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HOW INFLUENTIAL ARE THE STANDARDS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE TURKISH CONSTITUTIONAL SYSTEM IN BANNING POLITICAL PARTIES?

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Abstract

The European Convention on Human Rights (Convention) affects the Turkish constitutional system through two distinct paths. First, some of the constitutional provisions are rooted in the Convention. Second, the Convention and the European Court of Human Rights (ECHR) guide the interpretation of domestic law in courts. The Turkish Constitutional Court (TCC) also enjoins domestic law from conflicting with the Convention and the ECHR rulings, thanks to Article 90 of the Constitution that gives international human rights agreements priority over statutory norms. However, the TCC generally uses the principles of the Convention for the interpretation of the characteristics of the State to justify its narrow approach concerning rights and freedoms. Cases concerning the dissolution of political parties may be given as good examples to illustrate the TCC's relatively closed viewpoint. An oppposing current is seen in the political process in which recent constitutional amendments follow the EU standards and ongoing ECHR rulings that have been decided against Turkey have made some changes in the TCC's established perpective on political parties. This article will examine the changing approach of the TCC on the matter of banning political parties which violate the principle of "indivisible integrity of the State with its territory and nation" which is one of the constitutional and statutory grounds for dissolution.

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Öz

AİHS Türk anayasal sistemini iki biçimde etkilemektedir. Birincisi, bazı anayasa hükümleri Sözleşmeden alınmıştır. İkincisi, mahkemeler AİHS ve AİHM kararlarını yasaları yorumlarken göz önünde bulundurmakta ve Anayasanın 90. maddesi uyarınca, yasayla Sözleşme çatıştığında ikincisini esas almaktadır. Anayasa Mahkemesi de özellikle Devletin niteliklerini somutlaştırırken Anayasanın 90. maddesinden yararlanmaktadır. Ne var ki, Mahkeme AİHS'yi, kararlarında hak ve özgürlükler açısından genellikle benimsediği dar yoruma dayanak oluşturmak amacıyla kullanmaktadır. Siyasal partilerin kapatılması davaları, Mahkemenin bu yaklaşımına örnek olarak gösterilebilir. Ancak, AB standartlarını sağlamak amacıyla son yıllarda yapılan anayasa değişiklikleri ile AİHM'nin siyasi parti kapatma davaları nedeniyle Türkiye'nin Sözleşmeyi ihlal ettiği sonucuna varması, Anayasa Mahkemesinin siyasal partilere ilişkin yerleşik yaklaşımında bazı değişikliklere yol açmıştır. Bu makalede Mahkemenin, devletin ülkesi ve milletiyle bölünmez bütünlüğü ilkesine aykırı hareket etmesi nedeniyle hakkında kapatma davası açılan siyasal partilerle sınırlı olmak üzere bu yaklaşım değişikliği ele alınmaktadır.

Keywords: *Political parties, ECHR, integrity of the state with its territorry and nation, Hak-Par, DTP*

Anahtar Kelimeler: *Siyasal parti, AİHS, devletin ülkesi ve milletiyle bölünmez bütünlüğü, Hak-Par, DTP*

INTRODUCTION

The European Convention on Human Rights (Convention) affects the Turkish constitutional system through two distinct paths. First, some of the constitutional provisions are rooted in the Convention. The motive for many recent amendments in the Turkish Constitution has been to meet international standards, i.e. the Convention and the European Court of Human Rights (ECHR). These constitutional clauses have supremacy over domestic laws. Second, the Convention and the ECHR guide the interpretation of domestic law in courts. Additionally, I will argue that the structural placement of international law in Turkish legal system limits the constitutional impacts of the Convention.

The Turkish Constitutional Court (TCC) also prevents domestic law from conflicting with the Convention and the ECHR rulings, thanks to Article 90 of the Constitution that gives international human rights agreements priority over statutory norms. The TCC uses the principles of the Convention for the interpretation of the characteristics of the State as set out in Article 2 of the Turkish Constitution, including such concepts as democracy, rule of law, and respect for human rights. Since 1982, the Court has referred to the Convention,

generally in cases regarding gender equality, fair trials, property rights, freedom of association, and political parties.[1] However, the Court's approach to rights and freedoms has tended to be narrowing and limiting, rather than expansive and broading. Ironicly, the TCC uses the Convention to support its restrictive and strict interpretation of domestic norms, at times even disregarding and contradicting the rulings of the ECHR. Cases concerning the dissolution of political parties may be given as good examples to illustrate the court's relatively closed viewpoint. An opposing current is seen in the political process in which recent constitutional amendments follow the EU standards and ongoing ECHR rulings that have been decided against Turkey have made some changes in the TCC's established perpective on political parties.

This article will first discuss the direct influence of the Convention on the 1982 Constitution and place of the Convention within Turkish legal system. Second, it examines the changing approach of the TCC on the matter of banning political parties. At issue are parties that violate the principle of the "indivisible integrity of the state with respect to its territory and nation" which is one of the legal grounds for prohibition of a political party in accordance with Article 69 of the 1982 Constitution. Last is a comparison of the TCC's approach with the European Court's established perspective and European standards.

