

Penalty For Constitutional Violations

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ARTICLE INFO

Article History:

Received:27/3/2018

Accepted: 25/4/2018

Published: Fall 2018

Doi:

[10.25212/lfu.qzj.3.4.30](https://doi.org/10.25212/lfu.qzj.3.4.30)

Keywords:

*Constitution, violation,
government*

parliament

referendum

Kurdistan region

ABSTRACT

The purpose of this research is critical analyzing the penalty for constitutional violations. States have different perspective about the breaching of constitution and determining sentence for constitutional violators.

In this paper, we depend on qualitative method by using case studies and comparing with each other.

This legal paper divided into two parts. In the first part, Unconstitutional and Outlawed Political Parties will be argued by focusing on some cases in German and Turkey that related to violating their constitutions. In the second part, violating the constitution by government and parliament will be analyzed, for this purpose, the referendum of Kurdistan region and Catalans region as violation of constitution will be debated. Finally, the question is



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there any legal punishment for constitutional violations? Will be considered.

INTRODUCTION

It is clear that each individual state has constitution, which it is a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system.¹ It regulates the political system and the form of government in the country. In addition, it defines the framework of the legislative, executive and judicial power in the state.

So, it is extremely important to follow and consider the rules of constitution. In a state, all political parties, government, parliament, courts, companies and individuals have to protect their constitution and not violate the principals of constitution. There are strong arguments among legal and political scholars about the penalty for constitutional violations, whether there is any legal punishment for these parties that become violators for their state constitution or there is no any real punishment for constitutional violators, but only there is a moral punishment.

This legal paper divided into two parts. In the first part, Unconstitutional and Outlawed Political Parties will be argued by focusing on some cases in German and Turkey that related to violating their constitutions. In the second part, violating the constitution by government and parliament will be analyzed, for this purpose, the referendum of Kurdistan region and Catalans region as violation of constitution will be debated. Finally, the question is there any legal punishment for constitutional violations? Will be considered.

¹ Richard Bellamy, *'Political Constitutionalism: A Republican Defence Of The Constitutionality Of Democracy'* (1st edn, Cambridge University Press, USA 2007) p1.

1- UNCONSTITUTIONAL AND OUTLAWED POLITICAL PARTIES

States have different perspective about the breaching of constitution and determining sentence for constitutional violators. Some time, political parties in states violate constitutions, and then they have dissolved by constitutional courts as a punishment. In this part, several cases that related to the constitutional violations by political parties and penalties would be debated.

A- German Case:

The West German Constitution includes a provision that allows that country's highest constitutional court to declare political parties unconstitutional and to order them dissolved.

The political parties of the Federal Republic of German have a qualified constitutional status under Article 21 of the Basic Law, which provides that:

“1- Parties participate in the formation of the popular political will. They may be freely formed. Their internal organization must be speak democratic principles. They must give a public accounting of their funds.

2- Parties which by their goals or through the acts of their adherents seek to impair or to do away with the liberal democratic order, or to endanger the existence of the Federal Republic of Germany, are unconstitutional. The Federal Constitutional Court shall determine the unconstitutionality of a party.

3- This article shall be implemented by federal statutes”.²

While this article available and obligate political parties to respect the constitution, two political parties violated article 21(2) of the German constitution and then they faced punishment by the constitutional court.

² Article 21 (1949) Basic Law.



The first German political party that faced judgment is the Sozialistische Reichs partei (SRP). In May 1951, the German federal executive branch found that the SRP sought to impair the liberal democratic order.³

The Constitutional Court received abundant evidence that the *SRP* was an unabashed Nazi-front organization. With such evidence, the court could have issued a simple opinion making little law. Nevertheless, one of the defenses raised through the *SRP* requisite the court to describe the expression "liberal democratic order" of Article 21(2). The party debated that as a problem of constitutional principle, the form of government proposed by the party was as good as any potential government. This argument was influential. If the "liberal democratic order" of the constitution was only the blueprint of a construction for domestic government, there could be no constitutional base for denying the *SRP*'s substitute order, as long as the *SRP* could success adequate popular support to create itself and comprehend its objectives democratically.⁴

The court answered to the *SRP*'s argument by noting that the "liberal democratic order" of Article 21(2) was a "normative order." This order was "essential" and transcended the "constitutional order," a term used by the court to designate the political apparatus of the state.

