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Research Report

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SWP Comment, No. 38/2021

Provided in Cooperation with:

Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs, Berlin

Suggested Citation: Can, Osman (2021) : The motion before Turkey's Constitutional Court to ban the pro-Kurdish HDP: An example of the entanglement of politics and the judiciary, and a bad omen for a peaceful solution to the Kurdish conflict, SWP Comment, No. 38/2021, Stiftung Wissenschaft und Politik (SWP), Berlin,
<https://doi.org/10.18449/2021C38>

This Version is available at:

<https://hdl.handle.net/10419/256699>

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SWP Comment

NO. 38 JUNE 2021

The Motion before Turkey's Constitutional Court to Ban the Pro-Kurdish HDP

An Example of the Entanglement of Politics and the Judiciary, and a Bad Omen for a Peaceful Solution to the Kurdish Conflict

Osman Can

On 2 March 2021, the Turkish Prosecutor General's office opened investigations into the Peoples' Democratic Party (HDP). On 17 March it filed its application with the Constitutional Court to have the party banned. The Prosecutor General further sought to prohibit 687 HDP officials from engaging in political activities for five years. This would have amounted to excluding almost all HDP politicians from politics, and thus closing political channels for discussing and solving the Kurdish question for years. On 31 March the Constitutional Court rejected the application due to procedural flaws. However, on 6 June, the Prosecutor General's office announced that it had filed a further motion to ban the party. This move to prohibit civilian and non-violent Kurdish politics risks augmenting the illegal Kurdistan Workers' Party (PKK) and perpetuating the Kurdish conflict. It reveals the entanglement of politics and the judiciary in Turkey, and highlights structural deficits in the Turkish Constitution.

The catalyst was Devlet Bahçeli, president of the far-right Nationalist Movement Party (MHP). The MHP had changed its policy just before the failed coup by parts of the military on 15 July 2016. It had turned from an opponent of the current President Recep Tayyip Erdoğan and the presidential system he favours, into the staunchest defender of the new system and an Erdoğan ally. On 11 December 2020 Bahçeli publicly demanded that the Prosecutor General investigate the possibility of banning the HDP and file an application to do so, in order to comprehensively sweep Kurdish parties off the political stage. About three months later

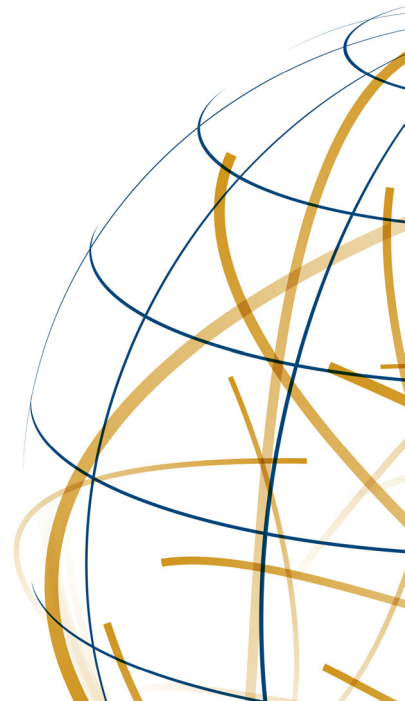
the prosecutor's office met Bahçeli's demands.

Party Politics as a Trigger for the Application to Ban the HDP

Given that it was the MHP president who attempted to have the HDP banned, and given the timing of the application, it is very unlikely that legal considerations were decisive in drawing it up. Even the controversial involvement of HDP leaders during the violent clashes in Southeast Anatolia in 2014, when so-called "Islamic State"

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besieged the Kurdish town of Kobani, did not result in an application being discussed, let alone filed. The same was true when PKK fighters dug trenches against Turkish security forces in the HDP-governed cities in the country's southeast in late 2015, even though such construction is hard to imagine without the help of district councils.

Nor is there any evidence that the HDP has become radicalised in recent years, triggering the filing of the application in 2021. Rather, the approach of the justice system is linked to political and constitutional changes since 2017.

Today the HDP is the only hope for any chance of success for the party alliance that has formed against the governing Justice and Development Party (AKP) and its partner, the MHP. In a change from its previous stance, the HDP now pursues a policy of peace and reconciliation, thus putting pressure on the government. Without the HDP's votes in the most recent local elections (2019), the candidates of the most important opposition party, the Republican People's Party (CHP), would not have been able to win the town halls of the country's largest cities for the opposition alliance, including Istanbul and Ankara. The AKP is steadily losing support among the citizenry, and there is a growing risk that the president might lose power at the next elections. It is therefore likely that, whenever the economic conditions seem right to Erdoğan, he will bring forward the elections. However, even with early elections, the HDP has to be removed from the equation in order for him to win. If the HDP was banned, its supporters would probably not have enough time to found a new party and participate in the elections. The exclusion of 687 HDP politicians would be a dramatic blow for the political movement embodied by the HDP.

