

# Preventive Defense of Democracy: The position of The European Court of Human Rights<sup>1</sup>

## *Defensa preventiva de la democracia: la posición del Tribunal Europeo de Derechos Humanos*

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### ABSTRACT

Freedom of expression and association are essentials to guarantee the opening of the democratic system, but they can also be exercised to undermine its foundations. For this reason, the Council of Europe was determined to establish a system capable of dealing with anti-democratic threats. This spirit is reflected in the European Convention on Human Rights. The European Court of Human Rights, when evaluating whether a particular political agenda can take part in the democratic process, has established a dual requirement: that the means used to implement it are pacific and that the political project advocated is democratic. Therefore, the democratic defence of an anti-democratic project can be legitimately excluded. According to it, the Court has formulated in *Refah Partisi v. Turkey* a doctrine of preventive defence of democracy that raises complex and sensitive questions.

**KEYWORDS:** European Court of Human Rights, freedom of expression, freedom of association, Preventive defense of democracy, *Refah Partisi v. Turkey*.

### RESUMEN

Las libertades de expresión y de asociación son esenciales para garantizar la apertura del sistema democrático, pero también pueden ser utilizadas para minar sus fundamentos. Por esta razón, el Consejo de Europa decidió establecer un sistema capaz de defenderse frente a posibles amenazas antidemocráticas. Y este espíritu quedó reflejado en el Convenio Europeo de Derechos Humanos. El Tribunal Europeo de Derechos Humanos, a la hora de evaluar si un determinado programa político puede tomar parte en el proceso democrático, ha establecido una doble exigencia: que los medios utilizados sean pacíficos y que el proyecto político propugnado sea democrático. Por tanto, puede excluirse legítimamente la defensa democrática de un proyecto antidemocrático. En virtud de ello, el Tribunal ha formulado en *Refah Partisi v. Turkey* una doctrina de la defensa preventiva de la democracia que suscita complejas y delicadas cuestiones.

**PALABRAS CLAVES:** Tribunal Europeo de Derechos Humanos, libertad de expresión, libertad de asociación, defensa preventiva de la democracia, *Refah Partisi v. Turkey*.

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## Introduction

### Pluralism, democracy and fundamental human rights: the concept of “democratic society”

Pluralism, tolerance and opening-up to new ideas are, in the view of the European Court of Human Rights (ECHR), the distinctive features of the model of a democratic society that represent the heart of the *European Convention on Human Rights*. Democracy is nurtured by the free debate of ideas and the discussion of diverse political projects competing for the direction of public affairs. The proper functioning of the democratic system depends on a great deal, on the political parties whose tasks—as the Court declared— “are part of a collective exercise of freedom of expression”<sup>3</sup>. Protecting one’s opinions and having the freedom to express them is precisely one of the goals of the freedom of association and assembly, especially if the political parties interact within public debate. Consequently, they can make use of articles 10 (freedom of expression) and 11 (freedom of association and assembly) of the Convention, which are closely inter-related and aimed at guarantying pluralism, an idea inherent to the concept of democratic society implied in such legal instrument<sup>4</sup>.

This attitude however, implies for the democratic state the assumption of certain risks for preserving its own existence. The knowledge gained through historical experience has proved distinctly that the exercise of fundamental rights and freedoms can be exploited by certain groups to undermine the constitutional structures of the State and the very foundations of the democratic system to the point of abolishing it. Anti-democratic options can thrive politically speaking, under the protection of the freedom of expression and association. Provided those conditions, how can the Democratic State hold before those threats? Shall any type of political discourse be admitted for public debate or shall any sort of political program be admitted for democratic competition? Democracy must face, in the end, the “paradox of freedom”: Must it be accepted that freedom can lead to the destruction of freedom?

As an example, the second electoral round abolition in 1992’s argelian elections and the subsequent declaration of a state of emergency as a reaction to the possibility of a vast majority from the Islamic Front of Salvation, could have made it possible for the state to make improvements to the constitution and transform the country into a Islamic state. In this case, the very Algerian Minister of Human Rights promoted and justi-

3. *United Communist Party of Turkey v. Turkey* (1998), par. 43.

4. The ECHR has stated in the case *Lingens v. Austria* (1986) that “the freedom to political debate lies in the very heart of the concept of democratic society which governs the whole agreement, par. 42.

fied the taking of power by the military forces as a legitimate instrument aimed at safeguarding the system of public freedoms<sup>5</sup>. Several democratic states have adopted preventive or self-protective measures before anti-cliché options precisely to avoid extreme situations like the Algerian case. And, in the field of International Rights a “substantive” conception of democracy has been generalized, which is understood as a democracy that not only constitutes a simple procedure for taking political decisions, but also, incorporates certain material contents which cannot be questioned. In essence, the problem is not new or exclusive from the democratic state. Ya Locke, in his *Letter about Tolerance*, warned about this paradox related to the problem of religious freedom, neglecting the right to be tolerated for those churches that “do not wish to practice and teach the duty to tolerate every man in the matters of religion”<sup>6</sup>. However, for the democratic system this problem becomes especially meaningful since its legitimizing point of law lies in the fact that it gives a chance to the political parties to participate within public scene, and being thus submitted without reserve to the criticism of the will of the people. Consequently, the protection of the democratic system by means of an *a priori* exclusion of certain political programmers for

democratic competition can only be reached by limiting the very budget of the system.

