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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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## 1. Introductory remarks

Political parties are an essential tool in the functioning and maintenance of democracy, while democracy is a fundamental feature of the public order established by the Council of Europe and aimed at by the European Convention on Human Rights (hereafter: Convention or ECHR). It should, therefore, be assumed that their establishment and functioning find protection in the Convention.

Indeed, according to the European Court of Human Rights (hereafter: Court or ECtHR): "In view of the importance of democracy in the Convention system (…), there can be no doubt that political parties come within the scope of Article 11 [the right to freedom of association]".[1]

The freedom to establish, organise and conduct political parties is – together with other rights laid down in the Convention[2] - of vital importance for the functioning and maintenance of a pluralistic democratic system of government. That requires that political parties are left with a large freedom under Article 10 of the Convention to formulate, carry on and strive for ideas and goals that are not necessarily in conformity with the traditional and/or majority opinions of the state concerned. This has been emphasised by the Court several times. Thus, in its *Socialist Party and Others* judgment the Court held that "there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (…). The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.[3]

This feature of political parties also implies that the limitations provided for in the second paragraph of Articles 10 and 11 of the Convention, which for their justification have to be "necessary in a democratic society", are to be construed strictly where political parties are concerned; "only convincing and compelling reasons can justify restrictions on such parties' freedom of association [and freedom of expression]".[4]

Even though, in general, the Council of Europe favours secular States, the criteria for secularism cannot be applied to political parties, as political parties that are animated by a certain religion, are widely spread in most member states.[5]

## 2. The general situation in Turkey concerning the freedom of political parties

Turkey has a very comprehensive Statute on Political Parties, which, however, contains so many prescriptions and regulations that it entails not only certain guaranties for political parties but also several legal foundations for interferences with, and even prohibitions or dissolution of political parties. This "law on the books" has in fact led to a "law in practice" where an extensive use is made of these legal possibilities of interference. This practice has not always respected the starting point emerging from the Strasbourg case law mentioned before that limitations of the rights of political parties of freedom of expression and freedom of association have to be construed strictly. Consequently, it has created serious tensions with Turkey's legal obligations under the Convention, which have to be solved by changes in both the law and the practice. The Parliamentary Assembly of the Council of Europe, in Resolution 1622 (2008) based on a

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[1] ECtHR, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, (hereafter: *United Communist Party*-judgment), § 25.

[2] The ECtHR refers in particular to Articles 6 and 10, *idem*, § 45.

[3] *Idem*, § 43.

[4] *Idem*, § 46.

[5] See Parliamentary Assembly, Resolution 1622 (2008) on "The functioning of democratic institutions in Turkey: recent developments", 26 June 2008, § 7.

report of its Monitoring Committee of 24 June 2008, noted "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" and "that the frequency with which political parties were dissolved was a real source of concern".[6] The Parliamentary Assembly also noted that "[t]he 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 [recent constitutional and statutory] reforms, the issue of dissolution of political parties in Turkey is not closed".[7] The Parliamentary Assembly concluded "that further constitutional and legislative reforms in this respect are necessary (…) in order to bring these texts fully into line with European standards".[8]

### 3. Request by the Chief Prosecutor to close down the AKP

On 14 March 2008, in particular in view of the proposal by Prime Minister Erdogan of constitutional amendments that would ease the ban on female students wearing the Muslim headscarf at University, and the adoption by Parliament of these amendments, the Chief Prosecutor of the Supreme Court requested the Constitutional Court to close down the AK Party on the ground that it had become a "centre of anti-secular activities" and to ban 71 party officials, including President Gül and Prime Minister Erdogan. As an alternative he requested the Constitutional Court to impose financial sanctions. The request is based upon Article 69 of the Constitution.

Article 69 of the Constitution states that "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 a 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."

Article 68 of the Constitution stipulates that "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 of any kind, or shall they incite citizens to crime".

In his indictment, the Chief Prosecutor acknowledges that the AK Party's programme and its written statutes are not unconstitutional; however, he deems that the party has acted against laws and the Constitution in actions and verbal statements. He cites several incidents and acts by party officials, and concludes that it has "revealed its intention to constitute the environment in which basic principles of the republic of Turkey will be changed by the actions mentioned

[6] Parliamentary Assembly, Resolution 1622 (2008) on "The functioning of democratic institutions in Turkey: recent developments", 26 June 2008, § 12, with reference to Resolution 1380 (2004); Report of the Monitoring Committee, Doc. 11660, 24 June 2008, Part A, § 11. According to the three dissenting judges in the *Refak* Case, Refah was the fifteenth political party to have been compulsory dissolved by the Turkish Constitutional Court in recent times, out of which four cases were brought before the Strasbourg Court.

