Conflicting Paradigms: Political Rights in the Turkish Constitutional Court

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This article aims to explore two different and apparently incompatible legal paradigms in constitutional jurisdiction.1 These opposing paradigms can be seen in a comparison of the decisions pertaining to political rights handed down by Turkey’s Constitutional Court and those by the European Court of Human Rights. This incompatibility of approaches results partly from an unavoidable tension between theory and practice in legal adjudication. A passage from Franz Kafka’s The Trial sums up well the core of the contradiction between theory and practice in the process of legal adjudication. In The Trial, the wise painter Tittorelli tries to enlighten Joseph K. who is perplexed about the true nature of judicial activity. Tittorelli says:

We must distinguish between two things: what is established by the Law, and what I have discovered through personal experience; you must not confuse the two. In the code of the Law, which I may say I have not read, it is of course laid down on the one hand that the innocent shall be acquitted, but it is not stated on the other hand that the Judges are open to influence. Now my experience is diametrically opposed to that. I have not met one case of definite acquittal, and I have met many cases of influential intervention.2

Long before Kafka, Aristotle made a similar observation about the nature of judicial thinking. According to Aristotle, for judges who decide cases ‘love, hate or personal interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasure or pain.’3

In reality, interpretation reveals itself as a multifaceted phenomenon combining such factors as the personal morality of the interpreter, the values embedded

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in the interpreted text, and the socio-political climate in which a text is to be interpreted. A constitution itself holds some values dear, although there is not always an agreement on which values these are. Thus, in constitutional adjudication judges inevitably are imposing certain value preferences on the public. Whether they are the personal values held by the judges themselves or the values embodied in the constitution is an entirely different and controversial matter. But ‘no act of constitutional adjudication—indeed, no act of interpretation—can be completely value-free.’ Constitutional adjudication is an act of interpretation that constitutes a ‘process by which a judge comes to understand and express the meaning of an authoritative text [the Constitution] and the values embodied in that text.’ Judges generally read their paradigms (particular conceptions of social and political philosophy) into the Constitution irrespective of the ‘real’ or ‘literal’ meaning of the constitutional text concerned. As Judith Shklar observed, ‘one’s political preferences will determine one’s interpretation of the Constitution.’ Interpretation is therefore political in the sense that it is determined by political values. In this context, Frederic Jameson sees ‘the political perspective not as some supplementary method, not as an optional auxiliary to other interpretive methods … but rather as the absolute horizon of all reading and all interpretation.’

Interpretation of constitutions is linked closely to ‘politics’ because ‘constitutional law is a political code par excellence.’ Thus, judges’ decisions concerning constitutional disputes inevitably reflect their political convictions. As Ronald Dworkin put it, ‘constitutional politics has been confused and corrupted by a pretense that judges (if only they were not so hungry for power) could use politically neutral strategies of constitutional interpretation.’ The structural and personal constraints on interpreters comprise the ‘legal paradigm.’ In his book *Between Facts and Norms*, Jürgen Habermas defines the legal paradigm as ‘the exemplary views of a legal community regarding how the system of rights and constitutional principles can be actualized in the perceived

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5 Ibid., pp. 861–62.
context of a given society.\textsuperscript{13} The legal paradigm is very important, according to Habermas, because it ‘determines how basic rights and constitutional principles are to be understood and how they can be realized.’\textsuperscript{14} Judges, especially in constitutional jurisdictions, decide cases according to the requirements of the socio-political framework in which they find themselves, as well as their political convictions.

The typical and best example of the role played by legal paradigms can be seen in ‘political trials.’ For Otto Kirchheimer, such trials best can be described as ‘attempts by regimes to control opponents by using legal procedure for political ends.’\textsuperscript{15} Therefore, the policy that political trials (the Gordian knots of a liberal legal system)\textsuperscript{16} pursue is ‘the destruction, or at least the disgrace and disrepute, of a political opponent’ who usually declines to accept the official ruling paradigm.\textsuperscript{17} The distinctive characteristic of political trials is the ‘perception of a direct threat to established political power.’\textsuperscript{18} The ruling elite, through courts, attempts to destroy this ‘threat’, whether or not it is real. The political trials are seen as ‘a functional authentication of political repression.’\textsuperscript{19} The judicial procedure is, in a word, ‘a reliable way of eliminating … pesky irritants or deadly challenges.’\textsuperscript{20} These challenges and threats may vary from one country to another, and from one period to another.

