THE IMPACT OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE
TURKISH CONSTITUTIONAL COURT’S RULINGS REGARDING FREEDOM
OF ASSOCIATION

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Introduction

Since the end of the WWII the topic of human rights is not merely a domestic matter for nation states. The international influence upon states regarding human rights is observed as the result of the creation of a long list of human rights documents and supranational protection of freedoms through judicial and semi-judicial mechanisms. The direct or indirect impact of international human rights documents on domestic law and their judicial mechanisms have been increasingly growing across the world.

Turkey is not an exception, infact Turkey is part and parcel of the international human rights systems., For instance Turkey is a party to the the Universal Declaration of Human Rights, the Convention on the Elimination of the All Forms of Discrimination against Women, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Social Charter,. Turkey also ratified thirty five ILO Treaties. Turkey is also a party of the European Convention on Human Rights (ECHR) since 1954, it recognized the right of an individual to have a recourse to the European Commission of Human Rights in 1987, and accepted the jurisdiction of the European Court of Human Rights (ECtHR) in 1989.

The ECHR influences the Turkish constitutional system through two distinct paths. First, some of the constitutional provisions are rooted in the ECHR. The motive for many recent alterations in the Turkish Constitution has been to meet international standards, i.e. the ECHR and the ECtHR. These constitutional clauses have supremacy
over domestic laws. Second, the ECHR and the ECtHR guide the interpretation of domestic law in courts.

The Turkish Constitutional Court (TCC) also enjoins domestic law to construe the ECHR and the ECtHR rulings, thanks to the Article 90 of the Constitution that gives international human rights agreements priority over statutory norms. The TCC uses the principles of the ECHR for the interpretation of the characteristics of the state set out in Article 2 of the Constitution, including such concepts as democracy, rule of law, and respect for human rights. Since the 1982 Constitution came into force, the Court has been referring to the ECHR and some other international human rights documents in some of its decisions, generally in cases regarding gender equality, fair trial, property rights, freedom of association.2

Modern democracies rest on a society of organizations. Hence, freedom of association is a pivotal freedom in a democratic regime. The constitutional and legal framework and the Constitutional Court’s approach on freedom of association will determine the understanding and quality of democracy in the country. This is why, I will discuss the role of the ECHR on the TCC’s rulings regarding freedom of association. I will approach freedom of association in a broad perspective including political parties and trade unions. Below, first I will give a brief information about the 1982 Constitution of Turkey, the protection of human rights and the place of international human rights law in Turkish Constitutional system. Then, I will discuss the influence of the ECHR and ECtHR on decisions of the TCC during the 1982 Constitution, concerning freedom of association, prohibition of political parties and freedom of trade unions.

**General Characteristics of the 1982 Constitution**

The 1982 Constitution of Turkey was drafted after the *coup d’état* in 1980 by the leading of the military government. The previous constitution was also written under the military regime. However there were substantial differences between two constitutions concerning understanding of democracy, the rule of law, and constitutionalism. They had different points of view on limitations of power and the strength of the state’s authority. The 1961 Constitution gave rights and freedoms a special and privileged place. Indeed, the Constitution recognized them in a more comprehensive way than the previous constitutions of the country. In Article 2, the 1961 Constitution identified the
Turkish state as a Republic ‘based on human rights’. Even though, the 1982 Constitution seems to maintain this approach, it gave priority to the authority of the state if the concepts of freedom and authority were ever in conflict. Accordingly, the 1982 Constitution placed more emphasis on the limits of freedom rather than their exercise. The 1982 Constitution identified the state as a Republic “respecting human rights” in Article 2, showing a weaker emphasis on human rights than the 1961 Constitution’s formula. Unlike the 1961 Constitution, according to the 1982 Constitution, fundamental rights and freedoms are also comprised of the duties and responsibilities of the individual. While the 1961 Constitution gave special importance to the freedoms and limited the government by various means, the 1982 Constitution’s aim was to strengthen the state’s authority by empowering the executive branch and restricting freedoms. The 1982 Constitution’s authoritarian tone also passed through to the provisions regarding freedom of association, trade union and political parties.

The 1982 Constitution was amended several times. Constitutional alterations made in 1987, 1993, 1995, 1999, 2001, and 2004 generally extended and strengthened fundamental rights and freedoms. These amendments diminished the difference regarding fundamental rights and freedoms between the 1961 Constitution and the 1982 Constitution. Also some of the constitutional changes made in 2006 and 2010 were in favor of the rights and freedoms. Turkey has an association with the European Economic Community since 1963 and assumed “candidate status” in 1999. We should note that Turkey’s new status in the European Union played a key part in constitutional reforms starting from 2001. The provisions concerning freedoms of association, trade union and political parties were altered and most of the prohibitions and restrictions on these rights were either eased or lifted by these constitutional alterations.

Protection of Human Rights and The Place of International Human Rights Law in Turkish Law

One of the most important steps concerning the judicial protection of human rights in Turkey is the establishment of the Constitutional Court by the 1961 Constitution. We should also add that, the institution of “constitutional complaint”, the so-called “individual application” in the Constitution, was introduced to the Turkish legal system with the 2010 constitutional amendments. This enables individuals to
access to the Constitutional Court directly on the grounds that one of their fundamental rights and freedoms, guaranteed by the Constitution together with the ECHR, is being violated by public authorities. Clearly, the new institution has increased the importance of the Convention and the ECtHR case law in Turkish constitutional system.

