BRIEFING PAPER

DIRECTORATE GENERAL EXTERNAL POLICIES OF THE UNION

EUROPEAN PARLIAMENT

Policy Department External Policies

# THE LEGAL RAMIFICATIONS OF THE CASE FOR CLOSURE OF THE AK PARTY IN VIEW OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

*Prohibition of Political Parties in Turkey – The case of the AKP*

HUMAN RIGHTS

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## A. Introduction[1]

The Adalet ve Kalkınma Partisi (Justice and Development Party; officially abbreviated to 'Akparti' or AKP) was founded in 2001 by Recep Tayyip Erdoğan, former Lord Mayor of Istanbul, and a group of politicians, including some from the outlawed Refah Partisi (Welfare Party)[2] as well as a number of supporters of other parties who did not stand out as having a particularly religious mindset. Erdoğan thus reinforced his profile as a religiously oriented but pragmatic politician open to the values of modern democracy. He had already made a name for himself in the Refah Partisi as a moderate politician with little in common with the ideological principles of Necmettin Erbakan.

As a result, the AKP's profile was that of the first genuine Turkish people's party – that is to say, a party with a wide support base amongst the population, which was in a position to cover a wide range of different trends. Accordingly, numerous politicians from other parties, including the Republican People's Party (CHP), the Motherland Party (Anavatan Partisi) and the True Path Party (DYP), joined the party.

From the very beginning, the concept led to an overwhelming victory in the elections of November 2002.[3] With 34.3% of the votes, the AKP gained more than two thirds of the seats in Parliament, a level of success that had not been seen for many decades. After an increase to 41.67% in the 2004 local government elections, the party achieved a result of 46.58% in an early election on 22 July 2007, with the result that, owing to the right-wing MHP (Nationalist Movement Party) becoming the third party to overcome the 10% hurdle, the number of seats in Parliament was reduced.

As early as 2002, the then Chief Prosecutor at the Court of Appeal responded by instituting proceedings banning the party. The reason which he cited for this was that Erdoğan should not have become the party's leader, because he had been sentenced to a brief term of imprisonment, which he did not complete, as a result of an alleged anti-secularist statement in a speech. Even on that occasion, the Chief Prosecutor's petition was unsuccessful in the Constitutional Court.

The overall impression that this party's political activities, which have become firmly established in all provinces and districts of the Republic of Turkey and brought many major cities, including Ankara and Istanbul, in particular, under its political control in the subsequent local government elections, have led to an 'islamisation' of Turkish society in the sense that headscarves and minarets have become much more visible again as a part of daily life, is in fact correct. At the same time, however, this party has contributed to several important steps forward in the democratisation process and to stabilising the Turkish economy.

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[1] **Literature:** Ekrem Akartürk, Türk Hukukunda Siyasal Parti Yasakları [Prohibition of political parties in Turkish law], Istanbul 2008; Christian Rumpf, Das türkische Verfassungssystem [The Turkish constitutional system], Wiesbaden 1996; Christian Rumpf, Einführung in das türkische Recht [Introduction to Turkish law], Munich 2004. Further literature in the footnotes.

[2] cf. ECtHR, (European Court of Human Rights) judgment of 31.7.2001 on the banning of the Refah Partisi [Welfare Party] (http://www.tuerkei-recht.de/Wohlfahrtspartei.doc).

[3] cf. Rumpf, Christian/Steinbach, Udo: Das politische System der Türkei [The political system in Turkey], in: Wolfgang Ismayr (Publisher), Die politischen System Osteuropas [The political systems of Eastern Europe], 2nd new revised edition, Opladen 2004, p. 847 et seq.

## B. Prohibition of political parties in Turkey

The ability to prohibit political parties by legal proceedings was first regulated in the Constitution of 1961. Since then, the **Turkish Constitutional Court has prohibited a total of 26 parties, 20 of them since 1980**. However, since 1983, there have also been numerous court cases that have attempted to prohibit political parties but have not led to a ban. These figures put Turkey at the top of the list of countries covered by the Council of Europe.

Before these figures are evaluated, however, the different circumstances giving rise to the high figures should be taken into account. Firstly, many, if not the majority, of the bans are the result of the same political protagonists having prompted repeated prohibition proceedings by forming successor political parties. In addition, Turkey has a strict party regime governed by the rule of law, which means that prohibition proceedings are not initiated on the basis of political decisions by political organs, but by a process similar to a criminal trial, initiated by the public prosecutor at the Court of Appeal, the country's highest civil and criminal court, in application of the principle of legality. To the extent that political institutions can initiate proceedings, even this requires the involvement of the Chief Prosecutor of the Republic. Therefore, in the event of violations of the Constitution or the law, proceedings must be instituted. The parties that were banned by the junta with the putsch on 12 September 1980 are not included in the total.

However, this has brought up the justified question in many quarters, not only in the countries of the European Union, but also within Turkey itself, of whether the Turkish regime of prohibiting political parties meets European standards, although it must also be considered that such standards do not yet exist[4] and each different country uses totally different means and methods of excluding a political party from political life. In some countries, very dubious legal framework conditions are applied so conservatively, though, that parties are almost never prohibited while, paradoxical as it might sound, the high number of party bans in Turkey is related particularly to the strict constitutional state framework of the party prohibition regime.

Monitoring the party prohibition regime is not only a national matter but is also of the utmost significance for the process of negotiations regarding Turkey's accession to the EU. On 10 and 11 December 1999 Turkey gained candidate country status, and accession negotiations have been under way since 3 October 2005. While the negotiations offer the EU and its Member States the opportunity to evaluate themselves according to the criteria being used for Turkey, to ensure their own credibility in the negotiations, Turkey is required to optimise its social and political system with regard to the accession criteria, particularly the Copenhagen criteria, in order to guarantee that it will align itself with the political standards applicable in the EU.

