parties.<sup>30</sup>

The Court reiterated some general principles governing the area of political activity and pluralist democracy.<sup>31</sup> Political parties in democratic societies have “an essential role in ensuring pluralism and the proper functioning of democracy.”<sup>32</sup> Democracy is evidently a fundamental feature of the European public order, and there can be no democracy without pluralism.<sup>33</sup> In the Court’s jurisprudence, freedom of expression is found applicable “not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”<sup>34</sup> Notwithstanding “its autonomous role and particular sphere of application,” Article 11 must also be interpreted in light of Article 10.<sup>35</sup> As put forward by the Court, the reason behind the link between the two freedoms is the fact that the activities of political parties form part of a collective exercise of freedom of expression.<sup>36</sup>

Further elaborations on the concept of democracy made the Court consider one of the principal characteristics of democracy,

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29. *See id.* at 19. Article 11 of the ECHR states:

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.

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.

European Convention on Human Rights, *supra* note 1, art. 11.

30. *United Communist Party*, 1998-I Eur. Ct. H.R. at 22.

31. *See id.* at 17, 18, 20–22.

32. *Id.* at 20.

33. *See id.* at 20–21.

34. *Id.* at 21.

35. *See id.* at 20; *see also* European Convention on Human Rights, *supra* note 1, art. 10.

36. *See United Communist Party*, 1998-I Eur. Ct. H.R. at 20–21.

namely the possibility it offers to a state to solve problems through dialogue even when the problems are irksome.<sup>37</sup> From here the Court concluded that “there could be no justification for hindering a political group solely because it seeks to debate in public [the problems] of part of the State’s population and to take part in the nation’s political life in order to find . . . solutions [to them].”<sup>38</sup> Therefore, the dissolution of a political party that seeks to open a political debate, regardless of whether it challenges the state ideology and structure, is a drastic measure in a pluralist democracy.

By 2005, the ECtHR had dealt with seven more cases where the applicant parties had discussed possible solutions to Turkey’s Kurdish issue at the domestic level and were therefore dissolved by the Turkish Constitutional Court.<sup>39</sup> In all of them, the Court found a violation of the Convention rights.<sup>40</sup>

In 2005, a Macedonian minority group in Bulgaria sought remedy in Strasbourg.<sup>41</sup> The UMO Ilinden-PIRIN, a political party founded on February 28, 1998 and based in southwestern Bulgaria (in an area known as the “Pirin region” or “the geographic region of Pirin Macedonia”), was declared

37. *See id.* at 27.

38. *Id.* at 57. Although the Court in this case tries to stress the importance of democracy in the Convention regime, no legal definition is given to the political concept of “democracy” in the case law. *See generally id.*

39. *See, e.g.*, *Emek Partisi v. Turkey*, App. No. 39434/98, ¶¶ 8, 14 (Eur. Ct. H.R. May 31, 2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=39434/98&sessionId=59748173&skin=hudoc-en>; *Democracy and Change Party v. Turkey*, App. Nos. 39210/98 & 39974/98, ¶¶ 7–12 (Eur. Ct. H.R. Apr. 26, 2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=39974/98&sessionId=59748173&skin=hudoc-en>; *Socialist Party of Turkey v. Turkey*, App. No. 26482/95, ¶¶ 31–35 (Eur. Ct. H.R. Nov. 12, 2003); *Dicle for the Democratic Party of Turkey v. Turkey*, App. No. 25141/94, ¶¶ 37–42 (Eur. Ct. H.R. Dec. 10, 2002), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=25141/94&sessionId=59747964&skin=hudoc-en>; *Yazar v. Turkey*, 2002-II Eur. Ct. H.R. 395, 402–04; *Freedom and Democracy Party v. Turkey*, 1999-VIII Eur. Ct. H.R. 293, 301–02; *Socialist Party v. Turkey*, 1998-III Eur. Ct. H.R. 1233, 1238, 1240–41, 1245.

40. *See, e.g.*, *Emek Partisi*, App. No. 39434/98, ¶¶ 29–30; *Democracy and Change Party*, App. Nos. 39210/98 & 39974/98, ¶¶ 26–27; *Socialist Party of Turkey*, App. No. 26482/95, ¶¶ 50–51; *Dicle for the Democratic Party of Turkey*, App. No. 25141/94, ¶¶ 65–66; *Yazar*, 2002-II Eur. Ct. H.R. at 415; *Freedom and Democracy Party*, 1999-VIII Eur. Ct. H.R. at 317; *Socialist Party*, 1998-III Eur. Ct. H.R. at 1239.

41. *United Macedonian Org. Ilinden-PIRIN v. Bulgaria*, 43 Eur. H.R. Rep. 1119 (2005).

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unconstitutional and, as a result, was dissolved by the Bulgarian Constitutional Court (“BCC”) on February 29, 2000.<sup>42</sup> Although the party was founded in 1998, it was finally registered by the Sofia City Court on February 12, 1999 upon making necessary changes in its constitution.<sup>43</sup> Similar to the UCP case, after just a short time (ten days after notice of the registration judgment was published), sixty-one members of the Bulgarian Parliament requested the BCC to declare the UMO Ilinden-PIRIN unconstitutional.<sup>44</sup>

According to the members of parliament (“MPs”) who requested that the BCC declare the party unconstitutional, the party’s ultimate goal was an independent Macedonian state, formed through the secession of Pirin Macedonia from Bulgaria.<sup>45</sup> The facts in the case were very similar to those in the UCP case. The party had asked for full cultural, political, and economic autonomy for the Macedonian minority; withdrawal of Bulgarian troops from the region; establishment of a Macedonian Orthodox Church independent of the Bulgarian Orthodox Church; and recognition of unique folklore, culture, traditions, and individuality of the Macedonian people.<sup>46</sup> The party printed a map of Macedonia featuring territories belonging to Bulgaria and Greece and also issued a memorandum calling the situation of Macedonians in Bulgaria as “modern-day genocide.”<sup>47</sup> Relying on Article 11, paragraph two of the ECHR, the BCC ruled, “There is no doubt that an activity aimed against the territorial integrity of the Republic of Bulgaria imperils its national security.”<sup>48</sup> Nevertheless, the interpretation and application of the limitation clauses of freedom of association in paragraph two of Article 11 by the BCC contradicts the case law of the ECtHR. The BCC, without trying to explain the scope of the right recognized in the first paragraph, attempted to give a wide application to the limitation clauses listed in the second paragraph.<sup>49</sup>

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42. *Id.* at 1121, 1123.

43. *See id.* at 1121–22.

44. *See id.*

45. *See id.* at 1122.

46. *See id.* at 1124–25.

47. *See id.* at 1124.

48. *See id.* at 1127.

49. *See id.* at 1127, 1133.

