DISSOLUTION OF POLITICAL PARTIES BY THE CONSTITUTIONAL COURT IN TURKEY: AN EVERLASTING CONFLICT BETWEEN THE COURT AND THE PARLIAMENT?

Türkiye'de Siyasi Partilerin Anayasa Mahkemesi Tarafından Kapatılması: Mahkeme ile Yasama Arasında Bitmeyen Bir Çatışma

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ABSTRACT

Dissolution of political parties in by the Constitutional Court in Turkey has been an ordinary reaction of the system, or of status quo so far. The frequent application of this power of the Constitutional Court has not only legal, but also economic, social and political effects, mostly of a negative nature. For this reason, the legislative body endeavoured to "scythe" the Constitutional Court time and again. This article assesses the attitude of the Constitutional Court on the one hand and seeks to reveal the conflict between the judiciary and the legislator in this field, on the other.

Keywords: Dissolution of political parties, Turkish Constitutional Court, Dissolution case, the 1982 Constitution, Justice and Development Party

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ÖZET

Türkiye'de siyasi partilerin Anayasa Mahkemesi tarafından kapatılması, geçmişten günümüze sistemin ya da statükonun adeta doğal bir tepkisi olagelmiştir. Anayasa Mahkemesi'nin bu yetkisini bu denli sık kullanmasının yalnızca hukuksal değil, aynı zamanda ekonomik, sosyal ve siyasal sonuçları söz konusudur. Bu nedenle, yasama organı, Anayasa Mahkemesi'nin bu yetkisini "tırpanlamak" için defalarca girişimlerde bulunmuştur. Bu çalışmada da bir yandan Anayasa Mahkemesi'nin siyasi parti kapatma davalarındaki tutumu ele alınmış, diğer yandan da yargı ve yasama erkleri arasındaki bu alanda göze çarpan çekişme ortaya konulmuştur.

Anahtar Kelimeler: Siyasi partilerin kapatılması, Anayasa Mahkemesi, Kapatma Davası, 1982 Anayasası, Adalet ve Kalkınma Partisi

I. Introduction

Turkish Constitutional Court was first established by the Constitution of 1961, which was drafted and adopted after a military coup. The Constitution of 1982, which is still in force today, has entitled the Court with similar powers. Among other functions, the Court was also authorized with handling the cases regarding dissolution of political parties. Up-to-date, 28 political parties were dissolved by the Constitutional Court, explicitly the most operative Court in Europe.[1]

[1] For a table displaying the political parties dissolved by the Constitutional Court till 2008 and the reasons for their dissolution, see Türkiye Büyük Millet Meclisi Araştırma Merkezi, Siyasi Partilerin Kapatılması Konusunda Türkiye ve Bazı Ülkelerdeki Yasal Düzenlemeler, March 2008, Ankara, p. 36-39. Parliamentary Assembly, Council of Europe (PACE), in its Written Declaration No. 409 of 18 April 2008 (Doc. No: 1159), pointed out that "Turkey has a legacy of political party closures". Judicial proceedings against the Justice and Development Party in Turkey, available at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11589.htm. Visited on 9 June 2011. See also Tülen, Hikmet. (2010). *Son Üç Kararı Çerçevesinde Anayasa Mahkemesinin Siyasi Partilerin Kapatılmasına İlişkin İçtihadı*, 2 December 2010, available at http://www.yargitay.gov.tr/abproje/belge/sunum

Turkish Constitutional Court, in the period of the Constitution of 1982, especially in 1990's, sentenced to dissolution of political parties more often.[2] It is then a matter to be considered why the Turkish Court is so "red blooded" when it comes to deciding closure of political parties.

This article manifests that the attitude of the Court in such cases is not compatible with the decisions of European Court of Human Rights and with the suggestions of the Venice Commission despite constitutional and legal amendments on the one hand and the shift in its case-law in recent years, on the other.[3] This article also points at the fact that the problem of political party dissolution cases is at the same time an "arena" where the Constitutional Court and the legislative body predominantly composed of members of various political parties. Until now, the outward image in Turkey is that the legislative body has been striving to curb the Constitutional Court by increasingly complicating the legal conditions for dissolution of political parties and, by all appearances, the constitutional amendment of September 2010 has changed both the composition and the attitude of the Court in such cases.

II. Legal Basis for the Dissolution of Political Parties by the Court

Legal grounds for dissolution of political parties by the Constitutional Court can be found both in the Constitution and the Law

/rt5/Tulen_SiyasiPartilerinKapatilmasi.pdf, (last access on 17.6.2011). As an author rightly stressed, such a picture does not indicate the subsistence of a "healthy" democratic order. Turhan, Mehmet. (2002). Avrupa İnsan Hakları Sözleşmesi ve Siyasi Parti Kapatma Davaları, *AÜSBF Dergisi*, Vol. 57, Nr. 3pp. 129-150, at p. 146.

[2] Hakyemez, Yusuf Şevki (2009). Anayasa Mahkemesi'nin Siyasal Parti Kapatma Konusundaki İçtidadı Değişti mi? TBKP ve HAK-PAR Kararları Üzerine Bir Değerlendirme", *Prof. Dr. Yılmaz Aliefendioğlu'na Armağan*, Yetkin Yayınları, Ankara, pp. 93-108, at p. 93. The Constitutional Court dissolved 17 political parties from 1990 to 1999.