Besides, any successor party to the HDP, even if it was founded quickly, could still be refused participation in the elections, or it could flounder on the nationwide ten-percent hurdle that any party must clear to enter parliament. Its voters would thus not be represented in parliament. In that case, the seats concerned would mostly go to the

AKP since the other parties have no support in the majority-Kurdish areas. This would mean an increase of 50 to 70 seats, which could help Erdoğan's party to regain an absolute majority in parliament.

It is unrealistic to hope that controversial issues relating to the organisation of the elections, such as the registration of parties, will be decided objectively. The Supreme Electoral Council, which is in charge of running the elections, was largely reconfigured after the 2019 local elections – to Erdoğan's benefit. The newly appointed members of the committee were drawn exclusively from the Court of Cassation and the Council of State. All previous judges at these two high-level courts had been removed from office under Law 6723 (paragraphs 12 and 22) ten days after the attempted coup; the new appointments corresponded with Erdoğan's needs.

The Impact of the Failed Coup on the Judiciary

The fact that the judiciary responded to the demands of the MHP president so willingly and quickly, and filed the application to ban the HDP only three months later, is due to the reordering of the Turkish judiciary after the failed coup by parts of the military in July 2016. President Erdoğan called the coup d'état aiming to topple him a "god-send" only shortly afterwards. Although the insurrection was crushed, and military leaders as well as the police rallied behind the president, and all political parties without exception condemned the attempted coup, he decreed a state of emergency. In the weeks that followed, numerous "decrees with legal force" were passed that enabled the president to make profound changes to the administration's composition, purge institutions, and influence the judiciary. The Constitutional Court declared itself not competent to examine the constitutionality of these decrees, thus making it possible for the president to push through regulations that contradict both the letter and the spirit of certain provisions in the Constitution.

The next step in consolidating the president's power was to prepare a revision of the Constitution in order to introduce a "Turkish presidential system". The draft modification was drawn up behind closed doors, excluding not just the public but also the AKP and MHP parliamentary parties, and was then hurried through parliament. The legally required referendum took place during the state of emergency. It was extremely difficult for critics to air their opinions in public; demonstrations against the change to the Constitution were banned. Nevertheless the draft change only received the smallest possible majority in the referendum.

Under the new system, Erdoğan is no longer just president but (once again) also chair of the AKP; there can now be no pretence that the AKP's internal affairs are run democratically. As a result, there is almost no parliamentary oversight of the president's actions, who is invested with executive power. Moreover, Erdoğan can now largely decide the composition of the council of judges and prosecutors, and thus influence the staffing of the Court of Cassation, the Council of State and the Supreme Election Council. In future, the president will appoint 12 of the 15 members of the Constitutional Court directly, and the remaining three indirectly, since his party selects the judges whom parliament then elects by simple majority. The Council of Europe's Venice Commission views these changes as a degeneration of the system towards "an authoritarian and personal regime" and has called on Turkey not to implement them or to reverse them immediately. The Commission has been ignored.

Eight of the 15 members of the current Constitutional Court already owe their appointment to President Erdoğan. His predecessor Abdullah Gül appointed five members; two were elected in 2010 by parliament, which was then still acting democratically. The old Kemalist elite no longer has any representatives at the court. The only difference in the judges currently appointed to the Constitutional Court is between conservative men who at times defend liberal

positions and men who can openly be called illiberal. The previous predominance at the Constitutional Court of the Kemalist elite – criticised as recently as 2009 by the Venice Commission – has thus been transformed into its mirror opposite. The last four appointments, which have changed the balance of power in Erdoğan's favour, have occurred in the past two years. Erdoğan also appointed the current Prosecutor General, who applied to have the HDP banned, last year.

It is therefore unlikely that the court will reject the application, which would amount to opposing the openly stated wishes of the president and his unofficial coalition partner, the extreme nationalist MHP. The only uncertainty regarding the ban application is that two-thirds of all judges have to vote in favour of a ban. This is more than the eight relatively neutral judges, as compared to the seven that can fairly clearly be categorised as "pro-Erdoğan".

