

# Dissolution of Political Party: Criteria adopted by the Korean Constitutional Court and Lessons from the European Court of Human Rights

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## Abstract

*The Korean Constitutional Court adopted a two-prong test in its first case on dissolution of political party in determining whether to dissolve the political party. According to Article 8 Section 4 of the Korean Constitution, a political party may be dissolved if the purposes or activities of the political party are contrary to the fundamental democratic order. The Korean Constitutional Court not only used Article 8(4) of the Constitution as a standard of review for dissolution of political party but also adopted the principle of proportionality as another standard of review to be met even though the Constitution does not explicitly say so. The European Court of Human Rights has also used essentially a two-step test where the dissolution of a political party is justified if there is a pressing social need for the dissolution and the dissolution is proportionate to the legitimate aims pursued. In principle, the criteria established by the Korean Constitutional Court is very similar to the ones developed by the European Court of Human Rights even though the outcome of the application seems to be somewhat different.*

KEY WORDS: Dissolution of Political Party, Fundamental Democratic Order, Principle of Proportionality, European Court of Human Rights, Democracy, Pluralism, Freedom of Association, Pressing Social Need, Political Party

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## I. Introduction

The Korean Constitutional Court handed down its first-ever decision<sup>1)</sup> on dissolution of political party on December 19, 2014. It was a historic moment as the system of adjudication on political party dissolution was first exercised in Korea since its adoption by the 3<sup>rd</sup> amendment of the Constitution on June 15, 1960. The Korean Constitutional Court has jurisdiction over constitutional review of statutes, constitutional complaints, competence disputes between governmental entities, impeachment of high governmental officials, and dissolution of political parties, but the jurisdiction of political party dissolution had never been used before.

Article 8 Section 4 of the Korean Constitution stipulates, “If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.” In the long judgment of 346 pages, the Korean Constitutional Court elaborated each element of the requirements, namely, the meanings of ‘purposes or activities of a political party,’ ‘fundamental democratic order,’ and ‘are contrary to.’ Then it went on to apply these requirements to the facts at hand. In addition, it decided whether members of a political party should be removed from seats once the party is dissolved by the Constitutional Court.

In determining whether to dissolve the political party, the Korean Constitutional Court adopted a two-prong test even though it did not explicitly say so. It not only interpreted Article 8(4) of the Constitution as a standard of review for dissolution of political parties but also adopted the principle of proportionality as another standard to be reviewed even if the Article 8(4) requirements are met. This approach is similar to the criteria developed by the European Court of Human Rights concerning the

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1) Constitutional Court of Korea, 2013Hun-Da1, Dec. 19, 2014 26-2(B) KCCR1. KCCR refers to Korean Constitutional Court Report (Hunbeopjaepanso palyejip) published by the Constitutional Court of Korea.

dissolution of political party since its first case<sup>2)</sup> in 1998.

In this article, I first explore the Korean case in detail with specific emphasis on the criteria adopted by the Korean Constitutional Court. And then I will compare the criteria with ones developed by the European Court of Human Rights in dozens of cases concerning the dissolution of political parties. I believe, in principle, the criteria established by the Korean Constitutional Court is very similar to the ones developed by the European Court of Human Rights even though the outcome of the application seem to be somewhat different.

## II. The Korean Case: 2013Hun-Da1<sup>3)</sup>

### 1. Background of the Case

The Unified Progressive Party, or the UPP (the “Respondent”), was founded on December 13, 2011 by a merger of the Democratic Labor Party (DLP), the People’s Participation Party (PPP), and the “Alliance for the Creation of New Progressive Party.” The UPP won 13 seats (seven local constituency seats and six proportional representative seats) at the 19<sup>th</sup> parliamentary election held on April 11, 2012. Immediately after, however, internal conflict broke out in a series of events, including the illegitimate proportional primary, violence at the UPP’s Central Committee, and the controversy over the expulsion of lawmakers Lee Seok-ki and Kim Jae-yeon. In addition lawmaker Lee Seok-ki and other members of the UPP were indicted on charges including plotting treason on September 25, 2013.

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2) European Court of Human Rights [ECtHR] January 30, 1998. *United Communist Party of Turkey and Others v. Turkey*, no. 133/1996/752/951

3) It is based on the English translation by the Constitutional Court of Korea in its annual series of ‘CONSTITUTIONAL COURT DECISIONS’ 2014 volume even though the English version is not binding the Court. See <http://www.ccourt.go.kr/cckhome/kor/info/publication/selectPublicationInfoList.do> (last visited April 20, 2016) It is also based on several other English summaries prepared by the Court, one of which was the transcript provided to the Venice Commission for its periodical, ‘The Bulletin on Constitutional Case Law.’ See [http://www.venice.coe.int/WebForms/pages/?p=02\\_02\\_Bulletins](http://www.venice.coe.int/WebForms/pages/?p=02_02_Bulletins) (last visited April 20, 2016) All those documents were taken into account with the necessary changes. The full translation by the Court is currently under preparation.

The Government of the Republic of Korea (the “Petitioner”), following the deliberation and decision by a Cabinet meeting on November 5, 2013, filed a petition with the Constitutional Court on the same day requesting dissolution of the Respondent and removal of its lawmakers from office, arguing that the Respondent’s purposes and activities are contrary to the fundamental democratic order stipulated in Article 8(4) of the Constitution. The subject matter of review in the case is whether the Respondent’s purposes and activities are contrary to the fundamental democratic order, whether the dissolution of the Respondent should be ordered and if so ordered, whether the lawmakers affiliated with the Respondent should be stripped of their seats.<sup>4)</sup>