The 1982 Constitution frames the place of international treaties in paragraph 5 of Article 90. The original version of the provision, which repeated verbatim Art. 65.5 of the Constitution of 1961 states that “international agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made regard to these agreements, on the grounds that they are unconstitutional”. However, the formulation of this provision raised some problematic issues about the place of the international agreements in domestic law from the 1961 Constitution. The confusion derived from the prohibition to appeal to the Constitutional Court against an international agreement. Some authors made a literal interpretation for this provision as ranking international agreements with laws. On the other hand, other scholars suggested that the prohibition to challenge unconstitutionality of the international agreements before the Constitutional Court put them in a different position in the legal system.3

Besides having an intention to eliminate this hot argument within the constitutional law literature, and considering the necessity of adoption of the EU regulations into the domestic law as a candidate country, Turkey made an alteration which added a sentence into Art. 90.5 in 2004. According to the new provision, “In case of a contradiction between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provision of international agreements shall be considered”. Hence, the amendment made it clear that international human rights agreements have priority over domestic laws.4 Accordingly, the ECtHR rulings are binding, since they interpret, clarify and concretize provisions of the ECHR. On the other hand, we should not read this provision as granting an absolute superiority to an international agreement over domestic law. In accordance with the principle of pre homine, among two provisions, the one that protects the right better should prevail. However the TCC does not construe Article 90.5 this way. According to the Court, Article 90.5 of the Constitution implicitly eliminates enforceability of a law (implied abrogation) that is in conflict with international agreements concerning fundamental rights. The Court states that,

In accordance with the fifth paragraph of Article 90 of the Constitution, agreements are part of our legal system and they can be
applied as laws. According to the same paragraph, should a conflict between a statutory provision and an international agreement provision regarding fundamental human rights exist in practice, it must be prevailed agreement provision. This is an implied abrogation rule that eliminates the application capability of a statutory provision which is in conformity with an international agreement provision regarding fundamental rights and freedoms.5

The TCC’s reading of Article 90.5 may yield to problems, especially when a right is protected broader by a domestic law.

The Role of the ECHR in the TCC Decisions on Freedom of Association, Freedom of Political Parties and Freedom of Trade Union

Freedom of Association

As many other rights and freedoms, the original text of the 1982 Constitution considerably limited freedom of association. The original text of the 1982 Constitution (Art 33) prohibited associations from pursuing political aims, engaging in political activities, receiving support from or giving support to political parties, or taking joint action with labor unions, public professional organizations, or foundations. Furthermore, the Article stipulated that while associations may normally be dissolved by the decision of a judge, they may also be suspended from activity by a competent (administrative) authority, pending a court decision in cases where delay endangers the indivisible integrity of the state within its territory and nation, national security, national sovereignty, public order, the protection of the rights and freedoms of others, or the prevention of offenses. The 1995 constitutional amendment eased prohibitions on associations. Hence, it was abolished the ban on the political activities of associations and permitted them to engage in collaborative action with political parties and other civil society organizations. Furthermore, the amended Article stipulated that in cases where an association is suspended from activity by the decision of the competent administrative authority, such decision should be submitted for the approval of a competent judge within 24 hours. The judge must proclaim his decision within 48
hours; otherwise, this administrative decision automatically ceases to be effective. Article 33 was also amended in 2001 without significantly changing its substance.6

It seems that in the beginning, the TCC read the restrictive provisions of the 1982 Constitution on freedom of association even in a more restrictive way. To give an example, the Court deemed constitutional a statutory provision that establishes Turkish Armed Forces Foundation abolishing three other foundations founded in the navy, air forces and land forces and reverts their movable and immovable properties, assets, rights and debts to the new foundation.7 The Court states that, according to law Turkish Armed Forces Foundation was founded to contribute to provide the national security. In order to achieve this aim, law founded a centralized and more powerful foundation and abolished other three foundations. The TCC concludes that the provision is compatible with the aim of public interest. It seems that the Court disregards in this case the constitutional provision that requires associations to be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. Indeed the Constitution exclusively vests courts power to dissolve an association. Otherwise, conformity with the freedom of association, an association should be closed or join another association with its organ’s own decision. On the other hand, law requires that some top-ranking civil servants shall be founders of the new foundation. The Court did not accept the claim that this requirement is incongruous with free will of individuals. Additionally, the TCC deemed statutory prohibition of establishing other foundations for the same purpose does not infringe the freedom of association. The TCC stated that, Article 33 of the Constitution that recognizes freedom of association envisages that rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require may be restricted. And the provisions regarding associations in Article 33 shall also apply to foundations. Hence, exercise of freedom of association of the civil servants may be banned. Moreover, the Constitution allows imposing restrictions on the ground of public interest. Note that, one of the dissenting votes referred the ECHR, however the Court did not use any of the international human rights documents in its decision.