The UMO Ilinden-Pirin, like other political parties, failed before the domestic courts and sought redress in Strasbourg by arguing that neither its activities nor the activities of its leaders and members suggested hostility towards a democratic form of government, and that a State's territorial integrity was open to debate like any other issue of public concern unless it made any calls for the use of violence.<sup>50</sup> Whereas the party built its defense in Strasbourg on the previous case law of the ECtHR, the Bulgarian government in its defense used the same arguments that were used by the Turkish government, which were already found unjustifiable for a measure like the dissolution of a political party in a pluralist democracy.

Unlike the previous cases on the dissolution of political parties, the parties in the UMO-Ilinden Prin case did not dispute that Article 11 is applicable to political parties.<sup>51</sup> Therefore, the ECtHR went on to discuss the necessity of the dissolution in a democratic society.<sup>52</sup> According to the Court, the BCC did not consider whether the party's constitution and program conformed with the constitution; rather it relied on "certain statements and activities of the Party's leaders and members, both before and after the Party's founding."<sup>53</sup> In this connection, the Court stated that the incidents referred to by the BCC were "rallies, speeches, press conferences, letters or maps, in which members of the . . . Party or of its predecessor organizations had stated that there existed a Macedonian minority in Bulgaria and that the Pirin region was not part of Bulgaria, and had made certain peaceful demands in that respect."<sup>54</sup> In the view of the ECtHR, elements of exaggeration and provocativeness included in the party's declarations and speeches of its leading members do not automatically amount to a pressing social need in a democracy for excluding the party from the political life through the measure of dissolution.<sup>55</sup>

In both cases against Turkey and Bulgaria, political parties touched upon thorny issues such as autonomy, federalism, self-determination, freedom of minority institutions, and suppression

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50. *See id.* at 1129.

51. *See id.* at 1132.

52. *See id.* at 1133–35.

53. *Id.* at 1134.

54. *Id.*

55. *See id.* at 1135.

of the minority culture and language. However, nothing like propagating or taking recourse to violence was found in the party programs or in the speeches of the leading members. In these cases, the ECtHR settled a case law which suggests that harboring separatist views, no matter how disturbing they could be for the state and the society in general, should be protected by the Convention system and, consequently, by the domestic legal systems of the contracting parties.

## II. ANTI-SECULAR POLITICAL PARTIES

The European Court of Human Rights has dealt with two dissolution cases concerning anti-secular political parties. Both cases, submitted from Turkey, required the Court to elaborate further on the limitations of political parties under the ECHR.

The first applicant was the Welfare Party (“WP”), which was founded on July 19, 1983.<sup>56</sup> The WP took part in a number of elections between 1983 and 1996.<sup>57</sup> In the general elections held on December 24, 1995, the Party managed to secure twenty-two percent of the votes, which made it the party with the largest percentage of votes in the country.<sup>58</sup> As a result of the general elections of 1995, the Party gained 158 of the then-450 seats in the Grand National Assembly.<sup>59</sup> In the local elections of November 1996, the party received about thirty-five percent of the total votes cast.<sup>60</sup> Whereas the WP supporters saw this victory as a transformation towards real democracy, the secular circles interpreted the WP’s growing political power as a revolt against the secular character of the Turkish Republic.<sup>61</sup>

The chief prosecutor of the Republic of Turkey applied to the Turkish Constitutional Court on May 21, 1997 for the dissolution the WP on the grounds that the Party had become the center of activities against the republican principle of secularism.<sup>62</sup> The TCC ordered the dissolution of the WP on

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56. *Welfare Party*, 2003-II Eur. Ct. H.R. 269, 275 (2003).

57. *See id.*

58. *See id.*

59. *See id.*

60. *Id.*

61. For further details, see M. Hakan Yavuz, *Political Islam and the Welfare (Refah) Party in Turkey*, 30 COMP. POL. 63, 76 (1997).

62. *See Welfare Party*, 2003-II Eur. Ct. H.R. at 276.

January 16, 1998,<sup>63</sup> when the party had been ruling the country in a coalition government with a center-right party for eighteen months.<sup>64</sup> This case has been the most important one in comparison to the previous dissolution cases decided by the TCC because it involved a ruling party; even those constitutional scholars who are not associated with holding liberal views stated that the dissolution process against a ruling party is unthinkable.<sup>65</sup>

In its case before the ECtHR, Turkey used acts, facilities, and speeches of the Party's representatives as pieces of evidence to prove the WP's anti-secular nature:

1. The WP's leaders condoned violence in order to set up a theocratic regime. The leader of the WP made the following speech on April 13, 1994, to the party group in the Parliament:

The second important point is this: Refah [the WP] will come to power and a just [social] order [*adil dozen*] will be established. The question we must ask ourselves is whether this change will be violent or peaceful; whether it will entail bloodshed. I would have preferred not to have to use those terms, but in the face of all that, in the face of terrorism, and so that everyone can see the true situation clearly, I feel obliged to do so. Today Turkey must take a decision. The Welfare Party will establish a just order, that is certain. [But] will the transition be peaceful or violent; will it be achieved harmoniously or by bloodshed? The sixty million [citizens] must make up their minds on that point.<sup>66</sup>

An MP of the WP addressed to the public: "If you attempt to close down the '*İmam-Hatip*' theological colleges while the Welfare Party is in government, blood will flow. It would be worse than in Algeria. I too would like blood to flow."<sup>67</sup>

2. The WP promoted *Sharia*. One of the MPs of the WP made the following speeches in public meetings: "[T]he army says: 'We can accept it if you're a supporter of the PKK, but a

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63. *See id.* at 279.

64. *See id.* at 275–76.

65. *See* Erdoğan Teziç, *Siyasi Partiler Yasası Tartışma Toplantıları Dizisi* [*Seminar on the Law on Political Parties*] 50 (TÜSİAD, May 1997).

66. *See Welfare Party*, 2003-II Eur. Ct. H.R. at 282 (quoting Mr. Necmettin Erbakan, Welfare Party chairman).

67. *See id.* at 284 (quoting Mr. İbrahim Halil Celik, Welfare Party MP for the province of Şanlıurfa).

supporter of *sharia*, never.’ Well you won’t solve the problem with that attitude. If you want the solution, it’s sharia.”<sup>68</sup>

Another stated:

Have you considered to what extent the Koran is applied in this country? I have done the sums. Only 39% [of the rules] in the Koran are applied in this country. Six thousand five hundred verses have been quietly forgotten. . . . Allah asked all His prophets to fight for power. . . . I tell you, if I had as many heads as I have hairs on my head, even if each of those heads were to be torn from my shoulders for following the way of the Koran, I would not abandon my cause. . . . The question Allah will ask you is this: ‘Why, in the time of the blasphemous regime, did you not work for the construction of an Islamic State?’ Erbakan and his friends want to bring Islam to this country in the form of a political party. The prosecutor understood that clearly.<sup>69</sup>

3. The WP suggested establishing a multiplicity of legal systems, which, according to the TCC, led to discrimination based on religious beliefs.<sup>70</sup> The leader of the WP, on March 23, 1993, made the following speech to the National Assembly:

“[Y]ou shall live in a manner compatible with your beliefs.” We want despotism to be abolished. There must be several legal systems. The citizen must be able to choose for himself which legal system is most appropriate for him, within a framework of general principles. Moreover, that has always been the case throughout our history. In our history there have been various religious movements. Everyone lived according to the legal rules of his own organisation, and so everyone lived in peace. Why, then, should I be obliged to live according to another’s rules? . . . The right to choose one’s own legal system is an integral part of the freedom of religion.<sup>71</sup>

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68. *See id.* at 283 (quoting Mr. Hassan Huseyin Ceylan, Welfare Party MP for the province of Ankara).