By 1995 at the latest, Turkey had, in fact, made progress in this respect. The Constitution was revised several times and the role of the European Court of Human Rights (ECtHR) as a guide to the practicalities of establishing the fundamental rights regime was strengthened. The main existing theory of the precedence of agreements

[4] To that extent, the Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, 10-11 December 1999, by the Venice Commission (www.venice.coe.int), can be understood as an attempt to create minimum standards. cf. Akartürk p. 101.

under international law before the laws was expressly included in the Constitution in 2004 for agreements that strengthen the protection of fundamental rights, thus taking account of an existing jurisdiction of the Turkish Constitutional Court. Judgments by the ECtHR were introduced to Turkish procedural law as grounds for a rehearing or retrial, even before German legislators came up with comparable measures.

The political party regime was also improved in that sanctions for parties not meeting constitutional requirements were staggered and prohibition was provided for only as the *ultima ratio*.

## C. Main features of Turkish law on political parties

Turkish law on political parties is regulated in the Constitution of 1982 and the Act on Political Parties of 1983. Both documents have since been amended several times.

The **status of political parties**[5] (sing. *siyasî parti*) as a 'symbol, yes, an indispensable requirement of democracy'[6] stands out because of its ideological framework conditions set by Kemalism and by numerous accompanying bans (Article 78 et seq. of the Act on Political Parties)[7] that have their roots in the putsch of 12 September 1980; this concept was codified in the 1983 Act on Political Parties[8] and, in parts, went beyond the restrictions laid down in the Constitution. The 1995 Amendment to the Constitution,[9] which was transposed into legislation in August 1999, mitigated it somewhat.[10]

No permit is required **to found a political party**. Parties obtain legal personality upon submitting the required documentation and the constitutive foundational statement, which must be passed by a meeting of at least 30 members, to the Ministry of the Interior (Article 8 et seq. of the Act on Political Parties). The main organ of a party is the *Grand Congress* (*büyük kongre*), which is made up of delegates from the provincial meetings and Members of Parliament, ministers and holders of offices in central party organs. The elected *Party Chairman* is also chairman of the *Central Decision Making and Administrative Council*, which is also elected by the Grand Congress. Lastly, there is a *Central Disciplinary Council*. The *organisation of provinces and districts* (*il* or *ilçe örgütü*) within a party is a replica of the central organisation (Article 19 et seq. of the Act on Political Parties). School pupils, civil servants, judges, lawyers and members of the armed forces may not belong to a political party. The ban on membership by members of university teaching staff, which was given provision of legality (statutory regulations), was terminated with the 1999 amendment. Article 11 II(b)(4) of the Act on Political Parties also stipulates a

[5] Rumpf, Constitutional System, p. 143 et seq.
[6] Constitutional Court, judgment of 10.7.1992, E. 1991/2, K. 1992/1 (Prohibition of a party; Sosyalist Parti), AMKD [Anayasa Mahkemesi Kararlar Dergisi; Law reports of the Constitutional Court] 28, p. 696 et seq. (772).
[7] Listed by Rumpf, Constitutional System s. 146 et seq., e.g.: no representation of distinctive regional or religious features, no activities or statements that could threaten national unity (not a federal concept!); prohibition of political activities with a religious basis.
[8] Act No 2820 of 22.4.1983, RG [Resmi Gazete; Official Gazette] No 18027 of 24.4.1983; replicated in German in Hirsch, JöR 32, p. 507 et seq. (p. 595 et seq.).
[9] For the legal situation prior to 1995, see Rumpf, op. cit.
[10] Act No 4445 of 12.8.1999, RG [Resmi Gazete; Official Gazette] No 23 786 of 14.8.1999. Further reforms followed, most recently in 2003.

ban on political offenders joining political parties. Only persons aged 18 or over may join a political party.

The founding of political parties that are opposed to free democratic public order is prohibited. Although the 'ban' that was originally included in Article 5 of the Act on Political Parties is no longer there in such general terms, this is purely an editorial correction, as any attempts at separatism, anti-secularism and antidemocratic activity still lead to the party being closed down. The Act on Political Parties is thoroughly underpinned by Kemalist principles, particularly the idea of nationalism.[11] The latest party to be the subject of an application for its prohibition because of violations of this principle was the Democratic Society Party (Demokrat Toplum Partisi) in November 2007, which stood in the tradition of various parties with strong roots in Kurdish regions. At the time of completing this manuscript, the proceedings were still pending, and have thus been 'overtaken' by the prohibition proceedings against the AKP. As well as the principle of nationalism, which was essentially the basis for numerous bans on separatist parties, not all of which were upheld by the ECtHR, the principle of secularism[12] has also played a key role in the history of bans on political parties.

**Monitoring of parties** is carried out by voters, by mechanisms within the party itself and by the office of the Chief Prosecutor of the Republic, which maintains a sort of 'personal file' on each political party and can require parties to provide information on their activities at regular intervals, with a focus on carrying out the regular party meetings and elections within the party that are required by law and the implementation of any warnings from the Constitutional Court. The Constitutional Court is responsible for monitoring the parties' bookkeeping (Article 74 et seq. of the Act on Political Parties) and, by petition by the Chief Prosecutor of the Republic to the Court of Appeal (*Yargıtay Cumhuriyet Başsavcılığı*), examining whether parties' activities are consistent with the Constitution and the Act on Political Parties. Possible sanctions are warning (*ihtar*)[13] and prohibition or banning (*kapatma*)[14] (Article 100 of the Act on Political Parties). Violations of the law must have been committed by members or organs of the party in a way that can be attributed to the party. The Chief Prosecutor can also require a party to rid itself of any members who do not meet the membership criteria or who are guilty of defamatory offences (Article 102 of the Act on Political Parties). If, after being founded, a party remains incapable of participating in political life because of a lack of members or for other reasons, the determination

[11] For more detail, see Rumpf, Constitutional System, p. 146 et seq.

