

Will it All End in Tears? What Really Happens when Democracies Use Law to Ban Political Parties

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The legal prohibition of political parties is ‘a practice that exists with surprising regularity across the range of democratic societies’ (Issacharoff, 2007: 1406) but one which continues to provoke controversy in both the real and the academic world, not only in different parts of Europe but also outside it (see Bourne and Casal, 2014, Bourne, 2012a and 2012b, Bogaards et al., 2010; also Reilly and Nordlund, 2008 and Mersel, 2006). Indeed, it often connects those sometimes separate spheres. At the end of 2007, for instance, a column in the Spanish newspaper *El País* (Gallego-Díaz, 2007) drew parallels between the banning of parties in Spain and Turkey; it also made explicit reference to the scholarly concept of ‘militant democracy’ – a term which captures the efforts on the part of some states to prevent elections being used by politicians who will then abolish them once they take power. The year before, as the EU had to make up its mind on how to deal with Hamas after it won a landslide in elections in Gaza, the *Jerusalem Post* treated its readers to a tour round some of the member and candidate states that can and have banned political parties, all in order to make the point that ‘Europe has taken a much more forgiving position toward violent and terrorist organizations that form parties here than they do on their own continent’ (Keinon, 2006). Looking at the problems of ‘dealing with the Hamas within’, to borrow from the *Post*’s arresting headline, is also interesting because it brings together scholars working in different disciplines, most obviously law and political science, who not only cross boundaries but also combine empirical enquiry and normative concerns (see – for a selection of recent examples – Sawyer, 2003, Sajó, 2004a, Brems, 2006, Minkenberg, 2006, Mersel, 2006, Capoccia, 2007, Issacharoff, 2007, Rosenblum, 2007, Cram, 2008, Thiel, 2009a and Bourne, forthcoming).

The banning of political parties in democratic states is commonly opposed, by politicians, pundits, lawyers and political scientists. Their opposition is sometimes philosophical: they may be supporters both of free speech and free association; they may take what is sometimes referred to as a 'procedural' rather than 'substantive' view of democracy.¹ But bans are also criticized on more practical grounds (see, for instance, the debates, past and present, outlined in Olsson, 2003 or the more contemporary concerns about banning certain parties in democratic Iraq cited by Randall, 2008: 251; see also Thiel, 2009b: 406). Both those whose objections are philosophical and those whose objections are practical suggest that bans may well prove pointless, counterproductive, or endanger hard-won achievements.

Not everyone, of course, agrees – including the present author. In an earlier study (Bale, 2007), I attempted to question the common wisdom, framed using Hirschman's perversity, futility and jeopardy theses (see Hirschman, 1991), by taking the trouble to look at what another scholar calls 'the actual experiences of functioning democracies confronted with [allegedly] antidemocratic challenges from within' (Issacharoff, 2007: 1415). A comparative empirical investigation of the consequences of recent bans on 'extremist' parties in three self-styled European democracies (Turkey, Spain and Belgium), selected in order to contrast what Pedahzur (2001, 2002) labels 'militant', 'defending' and 'immunized' democracies, found that those consequences were nowhere near as dire as predicted.² Firstly, bans in those countries saw no accentuation of the potentially existential threat apparently posed by the parties affected, whether that threat be religious, racist, or violent.³ Secondly, those parties did not simply carry on as before. Thirdly, bans did not seem to undermine positive democratic development and achievements that took place prior to them coming into force. This suggested that closing down parties – while by no means always the only or the right thing to do – is not necessarily a mistake, at least on practical rather than on normative grounds.⁴

Like all studies which involve analysing recent developments, however, the study ran the risk of being proved wrong by time and chance. The bans it spoke about, after all, had occurred within just one decade of writing. Mao Zedong, a big fan of banning parties (other than his own of course) was once asked what he thought of the French Revolution – an event which at the time had occurred a hundred and fifty years previously – and famously (though possibly apocryphally) replied was that it was 'too soon to say'. On that reasoning, it may be premature, therefore, to revisit a study only a decade later in order to see whether the judgements made

therein still hold good. Yet things have moved on apace in two of the three countries concerned (Turkey and Spain), while the lack of development in the other (Belgium) could be just as significant. This chapter looks at each country in turn before coming to an overall conclusion. Do those cases, then, still defy the philosophical and practical predictions that legal bans on parties will make no difference, that they will make things worse, or that they will put existing achievements at risk? Or, now that we have had more time to make up our minds, does it look instead like they will end in tears?

Turkey

‘Mainstream’ parties are often accused of using bans to deprive or even destroy small but still irritating opponents on the fringes of the party system – militant nationalists, ideological extremists, etc. The news coming out of Turkey in the spring of 2008 therefore came as quite a shock. The decision to initiate a case against the Kurdish nationalist Democratic Society Party (*Demokratik Toplum Partisi* – DTP), accused of having links to the outlawed paramilitary group, the PKK (*Partiya Karkeren Kurdistan*), was not the headline-grabber. Indeed, given Turkey’s history of banning such parties, notwithstanding objections from the European Court of Human Rights (ECtHR), that particular move was par for the course (see Issacharoff, 2007: 1440-1). In fact, there were consequences, which we shall examine later. But what really attracted the attention of the world’s media at the time was the unanimous decision, on 31 March, of the eleven-member Constitutional Court to hear a suit filed by the Chief Prosecutor of the High Court of Appeals to close down the AKP. AK, a religious party, had governed Turkey since winning 34 per cent of the vote in parliamentary elections in 2002 – a share that, in Turkey’s disproportional electoral system, gave it 363 seats out of 550. The court also declared it would consider the Chief Prosecutor’s request to bar seventy-one people from politics for five years – a group that included not only Recep Tayyip Erdoğan, the serving Prime Minister, but also Abdullah Gül, the serving President of the Republic, both of whom had been key players in the founding of AKP following the prohibition of two of its predecessors, *Refah* (Welfare) and *Fazilet* (Virtue) which had their origins in the Islamist *Milli Görüş* movement

The grounds for the ban were laid out in a 162 page indictment put together by the Chief Prosecutor, who, in contrast to the rules governing

many other jurisdictions, can bring such a case entirely on his own initiative (see Özbudun, 2010: 138). The indictment alleged that, because of the AK government, what was officially a secular democracy had come to be seen throughout the world (and notably by the US) as 'a moderate Islamic republic'. Worse still, it said, the determinedly 'anti-secular' party was now attempting to take the Republic down a road that would end in its becoming an Islamic state on the lines of Iran. Interestingly enough, it also pointed out that 'The AKP was founded by a group that drew lessons from the closure of earlier Islamic parties and uses democracy to reach its goal, which is installing *Shari'a* in Turkey.'⁵

The legal basis for the charge was Turkey's constitution, which (in Article 68) makes it possible to ban any party whose 'statutes, programs, and actions' run counter to the country's territorial integrity and national sovereignty, or to 'human rights, the principles of equality and the rule of law,' or to the principles of the democratic and laic Republic'; this is then given effect by the 1983 Law on Political Parties, which, like the constitution itself, has been subject to forceful critique by those who argue it affords too much discretion to those determined at all costs to prevent any dilution of Turkey's assertively – even aggressively – secular and unitary state (see Özbudun, 2010). Under these rules, or those they came after, a host of parties have been banned.⁶ Most were prohibited on the grounds that their support for minority (Kurdish) nationalism promoted the break-up of Turkey. Some, though, were broken up on the grounds that their Islamist ideals, if implemented, would undermine Turkey's commitment to secularism and even put democracy itself at risk, much in the way that fascist and communist parties in the 1930s and 1940s were elected to power but then did away with elections. This is a pre-emptive rationale that informs bans elsewhere and that has been backed by the European Court of Human Rights (ECtHR), not least in its decision (initially in 2001 and finally in 2003) to uphold the Turkish Constitutional Court's banning of one of AK's predecessors, *Refah* (see Bale, 2007, Issacharoff, 2007, Cram, 2008, Özbudun, 2010).