With respect to political rights, two conflicting legal paradigms may be discerned. One is the liberal paradigm characterized by the ‘rights-based’ approach to basic rights and constitutional principles. The other is the authoritarian paradigm based on the ‘ideology-based’ approach to basic rights and constitutional principles. While the liberal paradigm gives priority to individuals and their rights vis-à-vis every kind of social and political association, the ‘ideology-based’ paradigm favors the state and society over the individual. As shall be demonstrated in this article, the Turkish Constitutional Court has adopted an ‘ideology-based’ paradigm in deciding political party cases. This paradigm reflects a positivist, one-dimensional, monolithic, and authoritarian outlook. In contrast, the European Court of Human Rights seems to base its decisions, at least with respect to most political party cases, on the ‘rights-based’ paradigm that stands for a pluralist and libertarian position. The rights-based paradigm is pluralist in the sense that it envisages a political sphere that is open to competing conceptions of good. This public sphere embraces

\begin{enumerate}
\item\textsuperscript{14} Ibid., p. 195.
\item\textsuperscript{17} Shklar, \textit{Legalism}, p. 150.
\item\textsuperscript{20} Becker, ‘Introduction,’ p. xii.
\end{enumerate}
those unrepresented, marginalized, and excluded ‘others.’ \(^{21}\) The rights-based paradigm does not seek to silence the voices that are different from, and sometimes contrary to, the official discourse.

It must be conceded that this generalization between two legal paradigms and their respective associations with the Turkish Constitutional Court and Human Rights Court might be misleading at times. The fact that the Human Rights Court has adopted prima facie a ‘rights-based’ approach to political rights leads by no means to the conclusion that it always decides cases in accordance with this paradigm. On the contrary, many judgments of the Human Rights Court can be criticized on the ground that they contravene the requirements of a rights-based paradigm. Similarly, there may be found in the jurisprudence of the Turkish Constitutional Court some decisions that are perfectly compatible with a ‘rights-based’ paradigm. Nevertheless, these diversions do not alter the main argument of this article: that the Constitutional Court of Turkey decides political party cases within an ‘ideology-based’ paradigm.

**Legal Paradigm of Turkey’s Constitutional Court**

Court-based constitutional review as a way of controlling executive and legislative action generally is considered to be one of the most significant developments in constitutionalism. \(^{22}\) In Germany and Italy, for example, constitutional courts were created after the Second World War as a reaction to the perceived abuses of the pre-war political regimes in those countries. \(^{23}\) In Turkey, the establishment of the Constitutional Court was stipulated in the 1961 Constitution, which was drafted following the 1960 military intervention. The court’s creation was a response to a prevalent perception among the military elite that the Democrat Party, which controlled a parliamentary majority between 1950 and 1960, had abused power in an effort to eliminate political opposition and (more importantly) to destroy the basic principles of the republic.

The Constitutional Court is the highest organ having the right to interpret the Constitution and apply it to particular cases brought before it. According to the Constitution, its rulings are legally binding on all branches of state power (Article 153). The Constitutional Court consists of eleven regular and four

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substitute judges, all appointed by the president of the republic. However, the president appoints directly only three regular members and one substitute member. The other members of the Constitutional Court are appointed by the president from among the candidates nominated by various state bodies, such as the High Court of Appeals, the Council of State, the Military High Court of Appeals, and the High Military Administrative Court (Article 146). The executive cannot dismiss members of the Constitutional Court, although they retire automatically upon reaching the age of 65 (Article 147).

One can distinguish three main tasks assumed by the Constitutional Court. First, it reviews the constitutionality of laws. Second, it rules on the cases involving certain politicians and top-level state officials, e.g. the president, prime minister, cabinet ministers, and members of the high courts, such as the Constitutional Court itself and the High Court of Appeals. Third—and our primary concern here—the Constitutional Court has the authority to dissolve political parties (Article 169). Because political parties are an essential element in a participatory democracy, their dissolution by an unelected body inevitably gives rise to a legitimacy debate. From a positivistic point of view, the court’s role does not seem problematic; both the Constitution and the Political Parties Act provide legal grounds for dissolving political parties and excluding politicians from political activities for five years. Article 169 of the Constitution stipulates three main reasons for the dissolution of political parties. A political party shall be permanently dissolved, if (a) it is established that the statute and program of the political party violate the provisions of the fourth paragraph of Article 68 which protects, among others, the indivisible integrity of the state and the principles of the democratic and secular republic; (b) the Constitutional Court determines that the party in question has become a center for activities violating the provisions of the fourth paragraph of Article 68; and (c) it accepts financial assistance from foreign states, international institutions and foreign persons and corporate bodies. Article 169, along with some other articles of the Constitution, has been amended to provide more protection for the political parties. To this end, an elusive definition of the term ‘center’ (odak) is introduced into the text of the Constitution. Prior to this amendment, the Constitutional Court had an absolute discretion to decide whether a political party had become the center of activities contrary to fundamental principles of

