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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# COMMENTS
# ON THE CONSTITUTIONAL AND LEGAL PROVISIONS RELEVANT FOR THE PROHIBITION OF POLITICAL PARTIES IN TURKEY

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## 1. Introduction

The Venice Commission received a request from the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) on 15th September 2008 asking it “to review the constitutional and legal provisions which are relevant for the prohibition of political parties in Turkey”.

I understand the task to be to review and assess whether the rules in the Turkish Constitution and legislation on prohibition and dissolution of political parties are in line with European democratic and constitutional standards.

The general background for the request is the fact that in Turkey an unusually high number of political parties have been prohibited over the years, which is problematic from a democratic point of view. The actual background is the process against the ruling AK Party, which was initiated on 14 March 2008 and ended with the 30 July 2008 decision of the Constitutional Court, and which during this period led to great controversy and instability in Turkey. Although the AK Party was not dissolved, the case still demonstrates the problematic aspects of the relevant rules in the Turkish constitution. Ten out of the 11 judges found the AK Party to have been a “centre” for anti-secular activities prohibited under article 68 (4) of the Constitution, and sanctioned the party by withdrawing half of its public financial support. Furthermore a majority of 6 judges voted for dissolving the party – falling just one vote short of the necessary qualified majority of 7.

When announcing the judgment, the chairman of the Court, Hasim Kilic, stated that the case demonstrated the need for a constitutional amendment changing the rules in order to make it more difficult to bring party closure cases before the Court.[1] The same point was made by a number of European observers, including members of the EU-Turkey delegation in the European Parliament.

This is in line with the position taken before the judgment by the Parliamentary Assembly of the Council of Europe (PACE), which in a Resolution passed on 26 June 2008 stated that:

*14. The current proceedings against the AK Party, regardless of their outcome, spark a renewed debate about the legal basis for the closure of political parties in the country and show that, despite the above-mentioned reforms, the issue of dissolution of political parties in Turkey is not closed. The Assembly notes that it becomes clear that further constitutional and legislative reforms in this respect are necessary.*[2]

In the “Turkey 2008 Progress Report” presented by the Commission of the European Communities on 5th November 2008 it is stated that:

*As regards political parties, the closure cases against the AKP and the DTP (see section on Parliament) illustrate that the current legal provisions applicable to political parties do not provide political actors with an adequate level of protection from the state's interference in their freedom of association and freedom of expression. (p. 18)*

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[1] According to Zaman (31 July 2008) Kilic started his announcement by criticizing Turkey’s politicians for not having made passed regulation making it more difficult to open closure cases, and called on them to make the necessary legal changes to avoid a similar crisis in the future. See also Turkish Daily News (30 July) and EurActiv (31 July).

[2] Cf PACE Resolution 1622 (2008) on ”The functioning of democratic institutions in Turkey: recent developments”, based on a report by Mr Luc van den Brande of 24th June 2008 (doc. 11660), see http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1622.htm, and http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11660.pdf. The PACE resolution goes on to state that a review of the rules on party closure should be done as part of a general constitutional reform in Turkey, a process which should be conducted in cooperation with the Venice Commission.

*In the light of this case, the legal provisions on political parties need to be amended and brought into line with the case law of the ECtHR and best practice in EU Member States, as outlined by the Council of Europe's Venice Commission. (p. 70)*

I propose that our report should cover the following elements:

1. An overview of "European standards" for regulating prohibition and dissolution of political parties – both legal minimum standards and "best practice"
2. A general analysis of the present regulation of prohibition and dissolution of political parties in the Turkish constitution and legislation
3. An evaluation of whether reform of the Turkish rules is necessary in order to comply with European standards
4. A preliminary sketch of possible alternatives and models for such reform

The following comments are made according to this outline.

## 2. <u>European standards for protection of political parties against prohibition and dissolution</u>

### *2.1. Introduction*

In order to assess the Turkish rules and practice on prohibition and dissolution of political parties against "European standards", it is necessary first to analyse to what extent such standards exist in this field, and what they consist of.

A basic distinction should be drawn between (i) standards for "best practice" ("model" regulation) on how to regulate party closure, and (ii) legal minimum standards of protection which must be given to political parties in any country.

The first is a matter of comparing national rules on the subject in order to identify whether there is a common model, or if not to identify different alternative models which might serve as inspiration for national reform, for example in Turkey. The second is a question of what legal standards of protection can be derived from common legal obligations (in particular the ECHR) and from a common European democratic and constitutional heritage.

The first answers the question of whether and how the national provisions *should* be reformed, the second whether they *must* be reformed in order to comply with international legal obligations. The first is the more comprehensive approach, the second a minimum approach. But both can be addressed in our report, as I think they should, and both are commented upon in the following.

The main picture may be summarized in three points:

- There is no common "European model" on how to best regulate prohibition and dissolution of political parties. Rather there is great diversity in national constitutional regulation, ranging from no such rules at all to rather detailed and seemingly quite restrictive provisions.
- There is however, on closer analysis, a clear "European model" on how this is done in practice. It is simply not done. Even in countries with extensive provisions on party closure, these are strictly interpreted and not applied in practice. The few exemptions to this only confirm the main model.
- There are common legal standards on how far political parties must be protected against illegitimate prohibition and dissolution, in particular based on Article 11 of the ECHR. There is also relevant "soft law". The main core of these requirements is clear, but the exact reach is perhaps open to some interpretation. Furthermore, these are only

minimum standards. Each state is free to offer better protection to its political parties, and most do.

### *2.2. National rules on prohibition and dissolution of political parties – a comparative overview*

*2.1.1 A general comparative overview of national regulation on party closure*

In 1998 the Venice Commission undertook an extensive comparative review on "Prohibition of political parties and analogous measures" at the request of the General Secretary of the Council of Europe. Responses were received from Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Slovenia, Sweden, Switzerland, Turkey, Ukraine, and Uruguay.

On this basis the Venice Commission drew up a report that was adopted at the 35$^{th}$ plenary meeting on 12-13 June 1998, which categorizes and analyses national rules on the prohibition of political parties.

