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European Islamaphobia and Turkey - *Refah Partisi (The Welfare Party) v. Turkey*

I. INTRODUCTION

In February 2003, the European Court of Human Rights (ECHR) reviewed a decision by Turkey's highest court, the Constitutional Court, dissolving one of the largest political parties in Turkey, Refah Partisi ("Refah").¹ The ECHR found that the dissolution of Refah Partisi did not violate Article 11 of the European Human Rights Convention ("Convention").²

This Note will analyze the ECHR's decision to uphold the dissolution of Refah despite a history of overturning similar cases, and conclude that the Refah decision was incorrect. Part II will provide a brief introduction to Refah and the history of the dissolution of political parties and secularism in Turkey. Part III will provide a synopsis of the ECHR's decision in Refah. Part IV will demonstrate the way in which the ECHR's decision did not remain faithful to the values outlined in the Convention. Specifically, it will discuss how the ECHR's decisions failed to support the democratic process in Turkey. It will explain that the true impetus for the ECHR's decision was European concern about the rising popularity of Islam in Turkey and the increased infiltration of Islamic values into the Turkish political process. As a potential member of the European Union (EU) and a largely Islamic country sitting at the doorstep of mainland Europe, Turkey is a country of great interest to the European Community.³ An increased Islamic socio-political influence has created concern that a fundamentalist form of Islamic politics will soon take root in Turkey, just as such politics took root under similar circumstances in Iran.⁴ Part V will conclude with a summary of the ar-

1. Refah Partisi v. Turkey, (Eur. Ct. H.R., Feb. 13, 2003), at <http://www.echr.coe.int>.

2. *Id.* ¶ 13b.

3. Turkey is the EU's sixth largest trading partner and crossroads between Europe and the Middle East. Christopher Frank, *Turkey's Admittance to the European Union: A Keystone Between Continents*, 11 CURRENTS: INT'L TRADE L.J. 66, 66-67 (Summer 2002).

4. Susana Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 106 (2002).

gument, and a discussion of how the *Refah* decision may affect the current controlling party in Turkey.

II. BACKGROUND

A. *The Rise and Fall of Refah Partisi*

In 1983, Necmettin Erbakan, the former Turkish Prime Minister, formed Refah.⁵ Refah's members ran on a platform based on Islamic fundamental values.⁶ In the 1989 local elections, Refah received about 10 percent of the votes and won mayoral elections in five large cities.⁷ By 1995, Refah had grown dramatically in power. The party won twenty-four mayoral seats, a plurality of the public's vote, and the largest number of seats in Turkey's Parliamentary Assembly.⁸ That same year, Erbakan became the first Islamic Prime Minister in Turkey in over eighty years.⁹ As Prime Minister, Erbakan sought to improve ties with Libya and Iran.¹⁰ Erbakan further made statements praising Sudan, Iran, and Islamic groups like Hamas for resisting Western power, causing concern to Turkey's Western allies.¹¹

Refah's popularity increased rapidly due to several factors, including the people's growing dissatisfaction with Turkey's secular parties and those parties' pro-Western ideologies.¹² The Turkish people, in general, were dissatisfied with the West's perceived failure to protect Muslims in Bosnia and to support Turkey's bid to the European Union.¹³ This dissatisfaction with the West was exacerbated by the United Nations embargo against Iraq, an embargo that devastated the economy of eastern Turkey.¹⁴ In addition to a rising sense of Turkish dissatisfaction, Refah's success could also be attributed to the increasing popularity of Islam in Turkey.¹⁵ Refah's political platform focused on issues of social justice, government corruption, widespread poverty in Turkey, and

5. *Refah Partisi*, ¶ 10, at <http://www.echr.coe.int>.

6. *Id.* ¶ 27.

7. *Id.* ¶ 11.

8. Dokupil, *supra* note 4, at 105.

9. *Id.* at 109.

10. *Id.* at 113.

11. Ugur Akinci, *US Press Sees Erbakan's Rise "a Milestone,"* TURKISH DAILY NEWS, Jul. 1, 1996, available at http://www.turkishdailynews.com/old_editions/07_01_96/for.htm.

12. Dokupil, *supra* note 4, at 106.

13. *Id.* at 106.