[3] For the European practice on dissolution of political parties, see Coşkun, Birce Albayrak (2008). Türkiye'de Siyasi Parti Kapatma ve Avrupa Örnekleri: Parti Kapatmak Demokrasi Tehdidi mi?, *MEMLEKET Siyaset Yönetim*, Vol: 3, No: 7, pp.138-152, at p. 141-144.

on Political Parties.[4] Paradoxically, although the provisions of the Constitution of 1982 was drafted in a restrictive manner, the Law on Political Parties included even more restrictive rules enabling the closure of political parties and it apparently contradicted the Constitution.[5]

After two major amendments in 1995 and 2001, articles 68 and 69 of the Constitution lay down rules on this subject and accordingly, a political party can face dissolution as a result of violating the constitutional prohibitions by;

(i) its statute and programme;

(ii) its activities; and

(iii) receiving financial aid from foreign states, international institutions, persons and corporate bodies.

The permanent dissolution of a political party shall be decided when it is established that its statute and programme violate the provisions of Article 68, para. 4 of the Constitution. Article 68 first declares in paragraph 2 that *"[p]olitical parties are indispensable elements of the democratic political life*".[6] But, being indispensable for democracy does not grant them an absolute immunity. Paragraph 4 of the article indicates

[4] Law No. 2820, adopted on 22.04.1983, published in the Official Gazette (Resmi Gazete) on 24.4.1983, No. 18027. It is noteworthy that Turkey is one of the exceptional countries having a specialized law on political parties. Apart from Turkey, four Western European countries (Germany, Spain, Portugal and Austria) and two Eastern European countries (Poland and Chech Republic) have adopted laws on political parties. For a detailed information on the legal nature of political parties, see Eren, Abdurrahman. (2009). "Türk Hukukunda Siyasi Partilerin Hukuki Niteliği ve Türk Anayasa Mahkemesi'nin Tutumu", *Prof. Dr. Yılmaz Aliefendioğlu'na Armağan*, Yetkin Yayınları, Ankara, pp. 45-71.

[5] See Can, Osman (2005). *Demokratikleşme Serüveninde Anayasa ve Siyasi Partilerin Kapatılması*, Seçkin Yayıncılık, Ankara, p. 213-215. He rightly argues that the Law on Political Parties still conflicts with the Constitution as it limits the margin of discretion of the Court given by the Constitution.

[6] For the indspensability of political parties in democracies, see Yavuz, Bülent. (2009). Çoğulcu Demokrasi Anlayışı ve İnsan Hakları, *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Vol. XIII, Nr. 1-2, 283-302, at p. 297-298; Duverger, Maurice. Siyasi Partiler (Translated to Turkish by: Ergun Özbudun), Bilgi Yayınevi, Ankara, 1974, p. 85.

that the statutes and programmes, as well as activities of the political parties can not be in conflict with;

(i) the independence of the State;

(ii) its indivisible integrity with its territory and nation;

(iii) human rights;

(iv) the principles of equality and rule of law;

(v) sovereignty of the nation;

(vi) the principles of the democratic and secular republic.[7]

Additionally, political parties are not allowed to aim to protect or establish class or group dictatorship or dictatorship of any kind, and incite citizens to crime, according to the article.[8] Violating the above-mentioned values can culminate coming to an end.

Another constitutional reason for the closure of a political party is to accept financial aid from foreign states, international institutions and persons and corporate bodies, as indicated in Article 69, paragraph 10 of the Constitution.

In fact, there are other activities too, prohibited for the political parties both in the Constitution and in the Law on Political Parties, but, a political party can only be dissolved by the Constitutional Court for its activities violating Article 68, para. 4, mentioned above, according to Article 69, paragraph 6 of the Constitution. It was what the lawmaker intended,[9] and it was also accepted by the authors[10] and confirmed by the Constitutional Court.

[7] See also article 101 of Law on Political Parties.

[8] This wording of the article is criticized on the basis of including unnecessary conditions. The condition of commitment to democratic principles already includes rejection of all kinds of dictatorship. Turhan, Mehmet. (1996). Demokratik Devlet İlkesi Açısından Siyasi Partilerin Kapatılması ile İlgili Hükümlerdeki Uyumsuzluklar, *Yeni Türkiye*, Year 2, Nr. 10, p. 415.

[9] TBMM Tutanak Dergisi, Dönem 19, Cilt 88, Sıra Sayısı 861, 123. Birleşim, 14.6.1995, p. 33.

An amendment to Article 69 in 1995 underlined that the decision to dissolve a political party permanently due to *activities* that violate Article 68, para. 4 may be rendered only when the Constitutional Court determines that the party in question has "*become a centre for the execution of such activities*".[11] "*To become a centre*" is the key phrase in the provision. However, the Constitutional Court did not refrain from deciding closure of political parties after incorporation of this new criterion to the article. Then, the lawmaker preferred setting a definition in the Constitution in order to limit the margin of discretion of the Constitutional Court. According to Article 69, amended in 2001, "*[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*."

It should be noted that, a definition for "become a centre" had first been made in Article 103, paragraph 2 of the Law on Political Parties. But, Constitutional Court nullified it as article 103/2 made it impossible for the Court to apply Article 69/6 of the Constitution, so made it

[10] Can, 2005, p. 92; Teziç, Erdoğan. (2005). Anayasa Hukuku, 10th edition, Beta Basım A.Ş., p. 327-328; Öden, Merih. (2003). *Türk Anayasa Hukukunda Siyasi Partilerin Anayasaya Aykırı Eylemleri Nedeniyle Kapatılmaları*, Yetkin Yayınları, Ankara, p. 56.