The rapporteurs have also received from the secretariat the draft for an updated overview of comparative material on party prohibition, titled "Constitutional dispositions concerning the general arrangements of political parties and the possible reasons of unconstitutionality". The updated material confirm the conclusions made in the 1998 Venice Commission report, which still stands as a concise summary on national legislation in this field:

***Conclusion***

*The diversity of the legal provisions governing party activities in the countries which answered the questionnaire makes it difficult to define a European standard. A number of common features do stand out, however:*

*a. Party activities everywhere are guaranteed by the principle of freedom of association.*

*b. The fact that certain measures are lacking in many, if not most, of the states concerned leads us to conclude that they are not essential to the smooth functioning of democracy. Examples include:*
*- registration of political parties: no registration is required, even as a formality; this does not mean, however, that candidates for elective office do not have to meet certain formal requirements;*
*- sanctions, including prohibition and dissolution, against political parties which fail to abide by certain rules. This does not, of course, preclude the punishment of criminal behaviour by individuals in the context of political activities.*

*c. Even in those states, which do provide for sanctions against political parties, there is still considerable diversity. The same situations are not sanctioned in the same way or with the same severity in the different states.*

*d. The fact that it is so difficult – perhaps even impossible – to define behaviors which would generally warrant such serious sanctions as the prohibition or dissolution of a political party highlights the need to apply the principle of proportionality when enforcing legislation restricting freedom of association.*

*The way in which the often vast legal arsenal governing the activities of political parties is actually applied in practice reflects a genuine determination to respect this principle. There are very few democratic states in which the sanctions covered by the*

*questionnaire have actually been imposed on political parties in the recent past other than for formal reasons.*

*With the exception of restrictions of form, particularly those designed to avoid confusion between party names, measures designed to prevent the activities of political parties – which do not exist at all in certain states and are reserved in others to wartime situations – should be permitted only in exceptional circumstances. The extreme restraint shown by the vast majority of national authorities confirms this.*

e. *Finally, a recurrent feature in the national legislations studied was the guarantee of being heard by an independent and impartial judicial authority or tribunal. This is a clear sign of concern to keep something as politically important as the fate of political parties out of the control of the executive or administrative authorities, whose impartiality is often open to doubt.*

These conclusions still apply as a precise description of the "European tradition", and they form a good basis for assessing the rules on party closure in Turkey.

The first main message is that as regards the legal (formal) regulation on party closure there is no common model, but rather "considerable diversity" – reflecting different constitutional traditions, differences in history, context, and etcetera. A number of states have no rules on party closure at all, and manage very well without. Those states that do have rules on prohibitions and dissolution of parties have regulated this very differently – both in form, procedure and substance. While the legal (formal) threshold for prohibition in the great majority of states is very high, there are also states in which the relevant provisions on paper are vaguer and more open, leaving a seemingly greater discretionary room for application.

The second main message, however, is that in actual practice there is a clear common European tradition ("model"). There is a clear common democratic legacy, which is that political parties are *not* prohibited and dissolved on the basis of their opinions. In other words, even in states with seemingly wide rules on party closure there is "extreme restraint" in how these rules are applied. The actual threshold for actually applying (or even invoking) these rules is extremely high. The very few examples to the contrary only serve to confirm this common legacy.

This practice demonstrates a clear common European approach to the classic "liberal dilemma" of how a democracy should respond to those forces that threaten it – by way of open debate and through democratic channels. There is a common tradition for allowing parties which advocate fundamental changes in the form of government, or which advocate opinions that the majority finds unacceptable. Political opinions are not censored by way of prohibition and dissolution, and as regards illegal activities (by party members) these are sufficiently sanctioned through the ordinary criminal law system.

This tradition is basically the same in all European states, whether they have formal rules on party closure or not, and regardless of how these are formulated. And it also applies in practice to those constitutional systems which formally adhere to a principle of "militant democracy", such as for example the German one, which on closer analysis is not so "militant" but rather quite liberal and tolerant.

As a general rule, there is clearly a connection to the level of democratic maturity and stability of the national political system (regardless of constitutional variations). The more mature and stable a democratic system, the less need to even consider the issue of party closure.

As pointed out by the Venice Commission in its 1998 report there is really no need at all for specific constitutional rules on party closure. A number of states manage well without. In those states which have such provisions this is usually the result of historical factors – but even there the provisions are hardly ever invoked. Even in those cases where the constitution formally

provides for relatively wide rules on party dissolution then this is normally not seen as part of the operative and “living” constitution, but rather as a passive safety valve, which might serve a function by its existence, but which is rarely if ever actually invoked.

This in my opinion is the single most important factor when assessing the institute of party closure in the Turkish constitution and statutory law.

*2.1.2 Comparative overview of possible criteria for prohibition and dissolution of political parties*

The “considerable diversity” of national regulations on party closure is reflected in the formulation of material requirements that political parties have to abide with, and which might be invoked as criteria for prohibition and dissolution. Based on the 1998 Venice Commission report and new supplementary material, various national requirements for political parties include bans against:

- threatening the existence or sovereignty of the state
- threatening the basic democratic order
- threatening the territorial integrity of the state
- fostering social, ethnic, or religious hatred
- fostering ethnic discrimination
- use or threat of violence
- nazism or fascism
- criminal associations
- military or paramilitary associations
- secret or subversive methods

The list is not exhaustive, but illustrates the variation in material regulation even among those states which do have such provisions. The basic requirements are usually set out in the national constitution, but this can sometimes be supplemented (and extended) in statutory law. It appears that the variations to a considerable extent can be explained by different historical experiences.

It should be emphasized that no European constitutional system includes all these restrictions. Most national provisions are rather short, with just one or two. Others have several, but not all. It can be argued that although many of these restrictions in themselves are acceptable as part of a democratic system – they are still not acceptable if too many are bundled together, going beyond a “critical mass”.

As pointed out in the comments by Carlos Closa Montero, a useful distinction can be drawn depending on whether the national restrictions refer to means (activities) or ends (objectives). Only very few states prohibit party objectives and opinions as such, on a purely ideological basis, and there seems to be no example that this has actually been invoked to dissolve a party. It is more common that the national restrictions refer to illegal means, such as the use of violence. But the most common model in those countries that have rules on party prohibition is that this explicitly requires *both* unlawful means (activities) and illegitimate ends (objectives).

This also seems to have been the basis in those very few and scattered cases in which political parties have actually been prohibited in Europe, which have been marginal and extremist parties, inter alia in Germany in the 1950s and lately in Spain. In Germany, for example, the Constitutional Court (BVerfG) has stated that the basis for prohibiting a party must go beyond its anti-democratic opinions so as to also require the showing (with a high standard of proof) of a fixed purpose to combat the basic democratic order constantly and resolutely manifested in political action according to a fixed plan (cf. BVerfGE 5, 85, 141).

When assessing different national restrictions there are several challenges familiar to comparative constitutional law. First, it is difficult to compare national constitutional texts without going into national legal interpretation, and the political and legal context. Second, it varies to what extent these requirements are actually "hard law", which might be invoked before the courts as criteria for prohibiting a party. In some countries the party requirements are not even connected to procedures for actual application, and thus serve more as political statements. In others, application is in theory formally possible, but the procedural hurdles so high as to make this almost impossible. In others again, the material requirements may not seem so strict at first glance, but are in fact quite operative in character, thus setting much stricter actual limits on political life.

The number and content of the material restrictions stated in any given constitutional system therefore do not necessarily indicate the legal and actual threshold for prohibition of parties. Still it might be held that the more formal restrictions, and the wider their formulation, the clearer the signal that this is a legal instrument which might actually be invoked in practice.

The most striking feature of the Turkish rules on party closure is that they combine a comparatively very long list of material restrictions with a very low procedural threshold. Furthermore, prohibition can be based both on unlawful activities and on ideological opinions as such. This, together with the national political and historical context, is probably the reason why this institute has been so widely used.