But, to what extent can democracy give up its fundamental postulates –even struggling of its own preservation– without perverting the democratic essence? To what extent or under what circumstances is it justifiable to accept an intolerant democracy? The very foundations of the democratic system are at stake in sorting out this problem. Most probably, the adequate response to such issue shall depend on the ability of the democratic system to manage to get the legitimacy that justifies its ethical superiority opposed to any other political model. That feature is perhaps and ultimately, the best and only guarantee for a long-lasting existence.

Since the very Council of Europe was created and having the experience of the violent ravages caused by the totalitarian regimes, the State members of that organization showed their inclination to establishing a system of liberties capable of surviving anti-democratic threats. This spirit is reflected in the European Convention on Human Rights of 1950. In a general way, section 17, states the prohibition to the misuse of the law, by declaring that “Nothing in this

5. Ali Haroun explained the situation as follows: “As a minister of Human Rights, my question is: Who must defend the idea of Human Rights? Must I let happen a situation in which, in one or two months, people can no longer exercise their rights? I cannot do that. Today, there are men in Algeria who are taking responsibility for their actions, and there’s a large part of society who is beginning to feel safe again. We shall take the necessary time to strengthen the institutions which can lead this country towards a real democracy= not allowing that under the excuse of using a democratic procedure, democracy is killed.” Human Rights in Algeria Since the Halt of the Electoral Process, Middle East Watch, February 1992, p. 5.

6. LOCKE, J., *Carta sobre la Tolerancia*, Traducción de P. Bravo, Madrid, Tecnos, 1991, p. 56.

Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Particularly, the second paragraph of articles 8 to 11 where, the possibility to restrict the exercise of the freedoms of expression, reunion and association is anticipated when such restrictions “become necessary measures for a democratic society” in the search of certain legitimate state goals, such as the protection of alien rights and liberties. It is relevant to point out that if, in the mind of the writers of the Convention, totalitarianism seemed to be the greatest enemy, in the current international context, the main threats to democracy come from discourses of the racist or xenophobic type and from the movements or political parties of separatist nature linked to terrorist organizations and from the political peak of Islamic fundamentalism. And this it is reflected in the Case Law of the Court.

Though the Court did not hesitate at first, to use article 17 to face the discourse and political proposals that questioned the fundamentals of the democratic State, nowadays such precedent has adopted, for those cases, a subsidiary and integrative role—by means of interpretation—of the boundaries expected for the several specific rights. They are used as tools to establish the need of the questioned action within a democratic



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society.<sup>7</sup> The clause “necessary for a democratic society” is then the basic standard through which the ECHR develops its task of supervision and control of the state acting in the sphere of Freedom of expression and association. According to

7. As a consequence, as Lazcano shows in “Prohibición del abuso del derecho”, in Lagasabaster, I., (dir.), *Convenio Europeo de Derechos Humanos*, Madrid, Thomson-Civitas, 2004, article 17 does not have an autonomous character today, for its possible breach is to be necessarily connected with any of the rights protected. And then it works as “an (important) rule of interpretation of the rights of the Covenant, more than as a disposition” (p. 578).

the interpretation the Court has done of it, the exercise of these rights can only be restricted by the state authorities when it might arise a “social imperative need” that can justify the interference and when this interference is “proportional to the objective pursued”. Through the jurisprudential development of this clause the Court has shaped a model of European public order in the field of Human Rights in which the conception of an ideal democratic society is revealed in the light of the Convention as well as the function that shall correspond to such rights.

The notion of “democratic society” is characterized according to the jurisprudence of the ECHR as a dynamic concept which is defined in a teleological manner and responding to the objectives that such society aims to achieve –those noted beforehand, pluralism, tolerance and opening to new ideas–. The other side of the conception is defined instrumentally speaking, since political objectives can only be reached in a way that respect to fundamental rights and liberties is guaranteed<sup>8</sup>. Accordingly, the Court has also established a dual requirement when evaluating the pertinence of certain discourses or political programs for the democratic model relating to the means of behaving and the objectives pursued:

A. Firstly, for a political program to take part in the democratic process, it is necessary that the means used to get their goals are “legal

and democratic”, a statement through which, The Court refers essentially, to the prohibition to use violent methods. The democratic system is incompatible with the use of violence as a method for political participation. For this reason, those speeches promoting or enacting violence, are excluded from the protection of the Covenant.

Undoubtedly, one of the fundamental issues in this field, is establishing the boundaries between ideas and actions, between whatever may be interpreted as a legitimate exercise of the free expression of ideas and, whatever can be taken for a speech to enact violent actions. This may be really difficult to establish, at times.

The fact is, as Kelsen had warned, keeping democracy alive along with its legitimacy, depend on a great deal of an appropriate demarcation.<sup>9</sup> This issue becomes especially relevant nowadays, especially in relation with the problem originated by the existence of political parties supporting certain terrorist groups. Actually, the Court has had to pronounce itself several times regarding this problematic issue. For example in the case of Spain, Henri Batasuna brought several appeals before the Supreme Court and also did the subsequent political parties which were originated from him against the constant decisions of the

8. Cfr. GARCÍA SAN JOSÉ, D., *Los derechos y libertades fundamentales en la sociedad europea del siglo XXI*, Universidad de Sevilla, 2001, p. 65.

