REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Concurring Opinion of Judge Dr Šturm

The operative provisions and the reasoning have my full support. This case represents one of the most important decisions of the Constitutional Court in recent years, as it is the first time that the Constitutional Court has exhaustively and convincingly defined the constitutional premises and principles of a free democratic society and the freedom of political association. The reasoning under Section B–I, Paragraphs 7 to 10, is apt, as it is the first Constitutional Court decision of its kind. Like other European constitutional courts, some of which have been adopting positions on previous totalitarian systems even decades since their removal (e.g. the German, Italian, Spanish, Czech, and Bulgarian constitutional courts), the Constitutional Court has done the same in specific cases on numerous occasions. Allow me to draw attention to the decisions in the following cases:

- OdlUS I 102, Official Gazette RS, No. 61/92 (U-I-69/92) – Peter Urbanc and others (Citizenship Act)

- OdlUS III 33, Official Gazette RS, No. 23/94 (U-I-6/93) – Public prosecutor of the Republic of Slovenia (Decree on Military Courts)

- OdlUS III 123, Official Gazette RS, No. 73/94 (U-I-172/94) – Supreme Court (the Petan case)

- OdlUS IV 20, Official Gazette RS, No. 18/95 (U-I-158/94) – the Deputies of the National Assembly

- OdlUS IV 54, Official Gazette RS, No. 41/95 (U-I-344/94) – Sergij V. Majhen (the Notary Act)

- OdlUS V, 31, Official Gazette RS, No. 24/96 (U-I-67/94) – Public prosecutor of the Republic of Slovenia (the Combating Illicit Trafficking, Illicit Speculation, and Economic Sabotage Act)

- OdlUS V 174, Official Gazette RS, No. 1/97 (U-I-107/96) – The Roman Catholic Diocese of Maribor and others, and in recent Decision U-I-25/95, dated 27 November 1997, Official Gazette RS, No. 5/98, dated 23 January 1998 – Miha Brejc and others (the Criminal Procedure Act – police tapping)

If there were no such decisions of the Constitutional Court in the Slovene constitutional and legal space (these decisions were published in the Official Gazette RS and in the annual official collected decisions and orders of the Constitutional Court), a casual observer might get the impression as though there had been no communist totalitarian system in Slovenia and that a democratic system had been in place after 1945, with individual excesses, which were more or less severe, and human rights violations.

In this separate opinion, I focus on some constitutional, comparative, and historical facts and positions in order to completely clarify the issues discussed in Decision No. Up-301/96.

Historical reasons that are based on the empirical generalisations from some countries of the European continent in the 20th century are of great importance for the restrictions imposed on intolerant groups or undemocratic political parties. Experience suggests that democracy can be overthrown, as was the case when Hitler came to power in the 1930s. Constitutional safeguards against political parties, the programmes and activities of which are contrary to the principles of a free democratic society, were incorporated into the constitutional system by the Federal Republic of Germany (second paragraph of Article 21 of the Basic Law from 1949) and the Italian Republic (Transitional Provision XII of the Italian Constitution from 1947). The Portuguese Republic imposed similar safeguards based on historical experiences (Article 46 of the Constitution from 1976).

Two typical cases on the prohibition of political parties and their activities from German constitutional case law

The German Federal Constitutional Court prohibited the Socialist Reich Party (*Sozialistische Reichspartei* – SRP), which was the national socialist party, and the German Communist Party (*Kommunistische Partei Deutschlands* – KPD) on 23 October 1952 and 17 August 1956, respectively. Both of the mentioned judgments on the prohibition of the right and left extremist political parties gave the German Federal Constitutional Court an opportunity to define the concept of a free democratic society and the concept of democracy in general. This definition namely allowed the German Constitutional Court to substantiate the key reasons for prohibiting their activities.

In the judgment on the prohibition of the national socialist party SRP (BverfGE, 2, 1 and ff.), the German Constitutional Court established the principle that, owing to the special significance of political parties for the existence of a free democratic state, their exclusion from political life is not possible if they employ legal means to fight specific regulations or even specific constitutional institutions. Such exclusion is only permitted if these parties intend to undermine the fundamental values of a free and democratic constitutional state. These fundamental values are integral to a free democratic fundamental system, which deems the constitution to be the foundation of the entire state system. The fundamental constitutional order is linked with values. It is the antithesis of a totalitarian state that, as the only authority, rejects human dignity, freedom, and equality. The claim made by the SRP's representative that there may be different free democratic constitutional orders is erroneous. That claim is based on the confusion between the concept of a free democratic fundamental system and the forms in which it can be implemented within a democratic state. In this way, a free democratic fundamental system can be determined as a system that, by excluding any violence and oppression, represents the social order of a state governed by the rule of law and based on the self-determination of the people in accordance with the will of the majority, freedom, and equality.