*2.1.3 Comparative overview of possible procedures for prohibition and dissolution of political parties*

When assessing what restrictions actually apply to political parties the procedural aspect is as important as the material one. We should therefore include a brief analysis on the main differences in national procedures for initiating and deciding cases of party closure.

It is common ground that such cases must be heard and decided by impartial courts of law. In most countries with rules on party prohibition this task is entrusted to the Constitutional Court, as in Turkey. In some countries, such as Spain and Denmark, the competence is given to the Supreme Court, but with special procedures.

Most importantly from a procedural perspective is the question of which institution is given the competence to initiate a prohibition case against a political party. Unlike in ordinary criminal cases, this is very seldom entrusted solely to the prosecuting authorities. The reason is of course the political nature of such cases, and the fact that the initiation of a case in itself may have grave negative impact on the political situation in the country.

For this reason, all countries with rules on party prohibition have established special procedures for the initiation of such cases. In many countries this is purely a political decision. In Germany, for example, the competence rests with the Federal Parliament, the Federal Council or the Federal Government, while the Federal Prosecutor is *not* entitled to file an application. In other countries there are other forms of political filters, which hinder a purely "legal" approach to such cases.

In this perspective, the Turkish model of giving the public prosecutor unrestricted competence to launch cases against political parties, without any form of political filter or constraint, appears to be totally exceptional, as also pointed out in the comments by Carlos Closa Montero. There seems to be no other European countries where even from a procedural point of view (not to mention the political) it would be conceivable to initiate a closure case against a democratically elected majority party, as happened in Turkey in 2008.

*2.1.4 Conclusions – on the relevance of comparative studies*

The main conclusion to be drawn from a comparative analysis on European rules on party closure is twofold:

1. There is formally no common legal European "model" on party closure
2. There is in practice a clear common democratic European "model"

This is not a contradiction, but an interesting basis for further analysis, which is relevant when assessing the Turkish rules on party closure in light of the European democratic tradition. In particular, it is important when considering whether the Turkish rules comply not only with minimum legal standards (see below) but also with "best practice". This can be formulated in various ways, but in my view the defining element of a "best practice" would be that the general threshold for invoking and applying it is very high, both formally and in real life. This is the standard against which the Venice Commission should assess the Turkish rules.

### ***2.3. European legal standards for protection of national political parties against prohibition and dissolution***

*2.3.1 Introduction*

As a starting point, it is for the national constituent power to determine whether there should be legal restraints on political parties and what if any should be the rules on prohibition and dissolution. To the extent that there are legal limits on the nation states in this regard, then this must follow from legally binding international law, and subject to a greater or smaller national margin of appreciation.

The basic question is to what extent the national legal system is obliged to offer political parties *protection* against illegitimate prohibition and dissolution.

The common European legal standard on party protection is primarily to be deducted from Article 11 of the ECHR, as interpreted by the European Court of Human Rights (ECtHR), mainly in cases concerning Turkey. In addition, there are other relevant sources of law and legal argument which might be considered more as "soft law", or of a debatable "legal" nature, but still important, at least politically. These include:

- Resolutions and other documents by the Council of Europe and the PACE
- Guidelines and reports by the Venice Commission
- Statements made by the institutions of the EU.

Article 11 ECHR is a minimum legal standard, stating the lowest common denominator for protection of political parties, which is to be inferred from the right of freedom of association and assembly. This should *not* be confused with the question of how to *best* regulate the freedom to form and operate political parties. There is nothing to prevent a state offering its political parties better protection than Article 11, and the great majority of European democracies clearly do so.

The other relevant legal sources (PACE resolutions, Venice guidelines, etcetera) are not necessarily minimum standards, but to some extent go further. The exact line between minimum standards and "best practice" is of course not altogether clear.

*2.3.2 The European Convention on Human Rights*

The existence and activities of political parties are protected by ECHR Article 11 on freedom of association and assembly, and also Article 10 on freedom of expression. Furthermore, the European Court of Human Rights ("the Court") has stated that even more basic than the wording of Article 11 is the fact that political parties are a form of association essential to the

proper functioning of democracy, which is the only form of government compatible with the ECHR.

There is a relatively extensive case-law from the Court on party protection, with most if not all the major cases concerning Turkey. These include:

- United Communist Party v Turkey – 30 January 1998
- Socialist Party v Turkey – 25 May 1998
- Özdep v Turkey – 8 December 1999
- Yazar v Turkey – 9 April 2002
- Refah v Turkey – 13 February 2003

There are also a number of other judgments in which the Court confirms and reiterates the principles stated in the above-mentioned decisions.[3] The basic approach and general principles were laid down by the Court in the first two cases – concerning the United Communist Party and the Socialist Party. This was confirmed in the Özdep case, and developed in the Yazar case, which further strengthened party protection. In the Refah judgment of 2003 the Court referred to its earlier strict interpretation, but after careful scrutiny of the evidence found that the prohibition of the Refah (Welfare) Party was within the margin of appreciation of the Turkish courts, and therefore did not constitute an infringement of Article 11.

In his comments Pieter van Dijk has identified twelve main principles that can be deduced from the case law of the Court on Article 11:

1. Democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it; the Convention is a constitutional instrument of European public order;[4]
2. Political parties play a primordial role in a democratic state and are a form of association essential to the proper functioning of democracy;[5]
3. Political parties enjoy the right of freedom of expression and of freedom of association;[6]
4. Political parties play an important role in ensuring pluralism, which requires a close link between freedom of expression and freedom of association;[7]
5. Because freedom of expression is a vital tool for ensuring pluralism in democracy, its protection not only extends to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also, subject to the restrictions provided for in the second paragraph of Article 10, to those that offend, shock or disturb;[8]
6. Political parties may promote a change in the law or the legal or constitutional structures of the State, provided that:
   a) The means used to that end are legal and democratic, and
   b) The change proposed is itself compatible with fundamental democratic principles;[9]

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[3] These include the cases of DEP v Turkey of 10 December 2002 (25141/94), STP v Turkey of 12 November 2003 (26482/95), and EP v Turkey of 31 May 2005 (39434/98). Cases from other countries include lately the Christian Democratic People's Part v. Moldova of 14 February 2006 (28793/02), and Zhechev v. Bulgaria of 21 June 2007 (57045/00). The lists are not exhaustive.

[4] ECtHR, *Loizidou v. Turkey (Preliminary Objections*, judgment of 23 March 1995, § 75; *United Communist Party*-judgment, § 45.

[5] *United Communist Party*-judgment, § 25.

[6] *Idem*, §§ 42-43.

[7] *Idem*, § 43.

[8] ECtHR, *Handyside v. United Kingdom*, judgment of 7 December 1976, § 49.

[9] ECtHR, *Yazar and Others v. Turkey*, judgment of 9 April 2002, § 49.

