

# The Dutch Political Reformed Party (SGP) and Passive Female Suffrage: A Comparison of Three High Court Judgments From the Viewpoint of Democratic Theory

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## Keywords

Party regulation, freedom of association, freedom of religion, gender equality, passive female suffrage, democratic theory, European Court of Human Rights

## Abstract

Traditionally, in the Netherlands the idea was that political parties were essentially private associations in whose internal affairs the state ought not to interfere. However, the case of the *Staatkundig Gereformeerde Partij* (Political Reformed Party, hereafter, SGP) has led to a political and public debate on whether this view can be maintained. This article examines the case of the SGP, particularly from the viewpoint of democratic theory. It eventually concludes that party regulation does not need to remain a taboo topic forever, even in the Netherlands, although with the SGP having recently changed its own constitution it may take a while until further provisions will be introduced. Care should be taken, however, that it does not lead to unnecessary infringements on the constitutional freedoms of minorities such as the SGP and its followers. After all, what is the point in pursuing non-discriminatory policies that are themselves discriminatory?

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## I. Introduction

The internationally vibrant topic of party regulation has until recently been something of a taboo in the Netherlands. Traditionally, the idea was that political parties were essentially private associations in whose internal affairs the state ought not to interfere. However, the case of the *Staatkundig Gereformeerde Partij* (Political Reformed Party, hereafter, SGP) has led to a political and public debate on whether this view can be maintained. This article will examine the case of the SGP, particularly from the viewpoint of democratic theory.

The SGP is a small Orthodox Christian party that currently holds 2% of the seats in the Dutch Parliament. The party has evoked anger from some feminist and other organisations because it does not nominate women on its election lists; the party regards women bearing government or legislative responsibility to be at odds with the biblical vocation of women. Consequently, since 2005, legal proceedings have commenced twice concerning the question: should the Dutch state take measures against the party on the basis of the equality principle, or does the party's freedom of association and freedom of religion forbid the state to do so?

The Council of State, the highest administrative court in the Netherlands, ruled in 2007 that the state cannot exclude the party from receiving the regular political party subsidy. Three years later, however, the highest civil court, the Supreme Court, ruled that the state is obliged to take (other) measures that will force the party to end the exclusion of women from its election lists. In 2010, the party submitted a complaint to the European Court of Human Rights (ECtHR). In its decision of 10<sup>th</sup> July 2012, however, the Court declared the complaint manifestly ill-founded, and therefore inadmissible.<sup>1</sup>

In the following sections, we first set out two different conceptions of democracy. This allows us to analyse the two partially conflicting judgments of the Dutch highest courts referred to above, which is addressed in section three. Next, we examine the case law of the ECtHR to determine which conception of democracy it is characterised by, and to what extent the admissibility decision in the SGP case fits into the case law and the democracy conception of the Court.

## II. The Majoritarian versus the Constitutionalist Conceptions of Democracy

In democratic theory, a distinction is sometimes made between two conceptions of democracy.<sup>2</sup> These conceptions centre around the question of what the essential qualities of a democracy are and which constitutional rules are necessary to have a democracy. Defenders of majoritarianism hold the idea that majority rule and the election procedure are practically the only essential norms. On the other side, there are objectors who hold that additional constitutional norms, such as a bill of rights, are needed. The former position is often referred to as a procedural, formal, or 'thin' conception of democracy because it focuses its attention on the formal processes for elections and voting. The latter is called a substantive or 'thick' position because of the explicit attention it pays to the legitimacy of what a government does once elected. While the thin conception tends to advocate only a fair procedure, the thick conception of democracy demands an additional critical evaluation of the outcome of the procedure.

According to the proceduralists (i.e. those supporting the thin conception of democracy), principles such as civil rights are certainly important, but we should rely on the people to look after their own interests by respecting those rights. It is better not to incorporate these moral matters into the constitutional law, but to postpone them in favour of democratic, legislative deliberation, leaving them up to the people. It is argued that institutionalised constitutional devices hamper democratic deliberation and free formation of the will of the people. Another argument posits that there is too little consensus on any substantive value to make it suitable to serve as fundamental to democracy. However, substantivist theorists (i.e. those supporting the thick conception of democracy) defend the necessity of constitutional devices such as civil rights and freedoms, separation of powers, judicial review and/or qualified majorities on constitutional matters. These norms and institutions function as indispensable limitations to majority power, and therefore as essential features of a democracy, next to majority rule. According to the substantivists, the majority should be prevented from becoming tyrannical.

1 *Staatkundig Gereformeerde Partij v the Netherlands* App no 58369/10 (Third Section) (ECtHR, 10 July 2012).

2 Robert A Dahl, *Democracy and its critics* (New Haven/London: Yale University Press, 1989) 135–192; S Sottiaux, 'Democratie en grondrechten. De inhoudelijke en procedurele democratiemodellen van Dworkin en Habermas', in: Maurice Adams and Patricia Popelier (eds.), *Recht en democratie. De democratische verbeelding in het recht* (Antwerpen/New York/Oxford: Intersentia, 2004) 39–64; John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) 421–424; James Allan, 'Thin beats fat again – Conceptions of Democracy', *Law and Philosophy* 25 (2006) 533–559.

It is often assumed that proceduralists hardly make substantive moral claims because they only advocate the rules of democratic procedure while substantivists would need more moral overlays because they advocate criteria for a just outcome of the procedure. However, as John Rawls has argued, and rightly it seems to the authors, this assertion is false. First, a fair procedure in itself demands important moral principles; the process must guarantee equality and impartiality, accessibility of all relevant information, lack of coercion, and more.<sup>3</sup>

Moreover, Rawls shows that proceduralists are ultimately no less concerned about the outcome of the procedure than substantivists are. They advocate the thin conception because they believe that a good and just outcome is better guaranteed by having only procedural principles than by adhering to additional, prior constitutional criteria. Therefore, the thin conception is also concerned with the outcome in politics and makes its moral choices from that perspective, making the claim that the thin conception entails less substantive values than the thick position highly questionable.<sup>4</sup> When discussing the SGP judgments, we will come back to this crucial insight.