[12] For a detailed explanation, see Christian Rumpf, Laizismus, Fundamentalismus und Religionsfreiheit in der Türkei in Verfassung, Recht und Praxis [Secularism, fundamentalism and freedom of religion in Turkey in the Constitution, law and practice], VRÜ [Verfassung und Recht in Übersee; Constitution and law overseas] 1999, p. 164 et seq.

[13] cf. Constitutional Court, decision of 18.10.1989, E. 1989/1, K. 1989/1, AMKD [Anayasa Mahkemesi Kararlar Dergisi; Law reports of the Constitutional Court] 25, 472 et seq.; further examples in AMKD 28, 587 et seq. See also the ban on the Welfare Party, judgment of 9.1.1998, E. 1998/2, K. 1998/2, RG [Resmi Gazete; Official Gazette] No 23 266 of 22.2.1998, p. 19 et seq. (Unconstitutionality Article 103 II Act on Political Parties); judgment of 16.1.1998, E. 1997/1, K. 1998/1 (Prohibition of a party), RG No 23 266 of 22.2.1998, p. 31 et seq. (see Rumpf, ZfTS [Zeitschrift für Turkeistudien; Journal of Turkish Studies] 1998, p. 285 et seq. with further references).

[14] For a party to be banned, there must first be the threat of a prohibition action being raised (Article 102 of the Act on Political Parties; cf. *Constitutional Court*, judgment of 2.5.1989, E. 1988/1, K. 1989/1 [Prohibition of a party], AMKD 25, 462 et seq.).

of its non-existence by the Constitutional Court also comes into consideration.[15] Upon prohibition, the party's assets are transferred to the Treasury; if the party dissolves itself while a prohibition action is pending, this does not affect the legal consequences of a judgment on prohibition (Article 108 of the Act on Political Parties). When a party is banned, those Members of Parliament who caused the ban automatically lose their seats in Parliament; in addition, those members whose acts or statements are cited in a final judgment by the Constitutional Court as having caused the permanent dissolution of their party are subject to a 'ban on involvement in politics'; they are excluded from membership in any other party and from standing for parliament for five years after publication of the judgment of the Constitutional Court in the Official Gazette (before 1999, the period was 10 years; Article 95 of the Act on Political Parties). Finally, the founding of 'successor parties' to banned parties is forbidden.

If this system were to be summarised in terms of its ideological or constitutional law basis, it could be said that:

The Turkish party system with its prohibition mechanisms is a feature of a robust democracy (*militan demokrasi*). The concept of a robust democracy is one which was developed by German constitutional science before the Second World War and which became a renewed topic of debate in the 1960s in particular. It has now started to become established in Turkey as well. The system is the expression of a conflict between democracy and law, which is solved in this instance to the benefit of a state governed superficially by the rule of law and which, precisely because of that, endangers the proper function of the principle of the rule of law, which is to guarantee freedom and democracy.

## D. Prohibition of a party

### I. Preconditions for prohibition of a party

The Constitution itself[16], in Article 68 and 69, offers the framework for the party law provisions in the Act on Political Parties with its sanctions, the most important and serious of which is prohibition.

Article 68(4) of the Constitution reads:

> 'The statutes and programmes, 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.'

[15] e.g. Constitutional Court, judgment of 24.11.1992, E. 1992/3, K. 1992/4 ('varia'), AMKD [Anayasa Mahkemesi Kararlar Dergisi; Law reports of the Constitutional Court] 28, 832 et seq. Apparent founding of a party not sufficient for 'non-existence': Constitutional Court, judgment of 2.6.1987, E. 1987/1, K. 1987/2 ('varia'), AMKD 23, 444 et seq.

[16] For the full text of the Constitution, in English, see http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm

Article 69(5) et seq. provide for the dissolution of a political party as a sanction, although it is immediately also stipulated that such violations are not necessarily to be punished with dissolution:
'The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.

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.

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.'

Permanent dissolution occurs in every case where the party programme and articles of association contain violations of the principles of Article 64(4). However, this is not usually the case, because so far, parties have ensured that their programmes and articles of association have appeared to conform to the Constitution.

The provisions regarding actions are differentiated according to the intensity of the actions. The term '**centre**' (*odak*) plays a key role. Prohibition becomes mandatory for consideration only if the activities of a party are focused overall on unconstitutional activities. The important thing here, particularly with respect to the prohibition proceedings against the AKP, is that such unconstitutional activities are shared implicitly by party organs. Only then can such activities be attributed to the organs and thereby to the party.

## II. Requirement for a majority

Finally, prohibition also requires a qualified majority of three fifths of the 11 judges of the Constitutional Court. This limit, introduced in 2001, is designed to counteract and prevent parties having legal structure but no substance, such that simple majorities in the Constitutional Court achieved at random or by policies of nomination lead to the prohibition of a party.

### III. Alternatives to prohibition

#### 1. Deprival of funding for political parties

Deprival of aid from the state system for funding political parties comes into particular consideration as an alternative sanction. As well as the fact that deprival of party funding can be pronounced instead of prohibition (e.g.: it has been determined that the party is not yet a 'centre' of unconstitutional activities in a way that would necessitate prohibition), violations that are formulated in certain provisions of the Act on Political Parties also come into consideration, namely:

that it is determined that the party is a successor to a prohibited party (Article 95 of the Act on Political Parties);
that the party is using the name of a prohibited party;
that the party does not hand over to the Chief Prosecutor the requested documents that are required to comply with the Chief Prosecutor's supervisory responsibilities (Article 102 Act on Political Parties);
that the party does not implement the principle of democracy in its internal functioning (Article 93 of the Act on Political Parties);
that the party violates the ban on wearing uniforms or assigning party officials tasks similar to those of the police (Article 94 of the Act on Political Parties).

