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(VENICE COMMISSION)

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

by
Mr Carlos CLOSA MONTERO
(Member, Spain)

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A. Framing the issue

1. An inexorable requirement of constitutional design is that any given constitutional project must strike a balance between constitutional guarantee and democratic procedures or, in other words, between the values that are constitutionally protected and shielded from the free disposal in political disputes and the issues that are available for and subject to free democratic competition between political parties.

2. As the German constitutional court expressed in the case against the Communist party (17 August 1956), *the Basic Law* [or any Constitution in fact] *represents a conscious effort to achieve a synthesis between the principle of tolerance with respect for all political ideas and certain inalienable values of the political system* (BVerfGE 5, 85, 139).

3. The configuration of the balance between these principles that pull in different directions depends on specific historical circumstances. Whilst historical idiosyncrasy may induce large variance, members of the Council of Europe have come to accept that the guarantee of certain minimum standards such as human rights, the rule of law and the democratic principle itself cannot be renounced. Additionally to these *minimum standards*, it is always possible to consider higher *common or shared European standards*.

4. One of the issues on which this balance between constitutional guarantee and democratic availability results particularly important is the regulation of political parties. Constitutional configurations of political parties may consider them as quasi-institutions of the state, as it could be argued that is the case in Germany or Spain. In both cases, similar historical circumstances (i.e. the reaction to totalitarian or authoritarian anti pluralist regimes) explain this configuration.

5. The constitutional configuration of political parties may refer to a number of issues but the central ones are the regime for their creation including registration and dissolution. Again, specific historical circumstances account for the regimes of creation and dissolution. But, again, within the scope of the Council of Europe, these must be expected to fell in line with minimum European standards and to aim at common European standards.

B. The Turkish regulation of dissolution of political parties in comparative perspective

6. Turkish constitutional regulation of political parties combines a very open attitude towards their creation, which excludes any kind of control by means of registration control for instance, together with a tight regime for the dissolution of political parties.

7. The dissolution regime contains three components: first, the ***object of control*** and scrutiny for deciding on dissolution; secondly, the ***substantive grounds*** on which dissolution may be decided and, thirdly, the ***dissolution procedure*** itself.

B.1 Object

8. An overview of the regimes of dissolution of political parties in the Council of Europe member states shows that there are three kind of objects on which dissolution applies. The first is the ***finalities*** or ***ends*** dimension, i.e. party objectives and programmes may be considered the cause of dissolution. Few countries refer exclusively to the programmatic dimension, among these, clearly the first sentence in Article 13 of the Polish Constitution (even though a combined reference to means tempers it). A number of counties refer to ***means***, i.e. instruments or activities; for instance, Armenia, art. 7; Serbia 5; Spain, Art. 9 Law on Political Parties. However, the most common form to approach the issue is by means of a combined formula that refers ***simultaneously to ends and means***: Croatia, Art. 6, Germany; art. 21; Moldova Article 41; Romania; art. 40, FYRM; art. 20.

9. Dissolution of political parties does not appear to be a widespread practice in Europe and when it has happened, both *ends* and *means* justified it. Germany and Spain are the countries consistently quoted in this respect. In Germany, drafters decided, according to the expression of prof. dr. Hoffmann-Riem, for a "self-defensive democracy" in a historical context in which Nazism, on the one hand, and the expansion of Soviet totalitarianism, on the other, were felt as pressing on the nascent German democracy. This sense of historical "exceptionality" may explain why the finalist or programmatic dimension was prominently taken into account. Nevertheless, the test for dissolution is placed on activity (i.e. the means): the German Constitutional Court adopted a high standard of proof: *a showing of a fixed purpose to combat the free democratic basic order constantly and resolutely manifested in political action according to a fixed plan* (BVerfGE 5, 85, 141).

10. In Spain, the emphasis in the three cases resolved so far was on the activities of the parties and their connexion with terrorist organizations.

11. The Turkish regulation. Article 68 (4) of the Turkish Constitution states that "the ***statutes*** and ***programmes***, as well as the ***activities***, shall not be in collusion with the following (8) criteria (discussed below). The Turkish model fells into the third category and it induces control on the structural dimension of the party (reflected by its statutes), the more circumstantial programmatic dimension, and the means (activities) dimension.