A similar distinction in conceptions of democracy is also sometimes applied in writings on the topic of militant democracy: Whether a democracy should actively defend itself against parties that, because of their ideologies and practices, threaten the future of the democracy. Defenders of a militant democracy hold that political parties that constitute a threat to fundamental and essential democratic values must be banned.<sup>5</sup> This position is sometimes connected to the substantive conception of democracy described above, while the opposite view, the idea that ‘anything goes’ as long as the people want it, is identified with the thin conception. However, we analyse the SGP judgments using the first description of the two conceptions of democracy (the majoritarian versus the constitutionalist conception), as this appears to make more sense. The main problem with connecting these conceptions with the two positions in the militant democracy debate is that it makes the substantive view appear even more exclusivist and less open than the proceduralist view. This suggestion is false (or, in any case, not necessarily true) as demonstrated in the next section.

Furthermore, taking a stance in the SGP case in terms of ‘militant democracy’ would first require that one define democracy. In other words, the way in which the militant democracy distinctions are applied to the SGP case depends on what one considers to be essential for democracy. Indeed, in order to assess whether a party can be deemed a threat to democracy, it makes quite a difference whether democracy is primarily about fair procedure, or primarily about the guarantee of a free and open societal debate. This is why the framework of the majoritarian-constitutionalist debate is used in analysing the SGP-judgments.

### III. The SGP on Dutch Trial

#### A. Procedures

The legal proceedings began in 2005 when both the SGP and the Dutch state were summoned before the civil sector of the District Court by the feminist Clara Wichmann Foundation and a number of other philanthropic organisations.<sup>6</sup> The case against the SGP itself was declared inadmissible. In their claim against the state, however, the organisations were more successful: the Court ruled that state measures against the discrimination of women by the SGP were required, referring mainly to Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted in 1979 by the United Nations General Assembly. The Court therefore forbade the state to grant any further subsidies to the SGP.

The state subsequently discontinued providing the SGP with subsidies. The SGP challenged this decision in new proceedings in the administrative law sector of the District Court. In 2007, the Dutch Council of State, the highest administrative court, ruled that the SGP’s rights to freedom of association and religious freedom, and hence central tenets of the Dutch democracy,

3 Rawls (n 2) 425.

4 Rawls (n 2) 421–425; Joshua Cohen, ‘Pluralism and Proceduralism’, *Chicago-Kent Law Review* 69 (2004) 589–618.

5 See, for example, Yigal Mersel, ‘The Dissolution of Political Parties: The Problem of Internal Democracy’, *International Journal of Constitutional Law* 4 (2006) 84–113; Patrick Macklem, ‘Militant Democracy, Legal Pluralism and the Paradox of Self-Determination’, *International Journal of Constitutional Law* 4 (2006) 488–516; Samuel Issacharoff, ‘Fragile Democracies’, *Harvard Law Review* 120 (2007) 1405–1467. Mersel also justifies requiring internal democracy.

6 Gareth Davies, ‘Thou Shalt Not Discriminate Against Women: Public Subsidies to Religious Parties Condemned in *Clara Wichmann Foundation v. The Dutch State*. Court of First Instance, The Hague. Judgment of 7 September 2005’, *European Constitutional Law Review* 2 (2006) 152–166. In a sense, however, the history of the legal battle against the SGP actually dates back to the first half of the 1990s. See H-MThD ten Napel, ‘Een Nederlandse Taliban?’, in: NF van Manen (ed.), *De multiculturele samenleving en het recht* (Paul Scholten Instituut/Ars Aequi Libri, Nijmegen, 2002) 151–157.

were at stake because the measure against the SGP put the party at a disadvantage compared to other political parties. The lower court's ruling that the subsidies had to be stopped was therefore quashed.

Meanwhile, the civil proceedings continued; the state and the SGP both lodged appeals against the District Court's ruling. In 2008, the Court of Appeal ruled, after balancing the principle of non-discrimination against the freedom of religion, that the non-discrimination principle had to prevail in this case and that the state was under an obligation to take measures against the SGP. The Court left the nature of these measures open, but as a result of the Council of State's ruling, it was clear that these could not involve withholding the party's subsidies.

The state and the SGP appealed again to the Supreme Court, the highest judicial institution for civil cases in the Netherlands. The Supreme Court upheld the Court of Appeal's conclusion.<sup>7</sup>

### B. *Excursus: possible measures*

Before continuing the discussion of the judgments, it is important to pause and ask what kind of measures could be a possible means of executing the Supreme Court's judgment, as this is helpful in understanding what is truly at stake. To answer this question, we will briefly look at legal provisions in other European countries.

The Supreme Court requires a measure that would be effective against the SGP, yet which would infringe the party's rights as little as possible. As we have seen, the Council of State ruled out measures regarding the government's subsidies. According to legal scholars Schutgens and Sillen,<sup>8</sup> what is perhaps most suitable is the addition of a provision to the Elections Act that prevents political parties' statutes from being discriminatory.<sup>9</sup> *De jure* exclusion of women by the SGP would then be ruled out, assuming that the party wishes to continue its participation in elections, even though it would remain possible in practice not to nominate women candidates. Possibly more effective, but at the same time infringing further on the SGP's freedoms, would be a legal obligation to nominate women candidates on election lists, a kind of quota requirement possibly inspired by the Belgian example.