At least passive assent to these principles was a prerequisite to a party's involvement in the creation of the popular political will. The evidence versus the *SRP* presented it to be actively hostile to most of these values.

Consequently, the court reasoned that it could announce the party unconstitutional according to Article 21(2), because the Article's application no longer clashed with the democracy that is part of a liberal democratic order. After appropriate analyses, the court dissolved the party and seized its properties. The court also banned any restoration of the party in "ersatz" associations.⁵

Paul Franz, 'Unconstitutional and Outlawed Political Parties: A German-American Comparison' ³
(1982) 5 (1) 56-62.

Paul Franz (n 3). ⁴

Erick Bleich, 'The freedom to be Racist' (1st edn, Oxford University Press, USA 2011) 97- 115. ⁵



The finding of unconstitutionality did not resolve the problem completely. There were two SRP representatives in the federal legislature at Bonn, and other SRP memberships in different state legislatures. The matter of whether these delegates could remain their seats after the German constitutional court had prohibited the SRP. However, the court without reservation, held that the SRP's delegates must lose their seats, then the court declared:

“When by a judgment of the Constitutional Court a political party's ideas are found to fall short of the prerequisites for participation in the formation of the popular political will, the mere dissolution of the party's organizational apparatus, which was meant to further these goals, cannot truly implement the court's judgment. Rather, it is the intent of the Court's sentence to exclude the ideas themselves from the process of the formation of the political will”⁶.

The Second German political party that judged by Constitutional court is the Kommunistische Partei Deutschlands (KPD). The KPD party will subject of German constitutional court. The subject was to dissolve the political party because it was accused of a threat to liberal democratic order that Germany was aimed to be rebuilding upon. So, it could be said that the party violated the Article 21(2) of the constitution. It was in the 1950s after the SRP party was banned. It took a legal battle that was challengeable constitutionally because constitutional court exercised its power to hold the political parties existence.⁷

Paul Franz (n 3).⁶

⁷ Valentina BĂRBĂȚEANU, ‘The Place Of Political Parties In A Democratic State, Through The Glass Of Constitutional Review’, *Challenges of the Knowledge Society. Public Law*, 394-400.

In another word, the KPD party was banned and the party sought to challenge the courts decision based on (the principles of dignity of man). In addition, the political parties argument was their values and principles is in the line of German constitution and basic laws. And the parties ideology Marxist Leninist defined and presented as science not property because if it is a science it means every body can exercise that science or every one has the right to that science.

The second argument they had was their parts political goal and value was to reunify Germany. Therefore, again their goal is in the line of German basic law. However, the constitutional court did not over turn the decision because the political parties ideology was contradicting the liberal democratic principals that Germany was aimed to be rebuild upon.⁸ Thus, the constitutional court, its final decision, chosen liberal democratic order or principles above the German reunification goal which was KPD

party aimed for, because for the constitutional court liberal democratic principle was very important than the KPD parties political goal of reunification Germany, based on Marxist Leninist ideology. Even thought the constitutional court was aware of the basic laws and its constitutional principles.

As a result, it could be stated that there is not only condemning the violators and facing criminals to the moral punishment, but also, a real punishment will provide for these people that violate constitution.

B- Dissolution of Political Parties by the Constitutional Court in Turkey:

Turkish Constitutional Court, in the period of the Constitution of 1982, sentenced to dissolution of political parties. Up to 28 political parties were dissolved in Turkey by the Constitutional Court, explicitly the most operative Court in Europe. Majority of them violated the article 68 and 69 of the Turkish Constitution.