I. THE INFLUENCE OF THE CONVENTION ON THE 1982 CONSTITUTION

Some of the provisions of the 1982 Constitution were formulated following the Convention coming into force. The influence of the Convention is evident even in the original text of the Constitution that was prepared under conditions at the time and which reflected the values of its military founders. Consider, for example, Article 15 that establishes the conditions for the suspension of fundamental rights and freedoms in the time of war or other public emergency. The criteria that the Constitution provides to protect rights and freedoms in emergency situations also are found in Article 15 of the Convention.[2]

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[1] Kemal Başlar, TÜRK MAHKEME KARARLARINDA AVRUPA İNSAN HAKLARI SÖZLEŞMESI [THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN TURKISH COURT DECISIONS] 20 (Avrupa Konseyi Türkiye Temsilciliği Yayını, 2008).

[2] The 1982 Constitution provides three criteria. First, measures must not violate obligations under international law. Second, fundamental rights and freedoms may be suspended 'to the extent required by the exigencies of the situation,' i.e. the concept of proportionality applies. Third, measures cannot conflict with some basic rights and freedoms, i.e. 'right to life,' and 'the integrity of his or her material and spiritual entity'

Article 38 provides another example of direct influence of the Convention on the 1982 Constitution. This article lists some important rules and principles governing criminal law[3] that have found their way into the Turkish Constitution. Some of these are found in the Convention or within the principles of the international law,

The 1982 Constitution has been amended several times (in 1987, 1993, 1995, 1999 (twice), 2001, 2002, 2004, 2007 and 2010). Many of the important changes related to the human rights were made in order to meet the EU standards as contained in the Convention.[4] To give an example, in 2001, a revision to Article 13 altered the core approach to the restriction on fundamental rights and liberties, so that Article 13 ceased to be a general restrictive clause and became a general protective clause in line with European standards. The 'principle of proportionality' comes from the jurisprudence of the German Constitutional Court and the ECHR, whereas the protection of the 'essence' of rights and freedoms was added into Article 13 as the limits of the grounds for restrictions of rights and freedoms.

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except in respect of deaths resulting from lawful acts of war, freedom of religion and conscience, freedom of thought. Offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgment. TURKISH CONST., art Art. 15(2).

Similiar to the 1982 Constitution, the Convention states that "In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with its other obligations under international law. No derogation from right to life, except in respect of deaths resulting from lawful acts of war, or from prohibition of torture and slavery and punishment without shall be made under this provision." European Convention of Human Rights, art. 15.

[3]Examples are: 'criminal responsibility should be personal,' 'penalties, and security measures in lieu of penalties, shall be prescribed only by law', 'no one shall be considered guilty until proven guilty in a court of law', 'no one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed, and no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.'

[4] In particular, the 2001 amendments made wide-ranging changes in the Constitution and important improvements to personal liberty and security, privacy of individual life, inviolability of the domicile, secrecy of communications, freedom of residence and travel, freedom of expression, freedom of the press, freedom of association, freedom of assembly, the right to a fair trial, and a restriction on the death penalty to certain categories of crime, the right to work, the right to form labor unions, and the right to an equitable wage. For detailed information, see Levent Gönenç, *The 2001 Amendments to the 1982 Constitution of Turkey*, 1 ANKARA LAW REVIEW 89 (2004).

Both of these principles were used by the TCC prior to the 2001 amendment. However, the amendment provided an additional constitutional gurantee for the protection of rights and freedoms. The right to a fair trial from the Convention was added into the Constitution as well. Another constitutional amendment closely related to this right is the one that concerns the former State Security Courts that were composed of civilian judges, military judges and public prosecutors which were designed to deal with crimes against the security of the state. The ECHR consistently found Turkey to be in violation of Article 6 of the Convention in cases involving the State Security Courts.[5] Therefore, Article 143 of the Constitution was amended in 1999 to eliminate military judges and public prosecutors from these courts and amended again in 2004 to totally abolish the State Security Courts. The 2001 constitutional changes also reduced the period of arrest for collectively committed crimes from 15 to 4 days.[6] This alteration established conformity with the jurisprudence of the ECHR. The constitutional amendments brought other guarantees on crimes and punishments in Article 38, such as evidence obtained through illegal methods shall not be admissible in court as well as no one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation. Moreover, the death penalty was completely abolished in 2004, thereby removing the constitutional obstacle to Turkey's ratification of the 13th Additional Protocol to the Convention.

Another change in 2001 was to Article 14 of the Constitution which prohibits the abuse of fundamental rights and freedoms. Constitutional drafters rewrote this provision and limited the criteria deemed to be a misuse of fundamental rights and freedoms. The second paragraph of the revised article repeats almost verbatim Article 17 of the Convention.[7]

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[5] *See, e.g.* Incal v. Turkey, App. No. 22678/93 (ECHR, 09 June 1998); Çıraklar v. Turkey, App. No. 19601/92 (ECHR, 28 October 1998); Şener v. Turkey, App. No. 26680/95 (ECHR, 18 July 2000); Özel v. Turkey, App. No. 42739/98 (ECHR, 7 November 2002); Demirel v. Turkey, App. No. 39324 (ECHR, 28 January 2003); Güneş v. Turkey, App. No. 28490/95 (ECHR, 19 June 2003).

[6] TURKISH CONST., art. 19.

[7] Article 14

"(1) None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.