24 The qualifications for appointment are set out in Article 146 of the Constitution.
26 In fact, with regard to the legal prohibitions on political parties there is a clear conflict between the Constitution as amended in 1995 and 2001 and the Political Parties Act: although the Constitution restricts the conditions for dissolving parties, the Political Parties Act extends them. For instance, according to Article 96 of the Political Parties Act, a party can be dissolved on the grounds that it carries in its name the word ‘communist’ (the United Communist Party of Turkey was dissolved on this basis, among others). However, the Constitution does not provide such a prohibition on political parties.
Amended Article 169 of the Constitution states that a political party is considered to be a ‘center’ when its members act intensively against the elementary principles of the republic, and these activities are accepted explicitly or implicitly by the party organs such as the general congress, leader, central executive committee, and the parliamentary group, or when these party organs themselves insistently are engaged in such activities. The Constitutional Court also is empowered by the amended article to prevent the political parties, instead of dissolving them, temporarily or permanently from receiving state aid. The position of political parties facing trial before the Constitutional Court is further strengthened by the amendment, which changed the required quorum for dissolving a party from a simple majority to three-fifths of the members of the Constitutional Court (Article 149).

Because the law is an interpretive concept and the constitutional clauses with respect to political rights are written in general and abstract language, the courts have the opportunity to interpret these clauses in a democratic way. A rights-based legal paradigm would deem the dissolution of political parties as an exceptional measure that must be taken only under circumscribed conditions.

In democratic countries, supreme courts or constitutional courts are conceived as ‘a bulwark of fundamental rights.’ In other words, they are an institutional means to protect fundamental rights against any possible assault by the state. The main function of the courts, according to liberal theory, is to give effect to rights and protect them against possible unjustified interference by the government. This function is derived from the ‘rights conception’ of the rule of law according to which ‘judges do and should rest their judgments on … arguments of political principle that appeal to the political rights of individual citizens.’

In terms of its own rhetoric, the Constitutional Court has presented its role as being one of protecting the rights and freedoms set forth in the Constitution against possible threats from lawmakers. A former president of the Constitutional Court went even further by saying:

Human rights are universal [ideal]. They must be experienced and defended under any situation and circumstance. They must not be limited for any reason, and their essence must not be compromised. … The jurists, especially the Constitutional Court judges,

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27 In fact, on 16 January 1998, one week before the Refah Party was dissolved, the Constitutional Court declared as unconstitutional Article 103/2 of the Law on Political Parties, which had laid down the conditions of becoming a ‘center’ and provided, among other things, that for a political party to be considered a ‘center’ of activities contrary to the fundamental principles of the republic, the members of the party had to be convicted of such offences.


31 Anayasa Mahkemesi Kararlar Dergisi [The Constitutional Court Reports—AMKD], no. 22, p. 365.
have a great responsibility in this respect. Our court makes decisions that are based on human rights.\(^{32}\)

Yet if one scratches beneath the surface of this rhetoric, a different picture emerges. In political party cases, the Constitutional Court does not base its decisions on rights. Rather, its approach is ideology based. In this approach, rights and freedoms are not only defined and limited arbitrarily, but also they are often denied for the sake of official ideology. Rights are recognized only to the extent that they do not conflict with or undermine that ideology.\(^{33}\) In the Turkish legal system, ‘the constitutional jurist is primarily the jurist of the ideology of the Constitution,’\(^{34}\) and the court functions as ‘a watchdog of the regime.’\(^{35}\) As such, the Constitutional Court is ‘one of the most conservative organs’ in the political and legal status quo.\(^{36}\) In effect, the court has interpreted the Constitution in such a way that individual rights and liberties have been sacrificed for the sake of the state, that is, for the sake of ‘sacred authority.’\(^{37}\)

### Political Parties before the Constitutional Court

Since its establishment in 1961, the Constitutional Court has dissolved many political parties, thereby illustrating its ‘ideology-based’ approach to political and civil rights.\(^{38}\) The Constitutional Court’s judgments concerning political parties have shown a typical example of the ‘judicialization of politics,’ that is, ‘a definite tendency for an increasing number of decisions formerly taken exclusively within the overtly political branches of government to be taken, instead, by unelected judges answerable to no electorate.’\(^{39}\) This tendency may give rise to a legitimacy crisis for the Constitutional Court. A brief review of controversial cases during the 1990s demonstrates the court’s bias in favor of ideology over rights.