The method of excluding a party from party funding has the disadvantage that it can be applied only to parties that achieved more than 7% of the vote in the most recent parliamentary elections. The many parties below this level receive no funding anyway, so the sanction has no effect on them. This is a curiosity that is not covered by the Constitution itself, as it does not stipulate any differentiation in party funding (cf. final paragraph of Article 68 of the Constitution).

#### 2. Warning

A further form of sanction is the 'warning' (ihtar). This is regulated in Article 104 of the Act on Political Parties. It comes into consideration particularly when simple violations are involved which can be remedied by the competent party organs. In the prohibition proceedings against the AKP, there were not enough grounds to ban the party, but a warning was then issued.

## E. Procedure for prohibition of a party

### I. Competence

As is still the case in some European countries (e.g. France), before the 1961 Constitution came into effect, proceedings to prohibit a party could be instituted on the basis of the Act on Associations. In the opinion of the creators of the 1961 Constitution, who looked carefully at the system of constitutional jurisdiction under the Bonn Basic Law, among other things, this could not be combined with the privileges extended to political parties [cf. Article 21.2 of the Basic Law]. Therefore, not only was the procedure to approve the founding a political party uncoupled from

the law governing associations; with the introduction of the Constitutional Court, the competence to prohibit a political party was also transferred to the Constitutional Court. This new system for securing the status of political parties as organs of the decision-making process at constitutional level has remained intact until now.

## II. Right of action

### 1. Petitioner

The suspicion as regards the trustworthiness of political organs led to the linking of the prohibition of a party to a procedure with a legal form, which bears some similarity to a criminal trial. For this reason, only the Chief Prosecutor at the Court of Appeal, the highest prosecuting authority in the Republic of Turkey, can institute proceedings prohibiting a political party with a 'charge' (*iddianame*). However, politics are not completely excluded from the process; the Chief Prosecutor can not simply institute proceedings prohibiting a political party *ex officio*, but only after a petition by the Ministry of Justice (which, in turn, can do so only on the basis of a Ministerial order) or a political party (Article 68(4) of the Constitution; Article 100 of the Act on Political Parties).

The right of action presupposes violations of the bans in Article 68 of the Constitution (see above) or Article 101 of the Act on Political Parties. Otherwise, only a petition for the issuing of a warning comes into consideration. Only when the conditions of a warning have not been met within six months can the Prosecutor institute prohibition proceedings (Article 104(1) of the Act on Political Parties).

### 2. Proceedings upon petition by the Ministry of Justice or a political party

Proceedings to prohibit a party instituted by a petition by the Ministry of Justice or another party may not be instituted during the period between the announcement of a decision by Parliament to carry out elections and the day after voting has taken place (Article 100 of the Act on Political Parties). This is designed to ensure that the ability of the Government or a political party to institute proceedings to prohibit a political party cannot be misused to improve their own chances at the polls.

The Chief Prosecutor rejects a petition by the Government or a party to institute proceedings prohibiting a political party if he deems the request to be insufficiently substantiated and finds the evidence inadequate. The right to appeal to the Judicial Review Board can be exercised within 30 days of notification of the non-acceptance decision by the Chief Prosecutor. The Judicial Review Board comprises the chairmen of the prosecution senate of the Court of Appeal. This body must make a decision within a further 30 days, in which it either confirms the Chief Prosecutor's position or directs him to submit a petition for prohibition to the Constitutional Court.

This process reveals the efforts on the part of the writers of the Constitution and legislators to keep political despotism out of such proceedings as far as possible. To

that extent, it also corresponds to the report of the Venice Commission on the Prohibition and Dissolution of Political Parties and Analogous Measures.[17]

## III. The competent court

According to Article 69(4) of the Constitution, the Constitutional Court has the jurisdiction to implement prohibition of a party. The decision of the writers of the Constitution, which was made as early as the 1961 Constitution, is correct, with regard to the requirements of the Venice Commission Guidelines. Even though there are no binding rules within the legal sphere of the Council of Europe and the EU stipulating that only a constitutional court can have the appropriate jurisdiction, the assigning of competence to the Constitutional Court seems to be the optimal solution for implementing a judicial procedure in the political realm, as long as it is ensured that the Constitutional Court is in a position, in terms of its composition and procedures, to make decisions independent of political influence, without having to avoid political considerations altogether. The Turkish Constitutional Court offers this guarantee.[18]

## IV. Code of Procedure

The procedure is based on the Code of Criminal Procedure which, furthermore, rests on the German model and was last modernised in 2004 (in force since June 2005) (Article 33 of the Act on the Constitutional Court). In principle, the decision is made on the documents before the court, but the Constitutional Court can grant the party the right to defend itself, which is also carried out verbally. The Constitutional Court can also hear witnesses and experts. Theoretically, the Constitutional Court has discretion on this point, but as a rule an oral trial is fixed.

The fact that it is similar to criminal proceedings does not justify viewing the party prohibition procedure as a type of criminal case. Rather, it constitutes a unique type of proceedings, defined by its political nature, which is lacking – or ought to be lacking – in the case of criminal proceedings. On the other hand, the writers of the Constitution and lawmakers wished to give the procedure the maximum possible legal form, because it can result in a serious sanction similar to sentencing, to the extent that it is almost possible to speak of a specific type of criminal proceedings. However, essential precepts of criminal proceedings are missing that have in mind the goal of reforming the accused rather than simply achieving atonement, and that consciously focus on overall prevention. Distinctions of this type are lacking in the party prohibition proceedings, which essentially focus on eliminating an unconstitutional circumstance.

[17] Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures, 10-11 December 1999 (www.venice.coe.int).

[18] For the method of functioning of the Constitutional Court, see Rumpf, Introduction, § 8 margin number 83 et seq.; www.tuerkei-recht.de/Gerichtsverfassung.pdf, p. 1.

## V. Legal hearings

The central committee of the party is given a hearing on behalf of the party. There are no provisions on whether those party members whose acts or statements have been attributed to the party as unconstitutional are to be heard. If the right to a legal hearing is taken seriously, this right should also be granted to such members, since prohibition of the party has serious consequences for them too, such as the loss of their seats in Parliament and the suspension of the right to stand for a seat.

