

PROHIBITION OF POLITICAL PARTIES AND ANALOGOUS MEASURES

Draft report prepared by the Secretariat of the Commission

Introduction

A. Background

At the request of the Secretary General of the Council of Europe, the European Commission for Democracy through Law conducted a survey on the prohibition of political parties and analogous measures.

It was urgent to take a closer look at this issue because of the importance of political parties in cementing the foundations of democracy, particularly in states governed until recently by authoritarian regimes. Elections, which are the very foundation stone of democracy, are inconceivable without the active participation of freely constituted political parties. And freedom of political association is the political form of the broader fundamental freedom of association.

This comparative survey of the legislation and practice in the states participating in the Venice Commission's work identifies common values in the European constitutional heritage in this field, with a view to improving information on the subject and, where appropriate, learning from solutions implemented abroad. It is based on replies to a questionnaire (document CDL-PP (98) 1) on the prohibition of political parties, covering both the existence of rules prohibiting political parties or providing for similar measures and the extent to which they are applied.

Responses were received from the following countries: Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Slovenia, Sweden, Switzerland, Turkey, Ukraine, Uruguay (see document CDL-PP (98) 2).

B. General

The legal approach to political parties varies considerably from one state to another.

Registration of political parties, for example, is not required in all legal systems. There are no registration requirements in *Germany*, *Greece* or *Switzerland*, for example. In *Denmark* and *The Netherlands*, political parties are not obliged to register, but certain formalities are required in order for them to participate in elections. In *Ireland*, registration simply enables a party to post its name alongside those of its candidates, while in *Sweden* it protects the party's exclusive right to use the name.

In some states where political parties are required to register this is merely a formality, as in *Austria*, *Spain*, *Uruguay* or *Norway*, where the only condition is to produce 5000 signatures. In other countries, however, the authorities make sure that the party fulfils the material requisites applicable to political party activities (this is the case, for example, in the *Czech Republic*, *Latvia*, *Poland* and *Russia*).

Further divergences are found in the *legal level* - constitution or legislation - at which questions concerning political parties are dealt with. While they all guarantee *freedom of association*, the basis of political party activities, constitutions differ greatly in the degree of detail in which they address the subject. Several constitutions make no specific mention of political parties (eg *Albania*, *Finland*, *Ireland*, *Switzerland*). In most cases, however, having guaranteed freedom of association and mentioned political parties, constitutions explicitly list the main cases in which restrictions may be placed on their activities. The *German* constitution, for example, provides for the prohibition of parties which, in their aims or through the behaviour of their members, are likely to disrupt the free democratic constitutional order or to cause its downfall. The constitution of *Georgia* prohibits the formation of political parties whose purpose is to destroy the constitutional order, to violate the country's independence and/or its territorial integrity, to spread war and violence, to foster ethnic or religious hatred or social unrest, and bans the creation of military forces by political parties, while parties based on geographical or regional criteria are prohibited under the State Authorities Act. In *Slovakia*, on the other hand, the constitution contains a general clause restricting freedom of association, in cases justified by law where this is necessary, in a democratic society, to protect national security and public order, to prevent crime and protect the rights and freedoms of others, and to uphold the principle of the separation of parties and state; the ordinary law defines the exact circumstances under which parties may be banned. Among those constitutions which do address the question of political parties, *Portugal's* seems to adopt the most detailed approach, circumscribing the scope of freedom of association, especially in the political sphere, and listing most of the restrictions on political parties' activities, including their internal organisation. In *Austria* certain aspects of the law on political parties have a constitutional character.

The measures envisaged in the questionnaire were either *preventive* - ban on forming a political party or refusal to register it - or *repressive* - dissolution of the party. The fourth type of measure envisaged, prohibiting a party from standing for election, is not applied as such, at least in the states which answered the questionnaire, but may be a consequence of one of the other measures. Rather than examine these different measures separately, we shall break down our survey as follows.

The *first* and most detailed section will examine restrictions on political activities provided for in the legislation of the different states which answered the questionnaire. In the main such restrictions are connected with the activities or purposes of political parties and their membership or structure, tangible characteristics which will be examined in the second chapter of the first part of this report. The first chapter, shorter in length, will be devoted to restrictions of a formal nature, concerning such characteristics as name, number of members and registration procedures.

