HATE PARTIES: LIMITS ON THE FREEDOM OF EXTREME POLITICAL PARTIES

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ABSTRACT

Hate Parties: Limits on the Freedom of Extreme Political Parties

This thesis deals with the question of dissolution of extremist political parties at the European Court of Human Rights (ECtHR). Liberal democracies are characterised by freedom and pluralism. On the one hand, one could say that democracy is precisely about tolerating all opinions in politics; on the other, one could also say that democracy should only tolerate political parties to the extent that they do not jeopardise its own foundations. The ECtHR has to face the new paradigm in extremism that resulted in intolerant fringe parties replacing totalitarian parties. While the Court delivered a substantial number of judgments in party dissolution cases, yet it remains unknown what the oft-repeated high protection for freedom of association will mean in difficult dissolution cases in the future. The present study rethinks the ways the Court should interpret party dissolution cases to meet the challenge of new extremism. First, the thesis draws attention to the various aspects of a party's activities that the Court should observe in dissolution cases. Second, the thesis further argues that the Court should revitalise the definition stage of adjudication instead of uniquely relying on proportionality and balancing. Any dissolution case should start from defining what political parties are in a normative sense. Third, balancing understood as principled reasoning, should follow only after the definition. Drawing on the jurisprudence on articles 10, the thesis tries to rethink the balancing process in party dissolution cases of new extremist parties. It argues that because the legitimacy of the democratic government depends in part on the respect for political rights, chief amongst them the freedom of association, only compelling reasons and extraordinary circumstances may justify party dissolution. Finally, the thesis will outline such extra reasons with the help of other jurisdictions.

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TABLE OF ABBREVIATIONS

ECHR	European Convention on Human Rights, also referred to as 'the Convention'
ECtHR	European Court of Human Rights
ETA	Euskadi Ta Askatasuna (Basque Homeland and Freedom)
HEP	Halkın Emeği Partisi (People's Labour Party)
IRA	Irish Republican Army
KPD	Kommunistische Partei Deutschlands (Communist Party of Germany)
PKK	Partiya Karkerên Kurdistan (Kurdistan's Workers Party)
TBKP	Türkiye Birleşik Komünist Partisi (Turkish Communist Party)

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PART I

OUTLINING THE CHALLENGES AND SHORTCOMINGS OF THE ECTHR JURISPRUDENCE ON FREEDOM OF ASSOCIATION

CHAPTER ONE

INTRODUCTION: THE CHALLENGE

Tolerance poses the age-old question of its limits: should a democratic society tolerate its intolerant members? The dilemma is especially salient in politics: should intolerant political parties in a democracy be left to exist freely and eventually stand against democracy itself? Both the negative and the positive answers have some intuitive appeal. Liberal democracies are characterised by freedom and pluralism. On the one hand, one could say that democracy is precisely about tolerating all opinions in politics; on the other, one could also say that democracy should only tolerate political parties to the extent that they do not jeopardise its own foundations.

Following Karl Popper's work, this riddle came to be known as the 'paradox of democracy'. As Popper wrote in *Open Society and Its Enemies*: 'What if it is the will of the people that they should not rule, but a tyrant instead?'[1] If democracy means the rule of the people or the toleration of all political parties and political options, then democracy can logically lead to its self-destruction by the people (or a majority of them) voting for anti-democratic parties. To put it bluntly: the animating fear behind the paradox of democracy seems to be that anti-democratic majorities vote into power political parties

[1] Karl Popper, *Open Society and Its Enemies* (1st edition, vol 1, Routledge & Kegan Paul Ltd, 1945) 123.

that, once in power, would do away with democracy itself. In the light of political events in the 20th century, this fear is borne out by historical experience. Extreme anti-democratic parties were voted into parliament and then into power during the first part of the century. The long shadow of Nazi Germany makes this fear about democracy feel painfully real.

The paradox of democracy is present in court rooms when party dissolutions are legally challenged. In democracies, freedom of association is a highly protected basic human and constitutional right. But it is not by any means an absolute right, and can be limited in virtually all legal systems. In Germany, where a totalitarian party made its way to power through electoral victories, the post-war constitution outlaws parties that endanger the free and democratic constitutional order. Through Article 21 of the Basic Law, two parties were dissolved at the dawn of post-war Germany, the Communist and the Nazi parties. They were seen as antidemocratic, as once in power they would destroy democracy.

1.1 NEW PARADIGM OF ANTIDEMOCRATIC PARTIES

The paradox of democracy certainly remains relevant today. Fringe parties exist in all liberal democracies. As Downs writes, 'Germany, France, the United Kingdom, Belgium, Denmark, Austria, Sweden, and the Switzerland are among those countries where this central paradox of democracy – whether and how to tolerate the intolerant – still animates contemporary politics.'[2] The *Front National* in France, the British National Party, the *Vlaams Blok* or the *Front National* in Belgium, the Freedom Party in Austria, the Party for Freedom in the Netherlands or perhaps the Golden Dawn in Greece occupy the same

[2] William M. Downs, *Political Extremism in Democracies* (Palgrave Macmillan, 2012) 3.

place on the fringe of the political spectrum that the Nazis did in their time.[3] It is difficult to neatly categorise what falls into the category of 'extremist' or 'antidemocratic' parties, which is more of a concern for political science than for human rights law. It is enough for the purposes of this thesis that these parties subscribe to some form of intolerant agenda such as anti-immigration, xenophobia, Islamophobia or nationalism.[4] Anti-immigration and xenophobic parties are of further significance in politics nowadays because immigration policies and multiculturalism in Western societies have been standing at the heart of political debates for decades. These parties challenge such core democratic values as tolerance or equality. Some authors, such as Rosenblum add religious fundamentalist parties to the category of antidemocratic parties. She notes that 'parties based on religion, ethnicity, and cultural community are as ardent and potentially uncompromising as parties avowing radical, antidemocratic political ideologies.'[5]

However, the new extreme parties that occupy the fringes of the political spectrum nowadays, as intolerant and despicable as they might be, are hardly analogous to totalitarian ones. Their dislike of minorities or the liberal state, is beyond doubt. But they do not subscribe to full-blown anti-democratic ideologies like Nazis and communists did. This change can be seen as a new paradigm of extremism. The key feature of the new extremism is the lack of full-blown anti-democratic ideology. Of course antidemocratic parties have not become tolerant mainstream parties. But the new paradigm has legal implications for the dissolution of political parties. The real fear behind the paradox of

[3] ibid 16.

[4] A note on terminology: by antidemocratic, intolerant, fringe or extremist parties we invariably mean those parties that could be described under the new paradigm. These labels are set in opposition to totalitarian parties.

[5] Nancy Rosenblum, 'Banning Parties: Religious and Ethnic Parties in Multicultural Democracies' (2007) 1 Law & Ethics of Human Rights 1, 23.

democracy, that democracy could be destroyed from within, should be qualified with regard to the new paradigm parties. As Rosenblum writes:

> '[t]he reasons for banning parties have become more complex than these familiar formulations of the "paradox of democracy". They were invented when democracies were haunted by the European interwar experience and the catastrophe of National Socialism, compounded by Bolshevism. They were responses to mass parties gone wild on the one hand and to the suppression of party democracy on the other. The justifications for banning parties with overtly antidemocratic political ideologies, fascism or communism, cannot be neatly applied to Islamic parties or parties defending or attacking benefits to ethnic groups. The standard antidemocratic criteria are puzzling as applied to inciting hatred, for example, or opposition to secularism.'[6]

Historical analogies with totalitarian parties may no longer be available to substantiate the dissolution of political parties of this new paradigm.

1.2 WHAT HUMAN RIGHTS CHALLENGES ARISE AS A CONSEQUENCE OF THE NEW PARADIGM?

The new paradigm of anti-democratic parties poses a concrete challenge for courts applying human rights law, such as the European Court of Human Rights (ECtHR). Any court should be in sync with its surrounding world so as to avoid becoming irrelevant. Courts cannot afford to be complacent and disregard new phenomena in society. The new paradigm of antidemocratic parties is just such a new phenomenon that marks a departure from previous times when totalitarian parties represented the antidemocratic parties in politics. Courts' legitimacy partly depends on the relevance of their decisions for society. The ECtHR is running the risk of not taking this new paradigm into account if it fails to distinguish amongst various extremist parties. *The concrete challenge for the ECtHR*

[6] ibid 23.

consists in defining the standard by which it distinguishes fringe parties protected by freedom of association and those which are not protected.

The ECtHR case law contains a large pool of party dissolution judgments.[7] Many cases involved Turkish party dissolution measures that reflected sheer arbitrariness towards minority parties and those leftist parties that contested the constitutional arrangement of the country.[8] These parties could hardly be labelled 'antidemocratic'. Although some recent cases such as *Refah Partisi v. Turkey*[9] or *Batasuna v. Spain*[10] concerned the problem of antidemocratic parties, none of them fall clearly into the category of a new paradigm party. Therefore there is no clear precedent for such party dissolution. But one recent freedom of expression judgement, *Féret v. Belgium*[11], is instructive about the Court's approach. It hints that the Court has difficulties in living up to the challenge of the new paradigm.

Daniel Féret was the leader of the Belgian far-right party and a member of parliament. As a candidate he distributed xenophobic leaflets during his re-election campaign. Similar writings also featured on the web in the form of the party's programme. Subsequently he was charged and found guilty of fomenting hatred against immigrants. The impugned speeches included 'Belgians and Europeans first!' or calling Muslim families by the derogatory '*le couscous clan*'. These were clearly xenophobic or racist expressions. They also clearly represented the party's and the applicant's political

[7] Overall there were fourteen dissolution cases. This count does not include admissibility decisions.

[8] For a comment on the Turkish party dissolution cases and the ECtHR see Koçak and Örücü, "Dissolution of political parties in the name of democracy: cases from Turkey and the European Court of Human Rights" (2003) 9 E.P.L. 399.

[9] *Refah Partisi (the Welfare Party) and others v Turkey* App no 41340/98, 41342/98, 41343/98, 41344/98 (ECHR, 13 Feb 2003). For a case analysis see Olbourne, 'Refah Partisi (The Welfare Party) v Turkey' (2003) 4 E.H.R.L.R. 437.

[10] *Féret v Belgium* App no 15615/07 (ECHR, 10 Dec 2009).

[11] *Herri Batasuna and Batasuna v Spain* App no 25803/04 and 25817/04 (ECHR, 6 Nov 2009)

stance on the key issue of immigration policy.[12] The ECtHR approved of the judgment of the national courts with the narrowest margin possible (4:3) by declaring that there was no violation of article 10 (freedom of expression). The dissenting judges highlighted that the Court's blanket ban on intolerant speech had gone as far as impeding the democratic debate. In the words of the dissenters: 'freedom of expression should not be sacrificed for the politics of non-discrimination without due consideration to the pressing reasons.'[13] Immigration policy as a major political issue has gained huge importance in European politics in the last couple of decades, and anti-immigrant parties have made their entry into parliaments. *Féret* laid bare the challenge that intolerant far-right politics poses for the Court. The rationale of the Court in *Féret* amounts to a blanket ban on intolerant political speech.

Does the ECtHR jurisprudence meet the challenge of providing a good standard for dissolution of parties under the new paradigm of extremism? At first sight, one could give two wrong answers. The first answer consists in adopting the standard of *Féret* to party dissolution cases. It would mean an extremely low standard for dissolution: any fringe party could be banned at any time. The dissenters in *Féret* were criticising this blanket ban on intolerant speech. This answer certainly has its roots in the case law. In intolerant or hate speech cases, the Court repeatedly held against any applicant on the ground that the Convention does not cover intolerant speech because it effectively aims at the destruction of others rights.[14]

[12] In order to see that political speech and party-dissolution cases are related, one only has to look at Belgium again. In 2004 the Belgian authorities dissolved the Vlaams Blok, the fiercely anti-immigration party, for spreading hate against immigrants. For a discussion of Vlaams Blok see Downs (n 2) 85-6.

[13] See the dissent of Judge Sajó in *Féret* (only available in French, translations are from the author of the thesis).

[14] The analogy with hate speech will be discussed at chapter 2.

To put it bluntly: this first answer makes antidemocratic parties fair game for dissolution by authorities because they do not deserve any Convention protection under any circumstances. Chapter two will trace this thread in the case law to the influence of militant democracy. This answer is deficient because it does not square with reality, it ignores the change the new paradigm represents and it fails to carve out any protection for political parties by applying a blanket ban.

The second answer to the question of where to set the standard, consists in holding that the ECtHR's protection of antidemocratic parties should be confined to cases where the authorities' dissolution is based on flimsy or erroneous evidence. This answer also has ties with the case law. In numerous pro-Kurdish party dissolution cases the Turkish authorities falsely imputed facts and views to various parties to substantiate their dissolution. This was enough to declare a violation of freedom of association in a number of cases. But this way of answering the challenge is insufficient because it tries to evade the normative questions and fails to explain why the Court's review should be confined to checking whether the reasons for the dissolution were accurate or sufficient.

The proposition of the thesis is that neither of these answers are satisfactory, nor do they live up to the concrete challenges facing the ECtHR. But the case law can be reinterpreted in a way that the challenge could be met.

1.3 PLAN OF THE THESIS

Part I of the thesis will examine critically the current jurisprudence. Chapter two will outline the case law and the two characteristic features of the current course of adjudication in dissolution cases. It will show that, on the one hand the court heavily

relied on reason-checking analysis (2.1), and on the other hand the Court evoked militant democracy (2.2) when it comes to normative questions. Chapter three will demonstrate why these characteristics are shortcomings (3.1) and leave the Court without resources for meeting the challenge (3.2). The final chapter of Part I will raise two objections (4.1, 4.2) based on the margin of appreciation that if successful would prove that the level of protection of the current case law is sufficient.

Part II will argue nonetheless that the ECtHR jurisprudence can be reinterpreted in a way that gives a better answer. Chapter six will map the three aspects of activities of a party – the goal (6.1), the means (6.2) and the impact (6.3) – that the Court should scrutinise. Chapter seven will attempt to use the definitional stage of adjudication (7.1) to build on the existing case law (7.2) a concept of a political party capable of defining the limits of freedom of association (7.3). Chapter eight will show the place of proportionality analysis (8.1), with special regard to what balancing should mean (8.2) in party dissolution cases. It will draw on the analogous hate speech jurisprudence (8.3) but ultimately demonstrate the limits of analogy (8.4). Finally, the last chapter shall provide some extra or contextual reasons that may override the high protection of political parties and justify party dissolutions (9.1, 9.2).

CHAPTER TWO

THE CURRENT CASE LAW IN PARTY DISSOLUTION CASES

The ECtHR found violations of article 11 in the vast majority of dissolution cases. Even at first glance it appears appropriate for a human rights court to consistently defend unpopular ethnic minorities such as the Kurds in Turkey or the Macedonians in Bulgaria. Dissolution of parties advocating the rights of ethnic minorities smacks of arbitrariness and raises the dark shadow of the tyranny of the majority. The Court rightly sided in all these cases with the applicant parties. The same may be thought about the group of cases one may label the modern communist party cases[15]. The Court defended the political parties subscribing to communist ideology. These verdicts on minority parties and communist parties seem to reflect the core value of pluralism.

The ECtHR's jurisprudence is characterised by the Court's reliance on what will be called the reason-checking inquiry and the influence of militant democracy. This chapter aims at substantiating this claim. Later on, the next chapter will draw on the findings of this chapter to link the new challenge of extremism with the ECtHR's jurisprudence.

[15] *United Communist Party of Turkey v Turkey* App no 19392/92 (ECHR, 30 January1998), *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania* App no 46626/99 (ECHR, 3 February 2005), *Tsonev v Bulgaria* App no. 45963/99 (ECHR, 13 April 2006)

2.1. RELIANCE ON REASON-CHECKING

The European Court of Human Rights applies the proportionality analysis as a method of adjudication in its judgments. Proportionality analysis certainly does not automatically resolve the substance of the case, but rather it gives a structure of reasoning for courts that may take various forms in different cases. According to the powerful metaphor of Mathias Kumm, the point of proportionality analysis is the 'Socratic contestation' in the quest for a reasonable justification.[16] He wrote:'the proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy. Or to put it another way: it provides a structure for the justification of an act in terms of public reason.'[17] The point of the inquiry is to find out whether the state authority discharged its duty of justification. The Court uses the same method to find out whether the dissolution of a party amounted to a violation of freedom of association. Conversely an academic report on proportionality called the way the test is administered in article 11 cases 'a unique version of proportionality'. The report concluded that its application resulted in enhanced protection of the right to free association: 'the Court required "convincing and compelling reasons" for any limitation' of freedom of association 'and a much stronger standard of review than is typical for proportionality.'[18] This high level of protection may explain why the Court found violation of article 11 in thirteen out of fifteen party dissolution cases. But how does the proportionality analysis actually work in party dissolution cases?

[16] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 (2) Law & Ethics of Human Rights 142.

[17] ibid 143.

[18] Benjamin Goold, Liora Lazarus and Gabriel Swiney, 'Public Protection, Proportionality, and the Search for Balance' (Ministry of Justice Research Series 10/07, September 2007) 45.

Proportionality analysis requires a multiple steps test. The first step is to ask whether the aim the restriction serves is a legitimate one; the second question is whether the restriction is rationally connected to that aim; the third step concerns the necessity stage where the question is whether there was any equally effective but less restrictive measure; and the final or balancing stage is the proportionality in the strict sense.

Some observations should be made on the way proportionality is really administered in party dissolution cases. Firstly, all party dissolution cases get decided at the last, balancing stage. It is not just the case that no dissolution measure was found violating article 11 solely on the ground of legitimate aim alone. Rather, it is the case that none of the first three stages carried any weight in the adjudication process. It is telling that in *Partidul Comunistilor v. Romania* the Court skipped the first three steps entirely and started the reasoning right away at the balancing stage or in Strasbourg parlance what is necessary in a democratic society. Therefore the last stage of proportionality analysis carries particular importance.