9. KELSEN, H. *¿Qué es Justicia?*, Traducción de A. Calsamiglia, Barcelona, Ariel, 1992. “It is possible that the scope of the concept brings about certain risk. However, the honor and truth essence of democracy are worth facing the risk and if it cannot be lived, it does not deserve to be defended” (p. 62).



Spanish Supreme Court which declared those groups illegal.

These decisions were supported by the European Court of Human Rights since they considered that the activities of those parties, on the one hand, incited to rebellion and social confrontation, and on the other, became an implicit support to the terrorist actions of ETA<sup>10</sup>.

B. However, it is not enough to respect the democratic method of decision-making. It is necessary, secondly, that the political project advocated (that is to say, the objective pursued) is itself, of a democratic nature. It is redundant to exert democratic defense over a political project different from or alternative

to democracy<sup>11</sup>. The Court thus, affiliates to a model of “militant democracy”, which, –as we shall examine next– will result in a preventive defense of democracy<sup>12</sup>.

## Towards a Preventive Defense of Democracy

Perpetrating violent acts or adopting a type of discourse that promotes the use of violence in order to exclude a political project from democratic competition is by no means necessary. The bare intention of reaching anti-democratic goals once power has been taken democratically is quite enough to exclude them<sup>13</sup>.

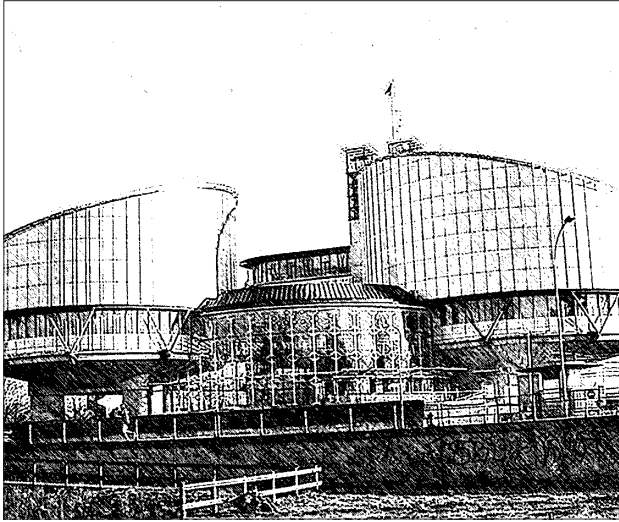
This fact presupposes a fundamental change of perspective regarding the first condition which

10. Cfr. *Herri Batasuna et Batasuna c. Spagne* (2009).

11. This position, in Kelsen’s view. ¿Qué es Justicia?, (quote), assumes there’s an abdication of one’s democratic principles. In his words, “when democracy is no longer tolerant, it is no longer democracy”. However, –he wonders– Is democracy able to be tolerant in its defense of anti-democratic tendencies? It is indeed, as long as it does not suppress the pacific expression of anti-democratic ideas”. Such type of tolerance is what “tells democracy and autocracy apart”. Provided this difference is respected “we shall be able to reject autocracy and feel proud about our democratic form of government”, but “democracy cannot defend its own existence if it surrenders” (p. 62).

12. Most of the European countries have adopted for their internal legal system a model of “open democracy”, in which the appeal to any anti-democratic means is solely excluded. This is the case of the Spanish legal system, in which, –as our Constitutional Right’s Court established– a military democratic model is unaccepted because “there is no assumption of the existence of a legal core inaccessible to the proceedings of the Constitutional Amendments. Due to its inherent nature it would not possibly become an autonomous parameter of legal correction, so that the single pretention to affect it made the proceeding anti-legal even though it would scrupulously abide to the legal proceedings (...) Any legal project is consistent with the Constitution, as long as it does not try to survive by means of an activity that breaches the democratic principles or fundamental rights” (STC 48/2003, of March 12th, Legal grounds 7º).

13. There are as well strong theoretical constructs to defend this position. As FOX, G. H. y NOLTE, G., “Intolerant Democracies”, *Harvard International Law Journal*, vol. 36, nº 1 (Winter 1995), point out, “the right to resistance before anti-democratic regimes lies in the heart of the traditional democratic theory” therefore, “thanks to the legitimacy of such acts, it would seem anomalous to argue that anti-democratic parties cannot be subject to restrictions during their rise to power, when it is much more plausible to defeat them”. Thus, “from the point of view of moral law, the first aspect (the resistance) would seem to make the second (restrictions to anti-democratic parties) legitimate a fortiori” (p. 68).



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relates to the means. When a trial is related to the use of anti-democratic means, we are facing an *a posteriori* control of certain behavior that is considered harmful. Those actions that may jeopardize the rules of the game are questioned. However, when considering the illegitimacy of the goals, the point is not to decide over past events but anticipating possible future intentions of a political party that may not be tied down in its political activity with violence or any form of illegal action. A trial dealing with anti-democratic intentions is generally a hard one to follow because in it, the program of a political party will hardly ever be presented as a project that restricts freedom. For that reason the ECHR stated that “the constitution and the program of a political party cannot be considered altogether as the only criteria to establish their objectives and intentions” and those items must be consistent with the actions of their leaders and the positions they hold<sup>14</sup>. Only when taking in consideration all these elements their real intentions may be inferred.