Following this look at legal provisions, the *second section* will examine the case law, for in order to appreciate the actual impact of measures restricting political parties' activities, it is essential to establish just how often they are applied.

Finally, a *third section* will take a brief look at the bodies competent in the matter.

I. Restrictions on political party activities in national law

A. Formal restrictions

These mainly concern the registration of parties and therefore those states where registration is actually required.

Regulations in this field frequently concern the *name* of the party. The idea is to avoid any risk of confusion. In *Lithuania*, for example, the legislation

provides for the registration only of parties or organisations whose names or symbols differ from those of existing political parties and organisations. In *Estonia* a party may be denied registration if their name resembles that of an existing party or one which existed in the past. Under *Canadian* law the name of a party, its abridged or abbreviated form or its logo must not be a source of confusion with those of a registered party or one whose application for registration is currently being processed. Where a name has not been registered, ordinary civil legislation on the names of legal persons precludes the use of names likely to cause confusion. The *Portuguese* constitution expressly prohibits the use by political parties of emblems likely to be confused with national or religious symbols. In *Slovenia* the names, abbreviations or symbols of political parties must not resemble those of state or regional institutions.

Some states have more restrictive rules on party names. In *Canada*, for example, party names may not include the word "independent". In *Portugal*, parties may not use names containing direct references to religions or churches "without prejudice to the philosophies or ideologies underlying their programmes". In *Slovenia* party names must not include the names of foreign states, parties or natural or legal persons. In *Argentina* political party names may not contain personal names or the words Argentine, national, international or derivatives thereof. These restrictions have no direct effect on the programmes and activities of the political parties concerned, and are therefore essentially formal restrictions. This is not the case when names are banned because they might affect the country's international relations, or because they are the expression or a potential cause of racial, class or religious unrest.

The creation or survival of a political party is sometimes subject to criteria concerning its *importance*. A party's importance may be measured in terms of its membership: under *Estonian* law a party must in principle have at least 1000 members; in *Latvia*, *Lithuania* and *Belarus* the minimum number of founders is fixed at 200, 400 and 500 respectively. In *Canada* parties which do not present candidates in at least 50 constituencies are struck off the register, but this obviously does not prevent members of these organisations from standing on an individual basis. In *Romania*, at the request of the Attorney General's department, the municipal court of Bucharest may dissolve a party for inactivity if it fails to present candidates in at least 10 constituencies, alone or as part of an alliance, in two successive election campaigns, or if it has held no general assembly for five years. In *Croatia* a party ceases to exist when it ceases its activities, or if the time lapse between two meetings of its governing body is twice as long as that provided for in its statutes. In *Hungary* a party may be dissolved if it has not functioned for at least a year and the number of its members has constantly been below the legal minimum.

Numerous national legislations regulate the *financing* of political parties, particularly where there are contributions from the public coffers. In the very great majority of states, however, failure to abide by these rules does not lead to the dissolution of the party concerned or to analogous measures. In *Albania* a party may be banned for failing to publish its financial resources or to submit them for inspection. In *Ukraine* systematic violation of the rules on party financing may lead to the dissolution of the party concerned. These rules are particularly strict; for example, political parties do not have the right to receive funds from foreign states or their citizens, international organisations, stateless persons or firms in which the state holds more than a 20% stake. Elsewhere, financial sanctions are applied: in *Argentina*, for example, the penalty is a fine twice the size of the illegal contribution.

Registration of political parties may be subjected to other formalities. In *Estonia*, for example, applications for registration must contain the party statute, the names, addresses and telephone numbers of party leaders, the political programme, a list of party members with their names and addresses and, where appropriate, the party emblem; *Canadian* legislation requires applications for registration to be signed by the party leader and to state the full name of the party, the name and address of the party leader, the address of its bureau, the names and addresses of the party executives and the names, addresses and signatures of 100 member voters.

B. Material restrictions

a. The material restrictions on political party activities, particularly those which may lead to prohibition of a party or the like, vary considerably from one country to another.