## VI. Implementation

Proceedings are instituted with a petition by the Chief Prosecutor at the Court of Appeal with a 'charge' (iddianame).

Once the Chief Prosecutor at the Court of Appeal has submitted the petition, the President and 10 other members of the Constitutional Court are required to implement the procedure. The composition of the bench is therefore the same as for judicial review proceedings, with 11 judges. If one judge is prevented from attending, a 'substitute judge' can be provided.

The Chief Prosecutor's petition is disallowed if less than three fifths (until 2001, a simple majority), i.e. seven judges, vote in favour of prohibition (dissolution) of the party (Article 149(1) of the Constitution). For the other sanctions (deprival of party funding and warning), only a simple majority is required.

The intention of the writers of the Constitution was in fact to use the qualified majority rule to allow for the principle of democracy or the special function of a political party in a constitutional democracy and offer it further protection. Whether this has actually been achieved seems doubtful. In decisions of this nature, the correct balance between protection of political freedoms and the interest in the stability of the political system in the sense of a robust democracy depends less on the determination of majority ratios and more on whether the judges are given comprehensible guidelines on how to do justice to this sensitive balance.[19]

## VII. A temporary order?

A further topic is the question of whether a party against which prohibition proceedings have been instituted can be prevented, by the temporary order, from participating in elections. This question arose during the prohibition proceedings against HADEP. The Constitutional Court had rejected a petition for a decree on a

[19] Experience has shown that even party bans that were issued unanimously or with only a few votes against are not in line with the Guidelines of the Venice Commission and have not stood up to scrutiny by the ECtHR (e.g.: Türkiye İşçi Partisi, Türkiye İleri Ülkü Partisi, Türkiye Emekçi Partisi, Demokrasi Partisi, Sosyalist Türkiye Partisi, Emek Partisi, Sosyalist Birlik Partisi, Türkiye Birleşik Komünist Partisi, Cumhuriyet Halk Partisi, Halkın Demokrasi Partisi (all unanimous); Demokrasi ve Değişim Partisi (one vote against), Halkın Emek Partisi (one vote against), Yeşiller Partisi (Green; one vote against), Özgürlük ve Demokrasi Partisi (Freedom and Democracy; one vote against), Sosyalist Parti (Socialist; two votes against), Refah Partisi (Welfare; two votes against), Fazilet Partisi (Virtue Party; three votes against).

temporary order on the grounds that there was insufficient evidence that the party should in fact be banned.[20] In the end, the party was banned.

From this statement, it can be deduced that the Constitutional Court basically took into consideration that a party could be prevented from participating in elections by means of the temporary order. However, there are two serious arguments against this: if the party prohibition proceedings have terms similar to criminal proceedings, then the same guarantees must also apply to the accused. There are no 'temporary sanctions' against the accused in a criminal trial, apart from the usual disciplinary sanctions or the seizure and confiscation of items used in the crime. Nor is 'remand in custody' a sanction, but rather a measure that can be imposed only in certain circumstances to ensure that the circumstances of the case can be properly ascertained or if there is a risk that the accused will escape. There are no equivalent security interests in the party prohibition proceedings.

The second argument is the principle of democracy which, like the principle of the rule of law, is rooted expressly in Article 2 of the Constitution and also arises, incidentally, from the system and text of the Constitution. Besides, in the Turkish system of prohibition of political parties, there is a rather problematic conflict between the principle of the rule of law and the principle of democracy, whereby the strict application of constitutional proceedings can work against the ability of the political system to function, in such a way that it eventually leads to the death of a functioning democracy. This is precisely what has been demonstrated again in the AKP case. Introducing the term 'robust democracy' again, while also referring to the Guidelines of the Venice Commission, which have been mentioned several times already, an order such as this comes into consideration only if sufficient evidence has already been called in the current case to suggest that the party is unconstitutional and has revolutionary intent, not only in word but also in deed, such as by forming groups of members that are prepared to use violence.

## VIII. Judgment

The judgment is prepared in a written procedure and with at least one hearing. There are two levels of scrutiny, which are carried out by the Constitutional Court in separate stages. First, the admissibility is determined, then the substantive case is checked.

As in other European constitutional courts, the rapporteur (*Raportör*) plays an important role, which corresponds to that of the legal assistant in Germany and is similar to that of the investigating judge (*tetkik hakimi*) at the Turkish Court of Appeal. The rapporteur prepares an expert report that also presents the Constitutional Court with a suggested decision.

The full written version of the judgment must be published in the Official Gazette. It must also be published in the AMKD [*Anayasa Mahkemesi Kararlar Dergisi*; Law

[20] Constitutional Court, judgment of 13.3.2003, E.1999/1 (HADEP), K. 2003/1; RG [Resmi Gazete; Official Gazette] No 25173 of 19.07.2003.

reports of the Constitutional Court] and on the Constitutional Court's website (www.anayasa.gov.tr).

## F. Legal consequences of the prohibition of a political party

### I. End of legal personality; Prohibition on the founding of new parties

Upon publication of the judgment on prohibition by the Constitutional Court, the party is deemed to have been dissolved and the party's assets are transferred to the Treasury. The judgment is therefore constitutive and provides a framework. As the case is non-appealable, even a temporary stay of execution is not possible, nor can this be considered when a petition is presented to the ECtHR.

Furthermore, the Constitution and legislation both prohibit the founding of a substitute organisation. In practice, this sanction has not prevented any politicians from founding new parties with the same goals, as the cases against the fundamentalist religious, separatist and (formerly) communist parties show. However, it does make it easier for the Chief Prosecutor to assert himself in the Constitutional Court because a substitute organisation usually has many objective features, such as, for example, use of the same party premises, a similar structure, and identical or similar leaders. For this reason, the writers of the Constitution and lawmakers also introduced the sanction of a 'ban on involvement in politics' for leading politicians and for those politicians who were the cause of the party being prohibited.