For example, on 16 July 1991, the Constitutional Court dissolved the United Communist Party of Turkey (TBKP), ordering \emph{ipso jure} the liquidation of the party and transfer of its assets to the Treasury. The founders and rulers of the

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\(^{33}\) This description may be found arbitrary on the grounds that the idea of rights is itself an ideology; see, for instance, Valerie Kerruish, \emph{Jurisprudence as Ideology} (London: Routledge, 1991), pp. 16–19; and Stuart A. Scheingold, \emph{The Politics of Rights} (New Haven: Yale University Press, 1974), p. 13ff. I am not concerned with this question here; suffice it to say, however, that even if the ‘rights-based’ approach is ideological, this is not the ‘ideology’ that the Constitutional Court adopts in deciding cases.


\(^{35}\) Yekta G. Özden, \emph{Hukukun Üstünliği üzerine Saygi} [Respect for the rule of law] (Ankara: Bilgi Yayinevi, 1990), pp. 130, 162, 413.

\(^{36}\) Hikmet Özdemir, \emph{Sivil Cumhuriyet} [Civil republic] (Istanbul: Boyut Yayinlari, 1991), p. 100.

\(^{37}\) Ibid.

\(^{38}\) See, for instance, AMKD 9 (E.1971/1, K.1971/1); AMKD 9 (E.1971/3, K.1971/3); AMKD 18 (E.1979/1, K.1980/1); AMKD 20 (E.1983/2, K.1983/2); and AMKD 29 (E.1992/1, K.1993/1).

party were banned from holding similar office in any political party. The court cited two grounds for the TBKP’s dissolution. First, the party’s incorporation of the word ‘communist’ into its name was found to be contrary to Article 96 (3) of the Political Parties Act. That article states: ‘No political party shall be formed with the name “communist,” “anarchist,” “fascist,” “theocratic,” or “national socialist,” the name of a religion, language, race, sect or religion, or a name including any of the above words or similar ones.’ Second, statements in the TBKP’s constitution about the ‘Kurdish question’ were construed as encouraging separatism and the division of the Turkish nation, both of which are prohibited by the Constitution (Articles 2.3, 66, and 68) and the Political Parties Act (Articles 78, 80, 81).  

The Constitutional Court next dissolved the Socialist Party (10 July 1992), resulting in its founders and managers being banned from holding similar office in any other political party. According to the court, the activities of the Socialist Party violated certain principles set out in the Constitution and the Political Parties Act that prohibit separatism and every kind of endeavor to create minorities within the country. And the court found as unacceptable the party’s statement concerning the existence of the ‘Kurdish nation’ as separate from the ‘Turkish nation.’

On 14 July 1994, the Constitutional Court dissolved the Freedom and Democracy Party (ÖZDEP) on the grounds that its objectives encouraged separatism by defending self-determination for the so-called ‘Kurdish people’ and conducting judicial and educational services in their own native language.  

Ironically, the court also ruled that ÖZDEP’s program violated, among other things, the principle of secularism, which is the core principle of the official ideology. According to the court, the statement in ÖZDEP’s program that ‘the State shall not interfere in religious affairs, which must be left to the religious communities,’ was incompatible with secularism and Article 89 of the Political Parties Act.

Defending the sanctity of secularism was of paramount importance to the court in the case of the Refah [Welfare] Party, which actually was the major party in a coalition government when the Principal State Counsel initiated the application for an order to dissolve it on 21 May 1997. According to the Constitutional Court, the Constitution is extremely vigilant in protecting the principle of secularism. In fact, ‘it does not sacrifice this principle for the sake

40 E.1990/1 (Siyasi Parti Kapatma); K.1991/1, K.T. 16.7.1991; and AMKD, 27/2.
42 E.1993/1 (Siyasi Parti Kapatma); K.1993/2, K.T. 23.11.1993; and AMKD, 30/2, p. 924.
43 AMKD, 30/2, p. 927.
44 The Principal State Counsel is appointed by the president of Turkey for a term of four years from among candidates nominated by the Plenary Assembly of the High Court of Appeals (Article 154). The Principal State Counsel is empowered to lodge applications with the Constitutional Court for an order to dissolve political parties, irrespective of the fact that they are in power or in opposition (Article 169). However, it is exceptional for a Principal State Counsel to initiate an application against a government party; the Refah case is unique in this sense.
of liberties.’

It is obvious that the Constitutional Court conceived secularism as an ‘ultra-constitutional norm’ that determines the boundary of rights. Thus, on 16 January 1998 the court, basing its decision mainly on speeches made by party leader Necmettin Erbakan and some other officials, dissolved the Refah Party on the grounds that the party had become the ‘center’ of activities against the principle of secularism.