In some countries there is simply no legislation providing for such measures. *Belgium* is one example. In *Greece*, while the constitution stipulates that party organisation and activities must serve the free functioning of the democratic system, no sanctions are taken in the event of failure to comply. In *Austria* there is no provision for prohibiting or dissolving political parties, with the exception of the ban on the revival of the national socialist party and its organisations.

b. In numerous countries the legislation provides for sanctions against parties which pursue certain *aims* or adopt certain *behaviours*.

1. As we saw earlier, for example, the law may require parties actually to be active. In *Ireland* effective political activity is required: in order to be registered a party must be "a genuine political party, organised in the State or a part thereof" in order to contest a Dail election, a European election or a local election. According to the case law of the Supreme Court, the purpose of this rule is to avoid the proliferation of "bogus political parties with aims and objects far removed from the political sphere". Remember too, that the only consequence of registration of a political party is that its name may then appear alongside those of its candidates in national and European elections.

2. In those countries where the *general legislation on associations* applies, *groups with unlawful or immoral aims* are denied legal status, or may be disbanded by the judicial authorities, as in *Switzerland*, *Liechtenstein* or *Finland*, where an association may also be dissolved if it is in contradiction with its statutory aim. *Estonian* law makes provision for associations to be dissolved by a court if their aims or activities are in contradiction with constitutional order, the law, morality or the declared aims of the association, and also for carrying on profit-making activities, and in the event of bankruptcy. In *Spain* a political party may be dissolved for being a criminal association under the code of criminal law, particularly when its purpose is to commit, or help to commit a crime or if it is an armed group or a terrorist group or organisation. In *Azerbaijan* the constitution authorises the courts to put a stop to the activities of associations which violate the constitution and the law. Associations may also be disbanded for committing offences: such a provision exists in *Russian* law, but in accordance with the principle of proportionality, it is applied only in the event of serious or repeated offences.

3. When parties do carry on political activities, these may be subjected to certain restrictions. Steps may be taken against *liberticidal* parties. In *Albania* parties whose programmes or activities are anti-popular, anti-democratic or totalitarian are banned, as are those whose aims or activities are in contradiction with the fundamental principles of the rule of law and democracy, the sovereignty of the people, pluralism and equality of political parties, the separation of powers and the independence of the judiciary. Both the *Czech Republic* and *Slovakia* ban parties which try to use the constitution to prevent other parties from rising to power by constitutional means, or which undermine equality between the citizens. In *Germany*, when a party's aim or the behaviour of its members threaten to disrupt or overthrow the free, democratic constitutional order, it may be banned. Under the *French* constitution, political parties are required to respect democracy. In *Turkey* parties are not allowed to manoeuvre to bring a dictator to power. In *Italy* parties must employ democratic methods in their public activities and their dealings with other parties and movements. There is no requirement, however, for their political programmes to be democratic, although the Constitution prohibits the revival of the Fascist Party. In *Moldova* the law bans the formation and activity of parties which foster the use of authoritarian and totalitarian methods of government.

4. In a similar vein a number of states have bans on *extremist parties*. The *Portuguese* constitution, for example, prohibits fascist or racist parties. In *Poland* the parties banned are those with programmes based on the totalitarian methods and procedures of nazism, fascism and communism, and those whose programmes or activities are based on racial or nationalistic hatred. In *Austria*, where the national socialist party and its organisations were dissolved by a special law, they may not be revived.

5. *Fostering discrimination, hatred or violence* may also lead to the prohibition of a party. Examples abound. In *France* parties may be banned for fostering discrimination, hatred or violence towards a person or group of persons because of their origins or the fact that they do not belong to a

particular ethnic group, nation, race or religion, or for spreading ideas or theories which justify or encourage such discrimination, hatred or violence. The situation in *Spain* is similar, but as well as race and creed, sex, sexual leaning, family situation, illness and disabilities are also taken into consideration. Political parties which foster *racial hatred* are also prohibited, for example, by the constitutions of *Belarus* and *Ukraine*, while in *Azerbaijan* the legislation highlights racial, national and religious conflict. Under *Bulgarian* law parties may be prohibited both for pursuing fascist ideals and for fomenting racial, national, religious or ethnic unrest. The *Russian* constitution prohibits the creation and activities of social associations whose aims or deeds stir up social, racial, ethnic and religious discord.