(2) No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

The constitutional guarantees for political parties were significantly strengthened with the constitutional amendments of 1995 and 2001. The prohibitions on political parties were narrowed in consideration of the ECHR decisions against Turkey for dissolving political parties. The majority necessary to dissolve a political party by the Constitutional Court was increased from a simple majority to three-fifths in 2001, then to two-thirds in 2010. In addition, Article 84/5 was annulled in 2010[8] to address the infringement of Article 3 of Protocol 1 to the Convention, as well as decisions of the ECHR.[9]

II. THE PLACE OF INTERNATIONAL LAW IN TURKISH LAW

Article 90 of the 1982 Constitution addresses the status of international treaties. The original version of the provision, which repeated verbatim Article 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 has raised some problematic issues about the status of international agreements in domestic law since the era of the 1961 Constitution. The confusion derived from the prohibition of appeal to the Constitutional Court against an international agreement.[10]

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(3) The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law."

Cf. Article 17 (European Convention on Human Rights).

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[8] This provision stipulated that "the membership of a deputy whose statements and acts are cited in a final judgment by the Constitutional Court as having caused the permanent dissolution of his party shall terminate on the date when the decision in question and its justifications are published in the Official Gazette."

[9] *See* Sadak and others v. Turkey, App. Nos. 25144/94, 26149/95 to 26154/95, 27100/95, 27101/95 (ECHR, 11 June 2002); Ilıcak v. Turkey, App. No. 15394/02 (ECHR, 15 March 2007); Kavakçı v. Turkey, App. No. 71907/01 (ECHR, 5 April 2007). However, it should also be noted that not all of the changes in the Constitution made in 2010 are based on, or are compatible with, relavant international human rights treaties and decisions of the ECHR. For comprehensive analysis of the 2010 constitutional amendments *see* İbrahim Ö. Kaboğlu, DEĞIŞIKLIKLER IŞIĞINDA 1982 ANAYASASI HALK NEYI OYLAYACAK [WHAT WILL THE PEOPLE ACCEPT IN LIGHT OF THE CHANGES TO THE 1982 CONSTITUTION] 242-287 (Imge, 2010).

[10] Some authors have made a literal interpretation for this provision as ranking international agreements with laws. On the other hand, other scholars have suggested

Besides intending to eliminate this hot argument in the constitutional law literature, the necessity to adopt EU regulations into the domestic law as a candidate country required Turkey to add a sentence into Article 90 in 2004.[11] Hence, the amendment made it clear that international human rights agreements have precedence over domestic laws.[12] Accordingly, the ECHR rulings are binding, since they interpret, clarify and concretize provisions of the concerned agreement. However if an international agreement regarding fundamental rights and freedoms conflicts with the Constitution then the latter will still be binding. So if it conflicts with the Constitution, the TCC may overcome the problem only by interpreting the Constitution in conformity with the international agreement.[13]

III. THE ROLE OF THE CONVENTION IN THE TCC DECISIONS ON POLITICAL PARTIES

According to the Constitution, a political party may be banned under three circumstances: First, 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 sovergnity, indivisible integrity of the state with its territory and nation, human rights, equality, rule of law; second, if the 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; and

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that the prohibition to challange the unconstitutionality of international agreements before the Turkish Constitutional Court put them in a different position in the legal system. For summary of the different arguments on Article 90(5) in Turkish constitutional law jurisprudence, see Levent Gönenç and Selin Esen, *The Problem of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution*, 8 EUROPEAN JOURNAL OF LAW REFORM 487 (2006).

[11] According to the new provision, "In case of contadiction 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." TURKISH CONST., art. 90(5).

[12] For a discussion about possible problems deriving from the new version of Article 90(5), see Gonenc & Esen, *supra* note 10, at 490-497.

[13] Some constitutions expressly stipulate the interpretation of the constitution in conformity with international law. For instance, Article 10(2) of the Spanish Constitution (1978) states that "The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain." Article 16(2) of the Portuguese Constitution (1976) states that, "The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights."

third, if a political party accepts financial aid from foreign states, international institutions, persons, and/or corporate bodies.[14] 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 the seriousness of its actions.

To date, the TCC has dissolved fourteen political parties since the 1982 Constitution came into force whereas only five were prohibited in the era of the 1961 Constitution era. The vast majority of its decisions were based on the violation of the principles of integrity of the State with its territory and nation and/or secular state. The Court's approach to limiting political parties based on violations of the principle of indivisible integrity of State with its territory and nation will be the focus of this paper.

The 1982 Constitution refers the principle of the "indivisable 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 the preamble and several other 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 amendment of this provision. Furthermore, the Constitution considers the exercise of the rights and freedoms recognized in the Constitution in an effort to violate this principle to be an abuse of fundamental rights and freedoms.[15] The Political Parties Act of 1983 (PPA) also specifies the principle of "indivisible integrity of the state" even in a more restrictive way. For example, political parties are banned from attempting or acting to change the principle of the unitary state.[16] This prohibits claiming the existance 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,[17] and aiming to and acting for regionalism or raicism.[18]

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[14] TURKISH CONST., art. 69.
[15] TURKISH CONST., Art. 14(1). The Constitution also refers to this principle in Article 28(4) (freedom of the press), Article 58 (protection of youth), Articles 81 and 103 (text of oath that deputies and the president of the republic must take to assume office) and Articles 130(4) (institutions of higher education).
[16] TURKISH CONST., Art. 80.
[17] *Id.*, art. 81.
[18] *Id*., art. 82.