[11] It was declared by the drafters of the amendment that they were inspired by the law and practice of Germany in determining the criteron of "become a centre". According to Basic Law for the Federal Republic of Germany (Grundgesetz, GG), article 21, para. 2, "[p]arties that, by reason of their aims or the behavior 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*" (emphasis added). This provision places certain restrictions on the ideological orientation of political parties; and it allowed for the dissolution of the neo-Nazi Socialist Reich Party in 1952 and the Communist Party of Germany (Kommunistische Partei Deutschlands -KPD) in 1956.

unconstitutional, according to the Court.[12] The lawmaker persistently brought up another provision defining it, being subject to be nullified by the Court again in the year 2000.[13] Finally, the legislative organ agreed to enact it by a constitutional amendment, as the Constitutional Court has very limited power of reviewing the constitutionality of constitutional amendments.[14]

The aim of the definition is apparently to limit the Court's scope of discretion in determining whether the political party in question has really been a centre of the forbidden activities or not. Nevertheless, this amendment was criticized as much of the criteria used in the definition were among the criteria which have already been established by the Constitutional Court in Wealth Party (Refah Partisi - RP) and Virtue Party (Fazilet Partisi - FP) cases. From this viewpoint, it is argued that the definition of "become a centre of such activities" enshrined in the Constitution by no means made it difficult for the Court to ban a political party.[15] An author defended this opinion with rigid and ironic statements:

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[12] Constitutional Court, E: 1998/2, K: 1998/1, Judgment of 9.1.1998; AMKD (Journal of Decisions of the Constitutional Court), Vol. 34, No. 1, pp. 236-243.

[13] Constitutional Court, E: 2000/86, K: 2000/50, Judgment of 12.2.2000; AMKD (Journal of Decisions of the Constitutional Court), Vol. 36, No. 2, p. 903.

[14] Article 148, para. 1 and 2 of the Constitution is as follows (emphasis added):
"The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having force of law, and the Rules of Procedure of the Turkish Grand National Assembly. *Constitutional amendments shall be examined and verified only with regard to their form*. However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having force of law issued during a state of emergency, martial law or in time of war.
The verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot; *the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with*. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the Turkish Grand National Assembly. Applications for annulment on the grounds of defect in form shall not be made more than ten days after the date on which the law was promulgated; nor shall objection be raised."

[15] See Öden, 2003, p. 92, 130-168.

"Article 69 of the Constitution does not anyhow involve that any political party which is faced with a case demanding closure be dissolved. The judicial discretion on this subject belongs to the Constitutional Court. *Unless this power of the Constitutional Court is abolished, the Constitutional Court can dissolve a political party no matter how the term of "become a centre" is defined, or how tough conditions are linked to the definition of "become a centre". The Constitutional Court can dissolve a political party by stating that all the conditions have been met, even if it is considered that not only a few, but twenty conditions are involved for being a centre*".

If there is a problem in the decisions of dissolution of political parties in Turkey, that problem does not arise from Article 69, but from the Constitutional Court itself. Therefore, the criticisms should better be directed to the Constitutional Court instead of Artice 69. The solution is then, not to change Article 69, but the Consitutional Court changes its opinion. If the Constitutional Court does not do this, then it is necessary, by amending Artice 146, to replace the concerned members of the Constitutional Court, who gave these wrong judgements, instead of amending Article 69. *The solution is not to change Article 69, but to change the members of the Consitutional Court.*[16]

On the other hand, it would not be wrong to argue that after the constitutional amendment, the Court is not as free as it used to be in the establishment of the criteria of being a centre of forbidden activities in a given case. At least, the Court is bound by this provision in assessing the seriousness of the activities of the political party organs, adherents etc.[17] Indeed, the limitation about the criterion "become a centre" in Article 69

[16]See Gözler, Kemal. (2001). *Anayasa Değişikliği Gerekli mi? 1982 Anayasası İçin Bir Savunma,* Ekin Kitabevi, Bursa, p. 40-41. Emphasis added by the author.

[17] According to *Gözler*, "Highly tough conditions crucial for "become a centre" are involved also in Article 69, para. 6 of the Constitution of 1982." But, "…*[t]hese conditions do not complicate The Constittutional Court from making a judgement upon closure*". Gözler, Kemal. (2008). Parti Kapatmanın Kriteri Ne? Parti Kapatmaya Karşı Anayasa Değişikliği Çözüm mü?, *Türkiye Günlüğü,* Nr. 93, pp.24-31, at p. 28.

may operate only when the Constitutional Court feels itself bounded by it.

The constitutional amendments of 2001 introduced another means of limitation for the Constitutional Court in political party banning cases. The 3/5 majority voting criterion was introduced instead of a simple majority in order to sentence dissolution. Considering that Turkish Constitutional Court was composed of 11 regular members, 7 would have to vote for dissolution rather than 6 members as it used to be.[18] However, as a result of the approval of a package of constitutional amendments by the Turkish people in September 2010, the condition of 3/5 majority voting criterion was increased to 2/3. It will be explained below.

In addition, apart from permanent dissolution, a new, lighter sanction of a fiscal nature was introduced so that political parties committing the prohibited activities can maintain their political activities in the future. The Constitutional Court may then rule that the party in question should be deprived of state aid wholly or in part, depending on the severity of the charges brought before the Court.

This amendment was strongly criticised on a number of grounds. First of all, this sanction can not be applied equally for all political parties as not all of them are extended financial aid, and the amount of it can vary depending on the vote the parties received. It is also alleged that deprivation of state aid is not a proportional sanction compared with the seriousness of the actions of the party.[19] This point of view is open to criticism for the reason that it is solely based on a positivist view. If it was reasonable to say that it is ordinary for political parties to be easily dissolved by the judicial authorities and this is a method which can be consulted in every modern democracy when it is deemed necessary, then it would be possible to consider these two sanction methods to be

[18] It is noteworthy that Turkey's ruling party, Development and Justice Party (AK Party/AKP) escaped dissolution thanks to this amendment.