[7] *Idem*, § 14 and Report § 13.

[8] *Idem*, §§ 14-15 and Report §§ 13-14.

above and especially by their proposals for a constitutional amendment and changes on the Law on Higher education".

In his rapport, the rapporteur of the Monitoring Committee expresses his confidence that the Constitutional Court, in taking its decision on the indictment, "will be inspired from European standards in the field of dissolution of political parties, and in particular the relevant case-law of the European Court of Human Rights and the Guidelines on prohibition and dissolution of political parties and analogous measures, adopted by the Venice Commission".[9]

## 4. European standards concerning the dissolution of political parties

From the case law of the Strasbourg Court the following main principles may be deduced:

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;[10]

2. political parties play a primordial role in a democratic state and are a form of association essential to the proper functioning of democracy;[11]

3. political parties enjoy the right of freedom of expression and of freedom of association;[12]

4. political parties play an important role in ensuring pluralism, which requires a close link between freedom of expression and freedom of association;[13]

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;[14]

6. political parties may promote a change I 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;[15]

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,

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[9] Explanatory memorandum to the report, by Mr. Luc Van den Brande, § 43.

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

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

[12] *Idem*, §§ 42-43.

[13] *Idem*, § 43.

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

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

are to be construed strictly, with only a limited margin of appreciation for the domestic authorities and rigorous supervision by the Court;[16]

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;[17]

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,[18] 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;[19]

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.

The European Convention, and accordingly the Strasbourg case law based thereupon, contain minimum standards. According to Article 53 of the Convention, nothing in the Convention prohibits the Contracting States to apply higher standards. On the basis of a comparative study of the legislation and legal practice of the member States of the Council of Europe, the Venice Commission has formulated European standards on the matter which, in some respect, provide higher protection to political parties than the minimum standards established by the European Court of Human Rights in its case law.

The Venice Commission has included in its "guidelines on prohibition and dissolution of political parties and analogous measures" the following relevant guidelines:

1. 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;

2. a political party as a whole cannot be held responsible for the individual behaviour of its members not authorised by the party within the framework of political/public and party activities;

3. 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 (…) whether other, less radical measures could prevent the said danger.

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

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

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

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

## 5. Application of European standards by the Strasbourg Court in the Turkish cases

*United Communist Party-judgment*

- democracy is a fundamental feature of the European public order (§ 45);
- the exceptions set out in Article 11 are, where political parties are concerned, to be constructed strictly (§ 46);
- in its scrutinizing role the Court must look at the interference complained of in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it are relevant and sufficient (§ 47);
- a political party's choice of name cannot in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances (§ 54); in the absence of any concrete evidence to show that in choosing to call itself :communist", the *TBKP* had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court cannot accept that the submission based upon the party's name may, by itself, entail the party's dissolution (*ibid.*);
- there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned (§ 57);
- the *TBKP*'s programme could hardly have been belied by any practical action it took, since it was dissolved immediately after being formed and accordingly did not even have time to take any action; it was thus penalised for conduct relating solely to the exercise of freedom of expression ( § 58)
- in the absence of any activity of the *TBKP*, the Court finds no evidence to enable it to conclude that the party bore any responsibility for the problems which terrorism poses in Turkey (§ 59);
- nothing in the constitution and programme of the *TBKP* warrants the conclusion that it relied on the Convention to engage in activity or perform acts aimed at the destruction of any of the rights and freedoms set forth in it (§ 60).

*Socialist Party-judgment*

- while the Court accepts that Mr. Perinçek's statements were directed at citizens of Kurdish origin and constituted an invitation to them to rally together and assert certain political claims, if finds no trace of any incitement to use violence or infringe the rules of democracy; they were scarcely any different from those made by other political groups that were active in other countries of the Council of Europe (§ 46);
- read together, the statements put forward a political programme with the essential aim being the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis; read in their context, the statements using the words "Kurdish nation" and "secede" do not encourage secession from Turkey but seek rather to stress that the proposed federal system could not come about without the Kurds' freely give consent, which should be expressed through a referendum; 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 (§ 47);
- in the absence of concrete actions belying Mr. Perinçek's sincerity in what he said, that sincerity could not be doubted; the SP was thus penalised for conduct relating solely to the exercise of freedom of expression (§ 48);
- it has not been established how the statements in question could be considered to have been in any way responsible for the problems which terrorism poses in Turkey (§ 52).

