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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION ON THE CONSTITUTIONAL AND LEGAL PROVISIONS RELEVANT TO THE PROHIBITION OF POLITICAL PARTIES IN TURKEY

on the basis of contributions by

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1. Introduction

1. The Venice Commission received a request from the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE) on 15 September 2008 asking it "to review the constitutional and legal provisions which are relevant to the prohibition of political parties in Turkey".

2. In view of its mandate, the Commission understands its task to be the review and assessment of whether the rules in the Turkish Constitution and legislation on prohibition and dissolution of political parties are in conformity with European democratic standards, the rule of law and human rights, as set forth in the European Convention on Human Rights (ECHR).

3. The general background for the request from the PACE is, on the one hand, the fact that in Turkey a high number of political parties have been prohibited over the years. This comes in contrast with the prevailing European approach, under which political parties are prohibited or dissolved only in exceptional cases. On the other hand, Turkey is engaged at present in a process of democratic reform which provides an opportunity to reconsider some traditional practices that are no longer in harmony with the state of development of modern Turkish society. A further reform of the rules on party prohibition would be in line with the logic of this reform process.

4. The more specific and actual background is the procedure against the ruling AK Party, which was initiated on 14 March 2008 and ended with the 30 July 2008 decision of the Turkish Constitutional Court. Although the AK Party was not dissolved, the case still demonstrates a number of problematic aspects of the rules on party prohibition in Turkey. Ten out of the 11 judges found the AK Party to have been a "centre" for anti-secular activities prohibited under article 68 (4) of the Constitution, and sanctioned the party by withdrawing half of its public financial support for the period of one year. A majority of 6 judges voted for dissolving the party, falling one vote short of the necessary qualified majority of 7.

5. When announcing the judgment, the President of the Constitutional Court stated that the case demonstrated the need for a constitutional amendment changing the rules in order to make it more difficult to bring party closure cases before the Court. The same point was made by a number of European observers, including members of the EU-Turkey delegation in the European Parliament.

6. This is in line with the position taken before the judgment by the PACE, which in a Resolution passed on 26 June 2008 stated that:

> *14. The 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 the above-mentioned reforms, the issue of dissolution of political parties in Turkey is not closed. The Assembly notes that it becomes clear that further constitutional and legislative reforms in this respect are necessary.*[1]

7. In the "Turkey 2008 Progress Report" presented by the Commission of the European Communities on 5 November 2008, it is stated that:

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[1] Cf PACE Resolution 1622 (2008) on "The functioning of democratic institutions in Turkey: recent developments", which goes on to suggest that a review of the rules on party closure should be part of a general constitutional reform in Turkey. See http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1622.htm.

As regards political parties, the closure cases against the AKP and the DTP (see section on Parliament) illustrate that the current legal provisions applicable to political parties do not provide political actors with an adequate level of protection from the state's interference in their freedom of association and freedom of expression. (p. 18)

In the light of this case, the legal provisions on political parties need to be amended and brought into line with the case law of the ECtHR and best practice in EU Member States, as outlined by the Council of Europe's Venice Commission. (p. 70)

8. The present opinion will cover the following three elements:

1. An overview of "European standards" for regulating prohibition and dissolution of political parties;
2. A general analysis of the present regulation on prohibition and dissolution of political parties in the Turkish constitution and legislation;
3. An evaluation of whether reform of the Turkish rules is necessary in order to comply with European standards.

9. The present Opinion was adopted at the 78th plenary session of the Commission in Venice on … in the presence of …, on the basis of contributions by Messrs Closa Montero (Spain), van Dijk (Netherlands), Grabenwarter (Austria), Hoffmann-Riem (Germany), Sejersted (Norway), Tuori (Finland) and Vogel (Sweden). Preliminary discussions took place at the 76th and 77th Plenary Sessions of the Commission in October and December 2008, respectively.

2. European standards for the protection of political parties against prohibition and dissolution

2.1. Introduction

10. In order to assess the Turkish rules and practice on prohibition and dissolution of political parties against "European standards", it is first necessary to analyse to what extent such standards exist in this field, and what they consist of.

11. A basic distinction should be drawn between (i) standards for "best practice" ("model" regulation) on how to regulate party closure, and (ii) legal minimum standards of protection which must be given to political parties in the member States of the Council of Europe.

12. The first is a matter of comparing rules on the subject in Council of Europe member states in order to identify whether there is a common model or, if not, to identify different alternative models which might serve as inspiration for national reform, for example in Turkey. The second is a question of what legal standards of protection can be derived from common legal obligations, in particular those ensuing from the ECHR, as interpreted by the European Court of Human Rights (ECtHR), and from a common European democratic and constitutional heritage. The first may form a basis for answering the question of whether and how the national provisions *should* be reformed, the second determines whether they *must* be reformed in order to comply with international legal obligations. Both are examined in the following.

2.2. Rules on prohibition and dissolution of political parties in the member States of the Council of Europe – a comparative overview

2.2.1 A general comparative overview of national regulation on party closure

13. In 1998 the Venice Commission undertook a comprehensive comparative review on "Prohibition of political parties and analogous measures" at the request of the Secretary General of the Council of Europe. Responses were received from Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Slovenia, Sweden, Switzerland, Turkey, Ukraine, and Uruguay.[2]

14. On this basis the Venice Commission drew up a report that was adopted at the 35th Plenary Session on 12-13 June 1998, and which categorises and analyses national rules on the prohibition of political parties.[3]

15. For the purposes of the present opinion, the Venice Commission has examined new comparative material. This updated material confirms that there have been no major changes in the last decade in how the member States of the Council of Europe regulate and handle the question of party closure. The conclusions made in the 1998 Venice Commission report therefore still apply as a concise summary of European practice. The conclusions read as follows:

> *Conclusion*
>
> *The diversity of the legal provisions governing party activities in the countries which answered the questionnaire makes it difficult to define a European standard. A number of common features do stand out, however:*
>
> *a. Party activities everywhere are guaranteed by the principle of freedom of association.*
>
> *b. The fact that certain measures are lacking in many, if not most, of the states concerned leads us to conclude that they are not essential to the smooth functioning of democracy. Examples include:*
> *- registration of political parties: no registration is required, even as a formality; this does not mean, however, that candidates for elective office do not have to meet certain formal requirements;*
> *- sanctions, including prohibition and dissolution, against political parties which fail to abide by certain rules. This does not, of course, preclude the punishment of criminal behaviour by individuals in the context of political activities.*
>
> *c. Even in those states, which do provide for sanctions against political parties, there is still considerable diversity. The same situations are not sanctioned in the same way or with the same severity in the different states.*
>
> *d. The fact that it is so difficult – perhaps even impossible – to define behaviours which would generally warrant such serious sanctions as the prohibition or dissolution of a political party highlights the need to apply the principle of proportionality when enforcing legislation restricting freedom of association.*
>
> *The way in which the often vast legal arsenal governing the activities of political parties is actually applied in practice reflects a genuine determination to respect this principle.*

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[2] Some non-member states of the Council of Europe enjoying observer status with the Venice Commission were included in the questionnaire.