The ban on *Refah*, and in particular its upholding by the European Court, has been subjected to severe criticism on legal and human rights grounds, not least because it put more weight on remarks made by individual members of the party (which supposedly revealed its true intentions) than it did on the party's official position and its behaviour in office; the Court also came close not only to equating secularism with human rights but also to presuming that *shari'a* is essentially incompatible with democracy which, if true, would rule out the possibility of the latter

in almost all Middle Eastern countries that have recently freed themselves from dictatorship (see Boyle, 2004 for the most detailed critique). However, a number of international scholars, whether they were academic lawyers or political scientists and irrespective of the fact that, as such, they were sometimes unaware of each other's work, opined that the bans handed out to AK's predecessors, however contestable their legal justification, may have benign rather than malign consequences: Issacharoff, in the course of an impressive international survey, even went so far as to suggest that 'under the circumstances, it is difficult to imagine a better outcome' (Issacharoff, 2007: 1447), while Randall, in a wide-ranging piece on party regulation, also sees Turkey as 'a success story' (Randall, 2008: 246). Moreover, most Turkish specialists, while making the point, quite rightly, that the bans on Refah and Fazilet, were by no means the only drivers of change which led the reformists (*yenilikçiler*) of the *Milli Görüş* towards a more moderate, democratic brand of religiously-inspired politics (see Gumuscu and Sert, 2009: 961 and n. 29-32; see also Cizre, 2008 and Çinar, 2006), acknowledge that they played a crucial part in the shift towards what the AKP calls 'conservative democracy' (see Çağlıyan-İçener, 2009 and Adoğan, 2006), even if it might be more accurately labelled 'conservative globalism' (Öniş, 2009) or even 'post-Islamism' (see Duran, 2010). Has this positive interpretation been contradicted by more recent events?

When it comes to perversity, one could, when taking the long view, now argue that the banning of Refah in 1998 has had precisely the opposite effect to that which was intended. Instead of lessening the threat of political Islam by obliging its adherents to moderate, it has simply led to them pretending moderation in order to create a party that has ensured they are in a better position than ever to undermine the secular nature of the Turkish state. This was, after all, one of the implications of the Chief Prosecutor's indictment. However, to be convincing, those making an argument along such lines would have to show that political Islam had indeed achieved a sneaky and final victory over secularism. While, as we shall see, AK has acted in ways that have given adherents of the latter cause for concern, it has hardly, as we shall also see, had things all its own way.

The immediate trigger for the case being brought was AK's decision in February 2008 to amend the Turkish Constitution to allow women in higher education to wear a headscarf – a measure which would mean that observant Muslim women would at last be able to attend university within Turkey, rather than, like the daughters of the Prime Minister and the President, having to do so overseas. The party's secular opponents,

who have long claimed – not wholly without reason (see Wiltse, 2008 and Bayram, 2009) – that the headscarf issue is the thin end of an Islamist wedge managed to block the governments plans: in early June 2008 Turkey's Constitutional Court declared they violated the country's constitutional commitment to secularism. But this was insufficient to assuage simmering resentment on the part of the secularists at the parliamentary selection of the President. In the spring of 2007, AK had found its candidate for the presidency Abdullah Gül (whose wife, Hayrünnisa, famously wears the headscarf) blocked and had decided to call an early election as a show of strength. At the election AK won 341 seats in the 550 seat parliament increasing its vote share by over 12 per cent but leaving it some twenty-six seats shy of a two-thirds majority. It nevertheless succeeded (albeit on the third round of voting and by a simple majority) in getting Gül (formerly Turkey's Foreign Minister) elected and sworn in August 2007, even if the ceremony was boycotted by the army, which had, back in April, issued an 'e-memorandum' which many interpreted as threatening a *coup d'état* if AKP pushed its luck.

Survey research suggests that much of the vote for the AKP in 2007 was driven not by religious zeal *shari'a* for or a desire to dismantle the Kemalist state but by a combination of enthusiasm for the party's apparently successful stewardship of the economy and the distinctly unimpressive alternative offered by the main opposition, the CHP, which seemed intent on defending the interests of its core support – the secularist, urban, middle-class elite (Çarkoğlu, 2007, Öniş, 2009, and Kalaycıoğlu, 2010; see also Dagi, 2008: 29-30).⁷ AK's leadership, however, seemed to many observers to interpret its victory almost as a mandate for regime change.⁸ An initial post-election plan to build a consensus around a new Constitution drafted by academics was quickly derailed by the government's decision to push for just two amendments that would allow the wearing of headscarves. Just as seriously, the AKP wasted no time in exercising the executive's right to make appointments to all sorts of bodies that were hitherto the preserve of secularists, continuing a trend that began with its election to office in 2002.⁹ It was the President of the Board of Higher Education, Yusuf Ziya Özcan, chosen by President Gül and Prime Minister Erdoğan, who backed the government's campaign on the headscarf and who stood to gain greater control of universities as outgoing rectors were replaced. Gül, like the President of the USA, also gets to nominate judges to the highest court in the land as his predecessors' secularist choices begin to retire – the very judges who decide on constitutional issues, including party bans. Moreover, although the AKP government has not yet succeeded in

getting the state to relinquish its control of mosques and sundry religiously endowed businesses and associations, it seems intent to exploit its tenure to move religiously inclined nominees into both high and low level posts, for example in the judiciary. The promotion of religious schools (*Imam-Hatip*) and an increase in the resources of the state's Directorate of Religious Affairs (*Diyanet*) have also worried secularists. Many liberals are no less alarmed by increased restrictions (often locally initiated) on alcohol sales and by the reduction in the number of women in top positions, not least in the AKP government itself (see Çağaptay and Perincek, 2010).