## 2. Adjudication Proceedings

On January 7, 2014, the Respondent filed a constitutional complaint regarding Article 40<sup>5)</sup> Section 1 of the Constitutional Court Act which states that the provisions of laws and regulations relating to civil litigation shall apply *mutatis mutandis* to the procedure for adjudication of the Constitutional Court as long as it is not contrary to the nature of constitutional adjudication. The Respondent argued that as long as Article 40(1) of the Constitutional Court Act is interpreted in a way that the rules of civil procedure are applied *mutate mutandis* to the admission of evidence and facts in the political party dissolution case, the Respondent’s right to a fair trial is violated. They claimed that the rules of criminal procedure, not

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4) 2013Hun-Da1 *supra* note 226-2(B) KCCR1

5) Heonbeop-Jepanso-Beop [Constitutional Court Act], Article 40 (Provisions Applicable Mutatis Mutandis)

(1) Except as otherwise provided in this Act, laws and regulations relating to civil litigation shall apply *mutatis mutandis* to the procedure for adjudication of the Constitutional Court as long as it is not contrary to the nature of constitutional adjudication: Provided, however, that laws and regulations relating to criminal litigation shall apply *mutatis mutandis* to the adjudication on impeachment, and those of the Administrative Litigation Act to the adjudication on competence dispute and constitutional complaint.

(2) In case referred to in the latter part of paragraph (1), if the laws and regulations relating to the criminal litigation or the Administrative Litigation Act conflict with those relating to the civil litigation, the laws and regulations relating to civil litigation shall not apply.

civil procedure, should be applied here because the dissolution of a political party is similar to the punishment for the political party and the discovery of substantive truth is important. The Constitutional Court, however, announced that the provision at issue is not unconstitutional since the application of rules of civil procedure should be within the limit not contrary to the nature of constitutional adjudication and the Constitutional Court can render an individual and case-specific decision based on comprehensive consideration of the legal nature of each case at issue.<sup>6)</sup> In accordance with this decision, the provisions of laws and regulations relating to civil litigation were applied to the proceedings of this case insofar as not contrary to the Constitutional Court Act, the Constitutional Court Regulations, and the nature of constitutional adjudication.

There have been two sets of preparatory proceedings for pleading and eighteen sets of oral argument hearings during which the Court conducted examination of evidence and fact finding. Regarding the documentary evidence admitted by the Court, each proponent of the evidence made summary statement to prove the relationship between the evidence presented and the facts to be proven thereby and the opponent party presented its opinion and arguments on the statement. Also, six witnesses designated by the Petitioner and six witnesses designated by the Respondent were questioned and examined by the Court. The Court received replies from the government agencies and public organizations including the Chairperson of the National Election Commission, the Minister of the Ministry of Unification, the Director of the National Intelligence Service, etc., regarding the facts necessary for the adjudication of the case. The Court also heard expert opinions.

### *3. Majority Opinion of Eight Justices<sup>7)</sup>*

#### *1) Meaning and Function of Dissolution of Political Party*

The authority of the Constitutional Court to review the motion

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6) Constitutional Court of Korea, 2014Hun-Ma7, February 27<sup>th</sup>, 2014(26-1(A) KCCR 310).

7) President Park Han-Chul, Justice Lee Jungmi, Justice Lee Jinsung, Justice Kim Changjong, Justice Ahn Changho, Justice Kang Ilwon, Justice Seo Kiseog, and Justice Cho Yongho.

requesting dissolution of political parties was introduced by the third constitutional amendment in 1960, which is a product of the regret of our modern history where a progressive opposition party was disbanded by a unilateral administrative action by the Government.<sup>8)</sup> In light of this regrettable history, this mechanism emerged as a procedure to protect political parties. Hence, the existence and activities of all political parties are being guaranteed to the utmost, and even if a party appears to be denying and aggressively attacking the fundamental democratic order, it is protected by the Constitution to the largest possible extent insofar as it engages in forming public political opinions.<sup>9)</sup> Thus, the party cannot be disbanded simply by a regular Executive action; it can be excluded from party politics only when the Constitutional Court finds it unconstitutional and decides that it needs to be disbanded.<sup>10)</sup>

If a political party, however, pursues totalitarian regime through violent, oppressive or arbitrary control, denying the democratic and autonomous political process and the fundamental principles of democracy, such a political party, if it takes power, can destroy the foundation of democratic system itself.<sup>11)</sup> Therefore the jurisdiction over political party dissolution is also needed as an institutional safeguard to prevent a political party from attacking, seriously damaging, or even abolishing our democratic system and thereby rendering it meaningless.<sup>12)</sup>

## 2) *Grounds for Dissolution of a Political Party*

Article 8(4) of the Korean Constitution stipulates, "If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution." The issue here is how to interpret this provision as the requirements for the dissolution of a political party.

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8) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1

9) *Id.* at 20 citing Constitutional Court of Korea, 99Hun-Ma135, Dec. 23, 1999 (11-2 KCCR 800).

10) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 20.

11) *Ibid.*

12) *Ibid.*

(1) "Purposes or Activities of a Political Party"<sup>13)</sup>

"Purposes of a political party" generally refers to the political direction to be pursued or the political plan to be implemented in reality. Such purposes are mainly manifested in the official party platform or the party constitution. But other means, such as official statements by a party's main figures including the chairperson or party executives, publications such as party journals or propaganda materials, and activities of party members who are influential in the party's decision-making process or those who are influenced by the party's ideology, can also be helpful in understanding the party's purposes. If the real purposes are hidden, they can be unveiled through means other than the party platform.

Meanwhile, "activities of a political party" means acts or behaviors conducted by the organs of the political party or by the party's important figures or its members, which in general are attributable to the party at large. Considering the structure of the provision, the Court concluded that either one or both of the purposes or activities of a political party needs to be in violation of the fundamental democratic order in order to justify the dissolution of a political party.

(2) "Fundamental Democratic Order"<sup>14)</sup>

The "fundamental democratic order" that the adjudication of political party dissolution system seeks to defend refers to the core and indispensable elements required to constitute and manage a constitutional democracy, including those for forming and realizing public opinion through democratic and free political process based on the principles of democracy, and those for managing and protecting such political process based on the rule of law. They are the minimum requirements in properly maintaining our constitutional democracy.