69. *See id.* at 282–83 (quoting Mr. Sevki Yilmaz, Welfare Party MP for the province of Rize).

70. *See id.* at 280–82.

71. *See id.* at 281 (quoting WP Chairman Necmettin Erbakan). Erbakan also said: The plurality of legal systems advocated by Mr Necmettin Erbakan in his speeches had its origin in the practice introduced in the first years of Islam by the “Medina Agreement,” which had given religious minorities—the Jewish and polytheistic communities—the right to live according to their own legal systems, not according to Islamic law. On the basis of the Medina Agreement,

The TCC stated it would undermine the legislative and judicial unity in the country if each religious movement was allowed to declare and apply the law they chose in their civil matters.<sup>72</sup>

4. The WP promoted the Islamic headscarf. In his speech of December 14, 1995, before the general election, the WP's leader said in public, "[University] chancellors are going to retreat before the headscarf when Refah [the WP] comes to power."<sup>73</sup>

5. The WP prime minister, during the coalition government, entertained leaders of some religious sects who attended in their religious vestments, in the secular area of the PM's official residence, which is understood as assuring them state support of the freedom to wear religious garb.

6. During the government of the WP, regulations were bent to allow special working hours in public settings to accommodate the devout fasting during the holy month of Ramadan.

7. The rhetoric and actions of the WP leaders led the Turkish state to identify the party as a center for activities to disintegrate the state.<sup>74</sup>

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some Islamist intellectuals and politicians had proposed a model of peaceful social co-existence under which each religious group would be free to choose its own legal system.

*Id.* A similar system, known as the Millet system (which may be called "cultural autonomy" with today's terms), was applied in Ottoman Turkey for non-Muslim communities. *Id.* For further information on the Ottoman Millet system, see PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 29 (1991).

72. *Welfare Party*, 2003-II Eur. Ct. H.R. at 281–82.

73. *See id.* at 281 (quoting WP Chairman Necmettin Erbakan). Upon an application submitted by a university student who had been refused access to education by the university administration for wearing the Islamic headscarf, the ECtHR had an opportunity to deal with the problem of the prohibition of veiling for female university students in Turkey. *See generally* Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 175 (2005). The ECtHR, like the highest domestic court in Turkey, found neither a violation of religious rights and freedoms nor a violation of the right to education. *See id.*; *see also* Jill Marshall, *Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate*, 30 *HUM. RTS. Q.* 631, 633 n.5 (2008).

74. *See Welfare Party*, 2003-II Eur. Ct. H.R. at 279–86. In addition to the above speeches made by representatives of the Welfare Party, both the Turkish Constitutional Court and the European Court of Human Rights gave unnecessary importance to some statements of the WP's MPs that do not have much meaning and logic. *See, e.g., id.* at 284 ("If they piss into the wind they'll get their faces wet. If anyone attacks me I will strike back. I will fight to the end to introduce sharia." (quoting Mr. Ibrahim Halil Celik, Welfare Party MP for the province of Sanhurfa)); *id.* at 285 ("A State without television is not a State. If today, with your leadership, you wished to create a State, if you wanted to set up a television station, you would not even be able to broadcast for more than twenty-four hours. Do you believe it is as easy as that to create a State? That's what I told

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The ECtHR evaluated the alleged anti-secular activities in the following manner: First, the Court interpreted the argument that the WP's policy to set up a plurality of legal systems led to discrimination based on religious beliefs and undermined the legal and judicial unity in Turkey.<sup>75</sup> The ECtHR took the view that such a societal model based on a plurality of legal systems cannot be considered compatible with the Convention system for two reasons<sup>76</sup>: (1) the system would exclude the state's role as the guarantor of individual rights and freedoms "since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned,"<sup>77</sup> and (2) such a system "would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy."<sup>78</sup>

Next, the ECtHR commented on the place of *Sharia* under the Convention regime.<sup>79</sup> The ECtHR made it very clear that a propagation of *Sharia* by a political party has no room under European human rights protection:

Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way

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them ten years ago. I remember it now. Because today people who have beliefs, an audience and a certain vision of the world, have a television station of their own, thanks be to God. It is a great event." (quoting Mr. Necmettin Erbakan)).

75. *See id.* at 309–10.

76. *See id.* at 310.

77. *See id.*

78. *See id.*

79. *See id.* at 310–12.

it intervenes in all spheres of private and public life in accordance with religious precepts. . . . In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.<sup>80</sup>

Third, the Court evaluated the possibility of recourse to violence as a political method by the WP members.<sup>81</sup> One of the main arguments of the WP's representatives before the ECtHR was the fact that recourse to violence had never been the party's method of reaching its aims. To substantiate their argument, the WP's representatives referred to the party program, which has no references to such means. In fact, in addition to the party program, no other public documents of the party nor the election manifesto advocated violence or *Sharia*. Like the TCC, the ECtHR simply disregarded these facts and demonstrated a skeptical approach by indicating that religious fundamentalists have been able to seize political power in certain states and have had the opportunity to set up the model Islamic society.<sup>82</sup>

As an additional penalty, the Constitutional Court also stripped six leading WP members, whose words and deeds had caused the party's dissolution, of their membership in the Parliament.<sup>83</sup> They were also banned for a period of five years from becoming founding members, ordinary members, leaders, administrators, or auditors of any other political party in Turkey.<sup>84</sup>

This author does not feel as competent as the ECtHR to comment on what *Sharia* is about, but it could be reminded that there are controversies, disagreements, and extremely conflicting views about *Sharia*. Further, Kevin Boyle points out the risk that the hostile formulations of Islam employed by the ECtHR will neither promote understanding nor help to distinguish between

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80. *See id.* at 312. Yigal Mersel suggests that courts, including the ECtHR, should not only ban political parties that are non-democratic externally, but should also consider the lack of internal democracy as a major factor in party dissolution. *See* Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT'L J. CONST. L. 84 (2006).

81. *See Welfare Party*, 2003-II Eur. Ct. H.R. at 314–15.

82. *See id.* at 312.

83. *See id.* at 286.

84. *See id.*

the interpretation of Islam by extremists and the beliefs of the millions of moderate Muslims. Doing so has become much more important since 9/11, due to the increase in prejudice against Islam in Europe.<sup>85</sup> In addition, it should not be the role of courts, especially a human rights court, to supply information about religion regardless of whether it is positive or negative.