[3] Cf. http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp

There are very few democratic states in which the sanctions covered by the questionnaire have actually been imposed on political parties in the recent past other than for formal reasons.

With the exception of restrictions of form, particularly those designed to avoid confusion between party names, measures designed to prevent the activities of political parties – which do not exist at all in certain states and are reserved in others to wartime situations – should be permitted only in exceptional circumstances. The extreme restraint shown by the vast majority of national authorities confirms this.

e. Finally, a recurrent feature in the national legislations studied was the guarantee of being heard by an independent and impartial judicial authority or tribunal. This is a clear sign of concern to keep something as politically important as the fate of political parties out of the control of the executive or administrative authorities, whose impartiality is often open to doubt.

16. The Venice Commission reiterates and confirms these conclusions, as a description of the common features of European practice, which forms an appropriate basis for assessing national rules on party prohibition in any given member State of the Council of Europe for their conformity with European standards.

17. A main point when comparing national rules on party closure is that as regards the legal (formal) regulation, there is no common European model, but rather "considerable diversity" – reflecting different constitutional traditions, differences in history, context and social and political conditions. A number of states have no rules on party closure at all, and manage well without. Those states that do have rules on the prohibition of parties have regulated this very differently, both in form, procedure and substance.

18. On the other hand, there is a clear common European approach in that there is a common democratic legacy that political parties are *not* prohibited and dissolved. Even in states with seemingly wide rules on party closure there is "extreme restraint" in how these rules are applied. The threshold for actually applying (or even invoking) these rules is extremely high. The very few examples to the contrary only serve to confirm this common legacy.

19. This practice demonstrates a clear common European approach to the classic "liberal dilemma" of how a democracy should respond to those forces that threaten it – namely by way of open debate and through democratic channels. There is a common practice for allowing parties which advocate fundamental changes in the form of government, or which advocate opinions that the majority finds unacceptable. Political opinions are not censored by way of prohibition and dissolution of the political party concerned, while illegal activities by party members are sanctioned through the ordinary criminal law system.

20. This practice is basically the same in all European states, whether they have formal rules on party closure or not, and regardless of how these are formulated. This even holds good for those constitutional systems which formally adhere to a principle of "militant democracy", such as the German one, which, on closer analysis, is not "militant" but rather liberal and tolerant.

21. The fact that a large number of European states have no regulation of party prohibition at all led the Venice Commission to conclude in its 1998 report, that such rules "are not essential to the smooth functioning of democracy". This conclusion still stands today. At the same time, it should be added that in some countries the provisions on party closure in practice do not function as a limitation on the freedom of party activity, but on the contrary as a special privilege and protection, which raises the threshold and protects political parties from the kind of legal dissolution to which other forms of associations might be subjected.

22. In those states which have specific provisions on party closure, these are usually the result of historical factors – but even there the provisions are hardly ever invoked. Even in those states, where the constitution formally provides for relatively wide rules on party dissolution, these rules do not appear to form part of the operative and "living" constitution, but are rather a passive safety valve, which might serve a function by its mere existence, but which is rarely if ever actually invoked.

2.2.2. Comparative overview of possible criteria for prohibition and dissolution of political parties

23. The "considerable diversity" of national regulations on party closure is reflected in the formulation of material requirements that political parties have to abide by, and which might be invoked as criteria for prohibition and dissolution. Based on the 1998 Venice Commission report and new updated material, various national requirements for political parties include bans against:

- threatening the existence or sovereignty of the state
- threatening the basic democratic order
- threatening the territorial integrity of the state
- fostering social, ethnic, or religious hatred
- fostering ethnic discrimination
- use or threat of violence
- nazism or fascism
- criminal associations
- military or paramilitary associations
- secret or subversive methods.

24. The list is not exhaustive, but illustrates the variation in substance even among those states which do have specific regulations. The basic criteria are usually set out in the national constitution, but can sometimes be supplemented (and extended) in statutory law. It appears that, to a considerable extent, the variations can be explained by different historical experiences.

25. It should be emphasised that no European constitutional system includes all these criteria. Most national provisions are rather short, with just one or two such criteria. Others have several, but not all of them. It can be argued that although several of these criteria in themselves may be acceptable as part of a democratic system, they are still not acceptable if there are too many that go beyond a "critical mass".

26. For the purpose of analysis, a useful distinction can be drawn depending on whether the national criteria for prohibition or dissolution refer to *means* (activities) or *ends* (objectives). Only a few states prohibit party objectives and opinions as such. It is more common that the national criteria refer to illegal means, such as the use of violence. But the most common model in those countries that have rules on party prohibition is that prohibition requires *both* unlawful means (activities) and illegitimate ends (objectives).

27. The very few and scattered cases in which political parties have actually been prohibited in Europe in modern times have all (with the exception of Turkey) concerned marginal and extremist parties, *inter alia* in Germany in the 1950s and lately in Spain. In Germany the Constitutional Court (BVerfG) has held that the basis for prohibiting a party must go beyond its anti-democratic opinions so as to also require the showing (with a high standard of proof) of a fixed purpose to combat the basic democratic order constantly and resolutely manifested in political action according to a fixed plan (cf. BVerfGE 5, 85, 141).

28. When assessing different national criteria, one is faced with several challenges familiar to comparative constitutional law. First, it is difficult to compare constitutional texts without going into their interpretation in national legal practice within their specific political and legal context. Second, the extent to which these criteria are actually "hard law", which might be invoked before the courts varies. In some countries the legal requirements imposed on political parties are not even linked to procedures for their actual application, and thus serve more as political statements. In others, application is in theory possible, but the procedural hurdles are so high as to make this almost impossible.

29. The number and content of the material criteria contained in any given constitutional system therefore do not necessarily indicate the legal and actual threshold for prohibition of parties. Still it might be held that the more formal restrictions there are, and the wider their formulation, the clearer the signal that this is a legal instrument which may actually be invoked in practice.

30. A (first) general comparative approach shows that the most striking feature of the Turkish rules on party closure is that they combine a very long list of material criteria for prohibition or dissolution with a very low procedural threshold. Furthermore, prohibition or dissolution can be based both on unlawful activities and on ideological opinions as such. This, together with the national political and historical context, is probably the reason why this instrument has been so widely used.