Opponents of such developments claim also point to the links between the AKP – a champion of privatization and in charge of public procurement – and the Islamist (but also neoliberal) business organization, MÜSİAD (see Şen, 2010: 71-76).¹⁰ They point, as well, to the rising influence of the Islamist and nationalist Fethullah Gülen Movement (see Criss, 2010: 50-52) in both domestic and foreign affairs, where Turkey, without abandoning NATO, has clearly moved to improve relations with Arab countries and Iran while cooling considerably toward Israel (even before that country's botched boarding operation against Turkish vessels heading for Gaza in May 2010 and its subsequent refusal to apologize for the loss of life). The AKP's critics also claim that the government is exploiting its apparent success in exposing and tackling what is popularly known as the *Ergenekon* (a shadowy conspiracy linked to the military) to its advantage by hinting that those who criticize the AKP are somehow implicated in Turkey's *Derin Devlet*, the 'deep state' that supposedly 'really' runs the country (see, for a balanced view, Jenkins, 2009). Some also claim to have identified a politically motivated attempt by the government to bankrupt the Doğan media group, which in recent years has become something of a thorn in its flesh.

The AKP, then, might like to portray itself to the outside world as a responsible, conservative reformist party doing its democratic best in the face of what it calls 'totalitarian secularism'. It might even claim that it is no more integralist than its Christian Democratic counterparts (see Nasr, 2005; see also Hale, 2005). But its political opponents argue that such claims ring hollow when the reality of the regime's actions, and indeed its populist rhetoric, is examined more closely. Academic observers are naturally less inclined to buy wholesale into the idea that the AKP's leaders are 'theocrats in neckties,' not least because many of them have a pedigree as reformers which predates their founding of a party which, it has been persuasively argued, represents a genuine break with its predecessors and one motivated not simply by political expediency but by profound

political and social change that has created space and demand for a party committed not to *shari'a* but to governing competence, free markets, and 'conservative democracy' (see Dagi, 2008, Gumuscu and Sert, 2009 and Dönmez, 2010). On the other hand, the party's actions in office have clearly provoked considerable concern about 'creeping Islamization' both among Turkish and foreign observers (see for example, Yeşilada and Rubin, 2010, Çağaptay, 2009).

Some of these – particularly those who argue (not unreasonably it should be emphasized) that there is a fundamental and possibly ineradicable incompatibility between Islamism and liberal democracy – were never particularly inclined to give AKP the benefit of the doubt (Tibi, 2008 and 2009).¹¹ Yet even some of those who are prepared to do so admit that the party 'has yet to clarify its position on the role of religion in social life' (Gumuscu and Sert, 2009: 958) and 'is open to criticism on the grounds that it has a narrow majoritarian and instrumental understanding of democracy and has ignored the sensitivities of the secular segments of society' during a fraught post-election period which has exposed 'the limits of liberal Islam and the underlying tensions between [its] globalist and conservative elements' (Öniş, 2009: 35, 37; see also Yavuz, 2009). And even those who are most inclined to believe in the transformation of the AKP wonder whether the party's need to borrow Western liberal rhetoric to defend itself against militant secularism has actually prevented it from finding a genuinely novel, Islamic, and therefore stable, synthesis (see Duran, 2010; see also Jenkins, 2008 for an excellent overview).

On balance, however, no objective observer could conclude that bans on its Islamist predecessors have perversely backfired by leading to the creation of a party, AKP, that is clearly interested in, or has yet succeeded in overthrowing Turkey's secular republic by stealth in order to bring into being some sort of Islamic republic. Indeed, more recent events – involving crackdowns on protesters and social media, the harassment of journalists, and the justification of such actions on the part of the prime minister by his pointing to the fact that his party is still capable of winning big majorities in various second order elections – smack less of a regime on the road to theocracy and more of the sort of depressing tactics the world is all-too-used to seeing from secular politicians tempted by more 'managed' forms of democracy.

But if the charge of perversity can be dismissed on the grounds that it was the threat to secular democracy that provoked Turkey's bans, actual or putative, what about futility? One could, after all, argue that attempts to ban AK itself implies that previous bans have been pointless, not simply

(or even mainly because) some of the banned entities have survived in other guises, but because such bans have done nothing to resolve the continuing tension between political Islam and militant secularism. This, however, is to place too much of a burden on one legal instrument. The conflict between AK and its supporters and Turkish secularists, be they in the military, the bureaucracy or simply in civil society and the general population, is a profound political cleavage which no single measure can hope to 'cure'.

What about jeopardy – the idea that bans endanger previous achievements? If anything, one effect of the threat to ban was, firstly, to encourage AKP publically to place even more stress on liberal values like human rights, the rule of law, and democracy in order to defend its actions in the court of international opinion.¹² Secondly, and not unrelatedly, the threat of a ban temporarily resuscitated the AK's enthusiasm for Europe (see Çinar, 2006: 480-1) which, since the general election of 2007, had appeared to be cooling, notwithstanding (or possibly because of) the opening of so far pretty fruitless accession negotiations in 2005. Both Prime Minister and President clearly decided that cosying up once again to the EU would be their best hope of deterring the Turkish Courts from an unfavourable judgement, EU diplomats having made it very clear since the case was accepted that a ban on AK would constitute a serious obstacle to good relations. On the other hand, this is to assume that people both inside and outside Turkey really set much store by the thinly veiled warnings issued by, among others, High Representative Javier Solana and Enlargement Commissioner Olli Rehn who was quoted in the media as saying that 'In EU member states, the kinds of political issues referred to in this case are debated in the parliament and decided through the ballot box, not in court rooms.'¹³

The unconscious irony of Rehn's words, given that Europe is no more immune than anywhere else from the (often politically-driven) 'judicialization of mega-politics' (Hirschl, 2008), may have escaped some, even if the superiority complex which they betray is far from subtle. But suggestions that the EU would have trouble dealing with a state which bans parties was slightly difficult to credit given that (as the *Jerusalem Post* acidly observed when writing about how Europe was 'dealing with 'the Hamas within') its own members are no slackers when it comes to proscription or other measures designed to hobble parties deemed to be threats to democracy. Nor is it true, as Turkey's Foreign Minister (echoing Rehn) asserted in an interview aimed at both an international as well as a domestic audience (Babacan, 2008), that states strictly limit bans (or

actions which try to achieve similar results by apparently lesser measures) to parties that advocate or employ violence. As one recent study notes, there are at least three additional rationales (including the prevention of incitement to hatred, of an existential change to the character of the state, and of outside interference) – not surprisingly so, given we live in an ever more complicated and ever more democratic world where fascism is no longer the only or even the most imminent danger (see Rosenblum, 2007). And, as a comprehensive survey of both international conventions and national codes (Brems, 2006) shows, these other rationales are built into and thereby acknowledged by both domestic and international law.

