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Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre juridique international et Droits de l'Homme

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DEMOCRACY IN EUROPE: THE INSTITUTIONAL AND LEGAL TREATMENT OF ANTIDEMOCRATIC POLITICAL PRACTICES**

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1. *Introduction*

The rise of extremist parties in many European countries after 1990 was a dynamic phenomenon. The collapse of communism in Central and Eastern Europe, starting from the fall of the Berlin wall in 1989 and ending in 1991 with the official dissolution of the former Union of Soviet Socialist Republics, marked the emergence of right-wing extremist parties and their will to regain the prominence they once enjoyed in the 1930s and 1940s[1].

Recent developments, including the European Parliament elections of 22-25 May 2014, demonstrate that extremist groups tend to expand and consolidate their presence in the political sphere all around Europe. In the French presidential and parliamentary elections in May and June 2012, the National Front received 18% and 14% of the vote respectively in the first rounds. In Hungary, the xenophobic Jobbik received 17% of the vote in the 2010 elections, while the right-wing populist Fidesz is currently the ruling party after having won 53% of the votes in 2010[2]. In Greece, Golden Dawn was ranked third in

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** Extended version of a paper presented at the 2013 Annual Conference of the Hellenic Society of International Law and International Relations (Athens, 19-21 December 2013).

1 See for this phenomenon S. RAMET, *The Radical Right in Central and Eastern Europe Since 1989*, The Pennsylvania State University Press, 1999.

2 See M. MINKENBERG, *The European Radical Right and Cenophobia in West and East: Trends, Patterns and Challenges*, in R. MELZER, S. SERAFIN (eds.), *Right-wing Extremism in Europe. Country Analyses, Counter-Strategies*

the recent European elections with 9,38% of the vote and 3 seats, while it has already 18 members in the Parliament following the national elections of June 2012.

The agenda of right-wing extremist groups varies from racism, ethnocentrism and xenophobia to an authoritarian ideology and euroscepticism[3]. Ultimately, despite their differences, they share a common feature. They are anti-democratic insofar as democracy rests on the promotion and protection of human rights[4].

This expanding phenomenon brought forth a well-known and inconvenient question. What is the appropriate reaction of a democratic regime to such "threats": the "punitive" approach or the defence of pluralism at any cost? In the present article, as far as the institutional terrain is concerned, we will refer to two cases that emerged within the EU and the Parliamentary Assembly of the Council of Europe. In the legal field we will explore the rich case-law of the European Court of Human Rights regarding the legality of dismantling political parties.

2. *The Practice in the European Union and the Interaction with the Council of Europe*

In the EU framework, the first crash-test took place in 2000, when the extreme right-wing "Freiheitliche Partei Österreichs" of Joerg Haider entered into the Austrian government. At that time, the EU had imposed certain diplomatic sanctions on Austria, albeit with little practical impact. Recently, the EU has gone through a major test in the case of Hungary. Since 2010, when the ultra-conservative political party Fidesz came to power, the government has embarked upon a series of amendments to the Constitution, which undermined the independence of the judiciary, limited religious freedom and restricted broadcasting political campaign ads to the state broadcaster, essentially adopting proposals of the xenophobic party Jobbik[5].

In the case of Hungary the EU threatened to invoke Article 7 of the Treaty on the European Union. According to this provision «on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 [i.e. the democratic principles]. Before making such a determination, the Council shall hear the Member State in question and may

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and Labor-Market Oriented Exit Strategies, Friedrich Ebert Stiftung, Projekt Gegen Rechts Extremismus, 2013, p. 9-33 (9).

[3] See the variants as described by M. MINKENBERG, *ibid.* p. 12-13.

[4] There is no universally accepted definition of democracy. However, its attributes have been clearly set out in regional instruments such as the Inter-American Democratic Charter, the African Charter on Democracy, Elections and Governance and the Protocol on Democracy and Good Governance of ECOWAS, see for these developments, V. SARANTI, *Pro-Democratic Intervention, Invitation or "Responsibility to Protect"? Challenges to International Law from the "Arab Spring"*, in C. PANARA, G. WILSON (eds.), *The Arab Spring. New Patterns for Democracy and International Law*, Leiden/Boston, 2013, pp. 169-201 (171-179).