The Legal Quality of the Ban Application

The fact that the application to ban the HDP was filed due to party-political considerations rather than constitutional ones does not change the requirement for the process itself to adhere to technical and material norms. Legally speaking, the question arises whether the application is even admissible. It is therefore an absolute necessity for its wording to meet legal procedural criteria. It has to avoid vague phrasing and non-specific accusations, and must only make accusations that can, beyond any doubt, be ascribed to certain persons and the party. Finally, the Prosecutor General's office must present both the incriminating *and the exonerating* evidence that is necessary for a just and balanced completion of the case. If the application is deficient in this regard, the court must refer it back to the Prosecutor General's office.

The material conditions for banning a party are set out in the Constitution. For instance, parties may be banned if their

charters or programmes are anticonstitutional. However, a ban will only be imposed if the Constitutional Court establishes that the party has become the focal point of such activities. This condition is met if large numbers of party members act anticonstitutionally, if central party committees tacitly or expressly tolerate such acts, or if party committees themselves deliberately engage in such activities. Depending on the gravity of the contravention, the court can either decide to impose a ban or not; in the latter case, it can order state funding for the party to cease in part or entirely. This sanction has so far only been used during proceedings to ban the AKP in July 2008.

Officials can only be ordered to cease their political activities in the event of a party ban. A two-thirds majority of judges is necessary to impose any sanction on a party. Ever since the HADEP (a predecessor of the HDP) was banned in 2003, the Constitutional Court has also taken into consideration whether a party condones the use of violence.

Considered under these criteria, the application to ban the HDP yields the following results:

- Exactly as in Kemalist times, the application begins with a reference to the ethnocentric orientation of the Constitution as formulated in its preamble: “no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence, the principle of indivisibility of State and territory, historical and moral values of Turkishness, the nationalism, principles, and reforms of Atatürk, and the civilisation envisaged by Atatürk”.
- The application claims that the HDP has become the focal point of acts that run counter to “the indivisible unity of the state with its territory and its nation”. However, the HDP has neither challenged the country’s territorial integrity nor openly advocated federalism.
- The majority of the evidence consists of acts for which the course of events is insufficiently documented, and of utterances whose content and intentions are not unequivocally clear. In other words, it has not been established yet whether the acts on which the accusations are based were even committed and/or whether they can be ascribed to a party member.
- The overwhelming majority of these acts consist of utterances that the Prosecutor General categorises as “terrorist propaganda”. A smaller proportion has been considered proof of “membership of [HDP] politicians in a criminal organisation”; an even smaller proportion has been interpreted as “acts against the existence and integrity of the state”. However, generally speaking, these acts are verbal criticisms of the politics of the state and/or the AKP government.
- The charge of “membership in a criminal organisation” alleges that HDP politicians are members of the Democratic Society Congress (DTK). Yet although the DTK has been inundated by political lawsuits, it has not been banned and must therefore continue to be considered a legal organisation.
- A further charge refers to “involvement in unauthorised demonstrations” – under the Constitution, however, demonstrations do not require any authorisation.
- Most of the statements that have been categorised as anticonstitutional stem from the period of peace negotiations between the Turkish government and the PKK (2013–2015). At the time, Erdoğan and allied politicians made very similar statements.
- Statements by prominent HDP politicians, for example the former Co-Chair Selahattin Demirtaş and former Member of Parliament Sırrı Süreyya Önder, form key parts of the application. Demirtaş had criticised the Turkish government for standing by during the “Islamic State” siege of the Syrian-Kurdish town of Kobani in 2014, and claimed that this had triggered violent demonstrations. Önder’s case revolves around statements made in 2015 during the trench warfare in HDP-ruled towns. However, all of this

has already been addressed in individual criminal proceedings against the two politicians; the European Court of Human Rights (ECHR) has called on Turkey to revise the verdicts in their cases.

- Acts by individual party members listed in the application, such as participation in arms deliveries or recruiting PKK fighters, are indisputably relevant for any party ban – if proven. However, their number is very limited, making it doubtful that these acts are sufficient to turn the party into a focal point of anti-constitutional activities. It is also questionable whether such acts can be attributed to the party as a whole, since the party leadership has always distanced itself from them.
- This also holds for the employment by HDP-led municipalities of persons previously convicted of terrorist acts, and for the use of municipal equipment (such as construction machines and diggers) to dig trenches for PKK fighters during the afore-mentioned trench warfare.
- The application concentrates mainly on proving that the PKK is a terrorist organisation which uses violence. However, this has been the firmly established and institutionalised classification of the organisation for decades, not only in Turkey but in Europe as well. Crucially, the application would need to prove a direct link between the HDP and the PKK. Here, the evidence presented is mostly limited to mere assumptions, questionable constructions, and vague formulations. Repeated value judgments are often designed to replace tangible proof. For example, the application interprets the approximate simultaneity of PKK actions and declarations with HDP actions and comments to prove that such a connection exists, without giving detailed evidence.
- Parallels between the HDP's and the PKK's political stances are also often considered evidence. For example, the fact that both the PKK and the HDP call for Kurdish children to be taught in their native language is presented as proof

