



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 50

February 2003

***Refah Partisi (the Welfare Party) and Others v. Turkey [GC] -
41340/98, 41342/98, 41343/98 et al.***

Judgment 13.2.2003 [GC]

Article 11

Article 11-1

Freedom of association

Dissolution of political party by the Constitutional Court: *no violation*

Facts: The first applicant is a political party and the others were, at the material time, its chairman and two vice-chairmen, all of whom were also Members of Parliament. The party obtained 16.88% of the vote in the 1991 general elections and 22% of the vote in the 1995 general elections, when it became the largest party in Parliament. It subsequently formed a coalition government with the True Path Party. In May 1997, Principal State Counsel at the Court of Cassation applied to the Constitutional Court for the dissolution of the party on the ground that it was a centre of activities contrary to the principles of secularism (Article 69 § 6 of the Constitution). He referred to acts and statements of certain leaders and members of the party. The party's representatives submitted that the statements had been distorted and taken out of context, that no criminal offence had been committed and that the party had been given no warning permitting it to expel any member acting contrary to the law. State Counsel maintained that the party had described itself as engaged in a holy war (*jihad*) and had expressed the intention of introducing a theocracy and Islamic law (*sharia*). In January 1998 the Constitutional Court ordered the dissolution of the party. It referred to statements made by the second applicant with regard to the introduction of separate legal systems and the institution of a theocracy, if necessary by force, which the court found to be contrary to the constitutional principle of secularism. The court also referred to statements made by other members of the party, including Members of Parliament, advocating the introduction of *sharia* and, in some instances, the use of violence. As an automatic consequence of the dissolution, the party's assets were transferred to the Treasury. Moreover, the court decided to terminate the applicants' mandates as Members of Parliament and to ban them from founding or joining any other political party for five years.

Law: Article 11 – The dissolution constituted an interference with freedom of association. As to whether it was prescribed by law, it was not disputed that activities contrary to the principles of equality and respect for the democratic, secular republic were undoubtedly unconstitutional or that the Constitutional Court had sole jurisdiction to dissolve a party which was a centre of such activities. Although a divergence had arisen between the Law on the regulation of political parties and the Constitution, the Constitution took precedence over statute law and the Constitutional Court was clearly required to give precedence to the provisions of the Constitution. Moreover, Refah was a large political party which had legal advisers conversant with constitutional law and the rules

governing political parties, while the other applicants were experienced politicians and two of them were also lawyers. In these circumstances, the applicants were reasonably able to foresee the dissolution of the party if its leaders engaged in anti-secular activities. Furthermore, taking into account the importance of the principle of secularism for the democratic system in Turkey, Refah's dissolution pursued the legitimate aims of protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

As to the necessity of the interference, the Court had to concentrate on (i) whether there was plausible evidence that any risk to democracy was sufficiently imminent, (ii) whether the acts and statements of the party's leaders and members were imputable to the party as a whole, and (iii) whether acts and statements imputable to the party formed a whole which gave a clear picture of a model of society advocated by the party which was incompatible with a "democratic society".

(a) pressing social need – in view of its election results, the party had at the time of its dissolution the real potential to seize political power without being restricted by the compromises inherent in a coalition. Moreover, although the statements had been made several years earlier, the courts could legitimately take into consideration the progression over time of the real risk that the party's activities represented. The programme and policies of a party may become clear through the accumulation of acts and speeches over a relatively long period and the party may over the years increase its chances of gaining political power and implementing its policies. While Refah's policies were dangerous for Convention rights and freedoms, the real chances of it implementing those policies made that danger more tangible and more immediate, so that the courts could not be criticised for not acting earlier or for not waiting and they had not, therefore, exceeded the margin of appreciation in electing to intervene when they did. As to the imputability to Refah of the acts and speeches of its members, the party had not proposed altering Turkey's constitutional arrangements in a manner contrary to democracy in either its constitution or its coalition programme. The dissolution referred rather to statements made by certain leading figures. The statements made by the three applicants could incontestably be attributed to Refah, since remarks by office-bearers on political questions are imputable to the party they represent unless otherwise indicated. Moreover, in as much as the acts and remarks of other members in elected posts formed a whole which disclosed the party's aims and intentions and projected an image of the society it wished to set up, these could also be imputed to Refah. Finally, Refah had presented those who had made such statements as candidates for important posts and had taken no disciplinary action against them before dissolution proceedings were instituted.

With regard to the main grounds for dissolution, these could be classified into three main groups:

(i) a plurality of legal systems cannot be considered compatible with the Convention system, as it would introduce a distinction between individuals based on religion and thus, firstly, do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of different religions and beliefs and, secondly, create an unacceptable discrimination;

(ii) as to the application of *sharia* within the context of such a plurality of systems, explicitly proposed in certain of the statements referred to, the Court accepted the Constitutional Court's conclusion that these statements formed a whole and gave a clear picture of a model proposed by Refah of a state and society organised according to religious rules; however, *sharia* is incompatible with the fundamental principles of democracy, since principles such as pluralism in the political sphere and the constant evolution of public freedoms have no place in it and a regime based on *sharia* clearly diverges from Convention values; Contracting States may oppose political movements

based on religious fundamentalism in the light of their historical experience, and taking into account the importance of the principle of secularism in Turkey the Constitutional Court was justified in holding that Refah's policy of establishing *sharia* was incompatible with democracy;

(iii) as to the relationship between *sharia* and the plurality of legal systems, Refah's policy was to apply some of *sharia*'s private law rules to the Muslim population in the framework of a plurality of legal systems; however, such a policy goes beyond the freedom of individuals to observe the precepts of their religion and falls outside the private sphere to which Turkey confines religion, thus suffering from the same contradictions with the Convention system as the introduction of *sharia*; freedom of religion, including freedom to manifest religion, is primarily a matter of individual conscience and the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society – it had not been disputed that in Turkey everyone can observe in his private life the requirements of his religion but on the other hand any State may legitimately prevent the application within its jurisdiction of private law rules of religious inspiration prejudicial to public order and the values of democracy;

(iv) as to the possibility of recourse to force, whatever meaning is given to *jihad* there was ambiguity in the terminology used to refer to the method to be employed to gain political power and in all the speeches referred to by the Constitutional Court the possibility was mentioned of resorting "legitimately" to force; moreover, the leaders had not taken prompt steps to distance themselves from members who had publicly approved the use of force.

In conclusion, in view of the fact that Refah's plans were incompatible with the concept of a "democratic society" and the real opportunities it had of putting them into practice, the penalty imposed by the Constitutional Court could reasonably be considered to have met a "pressing social need".

(b) proportionality – Refah's other Members of Parliament remained in office and in view of the low value of its assets the transfer to the Treasury had no bearing on proportionality. Moreover, the prohibition imposed on the individual applicants was temporary. The interference was not, therefore, disproportionate.

Conclusion: no violation (unanimously).

Articles 9, 10, 14, 17 and 18 and Articles 1 and 3 of Protocol No. 1 – It was unnecessary to examine these complaints separately.

Conclusion: not necessary to examine (unanimously).