14. *Id.*

15. HEINZ KRAMER, A CHANGING TURKEY: THE CHALLENGE TO EUROPE AND THE UNITED STATES 78-79 (The Brookings Inst. 2000).

whether a Turkish government, established under the precepts of Islamic values, could cure the many woes suffered by the populace.¹⁶

In June 1997, Refah began to unravel as Erbakan resigned under pressure from the military.¹⁷ Later that year, the Attorney General brought Refah before the Turkish Constitutional Court on charges of anti-secularism for attempting to introduce Islamic law.¹⁸ In January 1998, the Constitutional Court abolished Refah based on violations of secularism.¹⁹

B. History of Dissolution of Political Parties in Turkey

Refah's dissolution was not an isolated incident. Turkey has a long history of repressing groups and individuals that might present a threat to the stability of the state or the concept of secularism. For example, from 1923 to 1996, the Turkish courts dissolved or banned thirty-eight political parties.²⁰ The basis for dissolving political parties lies in the Turkish constitution itself. Article 14 states that "none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of . . . establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect".²¹ Under Article 68, a political party whose aim is to support and to set up the domination of a class or group, or any kind of dictatorship, cannot be formed.²² Finally, under Article 69, "[t]he dissolution of political parties shall be decided by the Constitutional Court after the filing of a suit by the Office of the Chief Public Prosecutor of the Republic."²³

The Constitutional Court has used its power frequently and effectively to remove political parties with contrarian views. For example, in 1993, the Constitutional Court dissolved the People's Labour Part (HEP), a Kurdish party supporting the creation of Kurdish provinces in Turkey, because its activities were likely to "undermine the territorial integrity of the State and unity of the nation."²⁴ Also, the Constitutional Court dissolved the United Communist Party of Turkey for similar rea-

16. *Id.* at 79.

17. Dokupil, *supra* note 4, at 119-20.

18. Herve Couturier, *Turkey's Islamic Party Facing Probable Ban*, AGENCE FRANCE-PRESSE, Nov. 12, 1997, available at 1997 WL 13432556.

19. Talip Kucukcan, *State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere*, *BYU L. Rev.* 475, 497 (2003).

20. Edip Yuksel, *Cannibal Democracies, Theocratic Secularism: The Turkish Version*, 7 *CARDOZO J. INT'L & COMP. L.* 423, 444-445 (1999).

21. TURK. CONST. pt. II, ch. I, art. 14.

22. TURK. CONST. pt. II, ch. IV, art. 68.

23. TURK. CONST. pt. II, ch. IV, art. 69.

24. *Yazar v. Turkey*, 2002-II Eur. Ct. H.R. 397, 402.

sons, in addition to the use of the word "Communist" in the party's name.²⁵ Although these cases involved dissolution of parties advocating Kurdish autonomy, most of the Constitutional Court's dissolution activity has been focused on Islamic-based political parties.²⁶

Refah is not the first Islamic party to have its fate determined by the Constitutional Court. Erbakan started a political party, Mill Nizam Partisi, in 1970.²⁷ One year later, the Constitutional Court dissolved the party because it used "religion for political purposes in violation of Turkey's fundamental constitutional provisions requiring secularism."²⁸ Erbakan created another political party two years later, Milli Selamet Partisi (National Salvation Party); however, that party too was dissolved in 1980.²⁹ Later that year, hoping the third time would be the charm, Erbakan created Refah. While Refah had greater success than Erbakan's first two endeavors into the political realm, Refah ultimately faced the same fate as its predecessors. The Constitutional Court banned the party, finding that Refah had become a "centre of activities contrary to the principle of secularism."³⁰

C. Secularism in Modern Turkey

Before turning to Refah's case before the ECHR, it is helpful to understand the principle of secularism in Turkey and the reasons why it was established. The secular movement in Turkey was inspired by Mustafa Kemal Ataturk, the first president of the post-Ottoman Empire Turkey.³¹ Ataturk's goal was to minimize the role of Islam and to promote more modern, Western values.³² Secularism sought to reduce the importance of Islam that was pervasive in every aspect of Turkish society during Ottoman rule.³³ The government under Ataturk implemented the secular agenda by utilizing new Turkish symbols, banning religious institutions that were closely tied to the government, and eliminating Sharia law in order to adopt the use of Western legal codes to firmly establish secularism within the Turkish Constitution.³⁴

25. United Communist Party of Turkey v. Turkey, 1998-I Eur. Ct. H.R. 1, 25-26.

26. See Frank, *supra* note 3, at 68.

27. Kucukcan, *supra* note 19, at 491.

28. *Id.*

29. *Id.* at 492.