The TCC’s ambivalent attitude to embrace right-based approach, i.e. the European standards on the freedom association may be seen in some other cases after 1995 and 2001 constitutional amendments came into force. Hence, the TCC deemed constitutional a statutory provision that prohibits individuals to form an association indefinitely or for five years depending on the type of the offence, who were convicted.
The Court considered the statutory limitation was within the scope of the freedom of association. The legislator has a discretionary power in creating offences and punishments according to the fundamental principals of the Constitution and criminal law. However, in this case the TCC ignored the fact that the provision was an intervention to the freedom of association. Additionally, it did not argue whether this limitation is necessary in a democratic order of the society and compatible with the principle of proportionality that are enshrined in the Constitution and implemented by the ECtHR. Indeed, five years later the ECtHR ruled a decision regarding this issue counterviewing the TCC. In *Piroğlu and Karakaya* case, the ECtHR stated that the authorities had not shown any legitimate reason for the annulment of the membership of the association. It is the requirement of the Convention that domestic law afford a measure of protection against arbitrary interference by the public authorities with Convention rights.

On the other hand, it seems that in some other cases regarding associations and foundations the Court took into consideration right-base approach of the 1995 and 2001 constitutional amendments. To give an example, the TCC found violation of the freedom of association in the statutory provision that empowers the Council of Ministers to approve and change its statute, to dissolve its organs and to establish interim committees instead of its organs of the Turkish Aviation Institution. Also the TCC declared unconstitutional a statutory provision that envisages reasons to remove executives of a foundation from office will be stipulated by foundation’s internal regulation instead of law. As the Court states, according to Article 33 of the Constitution, formation of associations, election and removal of their organs, principles and procedures of their activities are regulated by law. According to last paragraph of Article 33, the provisions of this Article shall also apply to foundations. Hence, the statutory provision infringes the Constitution.

Besides, the Court annulled the statutory provision that prohibits membership to a foundation. The TCC states that according to the first paragraph of Article 33 everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission. Since the provisions of Article 33 are also applied to foundations, law on prohibition of membership to a foundation violates freedom of Association. The Court viewed within the scope of freedom of association the provision that provides foundations to open branches and agencies abroad, to form higher bodies, to affiliate with an international institution, to collaborate
with international organizations, and to establish a company or enterprise in accordance with their purposes and activities. We should note that, even though it has followed a right-base approach, the TCC did not refer the ECHR or the ECtHR case-law except for the last decision. The Court mentioned some of the relevant ECtHR rulings in its last verdict, but it did not rest on its decision on them.

On the other hand, the TCC found unconstitutional a provision that allows associations to donate money to political parties. According to the Court, because of the law that allows associations to accept aid from foreigners and international institutions and to donate money to political parties, Article 69.10 of the Constitution stipulating political parties that accept aid from foreign states, international institutions and persons and corporate bodies of non-Turkish nationality shall be dissolved permanently, may become ineffective.

**Freedom of Political Parties**

According to the Constitution (Art. 69) a political party may be prohibited under three circumstances: Firstly, if the status and program of a party are in conflict with the principles set forth in the Constitution Article 68.5, such as independence of the state, secularism, democracy, national sovereignty, indivisible integrity of the state with its territory and nation, human rights, equality, rule of law. Secondly, if activities of a political party violate the principles of the Constitution in Article 68.5 and have become a center for the execution of such activities. Thirdly, if a political party accepts financial aid from foreign states, international institutions, persons, and/or corporate bodies. Under the first two circumstances the TCC may impose a lesser penalty instead of dissolving the party altogether. The concerned party may be deprived of State aid wholly or in part, depending on intensity of its actions.

To date the TCC has dissolved fourteen political parties since the 1982 Constitution came into force. Only five of them were prohibited in the 1961 Constitution era. The vast majority of its decisions were based on violation of the principles of integrity of state with its territory and nation and/or secular state.

The 1982 Constitution refers the principle of ‘indivisible integrity of state with its territory and nation’ not only in Article 68.4 as one of the elements that political parties must obey, but also in preamble and several provisions. To give an example, the Preamble denotes “the eternal existence of the Turkish nation and motherland and the
indivisible unity of the Turkish state” in the first paragraph and “the recognition that no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory” in the fifth paragraph. Also Article 3.1 stipulates that the Turkish state with its territory and nation is an indivisible entity and prohibits to alter this provision. Furthermore, the Constitution in Article 14.1 considers exercising the rights and the freedoms recognised in the Constitution in an effort to violate this principle as abuse of fundamental rights and freedoms. Law on Political Parties of 1983 (LPP) also specifies the principle of indivisible integrity of the state even in a more restrictive way. For example, political parties are banned from aiming and acting to change the principle of unitary state (Art. 80). This prohibits claiming the existence of national, religious, cultural, racial and linguistic minorities in the country, aiming and acting to destroy national unity through creating minorities by means of protection, development and dissemination of other languages and cultures aside from Turkish language and culture, using other languages than Turkish (Art. 81), and aiming to and acting for regionalism or racism (Art. 82).