With the case of the WP, the ECtHR, a supranational human rights monitoring organ, approved the dissolution of a political party for the first time in the history of human rights. The case took its place in the list of key judgments of the ECtHR. It provoked serious discussions on the limitations of political parties in pluralist democracies. Whether the Court is fully convinced that pluralist democracy and rule of law could only have been protected with the approval of the dissolution of the Welfare Party still remains an unanswered question. At the theoretical level, the Court ruled that a political party that fails to respect the principle of secularism will not enjoy religious freedoms.<sup>86</sup> In this conjunction, Koçak and Örücü argued that the remarks of the TCC on secularism have had an impact on the jurisprudence of the ECtHR.<sup>87</sup> Nonetheless, it was interesting to see how the ECtHR distanced itself from the issue of whether the Welfare Party posed a real threat to secularism, democracy, rule of law, and human rights in Turkey.

Although the ECtHR justified an absolute ban on the WP, one could simply argue that the timing of the prosecution in Turkey to move on the *Welfare* case was too early to warrant action, since it was mainly the party leader's rhetoric rather than explicit actions of the party that prompted the case. Even the Turkish government before the ECtHR accepted that the party had never exercised power alone and therefore never had an opportunity to put into practice its plan of setting up a theocratic state. Only if the WP had been the sole party in power could it have been capable of implementing its policies and put an end to democracy. However, regardless of whether a state is run by a non-secular party like the WP, the state's responsibility under

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85. See Kevin Boyle, *Human Rights, Religion and Democracy: The Refah Party Case*, 1 ESSEX HUM. RTS. REV. 1, 13–14 (2004).

86. See *Welfare Party*, 2003-II Eur. Ct. H.R. at 302.

87. Mustafa Koçak & Esin Örücü, *Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights*, 9 PUB. L. 399, 423 (2003).

international human rights law would end only if the state concerned withdraws from the Convention system<sup>88</sup> or ceases to be a member of an international organization, such as Council of Europe. Regardless of whether the application of the religious rules contradicts human rights norms, the state should take the initiative and apply secular norms.

For the ECtHR, national authorities are in a better position to decide the appropriate timing for interference, and state parties do not need to wait until the political party comes to power to embark on an action to destroy democracy and peace by tabling bills at the parliament.<sup>89</sup> The justifications of the ECtHR to uphold the dissolution feeds the idea that the system of *Sharia* was so close to being implemented that the TCC, by acting just in time, saved the secular democracy in Turkey. Boyle, on the other hand, who seems much more knowledgeable than the ECtHR about the political and legal system of Turkey, deems this picture unrealistic and adds that the Justice and Development Party, the successor to the WP, made more efforts toward democratic progress than any of the secular parties which have held power in the country.<sup>90</sup>

Where the Court stressed in *United Communist Party v. Turkey* that “[i]n determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation,” it granted a wide margin of appreciation to Turkish authorities when deciding the level of the threat posed by the party to the democratic political life in Turkey.<sup>91</sup> One could call the wide margin of appreciation provided to Turkish authorities in this case a protection of local

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88. State parties to the ECHR, for instance, have a right to withdraw under Article 58. See European Convention on Human Rights, *supra* note 1, art. 58. This is not to say that a state’s human rights obligations would cease entirely if it did withdraw. It would still be obliged to respect those human rights recognized by customary international law (“CIL”); however, whether any of the political rights discussed in this Article are in fact protected by CIL remains an open question.

89. See *Welfare Party*, 2003-II Eur. Ct. H.R. at 298, 304, 305, 307.

90. See Boyle, *supra* note 85, at 12.

91. See *United Communist Party v. Turkey*, 1998-I Eur. Ct. H.R. 1, 22 (1998). Referring to ECtHR’s previous case law, namely the *Welfare Party* judgment, the Bulgarian government in the UMO Ilinden-Pirin case indicated that states enjoy a wide margin of appreciation in choosing the means to restrict the freedom of association. See *United Macedonian Org. Ilinden-PIRIN v. Bulgaria*, 43 Eur. H.R. Rep. 1119, 1131 (2005).

jurisdiction, or in other words, multiculturalism. However, given the circumstances of the case, the Court settled on cultural singularism in an age of multiculturalism. As Scheinin argues:

Instead of excluding, as a matter of principle, the diversification of rights and obligations in a multicultural society according to religious affiliation and through the delegation of certain regulatory authority to religious entities, a human rights approach should look at the concrete modalities and safeguards of such delegation. If a political party declares as its aim to change legislation, through democratic means, so that room would be given to religious law, this should be seen as an opening for a discussion where human rights certainly have a role to play in designing the limits and safeguards necessitated by such delegation of authority. But to declare that such a proposal already makes the party program in question incompatible with human rights goes, in the view of the present author, too far and might leave too little room for multiculturalism.<sup>92</sup>

The WP representatives asked before both the TCC and the ECtHR to apply the “clear and present danger” test developed by the US Supreme Court, but neither of the courts found it necessary to apply.<sup>93</sup> The ECtHR insisted on the “clear and imminent danger” criteria as developed in its own case law.<sup>94</sup> According to the ECtHR, state parties are under a positive obligation to secure the rights and freedoms listed in the Convention to persons under its jurisdiction.<sup>95</sup> To this end, state parties are empowered with the power of “preventive intervention,” which totally rejects the “present danger” test of the US Supreme Court.<sup>96</sup>

The dissolution of the WP was unanimously upheld by the Grand Chamber of the ECtHR.<sup>97</sup> However, in the previous chamber judgment, three out of seven judges submitted a

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92. Martin Scheinin, *How to Resolve Conflicts Between Individual and Collective Rights?*, in *RETHINKING NON-DISCRIMINATION AND MINORITY RIGHTS* 219, 230 (Martin Scheinin & Reetta Toivanen eds., 2004).

93. *See Welfare Party*, 2003-II Eur. Ct. H.R. at 277, 306.

94. *See id.* at 305–06.

95. *See id.*

96. *See id.* at 277, 305–06.