In the event, Turkey's Constitutional Court did not end up banning the AKP when it announced its decision in July 2008. Although it believed that that the party was 'a focal point' for anti-secular activities, this appeared to be offset for a sufficient number of the justices by the lack of either incitement to violence or clear and present danger; equally significant was AK's support for the legislative and constitutional reforms urged on the country by the EU (see Vidal Prado, 2009: 307). Instead of banning, the Court made use of 'wiggle room' which allowed it to 'discipline' the government without bringing it down and making an already serious situation even worse. Two amendments to the constitution in 2001 left open the possibility that a party could be fined rather than closed down (Article 69, paragraph 7) and required any ruling on such matters would henceforth require a three-fifths majority (seven out of eleven) instead of a (six out of eleven) simple majority (Özbudun, 2010: 136-7). The new decision-rule saved the AKP in 2008, it was widely attested, precisely because of the availability of the alternative sanction (agreed by ten of the eleven judges). Handing down a fine equivalent to half the party's state funding for that year (an amount approaching US\$20 million), the Head of the Court, Haşim Kılıç, made it clear, that the AKP should regard the judgement as 'a serious warning' and professed the hope that it would 'get the message'.

This is likely to be the absolute limit of any leeway granted to the Court (and therefore to the political parties on whom it sits in judgement) in the foreseeable future: providing any more room for manoeuvre would in all likelihood involve amending the so-called 'unamendable' articles of the Constitution, such as its staunch commitment to secularism – a move that would require two-thirds of MPs and therefore the support of opposition parties. AK's hopes that it would gain a big enough majority at the general election of June 2011 to allow it to submit its proposals to a referendum without consulting its opponents were dashed when, although

it increased its share of the vote to 49.8 per cent, it actually lost seats – an irony given its continued support for a system whose 10 per cent threshold clearly favours big, national parties and discriminates against smaller formations, ensuring, for example, that even the biggest Kurdish party is best off sponsoring supposedly independent candidates in individual constituencies in order to make it into parliament. AK's ambitions for a new constitution however, have not faded and its efforts continued to alarm secularists, who noted that, of the package of 'minor' amendments approved in a referendum in September 2010, progress on implementation was greatest on those measures (like changes to judicial appointments) which arguably favour AK. They can, of course, be seen as illustrative of a less worrying and not uncommon tendency (see Hirschl, 2008: 109-10) among those elected politicians who have suffered at the hands of courts to take steps – sometimes involving institutional changes – to minimize the risk of it happening again.

In Turkey, of course, it already has. After the AKP was 'spared' in July 2008, the world turned its attention away from the country. As a result, it largely ignored the Constitutional Court's decision in the other case brought by the Chief Prosecutor, namely his call for the closure of the Kurdish nationalist DTP, which continued to call for more autonomy, as well as doing nothing to undermine the assumption that it was effectively the political wing of the outlawed PKK. In December 2009, the Court, citing articles 68 and 69 of the Constitution and the Party Law, ordered DTP be shut down on the grounds that it threatened the state's integrity and was linked to terrorist violence – links which probably explain the muted reaction to the news from the EU, whose revolving presidency (like the AKP) did little more than express its concern. The DTPs assets were seized, two of its parliamentarians removed from parliament, and nearly forty of its members barred from political activity for five years.

That opponents of the ban in Turkey insisted this was bound to set back a peaceful resolution to the Kurdish problem, while the party's remaining MPs promptly followed form and joined a successor party, *Barış ve Demokrasi Partisi* (BDP), already set up a 'lifeboat' for them, inevitably throws up questions, if not of perversity, then of jeopardy and futility. In the elections of June 2011, the BDP (effectively the eighth party of its kind) and the independents it sponsored made it into parliament only to find that several of them were denied their seats after being imprisoned for links with the PKK while another, Hatip Dicle, was barred on the grounds of a previous conviction for spreading terrorist propaganda – an offence not so very different, some argued, from the one which saw the Prime

Minister Erdoğan banned from parliament back in 2002 until a change was made to the law (with cross-party support) to rectify the situation. In Dicle's case no such change was forthcoming, despite widespread concern that the country's Supreme Electoral Council (YSK) had acted arbitrarily in his and other cases. As a result, 169 MPs – most of them from the main secularist opposition party who were protesting about two of their would-be colleagues being barred on the grounds of alleged involvement in a putative military coup – refused to take their oath of office.

Sympathy for the plight of the BDP, however, is qualified in many quarters by the suspicion that many of those elected on its slates are indeed linked to the PKK, which ended a ceasefire in the summer of 2011 and returned to a strategy of violent provocation of the army and an AK government – a government which had looked determined to pursue a more liberal policy toward the Kurds. That the return to violence and the barring and refusal of the BDP coincided suggested to some that the BDP's actions were all of a piece with the PKK cooling on the idea of a political rather than a warfighting strategy, although others argued that it was the proscription of elected candidates that caused (or at the very least reinforced) the decision to return to violence. Ironically, the civilian deaths that occurred as a consequence so outraged the general public in Kurdish areas that some prominent BDP politicians felt obliged to come out against them. Moreover, at the beginning of October 2011, those BDP MPs not subject to a ban (ie the vast majority of them) decided to take up their seats, primarily in order to be able to join in all-party talks on a new constitution.

In the Kurdish case, then, the arguments are more finely balanced than they are in the case of the AKP and the banned religious parties it took over from. While the decision to ban the BDP's predecessors, and to disbar some of its elected candidates from actually taking up their seats, may not have made things worse, it can hardly be said to have made them better. Moreover, the fact that the BDP would still appear not to have put clear blue water between itself and the PKK suggests that previous bans can, with some reason, be said to have been futile. The possibility of progress towards an all-party agreement on a new constitution – a document which may well make it less easy to ban parties in the future – means it would be premature to say that the proscription of yet another Kurdish formation (or at least some of its MPs) has ended in tears. But if, in the end, tears are shed they are likely to be triggered not so much as the result of the bans but as a consequence of the ongoing failure to solve (or

at least manage) the tension between the Kurds' desire for independence and Turkey's determination to preserve its borders intact.

Spain

Some of the same issues, of course, have been thrown up in Spain, although in that case the argument against futility (and jeopardy and perversity) would appear to be stronger – and to have grown stronger as time moves on. The supposedly 'permanent' ceasefire declared by the Basque terrorist group ETA in March 2006 lasted only just over a year – a year during which socialist politicians were prepared (in the end to no avail) to risk opposition accusations that they were secretly negotiating with ETA's political wing, *Batasuna*, whose prohibition in 2003 they had supported and whose successors they had, as a government, similarly shut down (see Ferreres Comella, 2004 and Vidal Prado, 2009). Although the ceasefire formally finished on 6 June 2007, it had effectively ended in December 2006 when an explosion at Madrid airport 'accidentally' killed two people. ETA mounted numerous attacks thereafter, some of them deadly. Given that in the period immediately before the ban on *Batasuna*, ETA had generally tried (not always successfully) to avoid fatalities, opponents of the ban could claim jeopardy – put bluntly, to suggest that things have got worse. They also argued that one of the reasons that ETA called off its ceasefire was the Government's stubborn refusal during secret negotiations, firstly, to allow *Batasuna* to take part in all-party talks in the Basque Country on a political solution to the conflict and, secondly, to take steps to facilitate its re-legalization in time for the municipal elections of 2007 and the general election of 2008 – supposedly more proof, if proof were needed, that the Spanish state's uncompromising stance made a settlement of the Basque question much more difficult than it really needs to be (see Guittet, 2008: 284; see also Woodworth, 2007).