The TCC interpreted the principle of ‘indivisible integrity of state with its territory and nation’ in the matter of dissolution of political parties narrowly in accordance with the Constitution and LPP, giving priority to the protection of ideology over rights and freedoms. The Court construed this principle to complement unitary state. According to the Court, unitary state is basis of existence of the Turkish nation and this basic principle can not be compromised or argued. This principle excludes the creation of ethnic or religious minorities, advocating regionalism, and racism. The Court asserted that to appropriate certain part of territory to a race and to give special rights to an ethnic group would mean to divide up the national unity. As of the case of the United Communist Party of Turkey in 1991, the Court ruled that some statements in the statute and program of a party or through its activities about the ‘Kurdish question’, the existence of the ‘Kurdish nation’ as separate from the ‘Turkish nation’, to advocate the establishment of a Kurdish-Turkish federation, conducting judicial and educational services in Kurdish language encourage separatism and the division of the Turkish nation, and deemed violation of the principle of the indivisible integrity of the state. In this context, the Court differs culture and politics. According to the Court, there are different cultural groups that freely follow their traditions. To follow a tradition is legitimate, however making political claims is illegitimate since it gives rise to separatism. According to the Court, the Lausanne Treaty of 1923 recognized the
foundation of the Turkish State with its current borders. This Treaty recognizes non-muslim communities, namely Armenians, Greek orthodoxes, and jews as minorities in Turkey. The Treaty set that fundamental principle for once and for all time. Therefore new minorities, such as Kurds which are not recognized in the treaty could not exist.20

The Court makes good use of the ECtHR, sometimes scooping it, only to justify its own ideology-base approach. For instance in some cases the Court made a controversial interpretation stating that to argue national and unitary state based on ethnic differences is outlawed by the international human rights documents, such as in the ECHR. The Court, however, did not propose a persuasive explanation.21 To sum up, according to the TCC the principle of the indivisible integrity of the state with its territory and nation comprises independence and unitary of the state, territorial integrity, equality among citizens, prevention to create minorities, prohibition of regionalism and racisim. The Court reads this principle in accordance with the restrictive provisions of the LPP.22

The other legal ground for the TCC to ban a political party is the violation of the principle of secularism. Under this concept the TCC dissolved the Peace Party, the Welfare Party and the Virtue Party on the basis of a violation of the principle of secularism. Secularism was an important principle for the founding fathers of the Republic. Indeed, the constitutional provision envisaging state’s religion was repealed in 1928. Secularism was inserted into the Constitution as a principle of the Republic in 1934. Since then secularism has taken place as an indispensable principle in all of the constitutions of Turkey. Also the 1982 Constitution in Article 2 envisages secularism as a chracteristics of the Republic. Additionally, this clause may not be amended. Many other provisions regarding secular state are introduced into different clauses of the Constitution.

The Court adopted the same restrictive approach reviewing whether a statute, program or activities of a political party infringes the principle of secularism. Hence it dissolved the Peace Party because its program included providing of religious education and training in universities and a system of education from primary school to the universities should be structured in accordance with the religious and moral values. According to the court, the ideology of the Constitution 1982 is based upon the founder of the Republic, Ataturk’s, reforms. Therefore, a political party’s program cannot contradict with the freedom of religion that is the essential pillar of Ataturk’s reforms and the principle of secularism.23 The TCC also banned the Welfare Party in 1998 on
the ground that it had become a “centre of activities contrary to the principle of secularism”.24 Some of the activities and speeches of the party’s chairman and leaders against the principle of state that rested on the Court’s verdict were advocating the wearing of Islamic headscarves in state schools and buildings; making proposals tending towards the abolition of secularism in Turkey; making speeches to consider whether the change in the social order which the party sought would be “peaceful or violent” and would be achieved “harmoniously or by bloodshed”; calling for the secular political system to be replaced by a theocratic system. The TCC observed that secularism was one of the indispensable conditions of democracy. In Turkey the principle of secularism was safeguarded by the Constitution, on account of the country’s historical experience and the specific features of Islam. The rules of sharia were incompatible with the democratic regime. The principle of secularism prevents the state from manifesting a preference for a particular religion or belief and constitutes the foundation of freedom of conscience and equality between citizens before the law. Intervention by the state to preserve the secular nature of the political regime had to be considered necessary in a democratic society. The TCC held that where a political party pursued activities aimed at bringing the democratic order to an end and used its freedom of expression to issue calls to action to achieve that aim, the Constitution and supranational human rights protection rules authorised its dissolution. The Court also outlawed Virtues Party because it was a hotbed of Islamism and therefore illegal under the 1982 Turkish Constitution.25

However, The ECtHR in general does not construe the Convention articles concerning freedom of political parties as the TCC does. Indeed, the ECtHR found a violation of the Convention in all cases from Turkey, except for the Welfare Party case. The European Court considers there can be no democracy without pluralism. Since political parties provide an “irreplaceble contribution to the political debate”,26 the European Court strictly construes the exceptions set out in the Convention27 and searches for compelling and convincing reasons to justify restrictions on political parties. The ECHR has thus viewed party dissolution as a “drastic measure” to be applied “only in the most serious cases”.28 The essence of democracy should allow diverse political programs to be proposed and debated, even those that call into question the way a state is currently organised. So, incompatibility of a political project with the current principles and constitutional order of a state does not mean that it infringes democratic rules per se.29 On the other hand, this implies that the means that a political party uses to
achieve its political goals must be in every respect be legal and democratic. Also
proposed alterations to a constitution must be compatible with fundamental democratic
principles.\textsuperscript{30} The statutes and the programs of a political party can not be considered as
the sole criterion to determine its objectives and intentions. The content of this program
should be tested with the actions and positions taken by members and leaders of the
party concerned.\textsuperscript{31}

