

## Why Party Bans Often Don't Work: How an Attempt to Ban Turkey's AKP Backfired

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In July 2008, in an intensely debated and enormously consequential case, Turkey's Constitutional Court weighed whether to close the ruling Justice and Development Party (AKP) and ban its 71 leading members, including then-Prime Minister Recep Tayyip Erdoğan.<sup>3</sup> Six of the eleven justices voted in favor – falling just one vote short of the super-majority required to dissolve the AKP and bar its leaders from politics for five years.<sup>4</sup>

More than 15 years after the AKP closure case, Turkey has experienced significant democratic backsliding,<sup>5</sup> and Erdoğan has secured a third term as president,<sup>6</sup> extending his tenure in office into 2028. A historic opposition victory in the March 2024 local elections<sup>7</sup> demonstrated that the AKP can still be beaten and offered a glimpse of a “post-Erdoğan Turkey.”<sup>8</sup> Nonetheless, Turkey offers a crucial case for understanding why party bans often do not work – and an example from which other embattled democracies must learn.

Far from weakening the AKP or deterring illiberal behavior, we argue that this attempted party closure backfired and accelerated Turkey's democratic erosion. The closure case enabled the AKP to rally public support for institutional changes to the judiciary, and the case's prosecutors made strategic mistakes that undercut the prosecution's legitimacy.

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<sup>3</sup> Robert Tait, Turkey's Governing Party Avoids Being Shut down for Anti-Secularism, *The Guardian*, July 31, 2008, <https://www.theguardian.com/world/2008/jul/30/turkey.nato1> (last visited Apr 25, 2024).

<sup>4</sup> Id.

<sup>5</sup> Staffan I. Lindberg et al., *Democracy Report 2024: Democracy Winning and Losing at the Ballot*, V-Dem Institute 2024, [https://v-dem.net/documents/43/v-dem\\_dr2024\\_lowres.pdf](https://v-dem.net/documents/43/v-dem_dr2024_lowres.pdf) (last visited Apr 25, 2024).

<sup>6</sup> Berk Esen/Sebnem Gumuscu, How Erdoğan's populism won again, in: *Journal of democracy* 2023, Vol. 34 No. 3, <https://www.journalofdemocracy.org/articles/how-erdogans-populism-won-again/> (last visited Apr 25, 2024).

<sup>7</sup> Adam Samson et al., Turkey's opposition wins big cities in blow to Recep Tayyip Erdoğan, *Financial Times*, Apr 1, 2024, <https://www.ft.com/content/0deeaad7-d98f-46a3-aac9-a4e18086e8b1> (last visited Apr 25, 2024).

<sup>8</sup> Steven A. Cook/Sinan Ciddi, Post-Erdogan Turkey Is Finally Here, *Foreign Policy*, Apr 4, 2024 <https://foreignpolicy.com/2024/04/04/turkey-local-elections-erdogan-akp-imamoglu/> (last visited Apr 25, 2024).

What, then, could have been a more effective legal strategy for protecting democracy? We underscore that party bans are not a long-term solution or substitute for systemic political reforms. Although the tools of “militant democracy”<sup>9</sup> may be useful, the Turkish case suggests that targeted legal interventions, rather than sweeping party bans, may be more effective at safeguarding democracy.

### How attempted party bans can backfire

When Turkey’s Constitutional Court came just one vote short of banning the AKP, one might have expected that the AKP would be chastened, with the judges’ verdict acting as a warning. Indeed, ten of the eleven justices voted to reduce state funding for the AKP, on the grounds that the party had become a center of “anti-secular activities.”<sup>10</sup>

Instead, we argue that the prosecution against the AKP backfired. Within Turkey’s ruling party, the closure case cemented the belief that the AKP needed to tame a judiciary that was staunchly opposed to the party. What is more, the closure case enabled the AKP to argue to voters that the judiciary was an anti-democratic constraint on the popular will and that constitutional changes were necessary to democratize Turkey’s political system.