After all, the "fundamental democratic order" stipulated in Article 8(4) of the Constitution is premised upon the pluralistic view of the world which believes in autonomous human reasoning and it also assumes that any and all political ideals have relative verity and rationality. The fundamental democratic order, therefore, implies a political order that is

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13) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 21.

14) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 22-23.

constituted and operated by the democratic decision making process which respects majorities while being considerate of minorities, and by the basic principles of liberty and equality, denying any violent and arbitrary ruling. Specifically, popular sovereignty, respect for basic human rights, separation of powers, and plural party system, etc. are the key elements of the fundamental democratic order specified in the current Constitution.

The way defining conceptual boundary of the fundamental democratic order directly affects the possibility of dissolution of a political party: the broader its boundary, the easier it is for the Court to render a decision to dissolve a political party at issue, resulting in further restrictions upon the freedom of political party. Given the importance of the freedom of activities of political party in democratic society or the risk of the political party dissolution system, the “fundamental democratic order” under Article 8(4) of the Constitution should be interpreted as strictly and narrowly as possible.

Therefore, fundamental democratic order should not be considered to be equivalent to the details of democratic system provided in the current Constitution. As long as a political party accepts the aforementioned basic elements of the democratic order, it can freely set forth different views on the detailed contents of democracy prescribed in the Constitution.

Likewise, as long as a political party does not deny the fundamental democratic order, it is free to pursue political ideals of a broad spectrum, following their own respective ideological orientations. In this contemporary world, the ideological orientations of political parties are very diverse, spanning from liberal democracy to communist ideas. Therefore, a political party oriented to a specific political ideology should not be considered unconstitutional simply because of its manifestation of uncommon political orientations unless its purposes or activities contradict the aforementioned elements of the fundamental democratic order.

(3) “Contrary to”<sup>15)</sup>

Considering the importance of political party in democratic society, it is hard to agree with a proposition that a simple breach of or conflict with the

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15) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 23-24.



fundamental democratic order can cause a political party to be dissolved. It should be interpreted to mean a situation where the party's purposes or activities have the concrete danger to cause actual harm to our fundamental democratic order such that restricting the party's existence itself is necessary, notwithstanding that it is one of the indispensable elements of a democratic society. The decision to dissolve a political party is an extreme measure and should be made only under very limited circumstances.

#### (4) Principle of Proportionality<sup>16)</sup>

A forced dissolution of a political party is ultimate restriction on the freedom of political party, which is a core fundamental right guaranteed by the Constitution. Therefore, the principle of proportionality prescribed in Article 37<sup>17)</sup> Section 2 of the Constitution must be satisfied for the Court to render a decision to dissolve a political party. In this regard, the Court's decision to dissolve a political party cannot be justified just because the conditions stipulated in Article 8(4) of the Constitution are satisfied, but it should also be proven that there is no other alternative than dissolution in order to effectively remove unconstitutionality inherent in the political party at issue and that the social interests expected to be gained by the decision to dissolve the political party far outweigh the adverse impact that could be incurred by the decision upon the freedom of the political party and democratic society at large.

#### 3) *Unique Circumstances of Korea*<sup>18)</sup>

The ideological confrontation in the Korean peninsula between South Korea and North Korea seems somewhat out of sync with the new historical trend of the 21st century. But territorial division, ideological

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16) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 24-25..

17) Daehanminguk Heonbeop [Constitution of the Republic of Korea], Article 37

(1) Freedoms and rights of citizens may not be neglected on the grounds that they are not enumerated in the Constitution.

(2) The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

18) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 25-26..

confrontation and possible threat to the regime arising therefrom are undeniable reality in the peninsula. South Korea is proclaimed as a target of attack by North Korea, placing the country on constant alert against possible attempt to subvert its current system by North Korea, and the fundamental democratic order of South Korea ultimately shares the same fate as its nation itself. Therefore, the Constitutional Court is obliged to contemplate not only the universal principles of constitutionalism but also a number of practical aspects facing our reality, the nation's unique historical background, as well as the common awareness and public sentiment on law shared by Koreans, all at the same time.

#### 4) *Purposes and Activities of the Respondent*<sup>19)</sup>

The Korean Constitutional Court examined the purposes and activities of Respondent based on the factual findings and evidence submitted to the Court. This part of judgment is quite elaborative and lasts for more than 70 pages out of 115 pages long majority opinion. The Court spells out detailed aspects of the Respondent including formation and history of the Respondent, activities of the leading members of the Respondent, Respondent's perception of the Korean society, Respondent's plans to implement its mission, the comparison of the socialism of North Korea and Respondent's revolution strategy against South Korea, and finally hidden purposes and activities of the Respondent.

#### 5) *Whether to Dissolve the Respondent*

##### (1) Whether the Respondent's Purposes or Activities Violate the Fundamental Democratic Order<sup>20)</sup>

The socialist system of North Korea pursued by the Respondent fundamentally contradicts the concept of "the fundamental democratic order" in the Constitution in that it accepts the political line proposed by the Chosun Workers' Party<sup>21)</sup> as the absolute good. It pursues as the essence

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19) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 26-104. This article does not go on in details about the factual findings of the case as this article is focused on the criteria adopted by the Korean Constitutional Court with respect to dissolution of political parties.

20) *Id.*, at 104-107.

21) North Korea's founding and ruling political party.

of governance the dictatorial style of people's democracy, based on the Great Leader theory of North Korea. In addition, the Respondent argues that in order to realize progressive democracy, the free democratic regime can be overthrown by the exercise of violence including all out uprising of people. Again, it directly conflicts with the fundamental democratic order of the Constitution.

On the other hand, the activities of the Respondent, including insurrection attempts, illegitimate primary in selecting proportional representatives, the violence at the Central Committee, and the manipulation of public poll incident in Gwanak-B district constituency defy the existence of the present government, parliamentary system, and the rule of law in terms of substance. In terms of their means or nature, the activities, which actively resort to violence to serve the Respondent's purpose, are in violation of the ideas of democracy.