that there is an organic connection between the two organisations. Anyone that advocates this teaching, the application claims, is guilty of supporting terrorists or is even a terrorist himself.

- Finally, the application neglects to mention or take into account any facts that exonerate the party, and thus does not comply with a key requirement of a ban application.

It is therefore not surprising that immediately after the text of the application became known, doubts were voiced as to whether the application was admissible in its current form. The wording gives the impression that it was formulated in a great hurry, even precipitately – further proof that the procedure was not launched based on legal considerations but rather at the behest of politicians, which is why the application was rejected.

A Long Tradition of Party Bans in Turkey

It is worthwhile looking at the constitutional history of political parties in Turkey to contextualise the current application for a ban. Until 1961 parties had the status of associations. They could therefore be banned by civilian courts if petitioned by the executive. Only in the 1961 Constitution did parties gain constitutional status: they were defined as indispensable components of democratic political life. Thereafter, they could only be banned by a Constitutional Court verdict upon application by the Prosecutor General's office. Officially, the executive has since then played no role in proceedings to ban parties. This arrangement was substantially retained in the 1982 Constitution.

On the surface, the fact that parties have constitutional status and that the procedure for banning them is separate from the executive seem to suggest that political parties can operate freely in Turkey. However, appearances are deceptive. Since the foundation of the Constitutional Court in 1961, 25 parties have been banned in Turkey,

Parties Banned by the Constitutional Court

The Constitutional Court imposed bans for **violating the principle of secularity** on the National Order Party (MNP, *unanimously*) in 1971, the Inner Peace Party (HP, 10 vs. 5) in 1983, the Welfare Party (RP, 9 vs. 2) in 1998 and the Virtue Party (FP, 8 vs. 3) in 2001. In 2008 the party currently in office, the Justice and Development Party (AKP, 5 vs. 6), only just avoided a ban.

The following parties have been banned for **separatism**: the Workers' Party of Turkey (TIP, *unanimously*) in 1971; the Turkish Labour Party (TEP, *unanimously*) in 1980; the United Communist Party of Turkey (TBKP-T, *unanimously*) in 1991; the Socialist Party (SP, 10 vs. 1) in 1992; the People's Labour Party (HEP, 10 vs. 1), Freedom and Democracy Party (ÖZDEP, *unanimously*) and Socialist Party of Turkey (STP, *unanimously*) in 1993; the Democracy Party (DEP, *unanimously*) in 1994; the Socialist Unity Party (SBP, *unanimously*) in 1995; the Party for Democratic Change (DDP, 10 vs. 1) in 1996; the Labour Party (EMEP, *unanimously*) in 1997; the Democratic Mass Party (DKP – Liberal Kurds, 6 vs. 5) in 1999; the People's Democracy Party (HADEP, *unanimously*) in 2003; and most recently, in 2009, the Democratic Society Party (DTP, *unanimously*).

Bans for **formal reasons** have been imposed on the Farmers and Workers Party (İÇP, *unanimously*) in 1968; the Progressive Ideal Party of Turkey (TIÜP, *unanimously*) in 1971; the Great Anatolia Party (BAP, *unanimously*) in 1972; the Republican People's Party (CHP, *unanimously*) in 1991; the Green Party (YP, 10 vs. 1) and Democratic Party (DP, *unanimously*) in 1994; and, most recently, the Resurrection Party (DIRIP, *unanimously*) in 1997.

more than in all other countries who are members of the Council of Europe.

In democratic countries, political parties can only be banned due to acts that actively target the constitutional order or threaten the territorial integrity of the state. Merely having charters or programmes that are incompatible with the constitution is not sufficient cause. Under ECHR legislation, and according to the recommendations of the Venice Commission, proceedings to ban a party must establish that the party uses

violence as a political means to reach its goals or at least considers the use of violence legitimate. Parties can also not expect the European Court for Human Rights to intervene for their protection if they aspire to a political order that fundamentally contradicts a democratic constitution as stipulated in the European Convention of Human Rights. For “democracy, the rule of law, and human rights” are the three pillars of Europe's common political order.