In countries where they were proposed, gender quotas with respect to the parties' election lists caused considerable debate. Opponents of such measures argued that it was incompatible with the principle of unity and generality of political representation. Representatives are to operate on behalf of the whole constituency, not just a part of it. Furthermore, the freedom of voters to choose their representatives, and thus the autonomy of political parties, should remain unconstrained by the law. In election law, according to these opponents, we need to attain formal equality. Any departure from that principle would be discriminatory. Advocates of parity democracy, to the contrary, opt for what they regard as substantive equality.<sup>10</sup>

In Belgium, France, Italy, and Spain, it was felt that the existing under representation of women in politics had to be counteracted, for which purpose gender quotas were enacted that require (near) parity on the candidature lists. These measures required constitutional changes in France and Italy. Additionally, in Belgium, the rules provide that persons of the same sex cannot hold the two top positions. In France, it is even provided that in certain instances the male and female candidates are to be listed alternately. The penalty for violating these regulations consists of receiving reduced funding from the French government. In other countries, notably Germany and the United Kingdom, voluntary quotas are observed by the political parties.<sup>11</sup>

Even if made compulsory, the introduction of gender quotas in the Netherlands would not guarantee success, however, as it would be possible, for example, for the SGP to formally nominate women who would then give up their seats after being

7 The rulings of the Council of State and the Supreme Court are available (in Dutch) at [www.rechtspraak.nl](http://www.rechtspraak.nl) under LJ-numbers BB9493, and BK4549 and BK4547, respectively.

8 RJB Schutgens and JJJ Sillen, 'De SGP, het rechterlijk bevel en het kiesrecht', *Nederlands Juristenblad* 85 (2010) 1114-1117.

9 See, however, BP Vermeulen and AJ Overbeeke, 'Godsdienst, levensovertuiging en politieke gezindheid' in CJ Forder (ed), *Gelijke behandeling: oordelen en commentaar 2010* (Nijmegen: Wolf Legal Publishers, 2011) 139-161, 147ff. Vermeulen and Overbeeke argue that the Constitution would need to be changed first before such a revision of the Elections Act could take effect.

10 Blanca Rodriguez Ruiz and Ruth Rubio-Marin, 'The Gender of Representation. On Democracy, Equality and Parity', *International Journal of Constitutional Law* 6 (2008) 287-316.

11 Rodriguez Ruiz and Rubio-Marin (n. 10); Mercedes Mateo Diaz and Suzan Milnns, 'Parity, Power and Representative Politics: The Elusive Pursuit of Gender Equality in Europe', *Feminist Legal Studies* 12 (2004) 279-302; Venice Commission, *Report on the Impact of Electoral Systems on Women's Representation in Politics* (Strasbourg: CDL-AD 029, 2009) 14. A number of Eastern European countries have also adopted gender quotas.

elected.<sup>12</sup> For the time being, the introduction of a far-reaching measure such as this is not likely.

### C. *The Council of State and pluralism*

In its reasoning on whether the principle of gender equality, as enshrined in Article 7 of the CEDAW, necessitated the state to end subsidies to the SGP, the Council of State noted that a democracy such as the Netherlands needs a broad representation of all philosophical and religious streams of thought within society. Therefore, for example, groups with views on the biblical vocations of men and women in public life that are rejected by the great majority of the population, including most fellow Christians, ought to receive the opportunity to bring their ideas to the fore. It would undermine the basic principles of a democracy if the state disadvantaged certain groups because of their convictions; this would hamper the legitimacy of the outcome of the debate. As long as a party abides by criminal law, the state should remain impartial and relate in an offhand manner toward all divergent political ideas. Therefore, according to the Council, the government ought not to interfere with the SGP's ideas and practices, and not disadvantage the party by withholding subsidies.

It is not too far-fetched to recognise within this type of reasoning the substantive conception of democracy described above, which emphasises the importance of certain values, such as freedom of religion, strict limits on state intervention in the autonomy of societal groups, and the protection of minorities with respect to their beliefs, as fundamental components of democracy supplementary to majority rule.

### D. *The Supreme Court and election procedures*

As was mentioned above, the Supreme Court in 2010 had to balance the same rights, yet did so in quite a different manner. The Court declared the citizens' voting rights to be the essential core of democracy. Therefore, it is not acceptable for a political party to act contrary to a clause that grants all citizens equal active and passive voting rights, even when this practice is rooted in a party's religious principles. This led the Supreme Court to the conclusion that the government needed to take effective measures against the SGP's disputed practice.

The fact that this judgment apparently puts universal voting rights at the top of its hierarchy of rights is indicative of its affinity for the majoritarian democracy paradigm. The Court seems mainly concerned with the election procedure and less with other (constitutional) values such as freedom of religion and association. Mainly through this striking emphasis on the election procedure, the Court clearly demonstrates an affinity for the majoritarian conception of democracy.

This might raise the question: if the Supreme Court (like the Court of Appeal) had stressed the importance of gender equality and its implications for political procedures, would the decision have reflected such an affinity for the majoritarian conception? And further, what if the Supreme Court had weighed the importance of gender equality against freedom of religion? Though the affinity would then without doubt have been less clear, we, the authors, contend that it would still have been present. The resemblance to the majoritarian conception would, in that case, primarily have reflected that the Court is not prepared to allow a religious minority the freedom to practise its own interpretation of gender equality, and that instead the (treaty) provision on gender equality, which is supported by the majority of contemporary societies, prevails over freedom of religion. However valid this application of gender equality for passive voting rights may be, in the context of maintaining the principle, the Court's choice still would be one that restricts the freedom of a minority for the sake of the majority's view on gender equality. Such a choice fits primarily in a majoritarian way of reasoning, while constitutionalists put more emphasis on the protection of minorities (and their chosen morals). In this judgment, freedom of religion is not able to fulfill its timeless function of protecting religious minorities against the moral convictions of the majority.

It can be argued that the Supreme Court's judgment also has features relating to the substantial conception of democracy, in that it places so much emphasis on the non-discrimination principle that it insists on measures against political parties that do not abide by it. However, this reasoning would fit better in the 'thick–thin' distinction found in the militant democracy debate. Viewed from this perspective, the Council of State's judgment can be characterised as being more formal (i.e. thin) by leaving all options open. The confusion seems to be a result of the paradoxical nature of democratic principles: they aim to ensure liberty and openness, but this leaves unanswered the extent to which they require measures against parties threatening those same values. As we have seen, since both the majoritarian and constitutionalist views raise this question, these positions cannot be fully identified with the thick and thin positions in the militant democracy debate.