[5] The changes in question, adopted on 11 March 2013, was a direct response to a series of critical rulings in 2012 by the country's Constitutional Court, which struck down problematic laws introduced by the government. With this action, the government tried to «bypass the Constitutional Court and subvert the Constitution» see Human Rights Watch, *Hungary: Constitution Changes Warrant EU Action*, 12 March 2013.

address recommendations to it, acting in accordance with the same procedure»[6]. If the European Council determines that there is a serious and persistent breach of the democratic principles, it may decide, by a qualified majority, to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council[7].

Unlike what is happening in other regional and subregional systems[8], the highly sensitive and political nature of such a decision has rendered it inapplicable in the EU framework up until now. In the case of Hungary, the European Commission decided to launch three accelerated infringement procedures[9] related to the new Constitution and a number of cardinal laws entered into force in the country. The infringement proceedings instituted in January 2012 covered legislative actions against the independence of the Central Bank, the independence of the Data Protection Authority and measures affecting the judiciary. While the European Commission was satisfied with the changes to the Central Bank statute, it remained concerned regarding the two other aspects and has thus referred the cases to the Court of Justice[10].

Regarding the independence of the Data Protection Authority, the problems focused on the reorganisation of the authority by the Hungarian government and the premature end of the six-year term of the Data Protection Commissioner. The Commission referred Hungary to the Court in April 2012. The latter in its judgment of 8 April 2014 decided that the abrupt termination of the Commissioner's term in office constituted an infringement of the independence of the Hungarian Data Protection Authority and was therefore in breach of EU law[11]. It is worth mentioning in this context that the independence of data protection supervisors is guaranteed under Article 16 of the Treaty on the Functioning of the EU and Article 8 of the Charter of Fundamental Rights. In addition, Directive 95/46/EC on data protection requires Member States to establish a supervisory body to monitor the application of the Directive acting in complete independence.

The legislative measures affecting the judiciary were on the one hand the action of the government on 17 January 2012 to request the forced early retirement of around 274 judges and public prosecutors across the country with the sudden reduction in the mandatory retirement age for these professions from 70 to 62. The Commission referred the case to the Court of Justice, which dealt with it in an expedited procedure. In its judgment of 6 November 2012, the Court judged that this action gave rise to a difference in treatment on grounds of age which was not proportionate as regards the objectives pursued and thus Hungary had failed to fulfil its obligations under Articles 2 and 6(1) of

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[6] Treaty on the European Union, art. 7 para.1.

[7] *Ibid*., art. 7 paras 2, 3.

[8] The EU has never suspended the membership of any country and, after the implications with Austria, the issue of imposing sanctions for violation of democratic principles was never again put forward. This is not the case with other regional organizations such as the Council of Europe, the Organization of American States, the African Union, the Economic Community of West African States and other sub-regional organizations of the African continent, which have effectively used this power in several occasions, see in detail V. SARANTI, *A System of Collective Defence of Democracy: The case of the Inter-American Democratic Charter*, in *GoJIL,* 3, 2011, pp. 675-714 and ID., *Pro-Democratic Intervention, Invitation or "Responsibility to Protect"*, op.cit.

[9] Pursuant to article 258 TFEU.

[10] See European Commission press release, «Hungary-infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary», IP/12/395, 25 April 2012.

[11] See *European Commission/Hungary,* case no C-288/12, Judgment 8.4.2014.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[12].