These criticisms, however, are flawed. With regard to the apparent increase in fatalities, ETA's willingness (and capacity) to take lives always fluctuated but actually declined in recent years, though not of course simply as a result of the ban on *Batasuna* (see de la Calle and Sánchez-Cuenca, 2009: 214). With regard to frustration at the ban being responsible for ending the ceasefire, this ignores the fact that, when the bomb went off at Madrid airport, it clearly took not just the government but some of its ETA and *Batasuna* interlocutors by surprise. Indeed, the latter scrambled, in the days and weeks that followed, to keep the peace process

on track – all in vain because it became clear that (younger) hardliners within the terrorist organization had (temporarily at least) triumphed over the moderates or simply taken matters into their own hands, forcing their internal opponents either to disown them and admit disunity or (as they eventually did) hang together and, however reluctantly, call off the ceasefire. It was clear, then, that at the time of the airport attack, Batasuna's leadership was still hopeful that it might allowed to contest the municipal elections; indeed, they were probably well aware that, if history was anything to go by, their fortunes were likely to be much improved if they could stand during a lull in the bombings and shootings. The end of the ceasefire, then, had more to do with disputes over strategy within ETA than it did with the ban on Batasuna *per se*.

Such oscillation between violence and negotiations will be familiar to anyone tracking the behaviour of the IRA in the initial phase of the Irish peace process even though its 'political wing', Sinn Féin, was not banned (see Richards, 2008). The Irish example, of course, is now even more relevant than ever since, in late October 2011, ETA (following a few months of ceasefire) finally declared a definitive (and according to most observers genuine) end to its armed struggle, following a peace conference in Donostia-San Sebastián attended by, among others, former Irish Prime Minister Bertie Ahern, Tony Blair's former Chief-of-Staff, Jonathan Powell, and Sinn Féin's Gerry Adams. Although decommissioning of weapons and disbandment of the organization itself were still apparently some way off, and polls suggested scepticism among many Spaniards, this development, above all, suggests that the ban on Batasuna did not, as many predicted, prove counterproductive. Whether that ban actually contributed to peace is, of course much harder to assess. It would be easy to fall into the *post hoc ergo propter hoc* fallacy and assume that because a permanent peace followed the ban, that the latter led to the former. But that is a temptation that must be avoided.

In the light of this, how, then, should we consider futility? Has the ban really made no difference? Even if we forget the possibly specious argument that it has, in fact, led to peace, there are ways of assessing the question, the most obvious being the extent to which the banned party has been able simply to continue its political-electoral activities by, for example, creating 'lifeboat' or 'spare' parties which carry on its work as if nothing had happened. Early critics of the ban, for example, pointed to the way in which a tiny party formed just prior to the ban, EHAK-PCTV (*Euskal Herrialdeetako Alderdi Komunista – Partido Comunista de las Tierras Vascas*), openly appealed, in the 2005 elections for the Basque

parliament, to voters who would otherwise have voted for the *Aukera Guztia* list that was proscribed as simply a front for Batasuna – an appeal that saw them come from nowhere to win 12.3 per cent of the vote and nine (out of 75) seats. Following the election, critics of the ban pointed to evidence of links between that party and Batasuna, especially after one of EHAK's MPs was discovered at a September 2007 meeting of Batasuna leaders broken up by police, as well as to the seizure of documents which appeared to show payments from EHAK to members of Batasuna. On the other hand, the fact that it took the authorities until February 2008 to prevent it participating at the forthcoming general election is testimony to the fact that EHAK was very careful until then to avoid publicly giving aid or comfort to a terrorist organization, in other words to avoid doing anything the ban was designed to prevent.

Possibly because of this reluctance, Batasuna – ETA made several attempts to put together other formations that would facilitate its involvement in elections and municipal and regional government. The most obvious of these – so obvious in fact that it may have been more a symbolic gesture than a genuine attempt – was the planned launch of *Abertzale Sozialisten Batasuna – Unión de Socialistas Patriotas* in March 2007, less than two months before the 27 May municipal elections. Given its use of the Batasuna brand and those who were involved, some of whom were facing criminal charges, its swift proscription prior to the elections in question came as no surprise. In fact, the Supreme Court (whose ruling was then upheld by the Constitutional Court) banned all 246 lists (containing thousands of candidates) presented by ASB, but also 133 lists presented by another outfit, the EAE-ANV (*Eusko Abertzale Ekintza – Acción Nacionalista Vasca*). EAE-ANV, like ASB, with which it stood in an electoral alliance called *Abertzale Sozialistak*, was deemed to be a 'fraudulent successor' of Batasuna; the fact that it had been around (if not particularly active) for decades made no difference since it had clearly been 'infiltrated' or colonized by Batasuna.

Only those EAE-ANV lists that contained three or more candidates deemed to be 'infiltrators' were proscribed in 2007 but even this denied them a presence in over half of all Basque local contests as well as the regional elections in Navarra, an autonomous community that many Basques see as an integral part of their homeland. The so called 'votantes huérfanos' of the banned formations either stayed at home or provided an unexpected windfall for other parties, such as the *Nafarroa Bai* electoral alliance in Navarra, which scored 24 per cent on its first outing. Nevertheless, the remaining lists of the EAE-ANV netted the party over

70,000 and 20,000 votes in local elections in the Basque Country and Navarra respectively – results which gave it effective control of 33 councils in the former and 9 in the latter. EAE-ANV was, however, effectively prevented by the Supreme Court from standing in the 2008 general election (see below) – a decision which, once again, probably saw votes transferred to Nafarroa Bai, which won one seat.

This action in particular illustrates that, even for those who support them, bans continue to throw up dilemmas or even injustices. One of the most obvious of these relates to the prevention of individuals standing for election simply because they appear on the same party list as others who in the past stood (quite legally at the time) either for Batasuna or one of its predecessors. Worse still, they might be prevented from standing if anyone on their list previously appeared on a list along with candidates belonging to Batasuna or its predecessors – all of which means that it is perfectly possible that lists have been banned even though none of the individuals on them have ever stood for Batasuna or its predecessors. Although one might argue that the candidates concerned could always have stood on a different list (that is, for parties that clearly reject violence), this is a serious and perhaps undue restriction on individuals' political rights.

Given that the stakes are so high, and that Spanish courts have continually proved themselves willing to back bans on Batasuna and its supposed successors, it is hardly surprising that the ECtHR has become involved in the Spanish as well as the Turkish case. In December 2007 the Court declared that it was prepared to hear Batasuna's claim that the Spanish government had violated its right to freedom of expression (article 10) and its right to freedom of association (article 11). Even though it ruled out a claim under article 13 (that the plaintiff had no effective remedy before a national authority) – thereby agreeing that the Spanish legal process was watertight – this represented encouraging news for opponents of the ban since only a tiny minority of claims even make it so far as a hearing.