12. Turkish practice seems to show, however, an adherence to the control of the programmatic dimension. Thus, the ECHR held in a number of cases against Turkey that the debate and/or the programme were no justification for the dissolution of political parties (United Communist Party [1991]; Socialist Party; [1992]; Freedom and Democracy Party [1993]). The ECHR reversed its case law in the Welfare Party case [1998] accepting in its reasoning that finalities (i.e. programmatic declarations) may be a reason for dissolution.

13. Likewise, the Venice Commission in its Guidelines on Prohibition of Political Parties (Explanatory Report) has conclusively established that

> *a party that aims at a peaceful change of the constitutional order through lawful means cannot be prohibited or dissolved on the basis of freedom of opinion. Merely challenging the established order in itself is not considered as a punishable offence in a liberal and democratic state. Any democratic society has other mechanisms to protect democracy and fundamental freedoms through such instruments as free elections and in some countries through referendums when attitudes to any proposal to change the constitutional order in the country can be expressed.*

14. Read together constitutional provisions and practices, it appears that the Turkish regime for dissolution of political parties conforms one of the most exhaustive regimes to be found throughout Europe. Being aware of this, the 2001 Constitutional amendments clarified article 69 and oriented it towards a more guarantist provision which oriented control towards activities (i.e. means):

> *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.*

15. Since the adoption of this constitutional amendment in 2001, the first cases on dissolution have happened in 2008. The forthcoming cases on the DTP and the HADEP may prove wheter this constitutional higher guarantee which requires to demonstrate that the party has become a *center for activities* works or not.

B.2 Substantive grounds for dissolution

16. A second characteristic of the Turkish regime is the large number of substantive requirements that a political party needs to comply in order to avoid dissolution. Article 68 lists up to 8 different reasons. After the 2001 amendments, Article 69 adds accepting aid from a foreign country. Furthermore, the Law on political parties adds a list of reasons justifying parties' bans.

17. Although taken in isolation these motives could be found in other European constitutions, the Turkish one contains the largest possible number of grounds for dissolution. From a more substantive point of view, two further considerations may be added. Firstly, the items mentioned in article 68 are of a very *different nature*; some are easily perceived as crimes (e.g. inciting to committing crime), whilst others are programmatic goals which in other context may not be considered crimes. Secondly, the article offers a certain *redundancy* which has an expansive effect and it may spill over into aspects of parties electoral programme. Thus, the respect for the integrity of the territory may be applied to programmes proposing federal, regional or even decentralised forms of government without this questioning at all the main aim (i.e. territorial integrity).

18. The large list of substantive grounds for dissolution and the large number of effective cases of dissolution raises in an observer the perception of a certain "*permanent exceptionalism*": the defence of the constitution from a number of potential enemies reduces significantly the number and type of the political programmes that may be legitimately debated. This reduces the arena for democratic politics and widens the scope of constitutional adjudication on political disputes.

B.3 The procedure: subjects

19. The procedure for dissolution of political parties involves two key subjects: the **jurisdictional organ** that may take the decision and the **subject entitled to initiate proceedings**.

20. **The jurisdictional organ**. Most European countries entrust their respective constitutional courts the decisions on dissolving political parties. These are, for instance, the cases of Albania (art. 131); Armenia (art. 100 & 1001 Const.); Azerbaijan (art. 100); Bulgaria (art. 150); Croatia; Germany; Poland (Arts. 188 & 191) and Portugal (arts. 281). The Spanish case is, in this respect, singular, since the Spanish Constitution grants this decision to ordinary jurisdiction. Nevertheless, the Law on Political Parties refers this case to a special Chamber of the Spanish Supreme Court of specific composition. And even in this case, claimants may appeal the Constitutional Court on *amparo* after a sentence of the Supreme Court if they think that their fundamental rights have been affected.

21. On this background, the Turkish model of applying the Constitutional Court for decisions on the dissolution of political parties does not stand as peculiar *vis-à-vis* the most common European models.

22. The **subject entitled to initiate proceedings**. Here, the coincidence among European states is also very intense. Whether they allow a large number of subjects to initiate a proceeding (for instance, Bulgaria, Poland or Portugal) or this is restricted to only one (for instance, Azerbaijan; where is the Ministry of Justice the one entitled, art. 16 Law on Political Parties) the common element is that political actors are permanently entitled: parliament (Bulgaria, Germany, Poland, Portugal, Armenia, Croatia); Government (idem); President of the Republic (idem).