A party that is subject to prohibition proceedings cannot escape the ban by dissolving itself (Article 108 of the Act on Political Parties). If necessary, a substitute organisation can be founded to gain time, as the proceedings cannot simply be 'diverted' to the substitute organisation, but new proceedings must be instituted.

### II. The fate of the party's assets

Once the judgment is issued, the party's assets are transferred to public funds (Article 107 of the Act on Political Parties). Even though the provision is not entirely unambiguous, this should apply to both assets and liabilities.21 To prevent the party from wasting or relocating its assets during the proceedings, Article 110 of the Act on Political Parties deprives the party of the power to dispose of the assets.

### III. Loss of seats in Parliament and bans on involvement in politics

Originally, the 1982 Constitution stipulated that members of prohibited parties automatically lost their seats in Parliament when the ban took effect, as is the case in Germany and Spain. Since the reform of 1995, this applies only to those party members whose acts or statements were the cause of the ban, according to the judgment of the Constitutional Court. Such persons may not play any role in or on

[21] Akartürk p. 241

behalf of a political party for five years (Article 69(9) of the Constitution) and may not stand on behalf of any party 'in any way whatsoever' in elections (Article 95 of the Act on Political Parties). It is not clear whether these politicians may campaign in the elections as 'independent candidates'. Prior to the reform in 1995, the law clearly prohibited this. The reverse argument ought to apply, namely that after the lapse of the prohibition on independent candidates, this is now permitted, according to the principle that what is not prohibited is permitted. Notwithstanding, it would be advisable for the Constitutional Court to bring some clarity to the situation from time to time, if the lawmakers themselves do not.

The ban applies from the date the judgment is published in the Official Gazette (Article 84(5) of the Constitution)

## G. Prohibition proceedings against the AKP

### I. Preliminary remarks

On 28 July 2008 the Constitutional Court delivered its judgment in the prohibition proceedings against the AKP, pronouncing a ban, by six votes to five, although this proportion of votes was less than the majority required to effect the ban. With a majority of ten to one, only a warning was issued and a fine of YTL 23 million (around EUR 14 million) imposed. This largely concluded the case in favour of the AKP.

The result was widely acclaimed because, even though the ban could well have been justified according to Turkish constitutional and political party legislation, it would have achieved precisely the effect that is most criticised with regard to the procedure for banning political parties, with its strict legal form, i.e. that banning the governing party would have made the political system very unstable. This could have caused significant damage to the process of democratisation in Turkey. The ban on founding successor parties would also have prevented a party with equally strong support amongst the people from being founded. The best scenario would have been to recreate the relatively unstable circumstances of the period prior to 2002, while the worst scenario would have led to polarisation and ultimately even strengthening of the fundamentalist forces, bringing further instability. Whether the further consequences might have included military intervention is debatable.

At the time this opinion was being written, the judgment had not yet been published.

### II. Procedure

The petition for prohibition by the Chief Prosecutor at the Court of Appeal was presented on 14 March 2008. It provided justifications of violations of the principle of secularism and stated that the party had become a **centre of antisecularist activities**. The petition for prohibition was combined with a petition to issue a ban on involvement in politics to 71 party members, including Prime Minister Recep Tayyip Erdoğan and President Abdullah Gül.

On 30 April 2008 the AKP presented its 'preliminary defence'[22]. On 31 May 2008 the Chief Prosecutor made a submission to the court. The AKP responded on 16 June 2008.[23] The party also gave further opinions on the accusations against the party general chairmanship and Prime Minister Erdoğan[24], and on the accusations against the other affected party members.[25] In general, this moved the proceedings along at a fast pace, probably due mainly to the need to achieve clarity as quickly as possible, as the matter involved not just any party but a governing party supported by almost 50% of the population. The proceedings thus lasted far less time than the proceedings against the DTP, which have been pending since November 2007.

Speculation that a judgment could not be expected before November 2008 at the earliest was put to rest by the rapid scheduling of a hearing[26] on 28 July 2008 and the judgment issued immediately afterwards. Even though the majority had pronounced a ban, the result corresponded to the suggestion made by the rapporteur of the Constitutional Court.

The rapporteur had suggested that the court disallow the petition by the Chief Prosecutor. According to press reports, the rapporteur, being fluent in German, had direct access to sources in German and drew upon freedom of opinion in particular. He is also believed to have likened prohibition of a political party to the death penalty in a criminal trial[27] with the goal of bringing extreme caution to bear in non-reversible verdicts. Among other things, the rapporteur had determined that many of the documents in the 17 folders of material were not mentioned in the charge. He also pointed out that the Constitutional Court could request the Chief Prosecutor to rewrite the charge, but that this would be at the Court's discretion.

As the written version of the judgment is not yet available, details of the grounds and justifications for the dissenting opinions, which are expected to be published, cannot yet be elaborated, although the theory of the Chief Prosecutor – that in light of the activities and speeches of more than 70 politicians nationwide, the party had become a centre of 'antisecularist activities' – did not secure a sufficient majority in support of prohibition in the Constitutional Court.

## H. Relationship to the jurisdiction of the European Court of Human Rights

### I. Preliminary remarks

In 1987 Turkey recognised the jurisdiction of the European Commission of Human Rights and in 1990, that of the European Court of Human Rights.[28] Even before that,

[22] http://www.akparti.org.tr/iddianame_cevap_en.pdf (in English).
[23] http://www.akparti.org.tr/eng2.pdf (in English).
[24] http://www.akparti.org.tr/receptayyiperdoganiddialar.pdf (in Turkish).
[25] http://www.akparti.org.tr/partimensuplariiddialar.pdf (in Turkish).
[26] The AKP published the text of the oral defence on the Internet: http://www.akparti.org.tr/sozlucevap.pdf (in Turkish).
[27] Online magazine www.megahaber.net, 17.7.2008.
[28] Rumpf, ZaöRV [Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht; Journal of foreign public law and international law] 47/4, p. 778 et seq.; Rumpf, EuGRZ [Europäische Grundrechte-Zeitschrift; European Fundamental Rights Journal] 1990, p. 53 et seq.

however, the Turkish Constitutional Court had begun interpreting Turkish fundamental rights provisions in the light of the ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms). This was because Article 90 of the Constitution grants agreements under international law the status of statute and, in paragraph 5, formulates an express ban on submitting agreements under international law to the Constitutional Court, claiming that they are unconstitutional. Further, the Turkish Constitution's system of restrictions had been adapted to the ECHR system.