On a more general level regarding other aspects of the independence of the judiciary, namely the powers attributed to the President of the National Judicial Office to designate a court in a given case and the possibility of transfer of judges without their consent, measures that could adversely affect the right to an effective remedy as guaranteed by article 47 of the EU Charter of Fundamental Rights[13], the European Commission decided to defer its actions in favour of the actions already undertaken by the European Commission for Democracy through Law ("Venice Commission") of the Council of Europe. The latter is in the process of monitoring the amendments to the new Constitution and has issued several opinions related to the matter[14]. The most recent one, in addition to the two measures described above regarding the independence of the judiciary, also touches upon issues arising in the Fundamental Law with regard to freedom of religion, freedom of speech, autonomy of institutions of higher education etc.[15] In any case, the European Commission decided to keep the matter under close review so as to verify whether the amendments to the legislation on the administration of justice would be satisfactory.

Notwithstanding the actions taken by both the European Commission and the Court of Justice on their respective fields regarding the combat of anti-democratic practices by the ruling party in Hungary, these do not affect the existence of the political party as such but rather focus on the non-compliance of its constitutional initiatives and legislative actions with the *acquis communautaire*. It is also worth noting that according to NGOs the amendments brought about to the Hungarian Constitution on 16 September 2013, upon criticism by the "Venice Commission", are considered in general cosmetic in nature and do not fix the human rights and rule of law problems in the fundamental law of the country[16].

Furthermore, the competent committee of the European Parliament (Committee on Civil Liberties, Justice and Home Affairs – LIBE) followed the monitoring process, requesting reports from the Hungarian government regarding the country's conformity with the democratic principles, especially with regard to the adoption of the new Constitution. In its resolution adopted on July 2013[17] it has also formulated general recommendations regarding the setting up of a new mechanism to enforce article 2 TEU effectively. In particular, the European Parliament asks EU institutions «to engage in a joint

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[12] *European Commission/Hungary,* case no C-286/12, Judgment 6.11.2012.

[13] See also in that respect, International Bar Association, Human Rights Institute, *Courting Controversy: The Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary*, September 2012.

[14] See, Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary; Opinion on the new Constitution of Hungary; Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary; Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary; Opinion on Act CLI of 2011 on the Constitutional Court of Hungary; Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary; Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary.

[15] European Commission for Democracy through Law ("Venice Commission"), *Opinion on the fourth amendment to the Fundamental Law of Hungary*, no 720/2013, 17 June 2013, CDL-AD(2013)012.

[16] See, Human Rights Watch, *Constitutional Change Falls Short*, press release, 18 September 2013.

[17] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), 2012/2130(INI).

reflection on new tools to ensure respect for democracy, rule of law and fundamental rights in member states, while avoiding any risks of double standards». It has also made reference to a prospective revision of the Treaties in that respect.

Indeed, the European Parliament's action touches the core of the problem which is actually anti-democratic practices, ushered by anti-democratic political parties and eventually anti-democratic governments, in the EU. The resolution states *inter alia* that a new mechanism is needed, a "Copenhagen Committee or high-level group", to ensure compliance by all Member States with the common values of Article 2 TEU. Such a mechanism should be independent from political influence, swift and effective and should have the following functions, without interfering or duplicating the work of the "Venice Commission" of the Council of Europe: a) regularly monitor respect for fundamental rights, the state of democracy and the rule of law in all Member States while fully respecting national constitutional traditions; b) conduct such monitoring uniformly in all Member States to avoid any risks of double standards between its Member States; c) warn the EU at an early stage about any risks of deterioration of the values enshrined in Article 2 TEU; d) issue recommendations to the EU institutions and Member States on how to respond and remedy any deterioration of the values enshrined in Article 2 TEU.

The resolution furthermore recommends that in case of potential risks of serious breaches of fundamental values in a Member State, the Commission should take a more comprehensive approach and immediately engage in a structured political dialogue with that Member State and the other EU institutions. When risks of violation of Article 2 TEU are identified, an "Article 2 Alarm Agenda" must be created, managed by the Commission at the highest political level. Finally, the resolution also recommends that the Commission updates its 2003 Communication on Article 7 TEU[18].