The defense of democracy thus, acquires for the Covenant, a purely preventive role. It is unquestionable that for contemporary Law, it has become more frequent to find cases where the jurist must anticipate reality deciding over future problems as if they were current threats. A complex and technologically advanced society requires unde-

14. *Refah Partisi v. Turkey* (2003), p. 101.

niably, the adoption of a preventive perspective if it wishes to face the challenges set out by the protection of the world's environment, traffic security, all the possible complications attached to the medical operations, the demands of civil responsibility, etc.<sup>15</sup>. Nonetheless, this approach has also been extended to other fields of Law, such as, to the protection of fundamental rights and freedoms, a fact which generates more inconveniences since it seems hard to combine the necessity to act in a preventive manner—by implementing certain measures of restrictive or punitive nature—with the democratic demand to safeguard and guarantee those rights.

The latest development denominated “Criminal law of the enemy” is aimed against those who pursue the destruction of the legal order. It is basically characterized as a type of right that “deals with threats” rather than with acts.<sup>16</sup> The now more aggressive Preventive Defense of Democracy for Constitutional and International Law and the Criminal Law of the Enemy are samples of those trends. It is worth establishing

which are the anti-democratic objectives that are subject to persecution and which can justify, in the view of the Court, the restriction empowered by the countries, of the Freedom of Expression and the Freedom of Association, up to the extent of excluding a political party from democratic competition. In this sense, it is essential to bear in mind that the measures adopted to restrict rights and freedoms must be aimed at preserving democracy, rather than to preserving the State itself or its constitutional structure. In other words, what is protected is not the territorial, political or constitutional organization of the State but the opening of the political process, singularly. The concept of “democratic society” is stated in the legal science of the ECHR solely as a “process” or “democratic system”.<sup>17</sup> The quote “essential for a democratic society” which traces the limits of legitimate State intervention refers exclusively to the protection of such system. Consequently, —as the Court states— a political party is not excluded from the protection awarded by the Covenant only because the national authorities consider that its actions

15. As BECK, U. points out in his book “La sociedad del riesgo, trans. of J. Navarro, D. Jiménez and M. R. Borrás, Barcelona, Paidós, 1998, for surviving in a society of threats, it is necessary to make use of “the capacity to anticipate threats, to bear them and to be able to face them biographically and politically speaking” (p. 85).

16. JAKOBS, G., “Derecho penal del ciudadano y Derecho penal del enemigo”, in Jakobs, G. y Cancio, M., *Derecho penal del enemigo*, Madrid, Civitas, 2003, p. 33. With the creation of this new model Criminal law would advance into gaining two tendencies in its regulations. On the one hand, there is the “Criminal Law for the citizen” in which he/she makes an action visible and then a subsequent reaction is generated, and on the other hand the “Criminal Law of the Enemy” in which it is intercepted in a previous stage and thus, fought against due to its adversity. (pp. 42-43).

17. Tough, as GARCÍA ROCA, J. points out in the text, “Abuso de los derechos fundamentales y defensa de la democracia”, in García Roca, J. y Santolaya, P. (coord.), *La Europa de los Derechos: el Convenio Europeo de Derechos Humanos*, Madrid, Centro de Estudios Políticos y Constitucionales, 2005, it shall never be forgotten that “it is about a material understanding of democracy, linked to rights and values, and is not only procedural or circumscribed to a method for decision-making” (pp. 737S-738).



endanger the constitutional structures of the State”<sup>18</sup>. The fact that a certain political party differs with the principles and constitutional structures of a State does not mean that it contradicts democratic rules. In fact, the nature of democracy must admit the proposal and the discussion of diverse political projects, even of those that challenge the current organization of a given State provided that they respect the conditions of the democratic system (that is to say, making use of democratic means and trying to achieve democratic objectives). Therefore, it is essential to distinguish between whatever an illegal political party is –because it opposes the democratic methods and goals– and whatever constitutes a political program that tries to modify the legal system or the constitutional structure of a given State using legitimate actions. Nothing must be excluded from democratic discussion, but democracy itself. At this point, the discussion is that in certain European countries the constitutional nature of the political parties is based entirely on the democratic system and on the acceptance of certain fundamental principles inherent to the organization of the State. Such is the case of the principles of unity and territorial integrity

of the State and their recognition becomes in several legal systems, a mandatory condition or *sine qua non* condition for political participation putting it aside from democratic debate.<sup>19</sup> In fact, in most of the cases in which the Court has had to pronounce itself about the legitimacy of the dissolution of a political party because its goals oppose the democratic system, the reason for such dissolution had precisely been the defense of political projects that questioned the territorial integrity of the State. In every case the Court has been consistent with its doctrine: the claims of self-determination of a given community, the proposal of the creation of a Federal State or even the defense of the secession and the territorial division of the State, become, altogether, legitimate political objectives within the framework of a democratic system. The fundamental virtuality of the system lies in the chance to sort out the problems of a country no matter how annoying or irritating they can be, by means of the dialogue and without resorting to violence. In that light, the Court has reasserted that “a political initiative must not feel affected by the single fact of wishing to debate openly about the future of the people of a State and for taking part

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18. *United Communist Party of Turkey v. Turkey* (1998), par. 27.

19. In France, for example, all associations that attempt against the republican government or the national territorial integrity are considered illegal. In the first case, on the one hand, it has been assumed that the attack had to be violent, regarding the defense of territorial integrity, the Council of State has interpreted that it is unnecessary that a group may be a real threat of violent actions; it is enough to question the territorial integrity of the State. In fact, several political groups have been dissolved due to their separatist goals, even though, none of those cases have been taken to the ECHR. However, there have been lawsuits taken to the European Council by political parties dissolved for this same reason in countries like Bulgaria and Turkey.



