

CASE OF REFAH PARTİSİ (THE WELFARE PARTY) AND OTHERS v. TURKEY

(Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98)

ECHR GRAND CHAMBER; 13 February 2003

Case concerns Article 11 of the Convention, the relevant parts of which provide:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ..."

FACTS

Refah Partisi (the Welfare Party - "Refah"), was a political party founded on 19 July 1983. The Party could broadly be described as "Islamist" and articulated a defense of national and traditional religious values and the interests of provincial small businesses.

Ultimately, Refah became the largest political party in Turkey and came to power by forming a coalition government. An opinion poll in 1997 predicted that Refah might obtain 67% of the votes in the general election to be held roughly four years later.

In May 1997, application was made to the Turkish Constitutional Court to have Refah dissolved.

In January 1998, the Constitutional Court dissolved Refah on the ground that it had become a "centre of activities contrary to the principle of secularism" based on sections of the law regulating political parties.

The Constitutional Court referred to the provisions of the Constitution which imposed respect for secularism on the various organs of political power and that while political parties were the main protagonists of democratic politics, their activities were not exempt from certain restrictions.

The Constitutional Court observed that it considered international human-rights protection instruments, including the Convention and the restrictions authorised by the second paragraph of Article 11 and Article 17 of the Convention, and pointed out in that context that Refah was using democratic rights and freedoms with a view to replacing the democratic order with a system based on sharia.

The Constitutional Court held that where a political party pursued activities aimed at bringing the democratic order to an end and used its freedom of expression to issue calls to action to achieve that aim, the Constitution and supranational human-rights protection rules authorised its dissolution.

Refah filed an application to the ECHR claiming a breach of Articles 9, 10, 11, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1. A Chamber of the Third Section of the Court gave judgment, holding by four votes to three that there had been no violation of the applicants' freedom of association under Article 11 of the Convention. The measures were found to be prescribed by law and necessary in a democratic society for the pursuit of legitimate aims. It held unanimously that it was not

necessary to examine separately the complaints under Articles 9, 10, 14, 17 and 18 of the Convention and Articles 1 and 3 of Protocol No. 1.

Refah then requested that the case be referred to the Grand Chamber.

COURT'S DECISION

The Court's first determines whether there was an "interference" with the applicants' rights, and then whether this interference was "prescribed by law." If so, the Court examines whether the interference was "in pursuit of legitimate aims" (i.e., the specific limitations on the right to freedom of assembly expressly set out in Article 11 of the ECHR), and whether it meets the test of "a pressing social need" that is "necessary in a democratic society."

I. LEGAL RULES

INTERFERENCE:

The parties accepted that Refah's dissolution and the measures which accompanied it amounted to an "interference" with the applicants' exercise of their right to freedom of association. The Court took the same view. §51

PRESCRIBED BY LAW:

With regard to "prescribed by law" the Court found that the written law most relevant to the question whether the interference was "prescribed by law" was the Turkish Constitution. It is primarily for the national authorities to interpret and apply domestic law. The dispute under domestic law concerned the constitutionality of the activities of a political party and fell within the jurisdiction of the Constitutional Court. §§57-58

LEGITIMATE AIM:

With regard to "legitimate aim", Refah accepted in principle that protection of public safety and the rights and freedoms of others and the prevention of crime might depend on safeguarding the principle of secularism. The Court considered that Refah's dissolution pursued several of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others. §§66-67

"NECESSARY IN A DEMOCRATIC SOCIETY" The Court reiterated General principles.

Democracy "appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it". §86

Political parties are a form of association essential to the proper functioning of democracy and enjoy the freedoms and rights enshrined in Articles 10 and 11 of the Convention. §87

Freedom of expression applies all the more in relation to political parties and extends to ideas that "offend, shock or disturb." §89

Freedom of thought, conscience, and religion, protected by Article 9, is one of the foundations of a democratic society. §90

Although the State should be the “neutral and impartial organizer of the exercise of various religions,” restrictions on the freedom of religion might be necessary, and the freedom to manifest one’s beliefs “does not protect every act motivated or influenced by a religion or belief.” §§91-92

The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardizes that State's institutions, of the right to protect those institutions. §96

The Court set forth two conditions for a political party to promote a change in the law or the legal and constitutional structures of the States:

1. The means used to that end must 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 violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of rights and freedoms recognized in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds. §98

The Court reiterated that where political parties are concerned, the exceptions in Article 11 are to be construed strictly. States have only a limited margin of appreciation. Drastic measures such as dissolving a party might be taken only in the most serious cases. §100

However, a State could not be required to wait until a party had seized power and begun to implement a policy before intervening. Where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may "reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions. This “power of preventing intervention” is consistent with its positive obligations to secure the rights and freedoms of persons within their jurisdiction against interference from private individuals within non-State entities. (Note: This is a concept known as “militant democracy”) §102

II. APPLIED TO THE FACTS

“PRESSING SOCIAL NEED”

OVERALL EXAMINATION of "pressing social need"

In making an overall assessment, the Court finds that the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place.