[19] Öden, 2003, p. 93-96. See also Sağlam, Fazıl. (2002). 2001 Yılı Anayasa Değişikliğinin Yaratabileceği Bazı Sorunlar ve Bunların Çözüm Olanakları, *Anayasa Yargısı*, Anayasa Mahkemesi yayını, Ankara, p. 301; Teziç, 2005, p. 331.

disproportionally compared to each other. However, with the amendment to the article in question, providing power of discretion to the Constitutional Court in assessing the gravity of the actions of political parties which may result dissolution was aimed by the legislator. Thus, political parties, which are indispensable elements of democratic life according to the Constitution itself, were provided with the chance of existing as well as carrying on their activities at the cost of a sanction of a fiscal nature. According to the article, the Consitutional Court has a margin of discretion about partially or completely forjudging the political party in question of state aid.

The inappropriateness of such reasoning can be expressed by another different approach. When it is prescribed in the Criminal Code that a court is allowed, instead of inflicting the death penalty, to an imprisonment for a crime by considering the severity of the evil action, it is clear that no matter how tough the imprisonment is, including lifetime imprisonment, it is explicitly disproportional compared with death penalty. While, the basic principle about the political parties, which are indispensable elements of a democratical system should be maintaining them instead of closing. Therefore, involving the political parties which are adjudicated to refrain from State aid at an annual base is indeed a fair sanction compared with dissolution. Longer terms of deprivations of financial aid would not only make it excessively hard for political parties to maintain, but also force them to dissolve themselves, therefore similar consequences as closure judgements would occur.

III. The Practice and Case-law of the Constitutional Court

A. Earlier Attitude of the Constitutional Court

It has been shown above that, Turkish legal system provided the Constitutional Court "convenient" constitutional and legal justifications which allowed it to conclude dissolution of political parties. To be frank, reading restrictive provisions in a constitution which was a produce of a military coup was not that surprising. Unfortunately, the problem worsened by the following decisions of the Constitutional Court, as it

interpreted the constitutional limitations to the disadvantage of political party freedoms. As a result, dissolution of political parties due to judicial action almost became an everyday occurrence, especially in the 1990's.

Despite the above-mentioned amendments aimed to complicate the dissolution of political parties by the Constitutional Court, it can be said that the attitude of the Court has not changed in general. After 1983, when it was allowed for establishment of political parties again, 19 political parties were dissolved by the Court so far. The Court also refused to close 18 political parties despite the closure cases filed by the Chief Public Prosecutor.[20]

Some of the decisions of the Constitutional Court were also brought before the European Court of Human Rights, and except the *Wealth Party* case,[21] the European Court found breach of Article 11 of the Convention in all cases.[22]

Considering the indispensability of freedom of thought and expression, it is really problematic to argue that political parties can be dissolved just for the opinions declared in their programmes and statutes. The Constitutional Court, however, frequently sentenced dissolution of a number of political parties on the basis of unconstitutional party programmes. The United Communist Party of Turkey (Türkiye Birleşik Komünist Partisi - TBKP), Socialist Party (Sosyalist Parti - SP), Labour

[20] See Coşkun, 2008, p. 146-149.

[21] For a critique of the attitude of the European Court of Human Rights in Wealth Party case, see Karagöz, Kasım. (2006). "İnsan Hakları Avrupa Mahkemesi Kararlarında Parti Kapatma Davaları ve Refah Partisi Kararının Venedik Komisyonu Raporları Doğrultusunda Değerlendirilmesi", *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, Vol. X, Nr. 1-2, pp. 311-348; Erdoğan, Mustafa. (2001). AİHM'nin RP Kararının Düşündürdükleri, *Liberal Düşünce*, Nr. 23, pp. 41-50; Yokuş, Sevtap. (2001). Türk Anayasa Mahkemesi'nin ve Avrupa İnsan Hakları Mahkemesi'nin Siyasi Partilere Yaklaşımı, *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 50, Nr. 4, pp. 107-128, at p. 120-124.

[22] See the *Case of United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.1.1998;*Case of the Socialist Party and Others v. Turkey*, Judgment of 25.5.1998; *Case of Freedom and Democracy Party (ÖZDEP)* v. Turkey, Judgment of 9.12.1999; *Case of Yazar, Karataş, Aksoy and the People's Labour Party (HEP) v. Turkey*, Judgment of 9.4.2002.

Party (Emek Partisi), Democracy and Change Party (Demokrasi ve Değişim Partisi - DDP), Democratic Mass Party (Demokratik Kitle Partisi - DKP) and Freedom and Democracy Party (Özgürlük ve Demokrasi Partisi - ÖZDEP) were dissolved not for their unconstitutional activities, but for the expressions set out in their programmes, which were found contrary to Article 68, paragraph 4 of the Constitution. The United Communist Party of Turkey decision of the Court was really notable as that party was exposed to a dissolution case only 10 days after it was officially founded. Moreover, the word "communist" in its name was found enough for the Constitutional Court to dissolve it.[23]

According to the Constitutional Court, the statements manifested in the party programme can give rise to closure of the political party when they are explicitly contrary to the Constitution (especially to Article 68, paragraph 4). The Court also specified that these expressions should aim at eliminating the values protected in Article 68, paragraph 4 of the Constitution to be the basis for closure.[24]

As a writer rightly observes, even if the Constitutional Court interprets the statutes and programmes of political parties in the light of *in dubio pro libertate*, dissolution of a political party would in any case be in conflict with the case-law of the European Court of Human Rights.[25] The European Court insistedly ascertains whether the programme and practice of a political party together contradicts the rights and freedoms enshrined in the European Convention:

Admittedly, it cannot be ruled out that a party's political programme may conceal objectives and intentions different from the ones it

[23] See the *Case of United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.1.1998, para. 53-54.
[24] See Socialist Party Case, E: 1991/2 (SPK), K: 1992/1, Judgment of 10.7.1992; Socialist Union Party Case, E: 1993/4 (SPK), K: 1995/1, Judgment of 19.7.1995; Labour Party Case, E: 1996/1, K: 1997/1, Judgment of 14.2.1997.
[25] CAN, 2005, p. 96.

proclaims. To verify that it does not, the content of the programme must be compared with the party's actions and the positions it defends.[26]

In other words, for sentencing to dissolution of a political party, the party statute and programme which is contrary to the Convention should be reaffirmed by the activities associated to the political party.