Responding to this resolution, the European Commission decided to establish a new EU framework to strengthen the rule of law[19]. Without discrediting the infringement procedures based on article 258 TFEU, which are an important instrument in addressing certain rule of law concerns emanating from a breach of a specific provision of EU law, the Commission pointed out that there are situations of concern which fall outside the scope of EU law but still pose a systemic threat to the rule of law. For these situations, the preventive and sanctioning mechanisms provided for in article 7 TEU may apply. Thus, the new framework will be activated in situations where «the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law»[20]. The threat to the rule of law (i.e. legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for fundamental rights and equality before the law) must be of a systemic nature.

The procedure consists of three stages: assessment, recommendation and follow-up. If the state in question has not remedied the systemic threat, then article 7 TEU, namely suspension of membership, may be activated. It remains to be seen whether the

[18] Communication from the Commission of 15 October 2003: Respect for and promotion of the values on which the Union is based, COM (2003) 606 final.
[19] Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the rule of law, COM (2014)158 final, 11 March 2014.
[20] *Ibid.*, p. 6.

Commission will move so decisively in the future if a State adopts anti-democratic measures or tolerates anti-democratic practices.

3. *The practice in the Parliamentary Assembly of the Council of Europe*

Before the official beginning of the winter session of the Parliamentary Assembly of the Council of Europe (21-25 January 2013), a major issue arose regarding the acceptance or not of the credentials of two members: Eleni Zaroulia from Greece belonging to the political party "Golden Dawn" and Tamás Gaudi Nagy from Hungary, member of "Jobbik" ("The Movement for a Better Hungary" - Nationalist Party of Hungary). The complaint was submitted because the statements of both members of parliament as well as the official positions of their political parties are considered racist and anti-Semitic and therefore incompatible with the principles and values of the Council of Europe.

The Parliamentary Assembly finally accepted the credentials, because for purely technical reasons it was not possible to reject them. The two cases, however, highlighted a relatively neglected issue concerning the functioning of the Parliamentary Assembly which is related in particular with the composition of the body.

According to Article 25 of the Statute of the Council of Europe, the Parliamentary Assembly is composed of members of the parliament of the Member States of the Organization, who are either elected by the national parliament of each country or are designated by it according to its procedures. Constraints on the composition of national delegations - according to article 6.2 of the Rules of Procedure - are related with the fair and proportionate representation of all political parties participating in the national parliament, as well as the participation of persons of the sex that is underrepresented in parliament (predominantly females)[21]. Furthermore, members must sign a declaration stating that they will abide by the purposes and principles of the Council of Europe. It follows from the above that the composition of delegations is basically an exclusive task and responsibility of the parliaments of each country, while there has been no instance thus far of a member refusing to sign the written declaration.

The challenge of credentials can be based on strictly formulated procedural grounds (article 7 Rules of Procedure) or substantial grounds (article 8 Rules of Procedure). The procedural grounds include the violation of Article 6.2 of the Rules of Procedure, namely composition of the delegation in a way that it does not reflect the composition of the national parliament, absence of women delegates or refusal to sign the written declaration. The substantive grounds include the violation of the basic principles of the Council of Europe, as referred to in the Preamble and in Article 3 of the Statute. The first case that concerns individually the members of the delegation, requires the signature of at least ten members of the Assembly, while the second that concerns the delegation as a whole, requires the signature of thirty members. In both cases, the complainants must belong to at least five national delegations.

In the case under consideration the complaint was submitted individually in accordance with Article 7 (i.e. for procedural reasons) and the issue was forwarded to the Committee on Rules of Procedure, Immunities and Institutional Affairs of the Assembly.

[21] See, also, PACE resolution 1798 (2011).

The Committee rejected the complaint[22], stating that the strict criteria set out in Article 7 do not allow the challenge of the credentials of the members of the delegation on an individual basis, so that they can be sanctioned for their actions or statements that seriously violate the principles and values of Council of Europe. The Committee pointed out that its decision should not be interpreted as an expression of implicit support or recognition of acts, beliefs and political statements of these parties, while it called on the Assembly to amend the wording of the Rules of Procedure so as to take sufficiently into account the concerns raised in this case.

