Strasbourg, 1 July 2009

CDL-JU(2009)052
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
Constitutional Court of Serbia

CONFERENCE

"CONSTITUTIONAL RESTRICTIONS ON FREEDOM OF ASSOCIATION"

BELGRADE, SERBIA, 2 JUNE 2009

REPORT

"PROHIBITION OF POLITICAL PARTIES IN GERMANY"

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PROHIBITION OF POLITICAL PARTIES IN GERMANY

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Prohibition of political parties has been much focussed by constitutional lawyers lately.

Last summer it was the decision of the Constitutional Court of Turkey on prohibition of the AKP which caught everyone's attention.

A month ago, five Ministers of the Interior of German Länder were reported to consider revival of an old application to the German Constitutional Court to prohibit a right-wing party, the Nationaldemokratische Partei Deutschlands, the NPD, which they thought was extremist. And it was also reported that the Vice President of the Constitutional Court in a newspaper interview – without referring to the initiative – had issued a stern warning that the threshold for a prohibition of the NPD by the Constitutional Court would presumably be very high.[2]

Concerning the Turkish party AKP you will recall that this party, the Justice and Development Party, is the party of Mr Recep Tayyip Erdogan, the Prime Minister of Turkey since 2003. If that party hand been prohibited the political consequences would have been serious both domestically and externally – both for the political landscape in Turkey and for Turkey's relations to the neighbour states, the European Union and the United States.

You will also recall that the outcome of the Turkish case was a very tight matter. The majority of the Court came to the conclusion that AKP's activities had been unconstitutional and that AKP therefore should be prohibited and dissolved. But this was not the last word in the case. The majority was one vote short of the *qualified* majority, which was necessary for prohibition and dissolution. Only a decision on substantial economic sanctions against the AKP got the necessary number of votes. That was the final result of the case. But was it the last word? I am not sure. Economic sanctions against a political party can result in a very heavy burden for the party – so heavy that the party cannot survive and may be forced to dissolve. But the question has still not been answered whether and to which extent such consequences can be in compliance with Article 11 and other Articles of the European Convention on Human Rights.[3]

In the European perspective the decision of the Turkish Constitutional Court was seen as crucial with regard to the relatively large number of cases on prohibition of political parties which already had been decided by the European Court of Human Rights. You will recall that these cases culminated in the Grand Chamber judgment in the case of Refah Partisi (The Welfare Party) and others v. Turkey of 13 February 2003.[4]

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[2] Interview: Hamburger Abendblatt, 15 April 2009, p. 1 and 2. – Initiative of the Ministers of the Lander Berlin, Bremen, Rheinland-Pfals, Sachsen-Anhalt and Schleswig-Holstein, who all belong to the German Social Democratic Party, the SPD, reported at http://www.sachsen-anhalt.de/LPSA/index.php?id=4231 [2009-05-06], with link to documentation Verfassungsfeind NPD. Dokumente eines Kampfes gegen die Demokratie at http://www.sachsen-anhalt.de/LPSA/fileadmin/Elementbibliothek/Bibliothek_Politik_und_Verwaltung/Bibliothek_Ministerium_des_Innern/PDF_Dokumente/Referat_02/Dokumentation_NPD.pdf,

[3] Cf. concerning this case the Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey, adopted by the Venice Commission at its 78th plenary session, Venice, 13-14 March 2009, CDL-AD(2009)006; at http://www.venice.coe.int/docs/2009/CDL-AD(2009)006-e.asp.

[4] Application numbers 41340/98, 41342/98, 41343/98 and 41344/98. http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698813&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

National regulations concerning prohibition and dissolution of political parties vary vastly in Europe. *Turkey,* on the one hand, has elaborate regulations, and so has *Germany.* In *Sweden,* there are neither regulations nor court cases on prohibition and dissolution.