The Court offered an abstract description of its role in deciding human rights cases in the first dissolution decision.[19] The Court stresses that it did not wish to take the role of the national court as a general matter. Though it also added that its review does not have to 'confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was

[19] *United Communist Party* [47].

"proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".'[20]

It is important that the Court clarified that the standard of scrutiny need not coincide with the standard of reasonableness. Although the Court did not attempt to make clear when the Court's review should go beyond reasonableness. But it did clarify what the aims of the proportionality method were. '[T]he Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.'[21] As a consequence two separate goals seem to emerge from the proportionality analysis.

The first is a normative one: it purports to know whether the dissolution decision violates the principles of article 11. The second one is not normative but factual: it purports to find out whether the reasons buttressing the dissolution decision are 'relevant and sufficient'. For this the second inquiry will be termed reason-checking. It is akin to checking the accuracy of the reasons offered by government. Note the two goals are of a different nature. Though one may object to the distinction by pointing out that evidently all reason-checking involves comparison, standards and judgement. A fact should be checked in relation to a standard of, for example, accuracy. Hence, the objection goes, this activity equally needs to involve normative reasons. That is true, but there is a way to differentiate between the two inquiries. Government has the basic duty to prove its case. The first exercise in reason-checking could be seen as holding the government's reasons to a simple standard of reasonableness or of accuracy. Hence this inquiry is a minimalist

[20] ibid para 47.

[21] ibid [47].

check. What this inquiry really aims at is to see whether the government took circumstances into account in the correct way: properly weighed relevant circumstances and discarded irrelevant ones; appropriately considered important evidence and left out unimportant evidence. This exercise stands in contradistinction to full normative reasoning that is not limited to checking the reasonableness of the government evidence. It aims rather at finding out whether the decision violates the moral principles that Convention rights embody. Or even more interestingly, it aims at finding out those moral principles embodied in freedom of association that are relevant and should apply.

2.1.1 Closer look at the reason-checking court

The dissolution judgements embody an amalgam of both inquires. But in most cases the reason-checking exercise dominates the proportionality analysis. Therefore the outcome of the reason-checking inquiry will tell us if there was a violation of article 11.

It is impossible to take stock, a priori, of all the potential circumstances that a national court should consider. Nonetheless, the case law offers some recurring reasoning that is typical of the reason checking inquiry.

The first such question pertains to the timing of the dissolution: when was the party dissolved? In practice there are two time slots when a political party can be dissolved: at the time of its registration (if there is such a legal requirement), and once the party is already up and running. The Court turned out to be highly suspicious of substantiating a ban merely on the party's programme at the stage of its registration. Thus, the state's margin of appreciation is the narrowest at the registration phase. It held in *Tsonev v. Bulgaria*:

> [t]he party's programme could hardly have been belied by any practical action it took, since its application for registration was refused and it consequently did not even have time to take any action. It was thus penalised for conduct relating to the exercise of freedom of expression.[22]

Checking the timing of the dissolution and requiring special reasons for early dissolution is a sensible requirement set by the high protection of the right.

The second recurring consideration was to unmask the false claims of the government that justified the dissolution measures. By doing so, the Court effectively pulled the rug from under the feet of the state: the dissolution decisions were shown to be ill founded. In pro-Kurdish party dissolution cases, the Court resorted to unmasking the alleged racism of the dissolved parties. In *Socialist Party of Turkey* or in *ÖZDEP*[23] the parties were charged with racism and support of terrorism merely because they stood for the Kurdish people's protection. The Court refused to accept the glaring misrepresentation of the parties as racist. In another pro-Kurdish case[24], the party was alleged to have called for the use of violence by Kurds in their struggle for independence. The Court demonstrated that this allegation was patently false: the party merely had a pro-Kurdish stance that was automatically taken by Turkish authorities as support for terrorism.

The Court had ample opportunities to unmask similar overblown or unfounded claims of national authorities that misrepresented political parties by falsely imputing facts to them. In *Dicle (DEP) v. Turkey*, the Turkish authorities laid heavy emphasis on the vociferous speech of a former president of the party that amounted to support for

[22] *Tsonev* [60].

[23] *Freedom and Democracy Party (ÖZDEP) v Turkey* App no 23885/94 (ECHR, 8 December 1999)

[24] *STP and others v Turkey* App no 26482/95 (ECHR, 12 February 2004)

terrorism. The ECtHR distanced the question of the party dissolution from the ex-president's speech and refused to accept that the consequence of a potentially criminal speech should fall back on the party, arguing that this would be 'disproportionate'. The Court held so because the criminal proceeding was already launched against the ex-president, the speech was not made in Turkey and not even in Turkish. Thus it could not have any measurable impact on Turkey's national security. Note that these are all sensible interpretations of facts but devoid of normative considerations.

Finally, the Court regularly took into account some pragmatic considerations that often worked in favour of the applicant parties. The influence of the party in politics has become an important material consideration in some cases.[25] In *United Macedonian* the party was said not to stand any chance 'of bringing about political changes which would not meet with the approval of everyone'.[26] What the Court really meant to highlight was the fierce opposition of other parties to the applicant pro-minority party that made it near impossible for it to achieve any goal through democratic politics. The Court's argument reflects a certain indifference: it is unreasonable to ban an unimportant party that has no influence whatsoever in politics: it just can't make trouble.

Closer scrutiny of the case law in party dissolution cases reveals that these and similar considerations that aimed at assessing the 'relevant and sufficient facts' dominate the Court's reasoning. At the same time normative inquiries that investigate whether the dissolution principles of article 11 took the back seat. This will be demonstrated through three cases, then it will set out what problems this entails.

[25] See *Yazar and others v. Turkey* App nos. 22723/93, 22724/93 and 22725/93 (ECHR, 9 April 2002) and *United Macedonian Org et al PIRIN v Bulgaria* App no 59489/00 (ECHR, 20 October 2005).

[26] *United Macedonian* [61].

2.1.2 Cases

It is worth recalling that the question the ECtHR is trying to answer through proportionality reasoning (and by the reason-checker inquiry) is whether there was a violation of a Convention right. The Court will conclude that there was a violation if the national courts erred in taking into account some relevant considerations or mistakenly took into account others which it should not have (or wrongly took into account some considerations). The reason-checking turned out to be an efficient tool to smoke out morally wrong motives on the part of the governments. Take the *United Communist Party of Turkey v. Turkey*, the first party dissolution judgment at the ECtHR.

The *Türkiye Birleşik Komünist Partisi* (TBKP), the party in question, was denied registration for three reasons. First, it used the word 'communist' in its name that was banned by law in Turkey. Second, the TBKP's goals were also found contrary to the constitution because it 'sought to establish the domination of one social class over the others'[27]. That was seen as an illegal 'totalitarian goal'[28]. Third, the authorities found that the TBKP endangered the territorial integrity and national unity of the country by supporting Kurdish independence. Therefore the TBKP tried to undermine the constitutional structure of the country in the eyes of the Turkish authorities. These severe conclusions were derived from the party's programme and its name. The ECtHR ruled for the applicant and found violation of article 11. It did so based on the following reasons. First, the Turkish authorities acted prematurely when they dissolved the party. While recognising that some parties might have 'hidden agendas', there was no time to find this out because of the premature dissolution. Second, the Turkish authorities' conclusions

[27] *United Communist Party* [9].

[28] ibid.

about the goals of the party turned out to be false. The allegation that it had totalitarian goals were based on the flimsy ground that it was a communist party. Its programme clearly stated that it did not seek hegemony and accepted democracy. This in turn distinguished the TBKP from the 1957 dissolution of the West-German communist party that the ECtHR's predecessor validated by declaring the party's complaint inadmissible.[29] Furthermore the evidence for the totalitarian goals was exceptionally weak: it was based on a 'purely formal' matter, i.e. the name of the party. Third, the allegation that it endangered national unity by its position on the Kurdish question was likewise refuted:

> The Court notes that although the *TBKP* refers in its programme to the Kurdish "people" and "nation" and Kurdish "citizens", it neither describes them as a "minority" nor makes any claim – other than for recognition of their existence – for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population. On the contrary, the programme states: "The *TBKP* will strive for a peaceful, democratic and fair solution of the Kurdish problem […]".[30]

Overall the Court agreed with the applicants that the national authority's decision was ill-founded.

The decision was one of the cases where the reason checking inquiry bore the bulk of the justification of the judgment as opposed to the normative inquiry. But it also had the negative consequence that the normative question was not tackled. The TBKP held views in politics that the government fundamentally disagreed with and to some extent punished. Its communist ideology turned out to be so objectionable in Turkey that it was made a crime to write it into a party's name. Moreover, the applicant party's

[29] *Communist Party of Germany (KPD) v Federal Republic of Germany* App no 250/57 (European Commission of Human Rights, 17 August 1956)

[30] *United Communist Party* [56].

position on the Kurdish question went against the majority's position. The normative question such a case raises is whether a party has a right to stand in politics for views that are impugned by the laws of the country. Or to turn the tables: the normative question was whether the state provided morally good reasons to deny registration to a new party. One of the problems with the reason checking inquiry is that it can validate morally unacceptable arguments. As mentioned above, the Court unmasked the allegation of the Turkish authorities that the TBKP held the Kurds 'as a minority' in opposition to the constitutional ban to do so. But it is not clear what difference it would have made if the Turkish authorities understanding of the TBKP's position was correct. The normative question here is whether a political party has the right to fight for the recognition of an unrecognised minority. Similarly, the ECtHR held that it was false to portray the TBKP's position as supporting the Kurds' right to secede from the rest of Turkey. The normative question is whether a political party has the right to propose secession of a region from the country. Instead of putting these normative questions at the centre of the reasoning, the ECtHR ruled that there was a violation of the right to freedom of association because Turkey imputed positions to the TBKP that it did not in fact hold. But the normatively interesting question is rather what if the party had held these 'objectionable' views?

The ECtHR may focus on the assessment of facts but that does not exhaust the Court's reasoning. Some important normative reasoning appeared as well. In *United Macedonian*, the Court stressed the normative inquiry. The facts of the case were similar to *United Communist Party*. An ethnic minority party explicitly defended regional autonomy, moreover it also supported the region's right to secede from the country. In opposition to *United Communist Party*, the Court directly tackled the question of whether a party had a right to hold such views and fight for them in politics:

> The mere fact that a political party calls for autonomy or even requests secession of part of the country's territory is not a sufficient basis to justify its dissolution on national security grounds. In a democratic society based on the rule of law, political ideas which challenge the existing order without putting into question the tenets of democracy, and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through, inter alia, participation in the political process. However shocking and unacceptable the statements of the applicant party's leaders and members may appear to the authorities or the majority of the population and however illegitimate their demands may be, they do not appear to warrant the impugned interference.'[31]

This way of reasoning is different from speculating about the exact views of the political party. Likewise the Court investigated in all cases whether the dissolved party advocated violence. This investigation occurs against the clear normative background that advocacy of violence violated the principle of article 11. Violence is incompatible with democratic competition hence the protection of the Convention should not extend to parties promoting the use of violence.

Nonetheless *United Macedonian* also included a rather problematic pragmatic consideration: this is the leverage consideration. The Court found it material for the judgment that the '[minority party's] public influence was negligible'[32]. The Court held that the party was so negligible that it lacked `any real chance of bringing about political changes which would not meet with the approval of everyone'.[33] The suggestion that everyone agrees on something in politics seems purely rhetorical. What the Court really meant to highlight was the fierce opposition of other parties to the applicant party that made it quasi impossible for it to achieve any goal through democratic politics. But the leverage consideration raises a deep concern: had the party representing minorities really

[31] *United Macedonian* [61].

[32] ibid.

[33] ibid.

enjoyed political influence, would the Court have been more lenient towards the state's dissolution measure? A less critical understanding of the leverage reason would be that it was an auxiliary, as opposed to a principle reason, of the judgment. The rulings that used the leverage argument clearly did not just cling to that thread of argument. A tougher critical understanding would refuse its use altogether. The lack of prospective success in politics shows the animosity and prejudice of the majority towards a minority party. This is an instance where the reason-checking court laid emphasis on a consideration, the political weight of the party that was based on an erroneous premise. Namely: as long as a party remains unimportant in politics, the protection of the right to free association will extend. However precisely the opposite logic seems to be correct: a party that is despised by the majority due to its stance on protecting a minority should be protected especially when it matters in politics.

Finally, another modern Communist case, *Partidul*, should also be singled out for it sheds light on the arguments that the reason-checking brings to bear on the question of violation of rights. The case concerned the registration of a communist party in a post-communist country. The national authorities refused the registration of the party on the ground that it denied democratic values. Accordingly the national court held that in the light of recent history the country 'cannot allow the emergence of a new communist party'[34]. Instead of conducting a normative inquiry as to whether it is a good reason to refuse the registration of a political party whose ideology offended some people because of recent history, the Court based its decision on reason checking. It held that there are a number of countries in Europe where communist parties operate legally. There are two problems with this empirical head counting. Firstly, if the applicant party were the first

[34] *Partidul* [55].

communist party in history the normative question would be still the same. The number of existing far left parties is at best a matter of evidence. The question is whether a party whose ideology is in opposition to liberal democracy and which offends historical sensibilities in the country could enjoy the protection of article 11? The question remains unanswered.

Secondly, this reason-checking approach is ultimately self-defeating. This is because the reason-checking inquiry lacks criteria to evaluate whether the reasoning is good or bad. Therefore the whole approach is vulnerable to arbitrariness. In the Romanian case, as a matter of fact some communist parties had indeed been enjoying considerable electoral support in Europe, especially in Western Europe. But in some others they happen to be constitutionally banned. These countries typically share the same post-communist historical past with Romania such as Poland.[35] The Court held that 'it was prepared to take into account the historical background to cases'[36], though it is difficult to see along what lines the Court should pick the relevant historical background. History clearly cuts both ways. This argument was a way to avoid the normative question.

To summarise the problems with the dominance of the reason-checking inquiry in rights adjudication. The approach does not necessarily beget bad decisions that are unfaithful to the principles of article 11. In many cases just the opposite is true. The basis for finding for the applicant in the cases cited above were that the reasons provided by the governments for the dissolution of political parties turned out to be false, premature or unnecessary. To put it this way: the reason-checking inquiry filtered out the arbitrary

[35] Jiří Přibáň and Wojciech Sadurski, 'The Role of Political Rights in the Democratization of Central and Eastern Europe' in Wojciech Sadurski (ed), *Political rights under stress in 21st century Europe* (OUP 2006) 226-7.

[36] *Partidul* [58].

reasons of national authorities rather effectively.[37] But there remain two problems with this way of resolving human rights questions. It is insufficient in difficult cases and it shuns the normative inquiry.

It is a mistake to think that all cases can be resolved solely on reason-checking grounds: a difficult case is difficult precisely because there is a full-blown moral dilemma with good reasons on both sides. The reason-checking inquiry is insufficient to solve difficult cases. But how does the reason checking inquiry matter for the normative one? The dominance of reason-checking leaves this link between the two inquiries unexplained.

By the same token the reason-checking inquiry has an objective aura that can be outright misleading. An important critic of proportionality method argues that it 'pretends to be objective, neutral, and totally extraneous to any moral reasoning.'[38] This is also the case in the reason-checking inquiry that often completely replaces the normative inquiry or hides the moral reasons of the case. Even if no arbitrariness were to be found in a government's dissolution decision, that decision could still violate normative principles of Convention rights. When the Court limits the proportionality reasoning to reason checking, it may overlook the difficulty of a case.

[37] Note that the reason-checking analysis is not unique to freedom of association cases. For instance in a recent right to peaceful assembly case, *Patyi and others v Hungary* App no 5529/05 (ECHR, 7 October 2008), the Court found violation of article 11 because a protest near the prime minister's house was denied by the police due to the disproportionate disturbance of the traffic. The Court argued that the rationale given by the police for refusing the permit was not reasonable because the sidewalk was wide enough for the few protester and public transport could not be hampered by the protesters because at that hour there was no bus scheduled (*Patyi* [42]). Therefore the question of right violation turned on a faulty factual assessment of the national police. See. Attila Gabor Tóth, 'A buszok emberi jogai' *Élet és Irodalom* (Budapest, 17 October 2008) (available only in Hungarian, the title reads 'The human rights of buses').

[38] Stavros Tsakyrakis, 'Proportionality: An assault on human rights' (2009) 7 Int'l J. Const. L. 468, 474.

2.2 RELIANCE ON MILITANT DEMOCRACY

2.2.1 What is militant democracy?

The ECtHR may have relied mostly on the reason checking inquiry but it does not mean that the dissolution decisions took place in a normative vacuum. The Court's approach to party dissolution was clearly influenced by a substantive view on democracy and rights that served as a normative guide. This substantive view is militant democracy.

Before turning to the ECtHR, a very brief introduction to militant democracy is required. Militant democracy 'refers to the idea of a democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime.'[39] Two main questions emerge from this definition. Against whom the pre-emptive measures should be taken in the name of defending democracy? And what should these pre-emptive measures consist of?

The term itself, militant democracy, was coined by the German political scientist Karl Loewenstein in the late 1930s in reaction to the Nazis' rise in Germany. Loewenstein abhorred what he called the 'democratic fundamentalism' that allowed fascist political techniques to flourish unrestricted. Instead of an ill-conceived democratic fundamentalism, he proposed that 'fire should be fought with fire'[40]. He put forth a set of propositions to restrict the political rights of extremists such as banning parties and restricting open demonstration of extremism. These measures reflected the pragmatic

[39] Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1253.

[40] Karl Loewenstein, 'Militant Democracy and Fundamental Rights' in András Sajó (ed), *Militant Democracy* (Eleven International 2004) 261.

nature of militant democracy. As Müller notes, there is no general theory or model of militant democracy. Consequently, it is probably more accurate to talk about doctrine of militant democracy that consists of a mesh of loosely interlinked right restriction propositions. This is the first insight into militant democracy: it is a doctrine that privileges restrictive measure in the face of anti-democratic politics and not a normative theory about democracy.