This is an issue that does not arise frequently within the Parliamentary Assembly. The only case in the past in which it had dealt with challenging of credentials was in 2004, under articles 8 and 9 of the Rules of Procedure, regarding the national delegation of Serbia-Montenegro[23]. At that time, although the participation in the elections of Slobodan Miloševic, Vojislav Seselj and Nebojsa Pavkovic, accused of serious violations of international humanitarian law before the International Criminal Tribunal for the former Yugoslavia, was criticized, however the national delegation was finally accepted. The resolution of the Assembly stressed that refusal to accept the credentials of the entire delegation, due to the behaviour of some of its members, would isolate the democratic forces in the country and would serve essentially those that flout the basic principles of the organization.

Although the Parliamentary Assembly had reserved its right to amend the Rules of Procedure, so as to allow refusal of credentials on an individual basis for disrespect of the democratic principles underpinning the Council of Europe as the continent's leading human rights organisation, it has not done so yet (with the exception of the introduction of the written declaration made by Resolution 1503/2006). The truth is that the Assembly has not dealt yet with the question, because it has not decided yet how to treat extremism. Indeed, there are two main conflicting points of view regarding the countering of extremist parties: on one hand, the legal and/or political ostracism of such political formations and on the other the gradual democratic shift of the citizens through persuasion and education. In the case in question, the first approach is represented by the Italian MP Fiamma Nirenstein, who pioneered in submitting the complaint, and the second by the Chairman of the Assembly, Jean-Claude Mignon, who stressed that «It is not for the Assembly to tell the Hungarians and Greeks 'You voted right' or 'you did not vote right'».

In any case, even though it is a difficult question, even though there are enough strong arguments in favour of and against both approaches, the Parliamentary Assembly should decide to settle the problem of extremist parties and individually of members of such parties when they are designated as members of national delegations. It is, after all, an imperative need arising from resolution 1344 (2003) «Threat posed to democracy by extremist parties and movements in Europe»[24].

[22] See the opinion and explanatory memorandum AS/Pro (2013) 03 def/22 January 2013.
[23] See PACE resolution 1370 (2004).
[24] The need is even more pressing since the Parliamentary Assembly decided not to open a monitoring procedure in respect of Hungary regarding the rule of law setbacks in the country, despite the explanatory memorandum by the co-rapporteurs Ms Lundgren and Ms Fischerová (doc. 13229, 10 June 2013), see Resolution 1941 (2013) Request for the opening of a monitoring procedure in respect of Hungary, 25 June 2013.

4. *The Practice of the European Court of Human Rights*

In the legal field there is not a common European model for the dissolution of political parties. However, the Strasbourg Court has dealt several times with cases involving dissolution of political parties and has thus developed relevant case-law and has established certain criteria as to when such "aggressive" legal practices can be considered legitimate.

The ban on political parties in the legal field is linked primarily to the protection of freedom of association and the legitimate restrictions that may be imposed on this right[25]. Furthermore, it depends on the margin of appreciation granted by the Strasbourg Court to the respondent state in terms of interpretation of the limitation clauses, namely whether the restrictions imposed are considered necessary in a democratic society and proportionate to the legitimate aim pursued[26]. Unlike the Court's deferral, in general, to the national authorities, when the margin of appreciation comes into play, exceptions set out in article 11 ECHR «are to be construed strictly where political parties were concerned. Thus, only limited margin of appreciation is granted, which goes hand in hand with rigorous European supervision»[27].

