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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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In the following, I shall not repeat the viewpoints already presented by members of our working party, especially by Pieter and Frederik. Their contributions establish a good basis for our future work. I also find Frederik's proposal for the structure of our report an excellent starting point. I content myself with a few additional points which we, in my opinion, should take into account when preparing our final report.

The provisions to be considered

We have been asked to "review the constitutional and legal provisions which are relevant for the prohibition of political parties in Turkey". Obviously, this relates to the relevant provisions both in the Constitution and in the Law on Political Parties. As regards the latter provisions, they can in principle be examined both against the European standards we choose to apply and the Turkish Constitution. We should obviously concentrate on the former aspect, although we can also point to at least evident contradictions with the Constitution, maybe with a reference to the views of Turkish constitutionalists and the present power of the Constitutional Court to annul the provisions of the law it finds unconstitutional. But as a general premise, it is not our task to engage in a thorough examination of the constitutionality of Turkish legislation, but to assess it by European standards.

As concerns the Constitution, we have to decide to what extent we discuss other provisions than those directly related to the prohibition of political parties (Art. 68-69). We should, of course, mention Art. 90(5) which accords international human-rights treatises primacy over "domestic laws" (the wording leaves unclear whether this also includes the Constitution). But in substantive respect, some of the provisions in Part One on General Principles can be considered relevant in the interpretation and application of Art. 68-69, and, in fact, they were appealed to in the Constitutional Court's ruling in the AK Party case. Art. 2 states, *inter alia*, that "the Republic of Turkey is a democratic, secular and social state" and also mentions loyalty to the nationalism of Atatürk. According to Art. 3(1), in turn, "the Turkish state, with its territory and nation, is an indivisible entity". These provisions belong to the non-amendable provisions of the Constitution, and Art. 4 prohibits even proposing their amendment. These provisions lay the ground for the intertwinement of the principles of democracy, secularism and the indivisibility of the territory and nation; the in many respects problematic interpretation of democracy through secularism and nationalism which has been typical of the Constitutional Court's argumentation in not only the recent ruling but also the previous ones.

Another problematic provision, which is also appealed to by the Constitutional Court in the AKP case, is Art. 24(5): "No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets."

The examination of the above-mentioned provisions could take us quite deep into the foundations of the Turkish constitutional order, its identity as a state and its legitimating ideology. On the other hand, I cannot see how a discussion of these foundations could be wholly avoided, because they are so pertinent to the issue before us: how to understand the role of political parties in constitutional democracies?

Finally, the composition of the Constitutional Court (Art. 146) also has, of course, a more general bearing. But it has been of a particular relevance for cases concerning the prohibition of political parties because of the fact that the President (at least before the last presidential election!) has been considered a guardian of the principles of secularism as well as territorial and national integrity. My suggestion would be that we include in our report a general comment on the necessity of guaranteeing not only the constitutional expertise in but also a broad political consensus on the composition of the Court.

Whether to discuss the rulings of the Constitutional Court

We have not been called on to review the rulings of the Constitutional Court, nor are we in the position to make detailed comments on them. But we cannot wholly bypass the praxis of the court, either: it is only the praxis and the mere fact of the exceptionally many cases that have been brought before the court which reveals the extent of the problems involved; for instance, the intermingling of the principles of democracy, secularism, and territorial and national integrity. So my conclusion is that we should at least present the general line of argument in the Constitutional Court's rulings and expound the relevant provisions in light of these rulings. This also means that we should discuss the prohibition of political parties on the grounds of violations not only of the principle of secularism but also of the principle of territorial and national integrity. Here we cannot ignore the problem of Kurdish parties.

As regards the AKP ruling in particular, my suggestion is to refrain from a detailed examination of it. In general, it would be very problematic with regard to our profile and role, as well as our legitimacy, to start discussing and even criticizing the rulings of the constitutional courts of the member states. In addition, there is the possibility of the case being brought before the ECtHR. But, as I have argued above, we have to present the relevant provisions in light of the general line the Constitutional Court has followed in their interpretation and application.

The normative standards to be used

I agree with Pieter and Frederik on the characterization of the ECtHR praxis as providing the minimum legal standards and our own guidelines, as well as the PACE recommendations and resolutions, as laying down higher, recommendable European criteria. There are obvious discrepancies between the two sets of standards, especially with respect to the extent to which parties are permitted to pursue constitutional changes with constitutional means.

We are not engaged in a judicial assessment of the Turkish case, and in our discussion of the constitutional and legislative provisions we should mainly apply our own guidelines (which have also been endorsed by the PACE). We can also pay due respect to relevance of the specific circumstances and history of a particular country (which may for instance, at least to a certain extent, not only explain but even to justify particular constitutional provisions on national, socialist, fascist or communist parties), but, at the same time, be cautious of too much understanding which would deprive the European standards of their critical relevance.

Although we should use our own guidelines as the primary criterion, we cannot ignore the praxis of the ECtHR, either. This is due already to the fact that Art. 90(5) of the Constitution accords the ECHR direct relevance in the domestic legal order. But I would avoid too large a reliance on especially the controversial Refah Party judgement, which I personally find quite problematic in its references to islam and the shariah.

Procedural issues

In procedural issues, our guidelines or the "common European practice" do not offer much of a guidance. The Turkish system meets the basic requirements of a judicial procedure and the decisive role of the Constitutional Court. As regards the right to launch the process, we should stress the desirability of a solution which, already at this stage, combines legal considerations and the attention to the political repercussions of such a highly politically-laden issue as the prohibition of a political party. As I have stated before, I find a purely political solution problematic, too. Already launching a case concerning the prohibition of party has political consequences, and those holding political power can always be accused of using their right of initiative for political purposes. This is highly detrimental to the legitimacy of the procedure. This consideration is of particular relevance in a country like Turkey with its long tradition of party

prohibition. We can – and should – refer to the German example but in my opinion, we should not recommend it straightforwardly and without qualifications.

What the optimal solution would be needs further discussion. One possibility would be to embrace the German solution (or some modification of it) but complement it with a legal scrutiny by an Ombudsman-like body.

As regards the composition of the Constitutional Court, I refer to my comments above.