Another difference between the attitude of the Constitutional Court and the European Court of Human Rights is how they approach the content of the statute and programme of political parties in the judgment of lawfulness of dissolution decisions. Anyhow, the case-law of the ECHR mainly depends on the decisions of the Turkish Constitutional Court regarding dissolution of political parties. In the view of the European Court of Human Rights, the programme of a party in question must have elements "*that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. That, in the Court's view is an essential factor to be taken into consideration*".[27] For the Constitutional Court, however, it would be enough for dissolution to conclude that programme of the party is explicitly in contradiction with the legal values enumerated in Article 68, paragraph 4 of the Constitution and the aim of annihilating them is apparently deductible from the programme. The Constitutional Court then needs not to find a call for violence in the statute and the programme.

These conclusions of the Constitutional Court do not coincide with the suggestions of the Venice Commission, too. According to the Commission, *"[p]rohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its*

[26] *Case of United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.1.1998, para. 58.

[27] *Case of Freedom and Democracy Party (ÖZDEP) v. Turkey*, Judgment of 9.12.1999, para. 40.

prohibition or dissolution".[28] The Commission also champions that "prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint".[29]

B. Recent Decisions, Developments and the Current Situation

The Constitutional Court reviewed 3 dissolution cases in recent years. Democratic Society Party (Demokratik Toplum Partisi - DTP) was the one dissolved, Rights and Freedoms Party (Hak ve Özgürlükler Partisi - HAK-PAR) and the ruling party, Justice and Development Party (Adalet ve Kalkınma Partisi - AK Parti), so to speak, had a near escape.

Despite the aforementioned legal and constitutional arrangements, it is widely accepted that the current legal provisions applicable to political parties do not provide political actors with an adequate level of protection in their exercise of freedom of association and freedom of expression.[30] In the light of this case, those provisions need to be amended and brought into line with the case law of the ECHR and best practice in EU Member States, as outlined by the Venice Commission.[31] Legal provisions about political party activities among EU countries vary, but what is common is that there is a common democratic legacy that political parties maintain their activities without the fear of being prohibited and dissolved.

An attempt to amend article 68 failed as the draft article 68 stipulating the consent of a commission members of which are parliamentarians for filing a suit for dissolution of a political party before the Constitutional Court was refused by the Turkish Parliament during

[28] European Commission for Democracy through Law (Venice Commission), Guidelines on prohibition of political parties and analogous measures, Strasbourg, 10 January 2000, 10 - 11 December 1999, para. 3.

[29] Guidelines on prohibition of political parties and analogous measures, para. 5.

[30] See Commission of the European Communities, "Turkey 2008 Progress Report", 5 November 2008, p. 18.

[31] European Commission for Democracy through Law (Venice Commission), 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), available at <http://www.venice.coe.int/docs/2009/CDL-AD(2009)006-e.asp>, (last access on 17.6.2011).

the negotiations for a package of constitutional amendments. Obviously, it was a reason of deep disappointment for the ruling party. Still, another amendment made it more difficult for the Constitutional Court to decide closure was approved in the Referendum of 2010 on the aforementioned package. According to the new version of article 149, para. 3 of the Constitution, *"[d]ecision of ...closure of political parties of their deprivation of state aid shall be taken by two-thirds majority*". This is to say that, 12 members of the Constitutional Court, which is composed of 17 members after the amendment, will have to agree with the decision of closure. Considering the new composition of the Court, such a coalition seems very unlikely.

1) The Rights and Freedoms Party (Hak ve Özgürlükler Partisi: HAK-PAR) Decision

The Constitutional Court did not make a judgement of closure when it came to Rights and Freedoms Party (HAK-PAR) and Justice and Development Party (AK Parti). In the rescript of the HAK-PAR case, it was emphasized by the Court that in the statute and the programme of the party, while including suggestions about the solution of the Kurdish problem, these suggestions should be discussed in the scope of latitude of thought and freedom of speech. Based on this earlier statement, it was also emphasized that imposing of the sanction of dissolution would have a huge negative impact on freedom of association and freedom of thought.[32] In the judgement, it was stated that "*[u]nless the expressions of the political parties set out in their statutes and programmes and which are alleged to be unconstitutional are directly considered to be "clear and present danger" for democratic life, it will be suitable to accept that these expressions fall within the scope of the freedom of speech*".[33] Moreover, the criteria "clear and present danger" which is applied by the

[32] E: 2002/1 (Siyasi Parti Kapatma), K: 2008/1, Judgment of 29.01.2008; Resmi Gazete (The Official Gazette), 01.07.2008, Nr. 26923. Also available at <http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=2684&content=>, (last access on 17.6.2011).

[33] *Ibid.*

European Court of Human Rights (ECHR) in numerous decisions played a major role in the judgement in question.