Currently, fundamental rights may be restricted only by or due to a law which, in turn, must pursue specific, constitutionally protected interests. In this connection, the 'requirements of a democratic society' and essence of fundamental rights, as well as the principle of proportionality, in turn form the barriers to options for restriction (Article 13 of the Constitution).

## II. Party prohibition proceedings

### 1. Party prohibition proceedings before the European Court of Human Rights (ECtHR)

The case-law of the European Court of Human Rights on the issue of party prohibition is currently based solely on cases concerning Turkish parties.[29] A Spanish case relating to the Basque party Batasuna is currently still pending and was held to be admissible by the Court on 11 December 2007.[30] Batasuna was declared anti-constitutional by the Spanish Supreme Court (*Corte Suprema*) on 27 June 2003, which was confirmed by the Constitutional Court.[31] This latter case is similar to the cases of HEP, DEP, etc., which concerned Turkish parties with a Kurdish background. The legal background to the prohibition of Batasuna is also similar to the Turkish cases, for since 27 June 2002 Spain has had a law on political parties which provides for party prohibition proceedings similar to the Turkish procedure.

### 2. Basis in the ECHR

#### a. General approach

On its own, the fact that a basic right or freedom is restricted by or due to a law does not constitute a 'violation' of a provision protecting the said basic right or freedom. The ECHR is also based on the principle, inherent in every doctrine of constitutional law and especially fundamental rights, that no basic right or freedom can be absolute. The State may encroach, in principle, on basic rights and freedoms in order to protect the rights of others or an overriding public interest. A 'violation' of a provision protecting basic rights can therefore only be said to occur if, in weighing up between one interest which is protected by a basic right and another interest which merits

[29] For an overview, see Turhan, Ankara Üniversitesi SBF Dergisi (Journal of the Faculty of Political Science of the University of Ankara) 57/3 (2002), p. 129 ff.
[30] Fifth Chamber, Decision of 11 December 2007, Applications Nos. 25803/04 and 25817/04.
[31] Second Senate, Judgment of 16 January 2004, Decision No. 6 (2004).

protection and to which the State wishes to accord greater priority, the State has not achieved the proper balance.

To establish the proper balance, the ECHR – in common with the provisions on basic rights contained in all modern constitutions – establishes specific regulatory criteria. These describe specific interests which the State must protect at the expense of individual rights and which therefore justify its encroachment on the sphere protected by basic rights legislation.

So that the public interest cited by the intervening state to justify its encroachment on basic rights is not given disproportionate priority to the detriment of freedom and basic rights, the ECHR has established a limit on the limitations, namely that they must be necessary in 'the interests of a democratic society'. In other words, the application of limitation criteria must serve the functionality of a democratic social order and also be proportionate.

### b. Approach in the context of party prohibitions

When considering a national prohibition on a political party, the European Court of Human Rights focuses especially on freedom of assembly (Article 11 ECHR). Consideration of other freedoms, e.g. freedom of opinion, is at most immanent, for a party ban, even if it is based on statements of opinion of individual party members, is not targeted initially against these party members unless legal action is taken against them directly for these statements. Whether this is the right approach for the Court to take is debatable.

The general approach for a verdict of a violation of Article 11 of the ECHR is as follows: first of all, it must be determined whether freedom of assembly is actually affected by a measure adopted by the state. If a restriction pursuant to Article 11(1) ECHR is indeed established, the question of justification arises, and must be answered pursuant to Article 11(2) ECHR. Justification can initially only be deemed to exist if the restriction has a basis in law. The law, in turn, must serve a particular public interest as set out in Article 11(2) ECHR, e.g. the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. These opportunities for restrictions are themselves restricted, as the restriction must be 'necessary' and serve the interests of a democratic society.

The ECHR thus has at its disposal various criteria for and against the restriction of freedom of assembly. However, it does not apply these rigidly to individual cases but grants the state a margin of appreciation when it comes to the question of what serves the protection of national security or the maintenance of law and order. Ultimate control is exerted via the proportionality principle, which can be derived from the notion that a measure must be 'necessary'.

### c. Application to party prohibitions

So far, ECtHR has not held party prohibition proceedings as such to violate the ECHR; until now, it has declined to assess the proceedings under Article 6 of the ECHR.[32] In fact, the member states have a wealth of diverse party banning mechanisms available which cannot be overlooked and which naturally make it difficult for a supranational court to apply its own or new criteria to the legality of party prohibition proceedings. Moreover, party prohibitions are a particular political process where a court is likely to be – and indeed should be – reluctant to intervene in accordance with the principle of 'political self-restraint'.

The ECtHR has not applied the provisions of Article 9 (Freedom of Religion and Conscience) and Article 10 (Freedom of Opinion) of the ECHR in the party prohibition proceedings. Instead, Art 11 of the ECHR (Freedom of Association) has been the focus of the decisions. This is in accordance with the constitutional situation in other countries, such as Germany and France, where political parties are rooted in the right of association, while under the Turkish Constitution they are expressly granted a status separate from the right of association.