23. On paper, Spain and Turkey are the only two cases in which the subject entitled to initiate the proceedings is the Public Prosecutor. In Spain, the Fiscal Ministry (i.e. the Prosecutor Officer) is entitled to submit a demand for illegalization. However, the Public Prosecutor is, in the Spanish case, a third possible agent: the government by means of the state's attorney may submit a demand for initiating an illegalization procedure. Additionally, both chambers of the Spanish Cortes, the Congress or the Senate, may request, through the mechanism that their respective governing bodies (i,e. Mesas) determine, the government to submit a demand. The government is obliged to proceed. Both of these agents are, typically, political ones.

In practice, the performance of the chief prosecutor has closely mirrored the preferences of the incumbent government. The chief prosecutor has initiated the three cases that the Supreme Court has so far known. Moreover, in the period between 2004 and 2007, the main opposition party asked repeatedly the chief prosecutor to initiate proceedings against Basque political forces allegedly linked to the terrorist organization ETA. Since this request contradicted the criterion of the government, the chief prosecutor resisted these demands. Once the government changed its policy in 2007, the chief prosecutor was prepared to initiate to processes against these political parties.

24. On this background, the Turkish model in which the Public Prosecutor is the only entitled authority stands as totally peculiar. This peculiarity is further strengthened because parties usually prosecuted are minor ones whilst in Turkey the regime has allowed to prosecute the biggest and ruling party. The fact that the democratically elected majority party may be legally prosecuted results awkward and this possibility requires strong safeguards.

C. Turkish practice

25. The biggest difference between the Turkish and other European regulations does not refer actually to the rules themselves but to their actual application. The Turkish Constitutional Court has dissolved 24 parties since it commenced its proceedings in 1962. Among these, 18 sentences of dissolution were dictated after the 1982 constitution.

26. This practice contradicts, *prima facie*, the recommendations contained in the Venice Commission Guidelines on political parties: *Restrictions of any kind and, in particular, dissolution are exceptional measures*. Turkish practice has transformed what is commonly regarded as an extraordinary mechanism into a common procedure.

27. It must be point out that, partly, the high number of dissolution cases derives from certain incongruence between a very liberal register system and a very tight dissolution regime. In several of these cases, it may be argued that parties dissolved are merely re-created, so the party dissolved is only one, in reality, although is re-created a number of times. For example, in the current case followed against the DTP, a new party, the Peace and Democracy Party (BDP) has already been created with the purpose to serve as successor to the DTP if eventually dissolved.

28. The Spanish model shows a different form of treating the cases of succeeding parties: if a party which has submitted a demand for registration (a fairly automatic process in Spain) is considered to be the continuator or successor of a dissolved party, the registering authority (the Home Affairs Ministry) may demand from the Supreme Court to determine whether the new party is, in fact, the succeeding party. If so, the registering authority is allowed to deny registration.

Conclusions

29. The Turkish regime combines four elements:

- The widest possible range of objects of control (ends and means)
- a long and detailed regulation of the substantive grounds which allow the dissolution of a political party
- an immediate and easy procedure for initiating a case which is shielded from any consideration of political opportunity
- an extensive practice of applying the procedure.

30. As a result, the Turkish regime of dissolution of political parties transforms an exceptional measure into an ordinary one and converts Turkish democracy into a permanent "self-defending" regime. This reduction of the scope for democratic politics is further eroded by the constitutional shielding of the first three articles of the Constitution, that prevent the emergence of political programmes that may even slightly question principles shaped at the origin of the Turkish republic. In this form, current democratic politics are constantly subordinated to immutable foundational values whose current popular acceptance, legitimacy and validity may pass totally unchecked.

31. A reversal of the current practice on dissolution of political parties may come about through either of the following mechanism:

- Judicial self-restraint as practiced mainly by the Prosecutor but also the Constitutional Court. The behavior of the Prosecutor and the CC in the AKP case indicate that both are not willing to exercise such self-restraint
- Constitutional reform of articles 68 and/or 69, in particular, the reduction and re-wording of the grounds for dissolution and the unchecked role of the prosecutor in the process.

32. Finally, it may seem advisable that the VC updates its 1999 Guidelines in order to face new ECHR case law and some more modern developments such as the Spanish law on political parties.