Firstly, it should be noted the difficulty in providing a general answer to the 'who question'. Against whom the state is entitled to adopt pre-emptive steps? There are two potential answers to that question. One reading of militant democracy subscribes to anti-extremism another to negative republicanism.[41] The latter defines as 'the self-definition of a militant democracy in contrast to a particular authoritarian past, in a way that differs markedly from the abstract and quasi-universal German approach of anti-extremism.'[42] Therefore the 'who are the extremist?' gets decided either thorough a particular or a universal understanding of history. According to Müller, Germany is unique with its universalist anti-extremist doctrine that focused on right and left totalitarianism equally.

Secondly, it is perhaps easier to answer the 'what measures' question. A prominent proponent of militant democracy, András Sajó, puts at the heart of the concept what he calls the fight against 'emotionalism'[43], i.e. the perils of emotional manipulation by antidemocratic parties. What is at stake is so high that restrictions of political rights should be condoned irrespective of the actual danger the antidemocratic actors pose. Sajó, stepping in the footsteps of Loewenstein, warns against the cascade effect of extremist

[41] About the two categories see Peter Niesen, 'Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties' (2002) 3 German L. J. 40

[42] ibid 40.

[43] András Sajó, 'Militant Democracy and Transition Towards Democracy' in Sajó (ed) (n 40) 209, 210.

ideology: the more you see and hear them the more widespread it becomes. This risk, especially where it is backed by national history, should mandate precaution and lead to the restriction of rights. Concerning the banning of political parties the point about militant democracy is that the rationale for dissolving an antidemocratic party is irrespective of its electoral significance. Sajó sees in the ECtHR's *Refah* decision the correct application of the doctrine.[44]

But what is the point of militant democracy as a normative guide for a court? Short of a full blooded theory it rather points to an attitude towards antidemocratic politics and paves the way for legitimising restrictive measures generally. This is the second insight into militant democracy: it rejects the absolute protection of rights.

2.2.2 Militant Democracy and the ECtHR

The proposition here is that the ECtHR accepts militant democracy as a normative guide in its jurisprudence.[45] One could immediately object that the Court has never been explicit about this endorsement. Though as Müller argues no national court has been explicit about endorsing militant democracy either, bar the German Constitutional Court. Nonetheless, some militant measures are visible in many European democracies' legal system without explicit endorsement of the doctrine.[46] This holds true for the Strasbourg court as well.

[44] Ibid 223.

[45] Harvey is of the same view: that the Court endorsed the doctrine, but it remains open what it makes out it. Paul Harvey, 'Militant democracy and the European Convention on Human Rights' [2004] E.L.Rev. 407.

[46] Otto Pfersmann, 'Shaping Militant Democracy' in Sajó (ed) (n 40).

The abuse clause of the Convention should be mentioned first as the potential cradle of militant democracy in the Convention. The wording of the Article 17 seems to unambiguously reflect militant democracy:

> '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 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.'

The Court deployed that article in the first party dissolution case. In *Communist Party of Germany (KPD) v. West Germany* the Court approved the German decision of banning the communist party whose programme was found to be irreconcilable with the Basic Law. The decision was based on the paradigmatic militant democracy clause, namely Article 21 (2) of the Basic Law. The provision declares anti-constitutional any party that seeks to abolish the free and democratic order. The ECtHR made explicit the close link between the Convention and the Basic Law's clauses by stipulating that article 17 was 'designed to safeguard the rights [...] by protecting the free operation of democratic institutions' and that 'a similar motive appears to have guided the German legislator when drafting Article 21 of the Basic Law'.[47] Be that as it may, the Court has not made use of article 17 again in any of the succeeding dissolution decisions, instead it applied the limitation clause of article 11 (2). This shift spurred its critics who charged the court with inconsistency in dissolution cases. For instance Boyle rightly pinpoints that the reasons the Court offered in *Refah* to sanction the dissolution of the Welfare Party were closer in substance to inferring that applicants abused their rights hence they could not avail themselves of the protection of the Convention.[48] Overall, one could conclude that

[47] *Communist Party of Germany* 4.

[48] Kevin Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1 Essex Human Rights Review 1

the inclusion of article 17 is a proof of some degree of endorsement of militant democracy, even though its explicit use in the jurisprudence remains exceptional in party dissolution cases.

All party dissolution cases inevitably raise the suspicion of being an instance of militant democracy. Commentators of ECtHR judgments seized the occasion to assign the label of militant democracy to the Court after *Refah Partisi v. Turkey* or *Batasuna v. Spain*.[49] However, all party dissolution need not have to do with militant democracy. A dissolution judgment is an instance of militant democracy only if its justification draws on the doctrine. This holds true for *Refah* but not necessarily for *Batasuna*.

Refah was the first occasion where the ECtHR sanctioned the dissolution of a political party.[50] The Welfare Party, an Islamist platform, was dissolved while it was the main partner in a coalition government and was predicted to win a landslide victory at the next election by pollsters. The party took controversial public positions on the place of religion in the state.[51] The Court accepted that once in power the Welfare Party would establish a plurality of legal systems based on religious lines, apply sharia to Muslims and it talked about *jihad*.

In *Refah*, the Court spelled out principles that reflected basic tenets of militant democracy. It laid heavy emphasis on the compromise view on the relation between democracy and rights and democracy and pluralism. Some 'compromise between the

[49] Paul Harvey argues that *Refah* opened the speculation of what a European concept of militant democracy might entail and what difficulties it shall cause for the Court. Harvey (n 45) 407.

[50] A note of precision. *Refah* was the first judgment where the Court found no violation of article 11, but the Court has already sanctioned one dissolution as an admissibility decision in *Communist Party of Germany*.

[51] McGoldrick analysis *Refah* in terms of clash between multiculturalism and universal human rights, where the former 'set limits on cultural claims' based on religion for example. Dominic McGoldrick, 'Multiculturalism and its Discontents' (2005) 5 (1) H. R. L. Rev. 27, 54.

requirements for defending democratic society and individual rights is inherent in the system of the Convention'.[52] Furthermore it held that 'pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole.'[53] The inherent compromise view claims that democracy and rights collide on occasion. For the sake of saving democracy one should forfeit her rights – so goes the logic. As an implication of the compromise view the Court found preventive party dissolution compatible with democracy because a 'State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy'.[54] Along similar lines the Court also accepted the view that parties should not be solely judged on such formal grounds as their manifesto or programme. It stated that the party's 'programme may conceal objectives and intentions different from the ones it proclaims'.[55] This realistic vigilance rings a bell with Sajó's work that propagated a risk averse stance against antidemocratic parties.

The doctrine also seems to have made its mark on the test the Court fashioned for testing the Convention-compatibility of the reasons of dissolutions. The Court in *Refah* based its two requirement-test for political parties seeking changes to the constitution on the substantial view that democracy sets a limit on the changes political parties can demand. A political party can seek fundamental changes of laws or constitution provided that the means used are legal and democratic and the goals of the party do not violate the

[52] *Refah* [96].

[53] ibid [99].

[54] *Refah* [87].

[55] ibid.

basic principles of democracy. Therefore democracy serves as a limit on rights. The inherent compromise and its implications by the Court echoes what Loewenstein had stressed decades ago against formalism and democratic fundamentalism for defending democracy.

There remains though one clear regard in which *Refah* may not entirely reflect the doctrine of militant democracy. A crucial evidence of the case turned out to be that Refah posed imminent danger. The 'considerable rise' of the party's chances of coming to power were buttressed by opinion polls. Moreover, the judges underlined that the Welfare Party would 'seize political power without being restricted by the compromises inherent in a coalition'.[56]

But the doctrine aimed just about lowering the bar for restricting rights below imminent danger. Sajó stressed the irrelevance of electoral power of parties when judging the necessity of dissolution. At the end of the day *Refah* may present a case where the danger made the public intervention in the form of dissolution necessary and legitimate without the appeal to militant democracy.

Finally, it is worth mentioning that in *Refah* the Court referred to related issues of right restriction that are telling about the influence of militant democracy. In *Yanasik v. Turkey* the Court accepted the imposition of duty on civil servants not to participate in Islamic fundamentalist movements for defending state secularism. These judgments bear close similarity with Loewenstein's proposition of loyalty requirements for civil

[56] *Yanasik v Turkey* App no. 14524/89 (European Commission of Human Rights, 6 January 1993)

servants.[57] But what may be more symptomatic are the issue of the ban on wearing the Islamic veil in secular universities that was approved of by Strasbourg in *Leyla Şahin v. Turkey*.[58]

Refah undoubtedly serves as 'the legal site of contestation'[59] over militant democracy, though it is questionable if the same holds for *Batasuna*, the dissolution of the Basque separatist party.[60] *Batasuna* did not involve the issue of political goals through democratic politics. Rather the party in case tries to achieve its goals outside of democratic politics by actively helping a terrorist organisation. Terrorism does not involve the same question as *Refah*. Conversely Müller contends that 'Terrorism is clearly a different tactic than subverting democratic values through contesting elections. It is not, I would argue, an object of militant democracy as traditionally understood.'[61] One does not need to evoke militant democracy to make a case for the restriction of the

[57] The Court accepted the legitimacy of the requirement in *Kosiek v Germany* App no 9704/82 (European Commission of Human Rights, 28 August 1986). Though *Kosiek* could be contrasted with the later *Vogt v Germany* App no 17851/91 (European Commission of Human Rights, 26 September 1995). In *Vogt*, the Court ruled for the applicant who was dismissed from civil servant position on the ground of the political affiliation of the applicant with the communist party.

[58] *Leyla Şahin v Turkey* App no 44774/98 (ECHR, 10 November 2005)

[59] Macklem uses this term for expressing the inherent link between any dissolution case and militant democracy. Patrick Macklem, 'Militant Democracy, legal pluralism, and the paradox of self-determination' (2006) Int'l J. Const. L. 488, 491

[60] The dissolution of the Basque separatist party triggered substantial literature. All the articles about *Batasuna* debates the idea of militant democracy with reference to *Batasuna*. Ian Cram, 'Constitutional responses to extremist political associations – *ETA, Batasuna* and democratic norms' (2008) 28 (1) Legal studies 68; Leslie Turano,'Spain: Banning political parties as a response to Basque terrorism' (2003) 1 Int'l J. Const. L. 730; Katherine A. Sawyer, 'Rejection of Weimarian Politics or Betrayal of Democracy? Spain's Proscription of Batasuna under the European Convention of Human Rights' (2002-2003) 52 Am. U. L. Rev. 1531; Thomas Ayres, 'Batasuna Banned: The Dissolution of Political Parties under the European Convention of Human Rights' (2004) 27 B.C.Int'l & Comp.L.Rev 99; Jernej Letnar Černič, 'National Security – a Trump Card? Combating terrorism while protecting freedom of association' (2001) Dignitas 51-52 <http://www.dignitas.si/en/no-51-52-vol-2011> accessed 30 September 2013

[61] Müller (n 39) 28.

rights of terrorists. And in *Batasuna* the ECtHR accepted that there was a 'deliberate apportionment of tasks between terrorism and politics'.[62]

Where militant democracy had its clearest influence on the jurisprudence is at article 10. The Court rejected any complaint of violation of article 10 if the impugned speech fell in the perimeters of hate speech. The Court stated unequivocally its position in *Gündüz v Turkey*: '[t]hat being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance).'[63] As it was stated in chapter 1, *Féret v. Belgium* is the case in point to highlight the Court's firm stance on the issue: not even a politician's campaign was protected.[64] The ECtHR's firm position is directly akin with militant democracy.

In the light of these features of the jurisprudence at the ECtHR, it can be concluded that the doctrine of militant democracy had a visible impact on the Court's approach to cases.

[62] *Batasuna* [31]. It is not to say that militant democracy is not relevant at all here. But it may be relevant for a different reason, namely because of the ease with which the court accepted the link between terrorism and politics. But this is not a normative but a factual or evidentiary question. In the literature Černič (n 60) is the most critical about the Court's deference for uncritically accepting all reasons offered by the national government that are related to national security dangers. Černič implies and deplores that national security seems to be working as a trump card in the hands of the government.

[63] *Gündüz v Turkey* App no 35071/97 (ECHR, 4 December 2003)

[64] Sottiaux pinpoints the more nuanced standard used by Canadian courts. Stefan Sottiaux, '"Bad Tendencies" in the ECtHR's "Hate Speech" Jurisprudence' (2011) 7 Eu. Const L. Rev. 40, 42.

CHAPTER THREE

DOES THE COURT HAVE THE RESOURCES TO MEET THE NEW CHALLENGE?

The previous chapters outlined the new reality of extremist parties, and then described the characteristics of the Court's jurisprudence in party dissolution cases. It may be worth first recalling what the new paradigm consisted of, then to see in light of the findings of the previous chapter whether the ECtHR jurisprudence provides enough resources to meet the challenge of the new paradigm. The challenge for the ECtHR is to define the standard by which it distinguishes fringe parties protected by freedom of association and those which are not under the new paradigm of extremism.

The challenge will be met if the Court provides an adequate standard for dissolution. But the standard should be adequate to what? The contention here is that the standard should be adequate to the moral values that underpin the Convention. Seeing the challenge this way makes it clear that it necessarily involves normative arguments for deciding the question. Moreover it is perhaps easier to frame the question of standard if it is seen as an instance of conflicting rights or rather rights and public interest. Hence any standard should adequately assign some protection to freedom of association and equally to the protection of democracy.

The criteria of what defines extremist parties have been in a state of flux for some time. This is due to the change in nature of extremist parties. Up to the end of the Cold

War it was relatively easy to define the enemies of democracy on ideological grounds. Neo-nazi parties on the right and communist parties on the left took up the roles of enemies of democracy due to their full-blown ideological opposition to liberal democracy. The lines have ceased to be so clear since then. In Müller's description:

> With the end of the Cold War, definitions of the supposed enemies of democracy have become much more diffuse and difficult to establish: 'populism' remains a notoriously vague concept; while attempts to link present-day parties to the totalitarian past—as with the German National Democratic Party (NPD) or post-communist parties in Central and Eastern Europe – often feel forced (and have in fact often fallen foul of the courts).[65]

Anti-immigration, xenophobic or racist parties took up the places on the fringe of politics as Rosenblum or Downs reminded us.[66] They ceased to follow a clear ideological agenda seeking to subvert the liberal order from within. Yet these political parties oppose basic liberal values by preaching intolerance against immigrants or Muslims etc. One can take as paradigmatic of these new extremist parties the French *Front National*, the British National Party or the Belgium *Vlaams Blok* or perhaps the Greek Golden Dawn.

Whether the ECtHR meets the challenge could be judged through a hypothetical party dissolution scenario. There is a staunch anti-immigration party with strong anti-immigrant views that is offensive especially for Muslims and immigrants. The party's policies look *prima facie* discriminatory and so do the party's communications. It has mild popular support with some representation in parliament but no prospect of getting into government. (The party neither used violence nor called for violence.) National authorities decided to dissolve the party on the ground that its goals are not compatible

[65] Müller (n 39) 1255.

[66] See chapter 1.

with democracy and that its communications violate anti-discrimination laws. The case may become soon less hypothetical. The recent political turmoil in Greece caused the rise of a neo-Nazi movement, the Golden Dawn, in national politics. Though Golden Dawn might be less analogous with the hypothetical case here. Recent developments showed a close link between criminality, especially hate crimes and the Golden Dawn that would set it apart from other new extremist parties like the French *Front National* that do not engage in violent criminality.[67]

The proposition here is that the ECtHR will not be able to meet the challenge if it relies on a strict version of militant democracy as its normative guide and if the heavy reliance on the reason-checking inquiry does not change. Militant democracy might be thought of on a scale, in this respect all countries are militant to a varying degree.[68] If the Court accepts a strict version of militant democracy, than the standard of dissolution would be unacceptably low. The strictest standard of militant democracy would deprive parties of any protection. Such a strict version of militant democracy should be rejected because it does not square with contemporary reality and it is normatively unappealing. Furthermore, the reason-checking inquiry has its scope limited to cases where the government's faulty evidence is at the centre of the case. Therefore, the reason-checking inquiry is of limited help for difficult cases where the evidence offered by government is accurate or not faulty.

[67] According to the BBC report out of 154 recent attacks on immigrant in Greece 104 were attributed to party members. <http://www.bbc.co.uk/news/world-europe-24314319> accessed on 1 October 2013.

[68] This is the view of Pfersmann: '[M]ilitant democracy – as a legal structure – is on a scale of degree with other forms of democracy […] democracies are always *more or less* militant. Pfersmann (n 46) (emphasis in the original)

3.1 LIMITATION OF THE REASON-CHECKING INQUIRY

Chapter two established that the Court relied heavily on the reason-checking inquiry in party dissolution cases. This inquiry focuses on whether the reasons for dissolutions or supporting evidence therefore offered by the governments are relevant and sufficient. To establish the accuracy of the evidence is a separate inquiry to the normative one. The result of the two inquiries should give the answer to the question of whether there was a violation of freedom of association.

The reason-checking inquiry is part of any court procedure to the extent that it serves to check the accuracy of the evidence offered by the parties in a case. For instance in *United Communist Party* the Court unmasked factual inaccuracies contained in the government charges against the party through the reason-checking inquiry. The Turkish authorities alleged that the pro-Kurdish parties held political positions that in reality they did not hold. Therefore, the reason-checking inquiry could certainly be useful in a hypothetical dissolution case for checking the accuracy of the charges.

The reason-checking inquiries were also perfectly suitable for filtering out the unreasonable reasons behind some party dissolution measures. The pro-Kurdish cases invariably involved such reasoning from the national authorities. A constant feature of the cases was that the parties in question were taken to be proposing discrimination on ethnic grounds. The authorities inferred that from the fact that the political party supported minority rights of the Kurds. These assertions were unreasonable and reflected rather the prejudice of the majority against the Kurdish minority. However, the hypothetical dissolution of an intolerant party need not be analogous to these cases. Unlike to pro-Kurdish parties, the intolerant parties could indeed reasonably be held to advocate

discrimination which would lead to the separate normative question: is it acceptable to dissolve a party on the ground that its public communication is discriminatory?