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12 Schutgens and Sillen (n 8) 1114–1117.

We nevertheless believe that our original analysis, framing the Supreme Court judgment as proceduralistic, makes better sense, if only because it casts more light on the different kinds of constitutional principles that are emphasised in the various judgments. Moreover, one could attempt to reconcile both distinctions by arguing that the Council of State judgment represents a relatively thin substantive conception of democracy.

### E. *Evaluation*

As we have seen, the two conceptions of democracy described in section two can be discerned, at least to some extent, in the respective high court judgments. There is much to be said in favour of characterising the Supreme Court's ruling as rather proceduralistic. The judgment emphasises the election process and voting rights rather than other constitutional values, such as classical freedom rights. Further, the Supreme Court's decision submits freedom of religion to principles subscribed to by the current majority. For the Council of State's judgment, the opposite holds true in both respects. As a result, it is representative of a more substantive conception of democracy.<sup>13</sup>

The Supreme Court judgment strikingly demonstrates why it can be misleading to regard a formal, majoritarian conception of democracy as more open and tolerant than a substantive and constitutionalist view. This formal approach turns out to bear values within it that exclude groups of citizens. In an attempt to identify which exclusive values lie at the heart of the Supreme Court judgment, it could be said that the principles of individual autonomy and self-determination play an important role: every single woman (whether she wants to or not) should have the opportunity to represent each political party in legislative organs and similar bodies.<sup>14</sup> SGP supporters, however, do not fully agree with these principles as they prefer to submit themselves to God's creation order as perceived by them.

In this context, it is interesting to note that the democracy theorist Robert Dahl places exactly the same notion of personal autonomy at the heart of his majoritarian theory. According to him, this principle requires every adult to have an equal voice in politics, and the election and voting procedures should guarantee this. A political decision reached in this way cannot be constrained by certain values next to or above the majority principle.<sup>15</sup>

The above viewpoint makes us seriously question the claim made by adherents of the thin conception that it includes less moral overlay than the substantive one. It can instead be argued that the substantive conception of democracy promotes a particular ideal, i.e. individual autonomy, to a much lesser extent. Because of its emphasis on the state's constitutional limits regarding interference in the internal affairs of societal and especially religious groups, this conception leaves it up to the communities in society whether or not to cultivate the ideals of individual autonomy and self-determination.

When we take into account the Dutch traditions of tolerance and openness, we could say that it is quite appropriate to guarantee religious freedom and diversity in society and politics. Therefore, it is appropriate to regard these freedoms as essential to democracy. To focus in a one-sided and thus unbalanced manner on the election procedure would mark a rather radical break of a centuries-old habit to take the whole essence of democracy into account.

Furthermore, an unconditional and unconstrained procedural approach paradoxically runs the risk of not taking into account the real preferences of the citizens whose rights it claims to defend.<sup>16</sup> In the SGP case, SGP women have not been asked whether they prefer a party that excludes women from candidature lists or not. It seems as if the Supreme Court simply said to them: you have the right to stand for election, and if you do not use that right, you cannot really be free. To the contrary, the substantive democracy approach gives members of a religious community a maximum amount of freedom within the boundaries of the law to organise themselves, to define and practice their own preferences, according to their own principles. It seems inappropriate to suppose that, because the choices they make are inconceivable to outsiders, the minorities involved must be more or less forced by the community to act contrary to their real preferences.

13 cf M de Blois, 'Een mijlpaal op weg naar maatschappelijke uitsluiting. Het SGP-arrest van de Hoge Raad van 9 April 2010', *Tijdschrift voor Religie, Recht en Beleid* 1 (2010) 61-68.

14 These principles can also be seen as the underlying motivation for parity democracy; see Rodriguez Ruiz and Rubio-Marin (n 10) 301-302.

15 Dahl (n 2) 79-105.

16 Barbara M Oomen, Joost Guijt and Matthias Ploeg (2010), 'CEDAW, the Bible and the State of the Netherlands: the Struggle over Orthodox Women's Political Participation and their Responses', *Utrecht Law Review* 6 (2010) 158-174.

#### IV. The ECtHR's decision and its case law

In this section, we will evaluate the ECtHR's decision concerning the SGP, with the help of its earlier case law. We begin with some remarks about the admissibility criteria. Subsequently, as the SGP's complaint was deemed 'manifestly ill-founded', we examine the general democratic principles the Court usually takes as its starting point. Finally, in the light of these, it is assessed as to what extent the Court's case law indeed unambiguously points towards dismissing the complaint. Imagining how the Court might have ruled instead, the actual test is applied: whether or not the Dutch Supreme Court's judgment can be considered necessary in a democratic society.

##### A. *Admissibility*

As we have said, the Court judged the complaint to be inadmissible because of it being manifestly ill-founded. However, Article 35 of the European Convention on Human Rights (ECHR) contains one more admissibility criterion that deserves attention here, namely the stipulation that the petitioner needs to be a *victim* of the alleged violation.<sup>17</sup> Concerning the SGP, there is a judgment that obliges the Dutch government to take measures against the party, although no actual damage had been done yet at the time of the admissibility decision. The Court briefly expresses its doubts concerning the SGP being a victim, but does not elaborate on it<sup>18</sup>. We think, however, that this criterion, on a closer inspection, should not be regarded as an obstacle in this particular case.