7. Political parties cannot rely on provisions of the Convention in order to weaken or destroy the rights and freedoms of the Convention and thus bring about the destruction of democracy;
8. In view of the close link between the Convention and democracy, political parties may have to accept limitations of some of their freedoms in order to guarantee greater stability of the country;
9. However, where political parties are concerned, the limitations of freedom of expression and association, provided for under the second paragraph of Articles 10 and 11, respectively, are to be construed strictly, with only a limited margin of appreciation for the domestic authorities and rigorous supervision by the Court;[10]
10. In examining the justification of the dissolution of a political party on the ground of a pressing social need, the Court focuses on the following points:
    a) whether there was plausible evidence that the risk to democracy invoked as a justification, supposed it had been proved to exist, was sufficiently imminent;
    b) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and
    c) whether these acts and speeches formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a democratic society;[11]
11. In addition, the Court examines whether dissolution is a measure proportionate to the aims pursued; although democracies have the right to defend themselves against extremist parties,[12] drastic measures, such as the dissolution of a political party or barring its leaders from carrying on their political activities, may be taken only in the most serious cases;[13]
12. A political party animated by the moral values imposed by a religion, cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention, provided that the means used to that end are legal and democratic and that the change proposed is itself compatible with fundamental democratic principles.

Of particular importance is the Court's basic statement that a political party must be allowed to express opinions that require national constitutional change, as long as this does not harm democracy itself:

*In the Court's view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.*[14]

Furthermore, the Court has been clear on the criteria for interpretation and judicial review under the ECHR in cases of national party prohibition:

*Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which*

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[10] *United Communist Party*-judgment, § 46.

[11] ECtHR, *Socialist Party and Others v. Turkey*, judgment of 25 May 1998 (hereafter: *Socialist Party*-judgment), § 51.

[12] See Resolution 1308 (2002) of the Parliamentary Assembly

[13] *United Communist Party*-judgment, § 46.

[14] *Socialist Party*-judgment § 47.

*goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.*[15]

In this way, the Court has interpreted Article 11 of the Convention so as to protect political parties of all variations and to set strict limits on the possibility of the national legislator to prohibit parties, except in truly extraordinary circumstances.

Even so, it should be emphasized that Article 11, as interpreted by the Court, is still only a minimum standard for the protection of political parties. According to Article 53 nothing in the Convention prohibits the Contracting States from applying higher standards. As regards protection of political parties, almost all European countries provide even higher protection to its parties than what can be derived from the minimum legal standards of the ECHR. And the same goes for the soft law standards developed by the Parliamentary Assembly of the Council of Europe and the Venice Commission. This is not a legal conflict, but merely a consequence of the fact that the common democratic European model in this sector goes further than the minimum protection guaranteed under ECHR Article 11.

*2.3.3 The Council of Europe*

There are several occasions on which the Parliamentary Assembly of the Council of Europe (PACE) has considered what should be the correct European standard for protection of political parties against prohibition. In Resolution 1308 (2002) on “Restrictions on political parties in the Council of Europe member states” the PACE stated in para 11 that:

11. In conclusion and in the light of the foregoing, the Assembly calls on the governments of member states to comply with the following principles:

- i. political pluralism is one of the fundamental principles of every democratic regime;
- ii. restrictions on or dissolution of political parties should be regarded as exceptional measures to be applied only in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country;
- iii. as far as possible, less radical measures than dissolution should be used;
- iv. a party cannot be held responsible for the action taken by its members if such action is contrary to its statute or activities;
- v. a political party should be banned or dissolved only as a last resort, in conformity with the constitutional order of the country, and in accordance with the procedures which provide all the necessary guarantees to a fair trial;
- vi. the legal system in each member state should include specific provisions to ensure that measures restricting parties cannot be used in an arbitrary manner by the political authorities.

In it Resolution 1380 (2004) closing the monitoring procedure for Turkey, the PACE stated that the frequency with which political parties were dissolved was a source of real concern and expressed the hope that in future the constitutional changes of October 2001 and those introduced in the legislation on political parties would “limit the use of such an extreme measure as dissolution”.

In Resolution 1622 (2008) of 26 June 2008 the PACE commented directly upon the (then) pending case against the AK Party before the Turkish Constitutional Court, stating, inter alia, that:

8. The Assembly is concerned that, regardless of its outcome, the lawsuit against the ruling party, as well as the Prime Minister and the President of the Republic, is

[15] *United Communist Party*-judgment § 46, repeated in all later judgments, including Refah §100.

seriously affecting political stability in the country, as well as the democratic functioning of state institutions and delays urgent economic and political reforms. […]

10. The Assembly notes that respect of the principle of proportionality is of special importance in the field of dissolution of political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy. It recalls that the European Court of Human Rights has repeatedly stated that the dissolution of a political party, accompanied by a temporary ban prohibiting its leaders from exercising political responsibilities, is the most drastic measure; a measure of such severity should be applied only in the most serious cases.

11. The Assembly also recalls its Resolution 1308 (2002), in which it underlined that, although democracies have the right to defend themselves against extremist parties, the dissolution of political parties should be regarded as an exceptional measure to be applied only in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country.

12. The Assembly notes that Turkey has a legacy of political party closures almost all of which have resulted in findings of violations of Article 11 of the European Convention of Human Rights. In its Resolution 1380 (2004) closing the monitoring procedure for Turkey, the Assembly, underlying that the frequency with which political parties were dissolved was a real source of concern, expressed the hope that in future the constitutional changes of October 2001 and those introduced in the legislation on political parties would "limit the use of such an extreme measure as dissolution".

13. It further notes that, in the light of these same reforms, the Committee of Ministers in 2007 closed the supervision of the execution of the European Court judgments in all cases concerning the dissolution of political parties in Turkey between 1991 and 1997, as it was satisfied that the relevant judgments had been appropriately executed. In so doing, the Committee of Ministers strongly encouraged the Turkish authorities to pursue their efforts to give direct effect of the Court's case-law in the implementation of Turkish law.

14. The current proceedings against the AK Party, regardless of their outcome, spark a renewed debate about the legal basis for the closure of political parties in the country and show that, despite the above-mentioned reforms, the issue of dissolution of political parties in Turkey is not closed. The Assembly notes that it becomes clear that further constitutional and legislative reforms in this respect are necessary.

15. A full revision of the 1982 Constitution which, despite repeated revisions, still bears the marks of the 1980 military *coup d'Etat,* and a comprehensive review of the law on political parties are required in order to bring these texts fully into line with European standards. In pursuing such reforms, the Turkish authorities should in particular envisage introducing stricter criteria for the dissolution of political parties, such as condoning or inciting violence or overt threats to fundamental democratic values, in line with the above-mentioned guidelines of the Venice Commission.

It should be noted that the PACE referred to the 1999 Venice Commission Guidelines as the proper basis for reforming the Turkish rules on party closure, and not just to the protection offered by the ECHR.