According to the Court, *"[o]ffering different solution proposals of political parties related to national matters which are highlihted according to them is the natural consequence of the function which is undertaken by them in democratic political life. For this reason, political parties are under protection of the related provisions of the Constitution and of Artices 10 and 11 of the European Convention on Human Rights (ECHR), which are about freedom of association, freedom of thought and freedom of speech*".[34]

In the HAK-PAR decision, the Constitutional Court remarked that the existence of political parties are *sine qua non* preconditions in a democratic regime and, underlined that the continuity of political parties is a must in the Constitution and law codes. For that reason, that the closure of political parties is held as only discrete/exceptional situations was pointed by the Court. The Constitutional Court preferred deciphering Article 68 of the Constitution, which stands for a well-grounded justification for the closure of political parties in a way which favors the freedoms but conflicts with the letter of the Article:

"It is impractical to admit that the Constitution adopting the aim of exceeding the level of modern civilizations, esteems the statute and programme which are included in the scope of mere freedom of speech, to be reasons for closure. It is crucial in a democratic regime that statements, which are concerned with presence and proposal of solution of a specific problem, are undertaken in the scope of freedom of thought and freedom of speech. Both in indictment and in following stages [of the dissolution case], any evidence, which is concerned with the fact that the party is going to execute a method which contradicts with the Constitution, in order to realize the causes in question, is not included."[35]

[34] *Ibid.*
[35] *Ibid.*

The dissenting members of the Court, on the other hand, asserted that the statute of HAK-PAR was contrary to Articles 68 and 69 of the Constitution and that the party in question should have been dissolved. The reasoning of the dissenting opinion was quite similar to those the Court had already propounded in previous dissolution cases. In their opinion, a political party whose statute and programme was contrary to the principle of the unity of the State with its territory and nation must be closed, no need to search for activities connected to the defendant party.[36]

2) The Justice and Development Party (Adalet ve Kalkınma Partisi: AK Parti) Decision

Another recent case which the Constitutional Court did not conclude to dissolution is the Justice and Development Party (AK Parti) decision.[37] Although the Court did not conclude to dissolution in this case, it adjudicated to deprive the Party of their State aid partially as mentioned above. That a party which had acceded a short time ago before the dissolution case polling 47% of the votes was exposed such a sanction brought about controversies despite non-closure. Moreover, 6 of 11 associate judges of the Constitutional Court voted for dissolution, 4 of them voted for the sanction of deprivation of the government aid. Only one judge was of the opinion that the actions of the Party did not involve any sanction. In other words, except for only one associate judge, all other judges requested to be applied a sanction. Thanks to the constitutional amendment of 2001 according to which 7 of the associate judges should vote for dissolution to close a political party, Turkey's ruling party could maintain the existence in the political life. As it appears, the point which rescues the Justice and Development Party from dissolution is in fact the constitutional amendment of 2001 which made it more difficult to give a verdict of dissolution, but not the change in the attitude of the Constitutional Court in political party dissolution cases.

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[36] *Ibid.*

[37] E: 2008/1 (Siyasi Parti Kapatma), K: 2008/2, Judgment of 30.07.2008. Available at <http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=2611&content=> , (last access on 17.6.2011).

In this case, the Court –in fact the minority of the members of the Court- asserted that the provisions of the Turkish Constitution emphasizing the special importance of political parties should be considered as well in assessing whether the statute and programme and activities of the political party in question are in conformity with Article 68, paragraph 4 of the Constitution. Thereby, the Court pointed at the constitutional provision underlining the indispensability of political parties in a democratic political life, namely Article 68, paragraph 2 of the Constitution.[38] The Court additionally indicated that the expressions set out in the statute and programme or the activities of the political party should constitute a threat for democratic system for concluding dissolution. Therefore, the Constitutional Court has predicated the criterion of "clear and present danger" on its decision as the European Court of Human Rights does in many decisions. The Court concluded that dissolution of a political party is justifiable only when "the expressions and activities [of a political party] are *principally* contrary to the principles protected by Article 68, paragraph 4 of the Constitution, they are *aimed at eliminating* these principles and so *pose direct clear and present danger directed to democratic life*...".[39] In this case, the expressions and activities conflicting with the principles enshrined in the Constitution can be basis for dissolution providing that they are characterized as constituting clear and present danger to democratic system. Otherwise, the political parties should not be prevented from political activities:

"Considering that dissolution of political parties is not approved in the countries in which the democratic regime has been adopted with its all institutions and principles as a whole unless it has an aim contrary to democratic principles and use violence as a means, or the party turns into a political party which aims at eliminating democracy and rights and

[38] According to the article, "[*P*]*olitical parties are indispensable elements of the democratic political system*".

[39] E: 2008/1 (Siyasi Parti Kapatma), K: 2008/2, Judgment of 30.07.2008. Available at <http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=2611&content=> , (last access on 17.6.2011). Emphasis added in the original text.

freedoms respected in a democracy, it is not compatible with the Constitution to deem closure of political parties compulsory because of their efforts on satisfying the societal demands peacefully and by legal arrangements…"[40]

It can be said that this interpretation of the provisions of both the Constitution and the Law on Political Parties by the Constitutional Court is in favor of political party freedoms and it also coincides with the attitude of the European Court of Human Rights.

While providing its justification, the Constitutional Court explicitly adopted the approach of ECHR such as *in the Case of United Communist Party v. Turkey*. According to the Constitutional Court, *"[a] quest of a system contrary to secularism could not be ascertained [by the Constitutional Court] in the statute and program of the defendant party. Furthermore, it could be possible for a political party to conceal objectives and intentions different from the ones it proclaims in its programme. To verify the accusation true or not, the content of the programme must be compared with the activities of the party and the positions it defends. All in all, if these activities and positions considered entirely as mentioned above are embodied with the aim of demolition of the constitutional system, dissolution of that party could be in question"*.[41]

After the consideration of the evidences regarding Justice and Development Party case, the Court stated that, despite becoming a centre of the activities contrary to the principle of secularism, that political party had not encouraged the violence:

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[40] *Ibid.*

[41] The ECHR stated in the *United Communist Party of Turkey* case as follows:
"Admittedly, it cannot be ruled out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the party's actions and the positions it defends." *Case of United Communist Party of Turkey and Others v. Turkey*, 30.1.1998, para. 58.

