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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

EXPLANATORY REPORT

ON GUIDELINES

OF PROHIBITION AND DISSOLUTION

OF POLITICAL PARTIES

AND ANALOGOUS MEASURES

I. Introduction

1. 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.

2. This comparative survey of the legislation and practice in the states participating in the Venice Commission's work identified common values in European constitutional heritage in this field, with a view to improving information on the subject and, where appropriate, learning from solutions implemented abroad. It was 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.

3. The Commission received replies from the following countries: Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, 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).

4. The Commission adopted the report on prohibition of political parties and analogous measures (CDL-INF (98) 14) at its 35th plenary meeting in Venice, 12-13 June 1998. Considering the importance of the issue the Commission decided to continue the study of this problem with a view to drafting guidelines in this field.

5. The Sub-Commission on democratic institutions at its 6th meeting (Venice, 10 December 1998) appointed a Rapporteur to draw up preliminary draft guidelines on the prohibition of political parties and analogous measures for its first meeting in 1999.

6. The draft guidelines on the prohibition of political parties were discussed by the Sub-Commission on democratic institutions during its meeting on 17 June 1999. Members of the Sub-Commission introduced a number of changes in the text prepared by Mr Alexandru Farcas and revised by the Secretariat on the basis of comments by Messrs Kaarlo Tuori (Finland) and Joseph Said Pullicino (Malta). In addition, the Secretariat was asked to prepare an explanatory memorandum to the guidelines.

II. Explanatory report to guidelines on the prohibition of political parties and analogous measures

The Venice Commission report on the prohibition of political parties and analogous measures revealed that there is a wide variety of approaches to this issue in different States. The aim of the guidelines on the prohibition of political parties and analogous measures is to establish a set of common principles for all member States of the Council of Europe and other countries, sharing the same values, which are reflected in the European Convention on Human Rights. The European Convention on Human Rights appears to be not only an effective instrument of international law but also “a constitutional instrument of the European public order”¹. Therefore, the best way to explain certain provisions of the guidelines is by reference to the relevant articles of this particular Convention.

¹ *European Court of Human Rights., case Loizidou v. Turkey (Preliminary objections), judgement of 23 March 1995, para.75.*

I

1. The right to associate freely in political parties forms an integral part of the freedom of association protected under Article 11 of the European Convention on Human Rights² in the following terms:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others [...]

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or the administration of the State.”

2. Although this Article does not mention specifically freedom to form political parties but freedom of association in general, the European Court of Human Rights has repeatedly applied this provision in cases directly related to freedom of association within the framework of political parties³.

3. The right to receive and impart information without interference by public authority and regardless of frontiers is rooted in Article 10 of the European Convention on Human Rights providing that:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

4. At present the right of freedom of association in the context of the Convention is interpreted, in most cases, together with Article 10. In its case law the European Court of Human Rights established that:

“Notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and freedom to express them is one of the objectives of the freedoms of assembly and association as

² The Article 22 of the International Pact on civil and political rights foresees analogous provisions.

³ *KPD v FRG* No 250/57, YB 222 (1957); *United Communist Party of Turkey and Others v. Turkey* (1998) and *the Socialist Party and others against Turkey* (1998).

enshrined in Article 11. That applies all more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy”⁴.

5. Whereas freedom of association, including freedom to form political parties must be regarded as one of the corner stones of pluralist democracy, restrictions to this right may be justified in a democratic society, in accordance with para.2 of Article 11. Moreover, Article 17 of the European Convention allows a state to impose a restraint upon a programme a political party might pursue. It provides:

“Nothing in this 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 of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

6. Therefore, the usual practice in a number of European States requiring registration of political parties, even if it were regarded as a restriction of the right to freedom of association and freedom of expression, would not *per se* amount to a violation of rights protected under Articles 11 and 10. On the other hand any restriction must be in conformity with principles of *legality* and *proportionality*.

II

7. No State can impose limitations based only on its internal legislation, ignoring its international obligations. This rule should be applied in normal times as well as in cases of public emergencies. This approach is confirmed by the practice of the European Court on Human Rights⁵.