To promote a good legislative standard in Europe is one of the tasks of the Council of Europe. To achieve this within the field of legislation on political parties, the Venice Commission in 1999 adopted Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures.[5] And also the Parliamentary Assembly and the Committee of Ministers of the Council of Europe have dealt extensively with the problem of prohibition of political parties.

Last year, in 2008, the Venice Commission also adopted an elaborate and comprehensive Code of Good Practice in the Field of Political Parties.[6] (We will hear more about this Code later today.) And finally, in its March-session this year, the Venice Commission adopted an Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey. In this opinion the Commission summarized the present European situation concerning application of national rules on prohibition and dissolution of political parties with the following words:

> "…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 [Parliamentary Assembly of the Council of Europe] and the Venice Commission, which may be said to reflect the common European democratic practice."[7]

These documents together provide – we think – good legislative advice in quite a number of tricky matters concerning prohibition and dissolution of political parties.

There is no need for me to explain in detail why there are rules in national legislation which in practice are not applied. In general they were enacted on the basis of political experience in difficult times. In Turkey they evolved out of the Atatürk-reforms during the 1920ies and 1930ies, and they were confirmed in the Constitution of 1982. In Germany they have their roots partly in the earliest years of party organisation in the 19th century and partly in the upheavals between the end of the First and the end of the Second World War. Sweden has no rules "on the book" (1) because of 200 years of quiet political development since the war against Russia in 1808/09 and (2) because of relatively low key discussions whether to regulate political parties (and trade unions!) and a quiet political consensus developing during the 1920ies better not to do anything.

With this said as background information, let me now turn to prohibition of political parties in Germany.

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[5] Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, adopted by the Venice Commission at its 41st plenary session (Venice, 10 – 11 December, 1999), document CDL-INF(2000)1; at http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.pdf.

[6] Code of Good Practice in the Field of Political Parties, adopted by the Venice Commission at its 77th plenary session (Venice, 12 – 13 December, 2008), document CDL-AD(2009)002; at http://www.venice.coe.int/docs/2009/CDL-AD(2009)002-e.pdf.

[7] Document CDL-AD(2009)006 (cf. footnote 1), paragraph 62.

Prohibition of political parties is regulated in a puzzle of legislative provisions. The basic ones are enacted in the German Constitution, The Basic Law of 1949 (which was adopted and ratified by the German Länder *almost to the day* 60 years ago, in May 1949). Other provisions specifically aiming at political parties are enacted in the Law on the Constitutional Court (§§ 43–47) and the Law on Political Parties (§§ 32 and 33). And, definitely not to be forgotten: the provisions of the European Convention of Human Rights – mainly those in its Article 11 – are applicable in Germany.

Let me read out the main provision on prohibition on political parties – in Article 21 of the Basic Law.

Paragraph 1 of this Article describes the role of the political party in the German democratic system – a provision which is used to develop a definition of the political party as distinguished from other associations.

Article 21 then continues in paragraphs 2 and 3 – and I quote:

> "2. Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.
> 3. Details shall be regulated by federal laws."[8]

One such federal law, which regulates details, is the already mentioned Law on the Federal Constitutional Court. § 43 of this law provides that only the two chambers of the Federal Parliament, *Bundestag* and *Bundesrat,* and the Federal Government may apply for prohibition of a political party. If the organisation of the party is limited to one Land only, the government of that Land may apply as well.

There are three decisions of the Federal Constitutional Court of Germany[9] which focus on prohibition of political parties. Two of these decisions were delivered on applications made by the Federal Government in November 1951. The third was delivered more than half a century later, in 2003, pursuant to applications made two years earlier, in 2001.

The two applications of 1951 referred to one party of the extreme political right, the *Sozialistische Reichspartei* (SRP), and one party of the extreme political left, the *Kommunistische Partei Deutschlands* (KPD). Both applications were based on Article 21.2 of the Constitution, and in both cases the Government asked the Federal Constitutional Court to declare the party to be unconstitutional.