2.2.3 Comparative overview of procedures for prohibition and dissolution of political parties

31. When assessing what restrictions apply to political parties, the procedural aspect is as important as the material one. It is the procedural rules that determine how and to what extent the substantial rules may actually be applied.

32. It is a common principle in all democratic states that cases of potential party prohibition must be heard and decided by impartial courts of law. In most countries with rules on party closure this task is entrusted to the Constitutional Court, as in Turkey[4]. In some countries, such as Spain and Denmark, the competence lays in the hands of the Supreme Court, but with special procedures and the possibility of an appeal to the Constitutional Court in the Spanish case.

33. Most important from a procedural perspective is the question of which institution is given the competence to *initiate* a prohibition procedure against a political party. Unlike in criminal cases, this power is very seldom entrusted solely to the prosecuting authorities. The reason is the political nature of such cases, and the fact that initiating a procedure for prohibition or dissolution may in itself have grave negative impact on the political situation in the country. Therefore initiating the procedure for the closure of a political party should not be the automatic legal consequence of the fulfilment of certain legal criteria. It should rather be a discretionary decision, which has to be based on an assessment of the risk posed by this party to the functioning of democracy and which has to take into account, in addition to the legal criteria, the political consequences of an eventual closure.

34. For this reason, the states with rules on party prohibition have established special procedures for bringing such cases before the competent court. In many countries this is purely a political decision. In Germany, for example, the competence rests with the Federal Parliament, the Federal Council or the Federal Government, while the Federal Prosecutor is *not*

[4] The rules in Austria on the ban of activities or parties promoting ideas of the former national-socialist party ("Wiederbetätigung") concern a specific historical background and are, therefore, not included in this analysis.

entitled to file an application. In other countries, there are other forms of political filters, which hinder a purely "legal" approach to such cases. Spain seems, at first sight, an exception to this rule since the procedure for the closure of a political party can be launched not only by the government through the state attorney, acting on its own initiative or at the request of one of the two chambers of the Cortes, but also by the Fiscal Ministry (prosecutor) acting on its own. Spanish practice shows, however, that this power has been used by the Fiscal Ministry only when this was in line with government policy.

35. The Venice Commission notes that, with the exception of Turkey, there seem to be very few, if any, countries in Europe in which the legal competence to initiate a prohibition case against a political party is given to the ordinary public prosecutor without any kind of political and democratic check or balance. For this reason, there is no other European state in which it would have been procedurally possible to initiate closure proceedings against a democratically elected majority party under circumstances comparable to those in Turkey in 2008.

2.3. European legal standards for the protection of national political parties against prohibition and dissolution

2.3.1 Introduction

36. As a starting point, it is for the national (constitutional) legislator to determine whether there should be legal restraints on political parties and what, if any, should be the rules on prohibition and dissolution. To the extent that there are legal limits on states in this regard, these result from legally binding international law, leaving to states a greater or smaller margin of appreciation.

37. The basic question is to what extent the member states of the Council of Europe are obliged, under international law, to offer political parties *protection* against illegitimate prohibition and dissolution.

38. The common European legal standard on party protection is primarily to be deducted from Article 11 of the ECHR, as interpreted by the European Court of Human Rights (ECtHR), mainly in cases concerning Turkey. Article 22 of the International Covenant on Civil and Political Rights corresponds to Article 11 of the ECHR.

39. In addition, there are other relevant sources of law and legal argument, which might be considered more as "soft law", but are still important, not least politically. These include:

- Resolutions and other documents by the Council of Europe, in particular of the Parliamentary Assembly of the Council of Europe (PACE) and the Committee of Ministers;
- Guidelines and reports by the Venice Commission.

40. Article 11 ECHR, like all substantive provisions of the Convention, contains a minimum legal standard, stating the lowest common denominator for protection of political parties, which is to be inferred from the right of freedom of association and assembly. This should *not* be confused with the question of how to *best* regulate the freedom to form and operate political parties. There is nothing to prevent a state offering its political parties better protection than Article 11 (see Article 53), and the great majority of European democracies clearly do so.

41. The other relevant legal sources (PACE resolutions, Venice Commission guidelines, etcetera) are not minimum standards, but to some extent go further, and rather reflect a "best model" approach.

2.3.2 The European Court of Human Rights

42. The existence and activities of political parties are protected by Article 11 ECHR on freedom of association and assembly, and also Article 10 on freedom of expression. The dissolution of a political party amounts to a restriction under Art. 11 ECHR. For such a restriction to be justified, it must be "prescribed by law in pursuit of one of the legitimate aims laid down in the article and "necessary in a democratic society". Furthermore, the ECtHR has stated that even more basic than the wording of Article 11 is the fact that political parties are a form of association essential to the proper functioning of democracy, which is the only form of government compatible with the ECHR. Due to this importance of political parties for the functioning of democracy, the ECtHR requires a particularly strong justification for the prohibition or dissolution of a political party as opposed to prohibition of other associations.

43. There is a relatively extensive case-law from the Court on party prohibition, with most major cases concerning Turkey. These include:

- United Communist Party v. Turkey – 30 January 1998
- Socialist Party v. Turkey – 25 May 1998
- Özdep v. Turkey – 8 December 1999
- Yazar v. Turkey – 9 April 2002
- Refah v. Turkey – 13 February 2003.

44. There are also a number of other judgments in which the Court confirms and reiterates the principles stated in the above-mentioned judgments.[5] The basic approach and general principles were laid down by the Court in the first two cases – concerning the United Communist Party and the Socialist Party. They were confirmed in the Özdep case, and developed in the Yazar case, which further strengthened protection of political parties. In the Refah judgment of 2003 the Court referred to its earlier strict interpretation, but after careful scrutiny of the evidence found that the prohibition of the Refah (Welfare) Party was within the margin of appreciation of the Turkish courts, and therefore did not constitute an infringement of Article 11.

45. The Venice Commission is of the opinion that the following principles can be deduced from the relevant case law of the Court on Article 11:

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;[6] political parties play a primordial role in a democratic state and are a form of association essential to the proper functioning of democracy;[7]

2) Political parties enjoy the right of freedom of expression and of freedom of association;[8]

3) Political parties play an important role in ensuring pluralism, which requires a close link between freedom of expression and freedom of association;[9]

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[5] These include the cases of DEP v Turkey of 10 December 2002 (25141/94), STP v Turkey of 12 November 2003 (26482/95), and EP v Turkey of 31 May 2005 (39434/98). Cases from other countries include lately the Christian Democratic People's Part v. Moldova of 14 February 2006 (28793/02), and Zhechev v. Bulgaria of 21 June 2007 (57045/00). The lists are not exhaustive.