Maybe another group of dissolution cases offers a closer analogy with the hypothetical case, those are the modern communist party cases. Recall that the Court found violation of article 11 in three communist party dissolution cases. The modern communist party cases were decided on reason-checking grounds: all the three cases were registration cases where the national governments held that the parties would necessarily work for hegemony but they did not provide further evidence to prove that. The authorities reached that conclusion from the parties' ideology. The ECtHR pointed out in these registration cases that short of a call for violence and of specific indication that the party really aimed at achieving hegemonic power (i.e. that is the fear behind the paradox of democracy), there was no sufficient reason for dissolution. Though it is clear that this way of resolving cases is of modest help for the hypothetical dissolution case of an intolerant party. These communist party cases uniquely focused on the prematurity of the dissolution decisions and the lack of evidence for the drastic dissolution measure. Furthermore, unlike communist parties, the modern intolerant parties' political messages are offensive to particular groups in society. That feature of the hypothetical case reveals a normative question that cannot be answered on reason-checking grounds. This normative question steers us towards investigating what answer militant democracy would hold.

3.2 LIMITATIONS OF MILITANT DEMOCRACY

Militant democracy stands for the limitability of rights for the sake of protecting democracy. The Court's inherent compromise view on democracy and rights reflects just

that. However, this compromise comes with its own dangers. It invites complacency in argumentation: the limitability of rights becomes an operational reason for limiting rights. But it is circular to say that rights should be limited because they are not absolute therefore they can be limited. Therefore the compromise view is certainly not enough for a standard.

Militant democracy was spurned by history, therefore one proposition for a standard could be to propose that the Court should look at history and use it as a standard for antidemocratic parties. In concurrence with this, the Court held that it 'considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history.'[69] But the new paradigm precisely takes the change in the nature of anti-democratic parties to be crucial. What the Court mentioned in *Refah* was the classical fear of the paradox of democracy: a totalitarian movement subverting democracy from within. Though the worry with the new intolerant parties stems from their assault on minorities rather than from any 'full-blown anti-democratic political theory'[70] that no party supports openly any more. The Court should be bound to find violation of article 11 under this reading in the hypothetical case: the party did not have any potential for getting into power and its goals were despicable but would not amount to 'doing away with democracy'.

But maybe the hypothetical party with its activity would do away with democracy in some other sense than totalitarian parties did. Thus, another proposition would be to

[69] *Refah* [99].

[70] Nancy L. Rosenblum, *On the Side of the Angels – An appreciation of Parties and Partisanship* (Princeton University Press 2008) 416.

use democracy in a straightforward fashion as the standard for dissolutions. This seems to be in sync with what the inherent compromise tenet suggests. Accordingly the Refah-test stated just that: a political party can seek fundamental changes of laws, constitution or politics in general provided that the means used are legal and democratic and the ends of the party do not violate the basic principles of democracy.[71] However, it is hardly possible to find a more debated concept than 'democracy', hence this standard just seems to kick the can one step further down the road because what democracy entails is not self-evident.[72] Normative arguments are needed for defining those principles. Hence proposing democracy as a standard for dissolution is not the end of the quest for a standard but the beginning. But if it is true, militant democracy is not of much help in defining the standard and the hypothetical dissolution case is left to the judges' discretion.

But militant democracy has had its influence on the Court more importantly in intolerant speech cases (article 10). Using these cases as an analogy for finding the standard for party dissolution seems sound. The dissolution cases the Court had to deal with almost always boiled down to judging the content of the communication the political party engaged in. The dissolution cases invariably involved whether the propositions of the party were compatible with the Convention. And for finding that out the Court observed what the party leaders or other politicians held as political opinion in the name of the party. Therefore, the hypothetical case could also be seen as analogous to an intolerant speech case. For a clear example of the connection between freedom of speech and freedom of association cases one only has to look at Belgium. In 2004 the Belgian

[71] The test in *Refah* was first formulated in *Yazar* [49] , but it has only become important since *Refah*. *Refah* [98].

[72] Fox and Nolte was criticised for not taking for granted the concept of democracy. Gregory H. Fox and Georg Nolte, 'Fox and Nolte Response' (1996) 37 Harv. Int'l L. J. 238.

authorities dissolved the fiercely anti-immigration party *Vlaams Blok* on hate speech grounds for spreading hate against immigrants.

Intolerant speech jurisprudence of the Court is clearly influenced by militant democracy. Two cases stand out for observation here. *Féret v. Belgium* and *Le Pen v. France* involved the leaders of the two far right *Front National* parties of Belgium and France.[73] Both of them were found guilty of hate speech laws and these decisions were subsequently approved by Strasbourg. The cases are emblematic of the Court's position in intolerant speech cases of article 10. In *Le Pen v. France* the leader of the party was found guilty of hate speech for saying in a newspaper interview that when Muslims constitute a majority in society in the future they will be the ones in charge. In the case of *Féret* already mentioned, the party leader used similar derogatory statements about Muslims.

In *Féret* three judges dissented[74] and made some insightful comments on the shortcomings of the Court's jurisprudence. The dissent accepted that xenophobic discourse is dangerous for society but it also stressed that this is not enough reason on its own to ban the party. They wrote that the protection of freedom of expression should not solely depend on the merit or the compatibility of an opinion with the 'spirit' of the Convention. In a powerful passage the judges noted that it is precisely in those instances, when one faces ideas that provoke one's hate and disgust, that one should be careful in judging in which circumstances the expression of ideas cause real danger. No doubt the harsh criticism of immigrants has the potential to impact on discrimination, but in the case of a non-violent political opinion the link with actual discriminatory impact should

[73] *Le Pen v France* App no 18788/09 (admissibility decision, ECHR, 20 April 2010)

[74] *Féret* Dissenting Opinion of András Sajó Joined by Vladimiro Zagrebelsky and Nona Tsotsoria

be tight rather than potential. And the dissenting judges in contrast with the majority did only find potential not actual danger for social peace and the stability of democratic institutions. According to the dissenting opinion, the majority steered close to a doctrine of 'dangerous speech' that was close to outlawing a category of political opinion without due consideration of the real dangers.[75]

Féret and *Le Pen* forcefully highlight one deficiency in the case law. The Court's position amounts to a blanket ban on intolerant speech which means that it leaves no room for other interests such as political participation and public debate to be taken into account. The fact that the bigoted remarks of politicians concerned one of the most important public debates on immigration and multiculturalism passed completely unappreciated. One way to see the problem is through the lack of safe haven exceptions. Some hate speech laws contain an affirmative public interest defence against prosecution.[76] Waldron, who is a supporter of hate speech laws, finds that these provisions provide adequate protection for free speech. He writes that these provisions protect 'the moderate expression of the gist of the view whose hateful or hate-inciting expression is prohibited.'[77] And that 'they try to define a legitimate mode of roughly equivalent expression.'[78] Pinpointing the lack of appreciation in the ECtHR's jurisprudence of safe havens is revealing about the difficulties the Court faces in meeting the challenge.[79] Another way of seeing the problem is through the blanket ban's relation

[75] ibid.

[76] For explicit safe-harbour clauses see: UK Racial and Religious Hatred Act 2006, s 29J; Racial Hatred Act 18D in Australia.

[77] Jeremy Waldron, The Harm in Hate Speech (Harvard University Press 2012) 190.

[78] Ibid 183.

[79] Waldron's analysis of hate speech laws and safe havens are not unanimously shared. For a concurring opinion see Ronald Dworkin, 'Reply to Jeremy Waldron' in Michael Herz and Peter Molnar (eds.) *The content and context of hate speech: rethinking regulation and responses* (Cambridge University Press 2012). Dworkin contends that bans on vituperative speech puts the democratic legitimacy of laws in question the same way as the bans on non-vituperative

to the method of proportionality. The point of proportionality analysis is that rights and public interest, such as protecting democracy, are thought to be comparable. But this is precisely what the blanket ban denies and makes it impossible to resolve the case by balancing.

Under the influence of militant democracy, in intolerant speech cases the Court has been reluctant to take into account countervailing considerations for protecting speech. If jurisprudence in article 10 cases is anything to go by for the hypothetical case, then it seems that the Court may apply a low standard of dissolution for new paradigm intolerant parties. Yet, it remains an open question how the Court would rule in party dissolution cases and how it would draw on article 10 case law in article 11 cases. It is up to the Court to interpret the level of threat to democracy that the party poses, as it is to interpret militant democracy that is not a crystal-clear normative theory. Nevertheless, the Court's endorsement of strict version militant democracy might prevent it from taking into account proper normative considerations in dissolution cases.

speech. Therefore the main problem with hate speech laws, namely that they spoil the democratic legitimacy of laws, is not solved by safe havens according to Dworkin. Id 341.

CHAPTER FOUR

A CASE FOR A WIDE MARGIN OF APPRECIATION?

The previous chapters demonstrated the limitations of the case law resulting from the Court's reliance on the reason-checking inquiry and from the influence of militant democracy. The difficulty lies in the limited protection that the Court's give to freedom of association, and the mismatch between this level of protection and the challenge of new extremism. However, there remains one way to prove that the current level of protection is sufficient. It might be possible to justify the Court's current level of protection by the use of the margin of appreciation.

It is common practice to classify judicial reasoning into first and second order reasons. The former are the internal factors or the direct considerations that concern the particular legal question at hand, whereas the latter brings external (indirect) factors or institutional considerations to bear on the decision. In human rights jurisprudence the issue of secondary reasons is linked with the question of judicial deference. Under what conditions should a court defer to the government or parliament? At the ECtHR, the doctrine of margin of appreciation is the doctrine for deference. Andrew Legg defines the doctrine as 'judicial deference whereby judges are influenced by factors outside of the immediate pros and cons of a particular decision related to their own institutional competence.'[80] Legg identifies three factors that usually justify the use of margin of

[80] Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 1.

appreciation at the ECtHR. These are: democratic legitimacy of national decision-making, the lack of consensus among contracting states and the greater expertise of the member state in a given question.[81] So far, this thesis has confined itself to elaboration of first order reasons for judicial decisions in party dissolution cases. But there might be two external arguments in favour of granting a wider margin of appreciation to states in cases of the dissolution of intolerant parties. Were these arguments to succeed, the limited protection currently afforded to freedom of association might be regarded as satisfactory as the ECtHR should defer widely to national courts in political party dissolutions. These second order arguments amount to objections to the starting proposition of the thesis, namely that the Court's case law is deficient or insufficient to meet the challenge of new extremism.

The first *sensitivity* objection relates to the nature of ECtHR as an international human rights court. It is a sensitive political issue for states to choose how to deal with antidemocratic parties. Moreover it is a choice which is often influenced by the dark chapters of national history. Hence democracies should have discretion in deciding how to choose. The second *institutional* objection, argues that courts are undemocratic institutions, hence they should be cautious about directly interfering with the democratic process.

Both objections fall into the category of what Letsas has labelled 'structural margin of appreciation' where 'state authorities enjoy a margin of appreciation, in that the Court will not substantively scrutinise their decision.'[82] This means that the Court refrains from reviewing the national courts' decision rather than pronouncing that there has been a

[81] ibid. 7.

[82] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 90.

violation of any right as a matter of substance.[83] The ECtHR often takes this deferential approach where the issue is either politically sensitive or when there is no consensus among states.

4.1 SENSITIVITY OBJECTION

The sensitivity objection stipulates that the fight against intolerance in politics should remain in the discretion of national authorities. To use the historical words of the *Handyside* decision: 'by reasons of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion […].'[84] The objection postulates that the dissolution of political parties concerns the core of the democratic process that is often linked with national history. Therefore, the international judge should refrain from meddling with it.

The ECtHR gave a deferential judgment on a politically and historically sensitive question involving precisely the core of the democratic process, namely the question of who is allowed to stand in elections. *Zdanoka v. Latvia*[85] did not involve a party dissolution but a closely analogous question. The Court had to consider whether a ban on former KGB employees standing in elections was compatible with the Convention.[86] The Court approved the ban on explicit historical grounds:

> [w]hile such a measure may scarcely be considered acceptable in the context of one political system, for example in a country

[83] Letsas calls this version the substantive margin of appreciation. Ibid. 84.

[84] *Handyside v the United Kingdom* App no 5493/72 (European Commission of Human Rights, 7 December 1976) [48].

[85] *Zdanoka v Latvia* App no 58278/00 (ECHR, 16 March 2006)

[86] Article 3 of Protocol No.1. to the Convention was at issue, that is the right to stand in election.

> which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.[87]

However, in other cases the post-communist historical background did not tip the balance towards the exercise of a structural margin of appreciation. In *Vajnai v. Hungary*[88], the ECtHR found a violation of article 10 for banning the display of the five star communist symbol for a Communist politician. Furthermore, some of the communist party dissolution cases indicate that the argument based on history for granting a margin of appreciation have limited import at the ECtHR. Concerning the question of the margin of appreciation in both *Tsonev v. Bulgaria* and in *Partidul Comunistilor v. Romania* the Court did not show deference similarly to *Vajnai* and in opposition to *Zdanoka*. Instead of granting deference to the better positioned national judges based on historical expertise, the Court opted to exercise proper scrutiny and ruled against heavy-handed party bans. Similarly in the pro-Kurdish party dissolution cases the Court refused to grant a wide margin of appreciation based on the complex historical and political backdrop of the case. Paradoxically, it may rather be the case that a troubled historical past leads to a limited margin of appreciation for states not least because of the risk of overreaction from national authorities. To put it bluntly: prejudice in politically or historically sensitive topics is more likely to occur in a national setting, than it is for an international judge and hence deference may be ill advised.

[87] *Zdanoka* [133].

[88] *Vajnai v Hungary* App no 33629/06 (ECHR, 8 July 2008)

A deeper issue has been emerging along with the discussion of the margin of appreciation about the nature of the Convention itself. The demand for margin of appreciation is tantamount to a sovereignty based claim for deference. The issue of party dissolution looks at first sight to be a suitable vehicle for such claims. Under the margin of appreciation, the state claims deference from the ECtHR because the issue is *soi-disant* too intimate for outsiders to intrude upon. However, for judging the validity of these claims one should take into account the nature of the Convention first. Is the Convention an international human rights law instrument or is it closer to a bill of (constitutional) rights? If the former is true, sovereignty based claims for deference should be more relevant and result in wider margin of appreciation. It seems though that the ECtHR is closer to the latter. Helfer and Slaughter argue that the effective adjudication system of the ECtHR is what makes it a *sui generis* supra national court: 'the distinguishing feature in this regard between supranational and international organizations is the greater transfer of, or limitation on, state sovereignty involved in the establishment of a supranational organization.'[89] The efficiency of adjudication renders the ECtHR different from other mere international institutions. Furthermore, others convincingly argue that the way the Convention as an instrument shapes individual rights is what really raises the Convention above mere international human rights instruments such as the UN treaty mechanisms. Letsas argues that the special subject matter of the Convention and the attitude with which individuals and states treat the Convention as mandatory are crucial. As he puts it: 'The ECHR is part of the normative materials that make each and every proposition of domestic law true. In this respect, the ECHR rights are exactly like the constitutional rights of Member States.'[90] Letsas also emphasises that the ECtHR is a regional

[89] Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale. L.J. 273, 287.

[90] Letsas (n 82) 35.

convention of alike liberal democracies, at least in an aspirational sense, whereas this feature certainly does not hold true for other international human rights treaties.[91] For these reasons, a call for a wider deference seems to be misplaced. If one accepts that the ECtHR is indeed an instantiation of a supranational human rights institution, then the consideration that party dissolution is a sensitive internal affair should not substantiate claims for a wide margin of appreciation.

4.2 INSTITUTIONAL OBJECTION

The institutional objection consists in rejecting any interference with the democratic process by the Court because it is seen as an unelected institution. Dissolving a political party should surely be seen as such an interference. The objection has some intuitive appeal. Courts are unelected and so in that sense are undemocratic institutions. Subsequently one could think that voters should be the judges of the political parties instead of court officials. As a matter of comparative law, a number of countries indeed do not have any legal provision for banning parties.[92] Be that as it may, the institutional objection applied to the ECtHR has very limited use. If the ECtHR should refrain from interfering with the democratic process because it is an undemocratic institution, then surely national courts should likewise refrain. Therefore this objection is either a wholesale objection to any party dissolution or a recycled version of the sensitivity argument camouflaged in institutional dress.

[91] Letsas (n 82) 29.

[92] European Commission Through Law (Venice Commission), *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* (Venice, 1999).

The institutional objection is strengthened by the argument that judicial review should be rejected outright on democracy grounds.[93] Judicial review is an illegitimate deviation from the normal majoritarian democratic decision making process. Democracy's legitimacy is diminished if the decisions over rights are made by unelected judges rather than by elected majorities in parliament. However, even those who favour the majoritarian process see something special in securing participation in the political process even through undemocratic means if necessary.[94] Therefore, the general argument against the allegedly undemocratic nature of judicial review does not necessarily save the institutional objection applied to party dissolutions. Similarly, the ECtHR stressed that the margin of appreciation of member states was limited in cases concerning the participation in the political process such as the right to vote (*Hirst v. United Kingdom* [95]) and indeed the dissolution of parties (*Refah*[96]). Even Legg, who advocates the doctrine of margin of appreciation as a valuable tool to accommodate sovereignty based claims of member states at the ECtHR, acknowledges that 'where there is a risk that certain elements of participation are inappropriately being hampered […] then less deference and greater scrutiny will result.'[97] Therefore, the institutional objection either misses its target because the objection is just as valid against any court and not just against the ECtHR, or the objection is such a full-blown rejection of judicial review that even majoritarian critics do not endorse it. In case party dissolution cases judicial review aims at protecting those political rights that help to keep open the democratic process.

[93] The most prominent supporter of majoritarianism is Jeremy Waldron. The original idea of right-based criticism of judicial review appeared in Jeremy Waldron, *Law and Disagreement* (Oxford Clarendon Press 1999).

[94] See 'the non-core case' for judicial review where even an influential critique of judicial review finds its practice acceptable. Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale. L.J. 1346, 1401. For the general process-based argument for judicial review: John Hart Ely: *Democracy and distrust: A Theory of Judicial Review* (Harvard University Press 1980)

[95] The Court acknowledged that the margin of appreciation was wide but 'not all embracing'. *Hirst v the United Kingdom* (No. 2) App no 74025/01 (ECHR, 6 October 2005) [82].