The TCC interpreted the principle of 'indivisable integrity of State with its territory and nation' in the matter of dissolution of political parties narrowly in accordance with the Constitution and PPA, giving priority to the protection of ideology over rights and freedoms.[19]

The TCC construed the principle of "indivisible integrity of the State with its territory" to complement the unitary state. According to the TCC, the unitary state is the basis for the existence of the Turkish nation and this basic principle cannot be compromised or opposed.[20] According to the interpretation by the TCC, this principle excludes the creation of ethnic or religious minorities, advocating regionalism, and racisim, and includes protection of the principle of equality.[21] However, one may argue that the principle of indivisible territorial integrity of the state refers to the nation-state. In a nation-state, the unitary state is one of the formations along with federalism and regionalism. Since the Constitution does not explicitly prohibits some of these nation-state formations, the TCC's interpretation based on Article 80 of the PPA could be considered to be unconstitutional.[22]

The TCC has also applied this restrictive interpretation of the principle of indivisible integrity of State with its nation. The Court asserted that to reserve a certain part of territory to a particular race or to give special rights to an ethnic group would mean to divide the national unity. As in 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 about the 'Kurdish question' encouraged separatism and the division of the Turkish nation, deemed the party in violation

[19] Zühtü Aslan, *Conflicting Paradigms: Political Rights in the Turkish Constitutional Court*, 11 CRITICAL MIDDLE EASTERN STUDIES 11 (2002).

[20] *See, e.g.* Socialist Party (SP), Case No. 1991/2 (Political Party Dissolution), Decision No. 1992/1 (TCC, 10 July 1992), published in Official Gazette 21386, 25 October 1992; People's Labour Party (HEP), Case No.1992/1(Political Party Dissolution), Decision No. 1993/1 (TCC, 14 July 1993), published in Official Gazette 21672, 18 August 1993.

[21] *See, e.g.,* People's Labour Party (HEP), Case No. 1992/1 (Political Party Dissolution), Decision No. 1993/1 (TCC, 14 July 1993), published in Official Gazette 21672, 18 August 1993; People's Democracy Party (HADEP), Case No. 1999/1 (Political Party Dissolution), Decision No. 2003/1 (TCC, 13 March 2003), published in Official Gazette 25173, 19 July 2003; Democratic Society Party (DTP), Case No. 2007/1 (Political Party Dissolution), Decision No. 2009/4 (TCC, 11 December 2009), published in Official Gazette 27432, 14 December 2009.

[22] For a similar approach, see Ergun Özbudun, *Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights*, 17 DEMOCRATIZATION 128 (2010).

of the principle of the indivisible integrity of the state, and closed the party permanently shortly after it was founded.[23]

The TCC used the smiliar legal grounds, i.e. undermining the territorial integrity and the unity of the nation, to ban political parties in its following decisions such as "to endeavor seperatism to create minorities within the country while stating the existence of the 'Kurdish nation' as separate from the 'Turkish nation,'" to advocate the establishment of a Kurdish-Turkish federation, defending self-determination for the so-called 'Kurdish people' and religious minorities, conducting judicial and educational services in Kurdish language[24] through the statements in their statutes and programs[25] and/or their activities.[26] In this context, the TCC differentiates culture and politics.

According to the TCC, 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.[27] According to the Court, minorities in Turkey, which are restricted to non-Muslim communities, e.g. Armenians, Greek Orthodox people, and Jewish people, are recognized only in the Lausanne Treaty that recognized the foundation of the Turkish State with its current borders. The treaty set that fundamental principle for once and for all time. Therefore new minorities, such as Kurds, who are not recognized in the treaty, could not exist.[28]

The TCC also established the existance of a close relationship between democracy and the existence of the state, and established ideology. According to the TCC, political activities that aim to demolish the state should not be considered to be an exercise of rights and freedoms.[29]

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[23] United Communist Party of Turkey (TBKP), Case No. 1990/1 (Political Party Dissolution), Decision No.1991/1 (TCC, 16 July 1991), published in Official Gazette 21125, 28 January 1992.

[24] Socialist Party (SP), Decision 1992/1; Freedom and Democracy Party (ÖZDEP), Case No. 1993/1 (Political Party Dissolution), Decision No. 1993/2 (TCC, 23 November 1993), published in Official Gazette 21849, 14 February 1994; Democracy Party (DEP), Case No. 1993/3 (Political Party Dissolution), Decision No. 1994/2 (TCC, 16 June 1994), published in Official Gazette 21976, 30 June 1994.

[25] *See, e.g.* United Communist Party of Turkey (TBKP), Decision 1991/1 and Freedom and Democracy Party (ÖZDEP), Decision 1993/2.

[26] See, e.g. Socialist Party (SP), Decision 1992/1 and People's Labour Party (HEP), Decision 1993/1.

[27] Dicle Kogacioğlu, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of Political Domain,* 18 INTERNATIONAL SOCIOLOGY 265 (2003).

[28] *Id*., at 269-270.