30. *Refah Partisi*, ¶ 39, at <http://www.echr.coe.int>.

31. Kucukcan, *supra* note 19, at 485.

32. TURKEY: A COUNTRY STUDY 36 (Helen Chapin Metz ed., 1995).

33. Kucukcan, *supra* note 19, at 486.

34. *Id.* at 486-88. Sharia law is the law governing Islamic society.

Ataturk's three-prong process of secularization was quite intensive. By changing the everyday symbols used by the Turkish people, the government sought to reduce the impact of Islam on the national identity.³⁵ For example, the new secular government changed the Turkish alphabet from Arabic to Latin script.³⁶ It also switched to a Gregorian calendar used by Western countries.³⁷ The government encouraged and accepted Western clothes and Western styles.³⁸

Ataturk took note of United States constitutional mores and carefully divided religious institutions from governmental institutions. One of his first steps as president was abolishing the caliphate.³⁹ That same year, Ataturk dissolved the Ministry of Religious Affairs.⁴⁰ By banning the involvement of religious institutions in government, Ataturk sought "to completely free the polity from religious considerations."⁴¹

Finally, by eliminating the use of Sharia law in the personal affairs of Muslims, Ataturk and his secular followers further reduced the influence of Islam in the community.⁴² The new codes, modeled after the codes of the West, were promulgated to minimize the role of Islam in Turkey.

The Turkish government's belief in secularism is so strong that it is set out in the Preamble of its Constitution:

[N]o protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and . . . as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics.⁴³

Secularism is further emphasized in Article 2 of the Constitution, which states that "The Republic of Turkey is a democratic, secular and

35. STANFORD J. SHAW & EZEL KURAL SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* 386 (1977).

36. Binnaz Toprak, *Politicisation of Islam in a Secular State: the National Salvation Party in Turkey*, in *FROM NATIONALISM TO REVOLUTIONARY ISLAM* 119, 120 (1984).

37. SHAW & SHAW, *supra* note 35, at 385.

38. *Id.* at 386.

39. The Ottoman caliphate was considered to be the primary caliphate in the Islamic world until it was abolished by the National Assembly (at Atatürk's request) in 1924. See ANDREW MANGO, *ATATÜRK: THE BIOGRAPHY OF THE FOUNDER OF MODERN TURKEY* 404 (1999); NEAL ROBINSON, *ISLAM: A CONCISE INTRODUCTION* 45 (1999).

40. Kucukcan, *supra* note 19, at 487.

41. Metin Heper, *Islam, Polity and Society in Turkey: A Middle Eastern Perspective*, 35 *MIDDLE E. J.* 345, 350 (1981).

42. Kucukcan, *supra* note 19, at 488.

43. TURK. CONST. pmbl (emphasis added).

social state governed by the rule of law."⁴⁴ Finally, the Constitution makes Article 2 unamendable.⁴⁵

III. REFAH PARTISI V. TURKEY PROCEDURAL HISTORY

Turkey's dissolution of Refah was done under the pretense of secularism. The Constitutional Court found that Refah's pro-Islamic rhetoric put the principles of secularism at risk.⁴⁶ The Court held that the rhetoric encouraged Turkish women to wear headscarves in public and in educational establishments,⁴⁷ the implementation of multiple legal systems based on religious affiliation,⁴⁸ and the establishment of a theocratic regime, whether peacefully or by force.⁴⁹ After its dissolution, Refah appealed its case to the ECHR, stating that the dissolution violated Article 11 of the Convention.⁵⁰

A. *The European Convention for Human Rights and Fundamental Freedoms and Turkey*

In 1950, the Council of Europe established the Convention.⁵¹ Signatories to the Convention are required to recognize the Convention's principles, but not required to enact them as domestic law.⁵² The Convention established the ECHR in 1958 as part of its adjudication structure.⁵³ Turkey, in its continuing bid to become part of the European Union, signed the Convention in 1954.⁵⁴

Since the establishment of the ECHR, Turkey has often been forced to defend its actions. Since the ECHR's inception, it has handed down over forty verdicts against Turkey.⁵⁵ This is largely attributable to Turkey's abysmal track record in the human rights arena. In addition to numerous political party dissolution cases, the ECHR has ruled against Turkey on issues involving the "imprisonment of people for their non-

44. TURK. CONST. pt. I, ch. II, art. 2.

45. TURK. CONST. pt. I, ch. IV, art. 4.

46. *Refah Partisi*, ¶ 40, at <http://www.echr.coe.int>.