[96] The Court wrote about the need to strictly construct the limits. Ibid.

[97] Legg (n 80) 93.

Overall, none of these objections seems to prove the case for a wide margin of appreciation for member states.

CHAPTER FIVE

CONCLUSION OF PART I

Part I of the thesis outlined a challenge and the shortcomings of the ECtHR case law in party dissolution cases. The findings thus far can be summarised as follows.

The ECtHR has to face a new situation with the rise of new extremist political parties in Europe. The new intolerant parties oppose core liberal values, though not in the same way as totalitarian parties used to do: they do not subscribe to a defined anti-democratic political philosophy. The way the ECtHR dealt with dissolution cases so far will not be sufficient anymore to judge on potential dissolutions of these new extremist parties.

The reason for this shortcoming lies in the Court's limited reasoning in dissolution cases, characterised by two features: the reason checking reasoning and militant democracy. The Court bifurcates its reasoning into a highly fact-sensitive reason-inquiry and to a normative-inquiry in dissolution cases. The Court arrived at this seemingly favourable record for freedom of association by an extensive reliance on reason-checking inquiry. The Court thus managed to smoke out all sorts of arbitrary reasons governments offered from outright misrepresentation of a party till emphasising the prematurity of a party's dissolution. In many cases the Court's inquiry was exhausted by checking the faulty reasoning of the national authorities.

In intolerant cases involving party dissolutions and, analogous issues such as hate speech, the Court relied on some version of militant democracy. However, militant

democracy is a broad brush theory that justifies the limitability of rights in general but might rather be thought of on a scale of degree. Moreover, given that new extremist parties differ from old totalitarian ones in nature, direct application of militant democracy is misplaced short of analogy. Beyond this practical difficulties lies though the normative difficulty. Militant democracy can be interpreted in a strict way that would lead the Court to a low standard that would be morally unattractive.

At the end of Part I, two arguments were presented that would still explain and legitimate this minimal protection against dissolution of new extremist parties. Both objections against higher protection aimed at justifying a large margin of appreciation for states in party dissolutions. It was found that the supranational nature of the Convention gives a satisfying answer to the sensitivity objection. The institutional objection against Courts meddling with democratic process was discarded on the basis that it was a general attack on judicial review that the ECtHR had responded forcefully.

The analysis concludes that if the Court keeps relying on reason-checking and militant democracy that would lead to a restrictive dissolution standard in party dissolution cases. Application of which to new extremist parties would confine article 11 protection to instances of patently arbitrary dissolutions. This minimal protection is problematic from a normative perspective and Part II will try to rethink the case law in a new way.

PART II

RETHINKING THE ECTHR JURISPRUDENCE ON FREEDOM OF ASSOCIATION

CHAPTER SIX

MAPPING WHAT THE COURT SHOULD SCRUTINISE

The first step in party dissolution cases at the ECtHR is to identify whether the aim of the restriction was legitimate at all. The Convention contains some legal grounds for the restriction of freedom of association, and for the eventual dissolution of political parties. The limitation clause of article 11(2) contains national security, public safety, the protection of health or morals, and the protection of the rights and freedoms of others. The preceding chapters established that the question of legitimate aim has never been decisive in the practice. Governments routinely justify their dissolution decisions on grounds that easily fall into any category on the list of limitation clauses. Nonetheless, grounds are inert legal forms in themselves. The real work of adjudication happens at the next stage of the proportionality analysis, where judges assess whether the dissolution of a political party is indeed required in a democratic society. In the end, the Court determines whether there was a violation of article 11 through the normative and reason-checking inquiries described in Part I.

However, before that the Court has to face another challenge in dissolution cases. Political parties engage in endless activities: they campaign for political propositions, field candidates for elections and organise demonstrations, to name but a few. Facing this multitude of activities, the Court should have a clear idea about what are the relevant

aspects of a party's activities that should be scrutinised. Moreover, the ECtHR should also be clear about the importance it accords to each political activity it scrutinises. This chapter aims to map in a descriptive fashion the various activities the Court has scrutinised thus far, while the next chapters will determine the normative significance of each scrutiny.

The question of scrutiny is of special significance for this thesis. Part I established that the challenge for the ECtHR was to fashion a dissolution standard that is adequate for new extremist parties. It is helpful to see that the question of dissolution boils down to a conflict between freedom of association and the protection of democracy. In a similar way Macklem showed that the conflict in *Refah* was whether 'the state is entitled to act in a militant manner and ban a political party in the name of democracy.'[98] One should bear in mind that it might be possible to define some constitutive elements of democracy, but would still disagree on what the defence of democracy requires. In the light of this difficulty the aspects of a party's activity that the Court scrutinises in dissolution cases become crucial.

The ECtHR has touched sporadically on the question of scrutiny. It stated explicitly in *Refah* what it intended to scrutinise for determining whether a party's activity is protected by the Convention or not. The Refah test states that

> '[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;

[98] Macklem (n 59) 506.

> secondly, the change proposed must itself be compatible with fundamental democratic principles.[99]

The Court emphasised the means the party uses and the goals it wishes to achieve. Furthermore, there is a third aspect of a party's activity that is highly relevant, namely, the general impact of those activities on society. Thus, the three scrutinised aspects of a party's activity are the goals, the means and the impact of the party. One can turn them into questions: What are the goals of the party? What are the means the political party uses (or advocates to use) for achieving its political goals? What impact does the party have on society? For reasons of clarity I shall hereafter refer to goal scrutiny, means scrutiny and impact scrutiny.

6.1 GOAL SCRUTINY

Are the goals of the political party compatible with democratic principles? Goal scrutiny seems to be the natural starting point for debating any party dissolution case. Besides, it closely reflects the paradox of democracy, that is, how a tolerant democracy should deal with its enemies. Party dissolution is a preventive restriction for protecting democracy. Realistically speaking, the decision to dissolve a party can only be taken before a party starts implementing its policies.[100] As a result, the goal scrutiny requires a delicate speculation about the consequences of a future government's unknown programme.

All dissolution cases involve goal scrutiny but not in the same way. First, in the communist party cases, the Court's scrutiny was tantamount to assessing whether the ideology as stated in party programmes was compatible with the Convention. The Court

[99] *Refah* [98].

[100] Boyle pointed out in relation to *Refah* that its dissolution 'was not suppressed for anything it had done in government but rather because of what it might do, should it, at some point in the future, become the outright party in power.' Boyle (n 48) 10.

emphasised, in *United Communist Party*, *Partidul* and *Tsonev*, that they had not aimed to achieve hegemonic power, as opposed to the West German communist party whose dissolution the European Commission (the ECtHR's predecessor) had approved in 1956.

Second, in the pro-Kurdish party cases the parties stood for the autonomy or the secession of a region, as in *United Macedonian*. The goal scrutiny aimed to ascertain whether the pro-autonomy position of the parties was reconcilable with the protection of national security. The ECtHR's position evolved on that question but it wound up holding unequivocally that the Convention should protect parties that propose the peaceful secession of a region. It effectively amounted to holding that the particular goal of secession was not a valid ground for banning a political party.

Third, in *Refah* the goal scrutiny aimed at assessing the potential consequences of the party's accession to power. The Turkish authorities imputed to the Welfare Party that it wanted to introduce a pluralistic legal system based on religious discrimination and the introduction of sharia law. The ECtHR found that both these political goals would have led to serious violations of Convention rights, should they be implemented. *Refah* was a particularly complex case in which other circumstances mattered more than the evaluation of the goals of the Welfare Party. The danger was imminent, because the Welfare Party 'had the real potential to seize political power without being restricted by the compromises inherent in a coalition'.[101] Therefore, *Refah* did not entirely turn on goal scrutiny. The distinction here is worth bearing in mind.[102] It consist in distinguishing between on the one hand judging the goals of a political party that might be thought

[101] *Refah* [31].

[102] Imminent danger will be discussed in chapter 9.

antidemocratic; and on the other hand judging the fact that a party may imminently accede to power and hence pose an imminent danger to democracy.

6.2 MEANS SCRUTINY

The second aspect of a party's activity that the Court scrutinised was the means the parties aimed to use for achieving their political goals. What are the means the political party uses (or advocates to use) for achieving its political goals? That is one of the conditions set up in the *Refah* test: the means should be legal and democratic. By that the Court meant the lack of any link to violence and respect for the democratic procedures of elections.

In that spirit, the Court has been scrupulously looking for links to violence in the activities of the parties in its investigations. As a normative question, the absolute ban on violence may be uncontentious but to prove or refute the link to violence as a matter of evidence turned out to be highly contentious. Again, this investigation took various forms and led to different results in different cases. In the pro-Kurdish party cases, the Turkish authorities tried to prove that the parties had links with terrorist organisations. But the Court refused to accept the existence of such links in these cases. The pro-Kurdish party decisions stood in contrast with *Batasuna* where the Court accepted that there was a 'deliberate apportionment of tasks between terrorism and politics'[103] and did not find violation of article 11.[104] In *Refah*, the Court also used means scrutiny when it investigated the endorsement of jihad, although in a different way. The Court found that

[103] *Batasuna* [31].

[104] Černič (n 60), Turano (n 60) put in the centre of their criticism of the dissolution case law the weakness of the evidence that the Spanish government put forth and the ECtHR accepted without further investigation. Similarly, Boyle criticises the assumption of dangers the Court accepted about the Welfare party. Boyle (n 48) 10-11.

the party accepted the possibility 'of resorting "legitimately" to force in order to overcome various obstacles the Welfare Party expected to meet in the political route by which it intended to gain and retain power'.[105] Therefore, in *Refah*, what the Court really scrutinised was the support for using violence in the future and not the existence of actual links with violent organisations, as in *Batasuna* and in the pro-Kurdish party cases.

Overall, it is the means scrutiny that the Court used in all dissolution cases. One can infer from the case law that the Court treats the link to violence as an absolute ban.

6.3 IMPACT SCRUTINY

The third aspect the Court may scrutinise is the political party's impact on the society in a sociological or discursive sense. Thus far, the impact scrutiny has only once been used implicitly, in *Batasuna*, but it is of great importance for the dissolution of new extremist parties.

In *Batasuna* the Court held that the separatist party contributed to 'the climate of confrontation'[106] in the region. *Herri Batasuna*, the separatist party, held meetings that provoked public outrage and discontent because they were perceived as supporting terrorist violence. Although the Basque separatist party also contributed to this climate by physically harassing other parties' representatives. This sort of violent impact on politics goes beyond the question of impact in the sense that it is used here, and *Batasuna* is therefore not a perfect example of impact scrutiny.

[105] *Refah* [130].

[106] *Batasuna* [86].

For better or worse, parties shape public discourse through their actions.[107] As a result of their presence they impact on society and its public discourse; therefore, impact scrutiny aims to observe this sociological, or discursive, impact. It is easy to see that intolerant parties represent an opposition to core liberal values by their anti-immigrant, xenophobic or even racist agendas. Therefore, they might have a corrosive impact on the core liberal values of a society. The example of the Norwegian anti-immigration populist Progress Party (*Fremskrittspartiet*) may be revealing. Downs discussed the public debate that ensued after the massacre committed by a right-wing terrorist in 2011 in Norway. The debate focused on the responsibility of the Progress Party for cultivating a fiercely xenophobic ideology that might have contributed to the tragedy.[108] According to Downs:

> [t]he puzzle here is whether extremist acts can be attributable to the rhetorical environment shaped by rejectionist parties, even if those parties publicly reject violence. If the words, symbols and posters employed by such parties do heighten risk for democracies, then how democratic actors respond is of major importance.[109]

Any attempt to rethink the case law should decide on the normative importance each of the scrutinies deserves. At the outset it should be uncontroversial that the Court ought to attend to all scrutinies in a party dissolution case for the sake of completeness and transparency. What might be controversial is to decide what importance the Court should accord to each scrutiny. It should be emphasised that, thus far, this chapter has only intended to map, in a descriptive and not conclusive manner, the aspects of activities

[107] In a recent case involving political parties, Judge Rozakis made a similar point about the impact of political parties in his dissent. 'Political parties do not only aspire to take control of the reins of a State, but also, even when they do not have governance over the State, exert significant influence on political life and an impact on the fate of the State and society.' *Parti Nationalist Basque –Organisation Régionale d'Iparralde v France* App no 71251/01 (ECHR, 7 June 2007).

[108] The debate was also enhanced by the fact that the terrorist once used to be a member of the party. Downs (n 2) 9.

[109] Ibid. 10.

that a Court can scrutinise. To decide what normative role each scrutiny deserves, one should first discuss the main questions of party dissolution. The natural place to start this process is at the heart of the subject matter: the definition of political parties. This thesis now turns to that discussion.

CHAPTER SEVEN

CONCEPT OF A POLITICAL PARTY

7.1 THE DEFINITION STAGE IN ADJUDICATION

Human rights cases at the ECtHR can be broken down to two stages: a definitional and a proportionality or balancing stage[110]. First, the Court tackles the definition or scope of the right[111] (whether the right has been interfered), then the proportionality stage (whether the restriction of the right was justified). The next chapters will investigate how the definition and the proportionality stage should work in party dissolution cases. The point of definition stage will be investigated in this chapter, and that of the proportionality stage in the next one.

On face of the case law, the ECtHR uses both stages of adjudication. But a closer look reveals that the definition stage had limited importance and the whole adjudicative process was heavily dominated by the balancing stage, where the proportionality test is effectively implemented. Similarly recent academic literature privileged the proportionality stage over the definition one.[112] One academic supporter of proportionality, Kai Möller argues that the first definitional stage, that he calls the prima

[110] For the sake of clarity: I shall talk about proportionality meaning the whole four-steps adjudication process, of which the final step is balancing.

[111] The terms scope and definition will be used interchangeably.

[112] From the recent literature Thomas Kumm and Kai Möller propagate proportionality as the most important adjudicative tool. See Kumm (n 16) and Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012). Both authors draw heavily on the theoretical work of Robert Alexy. Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002).

facie stage, lost its importance altogether because of the vast scope of rights. He contends that under human rights adjudication dominated by proportionality analysis one has a 'constitutional right to everything'[113]. Hence

> [t]he prima facie stage of rights, where every autonomy interest is protected, does not operate as a filter. Thus, most of the hard analytical work, separating successful from unsuccessful rights claims, must be done at the justification stage, and the main doctrinal tool there is the principle of proportionality.[114]

The party dissolution cases so far decided at the ECtHR seem to bear out this view: the Court has always taken a broad brush approach about the definition stage: it simply repeatedly remarked that the right of freedom of association was interfered with by the dissolution of the party and then went on straight to the proportionality analysis.

The proposition of this chapter is just the opposite: the definition stage can be useful in party dissolution cases.[115] The definition stage can and should operate as a filter for unsuccessful right claims. There are claims to freedom of association protection that should not be covered at all by article 11. As a result the Court should stop its investigation at that stage without reaching the proportionality stage in some cases. This is because some claims fall outside of the scope of protection completely. There are multiple advantages of using the definition stage. It achieves a transparent delineation of the scope of the right by a preliminary investigation about the moral content of freedom of association in relation to political parties. By that investigation, the Court avoids using plainly false assumptions for technical reasons of adjudication that the proportionality model cannot such as positing a 'right to everything'. For the proportionality supporters

[113] Möller (n 112) 197.

[114] ibid 178.

[115] The thesis does not investigate whether the use of definition stage should be extended for other rights as well.

the 'hard analytical work'[116] happens entirely at the proportionality stage because they posit a constitutional right to everything, or as Tsakyrakis put it the right to 'total freedom'[117]. But both assumptions are morally unappealing. Instead of these assumptions, the Court can engage in substantial reasoning about the right from the beginning. Moreover, by revitalising the definition stage the proportionality stage is left to deal with real conflicts between rights.

For rendering the definition stage useful one should have basic assumptions about the right to see whether the right was engaged at all. Party dissolution cases are about the activities of political parties. Therefore, the Court must have a concept of a political party. It means that before the Court starts to deliberate about the justification of the restriction at hand, it has to investigate what ought to entail the protection of freedom of association. The case law already contains examples of such preliminary investigations that serve as good starting points for defining the concept of a party. The task of this chapter is to reorganise and enrich this investigation about freedom of association in relation to parties. The debate over autonomous concepts in the ECtHR jurisprudence provides with some insights about the definition stage generally.

Chassagnou and other v. France[118] was a freedom of association case that exposed the issue of autonomous concepts. *Chassagnou* was about a hunting union that had a state licensed mandatory membership policy. People living on a given hunting territory automatically became members of the union. The applicants objected to hunting on an ethical basis and they wished to resign their memberships. However, the French

[116] ibid.

[117] Stavros Tsakyrakis, 'Total Freedom: the Morality of Proportionality' (SSRN paper, February 2013) Available: <http://ssrn.com/abstract=2220255> accessed 30 September 2013.

[118] *Chassagnou and others v France* App nos 25088/94, 28331/95 and 28443/95 (ECHR, 29 April 1999)

authorities denied the applicants' claim on the ground that the national law did not classify the hunting union as an association but rather as a 'para-administrative body'. The interpretation dilemma was clear: the complainant's article 11 right would have been violated but for the association being classified a 'para-administrative body' instead of an association. In *Chassagnou*, the Court declared that 'association' has an autonomous meaning within the Convention that is independent from state practice though it is informed by it. Letsas' explanation is revealing about the importance of the debate.[119] Autonomous concepts are not used by the Court for the sake of lexical precision. Legal concepts are legal creations, they have no existence outside of law. Therefore, the ECtHR in principle should not bother and simply take state practice as it finds them to define what a legal concept means. But that would be wrong because what certain concepts amount to matters for the protection of the right. The *raison d'être* of autonomous concepts is to prevent states from usurping rights by classifying legal concepts so as to exclude individuals from the scope of the protection of the Convention that they otherwise ought to enjoy but for the classification. The definition of some concepts, such as association, determines whether the Convention right is engaged, meaning whether the right was interfered with at all. As Letsas points out: the dispute about autonomous concepts arises where the member state classifies a legal concept in a way that leads to the restriction of Convention rights. The semantic undertone of the debate should not conceal the main point. It is the abridgment of the right that gives rise to dispute over concepts and not the need to harmonise legal concepts for the sake of clarity. '[D]isagreement therefore operates on the background assumption that such classifications are not neutral because they have a direct impact on what rights people

[119] Letsas (n 82) 40.

have and how state coercion will be used.'[120] Therefore, it seems that the dispute over concepts is really a proxy to a primary debate which is really about the scope of a right. Or to put it another way: one has to investigate what a right ought to protect in order to know whether the right was engaged.