The Respondent's series of activities including the insurrection related incidents tend to show that they are likely to be repeated in similar circumstances in that the activities were grounded on the Respondent's genuine purposes, orientations of the leading members of the Respondent, and the attitudes of the Respondent toward the activities of its members.

Taking into account the details and forms of activities and the disposition of the leading members of the Respondent, as well as the very supportive and protective attitude of the Respondent toward its members' activities, a number of activities of the Respondent including the gatherings where treason was plotted, are grounded on the actual purposes of the Respondent and are highly likely to be repeated in similar circumstances.

Furthermore, since the Respondent admits the possibility of seizure of power through violence, the activities of the Respondent present concrete danger of actual harm to the fundamental democratic order. In particular, the insurrection case, in which the leading members of the Respondent sympathized with North Korea and discussed specific ways to endanger the existence of South Korea, is a clear demonstration of the Respondent's true purposes, and it exceeds the limits of the freedom of expression and doubles the concrete risk of damage to the fundamental democratic order.

In conclusion, the true purposes of the Respondent or its activities based thereon are considered to have caused a concrete risk of substantially harming the fundamental democratic order of our society, and are therefore

in violation of the fundamental democratic order.

(2) Whether the principle of proportionality is satisfied<sup>22)</sup>

The purposes and activities of the Respondent aimed at implementing the North Korean-style socialism contain seriously unconstitutional elements; South Korea is in a unique situation where it faces confrontation with North Korea, a country that strives to overthrow the government of its southern neighbor; and there is no alternative other than dissolution in removing the risk of the Respondent since criminal punishment of its individual members would not be sufficient in effectively eliminating the danger inherent in the party as a whole. The importance of social interest in safeguarding the fundamental democratic order and democratic pluralism far outweighs the disadvantages caused by the party dissolution, namely the serious restraint on the freedom of party activities and on the pluralistic democracy. All these considered, the decision to dissolve the Respondent is an inevitable measure to effectively remove the risk posed to the fundamental democratic order, and is therefore not in violation of the principle of proportionality.

(3) Dissolution of the Respondent<sup>23)</sup>

There is a distinctive social need for dissolving the Respondent for the following reasons: the purposes and activities of the Respondent contravene the fundamental democratic order; there is no other alternative than dissolution to deal with such unconstitutional characteristics of the Respondent, in view of the severely unconstitutional aspect of the Respondent's purposes and activities and the particular situation facing the Republic of Korea; and the social interest of disbanding the Respondent distinctively overrides the possible disadvantages. Consequently, the Respondent should be dissolved.

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22) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1, at 107-112.

23) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 112.

6) *Whether parliamentary membership of those affiliated to the Respondent should be forfeited*<sup>24)</sup>

It is not specified in law whether members of the National Assembly shall lose their seats when their party is dissolved by the Constitutional Court, but since the essential purpose of entrusting the Court with the power to disband parties lies in protecting the citizens and the Constitution by eliminating the parties opposed to the fundamental democratic order from political decision-making and preventing engagement in political activities, in order to assure the practical effectiveness of the decision to dissolve a party, it is essential to forfeit the parliamentary membership of those affiliated with the party. For the reasons stated herein, once the Constitutional Court decides to dissolve a political party, its affiliated lawmakers should be removed from their National Assembly seats regardless of how they were elected.

3. *Dissenting Opinion of One Justice*<sup>25)</sup>

The dissenting opinion concurs with the majority opinion on the basic understanding of dissolution of political party system and criteria adopted by the majority opinion but with a different factual understandings of the Respondent.

1) *Necessity for strict interpretation and application of requirements for dissolution of political parties*<sup>26)</sup>

The requirements for dissolution of political parties should be interpreted in the most limited sense. Also in selecting the materials and data to be adopted for consideration, their relevance to the Respondent should be thoroughly examined. When interpreting the selected information about “acts of expression,” the overall intent of the expression should be comprehensively reviewed based on objective and universal interpretative methodology.

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24) *Id. supra* note 2, 26-2(B) KCCR 1at 112-114.

25) Justice Kim Yi-su. 2013Hun-Da1. The dissenting opinion is quite comprehensive and thorough. It is 126 pages long.

26) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1at 115-117.

In addition, even the smallest logical error or leap cannot be allowed in the process of reasoning. In this case, it is problematic that the Respondent's "hidden purpose" is readily established as premise although its existence itself should have been proven in the first place, corroborated by identifying certain secret party platform shared by members of the Respondent or by convincing hard evidence that the currently revealed purposes of the Respondent are merely a facade. Furthermore, one must, in inferring the political disposition of the Respondent's majority, be guarded against overgeneralization by presuming the political orientation of only a small fraction of the Respondent's members as that of the whole party, and refrain from overestimating the influence of the so-called leading members' activities on other members.

2) *Whether to Dissolve the Respondent*<sup>27)</sup>

It is not concretely proven that the Respondent or its leading members actually support the North Korean system, endorse radical transformation through violent anti-democratic means, or attempt to overthrow the fundamental democratic order. Therefore it cannot be concluded that the purposes of the Respondent violate the fundamental democratic order. The insurrection activities led by Lee Seok-ki and others were made against the basic political line of the Respondent at large. The illegitimate primary for selecting proportional representatives, violence at the Central Committee, etc also were by only a few members of the Respondent. It is difficult to reason that the Respondent actively supports these acts or that these people greatly influence the Respondent. Thus the activities of the Respondent are not in violation of the fundamental democratic order.