Nonetheless, this approach has also been extended to other fields of Law, such as, to the protection of fundamental rights and freedoms, a fact which generates more inconveniences since it seems hard to combine the necessity to act in a preventive manner –by implementing certain measures of restrictive or punitive nature– with the democratic demand to safeguard and guarantee those rights.

in the political life of the nation, in order to find, according to democratic rules, the solutions that may please those people concerned”<sup>20</sup>

The same statement can be said about other constitutional clauses of intangibility as long as their demands exceed the very requirements of the process or democratic system. That is what happened in *Freedom and Democracy Party against Turkey* (1999). In this case, the struggling party had been dissolved by the Constitutional Turkish Court, among other reasons by breaching the constitutional principle of secularism by proposing in its political party the abolition of the Department of Religious Affairs. This organism administers religious affairs in the unique case of the Turkish secular regime (it directs mandatory Muslim religious education through primary and secondary studies, it controls and distributes the interpretation of the word of God which is read every Friday in the mosques, it controls and pays to the religious leader that directs the prayer, etc). The party dissolved by the Turkish authorities proposed that these affairs were under the control of the religious institutions themselves<sup>21</sup>, and the dissolution was not accepted by the ECHR when it understood that even though

20. *United Communist Party of Turkey v. Turkey* (1998), par. 57. A conclusion that the ECHR has later reassured repetitively in *Socialist Party v. Turkey* (1998), *Yazar v. Turkey* (2002), *Sadak v. Turkey* (2002), *DEP v. Turkey* (2002), *Emek Partisi v. Turkey* (2005), *Parti de la Démocratie et de l'Évolution v. Turkey* (2005), *The United Macedonian Organisation Ilinden-Pirin v. Bulgaria* (2006) y *Demokratic Kitle Partisi v. Turkey* (2007).

21. The Department of Religious Affairs is the government agency that deals with religious affairs in the unique secular Turkish regime. The year 2000 report about this country (presented by the UN Special Rapporteur for the abolition of all forms of intolerance and discrimination due to religious reasons) underlines that such Department –among other things– is responsible of administering internal Islamic affairs, it directs mandatory muslim religious education throughout primary and secondary studies, it controls and distributes the interpretation of the word of God which is read every Friday in the mosques, it controls and pays to the religious leader that directs the prayer.

such proposal clearly disagreed with the constitutional structures and the current organizational model of the Turkish State, it did not breach the democratic principles<sup>22</sup>. Only in one of the cases initiated before the Court –also about Turkey and its secular problem– they have confirmed the dissolution of a political party because its objectives were against the democratic system. I am referring to the famous and controversial case of *Refah Partisi against Turkey*, in which the Council was divided –four votes against three– in Section 3 of the Court in 2001, and later on, an unanimous decision was taken by the Great Chamber in 2003.

### The Refah Partisi case: Islam and democracy

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Refah used to be an Islamic moderated ideology party with many followers in the country (more than 4 million) which, since its foundation in 1983, had been participating normally in Turkish political life, behaving all the time within the legal framework and adopting the rules and methods of the democratic system. In fact, at the moment of its dissolution by the Turkish Constitutional Court, it was the political party that led the political coalition that ruled the country. However, the European Court confirmed the decision of the Constitutional Turkish Court when establishing

that *Refah* pursued two objectives that disagreed with democracy:

- First, it claimed for a diversity of legal systems according to the religious beliefs of each individual. This objective disagrees with the model of a “democratic society” inherent in the Covenant, because, first of all, it would imply suppressing the role of the State in ensuring the exercise of individual rights and freedoms and secondly, it would breach the principle of non-discrimination in the enjoyment of those rights.
- Secondly, the establishment of the *Sharia* or Islamic Law as Common Law suited for the muslim community. In that case the Court pointed out that in such regime there was no place for principles such as pluralism for political participation or the ceaseless evolution of public freedoms, stressing as well, its conflict with the democratic system in some particular aspects such as those relating to the penal and procedural guarantees or the legal status of women<sup>23</sup>.

The clash of those objectives with the democratic system can hardly be questioned. Thus, the ECHR treated the dissolution of *Refah* as a legitimate exercise by Turkey as a preventive power of intervention to defend democracy.

22. Cfr. *Freedom and Democracy Party (ÖZDEP) v. Turkey* (1999), par. 41.

23. Cfr. *Refah Partisi v. Turkey* (2003), par. 119 & 123. A third reason for the ECHR to justify the dissolution of Refah was the possibility to resort to the *djihad* or “holy war”. However, in that case we would not be dealing with the field of the goals or ends but in the field of anti-democratic means (instigation to the use of violence), which are out of the scope of this article.

This exercise was acceptable due to the existence of a "present and amply proved danger"<sup>24</sup>. It is an interesting clarification and one relevant to bear in mind, because it demands the establishment of a *timing* for its dissolution and it resorts to a formula which brings back to our memories the standard of "clear and present danger" traditionally used by the American High Court. As the European Court had previously revealed in its line of arguments in the cases *Yazar against Turkey* and *DEP against Turkey* in which, there was a conflict between the objectives of the political parties and the democratic principles, it is not merely mandatory to show that their policies are directed towards undermining the democratic process but also, and for a state intervention to be justified, a real chance to introduce a non democratic regime must exist<sup>25</sup>.