6. In some countries the law prohibits political parties which are a threat to the *existence (Germany)* or the *independence (Ukraine)* of the state. The *French* constitution requires parties to respect national sovereignty. Other, more restrictive, texts merely protect the *territorial integrity* of the state (*Bosnia and Herzegovina, Bulgaria, France, Moldova, Russia, Slovakia, Turkey*). In *Albania* parties are not allowed to support an *anti-national programme or anti-national activities*; the exact scope of this rule is, of course, difficult to define. In *Argentina* party names with meanings which might affect the country's international relations are prohibited.

7. Legislation to protect the institutions sometimes goes beyond protecting the territorial inviolability of the nation and combating liberticidal parties. Merely challenging the established order in itself is not considered as a punishable offence in a liberal and democratic state. The type of *subversive activity* which is prohibited is essentially recourse to *violent means to overthrow the authorities in place* (this is the case in *Azerbaijan, Bulgaria, Estonia and Ukraine*, for example). In *Liechtenstein* the courts may disband organisations whose aims or methods are a danger to the state. The *Swiss* constitution provides for the prohibition of parties which are a danger to the state; it is generally agreed, however, that such extreme action should be taken only in times of war. The *Russian* and *Ukrainian* constitutions also prohibit political parties from jeopardising the security of the state. An added restriction in the *Belarus* constitution prohibits parties or other organisations whose purpose is to change the country's constitutional system.

8. In some of the former Soviet states the legislation is designed to avoid any confusion between a political party and the state. In *Slovakia*, for example, parties are refused registration when their statutes provide for them to carry on activities which are the exclusive preserve of the state authorities. In *Kyrgyzstan*, the constitution expressly forbids the merging of political parties and state bodies and submitting the activities of the state to the programmes and decisions of a party. The *Hungarian* constitution prohibits political parties from exercising political power directly or controlling an organ of the state; party members or leaders may not hold public office.

9. Certain states ban political party activities in specific social areas. In *Slovakia* the legislation is highly restrictive: it is possible, for example, to deny registration to a party which wants to carry on a political activity within the armed forces, or, more generally, in the work-place. Similar legislation exists in *Slovenia*. In *Azerbaijan* and *Kyrgyzstan* party activities are prohibited within the organs of the state. And in *Kyrgyzstan* members of the armed forces and people working in the national security and justice fields are not allowed to be members of political parties or even to make statements in support of political parties. In *Ukraine* this rule applies to the public sector in general.

10. The *Danish* and *Portuguese* constitutions, for example, permit the prohibition of parties which resort to or encourage *violence*, even if it is not subversive or racist. In *Albania* the law prohibits parties which draw attention to their aims and attempt to achieve them through violence, the use of weapons and other anti-democratic methods. The ban on *war-like propaganda (Belarus, Ukraine)* pursues a similar goal. In *Georgia* and *Latvia* parties may be prohibited for fostering violence through propaganda. We have already seen that several states can abolish parties for fostering hatred, particularly racial hatred; the purpose of such measures is notably to prevent acts of violence. In *Belarus* the constitution prohibits parties which foster social unrest, while the *Turkish* constitution, like the legislation of *Bosnia and Herzegovina*, provides for the dissolution of parties which encourage crime. Under the *Portuguese* constitution, associations may be formed provided that their aims are not in conflict with the country's criminal law.

11. Furthermore, *the general ban on the creation of private military or para-military formations* is sometimes expressly included in legislation on political parties (*Albania, Czech Republic, Estonia, Georgia, Slovakia, Ukraine*), or in the constitution (*Portugal*). In *Estonia* the mere fact that an organisation possesses weapons precludes it from acting as a political party.

c. Other restrictions which certain states place on political parties include:

1. Restrictions based on *nationality*. In *Latvia* political parties may operate only if at least half their members are Latvian nationals. Some states prohibit foreign political parties, ie parties set up by foreign citizens (*Moldova*), or which have their headquarters in foreign countries (*Azerbaijan, Belarus, Kyrgyzstan*). *Lithuania* and *Slovenia* also require party leadership bodies to be based on the national soil.

2. Some states prohibit the creation of parties around *regional* or territorial issues (*Georgia*), or parties whose names or programmes hinge on regional issues (*Portugal*).

