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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

by
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Pieter van Dijk's "provisional" observations seem to be an extremely good basis for further deliberations by the Venice Commission. I fully agree with his basic analysis though I recommend dealing with the AKP-decision (part 6 and partly also 7 of his observations) in a different way:

Before summarizing the Court's decision I suggest to emphasize that the decision in its outcome is not based on the opinion of the six members of the "majority". What counts are the arguments of the four members who voted against the dissolution and in favour of the milder sanction. This is due to the procedure, explained on p. 35 of the decision. I suggest putting it like this:

"Since the qualified majority stipulated in article 149, paragraph one of the constitution required for the dissolution of political parties had not been achieved, the decision is based on the arguments raised by the four judges who voted against the dissolution of the party and in favour of the financial sanction only". I suggest adding that the reasoning of the six judges, who form a non-sufficient "majority", is not the basis of the Court's decision and thus not the starting point for an appraisal of the decision.

The introductory remarks to the Court's "assessment of the demand for dissolution" (p. 28 et seq.) are rather liberal in tone. The arguments of the four judges allow the assessment by the Venice Commission that the abstract principles, formulated by the Court, are in accordance with the Strasbourg case law.

I personally do not feel fit to extend this assessment to the reasoning on the "majority" of the six.

On the other hand I do not think that the conclusion of the decision (p. 32) is convincing, namely the application of the principles, laid down in the decision on p. 28 – 32, to this specific case. It is not clear which concrete statements or activities are held not to be compatible with the democratic functions of political parties. We should stress that the protection of a political party in a democratic state does not allow sanctions like a dissolution unless specific facts are given as evidence for the threat, which is pretended to justify sanctions – in this case for the "exploitation of religion for political goals". It is not sufficient to refer to "some activities" without naming them and analysing them in detail. In addition it also is necessary to refer to concrete facts in order to show that the statements or activities are aimed at or able to "creating tensions and divisions within the society". Without analysing the facts it is impossible to check whether they are sufficient in face of the burden of proof as far as the dissolution of parties or other sanctions are concerned. The same is true as far as the Court says that the party has exploited religious sensitivities of society for the sake of naked political interests. In particular, it is insufficient just to say: "*It cannot be denied* that the defendant party's activities found in contradiction with secularism" … "may disrupt democratic functioning through alienation of the society from the state and politics..." (p. 32 bottom).

Though it is not our part to analyze and comment upon the decision in detail, we should raise the question of the burden of proof, especially focusing on the necessity to give concrete facts as a basis of the conclusion of the Court.

If I understand the decision correctly, the relevant facts are mentioned at the top of p. 33. Weighed against the principles one cannot see why the mentioned statements of the named politicians are in contradiction to the constitution. The main argument for the conclusion that the AKP has become the focus of activities contradicting article 68 seems to be the proposal and passing of law No. 5735. In my opinion we ought to state that initiatives in parliament must be free of any sanctions (immunity).

As far as I understand the decision, the opinion of the four judges does not lead to any statement that the AKP is unconstitutional. On p. 34 the Court says that there is no evidence, that an objective of the AKP to destroy democracy and secular state structure or to damage the fundamental principles of the constitutional order through the use of violence and intolerance has been established. The conclusion must be that facts have not been found in a degree sufficient to require dissolution. In order to justify other sanctions, in our case financial sanctions, the protection of political parties in a democratic society also requires specific facts in order to justify these other sanctions. The decision does not make clear that the activities referred to are capable of firing “traumatic reactions exceeding dimension of social tolerance…” (p. 34 in the middle of the page). I do not find sufficient reasons for the sanction of deprivation of half the annual state assistance in 2008.

This is my result of deliberations at the moment:

If we decide to deal with the AKP decision we should name these deficiencies. If we prefer not to do this then I suggest not to refer to the decision at all. In no case should we refer to the reasoning of the majority of the six, thus suggesting that they are the basis of the decision of the Court.

Measured against the premises of the decisions of the European Court of Human Rights, I cannot see that this Court would deny a violation of article 11 of the ECHR by the financial sanctions imposed. Therefore I suggest omitting any concluding observations which indicate the possibility of no violation of this article.