On the heels of the closure case, the AKP proposed a constitutional referendum in 2010.<sup>11</sup> In addition to increasing civilian oversight over the military, the referendum promised to increase the elected government’s appointments within the judiciary by enlarging the number of seats on the Constitutional Court and Supreme Board of Judges and Prosecutors.<sup>12</sup> The 2010 referendum passed by a wide margin, with 58% support, and demonstrated a popular mandate for institutional reform.<sup>13</sup>

Appealing to perceptions that the judiciary was partisan and anti-democratic, then-Prime Minister Erdoğan campaigned for the referendum as a step toward greater democracy. When celebrating the passage of the referendum in 2010, Erdoğan stated “The ‘yes’ verdict in today’s referendum is a result of our nation’s longing for democracy.”<sup>14</sup>

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<sup>9</sup> Giovanni Capoccia, *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, in: *Annual Review of Law and Social Science* 2013, Vol 9, <https://users.ox.ac.uk/~ssf0073/Writings%20pdf/Capoccia%20ARLSS%202013.pdf> (last visited Apr 25, 2024).

<sup>10</sup> Robert Tait, *supra* fn. 3.

<sup>11</sup> Sebnem Arsu/Dan Bilefsky, *Turkish Reforms Pass by Wide Margin*, *The New York Times*, Sept 12, 2010, <https://www.nytimes.com/2010/09/13/world/europe/13turkey.html> (last visited Apr 25, 2024).

<sup>12</sup> Soner Cagaptay, *Turkey after the Constitutional Referendum: Implications for Washington*, *The Washington Institute*, Sept 23, 2010, <https://www.washingtoninstitute.org/policy-analysis/turkey-after-constitutional-referendum-implications-washington> (last visited Apr 25, 2024).

<sup>13</sup> Sebnem Arsu/Dan Bilefsky, *supra* fn. 11.

<sup>14</sup> *Id.*

To this day, President Erdoğan argues that he and his party have strengthened the rule of law after years of victimization by the judiciary. As Turkey's president stated in a 2022 speech, "As a politician who has been subjected to many unlawful accusations, harassments, and punishments in the past, I have been struggling to strengthen Turkey's rule of law since the day I came to power."<sup>15</sup> Turkey's legacy of party bans, as well as the 2008 closure case against the AKP, helped enable Erdoğan to claim the mantle of democracy and cast the courts as anti-democratic.

### **How not to prosecute party bans**

An important reason why the closure case against the AKP backfired has to do with the way in which the case was prosecuted. From the outset, the prosecution was beset with tactical errors. First, the timing of the case was inopportune. Second, the evidence the prosecutors submitted against the AKP was weak and at times even speculative

By the time the prosecutors launched the closure case against the AKP in March 2008, the party had already won three consecutive and decisive electoral victories. In the 2002 general election, which was the party's first electoral contest, the AKP won after garnering 34 percent of the national vote.<sup>16</sup> That result translated into a disproportionate parliamentary supermajority of nearly 66 percent, due to the 10-percent national election threshold at the time that excluded a number of smaller parties from parliament. Only two years later, in 2004, the AKP won a landslide in nationwide local elections, increasing its vote share by eight percent to a total of 42 percent.<sup>17</sup> Then, in the July 2007 general election, less than a year before the prosecutors initiated the 2008 closure case, the AKP received 46.6 percent of the national vote, marking its third consecutive electoral victory.<sup>18</sup>

Moreover, the AKP's 2007 electoral victory came in the aftermath of a presidential election crisis in which the AKP's candidate, Abdullah Gül, ultimately secured the requisite majority in parliament and was elected president, following several attempts by the secular main opposition to block the process.<sup>19</sup>

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<sup>15</sup> "Hukuk devleti ilkesi, demokrasinin olmazsa olmaz şartıdır", May 10, 2022, <https://www.tc.cb.gov.tr/haberler/410/136822/hukuk-devleti-ilkesi-demokrasinin-olmazsa-olmaz-sartidir> (last visited Apr 25, 2024).

<sup>16</sup> Robert Tait, *supra* fn. 3.