The political party as a concept did not spark similar controversies before the ECtHR. For that to happen a state would have to classify, i.e. define, parties in a way that excludes groups that ought to be treated as a political party. Yet, the lessons drawn from the debate over autonomous concepts should be applied generally to the definition stage. The debate over autonomous concepts highlights that the definition stage about rights matters. In *Chassagnou,* the Court found out and subsequently worked on the assumption that freedom of association protects the right to decide over membership in a group. Consequently the right was engaged despite the national authorities' classification of hunting unions as administrative body.

It is worthwhile to apply this conclusion to party dissolution cases. Dissolution cases are about political parties. Therefore, the Court has to have assumptions about political parties to define the scope of the right.

7.2 BASIC ASSUMPTIONS IN THE CASE LAW ABOUT ASSOCIATIONS AND PARTIES

The Court has already made a number of substantial points about parties and associations. Many of these points or assumptions are generally valid for all associations, not confined to political parties.

[120] ibid 54.

The Court held in *United Communist Party* case that 'political parties are a form of association essential to the proper functioning of democracy'.[121] Furthermore, that they are instrumental in 'ensuring pluralism'[122] in society. These assumptions resonate closely with what the Court held about associations in a general way. This can be highlighted by *Gorzelik v. Poland*[123] which was about the registration of a controversial association dedicated to defending the interests of an unofficial regional minority. In that case the Court held:

> [w]hile in the context of article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy.[124]

Thus, it is no surprise that the Court equated parties and associations. For the Court both ensure pluralism and are equally essential for democracy.

Another similarity between political parties and associations is that both epitomise a collective exercise of free expression. Accordingly the Court bound together articles 10 (freedom of expression) and 11 (freedom of association) by stipulating that the latter should be interpreted 'in the light of the former.'[125] In *ÖZDEP*, the Court pinpointed that activity of political parties is a way of exercising freedom of expression collectively[126],

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[121] *United Communist Party* [25].

[122] ibid [43].

[123] *Gorzelik and others v Poland* App no 44158/98 (ECHR, 17 February 2004)

[124] *Gorzelik* [92].

[125] For example: *Yazar* [46].

[126] *ÖZDEP* [48]: 'The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.'

and it held similarly for associations in *Zhechev*.[127] This points to a shared common feature that is equally true for political parties and generally for associations. Associations try to influence politics by collective action such as giving voice to an opinion collectively. A teachers' union, a minority rights NGO or the East Oxford Conservative Club all strive to influence public debate in order to define the common good society should pursue. Therefore, the common feature that may be generally true about the right to freedom of association might be the interest in participating in politics and in influencing it. If it is true then the same interest is at stake whenever authorities restrict a trade union's rights to demonstrate or a political party's right to participate in elections. They are variations on the same theme.[128]

To enrich this description one could deepen the argument by distinguishing groups according to the degree of influence they exercise on politics. As a matter of conceptualization, influencing politics as an activity can be put on the same scale spanning from soft (indirect) to hard (direct) influence. It may be thought that people in associations strive to influence democratic politics in an indirect or soft way, whereas people in political parties aim at influencing politics head-on. The contention here is that this is not just a matter of degree how much an association influences politics. Political parties differ on the way they influence politics and this difference is reflected in ECtHR's case law.

[127] *Zhechev* [36]: '[T]he Court has also recognised that the protection of opinions and the freedom of expression within the meaning of Article 10 of the Convention is one of the objectives of the freedom of association.'

[128] There is nothing in the argument that precludes the acknowledgment of further interests that freedom of association may serve, such as strengthening of common bonds among members or even furthering the private interest of employees for trade unions. For the purpose of the thesis we bracket the discussion of these interests.

Before turning to the ECtHR, it is instructive to have a closer look on Germany's constitutional arrangement. Germany's constitutional system explicitly gives voice to the exceptional role of parties, implying an important dissimilarity between parties and associations. The German *Grundgesetz* creates an institutional exception for political parties or the so-called party privilege in its constitutional regime. This means that legal matters concerning parties, such as dissolutions, are only dealt with by the Constitutional Court, whereas legal questions of associations are dealt with by general courts. This party privilege amounts to a procedural guarantee of independence.

The German party privilege got its inspiration from the tragic history of the Weimar Republic. In Weimar, parliamentary democracy was submerged by excessive presidential power that also led to the destruction of political representation carried out by parties. The German Constitution declares that parties 'participate in forming the political will of the people' and it incorporates them into the state.[129] In the words of the Constitutional Court the incorporation of political parties in article 21 'means that parties are not only political-sociological entities; they are also integral parts of [our] constitutional structure and [our] constitutionally ordered political life.'[130] This is because parties are closely linked to the coercive power of government.[131] And this is unique: only political parties strive for government power. Hence, the insight of the German constitution is that parties have an institutional role in constitutional arrangements. One could possibly argue that the same goes for any other organization aiming at influencing politics such as trade unions. Though here influence figures in a sociological sense. Yet,

[129] Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 1997) 200.

[130] ibid 201.

[131] Sawyer argues about the link between Weimar and the later legitimacy of dissolving parties. 'The failure of the Weimar Republic provided fodder for the most compelling arguments in favor of proscription.' Sawyer (n 60) 1573.

it seems that the link to political power is tighter when it comes to parties. It is enough to compare a union of teachers protesting against a government policy and a political party actually voting on that motion in Parliament.

This difference has significance for appreciating associations and political parties in a normative sense. The political parties' unique position is echoed by the ECtHR as well.

> [I]t is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena.[132]

Therefore, one can conclude that the distinctive feature that makes political parties peculiar, and dissimilar to mere associations, is their potential to come to power and as a result to implement their vision of society. What normative implications should follow from the distinctive feature is investigated in the next part of this thesis.

7.3 THE CONCEPT OF A POLITICAL PARTY

In light of the basic assumptions one must ask what implications the distinctive feature of political parties have for dissolution cases. For a political scientist whose goal is to offer an accurate description of everyday political struggle, the constitutional role of parties has sheer descriptive importance. It may well be the case that parties' and other groups' influence is measured by the same metric of political influence on legislation. But the

[132] *Refah* [87].

distinctive feature of parties has normative significance for the Convention judge as opposed to sheer descriptive value. The proposition here is that it is crucially important to account for 'the nature of the role [political parties] play'[133] when the Court scrutinises the legitimacy of a party dissolution.

Parties attempt to acquire representation and to gain power in politics through elections that is also uniquely reserved for them. Parties stand between society and state that bridge them through elections. The ECtHR stressed this point when it held that 'any measure taken against them [i.e. political parties] affected both freedom of association and, consequently, democracy in the State'.[134] Through their electoral participation and access to legislation they become trustees of state power. Parties acquire a privileged position *vis-à-vis* the coercive power of the state so that they could implement their societal programme. Their distinctive normative feature originates from this privileged position. Therefore, the normative concept of a political party embodies the special relationship that only parties have with regard to coercive state power: they participate in the contest (through elections) for state power in order to exercise it (in government).

From the normative concept of a political party one can derive the constitutive elements of a political party in a liberal democracy. These constitutive elements are requirements for parties seeking article 11 protection. Because they are constitutive elements they are also of absolute nature. Should a party fail to meet them, it would not qualify as a political party and its claim to freedom of association protection would fall outside of the scope of the right to freedom of association. As a result there would be no need for reaching the proportionality stage at all. Two such requirements flow directly

[133] ibid.

[134] *United Communist Party* [31].

from the concept. The two requirements also provide answers to the question of scrutiny that was left unanswered at the end of the last chapter. Namely what normative importance should the Court give to the means scrutiny and the goals scrutiny?

7.3.1 Means scrutiny

Let's take an imaginary example. Suppose a violent robbery gang applied for political party status in No-Man's-Land. The government of No-Man's-Land (signatory to the European Convention on Human Rights) refuses to recognise a robbery gang as a political party. The case makes its way up to the ECtHR. The question for the Court is the following: Was the right to freedom of association engaged at all? Fortunately enough the ECHR case law already includes assumptions about political parties that answer this point. '[O]ne of the principal characteristics of democracy [is] the possibility it offers for debate through dialogue, without recourse to violence, of issues raised by various tides of political opinion, even when they are troubling or disturbing.'[135] To apply this dictum to our imaginary example, the robbery gang's claim would fall outside of the protection scope of article 11 under all circumstances because the right does not encompass the use of violence at all. Therefore No-Man's-Land was right to refuse registration of the pseudo party. It would be an odd way to see it as a conflict between freedom of association pitted against, say, democracy. There is no reason to reach the proportionality stage at all. It is a question of definition and not a matter of proportionality. Take the sister right of freedom of association, the right to peaceful assembly, for elucidating this point further. Under no condition should a court extend the protection to a non-peaceful assembly. In the case of the right to peaceful assembly this assumption is embedded in the wording of human rights conventions, but should treaty drafters forget the adjective, the right to assembly

[135] *Batasuna* [76].

would still not entail any right claim for non-peaceful assemblies. This suggests that the primordial importance of means scrutiny at the case law is confirmed. Refraining from using and advocating violence is what defines a political party.

7.3.2 Goal scrutiny

But the concept of a political party has implications beyond the means scrutiny. Further investigation of the normative concept of a party can refine the goal scrutiny as well. For once terminology turns out to be helpful. The very meaning of political 'party' means that it is indeed a part as opposed to the whole.[136] This idea is appropriately captured by the Court's insistence on the need for political parties to ensure pluralism. The commitment to pluralism combined with the fact that parties are the only bodies legitimately vying for political power are fundamental features to be taken into account at the definition stage. Nancy Rosenblum captures this idea when she writes that the ultimate characteristic of political parties is 'the peaceful assurance that politics is restricted to 'the open regulated rivalry'.[137] Rosenblum wrote: '[a] defining characteristic of parties is assurance that in situations of political polarization, conflict is restricted to the regulated rivalry of obtaining political office and influencing law and policy by peaceful, electoral means.'[138] One could call this the systemic pluralism of parties. The ECtHR set up an equivalent requirement by the Refah test: 'the change proposed [by a political party] must itself be compatible with fundamental democratic principles.'[139] Refah test requires a commitment to democracy the same way as Rosenblum: parties should consent to the open regulated

[136] Rosenblum writes about one philosophy tradition that stands against parties *per se*. She aptly labels this tradition of antipartyism 'holism' because: 'all social and political groups threaten unity and integrity of political order.' Rosenblum (n 70) 25.

[137] Ibid 416.

[138] Rosenblum (n 5) 43.

[139] *Refah* [98] and also with slightly different wording *Yazar* [49].

rivalry that democracy embodies. Through their participation in elections parties acquire special status *vis-à-vis* state power. Political power means the potential of the coercive government to implement a societal programme. Elections that result in designing temporary trustees of that power cannot grant power to destroy the cyclical elections.[140] The requirement for parties to acquiesce in cyclical elections is hence an absolute condition to qualify as a party and eventually for the protection of article 11. To put it bluntly: to qualify as a party qua a party in the legal sense (as opposed to a party in the sociological sense) it needs to commit itself to the open regulated rivalry. Therefore, in respect of commitment to the systemic pluralism the Court should also carefully scrutinise the goal of a political party.

The thesis initially started in chapter one with a discussion on the paradox of democracy. Behind the paradox there was the fear from democracy being captured by its enemies through elections. An infamous Nazi leader's oft quoted remark could reinforce this fear: 'This will always remain one of the best jokes of democracy—that it gave its deadly enemies the means by which it was destroyed.'[141] However, this fear need not be real, at least not in the sense that protecting political rights in a liberal democracy will necessarily lead to such a dark paradox with potential tragic outcome. If it is true that a political party only qualifies for freedom of association protection provided that it consents to regulated rivalry, then the paradox does not hold and the fear is not born out. There is no reason to provide protection to such enemies of democracy in the first place. Therefore the paradox of democracy is not a real danger in a normative sense.

[140] Franz contends that the early German dissolution cases stands for requiring '[a]t lease a passive consent' to the principle of democracy that the new-Nazi party did not meet. Paul Franz, 'Unconstitutional and Outlawed Political Parties: A German-American Comparison' (1982) 5 B. C. Int'l Comp. & L. Rev. 51, 57.

[141] Gregory H. Fox and Georg Nolte, 'Intolerant Democracies' (1995) 36 Harv. Int'l L. J. 1.

7.3.3 Implications for associations

The normative definition was tailored to parties and not to other associations generally. As a result the findings so far do not necessarily hold for them. Of course the ban on violence can be equally justified as a definitional requirement for associations. However, associations do not compete for power in elections but merely try to influence public affairs.[142] As a result they need not be committed to regulated rivalry for democratic power the same way as parties do. It means that, for example, the dissolution of a radical Islamist party that denies the open regulated rivalry of parties would not be a violation of article 11. Whereas the same is not true for banning a similar association. One could put it this way: the commitment to regulated rivalry is an ethical question for associations, whereas it is a definitional matter for parties.[143] Of course there might be other rationale available to ban antidemocratic associations such as violation of others' rights and freedoms.[144] Yet, it is enough to stress the point here that dissolution arguments are not invariably valid for both associations and parties.

7.4 EXTENDING THE DEFINITION STAGE TO A MORE ROBUST CONCEPTION?

Finally, there remains one proposition to be discussed in relation to the goal scrutiny at the definition stage. One could propose a more robust definition of democracy for the purposes of the definition stage of party dissolution cases. Instead of only requiring

[142] Similarly Turano argues for this distinction. 'The right to create a political party is based on the right of association, but party formation is not a simple exercise of this right; parties are the principal players in a democracy and, therefore, must adhere to certain conditions that would not apply to other associations.' Turano (n 60) 736.

[143] Cf. this position with *Hizb Ut-Tahrir and Others v Germany* App no 31098/08 (admissibility decision, ECHR, 12 June 2012). The Court refused to admit the complaint of a banned Islamist association that stood for the overthrow of non-Islamic governments and the establishment of an Islamic Caliphate despite it was not a political party. Requiring the respect for parties may only be valid for parties, though in this case the association also actively instigated violence, not just rejected democracy in principle.

[144] A recent association ban may be the case in point. The Court approved of the dissolution of a right-wing association whose activity was largely to intimidate the Roma minority in villages through patrolling where Roma population was high. *Vona v Hungary* App no 35943/10 (ECHR, 9 July 2013)

parties to commit themselves for the regulated rivalry, why not setting up more definitional requirements for parties? In *Refah* the Court might have just suggested that:

> [i]t necessarily follows that a political party whose leaders incite violence or put forward a policy which does not comply with one or more of the rules of 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.[145]

This seems to hint at extending the requirements further as a matter of definition. Based on such a reading one may contend that a political party that aims at flouting rights would possibly not enjoy protection under article 11 for the same reason as parties not committed to the open regulated rivalry would not either. At the end of the day, one may think that democracy is a rich concept: one should not simply equate it with party rivalry but enrich it with further assumptions such as the respect of basic rights.

Nevertheless, it would be ill-advised to extend the definition stage this way. Notice that the ECtHR dictum from *Refah* just cited above occurred in the proportionality stage of the adjudication, not in the definition stage. The definition stage should not of course exhaust the whole of the adjudication process. But democratic politics necessarily bring controversial issues to the table, such as the question of rights and their restrictions. Whether there are reasons to restrict freedom of association can be more properly scrutinised in the proportionality stage. This cautionary minimalism about the definition stage is buttressed by an additional argument. Parties are the most important constitutional institutions for representation in politics. The idea of representation does not convey the need for a perfect mirroring of the views in society. But it gives a strong

[145] *Refah* [98].

reason to allow even questionable propositions and political opinions to be part of the political contest. The Court seems to have given voice to a similar view in *Batasuna*: 'one of the principal characteristics of democracy to be the possibility it offers for debate through dialogue, without recourse to violence, of issues raised by various tides of political opinion, even when they are troubling or disturbing.'[146]

7.5 SUMMARY

Let's summarise the findings of this chapter. Human rights adjudication can be broken down to a definition or scope and a proportionality stage. It was found that in party dissolution cases, the first can be rendered useful by building up a normative concept of a political party. The argument's importance lies in the way it goes: it asks first what the right to freedom of association in relation to political parties ought to include and conversely to exclude from its scope. This chapter gathered together the basic assumptions about political parties that have already surfaced in the ECtHR case law. Political parties are the only associations that can implement their societal plans with the coercive force of the state. They are constitutional institutions or temporary trustees of state coercive force. This concept has a bearing on the scope of freedom of association. The conclusion of the chapter is that freedom of association does not entail the right to alter the systemic pluralism of parties the same way as it does not entail the right to use of violence as a means for political goals.

[146] *Batasuna* [76].

CHAPTER EIGHT

PROPORTIONALITY IN DISSOLUTION CASES

8.1 PRELIMINARIES ON PROPORTIONALITY

After the definition stage, we should clear the role of the proportionality stage. It is in the proportionality stage that the conflict between freedom of association and the protection of democracy should be resolved. Note that the last chapter has already defined some claims for protection of article 11 that should be immediately discarded. Parties using violence and denying organised rivalry do not even get to the proportionality stage. However, the typical new extremist parties do not use violence or deny democracy as totalitarian parties used to do. Therefore, the role of proportionality is crucial. First, the chapter will make some general observations about proportionality analysis in relation to dissolutions. Second, the chapter will focus on the way balancing between conflicting right should be carried out in party dissolution cases.