The judgment on the prohibition of the German communist party, the KPD (BVerfGE, 5, 85 and ff.), refers to this premise. A free democracy rejects the notion that historical development is determined by a final objective which can be scientifically

determined, and that, as a result, this final objective also determines specific community decisions as steps towards the realisation of this objective. It is rather the people themselves who determine their own development through community decisions, and these decisions can only be made if absolute freedom is guaranteed. This further requires that every community member is free to be involved in the creation of community decisions. The freedom of community decision-making is only possible if community decisions (i.e., in practice, majority decisions) leave the greatest possible degree of freedom, in terms of content, to each individual. As to what must be done in practice is determined through a continuous dialogue between all the people and groups who participate in shaping social life. This struggle escalates into a fight for political power in the state. However, it is not limited only to such. During this fight for power, an underlying process of clarification and transformation of these ideas is taking place. The decisions that are finally adopted will certainly correspond more to the wishes and interests of one or another group or social class; the purpose of the regulation and the possibility of free agreement between all real and intellectual forces provided thereby serves to balance and protect everyone's interests. The welfare of the community cannot therefore be equated *a priori* with the interests and wishes of a particular class; in principle, it strives to promote the welfare of all the citizens more or less equally and an approximately equal distribution of burdens. The ideal of democratic society exists in the form of a state governed by the rule of law.

A state system with a free democracy must therefore be systematically oriented towards continuous adjustment and improvement and social compromise; in particular, it must prevent the abuse of power. Its function is essentially to leave all doors open for every possible solution and to always enforce the will of the actual majority of people regarding specific decisions; however, it must also force the majority to substantiate its decision before all the people, i.e. even before the minority. This is the purpose of the guiding principles of such a system as well as its specific institutions. The will of the majority is established on a case-by-case basis in a carefully regulated procedure. However, the majority's decision is preceded by demands made by the minority that are followed by open discussion, for which a free democratic system provides, desires, and supports several different possibilities, and offers such to the members of the minority with as little risk as possible. Since the majority can always change, minority opinions have a real chance of becoming relevant. As a result, it is possible to positively come to terms with the critique of what currently exists, i.e. dissatisfaction with people, institutions, and specific decisions, to a significant extent within the existing system. The finally adopted majority decision is always linked to the critique of the minority in the opposition and its creative cooperation and intellectual work. Since there exist different, even drastic, ways of expressing discontent and critique, the awareness of the majority that its position is fragile also forces it to consider, in principle, the interests of the minority.

The functioning of such system, its ability to ultimately ensure the community's welfare in a manner that is acceptable to all, is ensured through a system of rules of the game that was legally determined in advance and established on the basis of the described principles over a long period of historical development.

Political freedom of opinion, expression, and association, which is guaranteed in various ways, leads to a multiparty system and organised political opposition. Free

elections held at relatively short intervals guarantee that the people have control over the use of power by the political majority. The government is accountable to the parliament. The implementation of the principle of the separation of powers, which ensures that the different branches of power check and balance each other, prevents an excessive concentration of power in one place within the state. The same aim is also pursued by the transfer of state functions from the central leadership to institutions which, in principle, assume responsibility for the performance of such functions. Citizens are guaranteed freedom not only by being granted fundamental rights but also by the extensive protection of their rights through independent courts. The protection of the entire system is above all entrusted to the constitutional court. As such a system, which is open and guarantees all kinds of freedoms and influence, is thus also a threatened system, it protects itself from forces which, in essence, deny its highest principles and ground rules, by way of provisions such as Articles 18 and 21 of the German Basic Law.
The dictatorship of the proletariat is not compatible with a free and democratic social order. Both government systems are mutually exclusive. In the KPD's opinion, a proletarian dictatorship represents the highest form of democracy. Such assessment depends on the conceptualisation and criteria applied. Evidently, the form of democracy that was to exist as a proletarian dictatorship is not a democracy in accordance with the principles of the German Basic Law (BVerfGE 5, 195–196). The aim of the KPD is to establish a form of government that is not compatible with the free democratic system of the Basic Law (BVerfGE 5, 207). Furthermore, the KPD is, in principle, hostile to a free and democratic system, which follows from a substantive and structural analysis of Marxism and Leninism (BVerfGE 5, 298 and ff.). Convincing evidence of the genuine opinion of the KPD regarding a free and democratic system is evident from the party's declarations, especially its political style and party tactics, which are clear from its agitation and propaganda (BVerfGE 5, 380).