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

[7] United Communist Party-judgment, § 25.

[8] Idem, §§ 42-43.

4) 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;[10]

5) However, political parties may promote a change in 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 in itself compatible with fundamental democratic principles;[11]

6) 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;

7) 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; 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, are to be construed strictly, with only a limited margin of appreciation for the domestic authorities and rigorous supervision by the European Court of Human Rights;[12]

8) In examining the justification of the dissolution of a political party on the ground of a pressing social need, the following points are of particular relevance:

a. whether there is plausible evidence that the risk to democracy invoked as a justification, provided it has been proved to exist, is sufficiently imminent;
b. whether the acts and speeches of the leaders and members of the political party concerned are 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;[13]

9) In addition, it has to be examined whether dissolution is a measure proportionate to the aims pursued; although democracies have the right to defend themselves against extremist parties,[14] 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;[15]

10) 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.

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[9] Idem, § 43.

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

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

[12] United Communist Party-judgment, § 46.

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

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

[15] United Communist Party-judgment, § 46.

46. The Venice Commission would, in particular, emphasise the Court's basic statement that a political party must be allowed to express opinions that require national constitutional change, as long as this does not harm democracy itself:

> *"In the Court's view, 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. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself."*[16]

47. The Court has been clear on the criteria for interpretation and judicial review under the ECHR in cases of national party prohibition:

> *"Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts."*[17]

48. In this way, the Court has interpreted Article 11 of the Convention so as to protect political parties of all variations and to set strict limits on the possibility of the national legislator to prohibit parties, except in truly extraordinary circumstances.

49. Even so, it should be emphasised that Article 11, as interpreted by the Court, is still only a minimum standard for the protection of political parties. According to Article 53, nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting State. As regards protection of political parties, almost all European countries provide higher protection to their parties than what can be derived from the ECHR. The soft law standards developed by the Parliamentary Assembly of the Council of Europe and the Venice Commission also opt for a higher standard of protection.

50. This difference of approach does not present a legal conflict, but is merely a consequence of the fact that the common democratic European practice in this sector goes further than the minimum legal protection guaranteed under ECHR Article 11. This is indeed acknowledged by the Court itself, which frequently cites the Venice Commission guidelines in its judgments.[18]

2.3.3 The Parliamentary Assembly and the Committee of Ministers of the Council of Europe

51. On several occasions the Parliamentary Assembly of the Council of Europe (PACE) has considered what should be the European standard for protection of political parties against prohibition or dissolution. In Resolution 1308 (2002) on "Restrictions on political parties in the Council of Europe member states" the PACE stated in para 11 that:

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[16] Socialist Party-judgment § 47.

[17] United Communist Party-judgment § 46, repeated in all later judgments, including Refah §100.

[18] EctHR, Christian Democratic People's Party v. Moldova, judgment of 14 February 2006, Herritarren Zerrenda v. Spain, judgment of 11 December 2007, Etxeberria and others v. Spain, judgment of 11 December 2007.

11. In conclusion and in the light of the foregoing, the Assembly calls on the governments of member states to comply with the following principles:

i. political pluralism is one of the fundamental principles of every democratic regime;

ii. restrictions on or dissolution of political parties should be regarded as exceptional measures to be applied only in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country;

iii. as far as possible, less radical measures than dissolution should be used;

iv. a party cannot be held responsible for the action taken by its members if such action is contrary to its statute or activities;

v. a political party should be banned or dissolved only as a last resort, in conformity with the constitutional order of the country, and in accordance with the procedures which provide all the necessary guarantees to a fair trial;

vi. the legal system in each member state should include specific provisions to ensure that measures restricting parties cannot be used in an arbitrary manner by the political authorities.

52. In it Resolution 1380 (2004) closing the monitoring procedure for Turkey, the PACE stated that the frequency with which political parties were dissolved was a source of real concern and expressed the hope that in future, the constitutional changes of October 2001 and those introduced in the legislation on political parties would "limit the use of such an extreme measure as dissolution".

In Resolution 1622 (2008) of 26 June 2008 the PACE recalled its Resolutions 1308 (2002) and 1380(2004) and stated:

14. The 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 the above-mentioned reforms, the issue of dissolution of political parties in Turkey is not closed. The Assembly notes that it becomes clear that further constitutional and legislative reforms in this respect are necessary.

15. A full revision of the 1982 Constitution which, despite repeated revisions, still bears the marks of the 1980 military coup d'Etat, and a comprehensive review of the law on political parties are required in order to bring these texts fully into line with European standards. In pursuing such reforms, the Turkish authorities should in particular envisage introducing stricter criteria for the dissolution of political parties, such as condoning or inciting violence or overt threats to fundamental democratic values, in line with the above-mentioned guidelines of the Venice Commission.

53. The Venice Commission notes in particular that the Parliamentary Assembly has thus endorsed and referred to its 1999 Guidelines as a proper basis on which to assess national rules on party prohibition.

54. The Committee of Ministers of the Council of Europe addressed the issue of the prohibition of political parties in Turkey in the framework of its task of supervising the execution of the judgments of the ECtHR. In its Resolution CM/ResDH(2007)100[19] on the

[19] Adopted by the Committee of Ministers on 20 June 2007 at the 997th meeting of the Ministers' Deputies.

Execution of the judgments of the European Court of Human Rights in the cases United Communist Party of Turkey (judgment of the Grand Chamber of 30/01/1998) and 7 other cases against Turkey concerning the dissolution of political parties between 1991 and 1997 the following considerations appear:

> *Emphasising with the Court the essential role played by political parties in maintaining the pluralism and proper functioning of democracy, and the need to avoid restricting their freedom of association and expression unless there are convincing and compelling reasons for doing so, and recalling that a political party may campaign to change the law or the legal or constitutional structures of a state subject to two conditions: (1) the means used to this end must be legal and democratic in every respect; and (2) the change advocated must itself be compatible with the fundamental principles of democracy;*
>
> *Noting in this connection the constitutional changes of 2001 and the amendments to the Law on Political Parties adopted in 2003 which reinforced the requirement of proportionality for any interference by the state in the freedom of association;*
>
> *Recalling the importance in this situation of the Turkish authorities' continued efforts to ensure the direct effect of the Court's judgments in the interpretation of the Turkish Constitution and law (see, for example the authorisation of the Communist Party to take part in the 2003 general election despite the formal constitutional ban on using the name "Communist"; see also the more general efforts described in Resolution ResDH(2001)71 in the Akkuş case and Interim Resolution ResDH(2005)43 concerning the actions of the security forces in Turkey);*
>
> *Welcoming the 2004 amendment to Article 90 of the Constitution, henceforth providing that international human rights treaties take precedence over any incompatible national legislation;*
>
> *Strongly encouraging the Turkish authorities to pursue their efforts to give direct effect of the Court's case-law in the implementation of Turkish law.*

2.3.4 The Guidelines of the Venice Commission

55. The survey on prohibition and dissolution of political parties in Europe, done by the Venice Commission in 1998, led to the adoption by the Venice Commission of its "Guidelines on prohibition and dissolution of political parties and analogous measures" in December 1999.[20] These guidelines consist of seven paragraphs, stressing *inter alia* the importance of political parties, and that prohibition or dissolution is a particularly far-reaching measure, which should be used with "utmost restraint" and subject to a strict principle of proportionality.