The reason for this is that, under the circumstances, the establishment of a violation is also possible when such damage is absent.<sup>19</sup> When general rules are at stake that have not (yet) been applied to the petitioner, the Court only accepts the petitioner's claim to be a victim when it is demonstrated that she/he is directly affected by the rule and 'differently from any other citizen'.<sup>20</sup> It needs to be proved that the petitioner runs a real risk of being directly struck by the rule and that the mere existence of the rule violates the petitioner's rights.<sup>21</sup> It seems obvious that the SGP can expect restrictive measures that will affect the party directly and which are meant to correct its individual practises as a party. True, as the Court also observes, the Dutch government had decided to refrain from action until the ECtHR would give its judgment. However, this adjournment depended on the SGP's appeal at the ECtHR, so it would seem rather circular and inappropriate to reason that therefore the SGP was not a victim.

##### B. *ECtHR on democracy*

How does the ECtHR regard democracy, according to its case law? Does it tend to adhere to a thicker or a rather thin conception of democracy? In the case of the *United Communist Party v Turkey* (1998), the Court established an indissoluble link between democracy and a diversity of political parties that enjoy the freedoms of association, religion, and expression. The following paragraphs from this judgment provide a clear overview of the Court's view on the essential characteristics of a democracy:

43. (...) As the Court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (...). The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.

44. In the *Informationsverein Lentia and Others v. Austria* judgment the Court described the State as the ultimate guarantor of the principle of pluralism (see the judgment of 24 November 1993, Series A no. 276, p. 16, §38). In the political sphere that responsibility means that the State is under the obligation, among others, to hold, in accordance with Article 3 of Protocol No. 1, free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion

17 cf the first question asked of the parties by the Court in its statement of facts and questions regarding App no 58369/10 (Third Section), *Staatkundig Gereformeerde Partij v. the Netherlands*, lodged on 6 October 2010.

18 SGP (n 1) para 67.

19 J VandeLanotte and Y Haeck, *Handboek EVRM* (Antwerpen/Oxford: Intersentia, Part 1, 2005), ch 9, 507.

20 T Zwart, *The Admissibility of Human Rights Petitions. The Case Law of the European Commission of Human Rights and the Human Rights Committee* (Leiden: Martinus Nijhoff Publishers, 1994) 58.

21 Vande Lanotte and Haeck (n 19) 510–512.

to be found within a country's population. By relaying this range of opinion, not only within political institutions but also—with the help of the media—at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society (...).<sup>22</sup>

In an earlier, classic judgment, the Court had already stated that without 'pluralism, tolerance and broadmindedness (...) there can be no democratic society'.<sup>23</sup> Furthermore, the Court attaches much weight to political parties' freedom of association, also because of the 'essential' or 'primordial' role of political parties within a democracy.<sup>24</sup> Nevertheless, this does not mean that diversity is completely unlimited: a democracy does not have to allow parties that threaten the plural democracy itself and want to replace it. In those cases, it can even be necessary, according to the ECtHR, to dissolve a party.<sup>25</sup>

Considering these statements on democracy in general, which emphasise that pluralism and the freedoms of religion, expression, and association are essential to a democracy, it can be established that the Court adheres to a substantial conception of democracy,<sup>26</sup> which we found to be the basic paradigm of the Dutch Council of State's judgment. In its judgment in the case *Republican Party of Russia v Russia* (2011), the Court even explicitly rejects the majoritarian conception of democracy:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.<sup>27</sup>

In this context, it can be added that religious and philosophical diversity is considered particularly important to pluralism within democracy:

As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>28</sup>

According to Alison Stuart,<sup>29</sup> the ECtHR considers it a very important function of Article 9 of the ECHR to safeguard precisely the religious communities' internal autonomy against state involvement. She quotes the Court's judgment in *Hasan and Chaush v Bulgaria*, in which it states:

Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.<sup>30</sup>

The ECtHR regards the limits to the state's discretion in restricting political parties' freedom of association as so important that it grants to the Member States only a very limited margin of appreciation to assess whether a restriction is justified by a

22 United Communist Party of Turkey *ao v Turkey* Case no 133/1996/752/951 (Grand Chamber) (ECtHR 30 January 1998), paras 43–44.

23 *Handyside v the United Kingdom* Case no 5493/72 (ECtHR 7 December 1976), para 49.

24 Case nos 41340/98, 41342/98, 41343/98 and 41344/98 (Grand Chamber) (ECtHR 13 February 2003) *Refah Partisi (The Welfare Party)*, para 87; *United Communist Party of Turkey*, para 25.

25 *Refah Partisi (The Welfare Party)* (n 24), para 99.

26 Hans-Martien ten Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance', *European Constitutional Law Review* 5 (2009) 464–480, 465–467ffs; Jure Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives', *Leiden Journal of International Law* 23 (2010) 209–240, 223–231ffs.

27 *Republican Party of Russia v Russia* Case no 12976/07 (ECtHR 12 April 2011), para 114.

28 *Refah Partisi (The Welfare Party)* (n 24), para 90. The formula occurs in many other judgments, beginning with *Kokkinakis v Greece* Case no 14307/88 (ECtHR 25 May 1993), para 31. Also see, for example, *Leyla Şahin v Turkey* Case no 44774/98 (Grand Chamber) (ECtHR 10 November 2005), para 104; *Moscow Branch of the Salvation Army v Russia* Case no 72881/01 (ECtHR 5 October 2006), para 57.

29 Alison Stuart, 'Freedom of Religion and Gender Equality: Inclusive or Exclusive?', *Human Rights Law Review* 10 (2010) 429–459.

30 *Hasan and Chaush v Bulgaria* Case no 30985/96 (ECtHR 26 October 2000), para 62.

necessity to take measures. The Court applies strict scrutiny to the justifiability of such restrictions because they are in need of ‘rigorous European supervision’.<sup>31</sup>

On the other hand, these principles do not always work out in practice the way one would expect on the basis of the Court’s theoretical expositions. Despite the increasing number of complaints concerning violations of Article 3 of the First Protocol on the right to free elections, for example, the requirements of this provision that have to be complied with are still rather thin in light of the inclusive democracy conception to which the Court adheres.<sup>32</sup>

In summary, in the Court’s vision of democracy, freedom rights are emphasised to prevent the state from hampering the free development of ideas and philosophies of life, and these rights are therefore indispensable elements of a democracy. In this respect, the Court’s conception of democracy quite resembles that of the Dutch Council of State, which suggests that the SGP decision is at odds with the ECHR’s earlier case law, as far as it concerns its stance on democracy. Given the Court’s practice, the outcome in this case is less surprising, however. This becomes even clearer when looking at the concrete steps that the Court would have to take before reaching a conclusion.