Even when a militant democracy model is adopted there seem to be good reasons to tolerate these parties as long as they do not become a real threat for the system. At this point it is relevant to remember Rawls for whom this problem of tolerance of the intolerants is directly "linked to the stability of a well organized society". If democracy is safe and stable enough, very little is gained by excluding them. On the contrary, the freedom they exercise can make them believe in freedom. This gentle persuasion is based on "the

psychological principle stating that those whose freedoms are protected and that enjoy a just constitution, shall obey it shortly afterwards."<sup>26</sup> In short, it is about trusting in the pedagogical capacity of democracy. On the other hand, such tolerance, rather than debilitating the political system, can strengthen it. The fact that all political positions can be expressed freely within the scope of democratic institutions, reinforces their legitimacy. What is more, the political participation of anti-democratic groups can exercise an important function for the political body, acting as a mechanism for the more or less, organized expression of antagonism basic to the system<sup>27</sup>.

Besides, the evident existence of hostile groups to the system has been defended appealing to other reasons of prudential and pragmatic nature. In this sense, tolerance to resistance is a file that allows measuring the level of dissatisfaction towards the political model, giving it the chance to predict latent threats. It would work as a kind of alarm system for democracy.

The problem arises when, as Rawl points out, the anti-democratic group is so strong or grows so rapidly that the forces of the system that work to ensure its stability cannot change it and then ends up by becoming a threat to democracy.

<sup>24</sup>. *Ibidem*, par. 102.

<sup>25</sup>. Cfr. *Yazar v. Turkey* (2002), par. 58 & *DEP v. Turkey* (2002), par. 55.

<sup>26</sup>. RAWLS, J., *Teoría de la Justicia*, trans. by M<sup>a</sup> Dolores González, Madrid, FCE, 1993, p. 253.

<sup>27</sup>. Cfr. KIRCHHEIMER, O., *Political Justice*, trans. by R. Quijano, Granada, Comares, 2001, pp. 202-203.



The legal system must establish then, which is the right moment for its dissolution anticipating the actual risk. It is a practical dilemma very hard to solve.

As it has been pointed out, the temporary standard used by the ECHR to legitimate the dissolution is the “imminent” character of the threat. The Court agreed to dissolve the party thanks to its privileged political position at the time, which was about to get exclusive control of the government mechanisms of power. In the Turkish legislative elections of 1995, *Refah* had gained 22% of the votes, becoming thus, the party with the most Members of Parliament in the National Assembly (158 over 450). This percentage increased visibly in the municipal elections of 1996, reaching 35% of the suffrage. As a consequence, *Refah Partisi* accessed power in 1996 and was able to install a coalition government with the *Drogu Yol Partisi* or DYP (in Turkish), and its president, N. Erbakan, became the Prime Minister, a position he was holding in government when the party was dissolved in January, 1998. Besides, at that time, surveys anticipated an even higher percentage of votes for the subsequent general elections, which predicted the possibility of a future solitary government. All these facts, in the view of the European Court, showed that when it was dissolved, *Refah* had a “real potential to access political power without being subject to the commitments inherent to a coalition” so that their “power monopoly would have made it possible for them to establish their own model of a society.” The Court concluded ultimately that if the political objectives of *Refah* became, a threat to the rights and freedoms protected by the Covenant, the real possibility to implement



The notion of “democratic society” is characterized according to the jurisprudence of the ECHR as a dynamic concept which is defined in a teleological manner and responding to the objectives that such society aims to achieve—those noted beforehand, pluralism, tolerance and opening to new ideas—. The other side of the conception is defined instrumentally speaking, since political objectives can only be reached in a way that respect to fundamental rights and liberties is guaranteed.

them would imply a predictable access in solitary to power which made such power more “solid and immediate.” It was the right moment for dissolution: the Turkish authorities could not be



blamed for having acted precipitately. It was also inappropriate to demand them to wait for *Refah* to begin to legally materialize their plans.<sup>28</sup> Until now, the line of arguments of the Court seems solid, however the weak point of the judgment in my opinion is the problem of the evidence. This is the moment of the discussion where the existing difficulties to legally create a preventive defense of democracy arise. Especially when—as happens in this case—the judgment about the inconsistency of the objectives of the party with the democratic system and in the end, the decision to dissolve it is not based on the analysis of the statutes of its political program or its political activity, but on certain actions and attitudes of some of its members. Regarding this issue it is necessary to point out that as the Turkish authorities recognized, the constitutional political program of *Refah* matched the constitutional order of the country. That was not all: *Refah* was a political party with a long history and which locally exercised government responsibilities. And, as it was pointed out before, by the time it was dissolved it had been leading the coalition that governed the country for even a year and a half. During this period, it had not adopted any initiative or had undertaken an act that revealed an intention to follow the political objectives stated above. In fact, the Government Programme of the coalition defined openly the Turkish Republic as a democratic and secular State and did not consider the possibility to modify its political regime and even less to breach the constitutional order. Likewise, there was not a public or private

document in the party that referred to those anti-democratic objectives. The attribution of those objectives to the party was based exclusively on the following declarations and acts performed by some of its members:

- a) Two speeches of N. Erbakan, its President in 1993 and 1995 in which he declared to be in favor of allowing to wear the veil in educational premises.
- b) A gathering prepared by Erbakan in the Prime Minister's house, offered to the leaders of several religious movements, who attended the event wearing garment that evidenced their religious conditions.
- c) The approval of a government decree in 1997 which rearranged the business hours in public establishments to facilitate the hours of fasting during Ramadan. This decree was approved by the government in full even by the ministers who did not belong to *Refah* and which also contained measures similar to the ones adopted by the country since 1981.
- d) The visit of the Minister of Justice (Vice-president of *Refah*) to a prisoner who was awaiting a hearing and who was charged for having done activities opposing to the principle of secularism.
- e) A speech by Erbakan in 1993, in which he defended for the individual the possibility, under some general common principles, to be

28. Cfr. *Refah Partisi v. Turkey* (2003), par. 108 & 110.

- ruled by certain aspects of Private Law (for instance, the form of matrimony) following the codes of each one's religion.
- f) The following statements expressed by three deputies of *Refah* in which the establishment of the *Sharia* or Islamic law was openly defended:
- Two speeches given by a Member of Parliament in 1994 calling for the introduction of the *Sharia*. For this reason criminal proceedings were initiated against him. He was expelled from the party a month after the process of dissolution began.
  - A public speech in 1993 and an interview in 1992, re-edited in 1996 by another deputy defending the call for the *Sharia*. Criminal proceedings were initiated against him once the process of dissolution was started and he was expelled from the party in that moment.
  - Certain statements done on May 8th, 1997 by deputy in the halls of Parliament supporting the establishment of the *Sharia* and in which he warned about possible violent acts if the Islamic schools of theology were closed down. Only a few days later, on May 21st the Attorney General requested the dissolution of the party and shortly after this deputy was expelled from the party.
- g) Three more vague speeches given by party members in which they referred to the establishment of a "Fair order".
- In the case of the statements and acts of the President and the Vice-presidents, these could be attributed directly to the party, in the case of the speeches of the three deputies the ECHR considered that the responsibility also reached the party for not having taken distance from the deputies, before the dissolution of the party was requested. Expelling the deputies after that moment was interpreted by the Court as a weak attempt to escape that measure. Once the attribution of those individual acts to the party was settled, the Court concluded that, though not all of the actions were illegitimate in themselves, together they constituted "a whole that revealed the goals and intentions of *Refah*, and which, analyzed altogether, reflected the image of the model of society they wanted to institute"<sup>29</sup>.
- That decision, as some commentators have declared, may be cautious and should not be regarded as irrational. However, there are serious political doubts surrounding the decision too, as it was stated by the three deputies of the Third Section that opposed to it in the first ruling of the Court. These deputies, after reminding that *Refah* was at that moment the fifteenth party which had been dissolved by the Constitutional Turkish Court in a short lapse of time and stressed that the dissolution of the party based only on individual behaviors of its members must be supported by very powerful and convincing reasons. They did not agree with the reasons for this case because the behaviors denounced were isolated cases that had happened in very differ-

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29. *Ibidem*, p. 115.

ent contexts throughout a period of nearly six years and they had occurred mostly, before *Refah* accessed power. This opinion was held –and it is here where the difference with the position of the other four deputies which became the majority resides– in an individual and stricter evaluation of the evidence. The majority valued the issue jointly, whereas the minority looked into each one of the behaviors and statements in detail.

From this more extensive perspective, it was clear that the first four behaviors (the speeches defending the use of the veil, the decree reorganizing business hours to facilitate Fast, the gathering offered by the Prime Minister to different religious leaders and the visit of the Vice-president of the party to an imprisoned person with like beliefs) showed by no means a kind of inconsistency with the democratic system. And these two were considered like that by the majority. However, they were taken into account and considered them relevant when tracing a general image of the political project of *Refah* and interpreted they were coherent with their unmentioned goal to establish the *Sharia*.

Regarding the three deputies who had openly advocated the establishment of this Islamic regime –I think this was the only objective that could clearly be considered incompatible with the democratic system– the minority did agree with

their expulsion from the party, even if it took place when the dissolution of the party began: in fact, except for one case, the legal proceedings against them were not initiated by the Turkish authorities after the dissolution process had started even though their statements had been pronounced years before, and it was right then when *Refah* pursued their expulsion<sup>30</sup>.

Furthermore, the very vague speeches about the instauration of a “fair order” which the majority –in the context of their joint evaluation of the diverse elements– interpreted as an invitation to establish a political order subject to religious observances and Erbakan’s speech about the possibility for legal pluralism, remained. In any case, these ambiguous statements, pronounced long ago, had not been subject to enact a legal proceeding or to any other restrictive measure –those days, though, Article 163 of the Criminal Code was in force and it sanctioned any behavior against the principle of secularism–. And there were, most of all, those measures about which there was no evidence about *Refah* attempting to establish them.

It was inappropriate, in the view of the minority, to try to find or see the intention of an anti-democratic project from the party. This idea differs from the possible individual responsibilities which the authors of such behaviors could have

30. There was another point to bear in mind and it is not of minor importance: Section 101 of the Law of Political Parties (which was in force until it was considered unconstitutional by the Constitutional Turkish Court only a week before the same Court dissolved *Refah*) stated specifically that, if the accused was expelled from a party within 30 days after the process of dissolution, the legal proceeding against him/her would be closed automatically.

generated. By no means, such an extreme decision like the dissolution of the party could ever be regarded as necessary or consistent with the facts or be adopted as an alternative solution to enacting proceedings against those individuals responsible for those behaviors.