*Freedom and Democracy Party-judgment*

- having analysed *ÖZDEP*'s programme, the Court finds nothing in it that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles (§ 40);
- the fact that a political project is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules (§ 41);
- given the absence of any concrete acts suggesting otherwise, there is no reason to cast doubts on the genuineness of *ÖZDEP*'s programme; *ÖZDEP* was therefore penalised solely for exercising its freedom of expression (§ 42);
- the Government have not established in any convincing manner how, despite their declared attachment to democracy and peaceful solutions, the passages in issue in *ÖZDEP*'s programme could be regarded as having exacerbated terrorism in Turkey (§ 46);
- nothing in the passages concerned warrants the conclusion that their author relied on the Convention to engage in activity or perform acts aimed at the destruction of any of the rights and freedoms set forth in it (§ 47).

*Welfare Party-judgment*

- democracy requires that only institutions created by and for the people be vested with the powers and authority of the State (§ 43);
- [the rule of law requires that] law be interpreted and applied by an independent judicial power (*ibidem*);
- the rule of law means that all human beings are equal before the law, in their rights as in their duties (*ibidem*);
- a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons (§ 47);
- freedom of thought, conscience and religion, as enshrined in Article 9, is one of the foundations of a "democratic society" within the meaning of the Convention; that freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion (§ 49);
- in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (§ 50);
- the State's role as a neutral and impartial organiser of the practising of the various religions, denominations and beliefs is conducive to religious harmony and tolerance in a democratic society (§ 51);
- the principle of secularism in Turkey is one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights (§ 52);
- the establishment of a theocratic regime, with rules valid in the sphere of public law as well as that of private law, is not completely inconceivable in Turkey, account being taken, firstly, of its relatively recent history and, secondly, of the fact that the great majority of its population are Muslims (§ 65);
- Refah's proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals, grounded on religion, would

categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement; such a societal model cannot be considered compatible with the Convention system since it would do away with the State's role as the guarantor of individual rights and freedoms, and would infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms (§ 70);

- statements which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy as conceived in the Convention taken as a whole, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious concepts; principles such as pluralism in the political sphere or the constant evolution of public freedom have no place in sharia (§ 72);
- a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention (*ibidem*);
- policy statements made by Refah's leaders on *inter alia* the question of Islamic headscarves did not constitute an imminent threat to the secular regime in Turkey; but they are consistent with Refah's unavowed aim of setting up a political regime based on sharia (§ 73);
- Refah's leaders did not, in government documents, call for the use of force and violence as a political weapon, but they did not take prompt practical steps to distance themselves from those members of Refah who had publicly referred with approval to the possibility of using force against politicians who opposed them (§ 74);
- where the conduct of leaders of a political party reaches a high level of insult and comes close to a negation of the freedom of religion of others it looses the right to society's tolerance (§ 75);
- Refah's political aims were neither theoretical nor illusory, but achievable, due to its influence as a political party and as shown by political movements in the past based on religious fundamentalism (§ 77);
- it was precisely the public declarations and policy statements made by Refah's leaders that revealed objectives and intentions of their party which were not set out in its statute (§ 80).

## 6. The Constitutional Court's decision in the AKP case

According to Article 69, paragraphs 5 and 6, of the Turkish Constitution, the dissolution of a political party 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, when it is established that the statute and program of the political party violate the provisions of the fourth paragraph of  or deprived of State subsidies, if it has become the focal point of activities in contradiction with the fourth paragraph of Article 68. Article 68, fourth paragraph, of the Constitution reads as follows: “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.”

A majority of six out of the eleven members of the Constitutional Court were of the opinion that the AKP had to be dissolved on the ground that its activities and statements violated the principles of the democratic and secular republic. It was only due to the requirement of a three fifth majority, which requirement was introduced with the amendment of Article 149 of the Constitution in October 2001, that the majority decision did not bring about this legal effect. On

the other hand, the decision that the AKP should loose 50 % of the State's subsidies was supported by ten of the eleven members.

It was recognized by the Constitutional Court that, in virtue of Article 83 of the Constitution, that activities performed and statements and votes expressed in Parliament, as well as those repeated or revealed outside Parliament and provided that the Bureau of Parliament does not decide otherwise, are not covered by Articles 68 and 69, Article 83 being a *lex specialis*. On the other hand it was deduced from Article 84 that a member of Parliament who aims at destroying the libertarian democratic order through his declarations and acts in Parliament, and who defends extra-constitutional methods to realize this aim, does not benefit from that parliamentary immunity and should, therefore, be taken into account in deciding on the dissolution of a political party.