47. *Id.* ¶ 27.

48. *Id.* ¶ 2.

49. *Id.* ¶ 40.

50. *Id.* ¶ 14.

51. Euro Know, *Euro Know: European Convention on Human Rights*, at <http://www.euro-know.org/dictionary/e.html> (last visited Apr. 27, 2004).

52. *Id.*

53. Signatory countries to the Convention ratified Protocol 11 in October 1997. MARK JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW 65 (1995).

54. European Court of Human Rights, *Dates of Entry Into Force*, at <http://www.echr.coe.int/Eng/EDocs/DatesOfRatifications.html> (last visited Apr. 5, 2004).

55. Human Rights Watch, *World Report 2003: Europe and Central Asia: Turkey*, available at <http://www.hrw.org/wr2k3/europe13.html> (last visited Mar. 15, 2004).

violent opinions or after unfair trials, as well as unlawful killings and arbitrary house destruction by the Turkish security forces."⁵⁶

B. Article 11 and Applicability to Refah

Article 11 of the Convention states:

1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.⁵⁷

Essentially, Article 11 allows people to assemble freely and associate peacefully. The ECHR has unwaveringly affirmed the principle that Article 11 applies to political parties.⁵⁸ States may legally limit Article 11 if it is necessary to maintain public safety, to maintain national security, to prevent crime, or to protect other freedoms.⁵⁹ The ECHR has emphasized, however, that "the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association."⁶⁰ Therefore, a government seeking to dissolve a political party cannot easily reach the threshold necessary to surmount Article 11 protections of association.

Moreover, European Parliamentary Assembly Resolution 1308 further underscores the high threshold necessary to overcome Article 11 protection when it states "restrictions on or dissolution of political parties should be regarded as exceptional measures to be applied only in cases where the party concerned uses violence or threatens civil peace

56. *Id.*

57. European Convention for Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 11, 213 U.N.T.S. 221, 232.

58. *E.g., United Communist Party of Turkey*, 1998-I Eur. Ct. H.R. at 1; *Yazar*, 2002-II Eur. Ct. H.R. at 397; *Socialist Party v. Turkey*, 27 Eur. H.R. Rep. 51 (1999).

59. European Convention for Human Rights and Fundamental Freedoms, *supra* note 57, art. 11, 213 U.N.T.S. at 232.

60. *United Communist Party of Turkey*, 1998-I Eur. Ct. H.R. at 46.

and the democratic constitutional order of the country."⁶¹ Thus, the dissolution of a political party is a drastic measure that should only be undertaken in the most dire circumstances.

Due to the high threshold necessary to overcome the freedom of association protections of Article 11, most party dissolution cases result in favorable rulings for the parties.⁶² However, *Refah* is unique because the ECHR determined that the Constitutional Court's decision did not violate Article 11.⁶³ The ECHR found that Turkey met the threshold established in *United Communist Party v. Turkey* to limit the general freedom of association rights outlined in Part One of Article 11.⁶⁴

C. *Refah's Case is not Distinguishable from Prior Article 11 Political Party Dissolution Cases*

Although *Refah's* case had few differences from past cases brought before the ECHR, its outcome was antipodal to the outcomes of such predecessors. Before looking at *Refah's* case in detail, it is important to review some past dissolution cases brought before the ECHR against Turkey, including *United Communist Party of Turkey v. Turkey* and *Yazar v. Turkey*.⁶⁵ The ECHR's rulings in these two cases will demonstrate how it diverged from its prior precedent in *Refah Partisi*.