By no means all legal scholars believed that the Strasbourg Court would find in favour of Spain (see Cram, 2008: 90-5), although some observers suspected that the state's case may well have been strengthened by the fact that, in February 2008, Spanish judges had rejected urgent requests by the government and prosecutors simply to impose a blanket ban on EHAK and ANV in advance of the general election to be held the following month. Instead, they chose the lesser (but immediately effective) option of cutting off the parties' funding and preventing them from presenting candidates, declaring, interestingly, that the latter was designed to prevent

parties claiming some kind of parliamentary immunity in the face of a future application to ban them completely. This – allowing the party to continue but preventing it contesting elections – mimics the ‘smarter’ sanctions employed for some time by Israel (which like Spain now permits the banning of parties supporting terrorism), arguably to good effect (Issacharoff, 2007: 1447-51 and Navot, 2008). Whether, however, it had any impact on the ECtHR is a matter for speculation, but in June 2009 the Court upheld the dissolution of Batasuna; it also upheld the Spanish legal system’s right to prevent successor parties running candidates in elections (running all the way up from local to European) in an attempt to render the initial ban useless, although it stressed that it would have to be able to show strong links between those candidates and the dissolved party (see Černič, 2010, for a critique).

Although Spanish courts’ decisions preventing certain lists and candidates from being put before the electorate led to demonstrations in the Basque country (and even to a clandestine meeting called to organize another party by Batasuna members who were promptly arrested by police), it gained a good deal of support in the rest of Spain. Yet the precautionary principle on which it was based, however reasonable and pragmatic, again raises thorny questions since, in effect, the ‘defendants’ are presumed guilty until proven innocent. Also problematic is the extent to which being seen to pursue the same objective as that pursued by the men of violence may by itself be enough to create a link between a candidate or a party and such men: the danger of ‘guilt by association’ (one, in fact, raised in the Spanish case by a UN Special Rapporteur) is blatantly obvious (see Černič, 2010: 11). The common response to such concerns, namely that ETA hardly gives the benefit of the doubt to its victims (one of whom, a former Socialist councillor was gunned down in front of his wife and five-year old daughter less than forty-eight hours before polling day in March 2008) is understandable, but not perhaps wholly convincing. More persuasive perhaps is the argument – one floated in debates about the prohibition of Nazi-inspired parties in Germany (see Niesen, 2002: 34-5) – that the intimidation resulting from such attacks creates a climate of fear in which alternatives to the party which instils such fear, fail to emerge or at least to thrive to the extent that one might expect in a fully-fledged democracy.

At the regional elections of 2009, Batasuna – already under pressure from *Aralar* (the secessionist but non-violent party founded by some of its disillusioned partisans in 2000) – again tried to get together a new party that would run lists on which its activists would stand. However,

D3M (*Democracia Tres Millones* or *Demokrazia Hiru Milioi*), was banned, obliging Batasuna to call on its supporters to vote for it anyway – votes which have to be totted up even if they count for nothing. The response from nationalists was not unimpressive: had D3M been running it would almost certainly have gained over 100,000 votes or around 8.5 per cent. On the other hand, this still represented a significant drop compared to the 12.3 per cent which went to EHAK-PCTV when the same seats were fought in 2005. Of course, not all of those who chose to cast a ballot that counted went straight over to Aralar (or indeed more mainstream nationalists) but many of them did (see de la Calle and Sánchez-Cuenca, 2009: 218-222).

In February 2011, however, in anticipation of municipal and regional elections, a new party, explicitly rejecting violence and promising an exclusively political campaign for Basque independence, *Sortu*, was founded. In late March 2011, though, it was denied the chance to stand candidates by a majority decision of the Supreme Court on the familiar grounds that it was, effectively, a ruse by which Batasuna activists could participate in the upcoming elections. In response, yet another electoral coalition, *Bildu*, was announced. Composed of the *Eusko Alkartasuna* party (originally a splinter party from the mainstream PNV) and the smaller (and more left-leaning) *Alternatiba*, as well as some supposedly non-affiliated ‘independents’, it was formed just before the election campaign began. It too was banned by the Supreme Court in early May; but a few days later the Constitutional Court (on a 6-5 majority vote) overturned the decision, arguing that, although there were concerns about two or three of the independents having Batasuna connections, they were not sufficient to permit the banning of two parties with an unblemished record of non-violence. This decision outraged the conservative *Partido Popular* but was greeted with relative equanimity by the *PSOE* minority government in Madrid – not surprisingly perhaps in view of the fact that the Supreme Court’s initial decision looked like costing it the vital parliamentary support of the mainstream Basque Nationalists, the PNV.

The Constitutional Court’s decision allowed *Bildu* to contest the elections, at which it performed impressively, winning, for example, 25 per cent of the vote in the city of San Sebastián and 13 per cent in the Navarre regional contest. In late September 2011, *Bildu*’s main components, *Eusko Alkartasuna* and *Alternatiba*, announced that they would be getting together with Aralar to form a coalition (called *Amaiur*) in order to contest the general election of 2011. It won seven seats in parliament that November, fielding candidates in the Basque Country and Navarra.

To argue, however, that all this means the ban on Batasuna was futile would be inaccurate. The new electoral coalition, while still separatist and left-wing, seems genuinely committed (or at the very least reconciled) to peace and no longer prepared to act as a front for, or to try to excuse, ETA violence, even if its stands on prisoners offends some Spaniards. In any case, there is now no violence (apart from the violence of the past) to excuse. If that continues to be the case, then there is no longer any justification for a ban.

Belgium

In Belgium, things do not seem to have got any worse. When it comes to elections, Vlaams Belang, the successor to the banned Vlaams Blok has, if anything, lost rather than gained support. In the municipal elections of October 2006, VB improved its performance in many places in Flanders but, despite a slightly increased share of the vote in its 'home-city', Antwerp, where it took 33.5 per cent, it actually suffered a reverse – this despite VB's claim (heavily disputed) that it could now count on the support of large numbers of Antwerp's 20,000 strong Orthodox Jewish community, now supposedly prepared to forgive its past links with the Nazi occupation in common cause against the cities growing Muslim population.¹⁴ At the June 2007 general elections, the party won 17 out of 150 seats in the Chamber of Representatives (down one seat albeit on a marginally increased vote share of 18.9 per cent) and 5 out of 40 seats in the Senate (the same as in 2003). VB also performed relatively poorly in the EP elections of 2009, its 15.9 per cent of the vote representing a drop of over seven points compared to its share in 2004. And at the general election of June 2010, VB was clearly outperformed by its separatist (non-far-right) rival N-VA (*Nieuw-Vlaamse Alliantie*), taking just 12.3 per cent of the vote and losing five and two seats in the lower and upper house respectively. In 2014 it performed even more poorly, winning only 3 seats (out of 150) in the lower house in the federal election and just 1 seat (out of Belgium's 21) in the European Parliament. This could even be a party on its way out.