To a large extent, ECHR legislation on banning political parties developed based on cases from Turkey that were submitted to the court after 1990, the year in which Turkey acknowledged the court's mandatory competence. So far, seven appeals have been examined by the court. Except in the case of the Islamist Charity Party (RP), the ECHR established that the Turkish Constitutional Court had breached the Convention in all cases.

In Turkey parties were banned mainly for their separatism and their violations of the principle of secularity; in a few cases, a ban was also imposed for exclusively formal reasons (see box). With all of these bans, there was a fundamental failure to verify whether the accused political party had legitimised or employed violence and terror as a method and instrument.

However, the Turkish Constitution also identifies other reasons for banning political parties, aside from separatism and violating secularity: contraventions of the principles of democracy, human rights and the rule of law, as well as propaganda aimed at establishing a dictatorship (Art. 68/4). So far, not a single motion to ban a political party has been justified using these reasons, despite such principles forming part of the invariable characteristics of the Republic and being protected within the Constitution by so-called “eternity clauses”. Yet the fact that no application for a ban has been based on these reasons does not mean that such principles are not endangered. However, these are not the primary defensive lines of the political conflict – it is not primarily a confrontation about more or less democracy, respect for human rights or

the rule of law. Instead, the political fight was (and is) usually focused on secularity and separatism.

Bans on parties that were accused of separatism were usually decided unanimously by the Constitutional Court. When banning Islamist parties, the court's judges normally arrived at a maximum of nine votes in favour out of the 11. This demonstrates that there is substantial social consensus on rejecting Kurdish demands for minority rights – seen as separatist – whilst there is disagreement about the role of religion within society and politics, i.e. about secularity.

Instrumentalising Party Bans in the Political Arena

At the constitutional level, party bans were made more difficult in 2001 as part of the preparations for EU accession negotiations. The reasons to impose a ban were restricted in scope, and the quorum for pronouncing a ban was raised to three-fifths of the judges. It is entirely due to these changes that the AKP avoided a ban in 2008 even though the court declared it a “focal point of anti-secular activities”. During revisions to the Constitution in 2010, the quorum for party bans was raised again, to two-thirds, which corresponds to 10 of the 15 judges.

The constitutional amendments in 2010 put an end to the dominance of the military over civilian politics, and diffused the tense relationship between religion and state at the constitutional – though not the social – level. However, any expectations that this would establish a democratic constitutional order and herald the end of party bans have not been fulfilled.

This is primarily due to the fact that the government camp, faced with rapidly diminishing social support, intends to use this political instrument once again to retain power. The demonstrations to save Gezi Park in Istanbul, which turned into

nationwide protests in 2013, were followed in late 2013 by the corruption investigations into government members by those loyal to the preacher Fethullah Gülen; both showed just how fragile the government of current President Erdoğan already was at the time. In the parliamentary elections of 7 June 2015 the AKP lost its absolute majority for the first time since entering government thirteen years earlier, in 2002.

In order to avoid having to share power, Erdoğan decided against a coalition with the Republican People's Party (CHP), which could have led to more democratisation and normalisation. Instead he entered into an unofficial alliance with the extreme-right-wing Nationalist Movement Party (MHP). As a result, peace negotiations with the illegal Kurdistan Workers' Party (PKK) were declared a failure, parliament was dissolved, and re-elections were decreed. The government camp recategorised the pro-Kurdish Peoples' Democratic Party (HDP), which had been mediating in the government's negotiations with the PKK, as puppets of the terrorist PKK, and declared its politicians to be terrorists. The current application to ban the HDP thus did not come as a surprise.

Kurdish voters in particular can hardly consider the application to be legitimate. They will surely interpret it to mean that the representatives they elect are criminalised even when they do not resort to violence but espouse democracy. There is a great risk that Kurds will feel even less of a sense of belonging to Turkey and that some will be radicalised anew, which will make the prospect of democratisation in Turkey even more remote.

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ISSN (Print) 1861-1761
ISSN (Online) 2747-5107
doi: 10.18449/2021C38

Translation by Tom Genrich

(English version of
SWP-Aktuell 44/2021)

Prof Osman Can was Short-Term-Fellow at the SWP in 2019 on the IPC Foundation's Mercator Fellowship Programme.

The Centre for Applied Turkey Studies (CATS) is funded by Stiftung Mercator and the German Federal Foreign Office.

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SWP Comment 38
June 2021