For the Constitutional Court, ‘secularism is based on national sovereignty, democracy, freedom and science, and as such is the contemporary regulator of the political, social and cultural life.’ The court also emphasized that the application of the principle of secularism may be different in Turkey from its application in Western countries. By referring to this ‘Turkish type of secularism,’ the Constitutional Court appeared to justify its judgment that speeches and activities of Erbakan and some other party members contravened the principle of secularism. It cited public statements by Erbakan such as ‘the headscarf must be free in the universities’ and ‘you shall have the right to opt for whatever law you want’ (legal pluralism).

On 22 June 2001, the Constitutional Court also dissolved the Virtue Party, the main opposition party, on the basis that it had become the ‘center’ of activities contrary to the principle of secularism, and it deprived two deputies of their elected membership in Parliament, prohibiting them, along with two other members of the party, from political activities for a period of five years.

In dissolving political parties, the Constitutional Court paid lip service to the European Convention on Human Rights (also known as the Strasbourg Convention) in order to justify its judgments. This is because Turkey’s legal obligation vis-à-vis international human rights treaties derive primarily from the Constitution. Under Article 90 of the Constitution, ‘international treaties duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional.’ In effect, the European Convention on Human Rights is seen as a part of Turkish law. More importantly, since the Convention cannot be amended by acts of Parliament or the Constitution, some legal scholars accept it as superior to national law. The Constitutional Court has invoked the Convention as a ‘supple-

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45 E.1989/1; K.1989/12; K.T. 7.3.1989; and AMKD, 25, p. 158.
48 AMKD, 34/2, p. 1026; see also AMKD, 25, p. 145.
49 AMKD, 34/2, p. 1027.
50 For a critical analysis of Turkish secularism, see Mustafa Erdogan, ‘İslam in Turkish Politics: Turkey’s Quest for Democracy without Islam,’ Critique, 5 (Fall 1999): 40–48.
51 AMKD, 34/2, pp. 1032 and 1035, respectively.
mentary norm’ rather than ‘primary norm’ in deciding cases. Thus, when the Constitutional Court ruled to dissolve the Socialist Party, it held that ‘there is no doubt that the activities of the Socialist Party which are found in breach of the Constitution will also be in violation with the provisions of this [Strasbourg] Convention.’ However, as will be demonstrated below, the approach of the Human Rights Court to political rights seems to be different from the approach taken by the Constitutional Court.

Legal Paradigm of the European Court of Human Rights

The European Court of Human Rights and affiliated bodies are based in the French city of Strasbourg and hence are referred to as the Strasbourg Court and Strasbourg organs. The legal paradigm that these Strasbourg bodies seem to adopt in deciding political party cases may be considered as ‘rights based.’ This ‘rights-based’ legal paradigm can be seen in the Court of Human Rights’ well-established case law concerning freedom of expression and freedom of association. Here, however, our concern is limited to the court’s decisions about the political parties dissolved by the Turkish Constitutional Court. A brief examination of these judgments will reveal the ongoing conflict between the legal paradigms of the two courts.

At the outset, it must be noted that pursuant to Article 34 of the European Convention on Human Rights, the Human Rights Court ‘may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties.’ Political parties therefore are entitled to lodge applications with the court on the grounds that decisions regarding their dissolution were in breach of the Convention. The Strasbourg Court so far has decided cases involving the four political parties mentioned above, namely the United Communist Party of Turkey, the Socialist Party, the Freedom and Democracy Party (ÖZDEP), and the Refah Party. According to the Human Rights Court, the dissolution of these parties, with the exception of the Refah Party, constituted a violation of Article 11 of the Human Rights Convention. The findings of the Human Rights Court in these cases can be summarized in four main areas. First, the Human Rights Court rejected the Turkish government’s argument that Article 11 did not apply to political parties. In the view of the court, ‘political parties are a form of association essential to the proper functioning of democracy.’ Bearing in mind the importance of democracy in the Convention system, the court held ‘there can be no doubt that political parties come within the scope of Article 11.’ As the

53 AMKD, 28/2, p. 809.
court observed in the TBKP case, the dissolution of political parties ‘affect[s] both freedom of association and, consequently, democracy in the State concerned.’

Second, the Human Rights Court ruled that in political party cases, the exceptions set out in the second paragraph of Article 11 are ‘to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association.’ In this regard, the contracting parties have only a limited margin of appreciation that ultimately is subject to rigorous supervision of the Human Rights Court. Radical measures, such as dissolving a party with the draconian consequence of banning its leaders from carrying on political activities in the future, may be applied only in the most serious cases. Third, in political party cases, the Human Rights Court considered Article 11 in conjunction with Article 10, which protects freedom of expression. The court stated that the main principle about freedom of expression is that it is applicable ‘not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those ideas that offend, shock or disturb.’ Fourth, the court emphasized the pluralistic nature of democracy. According to the court, the fact that the program or political projects of a political party are deemed ‘incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy.’ The court concluded that ‘[i]t is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.’