These declaratory statements are an expression of planned incitement with the aim of overthrowing and eliminating the constitutional order. Their purpose is to undermine the trust of the people in fundamental values, and it is crucial that they do not entail individual aberrations but a systematic whole (BVerfGE 5, 384).

The prohibition of the German communist party was explicitly not extended to other dependent organisations, supporter movements, or organisations, which served as a disguise for its activities. More specifically, these organisations were not political parties and therefore did not enjoy the special protection afforded to political parties in the context of freedom of association. If such organisations violated the constitutional order, it would be necessary to apply the constitutional and statutory regulation of associations (BVerfGE 5, 392).

In its judgment on the prohibition of the SRP, the Federal Constitutional Court also found that the requirement for democracy within parties prohibits a party from organising itself in a way that would substantially deviate from democratic principles. If a party deviates from the fundamental principles of the democratic internal organisation of parties to such extent that it is only possible to interpret the deviation as the expression of an action that is, in principle, hostile to democracy, then a state of facts arises (especially, if other circumstances also confirm such orientation of a

party) that justifies the establishment of the unconstitutionality and prohibition of a political party.

In its decision on the prohibition of both extremist political parties, the German Federal Constitutional Court ordered the dissolution of the neo-national-socialist party (SRP) as well as the communist party (KPD) and the confiscation of their assets for the benefit of the state. Furthermore, the court declared a prohibition on establishing any substitute organisations for both extremist political parties or any further activities of the existing organisations as substitute organisations. The judgment in the SRP case also resulted in the termination of their deputies' terms of office in the federal and state assemblies.

A retrospective on the prohibition of the Communist Party of Yugoslavia

In the context of the above-mentioned constitutional premises and as a comparison with the prohibition of extremist political parties in the Federal Republic of Germany, an examination of the prohibition of the former Communist Party of Yugoslavia [hereinafter referred to as the CPY] could be interesting. The question that we are interested in is whether this prohibition withstands assessment in terms of the modern notion of the admissibility, or rather the inadmissibility, of political parties and their activities, in particular from the viewpoint of the present constitutional order and principles of a free and democratic social order.

On 29 December 1929 by the special public pronouncement No. 29282, known as the *Obznana*, the Council of Ministers of the Kingdom of Serbs, Croats, and Slovenes prohibited communist propaganda and communist organisations, their publications and any other document produced by those organisations that could breach the peace in and outside the state, or justify and approve of dictatorship, revolution or any violence. It further prohibited any calls for a general strike and demonstrations of a disruptive or disturbing nature during the Constitutional Assembly in Belgrade. In particular, it imposed the requirement for all weapons to be registered, announced drastic measures against riots designed to overthrow the government, determined that foreigners involved in riots would be deported, and dismissed all officials from the state services who spread Bolshevik propaganda in the country. Even students who were communists were deprived of financial support for their studies.

A prohibition of any press that would diminish the importance of these measures was issued separately. The Council of Ministers explained that the then state authorities learned from reliable sources that disruptive elements were preparing an attack on the state, its structure, and social order with the intention to destroy – following the example of the Russian Bolsheviks – all its laws, institutions, and public and private goods, and to establish a proletarian dictatorship. It also referred to the then turbulent situation in the state and abroad, especially in Hungary and Czechoslovakia. Due to the announced general strike, which was to begin at the same time as the Constitutional Assembly in Belgrade and develop into a general riot, bloody revolution, and collapse, the Council of Ministers decided to act immediately.

Seven months later, on 1 August 1921, the Yugoslav Assembly adopted the Act of the Kingdom of Serbs, Croats, and Slovenes on the Protection of Public Security and State Order (*Službene Novine Kraljevine SHS* [Official Gazette of the Kingdom of the

Serbs, Croats, and Slovenes], No. 170 A, dated 3 August 1921). This Act represented the confirmation of the public pronouncement, dated 29 December 1920; the provisions of this Act were similar to the pronouncement in terms of content, but were legally more structured. It also included elements of criminal sanctions and determined criminal offences. It reiterated that members of communist parties were prohibited from being employed in public services; however, those affected could appeal against the minister's decision before the State Council. Types of conduct that constituted criminal offences under this Act were tried by judges in regular state courts on the basis of the judges' free assessment of the evidence.