"*In the light of these explanations, no evidence proving the aim of the defendant party to abolish democracy and the secular state order or to destroy the basic principles of the constitutional order by means of violence, no activities instantiating this purpose and no evidence demonstrating that the party utilised the facilities of power in the direction of violence could be ascertained, these activities [of the party] were not seen so serious requiring closure.*"

Thus, the Constitutional Court at the same time manifested that it adopted the opinion of the Venice Commission with respect to the justification of non-closure. According to the Venice Commission:

"*Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution*."[42]

3) The Democratic Society Party (Demokratik Toplum Partisi: DTP) Decision

Democratic Society Party is the last political party banned by the Constitutional Court so far. In this case, the Court concluded dissolution unanimously.[43] The rationale of the Court was that Democratic Society Party had become the centre of activities aiming at annihilating the unity of the state with its territory and nation and supporting PKK, the terrorrist organisation. Thus, it can be said that the legal basis for the closure of this party is again the "to become a centre" criterion prescribed by Article 68 of the Constitution.

[42] Guidelines on prohibition of political parties and analogous measures, para. 3.

[43] E: 2007/1 (Siyasi Parti Kapatma), K: 2009/4, Judgment of 11 December 2009, published in the Official Gazette (Resmi Gazete) on 31.12.2009, Nr. 27449. Available at <http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=2756&content= >, (last access on 17.6.2011).

Considering the Democratic Society Party decision of the Constitutional Court at length, it is observed that the Court mainly predicated dissolution on the following justifications:

(i) Democratic Society Party attempted to attain a number of rights and acquisitions by manipulating antidemocratic statements and actions and used terrorism as a means of its politics.

(ii) The managing organs of the party did not take measures but remained silent with regard to the outbreaks occured in the organizations performed by the members of the party; and this attitude of the party was just another appearance of their support to terrorism.

(iii) Democratic Society Party did not politically come up against terrorist activities clearly, and did not condemn crime and the criminals but did conceal them.

According to the Constitutional Court, the relationship between Democratic Society Party and the terrorist organisation PKK was "a manifest secret" as that Party had abstained from defining the PKK as a terrorist organisation. From the Court's standpoint, gaining rights by favor of terrorism had been adopted by the defendant party as a means.

The attitude of the European Court of Human Rights in the *Case of Herri Batasuna and Batasuna v. Spain*[44] was also referred by the Turkish Court in the Democratic Society Party dissolution case. According to the Constitutional Court, "The ECHR has seen the denial of condemnation of violence as an implicit support to terrorism whereas all other political parties condemn it in a terror environment of more than thirty years. *The Court has specified numerous serious and repeated actions and conduct which are attributable to the applicant parties and which amount to reconciliation with terrorism. The [European] Court, at any rate, is not of the view that dissolution of a party is also based on not condemning terrorism is not contrary to the Convention [ECHR]*. Because, not only

[44] Application nr: 25803/04 ; 25817/04, judgment of 03 June 2009. Only French text is available in the official website of the Court.

actions and expressions of the politicians but also their inaction and silence which can be reckoned as a supportive action of an absolutely clear nature should be taken into account as well."[45] The Constitutional Court concluded that the findings and conclusion of the ECHR in the *Case of Herri Batasuna & Batasuna v. Spain* was applicable to the Democratic Society Party case in its entirety, and held that dissolution of the defendant party was necessary in a democratic society.

4) An Important Annulment Decision of the Constitutional Court: The Annulment of Article 108 of the Law on Political Parties

In the last days of 2010, the Constitutional Court made a decision which was very important in the field of political party freedoms; it found Article 108 of the Law on Political Parties in contradiction with the Turkish Constitution culminating in annulment of the article. It assessed the constitutionality of the article during the pending of the dissolution case against Democratic People's Party (Demokratik Halk Partisi: DEHAP) which had already abrogated itself.[46] Article 108 prescribed that even if a political party against which a dissolution case had been brought before the Constitutional Court abrogated itself, the Court should not drop the case for that reason; this is to say that the Court was entitled to render a verdict on dissolution.[47] After this critical verdict, political parties subject to question may avoid closure by abrogating itself at any stage of the pending case before the Constitutional Court. Though it is not a desirable solution, it helps the party dodge the bullet after all, it is especially crucial for the parties under high rist of being dissolved. In practice, this decision of the Constitutional Court may produce two main results. The first, and the more important one is that the politicians,

[45] <http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=2756&content= >, (last access on 17.6.2011).

[46] E.: 2010/17, K.: 2010/112, Judgment of 8/12/2010.

[47] Article 108 of the Law on Political Parties was as follows:
"*A resolution by the competent body of a political party dissolving that party after an application for its dissolution has been lodged shall not prevent the proceedings before the Constitutional Court continuing or deprive any dissolution order that is made of its legal effects*".

namely the founders and the members of the party who are held responsible for their parties being dissolved by the Constitutional Court can no more be banned from political activities within a political parties.[48] In accordance with the article declared void, the Constitutional Court used to maintain the merits of the case and if it came to a conclusion that the defunct party should be banned from political life due to unconstitutional expressions and/or activities, it was still entitled to declare the above mentioned party members politically banned. Next, owing to the annulment decision of the Court, alienation of the defunct party's assets to the Public Purse in case of a dissolution decision is not applicable anymore.