Parallel to the findings of the Human Rights Court, the European Commission for Democracy through Law, generally referred to as the ‘Venice Commission,’ also developed criteria relevant to the banning of political parties. The Venice Commission sets out the main principles for the prohibition of political parties in a report prepared at the request of the Council of Europe. According to the Venice Commission, the prohibition or enforced dissolution of political parties is a particularly far-reaching measure that should be utilized only in exceptional circumstances and only with utmost restraint. Such action only can be:

justified in the case of parties which advocate the use of violence or use violence as political means to overthrow the democratic constitutional order; thereby undermining

56 United Communist Party of Turkey and others v. Turkey, para. 46; Socialist Party and others v. Turkey, para. 50; and (ÖZDEP) v. Turkey, para. 44.
57 United Communist Party of Turkey and others v. Turkey, para. 42, 43; Socialist Party and others v. Turkey, para. 41; and (ÖZDEP) v. Turkey, para. 37.
58 Socialist Party and others v. Turkey, para. 47; and (ÖZDEP) v. Turkey, para. 41. For a similar point, see United Communist Party of Turkey and others v. Turkey, para. 57.
59 The Venice Commission is an advisory body on constitutional law. Set up within the Council of Europe, it is composed of experts from member states of the Council as well as non-member states.
the rights and freedoms guaranteed by the constitution … [and must be based] on sufficient evidence that the party itself and not only individual members pursue political objectives using or preparing to use unconstitutional means; … [and must be decided by the Constitutional Court] in a procedure offering all guarantees of due process, openness and a fair trial. … [Furthermore] The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.60

As can be discerned from the above-mentioned principles, the rights-based paradigm does not categorically exclude restrictions to be imposed on political parties. There must be compelling and convincing reasons to dissolve political parties. The primary reason for banning political parties is incitement to violence or use of violence as a political means to overthrow government. This applies equally to the right to freedom of expression. It is generally accepted that the right to freedom of expression of those who incite hatred or violence is necessarily restricted in a democratic society. The rights-based paradigm advocates the application of a robust test in determining whether a particular expression incites hatred or violence against others.61

The Refah Case: Return of ‘Militant Democracy’?

The Human Rights Court has emphasized on many occasions that political parties can criticize or question the fundamental principles of the state, provided ‘they do not harm democracy itself’.62 This point needs to be elaborated in further detail. What does the court mean by ‘harming democracy itself’? What idea or ideology is believed to be harmful for democracy? Is communism, for example, a threat to the fundamental rights and freedoms set forth in the Human Rights Convention? It is difficult, if not impossible, to find a conclusive and categorical answer to these questions in the case law of the Human Rights Commission and the Human Rights Court. Nonetheless, it is true that the Strasbourg organs do not single out any particular ideology as the enemy of democracy. On the contrary, they set out the general principles and apply them to the concrete cases. It would not be inaccurate, however, to say that the application of these general principles changes from time to time, and from case to case. This change can be seen in the cases of the German Communist Party (KPD) and the United Communist Party of Turkey.

In 1957, by applying Article 17, the Human Rights Commission found


62 Socialist Party and others v. Turkey, para. 47; and (ÖZDEP) v. Turkey, para. 41. For a similar point, see United Communist Party of Turkey and others v. Turkey, para. 57.
inadmissible the application of the KPD on the grounds that the declared objective of this party was incompatible with the Human Rights Convention. The argument of the Human Rights Commission in this case is summarized below:

The avowed aim of the Communist Party, according to its own declaration, was to establish a communist society by means of a proletarian revolution and the dictatorship of the proletariat. Consequently, even if it sought power by solely constitutional methods, recourse to a dictatorship was incompatible with the Convention because it would involve the suppression of a number of rights and freedoms that the Convention guaranteed. The Turkish government submitted that Article 17 of the Human Rights Convention should be applied with respect to the TBKP. However, the Human Rights Commission rejected this argument. According to the commission:

The constitution of the TBKP, read as a whole, shows that it is organized along democratic lines. The party proposes to attain its political objectives exclusively by legal means. … [T]he TBKP is distinguishable from the German Communist Party, which was dissolved by the Federal Constitutional Court on 17 August 1956, and which expressly declared its intention of pursuing the goal of establishing the dictatorship of the proletariat by revolutionary means.