Owing to the very long time that has passed since then, it is difficult to assess the situation that existed when the CPY was prohibited. In any event, this is primarily the task of the historical sciences. It is easier to carry out a constitutional review of the acts of the Communist Party of Yugoslavia. Article 1 of the Statute of the Communist Party of Yugoslavia from 1920 defined the aim of the CPY. It expressly stated that the aim of the CPY, as a member of the Communist International, was to completely liberate the working class and all the supressed social classes of working people through uncompromising class struggle and the dictatorship of the proletariat and by establishing a communist order to replace its capitalist equivalent. Article 2 provided, *inter alia*, that members of the CPY could only be those persons that accepted the programme, statute, and tactics of the party and undertake by a written declaration that they will be active within the party (The Second Congress of the CPY, p. 118).

The first chapter of the CPY Programme stated that the ultimate objective of all the activities of the international communist party, as a wilful expression of the class movement, is social revolution, i.e. to replace capitalist relations of production with their communist equivalents.

The proletarian dictatorship, i.e. establishing the political power of the proletariat required to enable it to break any resistance of the exploiters, was a prerequisite for this social revolution to occur. The international communist party, the assignment of which was to train the proletariat to carry out its historic mission, had to organise the proletariat into an independent political party against all bourgeois parties, and lead and direct its class struggle (The Second Congress of the CPY, pp. 74–76).

The second chapter of the CPY Programme emphasised that a new era had arrived: the downfall of capitalism and an era of global proletarian revolution.

The second chapter concluded with the finding that the proletariat had to persist in constant economic and political struggle in order to be finally liberated, with all means available that were to be determined with regard to the social situation and the balance of forces between the proletariat and the bourgeoisie. The third chapter emphasised that the CPY, as a member of the Communist International, accepted the requirements of the world revolution as the starting point of its struggle. Therefore, it was the duty of the working class of the entire world to establish a socialist order. To this end, the proletariat had to first destroy the political power of the bourgeoisie and take political power into its own hands. The takeover of state power could not be confined solely to the replacement of persons holding power in the state authorities; it had to also entail the destruction of the alien state apparatus and the replacement of the bourgeois courts with proletarian courts, the destruction

of the reactionary bureaucracy, and the establishment of new proletarian authorities. The victory of the proletariat was guaranteed by the organisation of the proletarian authority. It was supposed to lead to a complete breakdown of the bourgeois apparatus and the establishment of the state proletarian apparatus (see The Second Congress of the CPY, pp. 78–80).

The fourth chapter of the CPY Programme emphasised that the lessons learned from the Russian Revolution demonstrated that it is only possible to establish a new social order through a social war against those in power.

Through their dictatorship, the supporters of the new order were to ensure the transition from the old to the new order. Socialism could not be established by means of bourgeois democracy or parliamentary institutions, but only through workers' councils. It was therefore the duty of the CPY to lead, through words and actions, the proletariat towards a revolutionary battle until the dictatorship of the proletariat was established in the form of Soviet republics (see The Second Congress of the CPY, p. 81).

The sixth chapter of the CPY Programme expressly stated that it was fighting for the Soviet Republic, i.e. for the transition to socialism by means of a dictatorship of the proletariat in the form of Soviet power.

The Soviet republic was to give all powers – legislative, executive, and judicial – to the working people, who were organised in workers', military, and farmers' councils. Immediately after assuming political power, the proletariat was to confiscate the means of production from the bourgeoisie (see The Second Congress of the CPY, p. 84).

The seventh chapter of the CPY Programme determined that the revolutionary era required the proletariat to use methods of fighting that engage large proletarian masses in major fights and incidents that end in open conflict with the bourgeois state. The idea that socialism could be introduced by making a compromise with the bourgeoisie was utopian. The working class was to actively participate in the movement and lead and conclude its struggle with the activation of the masses, subordinating, in the critical stage of the revolution according to the movement of the masses, all other means that are primarily used for class struggle during peaceful times. Representative bodies were also included among these (subordinated) means. In principle, the CPY opposed parliamentarism as a way to impose class rule. After the takeover of political power, parliamentarism was no longer possible (see The Second Congress of the CPY, pp. 85–86).

A comparative analysis reveals that a political party with such a programme, or a similar one, that operated in the same manner as the former CPY would be inconsistent with the principles of a free and democratic social system that is very tolerant towards the freedom of activities of political parties, and with the democratic European constitutional systems that exist today. In this light, the prohibition of the CPY was also justified at that time. Specific measures resulting from the prohibition of the CPY, which were directed against certain students and government officials, would now be deemed excessive and unacceptable in terms of constitutional

democracy. However, such does not affect the principled finding that the prohibition of the CPY as a party and all its activities was constitutionally admissible.

Sources:
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