Bearing in mind this approach, it is of no surprise that in most of the cases the Court finds that there has been a violation of article 11 ECHR, when competent national authorities order the dissolution of a political party[28]. There are only three cases where the party's programme or the acts and statements of its representatives were considered incompatible with democratic principles, which we will examine in the following paragraphs: the case of the islamist Welfare Party in Turkey, the case of Herri Batasuna

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[25] See, in general, O. AKBULUT, *Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties*, in *Fordh. Int. Law Jour.*, 34, 2010, pp. 46-77; T. MARINKOVIC, *Europeanization of Constitutional Standards of Freedom of Association Restrictions*, in A. DUPEYRIX, G. RAULET (eds.), *European Constitutionalism. Historical and Contemporary Perspectives*, Peter Lang, Bruxelles/Berlin/Francfort/New York, 2014 (forthcoming); F. MOLENAAR, *The Development of European Standards on Political Parties and their Regulation, The Legal Regulation of Political Parties*, Working Paper 4, Leiden University, February 2010; A. NIEUWENHUIS, *The Concept of Pluralism in the Case-Law of the European Court of Human Rights*, in *Eur. Const. Law Rev.*, 3, 2007. pp. 367-384; OSCE/ODIHR, Venice Commission, *Guidelines on Political Party Regulation*, 2011; C. OVEY, R. WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006, pp. 337-339; S. SOTTIAUX, S. RUMMENS, *Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights' Case Law on Freedom of Expression and Freedom of Association*, in *Int. Jour. Const. Law*, 10, 2012, pp. 106-126.

[26] See Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerpen/Oxford/New York, 2001.

[27] *United Communist Party of Turkey and others/Turkey,* case no 133/1996/752/951, Judgment 30.1.1998, para 46.

[28] *United Communist Party of Turkey and others/Turkey,* case no 133/1996/752/951, Judgment 30.1.1998; *Socialist Party and others/Turkey,* case no 20/1997/804/1007, Judgment 25.5.1998; *Freedom and Democracy Party (ÖZDEP)/Turkey,* appl. no 23885/94, Judgment 8.12.1999; *Yazar, Karatas, Aksoy and the People's Labour Party (HEP)/Turkey,* appl. nos 22723/93, 22724/93 and 22725/93, Judgment 9.4.2002; *Dicle pour le Parti de la Démocratie (DEP)/Turkey,* appl. no 25141/94, Judgment 10.12.2002; *Parti Socialiste de Turquie (STP) et autres/Turquie,* appl. no 26482/95, Judgment 12.11.2003; *Presidential Party of Mordovia/Russia,* appl. no 65659/01, Judgment 5.10.2004; *Partidul Comunistirol (Nepeceristi) and Ungureanu/Romania,* appl. no 46626/99, Judgment 3.2.2005; *Parti de la Démocratie et de l'Evolution et autres/Turquie,* appl. nos 39210/98 and 39974/98, Judgment 26.4.2005; *Emek Partisi et Şenol/Turquie,* appl. no 39434/98, 31.5.2005; *United Macedonian Organisation Ilinden Pirin and others/Bulgaria,* appl. no 59489/00, Judgment 20.10.2005; *Demokratik Kitle Partisi et Elçi/Turkey,* appl. no 51290/99, 3.5.2007; *HADEP and Demir/Turkey,* appl. no 28003/03, Judgment 14.12.2010; *Republican Party of Russia/Russia,* appl. no 12976/07, Judgment 12.4.2011.

affiliated with the terrorist organization ETA in Spain and the case of Vona, a quasi-paramilitary organization associated with the racist political party Jobbik of Hungary.

In the reasoning of the respective judgments, the Court makes extensive reference to notions such as democracy and democratic principles. Thus, under the Court's case-law, «democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it»[29]. Furthermore, «a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds [...]»[30]

Pursuant to this construction of democracy, the study of the case-law demonstrates that there are three categories of political parties that face the spectrum of dissolution[31]. The first category comprises parties that oppose secularism and seek to establish quasi-theocratic regimes in which religion will play an important role in the organization of the state. The second category is political parties that have proven links to terrorist organizations and usually appear as the political wing of the so-called "armed movement". And the third is political parties whose programme and plan of action are based on a racist discourse. These categories are composed by three emblematic cases which constitute the first time that the ECtHR has found that there has been no infringement of the freedom of association upon dissolution of the political parties involved[32].