According to *United Communist Party of Turkey v. Turkey*, the United Communist Party of Turkey (TBKP) was established as a political party in June 1990.⁶⁶ Ten days after its creation, the Principal State Counsel brought an action in the Constitutional Court to dissolve the TBKP.⁶⁷ The Constitutional Court banned the TBKP based upon the party's alleged encouragement of Kurdish separation and the use of "Communist" in its title. The ECHR held that the exceptions set out in Article 11(2) had to be construed strictly in relation to political parties.⁶⁸ Turkey's dissolution of the TBKP did not meet the exceptions because

61. *Resolution 1308 (2002): Restrictions on political parties in the Council of Europe member states*, ¶ 11, Eur. Parl. Ass., 2002 Sess. (Nov. 18, 2002), available at <http://assembly.coe.int/Documents/AdoptedText/TA02/ERES1308.htm>.

62. Since 1998, the ECHR has reviewed five party dissolution cases. In four of the five cases, the ECHR found an Article 11 violation. See *Refah Partisi*, at <http://www.echr.coe.int>; *Yazar*, 2002-II Eur. Ct. H.R. 397; *Socialist Party v. Turkey*, 27 Eur. H.R. Rep. 51 (1999); *Özdep v. Turkey*, 1999-VIII Eur. Ct. H.R. 295; *United Communist Party of Turkey*, 1998-I Eur. Ct. H.R. 1.

63. *Refah Partisi*, ¶ 136, at <http://www.echr.coe.int>.

64. *Id.* ¶ 87.

65. *Yazar*, 2002-II Eur. Ct. H.R. at 402; *United Communist Party of Turkey*, 1998-I Eur. Ct. H.R..

66. *United Communist Party of Turkey*, 1998-I Eur. Ct. H.R. at 7.

67. *Id.* at 7-8.

68. *Id.* at 22.

(1) a political party's choice of name could not justify dissolution and (2) the TBKP sought to resolve the Kurdish issue through dialogue.⁶⁹

Even though the TBKP advocated the "peaceful, democratic and fair solution of the Kurdish problem," and despite the government's contention that this would lead to discrimination based on race in addition to a national security risk, the ECHR found that the dissolution of the TBKP was unfounded under the Convention.⁷⁰ The ECHR based its decision on the fact that the TBKP's "programme" (constitution) did not advocate for special treatment for the Kurds or propose that the TBKP achieve its political agenda through violence.⁷¹

In *Yazar v. Turkey*, the Turkish government dissolved the People's Labour Party (HEP) two years after its creation, stating that the HEP's activities were "likely to undermine the territorial integrity of the State and the unity of the nation."⁷² Turkey based its decision on the fact that the HEP advocated the formation of Kurdish provinces in violation of the Turkish Constitution prohibiting racial discrimination.⁷³ HEP also claimed that terrorist acts by a Kurdish separatist group—which HEP considered to be freedom fighters—were acts of international war, and advocated for self-determination for the Kurds.⁷⁴

The ECHR found against Turkey, stating that HEP had not undermined Turkish democracy and had not advocated policies to that end.⁷⁵ The ECHR further stated that HEP's goals should be introduced into public debate in order to "find solutions to problems of general interest."⁷⁶

D. *The Court's Decision in Refah*

In *Refah*, the ECHR applied its standard Article 11 analysis to determine whether Refah's dissolution violated the Convention. First, the ECHR inquired whether there was an interference with Refah's freedom to associate.⁷⁷ Second, the ECHR determined whether the inference, if any, was justified.⁷⁸ To be justified, the interference had to be pre-

69. *Id.* at 26-27.

70. *Id.* at 26.

71. *Id.*

72. *Yazar*, 2002-II Eur. Ct. H.R. at 402.

73. *Id.* at 402.

74. *Id.* at 401-02.

75. *Id.*

76. *Id.* at 414.

77. *Refah Partisi*, ¶ 50, at <http://www.echr.coe.int>.

78. *Id.* ¶ 51.

scribed by law, serve a legitimate aim, and be necessary in a democratic society.⁷⁹

In most dissolution cases, there is little argument surrounding whether there was interference. The process of dissolution, by its very nature, is interference. Most of the controversy centers on whether or not the interference was justified.