*2.3.4 The Venice Commission*

The most extensive survey on prohibition of political parties in Europe is probably the one done by the Venice Commission in 1997-98, at the request of the Secretary General of the Council of Europe. 40 countries contributed to the study, which ended with the adoption in June 1998 of a report on "Prohibition of political parties and analogous measures".

This in turn led to the adoption in December 1999 by the Venice Commission of its "Guidelines on prohibition and dissolution of political parties and analogous measures". The guidelines set

out seven points, stressing inter alia the importance of political parties, and how dissolution is a particularly far-reaching measure, which should be used with "utmost restraint" and subject to a strict principle of proportionality.

Of particular importance is paragraph 3 of the guidelines, which states that:

3. *Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.*

The essence of this statement is that the Venice Commission only recognizes the threat or use of violence as a legitimate criterion for dissolution of political parties. In other words, the means must be undemocratic, not only the ends (objectives). It is not in itself sufficient for dissolution that a party holds opinions that are incompatible with democracy. There must in addition be a threat of violent activity on the part of the party concerned for prohibition to be legitimate.

This norm of the Venice Commission is somewhat stricter than that formulated by the ECtHR in its case law. In theory it is probably also stricter than the wording of the provisions on party closure that are to be found in some European countries, although only a few. However it is not stricter than what has been the actual practice in democratic Europe for many decades. In this way the Venice Commission's benchmark accurately reflects the common European tradition and model for protection of political parties.

Of interest is also how the Venice Commission emphasized the proportionality principle in paragraphs 5 and 6 of the guidelines:

5. *The prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint. Before asking the competent judicial body to prohibit or dissolve a party, governments or other state organs should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other, less radical measures could prevent the said danger.*

6. *Legal measures directed to the prohibition or legally enforced dissolution of political parties shall be a consequence of a judicial finding of unconstitutionality and shall be deemed as of an exceptional nature and governed by the principle of proportionality. Any such measure must be based on sufficient evidence that the party itself and not only individual members pursue political objectives using or preparing to use unconstitutional means.*

In my view, the Venice Commission should explicitly uphold its 1999 Guidelines as the proper European standard for assessing national rules on party closure. This is obviously in line with the opinion of the Parliamentary Assembly of the Council of Europe, which one several occasions have endorsed and referred to the Venice Commission's criteria. And it is also worth noting that the Commission of the European Communities did the same in its 2008 Progress Report on Turkey.

## 3. Rules and practice on dissolution of political parties in Turkey

### *3.1. Introduction*

In Turkey the constitutional rules on party closure has for many decades played a fundamentally different role as compared to the European tradition, and continues to do so right

up to the recent AK Party case of 2008 and the pending cases against the DTP and the HADEP.

The different tradition of Turkey refers both to the letter of the law and to its actual application. The Turkish legal restrictions on political parties are stricter than the European tradition, with more material restrictions on party programs and activities, a lower general threshold, and fewer procedural obstacles for bringing a case. The fundamental difference, however, is in the way the rules have been applied, and how in Turkey they have functioned as an operative part of the constitution, unlike in any other European country.

An analysis of the Turkish rules on prohibition and dissolution of political parties must cover both the legal norms and the way in which they have been interpreted and applied. Furthermore, it must take into account the specific Turkish context – politically, constitutionally and historically.

### *3.2. The constitutional and legislative framework for dissolution of political parties in Turkey*

Turkey has had provisions on party closure at least since the 1961 Constitution. In the present 1982 Constitution the relevant provisions are found in Articles 68 and 69, which have been amended in 1995 and 2001. In the Law on Political Parties of 1983 relevant provisions are found in great detail in Part 4 “Bans regarding the political parties” covering Articles 78 to 108. It appears to be a contested issue whether the statutory rules put stricter limits on parties than the constitutional provisions, and if so whether this in itself is unconstitutional.

Articles 68 and 69

Article 68 is titled “Forming parties, membership and withdrawal from membership in a party”. Paragraph 1 states the right of citizens to form political parties, paragraph 2 that parties “are indispensable elements of democratic political life”, and paragraph 3 that they may be formed “without prior permission and shall pursue their activities in accordance with the provisions set forth in the Constitution and law”. Paragraph 4 then states the criteria with which parties have to comply:

Art 68 (4). The statutes and programs, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.

Article 69 regulates the criteria and procedure for dissolving parties. The provision is lengthy and rather detailed. Relevant parts include:

Art 69.
(1) The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities. […]

(5) The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic.

(6) The permanent dissolution of a political party shall be decided when it is established that the statute and program of the political party violate the provisions of the fourth paragraph of Article 68.

(7) The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such

activities. A political party shall be deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.

(8) Instead of dissolving them permanently in accordance with the above-mentioned paragraphs, the Constitutional Court may rule the concerned party to be deprived of State aid wholly or in part with respect to intensity of the actions brought before the court.

(9) A party which has been dissolved permanently cannot be founded under another name.

(10) The members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision and its justification for permanently dissolving the party. […]

Article 69 (12) states that further rules on political parties are to be regulated in law, in accordance with the above-mentioned principles. This is done in the 1983 Law on political parties (see below).

<u>The criteria for prohibiting and dissolving parties</u>

The wording of Articles 68 and 69 is more lengthy and detailed than what is usual in European constitutions, which reflects the historical background and political context of the rules. The material restrictions on political parties are laid down in article 68 (4), which states that neither the statutes and programs nor the activities of a political party should be “in conflict” with:

- the independence of the state;
- its indivisible integrity with its territory and nation;
- human rights;
- the principles of equality and rule of law;
- sovereignty of the nation;
- the principles of the democratic and secular republic;
- shall not aim to protect or establish class or group dictatorship or dictatorship of any kind;
- shall not incite citizens to crime.

The paragraph lists 8 criteria, which is more than other European constitutions. Some of them widely formulated, as for example the prohibition against party programs or activities which are in conflict with “the principles of the democratic and secular republic”.

The list of material requirements gets even longer when Article 68 (4) of the Constitution is supplemented with the provisions in the Law on political parties, Articles 78 to 96, which states a number of additional “bans” on party opinions or activities. To some extent, these are statutory supplements which seem to be additions to the list in the Constitution, as for example the bans against “defamation or denigration of the personalities and activities of Ataturk”, the “abuse of religion and religiously sacred relics”, the ban against “religious demonstrations” of against the “status of the Religious Affairs Department”, or on the “use of uniforms”.

Furthermore, it has been argued by Turkish scholars that the Law on political parties interprets and extends several of the restrictions in Article 68 (4) beyond the wording of the Constitution.[16] This in particular applies to the practically important provisions in Article 80 on “Protection of the

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[16] Cf. Özbudun “Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights” [*original reference? date and publication?*], with further references to Turkish legal doctrine.

principle of unity of the state" and Article 81 on "Preventing the creation of minorities", which have been invoked in several cases as the basis for prohibiting (Kurdish) parties. According to the critics, while Article 68 (4) of the Constitution protects the "territorial integrity" of the state, Article 80 of the statute extends this to protect the unitary nature of the state as such, thus for example banning calls for a more federal system of government, which clearly goes beyond the issue of "territorial" integrity.