3. In *Kyrgyzstan* the law does not permit the existence of parties founded on religious principles, while in *Bulgaria* the constitution proscribes not only parties founded on religious principles, but also those founded on ethnic or racial principles.

4. In certain countries, such as *Hungary*, only natural persons may be members of political parties.

d. Finally, prohibition or analogous measures may also be based on the *form of organisation* of the party.

1. First of all, several states require the party's *internal structure and functioning to be democratic (Finland, Spain)*. In the *Czech Republic* and *Slovakia* party statutes must be democratic and their organs must be democratically established. In *Albania* freedom of expression must also be guaranteed within the party, as well as people's right to join and leave the party as they please. The *Portuguese* constitution requires political parties to be run according to the principles of transparency, democratic organisation and management and participation by all their members. In *Argentina* parties must be democratic, in so far as their bodies and the candidates they present for election must be periodically elected; a party organisational structure on which minorities were not represented, for example, would be anti-democratic.

2. Finally, *secret* organisations may be prohibited by the constitution (*Latvia, Moldova, Romania*) or by law (*Albania, Poland*).

II. Implementation of restrictive measures concerning political parties

The above information shows that there are numerous legal means of prohibiting the activities of political parties. What we now have to establish is how these means are used in practice. In so doing, we shall refer only to laws which, to all intents and purposes, are actually in force today, not to those which have been repealed.

In many states no legal restrictions whatsoever on the activities of political parties have been applied in the recent past, and in those cases where sanctions were envisaged, they were never actually applied. This goes without saying in states where there are no legal provisions for dissolution or prohibition (eg *Belgium, Greece*, and *Austria*, apart from this country's ban on national-socialist organisations). In other states a liberal interpretation of constitutional provisions designed to protect freedom of association makes recourse to such drastic measures virtually impossible in peace time (*Switzerland*). Various other long-standing democracies have not had to apply such measures for several decades: *Finland*, since the 1930s, *Liechtenstein*, since 1945, *Denmark*, since 1953, *Germany*, since 1956, and *Japan*. The two cases which arose in *Germany* concerned an extreme right-wing party (in 1953) and the former Communist Party (in 1956).

In a number of other states parties have been denied registration, but mainly for failure to comply with formal criteria. This has happened in *Ireland* and

Canada, where parties cannot be penalised for substantive reasons: in *Canada*, for example, one party was struck off the register for failing to present at least fifty candidates in a general election. In *Latvia* one organisation was denied registration for violating the foundation procedure, eight were struck off the register for having insufficient members, and one party was suspended for failing to submit a financial report, but the suspension was lifted when it subsequently submitted its report. In *Lithuania* the only case of denial of registration was the result of failure to observe the registration procedure; in *Croatia* too there has been just one case of non-registration, for formal reasons. In *Spain* parties have incurred sanctions only for using names likely to be confused with existing names, but no political party has ever been banned, in spite of the relatively large number of grounds for dissolution provided for in the legislation.

Where parties have been prohibited or dissolved for substantive reasons in the relatively recent past, they were generally extremist movements with few members (*France, Italy*). In *Slovenia*, however, one party which campaigned for the return of people who emigrated from the Slovene part of Istria after the second world war was considered unconstitutional for violating the principle of equality and treating people differently according to the region from which they had emigrated. Finally, *Turkey* reported that several political parties had been disbanded because they were a threat to national security and territorial integrity or to the secularity of the state. The most prominent recent case was the dissolution of the "Prosperity" party.

As a general rule, therefore, the small number of cases where measures as extreme as the prohibition or dissolution of a political party have been taken shows the importance attached to the principle of freedom of association, and consequently to the proportionality of the sanctions imposed on political parties, which are considered as an essential cog in the democratic machine.

III. Competent authorities

Although the questionnaire did not directly address questions of procedure, the responses received provided some interesting information about the bodies empowered to take the kind of measures envisaged in this study. In spite of the differences in legislation from one country to another, the questionnaire revealed one thing they had in common: the prohibition of political parties and analogous measures are the responsibility of the *judicial authorities*. Generally speaking such matters are dealt with directly by the courts, the authority of the judge being essential to avoid interference with party activities for purely political motives.