The case against the SRP[10] was decided one year later, on 23 October 1952. The Party was declared unconstitutional. The Court dissolved the party and confiscated its assets. Further, the Court issued a ban on establishing organisations to replace the dissolved party, and it decided that any mandate of the party's members of the federal parliament and of parliaments on the Land level was null and void. Finally, the Court ordered the Ministers of the Interior of the Federation and of the Länder to execute the decision of the Court, and the Court also announced that any deliberate contravention of the decision would be punishable under the Law on the Federal Constitutional Court.

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[8] English translation from Constitutions of Europe. Texts Collected by the Council of Europe Venice Commission. Martinus Nijhoff Publishers, Leiden and Boston 2004, volume I p. 769.

[9] Cases before the German Federal Constitutional Court are quoted as published either in Entscheidungen des Bundesverfassungsgerichts (BVerfGE) or – since 1 January 1998 – on the website of the Court at http://www.bundesverfassungsgericht.de/entscheidungen.html.

[10] 1 BvB 1/51, BVerfGE 1, 349; 2, 1.

The case against the KPD[11] took five years to its conclusion. By judgment of 17 August 1956 the Federal Constitutional Court declared even the Communist Party to be unconstitutional, dissolved the party and confiscated its assets. Further, the Court ordered the Ministers of the Interior to execute the decision and finally announced that any deliberate contravention of the decision would be punishable under the Law on the Federal Constitutional Court.[12]

Both cases were decided under intense public scrutiny. Apparently, the case against the SRP was relatively easy to decide for the Constitutional Court – only seven years after the end of the Third Reich and Second World War and three years after the establishment of the Federal Republic of Germany. The case against the Communist Party was more difficult; one of the arguments put forward in defence of the party was that a declaration of unconstitutionality would impede general elections in the whole of Germany, if and when re-unification was achieved.

After these decisions the political atmosphere became more relaxed. There were political activities on both the far right and the far left. But they were not felt to really endanger democracy. For almost 50 years therefore no dissolution proceedings against political parties under Article 21.2 of the Basic Law have taken place in the Federal Constitutional Court. However, a considerable number of other extremist organisations – almost all of them registered or unregistered associations – has been prohibited and dissolved under provisions of the Law on associations, *Vereinsgesetz.* Important to underline is that none of these organisations qualified as a political party as referred to in Article 21 of the Basic Law.[13]

The third case started in 2001[14] and ended in 2003 with a decision of the Federal Constitutional Court to discontinue proceedings. This final decision was announced on 18 March 2003, only a month after the decision of the Grand Chamber of the European Court of Human Rights in the Turkish case which I mentioned earlier.

The German case and its spectacular anti-climatic non-result have been widely discussed in Europe. Let me therefore report the proceedings a little more in detail.

The case concerned the already mentioned NPD, the *Nationaldemokratische Partei Deutschlands,* a party far to the right of the political spectrum.

It started by means of three applications to the Federal Constitutional Court under Article 21 of the Basic Law. Applicants were the Federal Government, represented by the Minister of the Interior, and the two chambers of the Federal Parliament, the Bundestag and the Bundesrat. The three applications were made separately, but they were co-ordinated and almost identical. The Court therefore decided to handle and decide them jointly.[15]

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[11] 1 BvB 2/51, BVerfGE 5, 85.

[12] A decision on the status of parliamentary mandates on the federal level was not necessary, because the Communist Party did not hold a mandate in the Bundestag. Concerning parliamentary mandates on the Land level cf. BVerfGE 6, 445.

[13] Cf. the cases BVerfGE 91, 262 (”Nationale Liste”) and BVerfGE 91, 276 “FAP”). – A list of prohibited extremist organisations belonging to the political right is published by Verfassungsschutz Brandenburg at http://www.verfassungsschutz.brandenburg.de/cms/detail.php/bb1.c.136854.de [2009-05-31]. For information about the political left and other extremist organisations cf. the annual reports of the Bundesamt für Verfassungsschutz. The latest report is available at http://www.verfassungsschutz.de/de/publikationen/verfassungsschutzbericht/vsbericht-presse_2008/ [2009-05-31].