The main justification of this decision of the Court was that the two sanctions mentioned above were of a consequent nature. In other words, the main function and sanction of the dissolution case is dissolution of a political party. If a political party is dissolved by a resolution of the competent organ of the party itself, this result would have been already emerged. As for the sanction of alienation of assets and banning members of the party from political life are secondary results of the dissolution case, according to the Constitutional Court.

With reference to this decision of the Court, it can be said that the sanction of dissolution of political parties is simply meaningles from now on, since the emergence of legal consequences of the verdict of dissolution can no longer materialize as expected. It should be noted that this decision of the Court can be criticised as it encourages the political parties in question to commit *fraus legi facta*, or fraud against law. Thanks to this decision, a political party under risk may possibly abrogate itself one day, and be founded again the following day, or all members of the abrogated party may join a "reserve party" before the final decision of

[48] According to Article 69 of the Turkish Constitution, *"[t]he 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*".

the Constitutional Court. At the same time, it can be presumed that the Chief Public Prosecutor of the Court of Cassation, the competent body to open the dissolution case, will not exert his authority as easily as he used to before. It is possible to say that this decision of the Constitutional Court has brought an important and effective, but at the same time an objectionable safety for political parties.

It should be noted that, both the Constitution (Article 69) and the Law on Political Parties (Article 95) include a provision which is quite eligible for the practice of *fraus legi facta*. This rule prohibits the foundation of a political party which is intrinsically successor of a party which was earlier dissolved by the Constitutional Court; and it is frequently by-passed by political parties in different ways. Founding a "reserve party" during the dissolution case is such a method and, when the party in question is dissolved by the Court, all members of the dissolved party affiliate to the "reserve party". As this second party was founded before the decision of closure, it can not formally be characterized as the successor of the dissolved one. Recently, members of the Democratic Society Party, especially all mayors and uninhibited deputies related to that party immediately were affiliated to "Peace and Democracy Party" (Barış ve Demokrasi Partisi: BDP), which was merely a "pseudo-political party" until that day. It is unanimously and undoubtedly accepted that, the BDP has adopted the political heritage and mission of the DTP. For that reason, the criticizm that the decision of the Constitutional Court encourages the political parties to commit *fraus legi facta* is not so salient as the Constitution and the Law on Political Parties already give way to similar actions by their other provisions. In fact, that political parties do that is not the main problem, but that they are obligated to do this is only and solely to continue their existence. As the Constitutional Court could not replace the legislator so that introduce better norms than those in force, it could only choose lessening the inconveniences emerging from the existing provisions related to political parties by an annulment decision on the ground of unconstituonality; and what the Court exactly did by annulling Article 108 was this.

IV. Conclusion

Considering the explanations set above, we may come to a conclusion on the law governing the political party freedoms and the practice of the Turkish Constitutional Court. It has been shown above that, despite the aforementioned legal and constitutional arrangements, it is widely accepted that the current legal provisions applicable to political parties do not provide political actors with an adequate level of protection in their exercise of freedom of association and freedom of expression. Those provisions need to be amended and brought into line with the decisions of the ECHR and best practice in EU Member States, as outlined by the Venice Commission. Legal provisions about political party activities among EU countries vary, but what is common is that there is a common democratic legacy that political parties maintain their activities without the fear of being prohibited and dissolved.

As to the practice of the Constitutional Court, the late practice of the Constitutional Court, at first sight, looks promising. However, the recent shift in the pattern of the Constitutional Court decisions is mainly because of the intervention of the legislative body. In other words, since mid-nineties, the lawmaker used legislative power in the direction of delimiting the margin of discretion of the Court in the political party dissolution cases. The introduction of the criterion "*to become a centre*" for closure and defining it[49] was the first, and unsuccessful attempt. The first effective initiative taken by the Turkish Parliament was the Constitutional amendment of 2001, which introduced a constitutional definition of "to become a centre" and which required 3/5 majority voting criterion for concluding closure of political parties. Today's ruling party, Justice and Development Party owes its subsistence to the latter. The next step taken by the lawmaker was more radical, which directed to the structure of the Court. It was the amendment of September 2010, by this amendment, the number of the members of the Court was increased from 11 to 17. Six new members to the Court may easily be seen as an attempt

[49] "To become a centre" was first defined in the Law on Political Parties, but annuled by the Constitutional Court, as explained above.

to change the Court's pattern, and, considering that this amendment was due to a referendum, one can say that this amendment has satisfied the majority of the voters, that is, the socio-politic legitimacy. In addition, by the 2010 amendment, 3/5 majority criterion was increased to 2/3, making it much more difficult to conclude dissolution or deprivation of State aid.

As a last word, it can be said that today, political parties in Turkey are in a safer position than they used to be. It is supposed that the Constitutional Court would be more tolerant to political parties in interpreting the provisions of both the Constitution and the Law on Political Parties in the future. However, the main reason generating this result is, the initiative taken by the legislative organ since mid-nineties. Paradoxically, what brought the Constitutional Court decisions into line with those of the European Court of Human Rights and suggestions of the Venice Commission was not the Court itself, but the legislative organ, which repeatedly endeavoured to transform the Court, and tackled it finally as far as can be seen. One can guess that from now on, dissolution of political parties by the Constitutional Court will come to an end and, such cases will not function as "judicial delimitation of the political domain".[50]

[50] I borrowed this expression from Dicle KOGACIOĞLU, "Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain", International Sociology, Vol. 18, Nr. 1, March 2003, pp. 258–276.

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