It is obvious that the original text of the 1982 Constitution brought heavy
restrictions on political parties. The LPP made them even heavier imposing more legal
grounds for prohibition. However, Art. 90.5 of the Constitution could open a door to the
TCC to interpret restrictive domestic law in a right-base approach giving the ECHR and
the ECtHR decisions priority. But the Court has not used this opportunity. It decided
that the ECHR may not be directly applied and the LPP may not be omitted for two
reasons. First, the latter is \textit{lex specialis}, second the Convention does not have specific
provisions to apply on the matter of dissolution of political parties.\textsuperscript{32}

The TCC’s approach to the illegalization of political parties has been in a
changing path recently. The Court has started to use the ECtHR’s case-law substantially
in some of the recent cases, such as the cases of Rights and Freedoms Party (Hak-Par),
Justice and Development Party (AKP) and Democratic Society Party (DTP), though the
perception of the Court’s view still continues to be controversial in some ways.

In the case of Hak-Par, the Court used a ‘clear and present danger’ test in the
case, and noted that statements about ‘the Kurdish question’ in the party’s statute and
program should be deemed to be within the scope of freedom of expression, unless
these statements pose a clear and present danger for the democratic regime. Political
parties should not be banned in democratic countries unless they create a serious threat
for regime. Furthermore, the 1982 Constitution is predicated upon attaining the
standards of contemporary civilization. This is why one may not construe that Article
68.4 of the Constitution allows the government to ban a political party because of its
statute and program. Furthermore, the Court did not find any evidence that Hak-Par
would intend to use an unlawful method to implement its goals. The suit against the
Hak-Par was opened shortly after it was founded. According to the TCC, any sanction
based on the statements in the statute and the program without testing with the party’s
activities would be grave intervention to the freedoms of association and expression,
and is not a necessary measure in a democratic society.\textsuperscript{33} Consequently, the Court
dismissed the case. As we see, this time the TCC followed the principles of the ECtHR
and, differently from its previous decisions, the Court made a narrow interpretation of Article 68.4 and read the provision based on freedom.34

The TCC continues the same approach in the AKP case35 the ruling party, faced with the dissolution sanction on the grounds that the party had become a center for the execution of activities which violate the principle of secularism. In that case, the Court clearly noted that Article 90.5 of the Constitution aims at providing parallelism between legal order of the country, and principals and practices of the contemporary democracies. Thus, one should take into consideration international standards in favour of freedoms. Constitutional norms, ruling cases of the ECtHR, and criteria set out by the Venice Commission about political parties, not only guaranty political freedoms, but also justify dissolution of political parties as last resort to protect and strengthen of democratic order. The Court, therefore, carries three criteria for dissolution of political parties to bear. Firstly, a political party’s statute and program or activities should contradict with the principles in Article 68.4 in a substantial degree. So, any single contradiction will not be enough to dissolve a political party. Secondly, the statute and program or activities should ‘aim at eliminating’ principles defined in Article 68.4. Thirdly, statute, program and activities should be ‘clear and present danger’ for democracy. Evidently, the TCC goes a step further in this case than in its previous judgement and introduces, explicitly, the fundamental requirements for the banning of a political party in conformance with international law, i.e. ECtHR.

However, the Court’s ruling is controversial. The TCC concluded that some activities of the party violated the principle of secularism, such as party leaders’ statements and explanations regarding lifting the ban on headscarves in universities and provide religious high schools advantages in university exams. The Court emphasized that these problems have evolved in a manner that they cause confrontation and tension in the society. On the other hand, according to the TCC, party’s statute and program are not comprised of anti secularism. Furthermore, since the AKP formed the government in 2002 it used its power in favour of reaching the standards of western democracies, e.g. constitutional reforms, strenghtening gender equality, starting full membership negotiations with the EU, and active contribution to solve international disputes peacefully. The Court pointed out that the AKP became a centre for anti-secular actions. However, considering positive parts of the party’s activities the TCC deprived the AKP from half of the state funding for the following year instead of outlaw.
The latest case in which the TCC used the thinking of the ECtHR in deciding whether to dissolve a political party is the DTP case. The Court unanimously dissolved DTP based on evidence that it had become a center for the execution of activities which violate the state’s indivisible integrity with its territory and nation, and the Court found that the party provided assistance and support to the Kurdistan Workers’ Party (PKK), a terrorist organization.