Likewise, the prohibition in Article 81 of the statute against "the creation of minorities" clearly seem to go further than the concept of "indivisible integrity" of the state in Article 68 (4) of the constitution. Indeed, many states have "minorities" without this threatening the "integrity" of the state as such.

Taken as a whole, it seems in effect that Article 68 (4) and the supplementary statutory rules can be invoked against almost any party program that would argue for changes in the constitutional model, regardless of whether this is advocated through the threat of violence or merely through peaceful democratic means.

The general threshold for applying the rules on party closure

There is no general qualifying criterion on the use of the prohibition in Articles 68 and 69 and the supplementary legislation. The wording of the provisions does not for example state that they should only be invoked in particularly severe cases, and there is no real formulation of a general principle of proportionality.[17]

One qualification was however introduced in the 2001 constitutional amendment, when the concept was taken into Article 69 that for a party to be dissolved it must be a "centre for the execution of such activities" as mentioned in Article 68 (4).

This qualification is stated first in art 69 (1). It seems not to apply under art 69 (6) in cases where it is the party statutes or programs which are in breach of Art 68 (4). But if it is only the *activities* of the party and party members that are "in conflict" with art 68 (4), then it applies, with the explanation in art 69 (7) that a party shall be "deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly" by central party organs.

When the qualification was introduced in 2001, there were hopes that this would be sufficient to actually raise the threshold for invoking Articles 68 and 69 to a level where this would only take place in exceptional circumstances. So far, recent events seem to imply that this is not so, at least as regards the initiation of cases by the Public Prosecutor, as demonstrated by the recent actions against the AK Party, the DTP and the HADEP. The fact that 10 out of 11 judges in the AK Party case concluded that it was a "centre" of anti-secular activities also indicates (based on a reading of the judgment) that they can not have set a very strict standard for the concept of "centre for the execution of such activities".

Another threshold that was introduced in 2001 was that voting rules were changed, introducing the requirement of a 3/5 qualified majority for prohibition of a party, cf. Article 149 of the Constitution. This was of decisive for the AK Party judgment in July 2008, in which a simple majority voted for prohibition, falling one vote short of the necessary qualified majority. However, the qualification only applies to dissolution, not as far as I understand to other sanctions.

[17] One aspect of proportionality may be said to follow from Article 69 (8) on sanctions, which states that instead of dissolving a party permanently, the Court "may" rule the party to be deprived of state funding "wholly or in part with respect to the intensity of the actions brought before the Court". But this is not a mandatory principle (cf. the word "may"), and it only deals with one aspect of proportionality, namely sanctions. This falls short of the strict and general proportionality test prescribed in the 1999 Guidelines of the Venice Commission.

On the procedure for dissolving parties

The procedural rules for cases on party closure before the Constitutional Court are to be found in Article 69 of the Constitution and 98 to 108 of the Law on political parties. As regards the competence to take action this rests with the Public Prosecutor. There are procedures under which the Minister of Justice or another political party may demand that the Public Prosecutor takes action. But in addition it appears that the Public Prosecutor can initiate cases ex officio and according to his own discretion, without any form of political check or balance.

As explained above, this stands in contrast to those European countries that have rules on party closure, in which – because of the exceptional nature of such cases – the decision to raise a case either rests with the democratic political institutions or at least is subject to some element of democratic control.

The Turkish model of giving this competence to one official – the Public Prosecutor – makes the system open and vulnerable to his discretion, which is problematic since the initiation of a case in itself will normally be a dramatic event that may have severe impact of the political climate and cause considerable instability.

### *3.3. The practice for dissolution of political parties in Turkey*

Unlike in any European state, there is in Turkey an extensive tradition for actually invoking and applying the rules on dissolution of political parties, as an operative part of the constitution and the political system.

According to figures often cited, since the 1961 Constitution entered into force, the Constitutional Court has closed down a total of 24 political parties.[18] This does not include political parties which have been prohibited and dissolved during periods of military intervention. The tradition continued after the entry into force of the 1982 Constitution, which gives the instrument of party closure a prominent place and regulates it in some detail.

Political parties prohibited and dissolved by the Constitutional Court in recent times include inter alia:[19]

- The United Communist Party of Turkey (TBKP) – dissolved July 1991
- The Socialist Party (SP) – dissolved July 1992
- The Freedom and Democratic Party (Özdep) – dissolved July 1993
- The People's Labour Party (HEP) – dissolved July 1993
- The Socialist Party of Turkey (STP) – dissolved November 1993
- The Democracy Party (DEP) – dissolved June 1994
- The Labour Party (EP) – dissolved February 1997
- The Welfare Party (Refah) – dissolved January 1998
- The Virtue Party (Fazilet) – dissolved June 2001

In addition to the recent case concerning the AK Party, there is another case concerning the Democratic Society Party (DTP), which was lodged by the public prosecutor in November 2007, and which is still pending. The DTP is the current main pro-Kurdish party, with 21 MPs in Parliament. There is also a pending case against another Kurdish party, the People's Democratic Party (HADAP).

[18] Cf. the statement of defense of the AK Party of 30 April 2008 p. 19. The same figures were used by the Economist, cf. "A tragedy in the making" Jun 12th 2008. See also the article by Özbudun on "Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights", according to which 6 of the rulings belong to the 1961 Constitution period and 18 to the 1982 Constitution period.

[19] The list is not exhaustive, and should be checked.

The great majority of closure cases have been against parties representing Kurdish interests, based on alleged violations of the provisions protecting the indivisible territorial and national integrity of the state. In five cases the Constitutional Court has closed down parties on account of their alleged anti-secular (Muslim) activities.[20] In addition there is the recent AK Party case, which was based on the same allegations, and which ended with financial sanctions.

The legacy of political party closure in Turkey has long been regarded as a problem in the light of European democratic standards. In a monitoring report on Turkey in 2004 the PACE stated that the frequency with which political parties were being dissolved in Turkey was not only a breach of the freedom of assembly and association embodied in Art 11 of the European Convention on Human Rights but also reflected a more general institutional problem. In Resolution 1380 (2004) the PACE stressed that this was a real source of concern, but expressed the hope that in the future the constitutional changes of 2004 would limit the practice.[21]

The latest cases, both the one against the AK Party and the pending one against the DTP and the HADAP, illustrate that this is not necessarily so. On the contrary, the AK Party case was the most controversial and politically dangerous closure case ever, and though the party escaped dissolution by the narrowest of margins, it was still found to have breached the Constitution and sanctioned financially.