56. In the present opinion, the Venice Commission reiterates and confirms these guidelines, which have also been endorsed by the Parliamentary Assembly of the Council of Europe, and which for a decade have been widely referred to as general European standards, *inter alia* by the institutions of the Council of Europe and the European Union.

57. Of particular relevance to the present assessment is paragraph 3 of the guidelines, which states that:

> *3. 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*

[20] Cf. http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp

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.

58. The essence of this paragraph is that the Venice Commission only recognises the threat or use of violence as the sole legitimate criterion for dissolution of political parties. In other words, first of all the means must be undemocratic, not only the ends (objectives), and, secondly it is not in itself sufficient for dissolution that a party holds opinions that are incompatible with democracy. There must in addition be a threat of violent activity on the part of the party concerned for prohibition to be legitimate.

59. This standard adopted by the Venice Commission is somewhat stricter than that formulated by the ECtHR in its case law. In theory, it may also be stricter than the wording of the provisions on party closure that are to be found in some European countries. However it conforms to what has been the actual practice in democratic Europe for many decades.

60. It may therefore be concluded that the Venice Commission's standard accurately reflects the common European practice and model for protection of political parties.

61. Of particular interest is also the emphasis on proportionality and burden of proof in paragraphs 5 and 6 of the guidelines:

5. 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, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other, less radical measures could prevent the said danger.

6. Legal measures directed to the prohibition or legally enforced dissolution of political parties shall be a consequence of a judicial finding of unconstitutionality and shall be deemed as of an exceptional nature and governed by the principle of proportionality. Any such measure must be based on sufficient evidence that the party itself and not only individual members pursue political objectives using or preparing to use unconstitutional means.

2.4. Summary – European standards

62. The European constitutional and democratic standards on the issue of party prohibition and dissolution can be summarised in three points:

- There is no common European model on how to formally regulate prohibition and dissolution of political parties. On the contrary, there is great diversity among national constitutional and statutory regulations, ranging from no such rules at all to rather detailed provisions.

- However, there is a clear European approach as to how these rules are applied in practice: they are not applied. Even in countries with comprehensive provisions on party closure, these are narrowly interpreted and not applied in practice. The few exceptions to this only confirm the main model.

- There are common legal standards on the extent to which political parties must be protected against prohibition and dissolution, based on Article 11 of the ECHR. These are

however only minimum standards. Each state is free to offer broader legal protection to its political parties, and most European states do so. There are also soft law standards formulated by the PACE and the Venice Commission, which may be said to reflect the common European democratic practice.

63. These are the standards against which the rules on party prohibition and their actual application in Turkey must be reviewed.

3. Rules and practice on dissolution of political parties in Turkey

3.1. Introduction

64. The Venice Commission notes, first of all, that in Turkey the constitutional rules on party closure have for many decades played a fundamentally different role as compared to the common European approach, and continue to do so right up to the recent AK Party case of 2008 and the pending case against the DTP.

65. The different tradition of Turkey refers both to the wording of the law and to its actual application. The Turkish legal restrictions on political parties are stricter than the European approach, with more material restrictions on party programmes and activities, a lower general threshold, and fewer procedural obstacles for initiating a procedure of prohibition or dissolution. The fundamental difference, however, concerns the way the rules have been applied in Turkey, and how they have functioned as an ordinary and operative part of the constitution, unlike in any other European country in modern times.

66. An analysis of the Turkish rules on prohibition and dissolution of political parties must cover both the text of the legal rules and the way in which these rules have been interpreted and applied in practice. Furthermore, it must take into account the specific Turkish context – politically, constitutionally and historically.

3.2. The constitutional and statutory framework for dissolution of political parties in Turkey

67. Turkey already had provisions on party closure in the 1961 Constitution. In the present 1982 Constitution, the relevant provisions are found in Articles 68 and 69, which were amended in 1995 and 2001. In the Law on Political Parties of 1983, additional provisions are to be found in great detail in Part 4 “Bans regarding the political parties” covering Articles 78 to 108. It appears to be a contested issue in the national legal debate whether the statutory rules place stricter limits on parties than the constitutional provisions, and, if so, whether this in itself is unconstitutional.

Articles 68 and 69 of the Constitution

68. Article 68 is titled “Forming parties, membership and withdrawal from membership in a party”. Paragraph 1 states that citizens have the right to form political parties, paragraph 2 that parties “are indispensable elements of democratic political life”, and paragraph 3 that they may be formed “without prior permission and shall pursue their activities in accordance with the provisions set forth in the Constitution and law”. Paragraph 4 states the criteria with which parties have to comply:

> *Article 68 (4). The statutes and programs, 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.

69. Article 69 regulates the criteria and procedure for dissolving parties. The provision is lengthy and rather detailed. Relevant parts include:

Article 69. (1) 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. […]

(5) The dissolution of political parties 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.

(6) The permanent dissolution of a political party shall be decided when it is established that the statute and program of the political party violate the provisions of the fourth paragraph of Article 68.

(7) 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.

(8) 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.

(9) A party which has been dissolved permanently cannot be founded under another name.

(10) The members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision and its justification for permanently dissolving the party. […]

70. Article 69 (12) stipulates that further rules on political parties shall be regulated by statute, in accordance with the above-mentioned principles. This is done in the 1983 Law on political parties (see below).

71. While Articles 68 and 69 constitute the main constitutional provisions on party prohibition, they must be seen in relation to other parts of the Constitution, with which they are closely related. This in particular applies to Article 2, which states that "the Republic of Turkey is a democratic, secular and social state" and also mentions loyalty to the nationalism of Atatürk. Of practical relevance is also Article 3 (1), according to which "the Turkish state, with its territory and nation, is an indivisible entity". These articles belong to the non-amendable provisions of the Constitution (Article 4 prohibits even proposing their amendment), and they lay the foundation for the particular Turkish tradition of interpreting democracy in accordance with a

particular model of secularism and nationalism, which has been central to the Constitutional Court's argumentation in the party prohibition cases. Another relevant provision, which was a main basis for the Constitutional Court's decision in the AKP case, is Article 24 (5):

> *Art. 24(5). No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.*

72. By contrast, Article 90 (5), which was introduced in 2004, and which accords international human right treaties primacy over "domestic laws" is a very positive provision. It reflects the reform spirit of recent years in Turkey and has the potential to lead to a harmonisation of Turkish practice with European standards. However, the wording leaves unclear whether this primacy also includes the Constitution, and to what extent Article 11 of the ECHR under Turkish law may prescribe a more restrictive interpretation of Articles 68 and 69.