Even assuming that the purposes or activities of the Respondent are in violation of the fundamental democratic order, a decision to disband a political party needs to meet the requirement of the principle of proportionality. A forced party dissolution must be used only as a last resort because it can be a serious threat to the democracy itself. However, there already is effective criticism and refutation about the Respondent in the political public sphere, as shown in the recent election results and the

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27) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1at 151-234.

court rulings in the criminal cases involving the members of that party. Also, considering the possible social stigma to the vast majority of its ordinary members and the reality of the overwhelming disparity of national strength between North Korea and South Korea, the decision to disband the Respondent is in violation of the principle of proportionality.

Therefore, the petition requesting judgment disbanding the Respondent and forfeiting the parliamentary seats of Respondent's members should be rejected.

#### 4. *Concurring Opinion of Two Justice*<sup>28)</sup>

The Respondent argues, while pointing to the portion of its party platform concerning social democracy, that there is no ulterior motive in progressive democracy other than that suggested in the text itself. However, the progressive democracy advocated by the Respondent is different from social democracy, and it can hardly be said that there is no hidden purpose of ultimately pursuing the North Korean-style socialism just because they are promoting the elements that can be implemented in the "current" social democracy. The Respondent claims that "people's sovereignty" is merely a concept designed to represent the interest of a specific class, namely "the people." However, pursuing an ultimate objective of protecting the interest of a certain class while being hostile to the remaining members of society is not consistent with the idea of popular sovereignty, and the "people's sovereignty" set forth by the leading members of the Respondent plainly appears to be pursuing the establishment of the people's proletarian state through the people's proletarian revolution and dictatorship. As the progressive democratic system advocated by the leading members of the Respondent indicates a society controlled by "class dictatorship" or "popular dictatorship," which is classified as proletariat dictatorship, the Respondent's primary (or interim) objective of implementing progressive democracy as well as its ultimate objective of advancing the North Korean-style socialism is contrary to the fundamental democratic order.

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28) Justice Ahn Changho and Justice Cho Yongho. 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 242-255.

In reviewing the federalism-based unification plan endorsed by the Respondent, the term “federalism” can be construed either compatible or incompatible with the fundamental democratic order depending on the proposed objectives and substances. However, the rationale of the leading members of the Respondent for adopting a so-called lower-phase federal unification is not convincing, and their unification plan based on “one people, one state, two systems, and two governments” only appears to be a strategy to eventually realize the North Korean-style socialism.

Democracy must, and actually does, allow for and guarantee free speech and criticism, as well as diverse ideas and cultures. Yet, actions that deny and aim to destroy the foundations of democracy should be dealt with firmly. The actions intended to bring down the very basis of liberal democracy, which lays the foundation for ‘safety, freedom, and happiness of us and our future generations,’ cannot be allowed unlimitedly under the name of tolerance.

### III. Lessons from the European Court of Human Rights

#### *1. Dissolution of Political Parties and the European Court of Human Rights*

There have been various cases concerning political parties at the European Court of Human Rights. Those cases were mostly challenged based on Article 11 (Freedom of assembly and association)<sup>29)</sup> of the European Convention on Human Rights including refusal to register as a

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29) Article 11 (Freedom of assembly and association)

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.



political party,<sup>30)</sup> ban on financing of a political party,<sup>31)</sup> and dissolution or prohibition of political parties. The European Court of Human Rights has dealt with 14 cases directly on the dissolution of political parties since the first case<sup>32)</sup> of its kind in 1998. Most of those cases, precisely speaking 11 cases,<sup>33)</sup> were challenged against Turkey and the rest of cases were each against Bulgaria (2005),<sup>34)</sup> Spain (2009),<sup>35)</sup> and Russia (2011).<sup>36)</sup>

The European Court of Human Rights has been very strict with the dissolution of political parties and continued to announce that only convincing and compelling reasons can justify such harsh restrictions.<sup>37)</sup>

30) European Court of Human Rights [ECtHR] December 7, 2006. *Artyomov v. Russia* (dec.), no. 17582/05

31) European Court of Human Rights [ECtHR] June 7, 2007. *Basque Nationalist Party – Iparralde Regional Organisation v. France*, no. 71251/01

32) European Court of Human Rights [ECtHR] January 30, 1998. *United Communist Party of Turkey and Others v. Turkey*, no. 133/1996/752/951

33) European Court of Human Rights [ECtHR] January 30, 1998. *United Communist Party of Turkey and Others*, *supra* note 33; European Court of Human Rights [ECtHR] May 25, 1998. *Socialist Party and Others v. Turkey*, no. 20/1997/804/1007; European Court of Human Rights [ECtHR] December 8, 1999. *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94; European Court of Human Rights [ECtHR] April 9, 2002 *Yazar and Others v. Turkey*, no. 22723/93, 22724/93 and 22725/93; European Court of Human Rights [ECtHR] December 10, 2002. *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94; European Court of Human Rights [ECtHR] February 13, 2003. *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 41342/98, 41343/98 and 41344/98; European Court of Human Rights [ECtHR] November 12, 2003. *Socialist Party of Turkey (STP) and Others v. Turkey*, no. 26482/95; European Court of Human Rights [ECtHR] April 26, 2005. *Democracy and Change Party and Others v. Turkey*, no. 39210/98 and 39974/98; European Court of Human Rights [ECtHR] May 31, 2005. *Emek Partisi and Şenol v. Turkey*, no. 39434/98; European Court of Human Rights [ECtHR] December 14, 2010. *HADEP and Demir v. Turkey*, no. 28003/03; European Court of Human Rights [ECtHR] January 12, 2016. *Party for a Democratic Society (DTP) and Others v. Turkey*, no. 3840/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10.

34) European Court of Human Rights [ECtHR] October 20, 2005. *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, no. 59489/00

35) European Court of Human Rights [ECtHR] June 30, 2009. *Herri Batasuna and Batasuna v. Spain*, no. 25803/04 and 25817/04

36) European Court of Human Rights [ECtHR] April 12, 2011. *Republican Party of Russia v. Russia*, no. 12976/07

37) *United Communist Party of Turkey and Others*, *supra* note 33 § 46; *Socialist Party and Others*, *supra* note 34 § 50; *Freedom and Democracy Party (ÖZDEP)*, *supra* note 34 § 44; *Refah Partisi (the Welfare Party) and Others*, *supra* note 34 § 100; *The United Macedonian Organisation*

Thus the dissolution of political parties only in 2 cases out of the total cases of 14 have been found justified under the European Convention on Human Rights and all the other cases were found violations of freedom of association.