The TCC repeated the formulation first set out in AKP case regarding the place of Article 90.5 of the Constitution. According to the Court, the Constitutional provisions should be interpreted conformity with the ECHR, the ECtHR decisions, and the principles of the Venice Commission. Besides conformity with the ECtHR rulings, the TCC indicated that the existence of multiple political parties and a diversity of the political programs among the parties are necessary to provide democratic legitimacy. The TCC intensively uses some principles set forth by the international institutions, such as the sanction of dissolving a political party should be used only in an exceptional situation. It referred to some of the international documents including ECHR about freedom of association and terrorism, as well as it makes quotations from various cases of the ECtHR, such as Karatepe, Zana, TBKP and Batasuna. The TCC stated that international documents do not justify terrorism by any means in a democratic society and denotes the PKK as a terrorist organization referring to the Turkish Court of Cassation’s decision and the EU’s list of terrorist organizations. The Court came to the conclusion that there is a substantial connection between the terrorist band on one hand and the political party on the other hand. The latter was using terror as an instrument to destroy the indivisible integrity of the state. This ruling was based on evidence such as: party leaders did not condemn, in fact they tolerated PKK’s terrorist activities; PKK’s terrorist activities were considered as ‘war’, ‘proud fight’, ‘rightful resistance’ by the political party; some party members provided weapons, supplies and information to the terrorist organization; documents making PKK’s propaganda and photographs of the members of the terrorist organization were found in the political party’s offices. At this point, the Court takes lessons from the the ECtHR rulings, especially the Batasuna case.36

On the other hand, the TCC’s second legal ground for the dissolution of the party is the violation of the principle of ‘indivisible integrity of state with its territory and nation’. Even though the Court leaves a strongly worded description of this principle in its previous cases, it continues to interpret the integrity of territory and
nation as a historically indispensable fundamental element. According to the Court, repeating its previous rulings, this principle prohibits endeavoring to create minorities within the country, region, and by race. So, the TCC notes that political parties should avoid any kind of action that might spoil this integrity. On the contrary, they should work for strengthening it. Subsequently, the Court stresses that political parties which support or receive support from terrorism can not survive as legal entities. Apart from violence or terrorism, to endeavor creating minorities within the country, regionalism and racism is still considered to be unconstitutional by the TCC.\(^{37}\) Ultimately, in addition to the engagement of the political party with violence, the TCC rested on violation of the principle of indivisible integrity of the state in its judgement. Therefore the Court weighed both real links with terrorism as well as some conducts or statements of the party members which were not necessarily involved terrorism, but which infringe upon the principle of indivisibility. Hence, the TCC continued to read this principle in a broad sense citing some actions and statements of the party members that would not contain violence or support violence.

However, the ECtHR predicates one more time in its *HADEP and Demir v. Turkey* case that even if a political party advocated the right to self-determination of the Kurds, that would not in itself be contrary to democratic principles and could not be equated to supporting acts of terrorism. Taking such a stance would imperil the possibility of dealing with related issues in the context of a democratic debate.\(^{38}\)

*Freedom of Trade Union*

The original text of the 1982 Constitution, in contrast to the 1961 Constitution, substantially narrowed union rights and drew limits by imposing various political and ideological prohibitions. Articles 51 and 52, which govern the right to form labor unions, were extensively amended in 1995. Thus, parallel to the changes made in Article 33 regarding the freedom of association, the ban on unions’ political activities and on their collaboration with political parties and other civil society organizations was abolished. Furthermore, the requirement that they could use their income only within their aims and must keep all their income in the state banks was repealed. The Article was amended again in 2001, substituting the word “employees” for the word “workers”, thus extending the right to unionize to public employees-without granting them the right to strike, however. The paragraphs that stipulated that employment in a given workplace
should not be made conditional on being, or not being, a member of a labor union, and that the workers should have held the status of a laborer for at least ten years in order to become an executive in a labor union, were also repealed.\textsuperscript{39} Paragraph 4 of Article 51 that prohibits concurrent membership in more than one labor union in the same work branch was removed in 2010. Also 2010 constitutional amendments eliminated provisions that held the labor union liable for any material damage caused in a workplace during the strike as a result of deliberately negligent behaviour by the workers and the labour union and that banned “politically motivated strikes and lockouts”, “solidarity strikes and lockouts”, “occupation of work premises”, “labor go-slows” as well as other forms of obstruction from the Constitution. Among other changes the 2010 constitutional amendments granted public servants and other public employees right to conclude collective agreements with some restrictions.

Some of the decisions of the TCC during the original text of the 1982 Constitution was in force that protected the freedom of trade union within the limits of the Constitution merit attention. To give an example, the original text of the Constitution (art. 51) guaranteed the right to establish trade union only to laborers. The Court took this constitutional restriction into account and found the provision that fails to recognize the rights to collective bargaining and to establish union for contract personnel in the state-owned enterprises to be unconstitutional.\textsuperscript{40} According to the TCC, legislation has a wide margin of appreciation to guarantee the right to trade unions for workers other than laborers. However, the Court found the provision that deprives laborers from trade union rights by changing their status to contract personnel unconstitutional.\textsuperscript{41}

The constitutional amendments of 1995 and 2001 that repealed some of the limitations on trade union rights influenced the TCC’s approach on this matter. For example, the Court, in a recent decision, annulled the provisions of the law that authorized the government to carry out a wide range of administrative and financial supervision on trade union activities, on the grounds that the concerned constitutional provision was revoked in 1995.\textsuperscript{42} The Court concluded that, maintaining trade unions and their ability to function freely in line with their objectives is an ‘integral part of the freedom of union’.