The criteria for prohibiting and dissolving parties

73. The wording of Articles 68 and 69 is lengthier and more detailed than what is usual in European constitutions, which reflects the historical background and political context of the rules. The material criteria for political parties are laid down in Article 68 (4), which states that neither the statutes and programmes nor the activities of a political party should be "in conflict" with:

- the independence of the state,
- the indivisible integrity of its territory and nation,
- human rights,
- the principles of equality and the rule of law,
- the sovereignty of the nation,
- the principles of the democratic and secular republic;
- shall not aim to protect or establish class or group dictatorship or dictatorship of any kind,
- shall not incite citizens to crime.

74. The paragraph thus lists 8 criteria, which is more than in other European constitutions. Some of them are formulated in very broad terms, as for example the prohibition against party programmes or activities which are in conflict with "the principles of the democratic and secular republic".

75. The list of material criteria gets even longer when Article 68 (4) of the Constitution is supplemented with the provisions in the Law on political parties, Articles 78 to 96, which state a number of additional "bans" on party opinions or activities. Some of them are statutory supplements which form additions to the list in the Constitution, as for example the bans against "defamation or denigration of the personalities and activities of Ataturk", the "abuse of religion and religiously sacred relics", the ban on "religious demonstrations" or of acting against the "preservation of the status of the Religious Affairs Department", or on the "use of uniforms".

76. It has been argued by Turkish legal scholars that the Law on political parties interprets and extends several of the criteria of Article 68 (4) beyond the wording of the Constitution. This in particular applies to the important provisions in Article 80 on "Protection of the principle of unity of the state" and Article 81 on "Preventing the creation of minorities", which have been invoked in several cases as the basis for prohibiting parties representing mainly Turkish citizens of Kurdish origin. According to the critics, while Article 68 (4) of the Constitution protects the "territorial integrity" of the state, Article 80 of the Law extends this to protect the unitary nature of

the state as such, thus for example banning calls for a more federal system of government. This clearly goes beyond the ordinary meaning of "territorial" integrity.

77. Likewise, the prohibition in Article 81 of the Law against "the creation of minorities" clearly seems to go further than the concept of "indivisible integrity" of the state in Article 68 (4) of the Constitution. Indeed, many states have and recognise "minorities" without this being regarded as threatening the "integrity" of the state as such.

78. Taken as a whole, it would seem in effect that Article 68 (4) and the supplementary statutory rules can be invoked against almost any party programme that would argue for changes in the constitutional model, regardless of whether this is advocated through the threat of violence or merely through peaceful democratic means.

The general threshold for applying the rules on party closure

79. There is no general qualifying criterion for the application of the closure procedure in Articles 68 and 69 of the constitution and the supplementary legislation. The wording of the provisions does not for example state that they should only be invoked in particularly severe cases, and there is no real formulation of a general principle of proportionality.[21]

80. One qualification was however introduced in the 2001 constitutional amendment, when the criterion was introduced into Article 69 that for a party to be dissolved it must be a "centre for the execution of such activities" as mentioned in Article 68 (4).

81. This qualification is included first in Article 69 (1). It seems not to apply under Article 69 (6) in cases where it is the party statutes or programmes which are in breach of ArtIcle 68 (4). But if it is only the *activities* of the party and party members that are "in conflict" with Article 68 (4), then it applies, with the explanation in Article 69 (7) that a 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 central party organs.

82. When the qualification was introduced in 2001, there were hopes that this would be sufficient to actually raise the threshold for invoking Articles 68 and 69 to a level where this would only take place in exceptional circumstances. So far, practice shows that this is not necessarily the case, at least not as regards the initiation of cases by the Public Prosecutor, as demonstrated by the recent actions against the AK Party and the DTP. The fact that 10 out of 11 judges in the AK Party case concluded that the party was a "centre" of anti-secular activities also seems to indicate that the standard of proof for the fulfilment of this requirement is not particularly high.

83. Another threshold that was introduced in 2001 was that voting rules were changed, introducing the requirement of a 3/5 qualified majority for prohibition of a party (cf. Article 149 of the Constitution). This was decisive for the AK Party judgment in July 2008, in which a majority of 6 out of 11 judges voted for prohibition, falling only one vote short of the necessary qualified majority.

On the procedure for dissolving parties

[21] One aspect of proportionality may be said to follow from Article 69 (8) on sanctions, which states that instead of dissolving a party permanently, the Court "may" rule the party to be deprived of state funding "wholly or in part with respect to the intensity of the actions brought before the Court". But this is not a mandatory principle (cf. the word "may"), and it only deals with one aspect of proportionality, namely sanctions.

84. The procedural rules concerning party closure before the Constitutional Court are to be found in Article 69 of the Constitution and Articles 98 to 108 of the Law on political parties. The power to take action rests with the Public Prosecutor. There are procedures under which the Minister of Justice or another political party may demand that the Public Prosecutor take action. But the latter may also initiate cases *ex officio* and according to his or her own discretion, without any form of political checks or balances.

85. As explained above, this stands in contrast to other European countries that have rules on party closure, in which – because of the exceptional nature of such cases – the decision to raise a case either rests with the democratic political institutions or at least is subject to some element of direct or indirect democratic control.

86. The Venice Commission is of the opinion that the Turkish model of giving this competence to one official – the Public Prosecutor – makes the system subject to his discretion, which is problematic since the initiation of the procedure by itself will normally be a dramatic event that may have severe impact on the political climate and may cause considerable instability.

87. By contrast, it is in line with the prevailing European approach that the decision on closure has to be taken by the Constitutional Court. The fact that the Turkish Constitutional Court has ruled fairly frequently in favour of the closure of political parties and that in the AKP decision 10 of 11 judges regarded the governing party, which had received more than 46% of the votes in free and fair elections, as a centre for unconstitutional activities, might, however, be seen as an indication that the composition of the Court does not sufficiently reflect the various tendencies of Turkish society.

