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THE EUROPEAN HUMAN RIGHTS ENFORCEMENT SYSTEM'S EFFECT ON THE HUMAN RIGHTS SITUATION IN TURKEY

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ABREVIATIONS

AI : Amnesty International

AK Party : Adalet ve Kalkinma Partisi

Bulletin EU : Bulletin of the European Union

CPL : Turkish Criminal Procedural Law

EEC : European Economic Community

ECHR : European Convention on Human Rights and Fundamental Freedoms

ECtHR : European Court on Human Rights

EU : European Union

EP : European Parliament

HRIB : Human Rights Information Bulletin

HRW : Human Rights Watch

ICCPR : International Covenant on Civil, Political and Social Rights

ICESCR : International Covenant on Economical, Social and Cultural Rights

KHRP : Kurdish Human Rights Project

OJ : Official Journal of the European Union

PKK : Kurdistan Worker Party

RG : Resmi Gazete

TCC : Turkish Criminal Code

TEU : Treaty on European Union

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Introduction

The human rights problem in Turkey is complex and has various components such as a legal system which does not function adequately according to ratified international human rights treaties, the 'resistance of the judiciary' to new laws or international human rights treaties, the lack of strength and will of the administrators, an oppressive state ideology which is based on the concepts of a unitary, secular, Turkish nationality, military intervention in the democratic system, the lack of a democratic and tolerant culture, etc.

On the other hand, one should also take into account the historical roots of these components since Turkey was established upon the collapse of the Ottoman Empire. Indeed, Turkey has inherited elements of the Ottoman social psychology and state tradition. The Turkish Republic was set up mainly in Anatolia, the last piece of land of the Ottoman Empire, which had ruled in almost three continents for 600 years. Even for this land she fought a war against the Allied states following the First World War in order to retain its independence. However, the political elites of the Ottoman Empire and Turkey blamed collapse of the Empire the on minority groups who had fought against the Empire for their independence despite the Empire's policy for minority groups, which had been to provide many rights and freedoms. While this has created a strong opposition against minority rights, the fear of losing more land has never been erased from the memory of Turkish political elites.[1]

Another significant element of the state's psychology comes from a completely opposite reflection of the political elites who have always denied the inheritance of the Ottoman Empire since the war to establish the Republic. The political elites saw the westernisation of the Turkish Republic as a tool, which required a sharp break from the Ottoman legacy. Thereupon, they considered 'secularity' the most essential component for the westernisation of the country.

[1] Akcam, p.323-345.

For these reasons political elites has always viewed a centralized strong state as vital for the indivisibility and integrity of the Turkish nation state.[2] Since the 'strong state' idea has prevailed, social transformation in many aspects of life have been imposed from above, rather than through the inner dynamic of Turkish society and the formation of the state institutions has been shaped by the idea of protection of the state. Meanwhile, the dream of westernising Turkey has led it to introducing new institutions, life style, clothing etc. she also ratified a great number of international human rights treaties when they were being established mainly from the 1950s.

Although Turkey was therefore familiar with the idea of human rights at the very beginning of the standard setting period, this could not yet adequately penetrate into state policy. Turkey has been a state party to the ECHR since 1950, but it did not have a considerable effect on Turkey until the 1990s. Indeed, since Turkey accepted the jurisdiction of the European Commission on Human Rights and European Court on Human Rights there has been increasing awareness about the human rights problems of the country at domestic and international level. The gravity of human rights abuses have constantly been brought to attention of the international plane via individual applications which could not be hidden by the state within its borders anymore.

The main question for this dissertation is to uncover the extent to which the European Human Rights enforcement system has had effects on the development of human rights in Turkey. Indeed, if the case law of the ECtHR is analysed, it can be seen that there are persistent patterns. However, what are these human rights abuses? What are the characteristics of the Court's judgements? The answers to these questions are main subject of chapter 1, together with a short historical background of the last 20 years in Turkey.

It is difficult to examine the effects of the European human rights enforcement without talking about the political, economical pressure of the European Union on Turkey on the way to possible accession. Therefore, in chapter 2, EU-Turkey relations are discussed with a view to understanding scope of the EU's influence on Turkey's human rights policy and its compliance with the ECHR and the implementation of ECtHR judgements.

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[2] Heper, p.13.

What has been the response of the Turkish administrative and judicial bodies? To what extent have the ECHR and the jurisprudence of the ECtHR penetrated into the legal system or legal practice? To what extent have the follow up measures as required by the Committee of Ministers' resolutions on Turkey been effective? In answering these questions in chapter 3 and 4 we also examine Turkey's diligence and willingness to comply with the ECtHR and the Committee of Ministers' requirements to discuss reasons for her failure to do so.