97. *See id.* at 316.

dissenting opinion.<sup>98</sup> They did not deduce from the evidence that the WP's actions justified the dissolution. In their joint dissenting opinion, which is almost as long as the majority opinion, they argued, *inter alia*, that many speeches of the WP representatives in question were made long before the party came to power and, therefore, afforded no proper basis for the dissolution.<sup>99</sup> Other actions when the Party was in power cannot be considered an imminent threat to the secular system in Turkey since the party was bound with the program of the coalition government.<sup>100</sup> Therefore, the party did not attempt to implement a non-secular system, nor did it take any steps to realize political aims that were incompatible with the Convention norms, nor engage in acts of violence or religious hatred, nor in any other manner threaten the legal and democratic order.<sup>101</sup> They remarked that in this case a blunt measure of dissolving a party was taken as an alternative to penalization of responsible individuals.<sup>102</sup>

When the dissolution case was pending before the TCC, MPs of the Welfare Party established another political party, the Virtue Party ("VP"), as a substitute for the Welfare Party on December 17, 1997.<sup>103</sup> By May 7, 1999, the Chief Prosecutor of the Republic applied to the TCC for the dissolution of the VP as well.<sup>104</sup> The TCC, in its judgment delivered on June 22, 2001, had no difficulty closing down the VP on the grounds of its activities against the republican principle of secularism.<sup>105</sup> The VP was dissolved mainly because its members supported the wearing of the Islamic headscarf at public institutions, including universities and the Turkish Parliament. The VP had, in fact, nominated a female candidate wearing a headscarf, who was elected in 1999,

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98. *Refah Partisi (Welfare Party) v. Turkey*, 35 Eur. H.R. Rep. 56, 92 (2002) (Fuhrmann, J., Loucaides, J., & Bratza, Sir Nicolas J., dissenting).

99. *See id.* at 98.

100. *See id.* at 97.

101. *See id.* at 94, 97–98.

102. *Id.*; *see Boyle, supra* note 85, at 11 (arguing that statements made a number of years before the party came to power were classified as meeting an immediate danger for the implementation of such a policy). *See generally* LOUKIS LOUCAIDES, AN ALTERNATIVE VIEW ON THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS: A COLLECTION OF SEPARATE OPINIONS (1998–2007) 299–313 (Françoise Tulken et al. eds., 2008).

103. *See* REGISTRY, EUROPEAN COURT OF HUMAN RIGHTS, INFORMATION NOTE NO. 76 ON THE CASE-LAW OF THE COURT 25.

104. *See id.*

105. *See id.*

entered into Parliament, and swore the oath with her headscarf on.<sup>106</sup>

Unlike the WP, the VP did not have any chances of gaining enough votes to come to power. None of its members used language referring to *Sharia*, the *jihad* (holy war), or violence. The party members declared no support for plurality of legal systems or any other form of religious rules. Bearing all this information in mind, the VP leaders were confident about a favorable ruling from Strasbourg when they submitted their application to the ECtHR against Turkey. The ECtHR found the application admissible;<sup>107</sup> it even held a hearing in Strasbourg at the Human Rights Palace of the Council of Europe.<sup>108</sup> However, representatives of the Virtue Party lost their faith in the ECtHR. Hence, less than two months after the hearing took place, they sent a declaration to the Court for the withdrawal of the case.<sup>109</sup> In their declaration, the VP representatives argued that European human rights protection is closed to believers of Islam.<sup>110</sup> Basing their arguments on the previous cases decided by the ECtHR, they expressed that the hypothetical interpretations and the practice of the Court in cases such as the WP dissolution case and the headscarf case<sup>111</sup> constitute a contradiction and a double standard, which is a violation of the prohibition of discrimination by the Court itself.<sup>112</sup> Having concluded that the Court was prejudiced against Muslim applicants, they decided to withdraw the case.<sup>113</sup> Pursuant to the withdrawal, the ECtHR decided on April 27, 2006, to strike the case from its docket.<sup>114</sup> This withdrawal relieved the ECtHR of the task of applying its previous restrictive remarks on Islam and anti-secularism to a

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106. See Press Release, European Court of Human Rights, Chamber Hearing: Kavakci v. Turkey, Fazilet Partisi and Kutan v. Turkey, Silay v. Turkey, and Ilıcak v. Turkey (Apr. 5, 2007) (on file with author).

107. *Virtue Party*, App. No. 1444/02, ¶ 6 (Eur. Ct. H.R. Apr. 27, 2006), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=1444/02&sessionid=59748173&skin=hudoc-en>.

108. *Id.* ¶ 7.

109. *Id.* ¶ 9.

110. See *id.*

111. *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 175 (2005).

112. See *id.*

113. See *id.*

114. See *id.* at 176.

party that only asked for the freedom to let female university students and public servants wear a veil.

In many other cases submitted to the ECtHR concerning the political activities of political parties, the Court stressed the importance of recourse to violence and a respect for Convention rights when designating limits for political parties.<sup>115</sup> For the Court, the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association enshrined in Article 11.<sup>116</sup> That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.<sup>117</sup> The Court further ruled:

In any event, the Court cannot find any statements . . . despite the critical and sometimes hostile language used, that might reasonably be construed as a call for the use of violence for political ends or as a policy in breach of the rules of democracy. In this connection, the Court observes that . . . [the] applicant stated that he was in favor of free, multi-party elections and a political system based on respect for others and their political opinions . . . .<sup>118</sup>

### III. *POLITICAL PARTIES WITH LINKS TO A TERRORIST ORGANIZATION*

The year 2009 marked another turning point in the history of human rights in Europe. The world had already experienced the terrorist attacks of 9/11 and the subsequent bombings in Bali, Istanbul, London, and Madrid. In the instant case of *Herri Batasuna v. Spain*, the ECtHR dealt with an application of a political party that was dissolved after having been found guilty of supporting terrorism.<sup>119</sup>

The Herri Batasuna, an electoral coalition, and the Batasuna, a political party, were founded on March 1, 1979, and

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115. *See, e.g.*, *Partidul Comunistilor v. Romania*, 2005-I Eur. Ct. H.R. 209, 220 (2005); *Yazar v. Turkey*, 2002-II Eur. Ct. H.R. 395, 412 (2002).

116. *See* *Partidul Comunistilor v. Romania*, 2005-I Eur. Ct. H.R. at 219–20.

117. *See id.* at 220.

118. *Id.* at 222.

119. *See generally* *Herri Batasuna v. Spain*, App. Nos. 25803/04 & 25817/04 (Eur. Ct. H.R. June 30, 2009), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=25817/04&sessionid=59748173&skin=hudoc-en>.

May 3, 2001, respectively, in Spain as the political wing of *Euskadi Ta Askatasuna* (“ETA”), the Basque separatist organization.<sup>120</sup> Following the Spanish Parliament’s newly enacted Law on Political Parties (“LOPP”),<sup>121</sup> Spain’s Attorney General submitted a case to the Spanish Supreme Court (“SSC”) on September 2, 2002, for the dissolution of the applicant parties.<sup>122</sup> The aim of LOPP was to set out the limitations on political parties when they violate rights of citizens by promoting racism or violence. The Spanish Parliament prepared the new regulations regarding political parties because of the relationship between ETA and Herri Batasuna and Batasuna. According to the key provision of Article 9 of LOPP, political parties could be declared illegal when they repeatedly: (1) violate fundamental rights by promoting, justifying, or excusing attacks on the life or dignity of the person or the exclusion or persecution of an individual by reason of ideology, religion, beliefs, nationality, race, sex, or sexual orientation; (2) encourage or enable violence to be used as a means to achieve political ends or as a means to undermine the conditions that make political pluralism possible; or (3) assist and give political support to terrorist organizations with the aim of subverting the constitutional order.<sup>123</sup>

In applying LOPP, the SSC declared the applicant parties illegal and ordered their dissolution on the basis of LOPP on March 12, 2003.<sup>124</sup> The crux of the Supreme Court’s decision was the fact that the applicant parties had strong links with the terrorist organization ETA, which put the Batasuna and Herri Batasuna under ETA control.<sup>125</sup> In other words, the applicant parties were working as a satellite organization of the ETA. The Supreme Court based its decision on a number of activities

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120. *See id.* ¶¶ 9, 16.