The Strasbourg Court shared the Human Rights Commission’s opinion that ‘the TBKP was clearly different from the German Communist Party.’ It pointed out that ‘nothing in the constitution and programme of the TBKP warrants the conclusion that it relied on the Convention to engage in activity or perform acts aimed at the destruction of any of the rights and freedoms set forth in it.’

Although these arguments of the Human Rights Commission and the Human Rights Court are apparently persuasive, they seem to reflect only half of the story. It is true that the program of the TBKP did not advocate violence or dictatorship, but its ultimate aim was undoubtedly to establish a communist society. Hence the vital question: is the notion of a ‘communist society,’ no matter by what means established, compatible with the Human Rights Convention? In the mid-1950s, the Human Rights Commission said ‘no’ to this question in the case of the KPD. The drafters of the Human Rights Convention also replied to this question in the negative. Their main concern was to protect democracy and human rights against the so-called totalitarian regimes whose specters were still haunting Europe in the 1950s. The ideology of communism was perceived as a threat to democracy and freedom. Indeed, the fear of communism was very strong during the Travaux Préparatoires and played an

64 Para. 81 of the decision of the Commission, 26 ECHR 121, at 136.
65 Communist Party of Turkey and others v. Turkey, para. 54.
66 Communist Party of Turkey and others v. Turkey, para. 60.
important role in shaping the Human Rights Convention. Thus, the Human Rights Convention was, as the French delegate noted, a response to the ‘scourges of the modern world …—Fascism, Hitlerism, Communism.’

However, with the disintegration of the Soviet Union in 1991, ‘real socialism’ ceased to be a threat to democracy. Turkey’s own perception of the ‘communist threat’ underwent a radical change in the post-communist era. Articles 141 and 142 of the Criminal Code, which had banned communist propaganda, were abolished in 1991. More importantly, the case law of Turkish courts was influenced by the removal of the communist threat. This development can be seen in the case of Ozturk v. Turkey, which raised the issue of whether the publication of a book praising a communist’s life is compatible with freedom of expression under Article 10 of the Human Rights Convention. While the publisher of the book was convicted for inciting hatred and hostility on the basis of a distinction between social classes, its author was subsequently tried and acquitted of the same charges. In order to justify these two conflicting judgments, the Turkish government referred to the changing political conjuncture in the world. According to the government, ‘Although the National Security Court, after convicting the applicant on 30 March 1989, had acquitted the author of the book on 22 May 1991, that had only been the result of the way application of Article 312/2 of the Criminal Code had been influenced by the changes in the world as regards the threat of communism and developments in the case-law that had taken place in the meantime.’

This historical development inevitably found its reflection in the case law of the Strasbourg organs. As Sir John Laws rightly puts it, ‘while the Gestapo and the death-camps are the Convention’s backdrop, its stage is now often a battleground against much lesser devils.’ There is no doubt that communism turned out to be a ‘lesser devil.’ Nonetheless, in these cases, the Human Rights Court has emphasized the importance of democracy and its main principles. For the court, ‘one of the principal characteristics of democracy [is] the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome.’ The court also ruled out the possibility of suppressing rights under the pretext that peculiar ‘national’ conditions should be taken into account when approaching the concept of democracy. In this

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68 Quote of M. Teitgen, France, in ‘Travaux Preparatories,’ vol. i, p. 40; for similar remarks made by Danish delegate Mr. Lannung, see ibid., p. 56.
regard, one is tempted to conclude that what the Strasbourg Court actually has condemned in these cases, again with the exception of Refah, is ‘Turkey’s understanding of combatant or militant democracy.’

The Refah judgment of the Human Rights Court raises the question of whether the Strasbourg Court is hesitant to condemn categorically Turkey’s understanding of ‘militant democracy.’ It is premature to answer this question properly, simply because the judgment is not yet final according to the procedural rules of the Human Rights Convention. However, a brief summary of the judgment and dissenting opinion will reveal the perplexities that seem to prevail in Strasbourg.

On 31 July 2001, the Human Rights Court, sitting as a chamber of seven judges, decided by four votes to three that the order of the Turkish Constitutional Court dissolving the Refah Party was not in breach of Article 11 of the Human Rights Convention. According to the Human Rights Court majority, which includes the national judge of Turkey, a political party may aim to change the legal and constitutional basis of the state on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles.

Having examined the evidences presented, the Human Rights Court reached the conclusion that ‘Refah’s unavowed aim of setting up a political regime based on shariah’ is not compatible with the democratic ideal that underlies the Human Rights Convention. The Human Rights Court is of the view that a state reasonably may act to prevent the realization of such incompatible aims even before those aims can be put into effect through concrete steps that might prejudice civil peace and the country’s democratic system.