[29] *See, e.g.,* Democracy Party (DEP), Decision No. 1994/2; Democracy and Change Party (DDP), Case No. 1995/1 (Political Party Dissolution), Decision No. 1996/1 (TCC,

The TCC makes good use of the Convention, sometimes scooping it, only to justify its own, conflicting, ideology–based rationale. For instance, in some cases, the TCC made a controversial interpretation by stating that to argue national and unitary state based on ethnic differences is outlawed by international human rights law, such as in Articles 11 and 17 of the Convention. The Court, however, did not propose a persuasive explanation.[30] In the Socialist Party case,[31] without discussing differences or opposing views, it held that "there is no doubt that the activities of the Socialist Party which were found to be in breach of the Constitution will also be in violation with the provisions of this Convention."

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 PPA.[32]

However, the ECHR does not construe the Convention articles concerning freedom of political parties as narrowly as the TCC does. The rulings of the Strasbourg Court in cases originating from Turkey concerning the prohibition of political parties prove this argument. Indeed, the ECHR has consistently found a violation of the Convention in all cases from Turkey, except for the Welfare Party case. It is obvious that the original text of the 1982 Constitution brought heavy restrictions on political parties. The PPA made them even heavier by imposing more legal grounds for prohibition. However, the original version of Article 90(5) of the Constitution could open a door to the Constitutional Court to interpret restrictive domestic law in a right-based approach giving the Convention and the ECHR decisions priority, but the Court has not used this opportunity. It decided that the Convention may not be directly applied and the PPA may not be omited for two reasons. First, the latter is *lex specialis* and,

19 March 1996), published in Official Gazette 23149, 23 October 1997; People's Democracy Party (HADEP) Case No. 1999/1.

[30] Freedom and Democracy Party (ÖZDEP), Decision No. 1993/2; Democracy Party (DEP), Decision No. 1994/2; Labor Party (EMEP), Case No. 1996/1 (Political Party Dissolution), Decision No. 1997/1 (TCC, 14 February 1997), published in Official Gazette 23384, 26 June 1998.

[31] Decision 1992/1.

[32] İbrahim Ö. Kaboğlu, ÖZGÜRLÜKLER HUKUKU [LAW OF FREEDOMS] 434-435, 359-360; (İmge Kitabevi, 2002) Merih Oden, Anayasa Hukukunda Siyasi Partilerin Anayasaya Aykırı Eylemleri Nedeniyle Kapatılmaları [CLOSURES IN CONSTITUTIONAL LAW FOR ACTIVITIES OF POLITICAL PARTIES CONTRARY TO THE CONSTITUTION] 120 (Yetkin Yayınlar, 2003).

second, the Convention does not have specific provisions to apply on the matter of dissolution of political parties.[33]

IV. EUROPEAN STANDARDS ON POLITICAL PARTY PROHIBITION

There are two considerable resources in Europe that set out the fundamental principles on the matter of dissolving political parties. These are the ECHR and the Commission for Democracy through Law (Venice Commission) of the Council of Europe. Even though the reports of the Venice Commission are not legaly binding for the party states, it is influencial on the member states.

The findings of the ECHR about dissolution of political parties can be summarized as follows: the Court considers that there can be no democracy without pluralism. Democracy is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. Since political parties provide an "irreplaceble contribution to the political debate,"[34] the Court strictly construes the exceptions set out in Article 11(2)[35] in order to search for compelling and convincing reasons to justfy restrictions on political parties. The Convention has thus viewed party dissolution as a "drastic measure" to be applied "only in the most serious cases."[36] This is why freedom of expression[37] is applicable, not

[33] Democratic Peace Movement, Case No. 1996/3 (Political Party Dissolution), Decision No. 1997/3 (TCC, 22 May 1997), published in Official Gazette 24067, 2 June 2000.

[34] United Communist Party of Turkey (TBKP) and others v. Turkey, App. No. 19392/92, (ECHR, 30 January 1998), para. 43.

[35] 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.

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

only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. The possibility that it offers for the resolution of a country's problems through dialogue, without recourse to violence, even when these ideas are irksome, is one of the principal characteristics of democracy.[38] 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 organized. So, the incompatiblity of a political project with the current principles and constitutional order of a state does not mean that it infringes democratic rules *per se*.[39] On the other hand, this implies that the means that a political party uses to achieve its political goals must be legal and democratic in every respect. Also proposed alterations to a constitution must be compatible with the fundamental principles of democracy.[40] The statutes and the programs of a political party cannot be considered to be the sole criteria 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.[41]

According to the Venice Commission, which established these guidelines in its report in 1999,[42] the prohibition or dissolution of political parties should be used as an exceptional measure in a democratic society if there is sufficient evidence that they create a real threat to the constitutional order or citizens' fundamental rights and freedoms. Political parties should be prohibited or dissolved only if they advocate violence (including such specific demonstrations of it such as racism, xenophobia and intolerance) or use violence as a means to overthrow the democratic constitutional order, thereby

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[37] Convention, art. 10.

[38] *See, e.g.,* United Communist Party of Turkey (TBKP), para. 57; Socialist Party, para. 45; Welfare Party, para 44; Freedom and Democracy Party (ÖZDEP), para. 37; Herri Batasuna and Batasuna, para. 76.

[39] United Communist Party of Turkey and Others v. Turkey, App. Nos. 19392/92 (ECHR, 30 January 1998), para. 57; Case of Socialist Party and others v. Turkey, para. 47; Freedom and Democracy Party (OZDEP) v. Turkey, App. No. 23885/94 (ECHR, 8 December 1999), para. 41.