121. Law on Political Parties art. IX (B.O.E. 2002, 6) (Spain).

122. *See id.* ¶ 28.

123. *Id.* Paragraph three of Article 9 of the Law on Political Parties (“LOPP”) also lists different types of conduct in detail that, when repeated, comprise the conditions set forth in the previous paragraph. *See id.*; *see also*, Katherine A. Sawyer, Comment, *Rejection of Weimarian Politics or Betrayal of Democracy?: Spain’s Proscription of Batasuna Under the European Convention on Human Rights*, 52 AM. U. L. REV. 1531, 1546, 1551 (2003); Leslie Turano, *Spain: Banning Political Parties as a Response to Basque Terrorism*, 1 INT’L J. CONST. L. 730, 733 (2003).

124. *See Herri Batasuna*, App. Nos. 25803/04 & 25817/04, ¶ 30.

125. *See id.* ¶¶ 30, 32.

carried out by the representatives of the applicant parties.<sup>126</sup> These activities were found to be instruments for the separatist strategy of the terrorist ETA.<sup>127</sup> Two appeals submitted to the Spanish Constitutional Court against the decisions of the SSC were unanimously rejected by the Constitutional Court on January 16, 2004.<sup>128</sup>

On July 7, 2002, Batasuna's representative stated in public that the party would continue to work and fight legally or illegally.<sup>129</sup> He also added that their "arms do not tremble because they are in a historical moment where nothing could force them to abandon their struggle."<sup>130</sup> During a demonstration on August 11, 2002, called by Batasuna to support ETA prisoners, party leaders were heard shouting slogans such as "the struggle is the only way," "you, the fascists, you are the real terrorists," and "live military ETA."<sup>131</sup> In another press conference held by the Batasuna on August 21, 2002, the spokesperson criticized the "genocidal strategy of the Spanish state" and declared that the Basque people would "organize" and "fight."<sup>132</sup> In an interview with a newspaper on August 23, 2002, another representative of the Batasuna in the Basque Parliament declared ETA an organization that sees the need to use all instruments to deal with the state.<sup>133</sup> The SSC also underlined the fact that in the municipalities run by the Batasuna and on the web page of the party, anagrams of an illegal organization was posted.<sup>134</sup> On many occasions these municipalities incited people to fight against the state, state representatives, and other political parties. In addition, in many other public meetings, representatives, mayors, and leading members of the applicant parties declared implicitly or explicitly their support to ETA terrorists.<sup>135</sup>

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126. *See id.* ¶ 34.

127. *See id.* ¶ 35.

128. *See id.* ¶¶ 44–46. By a decision dated March 12, 2003, the Spanish Constitutional Court had already found the new LOPP constitutional. *See id.* ¶ 20.

129. *See id.* ¶ 34.

130. *See id.* (author's translation from French).

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. For further activities of the applicant parties, see *id.*

Like other political parties dissolved by national courts, Herri Batasuna and Batasuna brought their case to the ECtHR.<sup>136</sup> For the representatives of the dissolved political parties, whatever action taken by the parties in the political arena should be seen as manifestations of freedom of expression. The legal problem for the applicants was the fact that their expressions were not shared by the state and were therefore interpreted subjectively by the domestic courts. For them, the facts attributed to the parties did not justify a severe measure of dissolution.<sup>137</sup>

In opposition to the applicants' claims that the activities should be analyzed under freedom of expression, the ECtHR followed its previous case law on the topic, which suggests that the means used to limit rights and freedoms should be legal (i.e., proportional and necessary) and comply with fundamental democratic principles.<sup>138</sup> Sharing the opinions of the domestic courts, the ECtHR considered the parties' links with the terrorist organization as a threat to democracy. This led the Court to decide that the sanction imposed on the applicants was in balance with the reason for interference and met a pressing social need, and was therefore necessary in a democratic society.<sup>139</sup>

The applicant parties' links to the ETA were not unknown to political and legal circles in Spain, Europe, and elsewhere. The question was whether democracies should deal with the expressions listed above individually on the bases of criminal law or whether affiliated institutions should also be subjected to the legal process for dissolution. Interpretations of the ECtHR decision in *Welfare Party v. Turkey* encouraged legal actions against political parties whose representatives actively supported the violent acts of illegal organizations.<sup>140</sup> The SCC found that the calls to and support for violence by the representatives of the Batasuna were more explicit than those by the WP representatives.<sup>141</sup>

The *Batasuna* judgment of the ECtHR encouraged the TCC to pursue the dissolution of the Kurdish political party, the

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136. *See id.* ¶ 1.

137. *See id.* ¶¶ 67–68.

138. *See id.* ¶¶ 74, 76–77, 79.

139. *See id.* ¶¶ 89, 92–94.

140. *See id.* ¶¶ 38, 67 (discussing *Welfare Party*).

141. *See id.*

Democratic Society Party (“DSP”).<sup>142</sup> In addition to classic arguments used in previous cases in which the party campaigned for minority rights, the Chief Prosecutor of the Republic accused the party of tolerating and not condemning the violent activities of the PKK (a Kurdish armed group placed in the lists of terrorist organizations by the European Union and the United States), encouraging their perpetrators, and directly and indirectly supporting the organization.<sup>143</sup> Unlike, the SSC, the TCC did not differentiate the speeches of the party members that could be considered as supporting violence from those expressions only endorsing the political views of the PKK.<sup>144</sup> Following the dissolution of the party by the TCC in December 2009,<sup>145</sup> the DSP’s representatives filed a case with the Strasbourg Court,<sup>146</sup> which will give the ECtHR a second chance to further elaborate on the limits of political parties that have established links with terrorist groups under European human rights law.

#### CONCLUSION

The strict legal regulations in Turkey regarding political party dissolution make the country a unique one in Europe. Unfortunately, Turkey’s legislation on political parties resembles anti-terrorism legislation. The military junta of 1980–1983, as the author of the existing law on political parties, designed it in response to the question of how to make political parties adhere to the 1982 Constitution, which was partly prepared by the junta to oppress any non-Turkish nationalist movements. Therefore, instead of securing a free space in which political parties could enjoy political rights, the law set out comprehensive limitations on parties in order to not allow them to challenge state ideology as enshrined in the constitution.