### C. *Assessing the SGP’s complaint*

In the SGP case, freedom of association seems to be the main issue, and we therefore concentrate on Article 11 of the ECHR which protects that freedom. In earlier cases concerning state measures against political parties, the Court did the same, although it interpreted the Article partly in the light of Article 9, protecting the freedom of religion and belief, and Article 10, regarding freedom of expression. This seems important in a case such as this where all of these rights are at stake, because in this way, these rights together can achieve more than when they are considered individually.<sup>33</sup> Article 11 reads as follows:

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.

To establish whether an infringement of this freedom constitutes a violation of the Convention, the Court first verifies whether the state measure is prescribed by law, i.e. the applicant should have had the opportunity to read somewhere (in statutes, case law, or otherwise) that the state could take this measure. Second, the aim of the disputed measure has to be legitimate, in that it must be one of those summarised in the article. Finally, and most importantly, the infringement must be necessary in a democratic society, in the sense that it meets a ‘pressing social need’ and is proportionate to the aim pursued.

#### 1. Is the state measure prescribed by law?

The complaint against the SGP itself is based on a court ruling that refers to the United Nations Women’s Treaty, among other authorities, and this constitutes the legal basis of measures restricting the party’s freedom of association. The Dutch state therefore would not have had to anticipate many problems demonstrating that the restriction is prescribed by law.

#### 2. Is the aim of the disputed measure legitimate?

In the SGP case, as in most cases, little attention would likely be paid to the criterion of legitimate aim. It is clear that the Dutch state could have suggested ‘protection of the rights and freedoms of others’ as its aim in restricting the SGP’s freedom. In its actual decision, the Court ‘assumes’ that there is an interference in the SGP’s rights, and that this interference is prescribed by law and serves a legitimate aim<sup>34</sup>.

31 See, for example, *Freedom and Democracy Party (Özdeğ) v Turkey* Case no 23885/94 (ECtHR 8 December 1999), para 44.

32 *Ten Napel* (n 24).

33 M.J. Busstra (2008), ‘De afweging gewogen. Een analyse van twee tegenstrijdige uitspraken ten aanzien van de SGP en het vrouwenkiesrecht’, *Rechtsgeleerd Magazijn Themis* 6 (2008) 235-242.

34 *SGP* (n 1), para 68.

### 3. Is the infringement necessary in a democratic society?

This step is crucial and simultaneously the most difficult one. In the past, there have been a number of ECtHR judgments about political parties, especially concerning parties that were dissolved by the Turkish Constitutional Court. Virtually all of those party bans were declared to be violations of Article 11 of the ECHR. However, the *Refah Partisi* (Welfare Party), among others, underwent another fate: this party could be forbidden, according to the Court, because its ideas and practices were held to be incompatible with democratic values.<sup>35</sup>

That the Court in the *Refah* case upheld the dissolution of the party should be observed in light of the specific Turkish background. The Court accepted the reasoning of the Turkish government that they needed to take effective measures to preserve the secular character of the state which is threatened by parties that do not respect all human rights.<sup>36</sup> Whatever the merits of this approach, we can derive from it that the Court takes the national tradition and specific background of the Member State into account.<sup>37</sup> As for the Dutch background, it was argued above that the Netherlands has a long and deep-rooted tradition of tolerance of minority ideas and values giving space for ideological pluralism among participating political parties. Furthermore, the Dutch situation entails a stable and relatively unthreatened multiparty democracy, in which the SGP has participated for nearly a century.

In light of the principles set out in section 4.2 that emphasise the need to facilitate diversity in a democracy, it is not surprising that, in cases concerning state measures against political parties, the Court ruled that only ‘convincing and compelling reasons’ can justify restrictions on political parties’ freedom of association.<sup>38</sup> Parties must have the opportunity to advocate proposals that do not comply with the state’s constitution, as long as (1) they only use legal and democratic means to attain their goals, and (2) their intentions are compatible with fundamental democratic principles.<sup>39</sup>

With a view to interpreting these criteria in order to apply them in the SGP case, the *Refah* case can serve as an example of when the Court considers that the criteria has not been met. Beginning with the first one: the Court held that certain *Refah* leaders incited recourse to violence, and judged therefore that the party’s means were not entirely legal and democratic. In the SGP case however, it has never been in dispute that its means are legal and democratic.

As for the compatibility of a party’s intentions with fundamental democratic principles, the Court identified two main elements of the *Refah*’s programme, namely the plea for legal pluralism and for an order based on Sharia. Within the limits of this article we cannot evaluate to what extent these aims are incompatible with the Convention principles. Suffice it to say that the Court ruled them to be non-compliant – not just on a few marginal points, but in general, regarding *inter alia* the state’s role in protecting basic citizen’s rights.

In the SGP case, however, only one element of the party’s ideology was at stake, raising the question whether or not this was ‘compatible with fundamental democratic principles. Before evaluating the SGP case as a whole (by comparing it with the *Refah* case), we will first deal with this question.

With respect to gender equality *in politicis*, the Court had not developed any case law on this question before. As the Court emphasises at some length in the decision, in its case law on gender equality it has ruled that only ‘very weighty reasons’ could justify differentiation on the basis of sex. In the majority of those cases, the unequal treatment was found to constitute a violation of Article 14. However, it must be borne in mind that the cases the Court refers to, concerned discrimination in the fields of social security, family name or immigration; none of them was about political rights. Furthermore, in the SGP case the equality principle collides with other fundamental rights, so that the outcome in this case cannot easily be deduced from the Court’s general case law on gender equality.