The joint dissenting opinion of three judges criticized the judgment on three grounds. First, the dissent pointed out that the principles underlined in the previous three judgments concerning political parties are not brought out fully in the majority judgment with respect to Refah. Second, the dissent maintained that ‘there is nothing in its constitution or programme to indicate that Refah was

73 The Convention system was changed radically by Protocol 11, which came into effect on 1 November 1998. In accordance with Article 43 of the Convention and Article 73 of the Rule of Court, any party to a case, within a period of three months from date of delivery of the judgment of a Chamber, may request that the case be referred to the Grand Chamber of 17 judges; if the panel of five judges accepts the request, the Grand Chamber examines and decides the case by means of a judgment. Two conditions must be met for a case to be referred to the Grand Chamber: the case must raise either a serious question affecting the interpretation or application of the Convention; or raise a serious issue of general importance.
74 Case of Refah Partisi and Others v. Turkey, 31 July 2001 (Application nos. 41340/98, 41342/98, 41344/98), para. 47.
75 Ibid., paras. 72, 73.
76 Ibid., para. 81.
other than democratic or that it was seeking to achieve its objectives by undemocratic means or that those objectives served to undermine or subvert the democratic and pluralistic political system in Turkey.’ Finally, referring to the majority judgment about the state’s preventive measures to curb incompatible aims, the dissenting judges concluded as follows:

What is in our view lacking is any compelling or convincing evidence to suggest that the party, whether before or after entering Government, took any steps to realize political aims which were incompatible with Convention norms, to destroy or undermine the secular society, to engage in or to encourage acts of violence or religious hatred, or otherwise to pose a threat to the legal and democratic order in Turkey.  

The Grand Chamber, which is currently examining the case, must opt for these conflicting opinions. Whatever the decision of the Grand Chamber, the jurisprudence of the Strasbourg Court in the Refah case will contribute significantly to the political debate as to whether the ‘communist threat’ of the Cold War era has been replaced with the ‘danger of Islam’ in the New World Order.

Conclusion

This article has tried to illustrate that there is an incompatibility between the legal paradigms of the Turkish Constitutional Court and the Strasbourg Court. In order to overcome this incompatibility, two crucial measures must be taken with respect to constitutional jurisdiction in Turkey. The first step is to change radically the Constitution and relevant laws such as the Political Parties Act so that they conform to the ‘rights-based’ paradigm of Strasbourg. Indeed, the incompatibility between the jurisprudence of the Constitutional Court and that of the Strasbourg Court also may be read as an incompatibility between the Turkish Constitution and the European Convention on Human Rights. Recent amendments to the Constitution, which came into force on 17 October 2001, included some substantial and procedural provisions in favor of political parties. Accordingly, (a) the definition of the term ‘center’ was introduced in the Constitution, (b) the Constitutional Court was given the option to render judgments leading to sanctions other than the dissolution of the political party concerned, and (c) the necessary quorum for dissolving a party was changed from a simple majority to three-fifths of Constitutional Court members. These amendments, albeit insufficient, may be viewed as initial steps toward liberalization of the political party regime in Turkey.

The second necessary measure is the adoption by the Constitutional Court of the rights-based paradigm. The court must abandon its long-practiced, ideology-based attitude and approach cases with a bias in favor of protecting individual rights instead of the ‘interests’ of the state. Failure to do so easily may place the

77 See Joint Dissenting Opinion of Judges Fuhrmann, Loucaides, and Sir Nicolas Bratza.
The Constitutional Court of Turkey, like many other courts ‘in the societies of our world today,’ among those that do not ‘stand out as protectors of liberty, of the rights of man, of the unprivileged.’ 79 It is true that the authoritarian nature of Turkey’s Constitution impedes the Constitutional Court in departing from its ideology-based approach. However, it is also true that the provisions of the Constitution with respect to the protection of rights and liberties are formulated in a vague and general way, and the Constitutional Court has the discretion to interpret them in a democratic way. As Justice Charles Evans Hughes of the US Supreme Court once said, ‘we are under a Constitution, but the Constitution is what the judges say it is.’ 80

The paradigm shift in the jurisprudence of the Constitutional Court is not easy to realize. It involves, above all, a public sphere that is sensitive to individual rights and freedoms. It is difficult, if not impossible, to change the basic parameters of the public sphere in the short term, simply because they depend, to a certain extent, on the political culture. The reform of the political public sphere, according to Habermas, ‘must be embedded in the context of a freedom-valuing political culture and be supported by a liberal associational structure of a civil society.’ 81 It remains to be seen whether ‘a freedom-valuing’ political culture will become rooted firmly in the civil society of Turkey.