<sup>17</sup> Soner Cagaptay, Local Elections in Turkey: A Landslide Victory for the Incumbent AKP, The Washington Institute, Apr 1, 2004, <https://www.washingtoninstitute.org/policy-analysis/local-elections-turkey-landslide-victory-incumbent-akp> (last visited Apr 25, 2024).

<sup>18</sup> Banu Eligür, The Changing Face of Turkish Politics: Turkey's July 2007 Parliamentary Elections, Crown Center for Middle East Studies, 2007, <https://www.brandeis.edu/crown/publications/middle-east-briefs/pdfs/1-100/meb22.pdf> (last visited 25 Apr 2024).

<sup>19</sup> Mark Tran, Gul Elected as Turkish President, The Guardian, Aug 28, 2007, <https://www.theguardian.com/world/2007/aug/28/turkey.marktran1> (last visited Apr 25, 2024).

In sum, by March 2008, when the closure case began, the AKP had won three decisive electoral victories, both in general and local elections, in addition to successfully appointing its candidate as president. That made the timing of the closure case inauspicious: prosecutors *waited* until after the AKP had solidified its legitimacy through elections.

An evidentiary problem compounded this issue of poor timing. Shortly after the case began, it became clear that prosecutors were relying on a hodgepodge of circumstantial, and sometimes even speculative, evidence. For example, among the admitted evidence in the closure case was an interview that then-Prime Minister Erdoğan gave to the Malaysian newspaper, *The New Straits Times*. The prosecutors proffered Erdoğan's remark during that interview that "Turkey can serve as a model of how Islam and democracy can coexist in a harmonious way" as purported evidence that he wanted to establish an Islamic republic in Turkey.<sup>20</sup> "I am not secular as a person; the state is secular. I am, on the other hand, responsible for preserving the secular order" was another quotation offered as evidence by the prosecution.

Erdoğan's following comment in another interview, featured in the German *Welt am Sonntag* in February 2005, was also in evidence: "A democratic country must guarantee the freedom of religion. This includes, within the confines of the laws, citizens' religious expressions through symbols."<sup>21</sup>

These purported pieces of evidence quickly generated a widespread sense among politicians and the public that the closure case was not motivated by legal merits but rather by party politics. By waiting until the AKP had bolstered its legitimacy through elections – and then failing to substantiate their case with convincing evidence – the prosecutors significantly undermined the legitimacy of their case.

### Why party bans aren't a long-term solution

Even when party bans are prosecuted effectively, the Turkish experience suggests that they are frequently a short-term fix, not a long-term solution. Turkey offers numerous examples to suggest that when political parties have deep-rooted popular support, banning them often amounts to a game of judicial whack-a-mole.

Consider Erdoğan's own rise in Turkish politics. When Erdoğan first rose to national prominence after being elected mayor of Istanbul in 1994, he was a member of the Islamist Welfare Party.<sup>22</sup> Yet in 1998, the Welfare Party was banned

<sup>20</sup> Turkish Constitutional Court, June 30, 2008, <https://www.resmigazete.gov.tr/eskiler/2008/10/20081024-10.htm> (last visited 25 Apr, 2024).

<sup>21</sup> Christoph Keese, Gespräch mit Folgen, *Die Welt*, Feb 13, 2005, <https://www.welt.de/print-wams/article123087/Gespraech-mit-Folgen.html> (last visited Apr 25, 2024).

<sup>22</sup> Kaya Genc, Erdogan's Way, *Foreign Affairs*, Aug 12, 2019, <https://www.foreignaffairs.com/articles/turkey/2019-08-12/erdogans-way> (last visited Apr 25, 2024).

from politics by the Constitutional Court for engaging in “anti-secular activities.”<sup>23</sup> Erdoğan himself was convicted, imprisoned for several months, and banned from politics for reciting a poem deemed to incite religious hatred.<sup>24</sup>

However, these bans could not prevent widespread popular support for religious political parties and candidates from achieving political representation. A successor to the Welfare Party, the Virtue Party, was quickly established in 1997 – only to be promptly banned in 2001 for its “anti-secular activities.”<sup>25</sup> Then, in 2001 Erdoğan and his allies founded the Justice and Development Party – which branded itself as “conservative democratic” and “antiestablishment” without labeling itself as Islamist.<sup>26</sup> The judiciary was playing whack-a-mole, rather than offering a sustainable solution to incorporate religious voters into politics.