In another case, the TCC defined unions as an “indispensable element of the democratic social state ruled by law” and stressed that the unions must be independent in order to fulfil their functions. It is noteworthy that the Court used relevant
international treaties, i.e. ILO Conventions no. 98 and 151 when interpreting the Constitutional provisions concerning union rights and freedoms.\textsuperscript{43}

Additionally, in one of its recent decisions the Court establishes a relation between the right to form a trade union and the principle of social justice. According to the TCC, workers are individually in a weak position against employer. They increase their bargaining power against entrepreneur by organizing and unionizing. They are in an active position to protect their rights and interests and solve their problems. In this regard, unionizing is an important democratic tool that serves to establish social justice.\textsuperscript{44}

The Court reviewed the constitutionality of the statutory prohibitions regarding the right to form and join a union of some public servants. In one case, the law bans the right to form and join trade unions of civilian public servants and government officials who work in the Turkish Armed Forces. The Court stated that considering the importance of the Armed Forces in homeland defence, the Parliament has a discretionary power to prescribe peculiar regulations within the constitutional limitations in order to provide necessary strict discipline for uniformed military personnel who actively carry out homeland defence that requires using weapons. In fact, according to the Court the ILO Convention No. 87 concerning freedom of association and collective bargaining vests a discretionary power to the states, stating that “(t)he extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations”.

However, the right to form a union of civilian personnel must not infringe the military discipline. Trade unions of the civilian personnel will not effect negatively the hierarchical structure in the military institutions, since the members of these trade unions will be only civilians. Accordingly, depriving civil personnel from the right to form and join trade unions by the reason of discipline is neither a necessity, nor is conformity with the nature of the service. In fact, there is no absolute prohibition for civil servants on the right to organize unions in other democratic countries. While annulling the provision the TCC also referred Article 11 of the ECHR and case of Demir and Baykara v. Turkey\textsuperscript{45} of the EctHR stating that the right to form a union of civil servants may be subject to lawful restrictions if there are convincing and compelling reasons.\textsuperscript{46}

The TCC reviewed the constitutionality of another similar statutory provision that prohibits all police to form and join trade unions. Also in this case the Court
declares unconstitutional the provision that prohibits civilian personnel who work at the police department with the same arguments. The Court has expanded this approach and interpreted constitutional prohibitions concerning the right to strike more narrowly. Accordingly, the Court annulled a legal provision that deemed any action of workers, other than collective bargaining, to be an illegal strike warranting criminal sanctions. According to the Court, the right to strike recognized by Article 54 of the Constitution is also acknowledged as the most effective fighting tool of workers in international treaties. Besides, workers can act collectively if the action is a work struggle or a form of expression. Such actions lie outside the sphere of both collective bargaining and the prohibitions against striking. Therefore, these prohibitions ought to be interpreted narrowly and the actions of workers intended to protect and improve their economic and social rights and interests in labor relations should be considered within the scope of freedoms. We may remark that this case indicates the Court’s changing understanding on the right to strike and that the TCC has made a significant jurisprudential contribution regarding the protection of union rights. The Court did not rest its verdict on the relevant ILO agreements or the ECtHR rulings. However, it seems that the TCC embraced the international human rights standards on limitation of the right to strike. Indeed, according to the ECtHR, the right to strike is not absolute and can be subject to certain conditions and restrictions. However, while certain categories of civil servants can be prohibited from taking strike action, the ban should not be extended to all public servants or to employees of state-run commercial or industrial concerns. We should also note that prohibitions on the right to strike in the Constitution (Art 54.7) were lifted in 2010.
However, it seems that the Court has not thoroughly abandoned its restrictive approach on union rights. Indeed, the TCC ruled constitutional a legal provision that prohibits going on strike and lock-out in places of work relating domestic capital markets including the stock exchanges. Strike is a very effective tool for workers to seek their rights. According to the TCC, because of the “society’s right to maintain economic welfare” and negative impacts of the strikes on the national economy, firms, banks and citizens, banning to strike in the financial markets will not infringe the public interest. Therefore, the Court considers that financial markets are strategically important. Prohibition to strike for implementing the public interest falls within the scope of duty of the state provided in Article 49 of the Constitution when it is considered economic impacts of the strike that may occur because of delays of works in the institutions.

The reasoning of the Court seems problematic. Firstly, the TCC places financial markets a “strategic importance”. According to the Freedom of Association Committee of the ILO, the right to strike may be restricted or prohibited either in the public service only for public servants exercising authority in the name of the state or in essential services in the strict sense of the term, that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Clearly, financial sector does not fall within this definition.

Secondly, the Court creates a new right, so called the “society’s right to maintain economic welfare” which does not exist in the Constitution in order to uphold the prohibition of the right to strike. In addition, the TCC remarkably excuses the prohibition the possible negative effects of the strikes to the national economy. Clearly, right to strike will be meaningless and ineffective if it does not cause any negative consequences. As the Freedom of Association Committee has noted, by linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service “essential”, and thus the right to strike should be maintained.