In most of the party prohibition cases that have come before the ECtHR, the latter has allowed only one violation of Article 11 of the ECHR. In the decision on the merits of the Batasuna case too, this is likely to have been the basis for the judgment in the case, even though the Court made its decision on admissibility with reference to Article 10 (freedom of opinion) and Article 11 ECHR. The Court thus gives priority to freedom of association (and with it, intrinsically, freedom of expression) over protection of certain state interests such as – in by far the majority of cases – the 'indivisible integrity with its territory and nation' or defence against communist trends in order to protect the free democratic basic order. However, this should not be misunderstood as meaning that the stated interests, protected by the Turkish Constitution, should not be seen as fundamentally worthy of protection, but rather that, with regard to the accusations made against Turkish party prohibition proceedings, the test of proportionality in the European Court of Human Rights produced a different result to that of the Turkish Constitutional Court.

In the case of the Welfare Party, which is the party most similar to the AKP, the ECtHR decided, by four votes to three, that there was no violation of that nature.[33]

Thus the ECtHR saw the protection of secularism as provided for in Turkish constitutional law and other legislation[34] as justification. That places the ECtHR in a tradition of jurisdiction that was subsequently continued, which permits Member States to counteract the politicisation of religion[35]. It also appears from the judgment, however, that the protection of the principle of secularism does not take precedence at any price, but the principle of proportionality may be called upon as an alternative. In

[32] cf. HEP judgment, ECtHR judgment of 9.4.2002, Appeals No 22723/93, No 22724/93 and No 22725/93; Refah judgment, ECtHR, judgment of 31.7.2001, Appeals No 41340/98, No 41342/98, No 41343/98 and No 41344/98.

[33] Refah judgment, ECtHR, judgment of 31.7.2001, Appeals No 41340/98, No 41342/98, No 41343/98 and No 41344/98. On prohibition by the Constitutional Court cf. Rumpf ZfTS [Zeitschrift für Turkeistudien; Journal of Turkish Studies] 1998, p. 285 et seq.

[34] Rumpf op. cit.; Rumpf, VRÜ [Verfassung und Recht in Übersee; Constitution and law overseas] 1999, p. 164 et seq.

[35] cf. ECtHR (4th chamber), judgment of 29.6.2004 and Grand Chamber, judgment of 10.11.2005, Sahin v. Turkey, Appeal No 44774/98.

the case of the Welfare Party, the ECtHR regarded its potential threat to the basic order protected by the ECHR as so serious that it was permissible to ban the party. On the other hand, the Court did not recognise a comparable potential threat in respect of the 'separatist' parties which are banned in Turkey.

In so far as those lodging the appeal in the Refah case had complained that, as a result of the ban, the party assets went to the state and certain politicians were not permitted to hold their seats in Parliament for a limited time or were excluded from further party political activities, the ECtHR described these sanctions as side effects of the ban and a violation of the ECHR and/or the first (Protection of property) and third (Right to free elections) Protocols thereto. Overall, it can be concluded from this that the ECtHR does not in principle have any objections to the sanction system laid down in Turkish law on political parties, but considers violations of the ECHR and the Protocols thereto individually as required.

What result the ECtHR would have arrived at if a ban on the AKP had made it to Strasbourg remains an unanswered question because it is by no means mandatory for the view of the Turkish Constitutional Court on the need for the principle of secularism to be protected to be identical to that of the ECtHR, especially since the judgment relating to the Welfare Party was passed by a small majority of four to three in Strasbourg. Further, unlike the Welfare Party, the AKP has deliberately avoided making ideologies of religion in its recent party history and always put the entitlement of the individual to exercise his or her freedom of religion in the foreground. Nor was there any visible attempt by the AKP during its period in power to influence the composition of the judiciary in a fundamentalist sense, as was the case under Prime Minister Necmettin Erbakan and his Minister of Justice, Mr Yilmaz. Unlike the Welfare Party, the AKP granted more space to freedom of religion, including in execution of public service, although – unlike the Welfare Party – not to the principles of secular regulations regarding hours of work. The AKP therefore probably would not have complied with the ECtHR's basic tendency, that political parties are to be banned as anti-constitutional only if they themselves conflict with the values enshrined in the ECHR and potentially threaten to undermine and ultimately erode the constitutional structures of a democratic social order. Whether the AKP poses a threat to the democratic social order in Turkey due to a gradual fundamental change in the Turkish social order which it has set in motion or tolerated, and thus threatens the political system over the long term and facilitates a shift away from the values enshrined in the ECHR, is extremely difficult to determine objectively at present and would constitute no more than unjustifiable speculation in any proceedings in Strasbourg.

## I. Conclusion and Summary

The AKP was not prohibited. Consequently, the circumstances that were causing concern within Turkey and throughout Europe did not eventuate.

The Turkish political party prohibition proceedings follow the principle of legality and have terms similar to criminal proceedings. In some cases, this leads to conflicts between democracy and the principle of the rule of law.

The Turkish legal system, in particular the constitutional system, seeks to be close to the standards of the ECHR. In fact, Turkish law on political parties and its party prohibition proceedings show similarities to the rules in place in other Council of Europe and EU countries.

The European Court of Human Rights has so far not expressed any fundamental misgivings about the sanction system laid down in Turkish law on political parties.

In the past, in political party prohibition proceedings, the Turkish Constitutional Court has often sought a balance between constitutionally protected constitutional principles, particularly in relation to the 'indivisible integrity with its territory and nation', which the ECtHR has not followed, so that numerous party bans have been categorised as violating the ECHR.

The only prohibition of a party with a religious aspect to have come before the ECtHR – the prohibition of the Welfare Party – withstood review by the ECtHR.

Whether prohibition of the AKP would have withstood review by the ECtHR cannot be assessed at this point. This would be pure speculation and would require at the very least detailed discussion of the content of the case file, which cannot be achieved within the framework of the present terms of reference.

The case-law of the ECtHR on the banning of political parties has so far developed solely on the basis of Turkish cases. A Spanish case (Batasuna) is currently pending and has already been declared admissible.