[40] Welfare Party and others v. Turkey, App. Nos. 41340/98, 41342/98, 41344/98 (ECHR, 31 July 2001), para. 98; Yazar, Karataş, Aksoy and the People's Labour Party v. Turkey, App. No. 22723/93, (ECHR, 9 April 2002), para 49; Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania, App. No. 46626/99 (ECHR, 3 February 2005), para. 46.

[41] United Communist Party of Turkey and others, para. 58; Socialist Party and others, para. 48; Herri Batasuna and Batasuna, para 80.

[42] Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures, adopted by the Venice Commission (41st Plenary session, 10-11 December 1999).

undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the constitutional order should not be sufficient for its prohibition or dissolution. Legal measures directed to the prohibition or legally-enforced dissolution of political parties shall be a consequence of a judicial finding of unconstitutionality and shall be deemed as of an exceptional nature and governed by the principle of proportionality. Any such measure must be based on sufficient evidence that the party itself and not only individual members pursue political objectives using or preparing to use unconstitutional means.

V. THE TCC'S NEW APPROACH TO POLITICAL PARTIES

The TCC's approach to the dissolution of political parties has been on a changing path recently. The TCC has started to use the ECHR substantially in some of the recent cases, although the perception of the TCC's view still continues to be controversial in some ways. I will analyze the TCC's approach based on two recent closure cases: the Rights and Freedoms Party (Hak-Par) and Democratic Society Party (DTP). Even though the legal grounds of another case concerned the violation of the principle of secularism, I will also consider the Justice and Development Party (AKP) closure case since the Court set forth some criteria to dissolve a political party.

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 Article 68(4) of the Constitution as to allow the government to ban a political party because of its statute and program. Second, the Court did not find any evidence that Hak-Par intended to use any 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 comparison to the party's activities would be a grave intervention into the freedoms of association and expression; this is not a necessary measure in a democratic society.[43] Consequently, the Court dismissed the case. As we see, this time the

[43] Rights and Freedoms Party (Hak-Par), Case No. 2002/1(Political Party Dissolution), Decision No. 2008/1 (TCC, 29 January 2008), published in Official Gazette 26923, 1 July 2008.

TCC followed the principles of the ECHR and, differently from its previous decisions,[44] the Court made a narrow interpretation of Article 68(4) and read the provision based on general principles of freedom.[45]

The TCC continued the same approach in the AKP case,[46] where the present ruling party faced 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 the legal order of the country to the principals and practices of the contemporary democracies. Thus, one should take into consideration international standards in favor of freedoms. Constitutional norms, the precedents of the ECHR, and the criteria set out by the Venice Commission about political parties, not only guarantee political freedoms, but also justify dissolution of political parties only as a last resort to protect and strengthen democratic order. Accordingly, the TCC takes into consideration other provisions of the Constitution, which emphasize the special importance of political parties. The TCC, therefore, uses three criteria for a decision to dissolve a political party. First, a political party's statute and program or activities should contradict the principles in Article 68/4 in the Convention to a substantial degree. So, any single contradiction will not be enough to dissolve a political party. Second, the statute and program or activities should 'aim at eliminating' principles as defined in Article 68/4. Third, statute, program and activities should be a 'clear and present danger' to democracy. Evidently, the TCC went a step further in this case than in its

[44] However, we should note that the Constitution required a three-fifth majority of the TCC judges to dissolve a political party until 2010. The decision was not made by the majority. Accordingly, it is not clear that the Court has changed its precedent in this case.

[45] A good example of the TCC's ongoing hesitation about observing European standards on political parties is in 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 ECHR. Nevertheless, the TCC failed 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 lack of a new material fact. Case No. 2003/6, Decision No. 2008/4 (TCC, 8 January 2008), published in Official Gazette 26824, 22 March 200814. Note that the TCC concluded both the case of HAK-PAR 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 then forced to enact a provision parallel to the Criminal Procedure Act in the Law of the Organization and Trial Procedures of the Constitutional Court of 2011 to eliminate the restrictive ruling of the Court.

[46] Case No. 2008/1 (Political Party Dissolution), Decision No. 2008/2 (TCC, 30 July 2008), published in Official Gazette 27034, 24 October 2008.

previous decisions and introduced, explicitly, the fundamental requirement for the banning of a political party to be in conformance with international law, i.e. the Convention as interpreted by the ECHR.[47]

The latest case in which the TCC used the thinking of the ECHR in deciding whether to dissolve a political party or not was the DTP case. The Court unanimously dissolved the DTP based on evidence that it had become a center for the execution of activities which violated the state's indivisible integrity of its territory and nation; the Court also found that the party provided assistance and support to the Kurdistan Workers' Party (PKK), a terrorist organization.[48]

The TCC repeated the formulation first set out in AKP case regarding the place of Article 90(5) of the Constitution. According to the TCC, the Constitutional provisions should be interpreted in conformity with the Convention, the ECHR decisions, and the principles of the Venice Commission. Besides comformity with the ECHR 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 used some of the principles set forth by international institutions, such as the sanction of dissolving a political party should be used only in an exceptional situation. It refered to some of the international documents about freedom of association and terrorism such as the Convention, the Charter of Paris, and UN Security Council Resolution 1624, as well as it quotes from various cases of the ECHR, such as the Karatepe, Zana, TBKP and Batasuna cases. 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 refering to the Turkish High Court of Appeals decision[49] and the EU's list of terrorist organizations. After stating expressly that the PKK is a terrorist organization, the TCC – departing from its previous rulings – based its judgment on the DTP's support of terrorism and on its organic relationship with the PKK. The Court came to the conclusion that there is a substantial connection between the terrorist group on the one hand and the political party on the other hand. The latter was using terror as an instrument to destroy the

[47] However, the Court's ruling in the AKP is controversial but that discussion is outside the scope of this article since the case was based on the violation of principle of secularism.