### *3.4. The 2008 AK Party case*

According to the request from the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Venice Commission should make a general assessment of all constitutional and legal provisions which are relevant for the prohibition of political parties in Turkey, and not confine itself to the recent AK Party case. Furthermore it is not for the Venice Commission to review the judgment of the Turkish Constitutional Court as such. It is however clearly within the mandate of the Commission to examine the judgment with a view to understanding how the relevant national constitutional and legal provisions are actually interpreted and applied, and this is also necessary in order to assess whether they are in conformity or not with European standards.

The case against the AK Party was initiated on 14 March 2008 by the Public Prosecutor under Article 69 of the Constitution. The action called for the Constitutional Court to close down the party on the grounds that it had become a “centre of anti-secular activities” and to ban 71 party officials, including President Gül and Prime Minister Erdogan. In the alternative he requested the court to impose financial sanctions. The indictment was extensive, with a large documentary material attached. It was followed by a similarly extensive statement of defense from the AK Party. The Court gave its decision on 30 July 2008, with the written judgment published on 24 October 2008. Only the operative parts of the judgment (42 pages) have been available to us in English translation.

In the judgment, ten out of the 11 judges of the Constitutional Court found the AK Party to have been a “centre” for anti-secular activities prohibited under article 68 (4) of the Constitution, and sanctioned the party by withdrawing half of its public financial support. Furthermore a majority of 6 judges voted for dissolving the party – falling just one vote short of the necessary qualified majority of 7.

It follows from the requirement of a qualified majority, and the voting of the Court, that it is the argument of the 4 judges voting for sanctions but against prohibition which is the *ratio decidendi*

[20] According to Özbudun, op. cit., these are the the National Order Party (20.05.1971), Turkey Peace Party (25.10.1983), Freedom and Democracy Party (23.11.1993), Welfare Party (16.01.1998), and the Virtue Party (22.06.2001).

[21] For more details, see the report of 24 June 2008 to the PACE by rapporteur Van den Brande (Doc. 11660) paras 56-66.

of the judgment. This is also the way in which the premises are written, with the arguments of the 4 followed by dissenting opinions from the other fractions. The findings of the Court however starts with several pages on “The assessment of the demand for dissolution”, which evaluates whether the AK Party has been a “centre” for anti-secular activities in breach of Article 68 (4) of the Constitution. This I understand to be the position of all ten of the judges, with only the President Hasim Kilic dissenting. Then follows a section on “The sanctions against activities contradicting the principles of the democratic and secular Republic” (two pages in our translation), which is the position of the 4-member minority deciding the case, and which ends up with the conclusion to financially sanction but not dissolve the AK Party.

The section in which the ten-member majority assesses whether the AK Party has acted in violation of Article 68 (4) starts with going thoroughly through the concept of democracy under the Turkish Constitution and the role of political parties, describing this in a way which is in line with European standards. It is then stated that parties can only be dissolved under “exceptional conditions”, and that under Article 90 of the Constitution international agreements concerning fundamental rights have the force of law before the domestic courts. The Court here refers explicitly both to the ECHR and to “the Venice Criteria”, and goes on to state that Articles 68 and 69 must be assessed within this framework:

Within this framework, in assessing the contradictions of the statute and program of a political party with the principles protected under article 68, paragraph four of the Constitution, other rules underlining the special importance attached by the Constitution to political parties should be taken into consideration. Therefore, in accordance with article 69 of the Constitution, it is deemed that the activities and statements in statutes and programs shall be conducive to the dissolution of political parties only if they are in *fundamentally in* contradiction with the principles protected under article 68, paragraph four of the Constitution, *aiming to eliminate* these principles, and hence *directly constitute clear and imminent danger to the democratic life*.

So far the normative basis of the Constitutional Court seems to be fully in line with both the ECHR and the Venice Commission’s guidelines, which is to be welcomed.

Then follow arguments concerning the principle of secularism under the Turkish Constitution, on the “mandatory relation between democracy and secularism”, and on why there must be a prohibition against political parties using “religion as a means of political struggle”, which is considered “exponentially” more damaging “if the said activities are conducted by a party using the state power”. These paragraphs are in my view very difficult to reconcile both with Article 11 of the ECHR and even more so with the Venice criteria. The basic problem seems to be that they apply a concept of “exploitation of religion for political goals” which has no parallel in other European legal orders, and which is in direct conflict with the basic principle that a political party should be free to express opinions influenced by religious belief as long as this is done in a democratic and peaceful manner. The general normative assessments of the ten-member majority on this point clearly go far beyond what was accepted by the ECtHR in the 2003 Refah judgment.

Seen from the outside, however, the most problematic element of the judgment appears to be the finding of the ten-member majority that a number of activities attributable to the AK Party and its leaders have been “in contradiction with the principle of the democratic and secular republic expressed in article 68 paragraph four of the constitution”, and that this has been done “intensely and in a determined manner”, so as to make the AK party the “centre” for anti-secular activities. This rests on the majority’s assessment of the documentary evidence presented, on which the Venice Commission should be careful to pronounce. But reading the application, the statement of defence and the operative parts of the judgment, it seems from the outside at least very doubtful whether the majority has actually applied the high standard of proof which European standards call for.

After finding that the AK Party had acted in breach of Article 68 (4) of the Constitution, the 4-member minority goes on to discuss the appropriate sanction. They find, inter alia, that it has

not been established that the AK Party has advocated the use of violence, nor in other ways tried to damage the fundamental principles of the constitutional order. The minority also lists the democratic achievements of the AK Party in recent years, inter alia in protection of human rights, in the approximation to the European Union, and in the effort of “raising the country up to the standards of contemporary western democracies”. In this light the minority finds that even if the anti-secular activities of the AK Party have been in breach of Article 68 (4) these actions still “do not exhibit a threat to the bases of social peace, do not provide any indication of an objective to eliminate the belief in the state governed by the rule of law or to flame social and political disturbances, and are far from a call for violence”.

On this basis the 4-member minority deciding the case voted for depriving the AK Party of half of the state financial funding for the period of one year.

It is not for the Venice Commission to explicitly pronounce on whether the concrete ruling by the Constitutional Court as such is in conformity with Article 11 of the ECHR, or what would be the likely outcome if the case should be brought before the ECtHR. It is however for the Commission to assess whether the norms applied in the case are in compliance with the ECHR and with European standards as defined by the PACE and the Venice Commission itself.

In such a perspective, it is to be recognised and welcomed that the ruling of the Constitutional Court did *not* dissolve the AK Party. This is by far the most important point, legally as well as politically. As regards prohibition, the outcome of this particular case is therefore clearly in line with European standards.

At the same time, it is also clear that the imposition of a substantial fine on the AK Party is a sanction which in itself can constitute a breach of Article 11 and other European standards. And in this case it seems furthermore clear that the sanction rests on a normative basis which is very difficult to reconcile both with Article 11 as interpreted by the ECtHR and even more so with the Venice criteria.