To justify the interference, Turkey had to satisfy three elements. First, Turkish law must prescribe the interference. Second, the interference must serve a legitimate aim. Finally, the interference must be necessary to protect the democratic principles of society.⁸⁰

Here, the ECHR found that Turkish law warranted the interference.⁸¹ Article 69 of the Constitution gives sole discretion to the Turkish Constitutional Court on the question of dissolution.⁸² In addition, Article 69 prohibits political parties from engaging in activities contrary to Article 68, such as those activities that discriminate against race, religion, language or sect.⁸³ The Constitution also charges the Turkish Constitutional Court with protecting secularism in the state.⁸⁴

Interestingly, the ECHR also gave weight to the identities of Refah's leaders and their prior legislative experience in determining whether the interference was prescribed by law.⁸⁵ In doing so, the ECHR implied that Refah's leaders could have foreseen the risk of dissolution and later assumed that risk, because many of its leaders were members of the Turkish parliament involved in discussions about amending the Constitution.⁸⁶ Apparently, the lawfully prescribed interference was reinforced because Refah's leaders were knowledgeable of the law and Turkey's amended Constitution.

After a notably brief analysis, the ECHR determined whether Turkey's interference served a legitimate aim. In its decision, the ECHR concluded that Turkey's dissolution of Refah pursued "several legitimate aims listed in Article 11 [of the Constitution]" including "protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others."⁸⁷

79. *Id.*

80. *Id.*

81. *Id.* at 22.

82. TURK. CONST. pt. III, ch. IV, art. 69.

83. *Id.*

84. TURK. CONST. pt. III, ch. IV, art. 68.

85. *Refah Partisi*, ¶ 62, at <http://www.echr.coe.int>.

86. *Id.* ¶ 63.

87. *Id.* ¶ 67.

Next, the ECHR discussed in detail whether the interference was necessary in a democratic society and determined that Turkey had a legitimate necessity to dissolve Refah. The ECHR specifically focused on Refah's proposals seeking to implement a plurality of legal systems based on religious affiliation, its support for Sharia-based law and its failure to promptly disassociate itself from members who expressed the need for jihad ("holy war") to gain political power.⁸⁸ Based on these factors, the ECHR felt that Turkey needed to protect the individual freedoms outlined in the Convention.⁸⁹

Furthermore, the ECHR held that a political party's means to achieve change must be legal and democratic.⁹⁰ Accordingly, the ECHR held that Refah's proposed changes failed to comport with fundamental democratic principles, and due to Refah's success in general elections, there was a likelihood it could implement those changes through the democratic process.⁹¹

IV. ANALYSIS OF THE ECHR'S DECISION

A. *The ECHR's Break with Precedent*

In making its decision, the ECHR did not rely on its past precedent and analysis. This break with precedent included: failing to use Refah's constitution for a basis of its decision, giving weight to Refah's actions while it was the controlling party in the Turkish Parliament, placing too great an emphasis on party extremists, and creating additional requirements before finding an Article 11 violation.⁹²

First, the ECHR abandoned its precedent of examining a party's constitution in order to determine whether there was a legitimate exception to Article 11(1).⁹³ If the ECHR had examined Refah's constitution, it would have found that Refah did not advocate the establishment of either Sharia or Islamic law as a fixture of Turkish society.⁹⁴ Also, the ECHR would have found that Refah's constitution did not substantiate the Turkish government's contentions about the threat Refah posed to

88. *Id.* ¶¶ 116-34.

89. *See id.* ¶ 133.

90. *Id.* ¶ 98.

91. *Id.* ¶ 108.

92. *See United Communist Party of Turkey*, 1998-I Eur. Ct. H.R. at 26; *Refah Partisi*, ¶ 115, at <http://www.echr.coe.int>.

93. *United Communist Party of Turkey*, 1998-I Eur. Ct. H.R. at 26.

94. The examples cited by the ECHR dealt with speeches given by Erbakan in 1993. Erbakan had proposed allowing Turkish citizens to choose a legal system based on their religious beliefs. *See Refah Partisi*, ¶ 72, at <http://www.echr.coe.int>.