The most typical case before the Strasbourg Court and extremely important since it involved a party that had already been the legitimate government of the country, applauded by popular vote, was directed against Turkey and concerned the dissolution of the Islamist Welfare Party[33]. Through the statements of its representatives, it became clear that the party in question welcomed, amongst others, the use of force for the establishment of a theocratic regime, advocated the sharia as appropriate legal system and promoted discrimination on the basis of religious belief[34].

Initially, the Court assessed the intention of the Welfare Party to establish a plurality of legal systems on the basis of religious belief. The Court rejected this theocratic model based on Sharia as incompatible with the Convention system, firstly because it would

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[29] *United Communist Party of Turkey and others, ibid.*, para 45.

[30] See *Yazar, Karatas, Aksoy and the People's Labour Party (HEP)/Turkey,* op.cit., para 49.

[31] For the case-law of the Strasbourg Court on political parties and associations in general, see, European Court of Human Rights, Press Unit, *Political parties and associations*, June 2014.

[32] One could also refer to a fourth potential category, although this one has found full support in the Court's case-law, namely political parties that engage in intense criticism of government policies related to sensitive issues of national security, for instance parties that represent minority groups demanding autonomy or even secession, such as the cases of the *United Communist Party of Turkey* (lending its support to the Kurdist minority) or *Ilinden Pirin*, representing the Macedonians of Bulgaria. A third similar case, *Vatan/Russia* (appl. no 47978/99, Judgment 7.10.2004), regarding the Tatar population of the country, was never decided on the merits, since the Court accepted the respondent state's preliminary objection that Vatan had no *locus standi* as a victim.

[33] *Refah Partisi (The Welfare Party) and others/Turkey,* appl. Nos 41340/98, 41342/98, 41343/98 and 41344/98, Judgment 13.2.2003. See also, K. BOYLE, *Human Rights, Religion and Democracy: The Refah Partisi Case*, in *Essex Hum. Rights Rev.*, vol 1, pp. 1-16.

[34] *Ibid.*, paras 116 et seq.

exclude the role of the state as guarantor of rights and freedoms, since people would not have to respect the laws of the state, but the static legal rules imposed by religion, and secondly because such a system would violate the principle of non-discrimination, which is one of the fundamental principles of democracy[35]. The Court concluded that «sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention»[36]. It is worth noting that the Court reached its judgment based not on the party's programme or other public documents, which made no reference to Sharia or the use of force to impose the Sharia rule, but on public and official declarations and acts of the party's representatives[37].

It was the first time in the history of international human rights law that an international institution approved the dissolution of a political party, in an extremely delicate context regarding terrorism issues in the wake of September 11, 2001 terrorist attacks by the Islamic terrorist group al-Qaeda upon the United States in New York City and the Washington D.C. metropolitan area. Understandably the Strasbourg Court's judgment stirred vigorous reactions[38]. The most prominent was the one criticizing emphatically the general political system of Turkey, highlighting the democratic deficit demonstrated intertemporally by the secular parties of the country, which suffered no consequences, let alone dissolution. Others argued that when a party seeks to change the law through democratic means, so as to give space to religious law, this should be seen as the ushering of a discussion, in which human rights could play an important role in determining the intervention of religion. According to this point of view, the overall rejection by an international institution of such a proposal as incompatible with human rights leaves very little room to multiculturalism[39]. Be that as it may, the Strasbourg jurisprudence has not been modified ever since.

In the case of the Spanish party Herri Batasuna, the Strasbourg Court had to deal with a political party that was deemed illegal because of its ties to the terrorist group ETA. The basic question presented here was whether in a democratic state the defence, in words and deeds, of violence should be dealt with on the basis of individual criminal responsibility, or whether the political party itself should be dissolved, as constituting the political wing of the terrorist organization. The Court based on its prior case law on the Welfare Party upheld the dissolution of the party and concluded that there was no violation of the freedom of association. This approach was further upheld by case *Eusko Abertzale Ekintza – Acción Nacionalista Vasca (EAE-ANV) No 2*[40], which was also dismissed.