## 2. Criteria developed by the European Court of Human Rights

### 1) Importance of Political Parties and their Role and Limitations in Democracy

The European Court of Human Rights (hereinafter “ECtHR” or “Court”) has emphasized the importance of political parties in democracy. Political parties are a form of association essential to the proper functioning of democracy.<sup>38)</sup> Democracy is without doubt a fundamental feature of the European public order.<sup>39)</sup> There can be no democracy without pluralism<sup>40)</sup> and political parties play an essential role in ensuring pluralism, which requires a close link between freedom of expression and freedom of association.<sup>41)</sup>

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.<sup>42)</sup> Democracy thrives on

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*Ilinden – PIRIN and Others*, supra note 35 § 56; *Herri Batasuna and Batasuna*, supra note 36 § 77; *HADEP and Demir*, supra note 34 § 59; *Republican Party of Russia*, supra note 37 § 102.

38) *Communist Party of Turkey and Others*, supra note 33 § 25; *Socialist Party and Others*, supra note 34 § 29; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 37; *Yazar and Others*, supra note 34 § 46; *Dicle for the Democratic Party (DEP) of Turkey*, supra note 34 § 30; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 87; *Herri Batasuna and Batasuna*, supra note 36 § 74; *HADEP and Demir*, supra note 34 § 56; *Republican Party of Russia*, supra note 37 § 102.

39) *United Communist Party of Turkey and Others*, supra note 33 § 45.

40) *United Communist Party of Turkey and Others*, supra note 33 § 43; *Socialist Party and Others*, supra note 34 § 41; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 37; *Yazar and Others*, supra note 34 § 46; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 89; *Herri Batasuna and Batasuna*, supra note 36 § 76; *HADEP and Demir*, supra note 34 § 57.

41) *United Communist Party of Turkey and Others*, supra note 33 § 43; *Socialist Party and Others*, supra note 34 § 41; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 37; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 88.

42) *United Communist Party of Turkey and Others*, supra note 33 § 57; *Socialist Party and Others*, supra note 34 § 45; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 44; *Dicle for the Democratic Party (DEP) of Turkey*, supra note 34 § 45; *Party for a Democratic Society (DTP) and Others*, supra note 34 § 102.

freedom of expression<sup>43)</sup> and the expression protected here is not only “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb.<sup>44)</sup> Thus there 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.<sup>45)</sup>

There are also certain limitations on the activities of political parties. A political party may promote a change in the law or the legal and constitutional structures of the State but with two conditions: firstly, the means used to that end must be legal and democratic and secondly, the change proposed must itself be compatible with fundamental democratic principles.<sup>46)</sup> The fact that, however, certain political programs advocated or pursued by a political party are incompatible with the current principles and structures of the State does not make it incompatible with the rules of democracy.<sup>47)</sup> The Court emphasized that it is of the essence of democracy to allow diverse political programs to be proposed and debated, even those that call into question the way a State is currently organised, provided that

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43) *United Communist Party of Turkey and Others*, supra note 33 § 57; *Socialist Party and Others*, supra note 34 § 45; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 44; *Herri Batasuna and Batasuna*, supra note 36 § 76; *Party for a Democratic Society (DTP) and Others*, supra note 34 § 102.

44) *United Communist Party of Turkey and Others*, supra note 33 § 43; *Socialist Party and Others*, supra note 34 § 41; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 37; *Yazar and Others*, supra note 34 § 46; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 89; *Herri Batasuna and Batasuna*, supra note 36 § 76; *HADEP and Demir*, supra note 34 § 57.

45) *United Communist Party of Turkey and Others*, supra note 33 § 57; *Socialist Party and Others*, supra note 34 § 45; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 44.

46) *Yazar and Others*, supra note 34 § 49; *Dicle for the Democratic Party (DEP) of Turkey*, supra note 34 § 46; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 98; *Socialist Party of Turkey (STP) and Others*, supra note 34 § 38; *Democracy and Change Party and Others*, supra note 34 § 22; *Emek Partisi and Şenol*, supra note 34 § 25; *The United Macedonian Organisation Ilinden – PIRIN and Others*, supra note 35 § 59; *Herri Batasuna and Batasuna*, supra note 36 § 79; *HADEP and Demir*, supra note 34 § 61.

47) *Socialist Party and Others*, supra note 34 § 47; *The United Macedonian Organisation Ilinden – PIRIN and Others*, supra note 35 § 61.

they do not harm democracy itself.<sup>48)</sup>

The only clear limitations set by ECtHR are when the activities or statements of a political party are considered to be a call for the use of violence, an uprising or any other form of rejection of democratic principles.<sup>49)</sup>

## 2) Criteria to Determine whether Dissolution of Political Parties is Justified

### (1) General Application of Article 11 Analysis to Dissolution of Political Parties Cases

ECtHR has decided that there can be no doubt that political parties come within the scope of Article 11, freedom of association, of the European Convention on Human Rights (hereinafter “ECHR” or “Convention”).<sup>50)</sup> Thus political parties are afforded the protection under Article 11 of the Convention, which means the typical analysis of Article 11 equally applies to the political parties: namely two-step approach, firstly whether there was an interference with freedom of association and secondly, whether the interference was justified under Article 11 (2).<sup>51)</sup>

The dissolution of political parties certainly amounts to the interference with freedom of association.<sup>52)</sup> Then the question to be answered is whether the dissolution of political parties is justified by Article 11(2) which states, “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

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48) *Socialist Party and Others*, supra note 34 § 47; *The United Macedonian Organisation Ilinden – PIRIN and Others*, supra note 35 § 61; *Republican Party of Russia*, supra note 37 § 123; *Party for a Democratic Society (DTP) and Others*, supra note 34 § 78.