88. In its study on 'the composition of constitutional courts,[22] the Venice Commission states:

> "*Society is necessarily pluralist - a field for the expression of various trends, be they philosophical, ethical, social, political, religious or legal. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism. The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions."*

89. It would go beyond the purpose of this Opinion to examine in detail the rules on the composition of the Turkish Constitutional Court. It is, however, striking that the Turkish Constitution does not provide for any involvement of Parliament in the nomination or appointment of constitutional court judges. All judges of the Court are appointed by the President of the Republic from among senior judges or candidates nominated by courts (including military courts) and the Higher Education Council, with the President being bound by these proposals. This is in contrast with the usual European approach giving parliament an important role, at least with respect to some of its members. The latter approach seems to better guarantee the necessary pluralism of a constitutional court.

3.3. The practice for dissolution of political parties in Turkey

90. When examining the compatibility of rules with European standards, it is not sufficient to look at the wording of the rules, but it is necessary to take into account the extent to which the

[22] Science and technique of democracy, No. 20, Council of Europe Publishing, Strasbourg 1997.

rules are actually applied in practice and the way in which they are interpreted. Since the Constitutional Court is the final authority for interpreting the Turkish Constitution, the Venice Commission has to base itself on the interpretation provided by this Court.

91. The first thing to be noted when examining Turkish practice is that, unlike in any other European state, there is in Turkey a tradition of frequently invoking and applying the rules on dissolution of political parties, as an operative part of the constitution and the political system.

92. According to figures often cited, since the 1961 Constitution entered into force, the Constitutional Court has closed down a total of 24 political parties, not including parties that were prohibited during periods of military intervention. Of these, 6 date from the period of the 1961 Constitution and 18 from that of the 1982 Constitution.

93. Political parties prohibited and dissolved by the Constitutional Court in recent times include inter alia:[23]

- The United Communist Party of Turkey (TBKP) – dissolved July 1991
- The Socialist Party (SP) – dissolved July 1992
- The Freedom and Democratic Party (Özdep) – dissolved July 1993
- The People's Labour Party (HEP) – dissolved July 1993
- The Socialist Party of Turkey (STP) – dissolved November 1993
- The Democracy Party (DEP) – dissolved June 1994
- The Labour Party (EP) – dissolved February 1997
- The Welfare Party (Refah) – dissolved January 1998
- The Virtue Party (Fazilet) – dissolved June 2001
- The People's Democracy Party (HADEP) – dissolved in March 2003

94. In addition to the recent case concerning the AK Party, there is another case concerning the Democratic Society Party (DTP), which was lodged by the public prosecutor in November 2007, and which is still pending. The DTP is the currently most important party representing primarily Turkish citizens of ethnic Kurdish origin, with 21 MPs in Parliament.

95. The great majority of closure cases have been brought against parties representing Kurdish interests, based on alleged violations of the provisions protecting the indivisible territorial and national integrity of the state. As set forth above, the Turkish Law on Political Parties does indeed contain provisions which can be used as the basis for the prohibition or dissolution of any party which questions the present unitary character of the Turkish state or defends the interest of minorities. The forthcoming decision of the Constitutional Court in the DTP case will presumably provide an indication as to whether the constitutional amendments already adopted will lead to a more liberal practice with respect to the closure of such parties.

96. In five cases the Constitutional Court has closed down parties on account of their alleged anti-secular activities.[24] In addition there is the recent AK Party case, which was based on the same allegations, and which ended not with the closure of the party, but with the imposition of financial sanctions.

97. The tradition of political party closure in Turkey has long been regarded as a problem in the light of European democratic standards. In a monitoring report on Turkey in 2004 the PACE stated that the frequency with which political parties were being dissolved in Turkey did not only

[23] The list is not exhaustive.

[24] These are the the National Order Party (20.05.1971), Turkey Peace Party (25.10.1983), Freedom and Democracy Party (23.11.1993), Welfare Party (16.01.1998), and the Virtue Party (22.06.2001).

constitute a breach of the freedom of assembly and association embodied in Article 11 of the European Convention on Human Rights but also reflected a more general institutional problem. In Resolution 1380 (2004) the PACE stressed that this was a real source of concern, but expressed the hope that in the future the constitutional changes of 2001 would limit the practice.

98. Recent cases, both the one against the AK Party and the pending one against the DTP illustrate that, with respect to the actions of the Chief Public Prosecutor, contrary to the hope expressed by PACE there has been no change in practice. On the contrary, the AK Party case has been widely regarded by observers as the most controversial and politically intrusive closure case ever. The fact that the AK party enjoys strong democratic legitimacy from a large part of the electorate made it not only politically more problematic to challenge the constitutional legitimacy of its existence, but also, in the light of European standards, *legally* far more problematic. Dissolution in such a case may in itself be seen as a threat to democracy and as an attempt at disenfranchisement of a large part of the electorate.

99. As regards the Constitutional Court, its decision in the AKP case shows that, on the basis of the constitutional amendments already enacted, the Court has felt able to take a position which is closer to the common European approach but which still falls short of European standards. The decision clearly recognises the crucial role of political parties for the functioning of the democratic system and refers to the constitutional guarantees for their functioning. It is stated "that parties can only be dissolved under "exceptional conditions", and that under Article 90 of the Constitution international agreements concerning fundamental rights have the force of law before the domestic courts. The Court here refers explicitly both to the ECHR and to "the Venice Criteria", and goes on to state that Articles 68 and 69 must be assessed within this framework:

> *… the activities and statements in statutes and programs shall be conducive to the dissolution of political parties only if they are fundamentally in contradiction with the principles protected under article 68, paragraph four of the Constitution, aiming to eliminate these principles, and hence directly constitute clear and imminent danger to the democratic life.*

100. The Venice Commission welcomes this interpretation of Articles 68 and 69 as well as the general new emphasis on democratic and liberal principles. It is in the spirit of the ECHR and the 1999 Venice Commission guidelines and confirms that recent reforms have brought Turkish practice closer to the usual European approach.

101. However, the further reasoning and the result of the decision also show that even the reformed rules in Turkey still leave room for an excessive intervention with the freedom of political parties. The decision lists a number of activities of AKP or its representatives regarded as being in contradiction with the "principle of democratic and secular republic" expressed in Article 68 (4) of the Constitution. It does, however, not become clear why these activities should be regarded as a threat to the principle of the secular state as such and not only as an attempt to change the present rules on the functioning of secularism in Turkey. The decision does not claim that AKP is aiming at the abolition of the democratic system in Turkey. When sanctioning the Party, it seems to apply both material standards and standards of proof which are at variance with the standards applied by the European Court of Human Rights or advocated by the Venice Commission.