According to one observer Loenen, the ECtHR in general considers gender equality as more important than the so-called

35 Yusuf Sevki Hakyemez and Birol Akgun, ‘Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights’, *Mediterranean Politics* 7 (2002) 54-78; Olgan Akbulut, ‘Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties’, *Fordham International Law Journal* 34 (2010) 46-77.

36 *Refah Partisi* (The Welfare Party) (n 24), paras 124–125.

37 See also *Otto Preminger Institut v Austria* Case no 13470/87 (ECtHR 20 September 1994).

38 See, for example, *Socialist Party ao v Turkey* Case no 20/1997/804/1007 (ECtHR 25 May 1998), para 50; *Refah Partisi* (The Welfare Party) (n 24), para 100.

39 See, among others, *Socialist Party ao* (n 38), para 46; *Refah Partisi* (The Welfare Party) (n 24), para 98.

'freedom of ...' rights.<sup>40</sup> She derives this mainly from cases concerning the Islamic veil, such as *Dahlab v Switzerland* (2001)<sup>41</sup> and *Leyla Şahin*, in which the Court upheld headscarf bans as legitimate restrictions of the applicants' freedom of religion, *inter alia*, on the grounds that such bans promoted gender equality. However, it seems questionable whether this can be generalised, as those cases concerned individuals whose freedom to manifest their belief was restricted, while the SGP case is about a religious association whose autonomy is hampered by the state.<sup>42</sup> Furthermore, the SGP is a political party, making the case substantially different. Another indication Loenen brings to the fore is the judgment in *Refah Partisi (The Welfare Party)*, where the Court referred, *inter alia*, to the position of women in Sharia law to explain why the party's ideas were incompatible with the freedoms enshrined in the European Convention. It is clear, however, that in the *Refah* case many more factors were at play.

Given the fact that directly relevant case law is missing on the subject, it seems appropriate to look at the work of other organs within the Council of Europe. The ECtHR usually looks carefully at the policy documents and guidelines of the Council of Europe.<sup>43</sup> Perhaps most relevant in this context is the Venice Commission, which published its 'Guidelines on Political Party Regulation' in 2010. In those guidelines, the importance of improving women's participation in politics is frequently stressed. Gender quotas are considered justified with respect to the candidature lists.<sup>44</sup> '[S]tates may legislate particular requirements or impose other measures aimed at ensuring women's equal participation in political life and as candidates. Quotas are one such measure that may be adopted by states.'<sup>45</sup>

The Assembly, the Secretariat and the Committee of Ministers within the Council have also had women's rights high on their agendas regularly. An example of this is the creation of an ad hoc Committee for Gender Equality in 1979 that became permanent in 1987. Committees such as this one promoted, for example, gender quotas with respect to election candidature lists.<sup>46</sup> The Parliamentary Assembly in 2010 issued a recommendation, encouraging the States Parties 'to take the necessary measures in order to increase women's representation in politics'. Possible means included the adoption of mandatory quotas, combined with sanctions in case of non-compliance (for example, non-acceptance of the candidate lists).<sup>47</sup>

Considering these publications and activities from the Council of Europe, it can hardly come as a surprise that the ECtHR in the SGP decision attaches so much weight to gender equality. Nevertheless, the Court also could have found exhortations in these and other documents to protect the classical freedoms that the SGP invoked. For instance, the Venice Commission also refers to the importance of pluralism.<sup>48</sup> The Commission ties the dissolution of political parties to strict conditions (i.e., only when the party uses violence or its means contravene fundamental democratic principles).<sup>49</sup> However, for less pervasive measures, such as denying ballot access, the criteria to be met are not so stringent.<sup>50</sup> Interestingly, the Commission does not speak of the situation wherein the principles of female political participation and pluralism conflict. In short, the Council of Europe documents contain important indications that gender equality in politics is a fundamental democratic principle, but they fail to provide a key for resolving situations as in the SGP case.

To return to the evaluation of the SGP decision: the ECtHR's determination that gender equality is an important democratic principle in this case does not come as a surprise. Yet, as we have seen, in the *Refah's* programme many more elements (including the central tenets of state powers) were considered to be incompatible with fundamental democratic principles. It is therefore less than obvious that, in the light of the *Refah* judgment, also state measures against the SGP had to be regarded as justified.

40 T Loenen, *Gelijkheid als juridisch beginsel* (Den Haag: Boom Juridische uitgevers, 2009) 91–92.

41 *Dahlab v. Switzerland* Case no 42393/98 (ECtHR 15 January 2001).

42 This is significant because the ECtHR, according to Stuart (n. 26), is more likely to establish a violation of the freedom of religion when it concerns collective entities than when individuals are applying.

43 See, for example, the case of *Republican Party of Russia v Russia*, ECtHR 12 April 2011, paras 57–64, which extensively quotes reports by the Venice Commission.

44 Venice Commission (2010), *Guidelines on Political Party Regulation* by OSCE/ODIHR and Venice Commission (Strasbourg: CDL-AD 024, 2010), particularly pp 22, 25, 30. See also Venice Commission, *Report on the Impact of Electoral Systems on Women's Representation in Politics*.

45 Venice Commission, *Guidelines on Political Party Regulation*, p 30, paras 132–133.

46 Jill Lovecy, 'Gender Mainstreaming and the Framing of Women's Rights in Europe: The Contribution of the Council of Europe', *Feminist Legal Studies* 10 (2002) 271–283.

47 Parliamentary Assembly of the Council of Europe, *Recommendation 1899* (2010), 'Increasing women's representation in politics through the electoral system'. See also the Reply from the Committee of Ministers, doc 12367.

48 Venice Commission, *Guidelines on Political Party Regulation*, 18. The importance of guaranteeing pluralism and diversity is also stressed on many other pages, such as pp 24 and 29.