Of course, strictly speaking, even if Vlaams Belang had instead made big electoral strides this would not constitute an argument against a ban on its predecessor: after all, bans are designed to rid the public sphere of parties whose infringement of basic human rights or whose advocacy of such infringement poses a real threat to democracy or public safety; they

are not designed – or at least should not be designed – to drain sympathy from parties we simply do not like or disagree with. Likewise they are not intended to prevent such parties gaining publicity. Some would see the invitation extended to two of VB's then leading figures, Filip Dewinter and Frank Vanhecke, to address the Washington-based Robert A. Taft Club as evidence that the ban had backfired by conferring upon the party an aura of martyrdom and respectability. But if America's so called 'paleoconservatives' thought it worth flying over representatives of what they claimed was 'the most successful true right wing party in Europe' to talk to them about 'the threat that multiculturalism, radical Islam, and mass immigration bring to the fundamental European and American values of free speech, tolerance, and representative government in Europe', then that (as well as the hope that VB's success 'can be duplicated by a genuinely right wing movement' in the US) is their business.¹⁵ It is unlikely that it harmed anybody back home in Belgium.

But if perversity and jeopardy can be relatively easily dismissed, what about futility? Has the effective banning of Vlams Blok been pointless? This, it seems, is a greyer area than we first thought: while it remains broadly true that the name-change to Vlaams Belang allowed the Flemish populists to drop some of their baggage, our initial findings arguably overstated the moderation involved. Inasmuch as VB's overt ethnocentrism and racism have receded, their replacement by an equally aggressive (and socially divisive) Islamophobia has continued apace. Outside of Belgium, too, the transmutation of the Blok into the Belang has made little difference to how it is perceived, for instance, in the international media where it continues to be routinely referred to as 'extreme-' or 'far-right'. This is partly inertia but partly because of the causes (sometimes the lost causes) that the VB champions and the company it keeps.

In March 2008, the party's president, Bruno Valkeniers, caused a storm by appearing to suggest in a TV appearance that he hankered after apartheid-era South Africa. Meanwhile, Filip Dewinter was busy launching a charter to 'fight the Islamization of West-European cities', focusing in particular on a moratorium on mosque building. Given that the latter is a controversial issue exploited by radical right wing populist parties all over Europe, it is interesting that the Austrian FPÖ was the only high-profile member of that party family to attend a meeting on the topic in Antwerp organized by the VB, suggesting perhaps that the latter, at least at that stage, remained rather too unreconstructed for some of its supposedly like-minded counterparts in other countries. The absence of Geert Wilders of the Dutch PVV (*Partij voor de Vrijheid*) –

Freedom Party) no slouch himself when it comes to criticizing Islam – was particularly noticeable. The fact that other parties of that ilk also stayed away also seemed to point to an ongoing distinction between radical right wing populist parties as a whole and those parties who joined the Identity Sovereignty and Tradition (ITS) group in the European Parliament – a group that split after just ten months of existence (from January to November 2007) when it could no longer contain the possibly predictable tensions between ultra-nationalists from East European gypsy-bashing parties and West European parties (such as the French *Front National*) which, at that point anyway, continued to flirt with fascism and even holocaust denial. The latter, incidentally, is something that VB itself would recoil from, having made a huge effort to portray itself as a friend of Israel in recent years, although its stance is somewhat qualified by its campaign for an amnesty for those who collaborated with the Nazis in wartime Belgium. Its outreach to Israel, however, is very much of a piece with its obsessive concern with the threat supposedly posed by Islam – a threat that is used as justification for the oft-made observation by party leaders that Flemish cities are starting to resemble Morocco or Mecca, proven, they say, by official lists of residents of certain suburbs apparently showing over ninety per cent of have African and Arabic names, or by school canteens serving *halal* meat and no pork. Concern apparently runs so deep that the party leadership expressed solidarity with the campaign against building a ‘mosque’ at Ground Zero in New York, with Filip DeWinter continually referring in remarks on the matter to the US President as Barack *Hussein* Obama.

Following elections to the European Parliament in 2009, VB declared itself interested in some form of cooperation, especially with the Austrian Freedom Party (FPÖ), the Sweden Democrats (both of whom have joined the VB in declaring their heartfelt support for Israel against Islamist terror), as well as the Danish People’s Party, the Italian Northern League, and the Slovak National Party, all of whom decided to distance themselves from more extremist outfits like Jobbik (Hungary) and Ataka (Bulgaria). Such cooperation, however, was to begin with largely limited to initiatives like the campaign against Turkish membership of the EU, the latter issue being quite high up in the mix for VB, with the Party courting controversy in the spring of 2011 by releasing a poster (modelled on a similar one from Switzerland) showing a white sheep standing on a collage of European flags kicking out a red sheep embossed with the flags of Turkey and Morocco. Later that year, however, the European Parliament recognized the ‘far-right-lite’ European Alliance for Freedom,

in which VB joined with the newly ‘detoxified’ French FN, the FPÖ, the Dutch PVV and the Northern League. VB will, however, play a very small role in any such group after 2014 since it performed so poorly in European elections that year.

In short, the VB might not be successful but it continues to hold and express views that border on the extreme. As such, our initial conclusion that the Belgian ban avoided futility might require some qualification. This has led some of the same groups (including *Kif Kif* and the Movement against Racism, Anti-semitism and Xenophobia) that brought the action which saw Vlaams Blok disband to consider doing the same to Vlaams Belang by getting the courts to deprive it of state funding on the grounds that it opposes rights granted under the European Convention. They know that the federal government is already under international pressure to fulfil what many states, regard as the obligation to prohibit racist organizations embodied in article four of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, to which 177 countries have signed up (see Brems, 2006). On the other hand, they also realize that, given the apparently chronic difficulties it has in even forming an administration that can hold the country together, the Belgian political class has had other things on its mind. In any case, bans are almost always responses to domestic rather than international pressure, and tend to occur when regimes face threats from parties that look like they are on the up rather than on the wane.

Conclusion

The motives for banning parties are rarely beyond question wherever in the world such bans are allowed for, proposed and enacted. They include ‘sheer partisan self-serving, prejudice, an expressly exclusionary national ideal, a unitary political identity hostile to multiculturalism, or simply a disproportionate response to fear of disorder’ (Rosenblum, 2007: 25; see also Randall, 2008). But nor are those motives wholly ulterior: there are good reasons, recognized by a host of international conventions and ranging well beyond the possibility of violence, for states to take such action or at least to assert their right to do so if they deem it necessary – and as long as it is proportionate and done within the law (see Brems, 2006).

These noble (or at least less base) motives do not necessarily give rise to outcomes which are perverse or futile or which jeopardize previous

achievements. But those outcomes, being political and being of only recent provenance, remain as disputed and debateable as the 'necessity' of banning parties in the first place (see Rosenblum, 2007: 71-3). In no small part this is because outright prohibition is by no means the only (and definitely not the first) weapon that states keen to contain internal threats should reach for (see Rummens and Abts, 2010). We would of course be wrong to claim that the consequences in every country in which a ban is actually implemented (rather than simply kept on the books as a deterrent) are uniformly positive. Research both from Europe and further afield suggests mixed results (see Minkinberg, 2006, Bieber, 2008: 109-110, Moroff, 2010, Moroff and Basedau, 2010), as well as 'unintended – and not so unintended – consequences' (Randall, 2008: 252-58). However, we would clearly be mistaken if we were to suggest that they are always and everywhere malign – evidence, if you like of some kind of iron law of institutional interference. After all, those consequences not only take time (if not necessarily as much time as Mao supposedly implied) to emerge but also vary considerably between polities. This is also the case, incidentally, for another of the strategies sometimes employed by 'mainstream' parties to discipline their more extremist counterparts, namely an attempt to ostracize them politically rather than legally via a *cordon sanitaire* (see Van Spanje and Van der Brug, 2009: 375-6; see also Rummens and Abts, 2010).