102. The practice of the Constitutional Court therefore shows that the Turkish constitutional and legal rules on the prohibition of political parties do not only make it too easy to prohibit a political party but that these rules are also applied in a way incompatible with European standards. The mere fact that the Constitutional Court, due to the specific voting rules introduced by the 2001 constitutional amendments, did not pronounce the closure of AKP but

pronounced financial sanctions only, is not sufficient to arrive at a different conclusion. While a purely financial sanction may be more easily regarded as proportional, it remains a serious interference with the freedom of a political party which can only be justified in exceptional cases.

103. The Venice Commission is also concerned about the chilling effect which the legal provisions together with the case law of the Constitutional Court may have on freedom of association in Turkey, in particular for political parties. The Commission recalls in this respect that the ECtHR stated in the case of *Informationsverein Lentia v. Austria* that the state is the ultimate guarantor of the principle of pluralism and that it has the obligation to ensure that fee elections take place at reasonable intervals under conditions ensuring the expression of the opinion of the people in the choice of the legislature, Such expression of the people's will is inconceivable without the participation of a plurality of parties representing the different shades of opinion to be found within a country's population.

4. Conclusions on the need to reform the Turkish rules on prohibition and dissolution of political parties

104. The Venice Commission, first of all, wishes to acknowledge the importance of the reforms carried out in Turkey in recent years. These reforms constitute important steps towards full harmonisation with standards of democracy applied in other European states and reflect the advances made by Turkish society. An example of this new approach is paragraph 5 of Article 90 of the Constitution, introduced in 2004, which gives priority to international human rights treaties over domestic laws. This encourages the Commission in its conviction that any criticism of the remaining imperfections in the system should not be regarded as outside interference based on ignorance of or indifference with respect to Turkish realities but as an encouragement to continue on the path of reforms the country already has chosen to undertake.

105. The Venice Commission concludes that, when compared to the common European practice, the situation in Turkey differs in three important respects:

1. There is a long list of substantive criteria applicable to the constitutionality of political parties, as laid down in Article 68 (4) and the Law on political parties, which go beyond the criteria recognised as legitimate by the ECtHR and the Venice Commission.
2. There is a procedure for initiating decisions on party prohibition or dissolution which makes this initiative more arbitrary and less subject to democratic control, than in other European countries.
3. There is a tradition for regularly applying the rules on party closure to an extent that has no parallel in any other European country, and which demonstrates that this is not in effect regarded as an extraordinary measure, but as a structural and operative part of the constitution.

106. In conclusion, the Venice Commission is of the opinion that the provisions in Article 68 and 69 of the Constitution and the relevant provisions of the Law on political parties together form a system which as a whole is incompatible with Article 11 of the ECHR as interpreted by the ECtHR and the criteria adopted in 1999 by the Venice Commission and since endorsed by the Parliamentary Assembly of the Council of Europe.

107. The basic problem with the present Turkish rules on party closure is that the general threshold is too low, both for initiating procedures for and for prohibiting or dissolving parties. This is in itself *in abstracto* deviating from common European democratic standards, and it leads too easily to action that will be in breach of the ECHR, as demonstrated in the many Turkish cases before the European Court of Human Rights.

108. Because the substantial and procedural threshold for applying the Turkish rules on party prohibition or dissolution is so low, what should be an exceptional measure functions in fact as a regular one. This reduces the arena for democratic politics and widens the scope for constitutional adjudication on political issues. The scope of democratic politics is further eroded by the constitutional shielding of the first three articles of the Constitution, in such a way as to prevent the emergence of political programmes that question the principles laid down at the origin of the Turkish Republic, even if done in a peaceful and democratic manner.

109. The Venice Commission is of the opinion that within democratic Europe these strict limitations on the legitimate arena for democratic politics are particular to the Turkish constitutional system, and difficult to reconcile with basic European traditions for constitutional democracy.

110. The Venice Commission recognises and welcomes the fact that in recent years the rules on party prohibition in Turkey have been changed in such a way as to raise the threshold for dissolution. In the 2001 reform, Article 69 was amended to include the qualification that for a party to be in conflict with the criteria of Article 68 (4) the party must be a "centre" for such activities. At the same time, the requirement of a 3/5 majority of the Constitutional Court for dissolving a political party was introduced into Article 149. This has shown itself to be an important reform, which was decisive for the outcome of the AK party case. While laudable, these reforms have not been sufficient to fully bridge the gap between the Turkish rules and the standards of the ECHR and the Venice Commission Guidelines.

111. Consequently, the Venice Commission is of the opinion that, although the 2001 revision was an important step in the right direction, it is still not sufficient to raise the general level of party protection in Turkey to that of the ECHR and the European common democratic standards. Further reform is necessary in order to achieve this, both on the substantive and the procedural side.

112. It is not for the Venice Commission to make concrete proposals on how a reform might be construed, unless invited to do so by the national authorities. It is for the appropriate Turkish institutions to make the necessary amendments to the national constitution and legislation. Several models are possible, and within the requirements set by common European standards the national provisions may legitimately be tailored to the constitutional tradition and the political and historical context of each state. The main issue is not how the reform is formulated in detail, but that it is done in a way which ensures that the instrument of party closure is transformed from being part of the operative constitution to become a genuine safety valve, to be invoked only in truly extraordinary circumstances.

113. In order to achieve this, in the opinion of the Venice Commission it will be necessary to change the provisions both on substance and procedure. As for the substantive rules, it seems clear that the list of criteria for the prohibition and dissolution of political parties in Article 68 (4) should be scrutinised, revised and reduced, and so should the many restrictions in the Law on political parties. As regards procedure, the Venice Commission would advocate a system under which the competence of the Public Prosecutor to initiate procedures concerning party closure subject to some form of democratic control. Furthermore, one might want to consider introducing a general threshold in the form of a strict principle of proportionality and more clearly defined standards of proof.

114. Any reform to the Turkish rules on party closure will require constitutional amendment. This can be done either as a separate process, confined to changing the relevant provisions of the Constitution, or as part of a more comprehensive constitutional reform. The Parliamentary Assembly of the Council of Europe (PACE) in Resolution 1622 (2008) advocated the latter approach, referring to the fact that the 1982 Constitution still bears the marks of the 1980

military *coup d'état*. The link between Articles 68 and 69 on the one hand and other constitutional provisions, such as Article 24 (5), makes it also seem preferable to opt for a more comprehensive reform. The Venice Commission notes in this context that the issue of general constitutional reform has been discussed in Turkey, and that in 2007 a preliminary draft for such a text was presented by a group of experts headed by professor Özbudun.

115. The Venice Commission remains at the disposal of the Turkish authorities, should they desire its assistance with and advice on amending the rules on party prohibition, as a separate process or as part of broader constitutional reform.