49) *Socialist Party and Others*, supra note 34 § 46; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 40; *Yazar and Others*, supra note 34 § 55; *Socialist Party of Turkey (STP) and Others*, supra note 34 § 45.

50) *United Communist Party of Turkey and Others*, supra note 33 § 25; *Socialist Party and Others*, supra note 34 § 29; *Yazar and Others*, supra note 34 § 32.

51) *United Communist Party of Turkey and Others*, supra note 33 § 33.

52) *Socialist Party and Others*, supra note 34 § 30; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 27; *Yazar and Others*, supra note 34 § 33; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 50; *Herri Batasuna and Batasuna*, supra note 36 § 52; *HADEP and Demir*, supra note 34 § 37; *Party for a Democratic Society (DTP) and Others*, supra note 34 § 52.

protection of the rights and freedoms of others. ...” (emphasis added) The Court said the dissolution would constitute a breach of Article 11 unless it was “prescribed by law”, pursued one or more legitimate aims under paragraph 2 and was “necessary in a democratic society” for the achievement of those aims.<sup>53)</sup>

## (2) Specific Application of Article 11 Analysis to Dissolution of Political Parties Cases

The first two requirements are easily met as dissolution of political parties is usually based on law which satisfies the first requirement of “prescribed by law” and the dissolution of political parties is considered to pursue the “legitimate aim” of national security.<sup>54)</sup> The last requirement of “necessary in a democratic society” is quite an open-ended question and the Court has tried to elaborate the requirement in more concrete way. Like other cases with respect to Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), and Article 11 (Freedom of assembly and association), the Court has announced that the requirement of “necessary in a democratic society” is considered to be met if there is a “pressing social need” and the interference is “proportionate to the legitimate aims pursued.”<sup>55)</sup>

### ① “pressing social need”

ECtHR has used two conditions to determine whether the requirement of a “pressing social need” in dissolution of political parties cases is met as follows. A political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the

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53) *United Communist Party of Turkey and Others*, supra note 33 § 37; *Socialist Party and Others*, supra note 34 § 31; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 28; *Yazar and Others*, supra note 34 § 34; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 51; *Herri Batasuna and Batasuna*, supra note 36 § 53; *HADEP and Demir*, supra note 34 § 38; *Party for a Democratic Society (DTP) and Others*, supra note 34 § 53.

54) *United Communist Party of Turkey and Others*, supra note 33 §§ 38-41; *Socialist Party and Others*, supra note 34 §§ 32-36; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 §§ 29-32; *Yazar and Others*, supra note 34 §§ 35-38.

55) *Socialist Party and Others*, supra note 34 § 49; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 43; *Yazar and Others*, supra note 34 §§ 51-52; *Dicle for the Democratic Party (DEP) of Turkey*, supra note 34 §§ 48-49; *HADEP and Demir*, supra note 34 § 65; *Party for a Democratic Society (DTP) and Others*, supra note 34 § 71.

means used to that end must be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles.<sup>56)</sup> It necessarily follows that a political party whose leaders incite to 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.<sup>57)</sup>

The Court further suggested that certain points should be more thoroughly scrutinized. Thus it said, the Court's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society."<sup>58)</sup>

② "proportionate to the legitimate aims pursued"

ECtHR has reiterated that the dissolution of a political party is a drastic measure and such a severe measure may only be applied in the most serious cases.<sup>59)</sup> The exceptional measure should be construed strictly and

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56) *Yazar and Others*, supra note 34 § 49; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 98; *Democracy and Change Party and Others*, supra note 34 § 22; *Emek Partisi and Şenol*, supra note 34 § 25; *Herri Batasuna and Batasuna*, supra note 36 § 79; *HADEP and Demir*, supra note 34 § 61.

57) *Yazar and Others*, supra note 34 § 49; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 98; *Democracy and Change Party and Others*, supra note 34 § 22; *Emek Partisi and Şenol*, supra note 34 § 25; *Herri Batasuna and Batasuna*, supra note 36 § 79; *HADEP and Demir*, supra note 34 § 61.

58) *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 104; *Herri Batasuna and Batasuna*, supra note 36 § 83.

59) *Socialist Party and Others*, supra note 34 § 51; *Freedom and Democracy Party (ÖZDEP)*, supra note 34 § 45; *Yazar and Others*, supra note 34 § 61; *Refah Partisi (the Welfare Party) and Others*, supra note 34 § 133; *The United Macedonian Organisation Ilinden – PIRIN and Others*,

only convincing and compelling reasons can justify such a radical interference.<sup>60)</sup> A measure as drastic as the immediate and permanent dissolution of a political party is disproportionate to the aim pursued and consequently unnecessary in a democratic society if an alternative and less drastic measure can be considered.<sup>61)</sup>

### 3. Comparison between Korean Constitutional Court and European Court of Human Rights

The Korean Constitutional Court (hereinafter “KCC”) has to find two requirements to be met in order to justify the dissolution of a political party: firstly whether the purposes or activities of the political party are contrary to the fundamental democratic order; and secondly whether the principle of proportionality is satisfied. On the other hand, ECtHR has decided that the dissolution of a political party is justified once it is proved that the dissolution is “necessary in a democratic society” which is, in turn, considered to be met if there is a “pressing social need” for the dissolution and the dissolution is “proportionate to the legitimate aims pursued.”

#### 1) “contrary to the fundamental democratic order” v. “pressing social need”

KCC saw the first requirement of “contrary to the fundamental democratic order” as meaning that the party posed a concrete danger of actual harm to the fundamental democratic order which is interpreted as the core and indispensable elements required in a constitutional democracy.<sup>62)</sup> The key elements of the fundamental democratic order include popular sovereignty, respect for basic human rights, separation of

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*supra* note 35 § 56; *Herri Batasuna and Batasuna*, *supra* note 36 § 78; *HADEP and Demir*, *supra* note 34 § 82; *Republican Party of Russia*, *supra* note 37 § 102.