Where cases are referred, in the first instance, to non-judicial authorities, they usually concern registration of parties. In *Albania*, for example, the competent authority is the Ministry of Justice, while in the *Czech Republic* and in *Slovakia* it is the Ministry of the Interior, in *Canada* the Director General of Elections, and in *Ireland* the Clerk of the Dail. Rulings denying registration in Ireland may be appealed before a special commission made up of a High Court Judge, the President of the Dail and the President of the Seanad or Senate; the partly political composition of this body is explained by the fact that the registration of political parties in Ireland is a pure formality, and refusal to grant registration does not really affect freedom of association. In *Croatia* the Ministry of Public Administration is empowered to certify that a party has ceased its activities.

In many states, however, the registration authority is a court. In *Bulgaria*, it is the Sofia city court; in *Estonia*, the ordinary courts; in *Poland*, the Warsaw provincial court, although in the event of doubt as to the conformity of a party's aims or principles with the constitution, this court must ask the constitutional court for an opinion, which is binding.

The dissolution or prohibition of a party may be the exclusive prerogative of the constitutional court, its decision being final. This is the case in *Azerbaijan, Croatia, Portugal, Slovenia* and *Turkey*. In some states there is co-operation between the ordinary courts and the constitutional court: examples are *Poland*, as we have already seen in respect of registration, and *Bulgaria*, where the Supreme Court is empowered to order the dissolution of a party at the suggestion of the Attorney General, while the constitutional court deals with litigation concerning the constitutionality of the parties. In *Slovakia* the Supreme Court rules in the first instance, at the request of the Attorney General, subject to appeal before the constitutional court. In the *Czech Republic, Belarus* and *Kyrgyzstan* too, the competent court is the Supreme Court. In other states the ordinary courts decide, and there are several levels of jurisdiction (eg: the federal courts in *Argentina*, the administrative courts in *Estonia* and *Liechtenstein*, or the ordinary courts in *Switzerland*).

Temporary suspension measures are sometimes taken by the government (in *Denmark*) or the Ministry of Justice (in *Kyrgyzstan*, and also in *Lithuania*, except during election campaigns, when a decision of the Vilnius district court is required), but needless to say such measures are subject to appeal in court. In *France* the dissolution of a political party is pronounced by decree of the President of the Republic adopted in a meeting with the Cabinet, and subject to appeal in the courts.

Conclusion

The diversity of the legal provisions governing party activities in the countries which answered the questionnaire makes it difficult to define a European standard. A number of common features do stand out, however:

- a. Party activities everywhere are guaranteed by the principle of freedom of association.
- b. The fact that certain measures are lacking in many, if not most, of the states concerned leads us to conclude that they are not essential to the smooth functioning of democracy. Examples include:
 - registration of political parties: no registration is required, even as a formality; this does not mean, however, that candidates for elective office do not have to meet certain formal requirements;
 - sanctions, including prohibition and dissolution, against political parties which fail to abide by certain rules. This does not, of course, preclude the punishment of criminal behaviour by individuals in the context of political activities.
- c. Even in those states which do provide for sanctions against political parties, there is still considerable diversity. The same situations are not sanctioned in the same way or with the same severity in the different states.
- d. The fact that it is so difficult - perhaps even impossible - to define behaviours which would generally warrant such serious sanctions as the prohibition or dissolution of a political party highlights the need to apply the principle of *proportionality* when enforcing legislation restricting freedom of association.

The way in which the often vast legal arsenal governing the activities of political parties is actually applied in practice reflects a genuine determination to respect this principle. There are very few democratic states in which the sanctions covered by the questionnaire have actually been imposed on political parties in the recent past other than for formal reasons.

With the exception of restrictions of form, particularly those designed to avoid confusion between party names, measures designed to prevent the activities of political parties - which do not exist at all in certain states and are reserved in others to wartime situations - should be permitted only in exceptional circumstances. The extreme restraint shown by the vast majority of national authorities confirms this.

- e. Finally, a recurrent feature in the national legislations studied was the guarantee of being heard by an independent and impartial judicial authority. This is a clear sign of concern to keep something as politically important as the fate of political parties out of the control of the executive or administrative authorities, whose impartiality is often open to doubt.