Perhaps proportionality analysis has become inevitable in human rights adjudication but one should still outline what it entails in party dissolution cases. Or to put it this way: what should one hope for from a proportionality analysis?

A myth should be dispelled at the outset. Proportionality analysis is certainly not a mechanical adjudicative tool for balancing right ‘A’ against interest ‘B’ in order to arrive at the outcome ‘C’ (correct). As Möller put it: ‘We must abandon the idea that balancing

could offer a 'shortcut' to moral truth and engage in the difficult work of developing a set of moral principles which can provide guidance in the resolution of such conflicts.'[147] Beside that point, proportionality is highly flexible. Everything depends on what use judges actually make out of it. Schlink also stresses this aspect of the doctrine: 'in practice, more crucial than the approach to the analysis is the diligence with which it is pursued'.[148] Even those who do not endorse proportionality as a desirable way of conducting human rights adjudication could accept it as a heuristic tool to expose the arguments of a case. Thus proportionality provides a structure of exposing the pros and cons of a case without resolving it. Möller seems to endorse this view: 'The added value is that the proportionality test provides a structure which guides judges through the reasoning process as to whether a policy is constitutionally legitimate.'[149] Seen in this structural way the advantage of proportionality, it is hardly possible for anyone to object to its use. Nevertheless, proportionality analysis might still be objectionable for other reasons: it might turn out to be either unhelpful or misleading. Applying the doctrine to party dissolution cases, these perils are certainly not unwarranted.

It is not clear how exactly the proportionality analysis would help resolve difficult party-dissolution cases. If the case law is anything to go by, than the structural argument will not help in judging party dissolutions because most of the steps in the analysis are simply irrelevant for dissolution cases. The first three steps of the analysis – legitimate aim, suitability, necessity – have never played any decisive role in any party dissolution case.

[147] Möller (n 112) 141.

[148] Bernhard Schlink, 'Proportionality' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 722.

[149] Möller (n 112) 179.

Further difficulty, is that party dissolutions do not offer a clear conflict between freedom of association and some other rights at first sight. Party dissolution cases involve parties that are perceived as endangering national security or democracy. Hence the dissolution of new extremist parties, sets freedom of association against some broadly defined public interest. The pro-Kurdish Socialist Party in Turkey is seen as advocating the disembodiment of the state; the Communist party in Bulgaria is perceived as wishing to impose the dictatorship of the proletariat. The Court confined its role to declaring that a dissolution measure falls in at least one of the broad legitimate aims.[150] The suitability part of the analysis was carried out with equal easiness. Given that banning a political party always turns out to be a suitable means to prevent the danger of which the party is a source. Without the party the danger would have never occurred in the first place.

Interestingly enough the necessity stage of the analysis was not even seriously evoked in any previous case. The necessity stage consists in asking whether the Court used the less restrictive means for the portrayed end. There might be one explanation available. The consideration of less restrictive measures are typically unavailable in these cases. In order to make sense of an alternative measure it should be less restrictive but equally as effective as banning a party. In the literature Brems enumerates eight alternatives to outright banning that exist in various legal systems.[151] These go from refusal to register the party (Turkey), through the disqualification of the list of a party (Israel) to the annulation of the election results (Algeria). Many of these measures figure in the list of the Venice Commission's Guideline on Prohibition and Dissolution of Political Parties and Analogous Measures[152]. The fact that these measures are analogous

[150] For example *ÖZDEP* [32].

[151] Eva Brems, 'Freedom of Political Association and the Question of Party Closures' in Sadurski (ed), (n 35) 141.

[152] Venice Commission Report (n 92).

also means that they are just as intrusive. Banning a party is an outright way to exclude a party from politics, whereas, say, disqualifying an electoral list of a party is an indirect one. Given that parties are purposeful entities, their only aim is to be in politics to gain power. Thus, any measure excluding them from the competition for power would in turn qualify as equally 'drastic' as banning them.

Overall, it has always been easy for governments to point out a legitimate aim for restricting the freedom of association and to prove the rational link between that aim and the ban of a party. Therefore the structuring capacity of proportionality will not yield any gains in party dissolution cases.

The question whether there was a violation of article 11 will always get decided at the last step of the proportionality analysis, that is at the balancing stage. This focus on balancing might explain why proportionality analysis in party dissolution cases translates into a quest for compelling reasons as it was highlighted in the literature.[153] It is certainly true that there is a consensus among ECtHR commentators about the 'high level' or 'strong' protection the Court afforded in freedom of association cases for political parties that translate into exacting judicial review. But what does it actually mean to have a high level of scrutiny? What is the criterion for a reason being compelling or convincing? Logically the balancing stage should provide an answer to these queries. And precisely in this respect balancing might be misleading. The notion of balancing might convey a false image about the conflict of rights and the way to resolve it by stressing the metaphor of balancing too much.

[153] Goold, Lazarus, Swiney (n 18) 45.

As Möller correctly points out there are a number of ways to conceive balancing. Some of which are unavailable in dissolution cases. If balancing is a relational concept, meaning that it requires a reference point (or a *tertium comparationis*[154]) to relate two measurable entities, the reference point should make the trick for carrying out the balancing. Party dissolution cases set against each other a public interest and a political right. The key question is how the measuring is really carried out. A strong theme of criticism of proportionality stresses that there is no common metric that would make the balancing of rights as an exercise possible. Tsakyrakis writes:

> [t]he most effective critique of balancing concerns the assumption of a common metric in the weighing process. The metaphor says nothing about how various interests are to be weighed, and this silence tends to conceal the impossibility of measuring incommensurable values by introducing the image of a mechanistic, quantitative common metric.[155]

This general criticism rings true for the particular level: the task to find a metric in party dissolution cases seems impossible. Is it possible to quantify and to compare the value of protecting democracy and the value of freedom of association? Imagine a fanciful example: a deeply religious, prudish society that is under the auspices of the ECHR. Pornography as such is banned in this society. Opposition to the ban is forming but at a rather slow pace. Finally, a protest movement from the mundane capital city launches a party for the general elections under the name of European Party for Pornography (or EPP). The authorities fear, with good reason, the shock and moral outrage with which the population will react to the EPP's participation in the election. As a result the authorities dissolve the party because it violates the rights and freedoms of others. How should one weigh the two rights against each other?

[154] Schlink uses this term Schlink (n 148) 720.

[155] Tsakyrakis (n 38) 471.

Balancing can mean maximizing interests, meaning that none of the conflicting interest can achieve complete fulfilment at the same time therefore some interest should yield to the demands of others. Here, what might count is the intensity of the interest the conflicting parties assign to their respective interest. Though this simplistic interest calculation is corrected by moral considerations as to what interests should be taken into account in the first place.[156] This might lead to certain quantification of interests in party dissolution cases. Or to say the same: this would lead to quantifying the harm caused by freedom of association. The question would be whether the harm caused to the population would or would not outweigh the potential harm done to, say, the members of the pornography party. But numbers will not do it as the case law has decisively demonstrated. In *Refah* the Court ruled against the most popular and the biggest political party in the country. Several millions of people voted for the Welfare Party that claimed to have several thousand party members. All the voters and especially the party members' rights were restricted by the dissolution. Or take *STP v. Turkey* where the pro-Kurdish party's proposition amounted to no less than the secession of a region from the country. It was hugely resented by the majority of the population. But the sheer numbers did not seem to have tipped the balance over the question of violation in either *Refah* or *STP*.

Quantification of interest and harm may be easily rejected as a way to carrying out the balancing. Perhaps one has to resort to a sort of trade-off balancing. Brems' proposition amounts to such a trade-off between freedom of association and the harm some party may inflict on democracy. 'Those reasons [for dissolving a party] reside in the harm that is caused by the party. The potential future harm […] is the harm that would be

[156] Möller discusses this question see (n 112) 138-9.

caused if the party's political programme were to be realized.'[157] The problem with Brems' proposition is that it does not instruct how the trade-off should be carried out. She contends that there are enough historical examples of extremist parties reaching power in Europe for not letting it happen again. But history in and of itself falls short of explaining when the circumstances favour dissolution of a party.

The danger one faces while using the trade-off of balancing is that the decision is taken on an *ad hoc* basis lacking transparency. Macklem discusses *Refah* decision's 'lack of specificity' in the same vein. He thinks that the probability of harm that the Court relied on its reasoning does not give any guidance of conducting the balancing in the future.

> In the absence of relatively specific rules and presumptions addressing these issues, this framework [that is, the Refah test] invites an entirely ad hoc exercise of interest balancing. Given the stakes, such an exercise would not only fail to provide guidance on the legality of militant state action; it would likely accord undue judicial deference to state interests at the expense of democratic freedom.[158]

A simple proposition might show the way out from this impasse. Some authors in the literature pointed out that balancing can simply mean an invitation for principled moral reasoning. For Schlink, proportionality is a solution for reconciling two normative premises of adjudication. According to him proportionality is the link between the proposition that we have rights and the proposition that they can be limited.[159] Proportionality analysis provides a reasoning process in which rights' moral implications can be effectively brought out. Möller similarly concludes that 'at the most general level

[157] Bremes (n 35) 151.

[158] Macklem (n 59) 514.

[159] Schlick (n 148) 728.

it [proportionality] simply points to the necessity of resolving a conflict of autonomy interests in line with sound moral principles (*balancing as reasoning*).'[160] The dissolution of political parties seems to be an issue where balancing is particularly inapt in terms of measuring and deciding on a scale the conflict of rights. Therefore, one should abandon to look for the metric that would ultimately make the trick. Instead balancing is an invitation for principled moral reasoning.

8.2 BALANCING AS IMPACT SCRUTINY

Chapter six established that the Court in a dissolution case can scrutinise three aspects of a party's activity: its goal, its means and its impact on society. These scrutinies exhaust the logical ways a court can scrutinise a political party in a dissolution case. So far the goal and the means scrutiny have been tackled at the definition stage. It was found that parties using violent means and proposing the overthrow of democracy should not be protected by freedom of association at all. The concept of a political party already explained the importance of both the means and outcome scrutinies. But it left unexplained how the Court should ascertain the impact a political party exercises on society. The proportionality analysis is the place where this question will be answered.

The conflict between freedom of association and competing interests should be resolved through principled reasoning at the balancing stage. But in what sense does freedom of association conflict with other rights or interests?

A political party exists for the sole purpose of gaining power so that it could influence the way the common goal is pursued in society. The only legitimate tool they

[160] Möller (n 112) 140. (emphasis in the original)

use for this purpose is communication. To put it bluntly: a political party is what it talks, what it communicates.[161] Parties have their impact on society thorough what they talk: they publish programs, they take positions in public debates and they propagate their views in campaign rallies and through party forums. Therefore, courts necessarily resort to scrutinise the communication of a party in dissolution cases. The link between freedom of association and freedom of expression should be evident by now.

The Court has not missed this link either. The Court considered dissolution measures in light of article 10 explicitly on several times. A textbook on ECtHR rightly stresses the strong doctrinal link between the two rights: 'the vital importance of the rights guaranteed under Article 10 can be most keenly felt by political parties.'[162] Similarly, the ECtHR repeatedly deplored in refusal cases that the party was 'penalised solely for exercising its freedom of expression.'[163]

The link between freedom of expression and association suggests that when it comes to the balancing step in dissolution cases, the Court faces a similar task as in freedom of expression cases. The Court has to ascertain whether the impact a party exercises on society should serve as a basis for dissolution or not. To be more specific, the question is whether the party's impact on certain interests of people, of groups or of the public in general should serve as a reason to ban a party.

A precision is needed as to what interests mean here. It goes without saying that the impact on interest must be negative so that any conflict could arise in the first place.

[161] As a shorthand version I will use the term 'stance of a party' to mean what a political party communicates.

[162] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd edition, OUP 2009) 457.

[163] *ÖZDEP* [42].

A political party has a negative impact or adverse effect on interests of some by advocating a certain position on political issues. One could also say that the party harms the interest of some through advocating its political propositions.[164] One could also say that the political party's negative impact consists in harming the interests of some. Take the example of a party that proposes high taxes. That party will certainly have a negative impact on the interests of the would-be-taxed people, call them the rich. Should a party oppose gay marriage, its political stance will have negative impact on the interest of gay people. But the impact should not be understood in an immediate sense, as in voting on a certain measure in Parliament or implementing a policy in government. Impact is rather used in a sociological sense, meaning to influence their environment by propositions in a discursive way. Of course the intensity or the immediate nature of the impact of the party depend on various factors, not last on whether the electorate agrees with the party or not. But at this stage of the analysis intensity does not play any role in the argument.[165]

It has been left unexplained whose interests a party can potentially harm. By observing the potential interest that a party may harm, it will become clear that some of the interests that are adversely affected from a political party's activity should not count as legitimate ground for any restriction on a political party.

8.2.1 Negative impact on personal interests

The most obvious example of a personal interest being harmed by a party stance is rich people's interest in paying low taxes by the Tax-The-Rich Party's stance. Here personal interest is used in an economic sense. It is beyond doubt that the redistribution and the

[164] A point on terminology is needed here: 'harm' and 'negative impact' will be used interchangeably.

[165] The question of intensity will be discussed at chapter nine.

economic policy including the tax system are at the heart of the democratic discourse. Therefore, any harm suffered from political parties' propositions should not be considered as a legitimate reason in the balancing stage in favour of dissolving a party.

Putting aside economic policy matters, a political party's stance might meet with the ethical disapproval of some people. Some, even a large majority might be outraged by a party's stance. The hypothetical example of the European Pornography Party in a prudish society is the case in point. Recall that the protection of public morals figures in the limitation clause of both article 10 and 11 of the Convention that might give some currency for protecting moralistic sensibilities.[166] In this example, the sensibility of people originate from conservative moralistic sources. And moralistic sources are generally dubious grounds for justifying restrictions of rights. Not least because these sensibilities often feed from prejudice. If a party had proposed the end of the ban on the criminalisation of homosexuality in the fortunately passed age where homosexuality was still criminalised, the party would certainly hurt deeply held sensibilities. Nonetheless, the majority's interest in keeping their prejudice unchallenged should not count as a valid reason to ban a party under any circumstances.

Overall, personal interest either understood in an economical or a personal-ethical sense should not count as legitimate consideration in the balancing stage of a dissolution cases.

[166] The case in point is the *Handyside* judgment.

8.2.2 Negative impact on national interest

In the pro-Kurdish cases, the dissolved parties in question had a negative impact on national security, meaning that according to the Turkish authorities they threatened the territorial integrity of the country. Furthermore, the authorities also contended that these parties threatened national unity by talking about the existence of a Kurdish minority. In all these cases, the state authorities perceived the pro-Kurdish parties as challenging the existing constitutional arrangements. The Court rightly refused to give priority to these national interests over freedom of association because the parties wanted to challenge precisely these questions in politics. In *United Communist Party* the ECtHR held that

> [t]here can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.[167]

The Court ruled that there cannot be legitimate harm in debating even irksome societal issues such as the Kurdish question. Banning parties on such ground would do a disservice to democracy because democracy is characterised by the possibility to resolve problems through open debate. The Court took a similar view in *Yazar*. The People's Labour Party called for the recognition of the Kurdish minority and supported their right to self-determination. In face of the Turkish authorities' allegation that the party threatened territorial integrity and the national unity, the Court held that even if a party's proposals

> [a]re likely to clash with the main strands of government policy or the convictions of the majority of the public, it is necessary for the proper functioning of democracy that political groups should be

[167] *United Communist Party* [57].

> able to introduce them into public debate in order to help find solutions to general problems concerning politicians of all persuasions.[168]

Therefore the Court concluded that a political party's stance might have a genuinely negative impact on important national interests but because of the importance of public debate, these interests will not suffice for restricting freedom of association.

8.2.3 Negative impact on equality interests

Neither the national interest nor the personal interests are directly relevant for the question of intolerant parties. Intolerant political parties, that reflect the phenomenon of new extremism, may exercise a negative impact on interests that are regarded as stronger than the ones discussed so far. The *Front National*, the British National Party of the Greek Golden Dawn take aim at various minorities, either immigrants or Muslims or gays. Their communication have a negative impact on minorities' interests generally in society in their political discourse. The case in point is Golden Dawn. It seems clear by now that Golden Dawn in surfaced in politics at the same time when intolerance and hate crimes against minorities soared.[169] Though this rise in intolerance is also certainly due to the economic turmoil through which Greece is going, but Golden Dawn exacerbates this phenomenon with its persistent political tone. To elucidate further the kind of negative impact that the intolerant parties exercise on minorities, the work of Jeremy Waldron is helpful. Waldron posits a distinction between offence in a subjective sense and an objective harm that hate speech causes to society. The former cannot, while the latter can serve as basis for banning hate speech. He suggests that the reason why societies should ban hate speech is because it 'negate[s] the implicit assurance that a society offers to the

[168] *Yazar* [58].

[169] See media reports on recent attacks (n 67).

members of vulnerable groups'.[170] One could infer from Waldron that hate speech erodes the egalitarian basis of liberal democracies. Without endorsing Waldron's normative position on hate speech laws, the explicatory force of his analysis about the harm in hate speech is undeniable. This way of articulating harm makes it clear that the negative impact of intolerant parties on minorities' interests differ from the first two kinds of interest discussed. Unlike the personal and national interest, the negative impact on equality interests should be taken as a real conflicting interest with freedom of association. Given the seeming link between hate speech and the dissolution of intolerant parties it is natural to turn to the ECtHR jurisprudence on intolerant expression cases for further insights.

8.3 ANALOGY WITH INTOLERANT SPEECH

The ECtHR's case law on hate speech was described in chapter three as one that was directly influenced by militant democracy. It meant that the Court left a wide margin of appreciation for states to regulate speech that was deemed contrary to the underlying values of the Convention. The category of hate speech is a comprehensive one. It includes speech from incitement to violence[171], revisionist speech that denies that the Holocaust happened, till expression that is conceived to be contrary to the dignity of persons because it conveys discriminatory expression based on race[172], creed[173] or sexual orientation[174].

[170] Waldron (n 77) 88.