This point of view would seem to be in accordance with the Strasbourg case law, since the Court adopted the position in the *Refah Partisi*-judgment that "The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions"(§ 96), and that "the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that these acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems (…) In view of the fact that these plans were incompatible with the concept of a 'democratic' society (…) the penalty imposed on the applicants by the Constitutional Court (…) may reasonably be considered to have met a 'pressing social need'." (§ 132) It is, however, not in accordance with the standards developed by the Venice Commission in its Guidelines, since there any sanction of prohibition or enforced dissolution of political parties is restricted to cases where the parties advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order (guideline 3).

Moreover, the Constitutional Court took the position that only activities and statements of members of the political party under scrutiny should be taken into account, which were performed and expressed during their membership of that political party in its present status, while activities and statements of public personnel who were not party members at the relevant moment, must also be left out of consideration. Activities and statements which have become public by secondary sources only, such as the media, are taken into account only if they have been reported in a non-contradictory way in different and opposing channels and have not been contradicted by the alleged source or the party, provided that proof without doubt has been provided or, at least, the member concerned or party has not dissociated him- or itself from the reported activities or statements.

Within that framework of evidence, the majority of the Constitutional Court concluded that the fourth paragraph of Article 68 had been violated by members of the AKP, or by the party itself, at various instances:

- Twelve statements by the leader of the AKP and present Prime Minister were deemed to be directed against secularism; the statements concerned mostly made reference to the right of Muslims to wear the hijab;
- Two statements by the President of the Grand National Assembly, member of the AKP, held to be against secularism;
- Two statements by the Minister of National Education, member of the AKP, held to be against secularism;
- An action by a local governors, members of the AKP, held to be against secularism;
- A statement by a local governors, members of the AKP, held to be against secularism;
- Two regulatory acts by State officials, members of the AKP, held to be against secularism;

- The law purporting to amend the Turkish Constitution and the Law on Higher Education to permit the free use of hijab at institutions of higher education, which was later on declared unconstitutional by the Constitutional Court, was proposed with the support of members of the AKP.

The majority of the Constitutional Court reached the conclusion that these acts and declarations, which make the AKP the foci of anti-secular activities, required its dissolution in accordance with Article 69, paragraph 6, of the Constitution in reference to Article 68, paragraph 4, as the only and obligatory method, which they deemed appropriate, necessary and proportionate. The reasoning of the majority contained, in particular, the following arguments:

- Secularism is one of the unalterable and basic principles of the republic of Turkey, as is also recognized by the European Court of Human Rights in its *Welfare Party*-judgment;
- Turkey has the right to take necessary measures against threats and risks for this secularism;
- Political Islam in Turkey is a totalitarian political movement with as its ultimate objective to establish a State structure based upon religious principles (sharia) instead of a State governed by the rule of law;
- The order of sharia can by no means accord with the Constitution nor with the European public order, as it does not accord with democracy and human rights and is of a fundamentally repressive nature;
- The AKP as a political party opposes all achievements of the republic, first and foremost secularism, notwithstanding its efforts to suggest a moderate character and its hiding behind concepts such as human rights, democracy, freedom of religion and freedom of education;
- The AKP, after the elections of 22 July 2008, has started to realize its objective to transform Turkish society into an Islamic state, step by step, *inter alia* by appointing prominent adherents of Islam on posts in supreme institutions; Turkey's image of secular country has been eroded in the international community in the five and a half years of AKP government;
- The AKP, since it occupies a majority in government, presents, from the perspective of realizing its Islamic model, constitutes a risk to secularism that is present and sufficiently imminent, the risk increasing daily during their tenure in government.

The reasoning also contains several other relevant elements, such as:

- Hijab, which is a symbol of religious fanaticism, is not a fundamental problem for women as shown by research, and has become the key to transforming society into a theocratic order;
- In Turkey, women cannot exercise the right to higher education, subject as they are to male dominance due to poverty and excessive religious fanaticism; instead of finding solutions for these problems, the AKP exploits the hajib in order to move society back in time, destroying the struggle of women for emancipation as well as the secular achievements of the Republic; this was also the intention behind the proposed constitutional amendments;
- In their statements APK members say that the implementation of secularism constitutes oppression against believers while ignoring the burning and murdering of secularists by religious fundamentalists.