Turkey's democratic principles.⁹⁵ Instead, the Refah constitution proposed granting Turkish citizens the right to send their children to Islamic middle schools, allowing women to wear headscarves at schools and public universities and allowing people with Islamic beliefs to remain in the military.⁹⁶

Even if Refah's proposals were inconsistent with the ideals of secularism espoused in the Turkish Constitution, the ECHR should not be the judge of secularism. Rather, the ECHR's role under Article 11 of the Convention is to ensure that people have the freedom to associate and publicly debate their ideas. In the *Refah* decision, however, the ECHR reduced the import of the party's constitution to controversial comments made by Refah's members.⁹⁷ Every political group has a faction with extremist views, and the ECHR improperly relied on the views of a few radical members to "speak for" the views of an entire party.⁹⁸ Refah did not advocate the abandonment or the drastic amendment of the Turkish Constitution.⁹⁹ Although Erbakan was a proponent of Islamic values, he always upheld the principles of democracy and secularism within the Constitutional parameters as Prime Minister.¹⁰⁰

Furthermore, Refah was a large, established party in Turkey with a track record of supporting democratic principles and the Turkish Constitution.¹⁰¹ Refah had existed for thirteen years prior to its dissolution and was the most powerful party in Turkey during the one year Erbakan served as Prime Minister of Turkey.¹⁰² Again, during this time, Refah did not take any measures that were contrary to democratic principles.¹⁰³ Specifically, Refah never introduced legislation to implement Islamic law.¹⁰⁴

Additionally, the ECHR added two hurdles into its analysis on Refah's appeal that were not required of other parties in dissolution cases: likelihood of success and assumption of risk.¹⁰⁵ In the TBKP and HEP decisions, the ECHR did not look at whether these parties would be successful in achieving their goals because this element was not part of an Article 11 analysis. Had the ECHR done so, it would have found that

95. *Id.* ¶ 81.

96. Yuksel, *supra* note 20, at 445-46.

97. *Refah Partisi*, ¶ 116, at <http://www.echr.coe.int>.

98. *See id.* ¶ 100.

99. *Id.* ¶ 76.

100. *See id.* ¶ 83.

101. *See id.* ¶ 70.

102. *Id.* ¶ 69.

103. *Id.* ¶ 76.

104. *See id.* ¶ 70.

105. *Id.* ¶ 61.

both TBKP and HEP were relatively new parties.¹⁰⁶ Thus, although their goals were, in part, to seek an independent Kurdish state, the reality that they would succeed was minimal at best.

This element of likelihood of success was instrumental in the ECHR's decision to uphold the dissolution of Refah, justified as a "pressing social need".¹⁰⁷ The Court stated "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."¹⁰⁸ An extension of the ECHR's analysis would lead to the inference that any political party, with a monopoly of control, should be dissolved because its monopoly posed a threat to Turkey's democratic principles. However, the ECHR does not extend this same logic in other party dissolution cases.

The second hurdle the ECHR added for Refah was an assumption that its leaders knew the risk associated with their conduct. The Court held that its leaders were experienced politicians.¹⁰⁹ Erbakan, who was a member of Parliament and Prime Minister, had knowledge that Refah's anti-secular platform and activities could cause its dissolution.¹¹⁰ In determining whether the dissolution was prescribed by law, the ECHR used this assumption of knowledge by Refah's leaders as a basis for its decision.¹¹¹ Although there was ample notice of support for dissolution in Turkey's Constitution, this additional hurdle was not imposed by the ECHR on other political parties where the dissolution was found to violate the Convention.

TBKP and HEP advocated for drastic change in Turkish society.¹¹² In their constitutions, both sought to achieve these social changes through non-violent means.¹¹³ Refah's situation only differs in two respects. First, Refah was a political party whose proposed changes to society were based on the precepts of Islam. Second, at one point in its brief history, Refah became the most powerful political party in Turkey. The combination of these two items swayed the ECHR's decision toward dissolution. Fundamentally, however, there were few differences between Refah, TBKP, and HEP. The changes impliedly proposed by Refah to Turkey's political system were no more incompatible with fun-

106. TBKP was an official party for ten days. HEP was an official party for two years.

107. *Refah Partisi*, ¶ 106, at <http://www.echr.coe.int>.

108. *Id.*

109. *See id.* ¶ 62.

110. *Id.*

111. *Id.*

112. *See id.* ¶ 99.

113. *Id.* ¶ 132.

damental democratic principles than those sought by other political parties.