[48] Democratic Society Party (DTP), Case No. 2007/1 (Political Party Dissolution), Decision No. 2009/4 (TCC, 11 December 2009), published in Official Gazette 27432, 14 December 2009.

[49] In Turkish, this court is called the *Yargitay* and could also be called the Turkish Court of Cassation in English. Case 1999/1296, Decision 1999/3623 (9th Criminal Chamber, 22 November 1999).

indivisible integrity of the State.[50] At this point, the Court took lessons from the the ECHR rulings, especially the Batasuna case.

On the other hand, the TCC's second legal ground for the dissolution of the party was the violation of the principle of 'indivisible integrity of State with its territory and nation.' Even though the Court left 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 TCC, in repeating its previous rulings, this principle prohibits trying to create minorities within the country, by region, or 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 to strengthen it. Political parties cannot act to spoil the state's indivisible integrity with its territory and nation while enjoying democratic rights and freedoms. Subsequently, the TCC stressed that political parties which support or recieve support from terrorism cannot survive as legal entities. Apart from violance or terrorism, to endeavor creating minorities within the country, regionalism and racisim is still considered to be unconstitutional by the TCC.[51]

At this point, we can make a brief comparison between the DTP case of the Turkish Constitutional Court and the Batasuna Case of the Spanish Supreme Court since both cases have a similar legal basis. In Spain, scholars have found that the behaviors formalized in Article 9 of Organic Law 6/2002 on Political Parties that will cause a political party to be banned should it be deemed to be antidemocratic in its activities and conducts, but not in its ideologies or ideas.[52] In fact, the Spanish Constitutional Court made clear in its review of the constitutionality of Organic Law 6/2002 that democracy and full respect for

[50] This ruling was based on evidence such as: party leaders did not condemn, but in fact tolerated PKK's terrorist activities; PKK's terrorist activities were considered as 'war', the 'proud fight', 'rightful resistance' by the political party; some party members provided weapons, supplies and information to the terrorist organization; and documents containing PKK propoganda and photographs of the members of the terrorist organization were found in the political party's offices.

[51] We should note that the TCC dissolved the HADEP based on the same legal grounds put forward in the DTP case. *See* People's Democracy Party (HADEP), Case 1999/1 (Political Party Dissolution), Decision No. 2003/1 (TCC, 13 March 2003), published in Official Gazette 25173, 19 July 2003.

[52] Fermín Javier Echarri Casi, DISOLUCIÓN Y SUSPENSIÓN JUDICIAL DE PARTIDOS POLÍTICOS [JUDICIAL SUSPENSION AND DISSOLUTION OF POLITICAL PARTIES] 124 (Dykinson, 2003); Mercedes Iglesias Barez, *La prohibición de los partidos polític en Francia, Alemania y España [The Prohibition of Political Parites in France, Germany and Spain],* 2 REVISTA DEL CENTRO DE INVESTIGACIONES JURÍDICAS DE LA FACULTAD LIBRE DE DERECHO DE MONTERREY [JOURNAL OF THE CENTER OF JURDICIAL INVESTIGATIONS OF THE FREE FACULTY OF THE RIGHTS OF MONTERREY]154 (2009).

pluralism are understood as obligations that political parties assume to carry out their constitutional duties, not statements in their programs. Accordingly, during the judicial procedure to determine whether a political party is illegal, a court must consider only party activities. In other words, Law 6/2002 does not allow dissolution of a political party due to only its ideas, no matter how disturbing, but must rely only on the use violance and violation of rights and freedoms as an instrument of political action.[53] In other words, it is possible to defend any idea no matter if it is contrary to the existing constitutional system or not, as long as the expression is peaceful. In the Batasuna case, the Spanish Supreme Court adopted the Spanish Constitutional Court's reading of the Spanish Constitution on political parties in its ruling. In contrast to the understanding of militant democracy adopted in Germany, both tribunals conclude that, the Spanish Constitution establishes a system that is extremely tolerant system of all political views. The Spanish democratic system protects the coexistance of social movements and dissenting political activities, so long and the expression of these is peaceful. Even expressions that advocate positions designed to replace the constitutionally established territorial scheme are allowed so long as they do not advocate violent means. However the Spanish Constitution does not allow political parties to alter the constitutional order by means of activities which are contrary to the Constitution.[54] Hence, the Supreme Court analyzed all of the actions and conducts of the concerned political party to weigh if these actions constituted legal proof to conclude that Batasuna was engaged in a political complement to terrorism or whether the party was engaged in a non-violent political restructuring. The behaviors envisaged in Organic Law 6/2002 on Political Parties are considered serious when they infringe the fundamental rights of other people and attack the democratic state.[55] As a result, the Court concluded that Batasuna was formed by the terrorist organization ETA and its political complements and still depended on the terrorist group.[56] On the other hand, in addition to the engagement of the political party with violance, 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 conduct or statements of the party members which did not necessarily involve terrorism, but which infringed upon the the principle of indivisibility. Hence, the TCC continued to read this principle in a broad sense