It is not the Venice Commission's intention, nor its role, to analyse and review the judgment of the Constitutional Court for its clarity, consistence and persuasiveness. Its only role is to examine and conclude whether the judgment, as it is formulated, reveals that the constitutional

and legal provisions as interpreted and applied, are not in conformity with European standards and need being amended.

## 7. Concluding observations

Even though the finding of the majority of the Constitutional Court that actions and statements by (members of) the AKP contradict the principles of a democratic and secular republic, has not led to the dissolution of the AKP, it was sanctioned by deprivation of half of the State's assistance on that same ground.

The above observations lead to the conclusion that the relevant provisions of the Turkish Constitution and of the Law on Political Parties entail limitations of the freedom of assembly of political parties. As to whether these limitations are in conformity with Article 11 of the European Convention on Human Rights as interpreted by the European Court of Human Rights, it has, first of all, to be taken into account that the AKP case concerned only one of the grounds for dissolution provided for in the Constitution and the Law on Political Parties.

As to that ground, any prediction about the outcome of a possible application to the Court in the matter is of course speculation. It is submitted, however, that the position of the AKP within Turkey's democratic society and its actions and statements used as evidence by the Constitutional Court, are not identical or even sufficiently comparable with those of the Welfare Party on which the judgment of the European Court of Human Rights was based, to take it for granted that the Court would reach the same conclusion. One of the important elements that might lead to a different evaluation is the position and context in which several of the statements were made. In that context, it is important to emphasize that even to the extent that parts of the grounds for dissolution of political parties in the said legislation are *in abstracto* not in violation of Article 11 as interpreted by the Court, they may have been interpreted and applied in Turkish legal practice in a way that constitutes a violation of Article 11.

Even if one would take a different view as to the similarity of the facts, it is submitted that it cannot be excluded that the Court would nevertheless reach a different conclusion as to the conformity of measure taken with respect to the AKP with Turkey’s obligations under the Convention, taking into account both the reactions which the judgment has received and its consequences outside the context of that particular case for political life in Turkey. Indeed, the Court is not bound by its previous judgment, not even a judgment of the Grand Chamber.

For the question submitted to the Venice Commission, attention should not be focused exclusively or even primarily on the dissolution ground that was applied in the AKP case, but on the provisions concerning dissolution in their entirety.

Finally, even to the extent that the said legislation and their interpretation and application in Turkey's practice are to be deemed not in violation of Article 11 as interpreted by the European Court of Human Rights, it is important to point out that Turkey is not only a State party to the Convention but also, and in the first place, a member State of the Council of Europe. The standard of (pluriform) democracy that constitutes one of the pillars of the Council of Europe, and consequently constitutes one of the essential requirements of membership of that organization, does not necessarily coincide with the standard laid down in Article 11 of the Convention. What is more important, in respect of the former standard the Court is not the ultimate interpreting authority, but the Council of Ministers, in the framework of its own monitoring tasks and on recommendation of the Parliamentary Assembly on the basis of its monitoring tasks. Against that background it is highly relevant that the Guidelines of the Venice Commission, also to the extent that they set a higher standard that Article 11 as interpreted by the Court, have been endorsed by the Parliamentary Assembly. In addition, the concept of (pluriform) democracy endorsed by the Institutions of the European Union, also in their negotiations concerning the admission of States as members of the Union, is influenced by but not necessarily restricted to the Strasbourg case law on the matter.

There would, therefore, still seem to be an urgent need to examine the question of whether it should be recommended that the relevant provisions of the Turkish Constitution and of the Law on Political Parties be amended. The fact that the Chief Prosecutor has recently lodged a request with the Constitutional Court for the closing down of another political party makes the discussion with the Turkish authorities, with non-governmental circles in Turkey, and within the broader framework of the Council of Europe the more urgent.

Within the framework of these discussions and of further examination, and in line with the recent declaration of the President of the Parliamentary Assembly, the Venice Commission could and should also play a role and offer its assistance to the Turkish authorities in either proposing new constitutional provisions or commenting on proposals drafted by governmental bodies or non-governmental groups in Turkey.

A comparative study of relevant constitutional provisions in other member States, but also proposals like that of the Özbudun Committee, could serve as guidance. However, in order for the Venice Commission to play such a role, a more comprehensive study will be required than the working group established by the Commission was able to provide at the present stage. At its plenary of December, therefore, the Venice Commission can and should not go further than indicating the need of amending both Turkish legislation and legal practice, and offering assistance to the Turkish authorities.