In my view the Venice Commission should also express grave concern that the case was initiated at all – against a ruling party, with a large parliamentary majority and wide democratic legitimacy, as well as personally against both the sitting president and the prime minister. This made the AK Party case both politically and legally even more problematic than any of the previous Turkish dissolution cases. The fact that the AK party enjoys strong democratic legitimacy from a large part of the electorate made it not only politically more problematic to challenge it, but also in the light of European standards *legally* far more problematic. Dissolution in such a case may in itself be seen as a threat to democracy and as an attempt at disenfranchisement of a large part of the electorate.

## 4. **Assessment of the need for reform of the Turkish rules on prohibition and dissolution of political parties**

Based on the above, it is in my opinion clear that the provisions in Article 68 and 69 of the Constitution and the relevant provisions of the Law on political parties form a system which as such is in breach both of Article 11 of the ECHR and even more so in breach of the criteria adopted in 199 by the Venice Commission and since endorsed by the Parliamentary Assembly of the Council of Europe.

The main problem with the present Turkish rules on party closure is that the general threshold is too low, both for initiating cases and for prohibiting parties. This is in itself *in abstracto* in breach of common European democratic standards. Furthermore, it leads all too easily to individual cases which will be in breach of the ECHR, as repeatedly demonstrated in the many Turkish cases before the European Court of Human Rights.

The main threshold in the present Turkish regulation is the one introduced in the 2001 amendment to Article 69 stating that for the activities of a party to be in conflict with the

restrictions in article 68 (4) the party must be a “centre” for such unlawful activities. This qualification seems only to apply to “activities”, and not to opinions, for example in party programs, and in light of the AK Party case it is debatable to what extent it actually functions as a qualifying criterion at all.

The other threshold in the Turkish regulation is the requirement of a 3/5 majority of the Constitutional Court for dissolving a political party, cf. Article 149. This was also introduced in 2001, and it has shown itself to be an important reform, which determined the overall positive outcome of the AK Party case. However, this threshold is no barrier to actions being brought, or to parties being sanctioned financially. And even if the requirement of a qualified majority makes it more difficult to prohibit parties, it does not repair the material discrepancies between the Turkish rules on party closure and the far stricter standards of the ECHR and the Venice Guidelines.

By way of contrast, a number of European states have no rules on party prohibition at all, while others have only very strict rules, with a very high explicit or implicit threshold both as regards legal interpretation and actual application. According to paragraph 6 of the 1999 Venice Guidelines legal national provisions on party prohibition and dissolution should be (i) deemed as of an exceptional nature, (ii) governed by a strict principle of proportionality, and (iii) subject to a demand for sufficient evidence, i.e. a certain qualified burden of proof.

On this basis, I hold that the Venice Commission should state that although the 2001 revision was a substantial step in the right direction, it is still not sufficient to raise the general level of party protection in Turkey to that of the ECHR, and even less that of a European common democratic standard. Further reform is necessary to achieve this, both on the material and the procedural side. The problem with the Turkish regulation is that it combines:

1. A long list of substantial restrictions on political parties, as laid down in Article 68 (4) and the Law on political parties, which go far beyond the criteria recognized as legitimate by the ECtHR and the Venice Commission
2. A procedure for initiating cases which makes this far easier to do, and less subject to democratic control, than in any other European country
3. A tradition for regularly applying the rules on party closure which has no parallel in any other European country, and which demonstrates that this is not in effect regarded as an extraordinary measure.

As well put in the comments of Carlos Closa Montero, the result is that the Turkish regime transforms an exceptional measure into an ordinary one and converts Turkish democracy into a permanent “self-defending” regime. This reduces the arena for democratic politics and widens the scope for constitutional adjudication on political issues. This reduction of the scope of democratic politics is further eroded by the constitutional shielding of the first three articles of the Constitution, in such a way as to prevent the emergence of political programmes that may even slightly question the principles laid down at the origin of the Turkish republic.

These strict limitations on the legitimate arena for democratic politics are in my view unique to the Turkish constitutional system, and fundamentally out of tune with basic European traditions for constitutional democracy.

To comply with European standards, it is in my view clear that Turkey must reform both the substantive and the procedural rules for party closure, in order to bring about the necessary change of tradition and mentality.

## 5. Alternative models for reform

Several models for reform might be envisaged. It is perhaps not for the Venice Commission to advocate one specific model, but rather to point of which alternatives are compatible with European standards.

The important thing is that the general threshold for prohibiting and dissolving political parties in Turkey should be raised substantially – both formally and in practice. Any reform should be construed so that this instrument is altered from being part of the operative ("living") constitution to become a more passive safety valve, to be invoked only in truly extraordinary circumstances.

Reform might aim only to comply with the minimum European requirements for protection of parties, but otherwise keep open the option of dissolution as far as possible. Or it might be more radical, trying to confirm to the main European democratic model, which would take into account democratic principles beyond the legal requirements, and offer more than minimum protection for political parties.

At least three main alternatives might be envisaged:

1. No rules on party closure at all.
2. A very strict prohibition provision based on the Venice guidelines, with threat of violence as the only criterion for dissolution.
3. A prohibition provision based on ECHR case-law, still strict, but with some more criteria for dissolution, including a threat to democracy and human rights.

The easiest and most far-reaching reform would be simply to abolish all rules on party prohibition and closure. A number of European democracies manage very well without any such rules. Such a reform would be radical in the Turkish tradition, and it is perhaps not realistic to suggest it. But it should be pointed out as a perfectly possible solution, and one which would send a strong signal that this controversial chapter in Turkish constitutional history has come to an end.

A second alternative is to form a new model directly upon the 1999 Guidelines of the Venice Commission. This would call for a short provision, stating the use or threat of violence as a necessary criterion for prohibiting political parties, and introducing a strict proportionality principle as well as strict procedural safeguards. Such a provision would no longer be an operational part of the constitutional system, but rather a marginal safety valve to be used only in extreme situations

The third alternative is a model which continues the Turkish tradition of regulating party closure in some detail, but seeks to bring this in line with the requirements of the ECHR. Even this would require quite extensive reform of the present provisions, both in the Constitution and the supplementary legislation, both of the material restrictions and the procedure.

This is the approach suggested by a group of experts headed by professor Özbudun, which in September 2007 presented a draft for a new Constitution. In this draft a new provision on party closure is suggested in Article 38. Though still quite extensive by common European standards, the proposed model is far stricter than the present rules. The material restrictions are down to a fairly short list, stating that party programs and actions "shall not be shall not be against human rights, the independence and the indivisible integrity of the state, democracy, republic, and secularism", and a new general threshold including the requirement of "a serious danger" is introduced. Procedurally, a system of formal warning is proposed before actual dissolution can take place, and even in the case of party closure the individual parliamentarians will not have their mandates revoked.

Any substantial reform to the Turkish rules on party closure will require constitutional amendment. This can be done either as a separate process, confined to changing Articles 68 and 69 (as well as the law on political parties), or as part of a general constitutional reform. The PACE has advocated the latter approach, and this is also the proposal of the Özbudun group. The Venice Commission should offer its assistance if the Turkish authorities decide to go for such reform.