Looking again at developments in Turkey, Spain, and Belgium, it seems clear that different judgements apply in each country and might even had been different had events taken a different turn. In Turkey, for instance, both the perversity and futility arguments can on balance be dismissed when it comes to the AKP; so too can jeopardy – but only because the judges' decision to avoid an outright ban on the governing party meant that the country's long-sought EU candidature was not put at risk. The less high-profile case of the DTP, however, should prevent us from making too sweeping a judgement in that case. In Spain, perversity and jeopardy can be dismissed and, although some might like to argue that the eventual decision to allow the Bildu and Amaiur electoral coalitions to stand candidates in 2011 constitutes futility, this ignores both the degree of separation with ETA and even Batasuna, and the fact that the former has now apparently ended its terrorist campaign for good. On the other hand this rather more sanguine conclusion should not blind us to the fact that previous bans throw up injustices (particularly those done to individual candidates) which may or may not be possible to mitigate. In Belgium, neither perversity nor jeopardy is the problem, but, given the

continued ethno-cultural extremism of the Vlaams Belang, futility might be.

Our earlier findings, then, need not be thrown overboard but they may require some qualification – not only right now but in the future, too. Whether, as political scientists or legal scholars, rather than, say historians, our findings can ever be much more definitive than that is a moot point. Only slightly less moot is an additional finding made possible by this return visit to two of the cases concerned – Turkey and Spain. This is that ‘the authorities’, especially where the bans in question are seen to have ‘worked’, tend not to repeat them *holus bolus* but instead to employ rather more sophisticated or ‘surgical’ (Issacharoff, 2007: 1446) methods: where previously they might have reached for the cosh, they now prefer the scalpel. States, then, would appear to travel along a learning curve, albeit one characterized not so much by cool consideration of abstractions but instead (and rather appositely) by trial and error. This process, not surprisingly perhaps, gets more attention from academic lawyers (see Sajó, 2004b: 217 and Thiel, 2009b: 420) than from political scientists, who, despite their increased interest in path-dependence, are always anxious to avoid explanations that seem to smack of particularism. That said, as the different treatment handed out to AKP and DTP (and BDP) in Turkey reminds us, we are dealing with a trend that, even within a single polity, is far from linear or unqualified. Speaking normatively, that is perhaps how it should be: as recent work on combating racism, for example, emphasizes (see Bleich, 2011), solutions – presuming there are solutions – have to be contextually appropriate as well as proportionate.

Notes

- 1 Put briefly, the adherents of ‘procedural democracy’ value pluralistic political competition primarily for its capacity to determine and give effect to the preferences of the electorate, irrespective of what those preferences may be; the adherents of ‘substantive democracy’, on the other hand, fear that goods such as liberty, human rights, equality, etc., will not necessarily be protected by a majority vote, especially if that vote brings to power actors that will ignore them. Arguably, the former is a ‘thinner’ conception of democracy than the latter.
- 2 For an interesting critical discussion on whether such labels really help us, given how difficult it is to come up with categories or clusters that are

genuinely mutually exclusive, and attempt to come up with an alternative, see Thiel, 2009b.

- 3 Strictly speaking, it would be more accurate to use the formulation 'and/or' because, as Issacharoff (2007: 1434) rightly notes, the perceived threats and resulting rationales 'cannot be hermetically walled off from each other.'
- 4 Pragmatists, of course, can always seek refuge in the (not necessarily philosophically illegitimate) 'lesser of two evils' argument – one that bleeds into a consequentialist logic (see Darwall, 2002) that an action's morality cannot, indeed should not, be separated from its outcome.
- 5 Translation by Sinan Ikinici, 'Turkey's chief prosecutor seeks to ban the ruling AKP', *WSWS*, 2 April 2008, available at <http://www.wsws.org/articles/2008/apr2008/turk-a02.shtml>.
- 6 Some 27 parties have been banned in Turkey since 1923 – 19 of them since 1983. Not all attempts to ban parties, however, have been successful: up to and including the two most recent cases, 17 have escaped that fate.
- 7 The CHP may now present more of a threat to the AKP after its uncompromising leader, Deniz Baykal, was forced to step down after a sex-scandal and replaced by the potentially more popular Kemal Kılıçdaroğlu.
- 8 For a series of increasingly critical articles on AKP rule, see the Turkish Research Program pages of the US think-tank, <http://www.washingtoninstitute.org>.
- 9 Technically, a new Constitution would actually be an amendment to the 1982 document and, in order to stand any chance of being accepted without a full-blown crisis, would have to leave in place its unamendable articles which, among other things, protect Turkey's territorial integrity and its secular nature.
- 10 It should be noted, in all fairness, that the organization has long been an important – and open – ally of the party (Gumuscu and Sert, 2009: 954). Moreover, its involvement hardly makes AKP an outlier: one only has to look to the US to see a centre-right party winning backing from groups that are liberal on economics but conservative (often religiously so) on almost everything else under the sun (see Insel, 2003).
- 11 Islamism must of course be distinguished from Islam. According to one uncompromising definition (Tibi, 2008) 'Islam itself is basically a faith, a cultural system, and an ethics', whereas 'Islamism... is a political ideology, albeit one based on religion' held to by those who 'seek to "*shari'a*-tize" Islam' and to 'establish an "Islamic state" or "Islamic order"' in which 'difference appears as heresy and politics is placed within the ambit of that which is sacred and hence nonnegotiable.' For a detailed discussion, see Ayoob, 2008.
- 12 Sceptics, of course, may very well claim that the AK's resort to such values is instrumental rather than because they have been internalized – after all,

one man's attempt finally to get a supposedly 'fascist' military under civilian control is another's plot to dupe Western liberals and neutralize the one force that, when it comes to the crunch, stands a chance of preventing Turkey from falling into the hands of 'fundamentalists' (see, for example, Tibi, 2009).

- 13 See 'EU slams Turkish Court's decision to hear AKP ban', *EurActiv*, 1 April 2008, available online at <http://www.euractiv.com/en/enlargement/eu-slams-turkish-court-decision-hear-akp-ban/article-171240>.
- 14 For evidence of the Jewish community's resistance to VB's overtures, (but also perhaps of concern lest they strike a chord) see 'De 10 Hoofdzonden van het Vlaams Belang' ('trans: VB's ten deadly sins'), *Joods Actueel*, January 2008.
- 15 See http://www.youtube.com/view_play_list?p=7B81CB2087830F6D.

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