Before arguing some cases it is important to consider these articles of the constitution that related to dissolution of the political parties in Turkey.

Article 68 paragraph 2 of the Turkish Constitution stated that “Political parties are indispensable elements of the democratic political system”,⁹ and also in paragraph 4 mentioned that “The statutes and programmes of political parties shall not be in conflict with the indivisible integrity of the state with its territory and nation, human rights, national sovereignty, and the principles of the democratic and secular Republic”.¹⁰ Additionally, political parties are not allowed to aim to protect or establish class or group dictatorship or dictatorship of any kind, and incite citizens to crime.¹¹

Furthermore, article 69 of the constitution stated that a political party could face dissolution as a result of violating the constitutional prohibitions by;

- (i) Its statute and programme
- (ii) Its activities
- (iii) Receiving financial aid from foreign states, international institutions, persons and corporate bodies.¹²

The Constitutional Court commonly penalized dissolution of a number of political parties on the basis of unconstitutional party programs. The United Communist Party of Turkey, Socialist Party, Labor Party, Democracy and Change Party, Democratic Mass Party and Freedom and Democracy Party were dissolved not for their unconstitutional activities, but for the expressions set out in their programs, which were found opposing to Article 68 (4) of the Constitution.¹³

Article 68 (2), Turkish Constitution (1982).⁹

Article 68 (4), Turkish Constitution (1982).¹⁰

Article 68 (5), Turkish Constitution (1982).¹¹

Article 69, Turkish Constitution (1982).¹²

¹³ Bülent ALGAN, ‘Dissolution of Political Parties by the Constitutional Court in Turkey: An Everlasting Conflict Between the Court and the Parliament?’ (2011) 60 (4) AUHFD 820. Online available at:

<http://dergiler.ankara.edu.tr/dergiler/38/1643/17565.pdf>

There were other political parties that banned by the constitutional court, but Democratic Society Party is the last political party banned by the Constitutional Court so far. The Court concluded dissolution collectively in this case because the DTP had become the center of activities aiming at destroying the unity of the Turkish state with its territory and nation. At the same time, it had supported PKK, which it is a terrorist organization. Therefore, it can be said that the legal basis for the closure of this party was the violating of the Article 68 of the Constitution by the party.¹⁴

The constitutional court provided the following justifications for the dissolution of the Democratic Society Party:

- 1- The management organs of the Democratic Society Party did not take measures, but stayed silent with regard to the outbreaks happened in the organizations implemented by the members of the party; and the party support to terrorism in its attitudes.
- 2- The party tried to achieve a number of rights and possessions by controlling antidemocratic announcements and used terrorism as a means of its politics.
- 3- Politically the party did not come up against terrorist activities obviously, and it concealed crimes and the criminals, but did not condemn them.¹⁵

The Constitutional Court declared that the relationship between the terrorist organization PKK and Democratic Society Party was “a manifest secret” as that Party had refrain from defining the PKK as a terrorist group. So, it could be said that

¹⁴ Freedom House, *Turkey in Transit Democratization in Turkey* (1st edn, Demax Múvek Kft, Hungary 2008) 20. Available online at:

https://freedomhouse.org/sites/default/files/inline_images/Turkey%20in%20Transit.pdf



there is a real punishment and judgment for violating the principles of the constitution.

2- VIOLATING CONSTITUTION BY GOVERNMENT AND PARLIAMENT

It could be argued that some time constitutions violated by the government and parliament. That's why they faced binding punishment, whether is a legal punishment or moral punishment.