7. The European Court of Human Rights upheld on several occasions in its jurisprudence that political parties are a form of association essential to the proper functioning of democracy and that in view of the importance of democracy in the European Convention on Human Rights system, an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions.

8. Any derogation to the European Convention should be made in respect of the provisions of Article 15 of the European Convention on Human Rights, that provides that they should not be in breach of other international obligations of the State (para.1) and should be of a temporary duration (para.3).

III

9. As mentioned in the previous paragraph, prohibition or dissolution of political parties can be envisaged only if it is necessary in a democratic society and if there is concrete evidence that a

⁴ *The case of the Socialist Party and others against Turkey (1998), para.41.*

⁵ *Idem, para.50.*

party is engaged in activities threatening democracy and fundamental freedoms⁶. This could include any party that advocates violence in all forms as part of its political programme or any party aiming to overthrow the existing constitutional order through armed struggle, terrorism or the organisation of any subversive activity.

10. Most contemporary constitutions establish mechanisms of protection of democracy and fundamental freedoms. In numerous states the general ban on the creation of para-military formations, parties that are a threat to the existence of the state or its independence, is expressly included in legislation on political parties or in the constitution⁷.

11. A party that aims at a peaceful change of the constitutional order through lawful means cannot be prohibited or dissolved in the light of freedom of opinion. Merely challenging the established order in itself is not considered as a punishable offence in a liberal and democratic state. Any democratic society has other mechanisms to protect democracy and fundamental freedoms through such instruments as free elections and in some countries through referendums when it can express its attitude to any proposal to change the constitutional order in the country.

IV

12. No political party should be held responsible for the behaviour of its members. Any restrictive measure taken against a political party on the basis of the behaviour of its members should be supported by evidence that he or she acted with the support of the party in question or that such behaviour was the result of the party's programme or political aims. In the case that these links are missing or cannot be established the responsibility should fall entirely on the party member.

V

13. The prohibition or dissolution of a political party is an exceptional measure in a democratic society. If relevant state bodies take a decision to seize the judicial body on the question of prohibition of a political party they should have sufficient evidence that there is a real threat to the constitutional order or citizens' fundamental rights and freedoms.

14. As was indicated in part III of this report the competent bodies should have sufficient evidence that the political party in question is advocating violence (including such specific demonstrations of it such as racism, xenophobia and intolerance), is clearly involved in terrorist or other subversive activities. State authorities should also evaluate the level of threat to the democratic order in the country and whether other measures, such as fines, other administrative measures or bringing to justice individual members of the political party involved in such activities, could remedy the situation.

15. Obviously, the general situation in the country is an important factor in such an evaluation. At the same time, standards of the developing European democracy practice must also be taken into consideration as was already observed in previous paragraphs, even in the case

⁶ *European Court of Human Rights. Case of Sidepoulos and others v. Greece (57/1997/841/1047), para.46.*

⁷ *Report of the Venice Commission on prohibition of political parties and analogous measures, adopted at its 35th plenary meeting, Venice, 12-13 June 1998, CDL-INF (98) 14, pages 5 – 8.*

of a state of emergency, international obligations of the State should be observed and any measures of exceptional character should have a clearly defined temporary effect in compliance with Article 15 of the European Convention on Human Rights.

VI

16. Both points 6 and 7 of the guidelines deal with the role of the judiciary in prohibition or dissolution of political parties, therefore they can be treated together.

17. The role of the judiciary is essential in prohibition or dissolution of political parties. As is clear from the Venice Commission report, there can be different jurisdictions competent in this field. In some states it lies within the sole competence of Constitutional courts whereas in others it is within the sphere of ordinary jurisdictions.

18. Regardless of the judicial authority competent in this field the first stage should be to find unconstitutionality in the activities of a political party. The court should examine the evidence presented against a political party and define whether the latter has committed a serious offence against the constitutional order. If this is the case, the competent jurisdiction should decide on the prohibition or dissolution in a procedure offering all guarantees of due process, openness and fair trial {and in respect of the standards established by the European Convention on Human Rights}.