The last in this row of cases is *Vona/Hungary*[41], which was decided on 9.7.2013, while a request for referral to the Grand Chamber is still pending. Strictly speaking the case concerns the dissolution of an association, not a political party, but taking into account its links with Jobbik as well as the Court's reasoning that makes extensive references to democracy, we include it in the same series of cases. The case in question concerned the

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35 *Ibid.*, para 119.
36 *Ibid.*, para 123.
37 *Ibid.*, para 120 et seq.
38 See in that respect case *Fazile Partisi et Kutan/Turquie* (appl. no 1444/02, Judgment 27.4.2006), which was struck out of the list, because the applicants withdrew their application in the aftermath of the *Refah Partisi* case, accusing the Court that it «has prejudices against Muslim communities».
39 M. SCHEININ, *How to Resolve Conflicts Between Individual and Collective Rights?* in M. SCHEININ, R. TOIVANEN (eds.), *Rethinking Non-Discrimination and Minority Rights*, p. 230.
40 Appl. no 40959/09, Judgment 15.1.2013.
41 Appl. no 35943/10.

Maguar Gárda Egyesület (Hungarian Guard Association), which was founded by ten members of the political party Jobbik and has been dissolved by court order due to its racist activities against the Roma communities of Hungary. In the Court's view: «the State is entitled to take preventive measures to protect democracy vis-à-vis such non-party entities as well, if a sufficiently imminent prejudice to the rights of others undermines the fundamental values upon which a democratic society rests and functions. One of such values is the cohabitation of members of society without racial segregation, without which a democratic society is inconceivable. The State cannot be required to wait, before intervening, until a political movement takes action to undermine democracy or has recourse to violence. Even if that movement has not made an attempt to seize power and the danger of its policy to democracy is not sufficiently imminent, the State is entitled to act preventively, if it is established that such a movement has started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy»[42].

5. *Concluding Observations*

In conclusion, out of the European institutions examined, the European Court of Human Rights has the most consistent approach regarding the treatment of anti-democratic political practices. While the EU is in quest of an effective implementation of the preventive and sanctioning mechanism of article 7 TEU and PACE still declines to clarify its stance towards the participation of political parties that employ a racist discourse and their representatives in its sessions, the Strasbourg Court case-law offers an important legal guidance as to when the dissolution of a political party is considered legitimate.

We could focus on four points deriving from its jurisprudence: a) parties that support or seek the use of force to enforce their programmes have no place in the European public order; b) parties that adopt a racist discourse are equally excluded; c) eventual prohibitions must have a clear legal basis in the law of the state; and finally d) the anti-democratic attributes of the parties do not necessarily follow from the official programme or statute of the party. The verbal or practical support of violence by party representatives, members of parliament or officers, is enough to render the dissolution of a political formation legal. It thus becomes clear that the Court does not opt for a bureaucratic and superficial approach of the statute of the party, so as to decide about the legality of its dissolution, an inquiry that can often prove ineffective.

In general, we could conclude that the institutions of the Council of Europe and predominantly the Strasbourg Court align with the principles set out by PACE in its resolution on restrictions on political parties, which are the following: a) political pluralism is one of the fundamental principles of every democratic regime; b) restrictions on or dissolution of political parties should be regarded as exceptional measures to be applied only in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country; c) as far as possible, less radical measures than dissolution should be used; d) a party cannot be held responsible for the action taken by its members if such action is contrary to its statute or activities; e) a political party

[42] *Ibid.*, para 57.

should be banned or dissolved only as a last resort, in conformity with the constitutional order of the country, and in accordance with the procedures which provide all the necessary guarantees to a fair trial; f) the legal system in each member State should include specific provisions to ensure that measures restricting parties cannot be used in an arbitrary manner by the political authorities[43].

[43] Resolution 1308 (2002), Restrictions on political parties in the Council of Europe member States, 18 November 2002.