[53] S.T.C., 12 March 2003 at FJ 7; S.T.S., 27 March 2003 .
[54] *Id.*
[55] Eduardo Virgala Foruria, *La STS de 27 de marzo de 2003 de illegalización de Batasuna: el estado de derecho penetra en Euskadi [The STS of March 27, 2003 on Batasuna Being Made Illegal: The Rule of Law Penetrates Euskadi]*, 12-13 TEORÍA Y REALIDAD CONSTITUCIONAL [THEORY AND CONSTITUTIONAL REALITY] 620 (2003).
[56] S.T.C., 12 March 2003 (FJ 7, No. 48, p. 102).

citing some actions and statements of the party members that would not contain violance or support violance.

The ECHR has upheld the Spanish Supreme Court's decision against the Batasuna Party, finding no violation of the Convention. The Spanish Supreme Court and Constitutional Court convinced the ECHR that their decision was based upon the documented list of behaviors by the party and its members supporting and inciting violence.[57]

Indeed, the ECHR, in its recent HADEP case, held one more time 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.[58] Furthermore, refering the case of *Herri Batasuna and Batasuna v. Spain,* the ECHR notes that to dissolve a political party because of links between a political party and a terrorist organisation should objectively be considered as a threat to democracy.[59]

CONCLUSION

The primary function of constitutional courts is to protect fundamental rights and freedoms against state actions. The Turkish Constitution does not prohibit this modality to the constitutional court. However the TCC has not used this tool to amplify rights and freedoms. Accordingly, it used the principles set forth by the European Council, the EU, the Convention and the ECHR to justify its decisions and to supplement the municipal law, instead of amplifying the sphere of constitutional rights and freedoms. In actions to ban political parties, the TCC has not acted contrary to this pattern. However, contrary to its previous decisions, the TCC refers more to international human rights documents and has used the principles of the Convention and the ECHR, especially in the field of freedom of association, i.e. political parties, in its recent cases. Doubtlessly, the several decisions of the ECHR that held Turkey had violated the Convention and political endeavors to harmonize domestic law with the EU standards have been the primary causes for the TCC to revise its approch.

Even though it is an improvement, the TCC does not seem to entirely embrace the essence of the principles of the ECHR on the matter of political parties. It seems that the TCC has recently been caught in between the European

[57] Herri Batasuna and Batasuna, para. 85 & 86.
[58] HADEP and Demir, App. No. 28003/03 (ECHR, 14 December 2010), para. 79.
[59] *Id*., para. 80.

standards and its own established, more conservative approach. As in the DTP case, the TCC seems confused about actions aiming to infringe a state's integrity and supporting terrorist organization. A political party can aim to spoil the integrity of the state by advocating a radical change in constitutional framework within democratic values. On the other hand, a political party may support violence without aiming to alter constitutional order. These two cases differ from each other and only the latter should be outlawed. However, we still may predict that the importance of the European standards on human rights will increase in constitutional judiciary.

BIBLIOGRAPHY

Aslan, Zühtü, *Conflicting Paradigms: Political Rights in the Turkish Constitutional Court*, 11 CRITICAL MIDDLE EASTERN STUDIES 11 (2002).

Barez, Mercedes Iglesias, *La prohibición de los partidos polític en Francia, Alemania y España*, 2 REVISTA DEL CENTRO DE INVESTIGACIONES JURÍDICAS DE LA FACULTAD LIBRE DE DERECHO DE MONTERREY 154 (2009).

Başlar, Kemal, TÜRK MAHKEME KARARLARINDA AVRUPA İNSAN HAKLARI SÖZLEŞMESI (Avrupa Konseyi Türkiye Temsilciliği Yayını, 2008).

Echarri Casi, Fermín Javier, DISOLUCIÓN Y SUSPENSIÓN JUDICIAL DE PARTIDOS POLÍTICOS (Dykinson, 2003):

Gönenç, Levent, *The 2001 Amendments to the 1982 Constitution of Turkey*, 1 ANKARA LAW REVIEW 89 (2004).

Gönenç, Levent, and Selin Esen, *The Problem of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution*, 8 EUROPEAN JOURNAL OF LAW REFORM 487 (2006).

Kaboğlu, İbrahim Ö., ÖZGÜRLÜKLER HUKUKU (İmge Kitabevi, 2002).

Kaboğlu, İbrahim Ö., DEĞIŞIKLIKLER IŞIĞINDA 1982 ANAYASASI HALK NEYI OYLAYACAK (Imge, 2010).

Kogacioğlu, Dicle, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of Political Domain,* 18 INTERNATIONAL SOCIOLOGY 265 (2003).

Oden, Merih, ANAYASA HUKUKUNDA SIYASI PARTILERIN ANAYASAYA AYKIRI EYLEMLERI NEDENIYLE KAPATILMALARI (Yetkin Yayınlar, 2003).

Özbudun, Ergun, *Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights*, 17 DEMOCRATIZATION 128 (2010).

Virgala Foruria, Eduardo, *La STS de 27 de marzo de 2003 de illegalización de Batasuna: el estado de derecho penetra en Euskadi*, 12-13 TEORÍA Y REALIDAD CONSTITUCIONAL 620 (2003).