[171] *Sürek v Turkey* App no 26682/95 (ECHR, 8 July 1999)

[172] *Garaudy v France* App no 65831/01 (ECHR, 24 June 2003)

[173] *Glimmerveen and Hagenbeek v Holland* App no 8348/78 (ECHR, 11 October 1979)

[174] *Vejdeland and Others v Sweden* App no 1813/07 (ECHR,9 February 2009)

Previous chapters have already highlighted the limitation of article 10 case law. It consists in failing to give any protection to expressions that is deemed intolerant.[175] It was called the blanket ban position. The Court does not have doctrinal tools to balance the ban on hate speech with countervailing freedom of expression interests. In contrast to the case law, even some hate speech laws contains limitation clauses for safeguarding some speech. The Australian law for example protects some intolerant speech 'for the genuine purpose of public interest'.[176] Even Waldron concedes that some free speech protection for 'non-vituperative' hate speech should be allowed. He wrote: '[n]o doubt the adverbial element is important: we want to catch only hate speech that is expressed in an abusive, insulting, or threatening way.'[177]

At the outset of the thesis, *Féret* was cited as the case in point for demonstrating this limitation. The leader of the Belgian *Front National* was found guilty of hate speech crime for some derogatory remarks he made about immigrants and Muslims. Féret expressed his opinions during his campaign in various forms including Internet publications, leaflets and speech on the campaign trail. In light of the previous case law, *Féret* could be seen as sign of an evolution. The Court in 1979 had to consider in a highly similar case, (*Glimmerveen*) a local extremist political party's candidates' complaint who were found guilty for distributing leaflets that 'incited to discrimination'. The leaflet contained remarks about the need to remove the 'undesired aliens' by whom they meant guest workers. The Court declared the complaint inadmissible on article 17 grounds. *Le*

[175] Commentators often refer to the famous *Jersild v Denmark* case as limitation on hate speech laws, for example Harris (n 162) 450. However, it is a mistake. In *Jersild* a journalist reporting on a Nazi group was found guilty of hate speech laws. The journalist exposed the vicious views of his interviewees. The fact that he was taken to court for the reporting was a misapplication of hate speech laws, not an exception based on free speech. *Jersild v Denmark* App no 15890/89 (ECHR, 23 September 1994)

[176] See (n 76).

[177] Waldron (n 77) 151.

Pen v. France offers a similar case, where the president of the extreme right wing party talked in a derogatory fashion about Muslims in France and the Court declared his complaint inadmissible. Yet, in *Féret* the Court only approved the politician's sentence on a narrow margin with three judges dissenting. The dissent of Judge Sajó argued that basing a severe restriction on freedom of expression on the basis that it violated the spirit of the Convention is unacceptable. Sajó differentiated between racism in the sense of promoting racial superiority from other forms of intolerant expression such as the intolerant speech of Féret. It is also noteworthy that the dissent argued for the protection of free speech despite the recognition that such intolerant speech probably have serious negative impact on some vulnerable minorities in society.

However, it would be too quick to infer from article 10 case law that the Court should not grant any protection to intolerant parties. The proposition here is that party dissolution cases need not be taken as fully analogous with hate speech cases. In party dissolution cases there is a further important argument to be taken into account.

8.4 THE RATIONALE FROM DEMOCRATIC LEGITIMACY

It is common to justify political rights on grounds of democracy. Many authors link up the condition of free exercise of political rights with the legitimacy of government. It means that the respect of political rights is a precondition for the legitimacy of the coercive force of government. This is the view of Ronald Dworkin. According to him, democracy requires that

> [e]ach citizen have not just a vote but a voice: a majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or

> presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action. The majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken.[178]

Hence, Dworkin proposes a robust protection of freedom of expression even for some forms of hate speech. In a similar vein, Robert Post expends the argument for a similarly broad protection of political rights with the idea of public discourse and self-governance that is at the heart of the American jurisprudence. 'The first amendment principles […] are those that function to safeguard from majoritarian interference this structure of public discourse, so that our democracy will be able to serve the end of collective self-determination.'[179] James Weinstein echoes this view by positing popular sovereignty and the individual right of political participation as the two underpinning ideas behind democracy. Weinstein suggests that these ideas generate a broad free speech core that is the source of democratic legitimacy.

> [I]f someone is barred from expressing a view on a proposed tax increase or on whether the nation goes to war, or on the country's immigration policy, to that extent and with respect to that citizen, the government is no democracy but rather an illegitimate autocracy.[180]

Overall Dworkin, Post and Weinstein point out that the exercise of popular sovereignty can only obtain the legitimacy of a government if the political process

[178] Ronald Dworkin, 'Foreword' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) vii.

[179] Robert Post, 'Racist Speech, Democracy, and the Frist Amendment' (1990) 32 Wm. & Mary L. Rev. 267, 283.

[180] James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from The Masses' in Hare and Weinstein (eds) (n 178) 28.

respects participatory or political rights. Evidently freedom of association figures amongst these rights.

Nonetheless, the ECtHR's view on the relationship between democracy and human rights, as chapter two described, was influenced by militant democracy rather than by a need for a robust protection of participatory rights for the sake of legitimacy of democratic government. The Court held as a matter of principle that a compromise is needed between the protection of democracy and rights.[181] Notice that all the three authors articulated their position in the context of the hate speech debate. Their argument focused on protecting individuals' freedom of speech, though their position certainly holds true for political parties as well. Without discussing the merits of the argument concerning hate speech, the argument from democratic legitimacy seems to gain special force for political parties. Since the political process goes through elections of which political parties are constitutive elements, their participation is fundamental to government's legitimacy. Therefore the argument from democratic legitimacy works *a fortiori* in favour of a strong protection for political parties. The restriction of any political party demands robust justification, because party dissolution erodes the legitimacy of democratic government in the most direct sense. Therefore, one should conclude that the sheer negative impact that political parties exercise on society through their intolerant speech cannot serve alone as a reason for dissolution.

Note that this conclusion does not lead to reconsider the findings of the last chapter about violent parties and parties refusing to consent to the regulated rivalry of democracy. These parties' claim for protection completely fall outside of the scope of the

[181] *Klass and others v Germany* App no 5029/71 (ECHR, 6 September 1978)

right to freedom of association. The argument so far only led to the conclusion that a negative impact on society of an intolerant party in itself is not a sufficient ground for dissolution. This conclusion seems to give a better account about what the high protection of freedom of association requires in party dissolution cases. During this chapter it was flagged up that the argument so far refrained from taking into account the intensity and the immediate nature of the impact. One might formulate it in a way that the argument developed so far was about the content of the party's stance without putting it into the context of society where they function. Nonetheless, it does not follow from the argument so far that all political parties are immune from any restriction because of the high protection they ought to enjoy. Context based extra reasons might tip the balance in favour of allowing the ban of an intolerant political party. Two such reasons will be discussed in the last chapter.

CHAPTER NINE

EXTRA REASONS FOR DISSOLUTIONS

The last chapter finished with the proposition that the Court should also attend the impact scrutiny of a political party's activity, but the focus should not be merely on the stance of the party. Even if a political party has a negative impact through its communication on the equality interest of minorities, it is not reason enough for banning a political party. Parties are constitutive entities of the democratic process. Their participation gives legitimacy to the democratic government, and consequently banning them on the mere basis of their platform would seriously violate freedom of association.

This chapter will present two extra reasons that can justify the dissolution of political parties in special circumstances. They are extra reasons because they override the otherwise high protection that political parties ought to enjoy. The inhibition rationale and the immediate danger rationale are those extra reasons. The former denotes the intensity of a party's impact on society, whereas the latter marks the immediate nature of a party's impact on society. Both depart from the earlier discussed version of impact scrutiny in the same way. These reasons come from the social context not the content of a political party. One might object with reason that dissolving parties on that basis leads to the loss of democratic government's legitimacy that justified the high protection of parties in the first place. This objection is correct as far as it goes. Nonetheless, the extra reasons proposed here are based on the justification that political parties' action might

have such a devastating consequence that the restriction of article 11 becomes legitimate. Extra reasons only justifies reasoning in extraordinary situations that should not necessarily change the high level of protection of right under normal circumstances.[182] Furthermore, extra reasons are explicitly conceived in light of the consequences and of the merits of a political party. Thus it avoids any objection of partiality.

9.1 INHIBITION RATIONALE

The impact of a political party can vary in terms of intensity, meaning the actual effect parties exercise on society. This is partly contingent on the size and the popularity of the party in question but not exclusively. The intensity of the impact of a political party may amount to an extra reason for dissolution if the negative impact on minorities consists in inhibiting the exercise of fundamental rights. This is unfortunately not just a hypothetical scenario. India may offer valuable lessons.

India has a tragic history of communal violence at election periods. Issacharoff describes in details the recent tragic history of the country that culminated in the massacre of approximately a thousand Muslims in Gujarat.[183] Fundamentalist Hindu parties instigated violence against Muslims during the electoral campaigns that resulted in the horrible bloodshed. The federal Parliament was prompted by these events to pass a legislation that introduced special constraints on speech that instigates communal hate in election times. Issacharoff highlights that in the Indian constitutional system the corrupt

[182] See a helpful discussion about 'the consequential threshold' that make the case for restricting rights in extraordinary circumstances but not in normal one at Nagel. Thomas Nagel, 'Personal Rights and Public Space' in Thomas Nagel, *Concealment & Exposure and Other Essays* (OUP 2002) 36.

[183] Samuel Issacharoff, 'Fragile Democracies' (2007) 120 Harv.L.Rev. 1406, 1427.

practice laws showed the recognition the special constitutional status of elections where the need for the protection of public order was demonstrated on several times.[184]

There are a number of points to be highlighted. The Indian case involved political parties that endorsed and practiced violence as a means in politics. In accordance with earlier chapter these parties should not be granted any protection under article 11. Furthermore, the Indian legislation takes aim at inciting speech of politicians, not political parties' stance *per se*. Nonetheless the case is instructive. In a social context where inter-communal violence is prevalent, the negative impact of an intolerant party is intensified and overall wholly different than under normal circumstances because intolerant parties have a special, inhibiting effect on citizens. This inhibition can be particularly true for exercising political participatory rights such as the right to vote or right to free political expression during campaigns. In the sort of climate of violence that was prevalent in some parts of India, the impact of intolerant parties amounted to a restriction on rights. Under such extra circumstances restrictions on a political party even in the form of banning parties should be seen as an extra reason in favour of dissolution.

There was one case before the ECtHR the circumstances of which bore resemblance to the inhibition rationale. That was *Batasuna*. The Court accepted the claim of the national government that the party contributed to a climate of confrontation. '[T]he Court considers that the national courts sufficiently established that the climate of confrontation created by the applicant parties risked provoking intense reactions in society capable of disrupting public order, as has been the case in the past.'[185] For

[184] ibid 1426.

[185] *Batasuna* [86]. The evidence for the climate of confrontation analysed thoroughly and approvingly by Swayer. Sawyer (n 60) 1569-72.

substantiating the party's contribution to the social climate the Court cited the party's outright support for terrorist groups (ETA), its refusal to condemn violence and its alleged physical intimidation of non-independentist parties' candidates. However, the judgment did not exactly specify what it meant by social confrontation that would have been special in the tormented historical fight between independents and their opponents. Therefore, some commentators in the literature like Černič contends that the evidence accepted by the Court were questionable: the Court accepted national security as a trump card from the Spanish government without further investigation.[186] The Court might have not specified any inhibition impact on the exercise of political rights indeed. Nonetheless, the physical intimidation of rival parties' candidates might rather be a manifestation of a direct violent means used by a party as opposed to a negative impact on society. That in itself would have sufficed to make the dissolution legitimate. Overall *Batasuna* rather highlights the difficulties in using the inhibition rationale than making a clear case for it.

9.2 IMMEDIATE DANGER RATIONALE

The other context based extra reason concerns the immediacy of the danger that the party poses to society. It flows from the argument so far that political parties are entitled to shape the public discourse in ways they see fit, and even to propose despicable policies that would violate rights if implemented. The distinction is key between proposing rights that would violate policies and actually implementing such policies. The seminal Israeli

[186] Id (n 60).

case of *Neiman v. Chairman of the Elections Committee*[187] offers some insights under what circumstances the evocation of immediate danger rationale should be legitimate.[188]

Neiman was not about dissolution, but about the analogous issue of approval of political party lists for standing in elections. In *Neiman* a right-wing party and a left-wing party were refused registration on the ground that they denied the democratic character and the existence of Israel. Moreover the right-wing *Kach Party* was deemed to be racist because it rejected the equality of non-Jewish citizens. The Supreme Court reversed the Elections Committee's decision and allowed both lists to stand. The five judges wrote five separate concurring opinions. Judge Barak's reasoning stands out because of its analysis of the standard of refusal of the *Kach Party*'s list. Judge Barak argued that it was unacceptable to discard a party list on the sheer ground that the platform denies fundamental values. Even though there was the Kach Party's despicable stance was clear: 'I have no doubt that the ideas of *Kach* are racist and that its principles violate the fundamental doctrines on which the democratic regime of the state is founded.'[189] Barak argued that an extra element is needed so that a party list could be discarded, otherwise the court would revert to a bad tendency test. Judge Barak rejected the bad tendency test as a very low protection compared to the one required by freedom of expression. He found the proper standard in reasonability, meaning that the Court should have a reasonable certainty that the anticipated harm to democracy will actually come about. '[T]he platform alone is not sufficient, and the Elections Committee must consider whether the list poses a reasonable possibility of harm to the democratic character of the

[187] Moshe Neiman et al. v. Chairman of the Central Elections Committee for the Eleventh Knesset EA 2/84. The Supreme Court Sitting as a Court of Election Appeals [May 15, 1985]

[188] For a comparative analysis of Israeli law, see Dan Gordon, 'Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with that of the United States and West Germany' (1986-1987) 10 Hastings Int'l & Comp. L. Rev. 347.

[189] ibid.

state.'[190] Such could be the case if the party was close to become a government party. Judge Barak found that the marginal racist party was nowhere close to represent such level of danger.

About the immediate danger the ECtHR might have a lesson to teach. The seminal dissolution case, *Refah,* was just such an instance of immediate danger. Of course the facts of the case were complex, but the Court did not leave any doubt that one of the major reasons that tipped the balance in favour of approving the dissolution of a then-governing party was the very high probability that the party will have the immediate prospect to implement its political project that was deemed to be contrary to the Convention.[191]

> The Court accordingly considers that at the time of its dissolution Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme.[192]

In light of the *Refah* judgement one might think that the Court raised the bar or limitation even higher than the Israeli Supreme Court by requiring tangible and immediate danger as opposed to sheer reasonable danger. Such a reading of *Refah* is not correct though. Rather, it seems the Court acknowledged that the danger of implementing the policy can be a separate reason in a party dissolution case. This lesson is applicable to

[190] ibid.

[191] It remains on open question whether the danger was 'real' enough. At the first instance of the Court three judges dissented from the judgment claiming that the evidence as to what the Welfare Party was preparing to implement was so weak that the Court should have ruled for the applicant party. Joint Dissenting Opinion of Judges Fuhrmann, Loucaides and Sir Nicolas Bratza *Refah Partisi v Turkey* App no. 41340/98 (ECtHR Third Chamber, 31 July 2001)

[192] *Refah* [108].

intolerant parties as well. Intolerant parties may be dissolved if their human rights violating policies loom realistically.

CONCLUSION

The phenomenon of new extremism represents a challenge for the ECtHR that consists in redefining the standard by which it should distinguish fringe parties protected by freedom of association from those which should not be protected. The thesis has aimed to explore the ECtHR's dissolution case law critically in the light of this challenge (Part I). It has also aimed to offer a constructive reinterpretation of the case law (Part II).

The case law has exhibited two limitations so far. On the one hand the ECtHR often confined its scrutiny to unmasking patently false reasons that national authorities presented for banning parties that amounted to a reason-checking minimalism. On the other hand, in dissolution and analogous cases the Court implicitly had recourse to a strict doctrine of militant democracy for approving right restrictions in an unsophisticated manner. However, new extremist parties reveal different, normatively difficult questions.

In Part II four propositions led the re-interpretation of the case law and the question of party dissolution. First, it mapped the potential activities of political parties that the Court might take into account when judging the legitimacy of the dissolution of a party. Hence the Court should scrutinise a party's goal, the means it intends to use and its general impact on society.

Second, it was proposed that the Court should resuscitate the definition stage of adjudication and hence abandon the overreliance on proportionality. It should investigate what freedom of association ought to protect as a matter of definition. This investigation led to a concept of a political party. Parties are the only associations that participate in the contest (through elections) for state power in order to exercise it (in government). The

thesis derived from this concept two constitutive requirements: parties should refrain from using violence as a means in politics and consent to the open and regulated rivalry of parties. The ECtHR should not protect such parties under article 11 at all. Through this way of interpreting the case law, the supposed paradox of democracy, i.e. that antidemocratic parties may gain power, is effectively tackled without recourse to a blanket ban on all intolerant parties.

Third, for new extremist parties, there is indeed conflict of rights and interests that should be dealt with at the proportionality stage. New extremist parties exercise a negative impact on the equality of minorities in society. Intolerant parties' persistent presence in politics have an adverse effect on equality interests of minorities. This conflict is analogous with hate speech cases. The Court has traditionally refused to extend protection to intolerant speech, but the Court should take a different course in article 11 cases. Democratic legitimacy flows from the robust protection of political rights. This rationale holds for free speech but it holds *a fortiori* in favour of freedom of association of parties. The high protection of freedom of association imposes that the mere negative impact on equality alone should not suffice for the dissolution of political parties.

Nonetheless, it does not mean that political parties can never be dissolved. There are contextual extra reasons that might legitimise the dissolution of parties. First, the inhibition rationale would justify restricting freedom of association when a party's impact amounts to effectively inhibiting the exercise of rights, especially participatory rights, of minorities. *Batasuna* may have been such an instance, but it demonstrates the difficulty of proving it. Second, *Refah* pinpoints a scenario of imminent danger where a party's impact exceeds mere negative impact but has the potential to implement policies that violate

human rights. Militant democracy should be seen as justifying the dissolution in these special cases.

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