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142. *See* Anayasa Mahkemesi [Constitutional Court of the Republic of Turkey] Dec. 31, 2009, E. 2007/1, Official Gazette No. 27449.

143. *Id.*

144. *Id.*

145. *See id.*

146. *DTP AİHM’e başvurdu* [DTP Appelas to the ECtHR], TURKEY RADIO & TELEVISION CORP., Jan. 20, 2010, <http://www.trt.net.tr/haber/HaberDetay.aspx?HaberKodu=9323d5c5-fe57-4c60-a20a-54f999853178>.

Between 1968 and 2009, the Turkish Constitutional Court closed down twenty-five political parties in Turkey.<sup>147</sup> More than half of these cases were brought before the TCC from the 1990s onwards.<sup>148</sup> It is well developed in the country's political and legal culture that the dissolution of political parties serves best to suppress political ideas that challenge state ideology. Due to the high number of parties faced with the dissolution process, the domestic case law is often referred to as a "cemetery for political parties."<sup>149</sup> Representatives of the dissolved parties filed eleven applications to the European Court of Human Rights. In only one of the cases, *Welfare Party*, did the ECtHR side with the state.

The WP's liberal successor, the ruling Justice and Development Party, also faced the dissolution process as late as 2008.<sup>150</sup> Despite the fact that the party was very careful to carry out activities without using religious rhetoric and thus preferred to be named conservative democrats, the TCC declared the party's activities unconstitutional on the grounds that the party engaged in activities against the secularism principle of the Republic.<sup>151</sup> Instead of a permanent dissolution, the TCC ordered a one year deprivation of state aid as a penalty.<sup>152</sup> This non-dissolution conclusion arrived after the Turkish Parliament, within the 2001 EU harmonization package, amended relevant articles in the constitution to give the TCC an opportunity to decide on an alternative penalty instead of permanently dissolving the political party.<sup>153</sup> Another threshold that was introduced in this package was that the voting rules of the TCC were changed, introducing the requirement of a three-fifths qualified majority (seven out of eleven judges) for dissolution of

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147. See Murat Sevinç, *DTP'nin Kaptılması* [Closing Down the DSP], RADIKAL İKİ, Nov. 25, 2007, [http://www.radikal.com.tr/ed\\_haber.php?ek=r2&haberno=7695](http://www.radikal.com.tr/ed_haber.php?ek=r2&haberno=7695).

148. See Edip Yuksel, *Cannibal Democracies, Theocratic Secularism: The Turkish Version*, 7 CARDOZO J. INT'L & COMP. L. 423, 444–45 (1999).

149. See, e.g., Press Release, Union of European Turkish Democrats, Decision of the Turkish Constitutional Court to Not Outlaw the AKP, July 31, 2008, <http://www.uetd-brussels.eu/2008/07/31/decision-of-the-turkish-constitutional-court-to-not-outlaw-the-akp-press-release-from-the-uetd-brussels/?lang=en&lang=en>; Hilmi Toros, *Turkey Ready for Another Political Burial*, ASIA TIMES, Dec. 11, 2007, [http://www.atimes.com/atimes/Middle\\_East/IL11Ak06.html](http://www.atimes.com/atimes/Middle_East/IL11Ak06.html).

150. See Anayasa Mahkemesi [Constitutional Court of the Republic of Turkey], July 30, 2008, No. 27034, 24.10.2008.

151. *Id.* § VI.

152. *Id.* § VII.A.

153. See *Opinion on Turkey*, *supra* note 5, at 16.

a political party.<sup>154</sup> In the Justice and Development Party case, only six judges voted for the dissolution; one vote saved the Party's political life.<sup>155</sup> The fascinating aspect of the outcome of this case is that Turkey's strongest political party, which received more than forty-six percent of the votes cast in general elections held in July 2007 and has been ruling the country since 2002, was found unconstitutional by the TCC.<sup>156</sup> Yet, the Party is in power but still in constitutional limbo. In addition, it was only in late December 2009 that the TCC dissolved the Kurdish political party, the Democratic Society Party.<sup>157</sup>

In fact, the aim and the provisions on the limitations of the Turkish law on political parties have not changed. The change in 2001 was made in the voting rules of the TCC, which asked a qualified majority to decide on dissolution, and a new alternative penalty—deprivation of state aid—was also introduced. However, the list of material limitations on political parties is still so long that the Constitutional Court may dissolve any party that challenges the state ideology on minorities and secularism. Due to the fact that the legislation literally falls short of European human rights standards, the Parliamentary Assembly of the Council of Europe in its regulations and the Commission of the European Union in its annual progress reports on Turkey's EU membership constantly calls on Turkey to make changes in its domestic law with an aim to limit the possibility of applying such extreme a measure as dissolution.

Unlike the Turkish legislation, Bulgaria's new legislation on political parties was found clear, straightforward, modern, and ambitious by the Venice Commission.<sup>158</sup> Regarding political party dissolution, the commission criticized the legislation only on two procedural points: First, the law empowers both the Constitutional Court and the Sofia City Court to dissolve a political party. Second, public prosecutors are the only persons

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154. *See id.* at 19.

155. *See id.*

156. Commission of the European Communities, Commission Staff Working Document, Turkey 2007 Progress Report, SEC (2007) 1436, at 6.

157. *See* Anayasa Mahkemesi [Constitutional Court of the Republic of Turkey] Dec. 31, 2009, Official Gazette No. 27449, E. 2007/1.

158. *See* European Commission for Democracy Through Law (Venice Commission), *Opinion on the Draft Amendments to the Law on Political Parties of Bulgaria* 2 CDL-AD (2008) 034, ¶ 3 (Dec. 15, 2008).

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who may apply for dissolution.<sup>159</sup> In Spain, the competent organ for party closure is the Supreme Court, but the party concerned has a possibility to appeal the decision of the Supreme Court to the Constitutional Court. In Turkey and in many other European countries the only competent organ that could rule on the dissolution is the constitutional court. In the view of the Commission, in a constitutional democracy, the dissolution of a political party should not be a matter for ordinary or administrative courts; it should be for the constitutional court to decide involuntary dissolution.<sup>160</sup>

On the second procedural point, the Commission observed that the obligation to apply for the dissolution of a party should be entrusted to an institution with political legitimacy, not to public prosecutors.<sup>161</sup> The reason for this view is the political nature and consequences of a decision for dissolution. Both in Turkey and Bulgaria, the legal competence to initiate a dissolution case against a political party is given to public prosecutors. In Spain, the procedure can be launched either by the government through the state attorney, acting on its own, at the request of one of the two chambers of the Parliament, or by the Fiscal Ministry acting on its own.<sup>162</sup>

The cases on political party dissolutions that were analyzed in this Article gave the Strasbourg human rights institutions—the European Commission of Human Rights, the European Court of Human Rights, and the Venice Commission—a significant opportunity to further advance their views on the relationship between the freedom of expression, thought, conscience, and religion provided in Articles 9 and 10 of the ECHR and the freedom of association and the freedom of assembly provided in Article 11.