In conclusion, as this case shows, the judgment about the existence or absence of an anti-democratic intention is the cornerstone on which is based the doctrine of the ECHR concerning the preventive defense of democracy. It is a trial that generates a lot of threat, as the doubts generated by the opinions of the minority in the decision of the Third Section evidence. The key issue here is the evidence. In cases like these it is inappropriate to consider there is evidence for presumptions or indirect evidence because the harmful result for democracy is finally never seen. The fact is the decision taken about *Refah* ultimately, lies on the assumptions or interpretations, in the predictions about the possible future behaviors of an association; it is a judgment of intentions that cannot be taken as a model or example for the legal system to be used in the evidentiary process: How could it be proved that the party will not proceed in certain manner in the future?<sup>31</sup> Thus, there is a treat, as Judge Jackson of the American High Court announced in *Denis vs. United States* that the legal decision adopted becomes something not

very different from “a prophecy in the shape of a legal decision”. The suitability of the prophecy, in the case of *Refah* has only generated more doubts as days pass by. In this sense, it is relevant to show that since the general Turkish elections of 2002 until today, the Turkish government is directed by an Islamic party derived from *Refah* and today they are vast a majority and there has been no attempt to destroy the democratic system.

On the other hand, not only the problem of the proof arises, there is also the appraisal of the existence of a threat. This is a matter whose objectivity is difficult to prove because as U. Beck warns “the threats are real when human beings perceive them as real”<sup>32</sup>. In the society of threats, the single belief of the existence of a given reality substitutes reality itself and this is enough to produce the corresponding social, economic, political and even legal consequences. And in this manner, under the pressure of the threats arises a political explosive material. An idea that was plausible, acceptable or that could be adopted in the past because it was beyond the scope of political intervention, becomes an unacceptable threat today that must be stopped. This sharp perception of the threat in the end, affects the field of the competences, favoring a type politics that is vigilant and biased and which makes uses threat in order to extend its possibilities of in-

31. GARCÍA ROCA's view of the problematic dissolution of the Refah Party by the ECHR: Constitutional State and control of behaviors of fundamentalists parties, quote “the result generated by the opinion of the majority is a presumption with reversal of the burden of the proof because the party must persuade that it is not unconstitutional, because it shall not do certain things in the future” It is demanded from them a “*Probatio Diabolica*” (p. 324).

32. BECK, U., *La sociedad del riesgo*, quote, p. 86.

tervention.<sup>33</sup> As a result of that, responsibilities are re-defined, guarantees are eroded and in the end, controls and restrictions once difficult to justify, were legalized. In this sense, it has been possible to confirm how in the last years after the terrorist attacks of September 11th 2001, the constitutional and international foundations have crumbled before the advance of the politics of suspicion or the doctrine of preventive wars.”<sup>34</sup>. There is no doubt that under the influence of those and other more recent events, the existence of a sharper social perception about the closeness to threat has been interpreted as a parallel increase of the levels of suspicion and prevention. The establishment of that preventive perspective which presupposes the adoption of a conclusive approach, in the end, has influenced “the legal discourse that, on its own, is logically and structurally oriented towards the media”<sup>35</sup>.

We cannot even discard that, regarding the case we have been commenting, this variation in the perception of the threat is precisely one of the reasons that explains the impressive difference between the tight decision of the Third Section of the ECHR (July 31st 2001) and the unanimity of the judgment of the Great Chamber in 2003 when all the members of the Full Court supported straightforwardly the dissolution of *Refah*.

## Conclusion

The recent context of the existence of a new social threat caused by anti-terrorist policies after September 11, 2002, and the construction of international spaces for the preventive defense of democracy, may encourage the tendency that is allegedly observed in certain European states to constantly watch the political parties. Under that state of surveillance, they are subject to a strict scrutiny of their resolutions, documents and statements, to the agenda of their public acts and even to the behaviors and statements of their leaders and activists, whether they happen openly or in the privacy of the party in as much as they are considered relevant to reveal their “true” intentions.

A sample of the problems generated by this assumed demand to a preventive control of political parties and the threats that it implies for the Rule of the Law is offered by the proceedings opened in Germany against the *Nationaldemokratische Partei Deutschlands* in the same year, 2003. In this case, the attribution of anti-democratic objectives was basically based on information obtained by the Secret Service and which referred to statements expressed by their leaders in the internal deliberations of the party.

33. Cfr. *Ibidem*, p. 87.

34. ASENSI, J., “Principales dudas acerca de la Ley de partidos políticos (LO 6/2002 and STC 48/2003)”, in Montilla, J. A. (ed.), *La prohibición de partidos políticos*, Universidad de Almería, 2004.

35. 123. *Ibidem*, p. 101.



The legal proceeding had to be closed when the high level of infiltration of the officials of the *Constitutional Defense Bureau*, who had provided the information, was revealed in the directing organs of the party investigated.

It was stated that a third of the party leaders were government agents who had been acting promoting and encouraging the most radical positions among the party. The evidential value of their information was disputable in itself, the evidence of the direct influence on the activities of the party nullified it completely, because the origin of the action that motivated the suspicion of threat for the democratic system could no longer be attributed to the party.<sup>36</sup>

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36. Cfr. MORLOK, M., "La prohibición de partidos políticos en Alemania", en J. A. Montilla (ed.), *La prohibición de partidos políticos*, cit., pp. 213-214.

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