In view of the fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a "pressing social need". §132

SPECIFIC ISSUES regarding “Pressing Social Need”

1. TIMING FOR DISSOLUTION:

The Court considers that in electing to intervene at the time when they did in the present case the national authorities did not go beyond the margin of appreciation left to them under the Convention.

Though Refah's policies were dangerous for the rights and freedoms guaranteed by the Convention, the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate.

The risk of intervening prematurely, before the danger concerned had taken shape and become real, or the for not waiting, at the risk of putting the political regime and civil peace in jeopardy, and Refah seizing power and swinging into action in order to implement its plans cannot be criticized. §110

2. IMPUTABILITY to Refah of the acts and speeches of its members

The Court concluded that the acts and speeches of Refah's members and leaders cited by the Constitutional Court in its dissolution judgment were imputable to the whole party.

Among other things, remarks on politically sensitive subjects or positions taken up by the chairman of a party are perceived by political institutions and by public opinion as acts reflecting the party's views, and the chairman never made it clear that his statements and stances did not reflect Refah's policy or that he was only expressing his personal opinion. The speeches and stances of Refah's vice-chairmen could be treated in the same way as those of its chairman. §§113-115

3. MAIN GROUNDS FOR DISSOLUTION CITED BY THE CONSTITUTIONAL COURT: (that Refah had become a centre of anti-constitutional activities)

A. The plan to set up a PLURALITY OF LEGAL SYSTEMS

The Court agreed with the Chamber's conclusion that the plurality of legal systems proposed by Refah was not compatible with the Convention system for two reasons:

First, the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention. The Refah system would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organizer of various beliefs and religions in a democratic society. 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.

Second, it 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. 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, and more particularly Article 14 thereof, which prohibits discrimination because it cannot maintain a fair balance between the claims of certain religious groups who wish to be governed by their own rules and the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs. §119

B. SHARIA

The intention to set up a regime based on sharia was explicitly set forth in some remarks cited by the Constitutional Court, and in others the common denominator is reference to religious or divine rules as the basis for the political regime which the speakers wished to bring into being. §§120-122

The Court concurred with the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention:

Sharia, which 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.

A regime based on sharia 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 it intervenes in all spheres of private and public life in accordance with religious precepts. 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. §123

Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy. §125

C. SHARIA'S RELATIONSHIP WITH THE PLURALITY OF LEGAL SYSTEMS proposed by Refah

Refah argues that the Chamber contradicted itself in holding that Refah supported introducing both a plurality of legal systems and sharia simultaneously and that prohibiting a plurality of private-law systems in the name of the special role of secularism in Turkey amounted to establishing discrimination against Muslims who wished to live their private lives in accordance with the precepts of their religion. Freedom of religion is primarily a matter of individual conscience and is quite different from the field of private law, which concerns the organisation and functioning of society as a whole. In Turkey everyone can observe in his private life the requirements of his religion and, like any other Contracting Party, it may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes. §§126-128

D. POSSIBILITY OF RECOURSE TO FORCE

In speeches the possibility was mentioned of resorting "legitimately" to force in order to overcome various obstacles Refah expected to meet in the political route by which it intended to gain and retain power. §§129-130

The Court endorsed a finding of the Chamber that although Refah's leaders did not call for the use of force and violence as a political weapon, they did not take prompt practical steps to distance themselves from those members who publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah's leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it. §131

"PROPORTIONALITY" OF THE MEASURE COMPLAINED OF

The Court saw no good reason to depart from the considerations in the Chamber's judgment:

The dissolution of a political party accompanied by a temporary ban prohibiting its leaders from exercising political responsibilities was a drastic measure and that measures of such severity might be applied only in the most serious cases. The interference in question here met a 'pressing social need'. After the dissolution only five of its MPs (including the applicants) temporarily forfeited their parliamentary office and their role as leaders of a political party while the 152 remaining MPs continued to sit in Parliament and pursued their political careers normally. In that connection that the nature and severity of the interference are also factors to be taken into account when assessing its proportionality. §133

The interference in issue cannot be regarded as disproportionate in relation to the aims pursued.

III. COURT'S CONCLUSION

There were convincing and compelling reasons justifying Refah's dissolution and the temporary forfeiture of certain political rights imposed on the other applicants.

The interferences met a "pressing social need" and were "proportionate to the aims pursued" and Refah's dissolution may be regarded as "necessary in a democratic society" within the meaning of Article 11 § 2. §135

Accordingly, there has been no violation of Article 11 of the Convention. §136

With regard to the alleged the violation of Articles 9, 10, 14, 17 and 18 of the Convention, as their complaints concern the same facts as those examined under Article 11, the Court considers that it is not necessary to examine them separately. §137