Thirdly, Article 49 of the Constitution does not provide any constitutional basis for the prohibition. On the contrary the state should provide necessary conditions for
workers in order to enjoy their constitutional rights. Obviously, labor rights are very important tools in order to “raise the standard of living of workers” and “secure labour peace”. We may conclude that the TCC still does not fully embrace right-based approach and international human rights standards on labor rights.

**Conclusion**

Since the 1982 Constitution entered into force, The Court’s use of international human rights documents in its decisions differs from the matter. Indeed, in cases regarding freedom of association sometimes the TCC uses the ECHR to support its restrictive and strict interpretation of domestic norms, at times even disregarding and contradicting the rulings of the ECtHR. We may claim that, The TCC generally has construed freedom of association narrowly. In cases concerning freedom of association, It does not refer international human rights documents, especially the ECHR and the ECtHR case-law often. However, the Court uses more often the ECtHR precedents especially in cases of prohibition of political parties, especially since 2000’s. In the matter of union rights the TCC does not use the international human rights standards regularly. To conclude, the TCC has not fully embraced the ECHR and the ECtHR case-law in the freedom of association, political parties and trade union. However, we should not disregard the impact of the ECtHR on changing the Court’s narrow approach on freedom of association towards broadening the scope of the freedom. We may provide that the influence of the ECtHR decisions will be even greater on the TCC rulings in the future with the institution of the constitutional complaint.

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Notas

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4 For a discussion about possible problems deriving from the new version of Article 90.5. see Gonenc, Levent and Esen, Selin, Ibid., pp. 490-497.

5 Decisions of the TCC: First Section (individual application), 19 December 2013 (Application No. 2013/2187), (Official Gazette, 7 January 2014-28875), para. 44; First Section (individual application), 6 March 2014 (Application No. 2013/4439), para. 39.


9 Piroğlu and Karakaya v. Turkey, 18 March 2008 (application no. 36370/02 and 37581/02), para. 65.


17 For a similar approach see Özbudun, Ergun, “Party prohibition cases : different approaches by the Turkish Constitutional Court and the European Court of Human Rights”, *Democratization*, Vol.17 No.1, 2010, pp. 128.


Case of United Communist Party of Turkey (TBKP) and others v. Turkey, 30 January 1998 (Application no. 19392/92), para. 43.

Article 11 – Freedom of Assembly and Association. (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Case of United Communist Party of Turkey (TBKP) and Others, para. 46; Case of Socialist Party and Others v. Turkey, 25 May 1998 (Application No. 21237/93) para. 50; Case of Freedom Party and Democracy (ÖZDEP) v. Turkey, 8 December 1999 (Application No. 23885/94), para. 45; Case of Herri Batasuna and Batasuna v. Spain, 30 June 2009 (Application No. 25803/04 and 25817/04), para. 78.

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Case of United Communist Party of Turkey and others v. Turkey, para. 58; Case of Socialist Party and others v. Turkey, para. 48; Case of Herri Batasuna and Batasuna v. Spain, para. 80.

A good example concerning the TCC’s ongoing hesitation about observing the European standards on political parties is its recent ruling about the retrial of party dissolution cases. The Criminal Procedure Act of 2004 (Art 311) provides a right to retrial for criminal cases which are later found to be in violation of the Convention by the ECtHR. Nevertheless, the TCC, disregarded to apply this provision for dissolved parties and refused the application of the United Communist Party of Turkey for retrial in 2008 due to the lacking of a new material fact (E.2003/6, K.2008/4, 8 January 2008 (Official Gazette, 22 March 2008-26824). Note that the TCC concluded both the case of HAKPAR and the application of the TBKP for retrial within the same month. This indicates that the Court has not fully adhered to the European standards. The Turkish parliament was prodded to enact a provision parallel to the Criminal Procedure Act in Law of the Organisation and Trial Procedures of the Constitutional Court of 2011 to eliminate the restrictive ruling of the Court.


We should note that the TCC dissolved HADEP based on the same legal grounds put forward in the DTP case. See case of People’s Democracy Party (HADEP) E.1999/1 (Political Party Dissolution), K.2003/1, 13 March 2003 (Official Gazette, 19 July 2003-25173).

Case of HADEP and Demir v. Turkey, 14 December 2010 (Application No. 28003/03), para. 79.


45 Case of Demir and Baykara v. Turkey, 11 November 2008 (Application No. 34503/97).


50 Case of Pellegrin v. France, 8 December 1999 (Application No. 28541/95); Case of Demir and Baykara v. Turkey, 11 November 2008 (Application No. 34503/97); Case of Enerji Yapı-Yol Sen v. Turkey, 21 April 2009 (Application No. 68959/01).


52 Article 49. Everyone has the right and duty to work. The State shall take the necessary measures to raise the standard of living of workers, and to protect workers and the unemployed in order to improve the general conditions of labor, to promote labor, to create suitable economic conditions for prevention of unemployment and to secure labor peace.


54 Ibid., para. 592.