A- The Case of Kurdistan Regional Referendum for Independent

As it mentioned above that sometime the government and parliament violate the constitution. For example, the Article one of the Iraqi constitution stated that "the Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq".¹⁶

While it is a responsibility for all the political parties, reigns, governments and parliaments to protect Iraqi unity, the Kurdistan Parliament and Government announced the referendum for Kurdistan independent, which it was against the Iraqi constitution. At the beginning the Kurdistan Parliament supported and passed a special law to implement the processes of independent referendum. Then, the Kurdistan Government fulfilled the processes of referendum. As a result more than ninety per cent of the voters voted Yes for independent and the government announced the result of the processes.

There is a strong argument about the legality of this referendum, some Kurdish politicians and leaders declared that the referendum is not against Iraqi constitution and it is legal. While Iraqi political and legal scholars rejected this idea and they stated that the referendum is against article one of the constitution and the aim of that proses is to destroy Iraqi unification and it is against the Iraqi territorial integrity and political independence.

As a result, The Iraqi Federal Court ruled that the Kurdish independence referendum which was held on September 25, is "unconstitutional" and therefore its results are null and void. After the implementing referendum, Iraqi government

Article 1 (2005), Iraqi Constitutional Court.¹⁶

imposed many political and economic sanctions on Kurdistan region as a sentence.¹⁷ Not only these punishments, also they used military force against Kurdish Peshmarga to leave these places that they fought against Daesh. In addition, the Iraqi government stopped sending Kurdistan budget and they closed Kurdistan region borders with neighbouring countries and airports. So, it could be said that there is punishment for violating constitution.

B- The Catalans Referendum Case

An independence referendum held on 1 October 2017 in the Spanish autonomous community of Catalonia. At the beginning, the Parliament of Catalonia passed a law to implement the independent referendum. Then, the proses implemented by the government. As a result, it was declared illegal on 7 September 2017 and suspended by the Spain Constitutional Court after a request from the Spanish government, who declared it a breach of the Spanish Constitution of 1978.¹⁸ There is an important question that should be considered, whether is there any punishment for this violation that committed by Catalonia government and parliament or not?

To answer this question, the Article 155 of the Spanish Constitution 1978 will be argued. The Article stated that:

“1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the

¹⁷ BBC News, ‘Iraq Supreme Court rules Kurdish referendum unconstitutional’ (2017)

available online at: <http://www.bbc.com/news/world-middle-east-42053283>

¹⁸ Manuel de la Rocha, ‘A Way Forward For Catalonia’ (2017) Social Europe. Available

online at: <https://www.socialeurope.eu/way-forward-catalonia>

measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.

2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities”.¹⁹

According to the above-mentioned Article, it could be said that the central government in Madrid can take all appropriate measures against Catalina’s government. But there is some vague of the article 155, paragraph one because there is no limitation concerning with the obligations, what type of obligation should be implemented? Another problem is the statement of “seriously prejudicing the general interests of Spain”, what is general interest and what are the standards of the seriousness.

In addition, the constitution not explained the term of the “ all measures” that it is so general. However, some constitutional experts argued that “ all measures” comprise of the right of central government in Madrid to take over all political and administrative agencies from self governing communities and can manage the public services also bring employees to work instead off the locals.

Furthermore, article 2 of the Spain Constitution 1978 is supporting the trend of article 155 by protecting the unity of Spain and confirming that no self governing communities have the right to be independence.

Ultimately, As a result of the referendum the Catalans government and parliament have dissolved and the prime minister of the Catalans left the country and the central government has also shut down most of the Catalan government’s diplomatic service.²⁰ So, the Catalans region faced difficult punishment that forced by the central government of Madrid.

Article 155 (1978) Spain Constitutional Court. ¹⁹

²⁰ Michael Stothard, ‘Madrid takes control of Catalonia after independence vote’ (2017), Financial Times, available online at: <https://www.ft.com/content/01355070-bae7-11e7-8c12-5661783e5589>

CONCLUSION:

It is clear that states constitution is the highest seat on the other laws. All powers, Legislative, Executive and Judicial powers have to follow the principles of the constitution and also they should not try to amend constitution. All laws that passed by the parliament must regulate with the constitution. If the law that passed by the parliament not appropriate with the constitution, the law should be dissolved. At the same time, governments and courts have big responsibilities to pass decisions, orders and regulations, which appropriate with the constitution. If the acts of the court and government are against constitution, the acts have to reject by the constitutional court.