B. An Islamic Turkey as a Barrier to Entry into the European Union

The next question that logically arises is why the ECHR decided to uphold the dissolution of Refah. Refah's Islamic base coupled with its growing popularity in Turkey was likely a driving force in the ECHR's decision.¹¹⁴ The decision implicitly expressed the fears that Europeans have about an Islamic country potentially becoming a member of the European Union.

The Court observed that forecasts estimated that Refah could obtain 67 percent of the vote in the general election in 2001.¹¹⁵ With this super-majority, the ECHR expressed the concern that "at the time of 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."¹¹⁶

The Court's concern that Refah could have fundamentally changed the direction of Turkish politics is an ongoing concern shared throughout the European Union. Europeans fear the possibility of a fundamental Islamic state, not only on the border of Europe, but within the European Union. Some believe that "Islam is so different from other religions that a separation between religion and politics cannot be accepted" in a country where the primary religion is Islam.¹¹⁷ Others feel political Islam is dangerous because radical behavior often follows.¹¹⁸ This belief is underscored by the terrorist attacks by fundamentalist Islamic extremists on September 11, 2001.

Finally, another European sentiment is that Turkey's form of secularization is driven by the military regime and not espoused by the general populace.¹¹⁹ In order for Turkey to become part of the European Union, Islam in Turkey must become Europeanized to include recognition of "individual human rights, [formation of] a civil society, tolerance

114. *See id.*

115. *Id.* ¶ 107.

116. *Id.* ¶ 168.

117. Giacomo Luciani, *Turkey and Islam-Obstacle on the Way to Europe* (May 2, 2003), at http://www.quantara.de/webcom/show_article.php/_c-301/_nr-3/_p-1/i.html.

118. *Id.*

119. *European Press Review: E.U. Snubs Turkey*, WORLD PRESS REV. ONLINE (Dec. 2003), at <http://www.worldpress.org/Europe/867.cfm> (last visited Apr. 27, 2004).

and cultural and religious pluralism."¹²⁰ Essentially, the ECHR emphasizes the feeling in Europe that acceptance of Turkey into the European Union is conditioned upon Turkish politics conforming to European and Western ideals.

The concern over popularity of a fundamental Islamic political regime in addition to Turkey's abysmal human rights record and significant poverty have led many prominent Europeans to believe Turkey and the European Union are not a good fit.¹²¹

V. CONCLUSION

The Court's decision in *Refah Partisi v. Turkey* was contrary to its typical resolution to political party dissolution cases. Rather than focusing the decision on Refah's constitution and acts by the party while it was in power, the court relied instead upon statements and beliefs of Refah's individual members. It also relied on the allegedly imminent political threat created by the rapid growth of the party. The Court's conclusion is a response to an overall European concern about a political Islamic regime arising in Turkey. By upholding the Turkish Constitutional Court's decision, the ECHR sought to eliminate this perceived threat to the security of Europe.

Although Refah is no longer an active party in Turkey, political parties with Islamic principles still tend to gain widespread support.¹²² The current controlling party in Turkey's parliament, the Justice and Development Party (AKP), traces its roots back to Refah and is led by a former member of Refah, Recep Tayyip Erdogan.¹²³ Even though AKP has taken a more open stance toward integration into the EU, it is still viewed with some concern by secularists as a watered-down version of Refah.¹²⁴ Given this tension, it is likely only a matter of time before AKP faces a similar fate as Refah.

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120. *Id.*

121. *See id.* (quoting former French President Valerie Giscard D'Estaing).

122. The Justice and Development Party (AKP) became the dominant party in Parliament in November 2002. Philip Pan, *Political Experiment Stumbles in Turkey: Effort to Reconcile Islam, Democracy Showing Few Results After Six Months*, WASH. POST FOREIGN SERV., Apr. 27, 2003, at <http://www.washingtonpost.com/ac2/wp-dyn/A42727-2003Apr26> (last visited Apr. 25, 2004).

123. Wendy Kristianasen, *Turkey: Post-Islamists in Power*, LE MONDE DIPLOMATIQUE, Mar. 2003, available at http://mondediplo.com/2003/03/06_turkey (last visited Apr. 27, 2004).

124. *See* Dokupil, *supra* note 4, at 106.

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