49 This is obviously derived from ECtHR case law.

50 Venice Commission, *Guidelines on Political Party Regulation*, 23–24.

An important point of consideration is of course the intrusiveness of the measure. As Loenen has argued,<sup>51</sup> the Council of State in referring to the case of *Refah (The Welfare Party)* did not take into account that the case concerned a party ban, which is not at stake in the SGP case. She pointed, in this context, to the *Sobaci* case,<sup>52</sup> in which the ECtHR suggested that less intrusive measures against political parties could be upheld more easily. Concerning the SGP, the Supreme Court required the measures to be effective, yet as unintrusive as possible. Furthermore, as we have seen, measures like gender quotas are recommended by the Council of Europe, which makes it conceivable that the ECtHR did not regard such measures as very intrusive. In any case, it did not pay attention to the SGP's interests in the decisive paragraphs<sup>53</sup>.

Nevertheless, the Court could have borne in mind that, in the Dutch context, such measures are generally conceived as relatively restrictive and as an interference. Furthermore, compared to the *Refah* case, it can hardly be held that there was a 'pressing social need', in the sense of an imminent threat to democratic principles. In the *Refah* judgment, the Court emphasised that the party's influence was already significant, and that it was still growing – possibly up to 35% of the parliamentary seats. The SGP case shows nothing even near such an imminent threat: it concerns a small party with a stable number of two or three out of 150 seats in parliament, which has adhered to its viewpoint for almost a century, and does not show any inclination to radicalise. (It is rather the society around the SGP which has changed its mind.)

Moreover, the ECtHR might have considered that for the SGP a religiously based principle is at stake, which makes it relatively disturbing for the party to be subjected to such measures. The significance one attaches to this point depends on one's view on religious freedom. Some conceive of religious freedom as primarily the liberty to practise one's religion within the boundaries of the law that is issued on neutral or secular grounds. From this point of view the fact that the SGP's practice is based on its religious principles is hardly relevant – the way the ECtHR and the Dutch Supreme Court have dealt with the case. It is also possible, however, to conceive of religious freedom primarily as an obstacle to creating laws that would deprive people of the possibility of practising their religious beliefs. Concerning the SGP, if the latter conception of religious freedom is emphasised more attention must be paid to the question of whether or not gender equality outweighs the party's freedom of association and freedom of religion.

From the latter perspective, it would seem inappropriate for the ECtHR not to pay substantive attention to the party's practise being based on religion, even when taking into account the fact that an admissibility decision's motivation must be kept brief. In its case law on religious freedom, the Court usually treats it as a right that can only be restricted by law for compelling reasons.<sup>54</sup> Especially in cases concerning the freedom of churches and like communities to organise themselves according to religious principles, there has traditionally been protection afforded by the Court against state interference, even when the state's aim was to advance individual rights within those communities.<sup>55</sup> Against this background, it would have been normal for the Court to at least pay attention to the SGP's rights to freedom of association and freedom of religion.

The impression must be that faith-based organisations that operate in the (semi-)public sphere might well enjoy less freedom to organise themselves than private organisations. Although understandable up to a point, one can nevertheless wonder whether this constitutes a potential threat to democracy, which after all requires ample possibilities for all kinds of different voices from civil society to be heard – or to use the Court's own words: which requires 'pluralism, tolerance and broadmindedness'.

## V. Concluding Remarks

The question of whether the ECtHR has remained faithful to its self-proclaimed conception of democracy is indeed a pressing one. The admissibility decision in the SGP case shows more concern for the procedural requirement of equal standing for every individual, than for the substantive principle that all kinds of different voices from civil society should be heard. Especially given the Court's case law and the policies within the Council of Europe in this field, the emphasis on gender equality in the decision did not come unexpectedly. However, given its earlier defence of broad freedoms for political parties, it does come as a surprise that in this particular case the pending restrictions for the SGP were so easily justified.

51 T Loenen, 'De SGP-discussie re-visited', *Nederlands Juristenblad* 85: 2269-2274.

52 *Sobaci v Turkey* App no 26733/02 (only in French) (ECtHR 29 November 2007), para 34.

53 SGP (n 1), paras 68-79.

54 See for example, *Thlimmenos v Greece* Case no 34369/97 (ECtHR 6 April 2000).

55 See for example, *Hasan and Chaush v Bulgaria* Case no 30985/96 (ECtHR 26 October 2000); *Knudsen v Norway* Case no 11045/84 (ECtHR 8 March 1985); *Metropolitan Church of Bessarabia v Moldova* Case no 45701/99 (ECtHR 13 December 2001); *Siebenhaar v Germany* Case no 18136/02 (ECtHR 3 February 2011); *Obst v Germany* Case no 425/03 (ECtHR 23 September 2010); *Schüth v Germany* Case no 1620/03 (ECtHR 23 September 2010); *Fernandez-Martinez v Spain* Case no 56030/07 (ECtHR 15 May 2012).

Equally surprising is the lack of attention paid in the decision to the party's freedom of association and freedom of religion.

Generally speaking, a light version of the substantial democracy conception is to be preferred over a proceduralist conception. The difference, as we have seen, is not so much that one conception of democracy or the other makes more moral choices. Rather, as we can learn from the SGP case, in a light version of the substantial democracy conception, a broader range of constitutional values is taken into account, whereas in a proceduralist conception, often one or two specific principles are singled out. From that perspective, a light version of the substantial democracy conception better guarantees the freedom and paradoxically the autonomy of both citizens and their associations. Therefore, it seems more suitable for a proper constitutional democracy.

Party regulation does not need to remain a taboo topic forever, even in the Netherlands, although with the SGP having recently changed its own constitution it may take a while until further provisions will be introduced. Care should be taken, however, that it does not lead to unnecessary infringements on the constitutional freedoms of minorities such as the SGP and its followers. After all, what is the point in pursuing non-discriminatory policies that are themselves discriminatory?<sup>56</sup> ■

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56 cf Jonathan Turley, 'When it Comes to Religious Groups, Who's Really Facing Discrimination?', The Washington Post, April 18, 2010.