If anything, Erdoğan's past imprisonment and ban from politics may only have bolstered his standing in the eyes of more religious voters. As Kaya Genç observes, “The legal stain [of imprisonment], which the judiciary planned as a way to terminate his career, maximized Erdogan's popularity, since pious Turks now viewed him as their voice, which the state wanted to silence.”<sup>27</sup>

Given the significant well of popular support for religious, conservative parties in Turkey, repeated party bans could not prevent the long-term emergence of such parties. The persistent use of such bans represented a failure of the Turkish political establishment to learn and adopt long-term institutional solutions to include religious voices in Turkey's political system.

### What works better than party bans

If party bans often are not effective remedies, what alternative legal strategies might be? The risk that party bans may backfire, coupled with difficulties in prosecuting such cases, makes it all the more important for the judiciary to appreciate the panoply of options at its disposal.

One alternative is middle-way options. An asset freeze would very likely accomplish the objective of a ban by depriving the political party of its financial resources and thereby weakening it. For example, freezing party assets, either temporarily or permanently, could be a useful alternative to outright closure, to the extent the law permits it. An asset freeze can cover current and/or future financial

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<sup>23</sup> Chris Morris, Turkey Bans Islamist Party, *The Guardian*, Jan 17, 1998, <https://www.theguardian.com/world/1998/jan/17/turkey> (last visited Apr 25, 2024).

<sup>24</sup> Kaya Genç, *supra* fn. 22.

<sup>25</sup> Douglas Frantz, Turkish Court Bans Religious Party, Main Opposition Force, *The New York Times*, Jan 23, 2001, <https://www.nytimes.com/2001/06/23/world/turkish-court-bans-religious-party-main-opposition-force.html> (last visited Apr 25, 2024).

<sup>26</sup> Kaya Genç, *supra* fn. 22.

<sup>27</sup> *Id.*

resources, including, for example, state aid not yet disbursed to a party. Moreover, an asset freeze can be partial or total, extending to some or all of a party's finances. Thus, an asset freeze permits the judiciary to fashion an individualized and case-specific remedy that would account for the length, seriousness, and pervasiveness of the threat posed by a political party. That, in turn, incentivizes judges to engage in a case-by-case inquiry that promotes considerations of fairness, moderation, and proportionality.

A second alternative that judges and prosecutors should consider is targeted legal interventions. More often than not, party bans focus on a number of higher-level operatives within a political party, as opposed to its rank and file. Targeted measures aimed at specific party leaders and using the tools of ordinary criminal and civil law could accomplish the same. Targeted asset freezes, to the extent the party in question is largely financed by one or a number of individuals, is a further possibility. If the party leadership is criminally culpable for closure-related crimes or other offenses, which would likely be the case, ordinary criminal prosecution is another option.

Such targeted measures carry their own risks: for instance, sanctioning higher-level party officials individually may pose the risk of creating unintended political martyrs. Still, less-than-closure measures could avoid the political cost of banning a party outright. While targeted sanctions might still make martyrs of a few specific politicians, full party bans risk creating an entire cadre of political martyrs and providing fodder to a domestic and international perception that the banning jurisdiction is anti-democratic. What is more, these targeted measures would keep the option of a full closure on the table, thereby leaving open the possibility of a ban as a future deterrent.

Turkey's experience offers the sobering lesson that when prosecutors seek the maximalist penalty of an outright party ban, such legal interventions can dangerously backfire. As democracies globally grapple with the challenge of prosecuting high-ranking politicians and weighing whether to ban political parties, the Turkish case offers valuable insights for judges, prosecutors, and citizens alike.