Some time the political parties breach the constitution and then they face punishment. For example, in German, the constitutional court dissolved two political parties, such as, Sozialistische Reichspartei (SRP) and Kommunistische Partei Deutschlands (KPD). Both of them violated the Article 21 (2) of the German Constitution because they were accused of threat to liberal democratic order that Germany was aimed to be rebuilding upon and also they support the Marxist Leninist ideology.

In addition, in Turkey the Constitutional Court commonly penalized dissolution of a number of political parties on the basis of unconstitutional party programs, such as, The United Communist Party of Turkey, Socialist Party, Labor Party. They were dissolved for the expressions set out in their programs, which were found opposing to Article 68 (4) of the Constitution.

Moreover, the government and parliament could breach the constitution. For instance, the parliament and government of Kurdistan region violated the Iraqi constitution by performing the referendum for independent. However, Iraqi government imposed many political and economic sanctions against Kurdistan region as a punishment. Furthermore, Spain government also passed many regulations against Catalans government because the Catalans government



fulfilled the referendum for independent, which not regulate with general interest of the Spain and contradict with the unification of the republic of German state.

It could be said that states should respect constitution by following it and not violate its principles, when parties breach the values of the constitution they have to bear responsibilities and punishments that forced by the constitutional courts. However, some time punishment could be moral instead off physical penalty.

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پوخته

نەم توێژینەوێهێه شیکردنەوێهێه کی رهخنه ئامیزه بۆ پێشیلکاربهکانی دهقهکانی دهستور، بۆیه پشتمان بهستوه به میتۆدی شیکاری و بهراوردکاری له ریگای باسکردنی چه ندروداویکی نوێ و په یوه ندیدار، له و پێودانگه وه توێژینەوێهێه که مان کردوو به دوو بهشی سه رهکیه وه به م شیوه یه ی خواره وه:

بهشی یه که م تهرخان کراوه بۆ ئه و پارته سیاسیانه ی که به هۆی دزایه تی کردنی دهستور و یاساوه له ئه لمانیا و تورکیا له لایهن دادگای دهستورییه وه هه لوه شینراونه ته وه .
بهشی دووه میش پیشیلکاریه دهستورییه کانی حکومت و په رله مان باس ده که یین و نمونه ی ریفرا نۆمه که ی کوردستان و که ته لۆنیا ده که یینه هه و یینی باسه که مان .
له کۆتاییدا هه و ل ده ده یین شیکارییه کی زانستیانه بکه یین بۆ ئه گه ری هه ر سزایه کی یاسایی بۆ پیشیلکارییه دهستورییه کان له کاتی ئه و پیشیلکارییانه .

المخلص.

أن بحثنا هذا عبارة عن تحليل نقدي للعقوبات الممكنة عند خرق النصوص الدستورية معتمدا على المنهج التحليلي والمقارن مستخدما أحداث ونماذج جديدة حصلت في الآونة الأخيرة، عليه تم تقسيم هذا البحث الى فقرتين رئيسيتين كالتالي:
خصصت الفقرة الأولى لسحب الاجازة من الأحزاب المخالفة للدستور من قبل المحكمة الدستورية في دولتي ألمانيا وتركيا، وفي الفقرة الثانية تم معالجة المخالفات الدستورية من قبل السلطة التنفيذية والتشريعية بعد الاستفتاءات التي اجريت في اقليم كردستان العراق واطليم كتلونيا الاسبانية.
أخيرا وليس آخرا نسعى الى بلورة فكرة وجود أية عقوبة عند خرق القواعد الدستورية.