[14] Originally there were three separate cases 2 BvB 1/01, 2 BvB 2/01 and 2 BvB 3/01, which were decided jointly; BVerfGE 107, 339.

[15] Decision 3.7.2001, at http://www.bundesverfassungsgericht.de/entscheidungen/bs20010703_2bvb000101.html.

The Court hereby recognized the fact that the co-ordinated applications of the three politically highest ranking institutions of the Federal Republic of Germany indicated extraordinary political importance of the case.

After this decision the usual exchange of arguments started between the parties to the case. Among other things the defendant party initially asked the Constitutional Court to refer the case to the Court of the European Communities for a preliminary ruling under Article 234 of the EC Treaty, but the Court refused.[16] Then preparations were made for an oral hearing on the substance of the case.

During these preparations, the Court surprisingly was informed by the Federal Ministry of the Interior that one witness would file the usual permission, which all civil servants have to provide, when appearing in a law court to give testimony in matters concerning their work and capacity as public officials. But the witness had not been called in his capacity as *public official;* he had been called as *prominent functionary of the defendant party,* the NPD. The Court demanded, but did not immediately get, full information from the Ministry of the Interior about this coincidence. The Court, however, understood that the civil servant had been some kind of undercover agent. But neither the Court nor the defendant party had previously during the proceedings been informed that any investigations had been conducted by an undercover agent. So the Court cancelled the oral hearings to get more time to analyze the legal side of the matter.[17]

In October 2002, an oral hearing took place to discuss both facts and legal considerations. The Court was informed that not only *one,* but *several* high ranking functionaries of the NPD at the same time were working not only as party functionaries but also as undercover agents of the *Verfassungsschutz,* the public authorities, which investigated the NPD and prepared the case for the Constitutional Court.

Acting on this information, the Constitutional Court in March 2003 reached the conclusion that the proceedings had to be discontinued.[18] A *minority* of three judges thought that there was a permanently insurmountable obstacle to the continuation of the proceedings. A *majority* of four judges voted that proceedings should continue. But under the rules of procedure of the Constitutional Court, a *qualified majority* of five judges would have been necessary to continue proceedings.

This decision was a procedural one. The Constitutional Court did not get to the material question of how to apply Article 21 of the Basic Law. However, the text of the decision is worth reading anyhow, as many legal problems concerning prohibition and dissolution of political parties are identified in it. But none of these problems is solved.

To conclude:

There is widespread reluctance in Germany to attempt prohibition of a political party by court decision. That was tried twice in the 1950ies, but to no permanent avail. Political opinions with roots in ideologies of the far right and far left are still voiced, and sometimes loudly so; but they have received minimal support of the electorate in general elections. A new attempt was made more than half a century later to recycle the old legal tool of prohibition by court decision. This attempt did not succeed; it had to be abolished in 2003 because of legally faulty investigations.

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[16] Decision 22.11.2001, at http://www.bundesverfassungsgericht.de/entscheidungen/bs20011122_2bvb000101.html.
[17] Decision 22.1.2002, at http://www.bundesverfassungsgericht.de/entscheidungen/bs20020122_2bvb000101.html.
[18] Decision 18.3.2003 (in German: “Die Verfahren werden eingestellt.“), at http://www.bundesverfassungsgericht.de/entscheidungen/bs20030318_2bvb000101.html, summary (for the media) at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg22-03.html.

Could better investigations nine years ago have led to a different result in the proceedings of the Constitutional Court? The attempt a month ago to revive the bungled applications of 2001 was met with silence – devastating silence, I think – of the political establishment. Maybe this silence indicates consensus that court proceedings and the lawyer's careful balancing of argument pro and contra is not a really suitable tool to meet extremist political views.