60) *Socialist Party and Others*, *supra* note 34 §§ 50-51; *Refah Partisi (the Welfare Party) and Others*, *supra* note 34 § 100; *The United Macedonian Organisation Ilinden – PIRIN and Others*, *supra* note 35 § 56; *Herri Batasuna and Batasuna*, *supra* note 36 § 77; *HADEP and Demir*, *supra* note 34 § 59; *Republican Party of Russia*, *supra* note 37 § 102.

61) *United Communist Party of Turkey and Others*, *supra* note 33 § 61; *Dicle for the Democratic Party (DEP) of Turkey*, *supra* note 34 §§ 64-65; *HADEP and Demir*, *supra* note 34 § 76; *Republican Party of Russia*, *supra* note 37 § 102; *Party for a Democratic Society (DTP) and Others*, *supra* note 34 §§ 104-109.

62) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 22-24.

powers, and plural party system.<sup>63)</sup> KCC, however, said the fundamental democratic order should not be considered to be equivalent to the details of democratic system provided in the current Constitution.<sup>64)</sup> As long as a political party accepts the aforementioned basic elements of the democratic order, it can freely set forth different views on the detailed contents of democracy prescribed in the Constitution.<sup>65)</sup>

On the other hand, ECtHR has set up two conditions to determine whether the requirement of a “pressing social need” is met. A political party may campaign for a change in the law or the legal and constitutional structures of the State but on two conditions: firstly, the means used to that end must be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles.<sup>66)</sup> The mere fact that, however, certain political programs advocated or pursued by a political party are incompatible with the current principles and structures of the State does not make it incompatible with the rules of democracy.<sup>67)</sup> ECtHR emphasized that it is of the essence of democracy to allow diverse political programs 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.<sup>68)</sup>

As shown likewise, both KCC and ECtHR interpreted these requirements in a way that a political party can be better protected in principle. Thus KCC said, “[T]he ideological orientations of political parties are very diverse, spanning from liberal democracy to communist ideas. Therefore, a political party oriented to a specific political ideology should not be considered unconstitutional simply because of its manifestation of uncommon political orientations unless its purposes or activities contradict the aforementioned elements<sup>69)</sup> of the fundamental democratic order.”<sup>70)</sup>

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63) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 23.

64) *Ibid.*

65) *Ibid.*

66) *See* note 47.

67) *See* note 48.

68) *See* note 49.

69) Namely popular sovereignty, respect for basic human rights, separation of powers, and plural party system.

70) 2013Hun-Da1 *supra* note 2, 26-2(B) KCCR 1 at 23.



ECtHR was even going further stating, “[T]he 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. The fact that the applicant party’s political programme was considered incompatible with the current principles and structures of the Bulgarian State does not make it incompatible with the rules and principles of democracy.”<sup>71)</sup>

2) *“principle of proportionality” v. “proportionate to the legitimate aims pursued”*

The second stage of the test for both KCC and ECtHR is the proportionality test. Thus KCC emphasized that even though the first part of the test was satisfied, it should also be proven that there is no other alternative than dissolution in order to effectively remove unconstitutionality inherent in the political party at issue and that the social interests expected to be gained by the decision to dissolve the political party far outweigh the adverse impact that could be incurred by the decision upon the freedom of the political party and democratic society at large.<sup>72)</sup>

It is also same as ECtHR. ECtHR said the exceptional measure of dissolution of political party should be construed strictly and only convincing and compelling reasons can justify such a radical measure.<sup>73)</sup> A measure as drastic as the immediate and permanent dissolution of a political party is disproportionate to the aim pursued and consequently

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71) *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, supra note 35 § 61.

72) 2013Hun-Da1 supra note 2, 26-2(B) KCCR 1 at 24-25.

73) See note 61.

unnecessary in a democratic society if an alternative and less drastic measure can be considered.<sup>74)</sup>

#### IV. Conclusion

As seen above, KCC and ECtHR are quite similar in that they adopted a very strict test with respect to political party dissolution cases. Only convincing and compelling reasons can justify such an extreme measure and the decision to dissolve a political party should be made only under very limited circumstances. But still some people criticized the KCC case of 2013Hun-Da1<sup>75)</sup> and some people criticized the ECtHR case of *Refah Partisi (the Welfare Party)*,<sup>76)</sup> in both of which the dissolution of a political party was approved. They said there was a disparity between the principles applied and the conclusions afterward. It needs to be pointed out that in both cases, unique factors were taken into account in determining the justification of the dissolution of the political parties at issue.

KCC put special emphasis on the unique circumstances of Korea, namely the territorial division and ideological confrontation between South Korea and North Korea, the threat to attack and subvert South Korea by North Korea, and the nation's unique historical background. KCC contemplated a number of practical aspects facing the reality. In the case of *Refah Partisi (the Welfare Party)*, ECtHR also took into account a special factor it did not usually consider before in political party dissolution cases, namely religion. ECtHR allocated quite a portion of the judgment explaining under the headings of 'Democracy and religion in the Convention system,' 'The plan to set up a plurality of legal systems,' 'Sharia,' and 'Sharia and its relationship with the plurality of legal systems.'

People might have different ideas and understandings with respect to

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74) See note 62.

75) Jibong Lim, *An Analysis and Assessment on the Dissolution Decision of Unified Progressive Party by Korean Constitutional Court*, 33 SOONGSIL-BEOPHAK-NONCHONG [SOONGSIL LAW REVIEW], 369~387 (January 2015).

76) Olgun Akbulut, *Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties*, 34 FORDHAM INTERNATIONAL LAW JOURNAL, 46 (2010).

the special factors considered in those cases. I believe those different understandings might have led to the different conclusions even though the same very strict test was applied.