According to the dissolved political parties, the aim behind the dissolution processes was to eliminate political expressions and debates on sensitive issues. This was certainly the case in Turkey concerning pro-minority political parties. However, in *Batasuna*, the Spanish government successfully presented

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159. *See id.* at 7.

160. *See id.*; *see also Opinion on Turkey*, *supra* note 5, at 7.

161. *See Opinion on the Draft Amendments to the Law on Political Parties of Bulgaria*, *supra* note 158, at 7.

162. *Opinion on Turkey*, *supra* note 5, at 8.

evidence that separatist political parties do exist in the political domain of various autonomous regions of the country and that it was only those political parties who support violence that faced dissolution. This view was the strongest point of the government in the case and was fully shared by the ECtHR. In addition, in *Zana v. Turkey*, where the applicant was a Kurdish intellectual and an ex-mayor of a city run by the Kurdish minority party, the ECtHR upheld the conviction of the applicant who, in an interview, stated, “I support the PKK national movement; on the other hand, I am not in favor of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake.”<sup>163</sup> Individual expressions or statements made on behalf of the political parties in favor of separatism have secured protection in Strasbourg, but expressions implicitly or explicitly giving support to violence are not tolerated under European human rights law. Since the link with a terrorist organization was clear and not even denied by the applicants in *Batasuna*,<sup>164</sup> the ECtHR did not have much difficulty in ruling that the party posed a threat to democracy in Spain. The enjoyment of democratic rights and freedoms with an “aim” to replace existing democratic order with a non-democratic one has no protection under European human rights law. The European human rights platform is closed to enemies of democracy provided that they gained significant power for the change.

It is interesting to observe in these cases that a European-wide human rights court may also use terms such as “secularism,” which has totally different meanings in different parts of Europe. While the ECtHR in the WP case deprived the political party of human rights protection on the basis of its anti-secular activities, in its well-established jurisprudence the ECtHR provided full protection to the prohibition of abortion and divorce in Catholic countries without even arguing that applying such rules that have roots in a religion may contradict the principle of secularism.<sup>165</sup>

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163. See *Zana v. Turkey*, 1997-VII Eur. Ct. H.R. 2533, 2540 (1997).

164. See *Herri Batasuna v. Spain*, App. Nos. 25803/04 & 25817/04, ¶¶ 34–35 (Eur. Ct. H.R. June 30, 2009), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=25817/04&sessionid=59748173&skin=hudoc-en>.

165. See *Refah Partisi v. Turkey (Welfare Party)*, 2003-II Eur. Ct. H.R. 269, 310–12 (2003); see also *Tysiac v. Poland*, 45 Eur. H.R. Rep. 947, 968 (2007); *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) 203, 217–20 (1986).

Yet the protection provided by the ECtHR to anti-secular views appears somewhat different from the protection provided to separatist views. In *Gündüz v. Turkey*, the ECtHR gave full protection to the anti-secular views of the applicant a leader of a religious sect. He was convicted in Turkey for his violent criticism of the secular regime by labeling democrats “impious,” describing children born of marriages officiated before the secular authorities as “bastards,” and calling for the introduction of *Sharia* as a final solution.<sup>166</sup> The ECtHR has departed from its previous decision by arguing that the anti-secular political party, the WP, had potential to seize power and turn against the Convention system, but this cannot be the case for an individual.<sup>167</sup> This indicates that in European human rights law, separatist views can be restricted only when they are combined with recourse to violence while anti-secular views can be limited if there is violent recourse *or* support for the institutionalization of *Sharia* law. Keeping in mind that political parties have more power over the people than they have over an individual, the ECtHR endeavors to prevent the existence of such a pro-*Sharia* power embodied in a political party, which is deemed dangerous for the application of the Convention at the national level. Thus, the recent judgments of the ECtHR are perhaps part of an increasing prejudice against Islam in Europe analogous to the fear of totalitarianism, which also framed the case law of the 1950s.

The ECtHR describes the ECHR as a constitutional instrument of the European public order.<sup>168</sup> This description lays down the necessity of compliance with the Convention system. Considering this, the ECHR together with the strong language used by the ECtHR against anti-secular political parties, one could still ask whether state parties to the Convention could tolerate a political party promoting *Sharia* in their domestic jurisdictions. In the view of the present author, Strasbourg jurisdiction on this subject should be taken as minimum legal standards but not as the ultimate normative rules. The ECtHR,

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166. See *Gündüz v. Turkey*, 2003-XI Eur. Ct. H.R. 257, 262–64 (2003); see also *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 175, 224 (2005) (Tulken, J., dissenting).

167. *Gündüz*, 2003-XI Eur. Ct. H.R. at 275.

168. See *Louizidou v. Turkey* (Preliminary Objections), 20 Eur. H.R. Rep. 99, 134 (1995).

under the margin of appreciation doctrine, allowed certain discretion to the states in deciding the appropriate time to take action. This means that only when states deem it necessary will they apply the ECtHR rulings. If not, as provided by Article 53 ECHR, European human rights law should not be construed as limiting or derogating from wider protection ensured under the domestic law of contracting parties.

Will there be more dissolution of political parties in Europe in the near future? In its reports, the Venice Commission of the Council of Europe determined that a large number of European states have no regulations on party dissolution.<sup>169</sup> Even in those states which have comprehensive provisions on party dissolution, the provisions are narrowly interpreted and rarely invoked. Rather, they work as a passive safety tool.<sup>170</sup>

The dissolution processes also presented some answers to the question of whether banning a political party could serve as a method to combat political ideologies that challenge those held by the state. In the case of Turkey, while the dissolution of pro-minority political parties simply paved the way for the birth of more radical successors, the dissolution process faced by the anti-secular parties apparently pushed those parties to the center-right wing of the political domain. Today's Kurdish party in Turkey, the Peace and Democracy Party ("PDP"), does not hide its support for the PKK. In fact, the PDP was founded on the ashes of its predecessors, the DSP. On the other hand, both the current Justice and Development Party as well as the Happiness Party pursue more liberal policies than their predecessors, the WP and the VP. They are reluctant to refer to Islamic law at any level.

As a final remark, it should be emphasized that the jurisprudence of the ECtHR has been the driving force behind several positive amendments in domestic legislation regarding the limitations on political parties. However, in the view of this author, preparatory works for possible new legislation on political parties should also take into account the domestic legislation of

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169. See *Opinion on Turkey*, *supra* note 5, at 5.

170. See generally European Commission for Democracy Through Law (Venice Commission), *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, CDL-INF(2001)1 (Jan. 10, 2000); see also *Opinion on Turkey*, *supra* note 5, at 5–6, 14–15.

European democracies and the comments of the supranational organizations, i.e., the Council of Europe, the European Union, and the Human Rights Committee of the UN, all of which are in some ways more liberal in their interpretations than the European Court of Human Rights.