One of the main difficulties during the writing of this dissertation has been the limited secondary academic literature on the issues discussed either in Turkish or in English. This unfortunately reflects our poor state of knowledge and the lack of detailed analyses of the human rights situation in Turkey. Nevertheless, there are only very a few and limited studies on human rights and ECtHR in Turkey. This situation, however, also provides a main justification for embarking on a study of this type. As a human rights lawyer who has practiced in Turkey and been involved in some of the cases that are discussed in this dissertation, I thought that it was high time that a detailed analysis of the impact that human rights protection mechanisms were having within Turkey itself was made. This enables one to contextualise one's own activity and to appreciate from a certain distance the myriad other actors and factors involved in the realisation of human rights. At the same time one cannot be oblivious to the fact that Turkey's human rights record has significant political ramifications, and it is hoped that this work can provide some light to the intensely politicised nature of the issues and a guide to the legal processes that are involved.

On account of the difficulty of literature already mentioned, I have mainly used various reports of international and national NGOs, governmental and non-governmental organisations, the webpages of the Turkish state, the EU, the Council of Europe institutions and also the Internet version of the newspapers, etc. The jurisprudence of the Turkish judiciary was available through a CD of collected legal acts. Thus it will be found that primary materials have been of great use in the writing of this dissertation.

Chapter 1

The recent history and context of human rights violations in Turkey

All states violate human rights. But each state has its own particular history which colours the ways in which human rights violations take place and also the ways in which that state responds to accusations of such violations. In this chapter we therefore set out the recent history of human rights violations in Turkey and draw a picture of the sorts of violations that have most frequently come to light in the European human rights fora. The first section therefore deals with the recent political history of Turkey which constitutes the backdrop to the frequency of allegations of violations that have reached Strasbourg. We find in this a picture of turbulence in which the state, irrationally fearing for its own existence, responds with massive abuses against its own citizens. Next we examine the pattern of cases against Turkey and this is done by presenting on overview of the number of cases and the sorts of violations which Turkey has been found liable for.

1.1 Political turbulence and state overreaction

On the morning of 12 September 1980 Turkey opened its eyes with the sound of a military march for the third time in its 67-year short history. In tandem with the announcement of a state emergency in the whole country there was a wave of the apprehensions, torture, and oppression that had never been seen. All political parties were closed and their leaders were arrested.

The State Emergency Courts gave 517 death penalty decisions, of which 124 were upheld by the Military Court of Appeal. The National Security Council (NSC), which was established after the military take-over, started to execute the death penalty, which had not been used since 1972. Between 1980 and 1984, 50 death penalties were executed. The head of the military takeover Kenan Evren stated, on 3 October 1984, his unconditional acknowledgement of the execution of the death penalty: 'Should we feed instead of hang those traitors?'

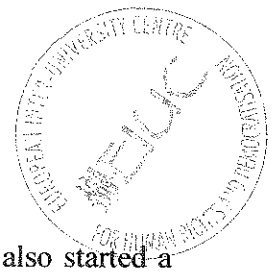
With international pressure from the Council of Europe and the European Parliament military leaders prepared a draft new Constitution which was passed by

91.37% of the vote in a referendum in November 1982. The first election took place in 1983; however, the democratic character of that election was controversial since the NSC allowed participation of only a few of the political parties. The newly established political party, the 'Motherland party', came to government.

However, since the NSC saw the Kurdish and Turkish left-wing organisations as being responsible for the turbulence of the 1970s it wanted to remove all the remnants of their ideas. The NSC used Islam against the threat of Communism and intensified its assimilation policy against the Kurds. On the one hand, the NSC and the new government were trying to spread the Islamic ideas over the society, supporting Islamic organisations, opening many new 'Koran courses', and introducing 'religious education' (only Islamic) into the secondary and high school curriculum. On the other hand, a new campaign to prohibit the speaking of Kurdish and to deny the existence of the Kurdish minority (they were being called the 'Mountain Turks') was launched. However, these were going to be Turkey's two main problems soon.

Because of the Turkish state's assimilation policy, the Kurdish opposition group, Kurdistan Workers Party (Partiya Karkaren Kurdistan or PKK), commenced an insurgency against the Turkish state by attacking two gendarme stations on 15 August 1984. During this so-called 'low intensity war' 30,000 thousand people were killed, 3,000 villages and hamlets evacuated and 3 million people displaced to the western part of the country or some other big cities in region such as Diyarbakir, Van, etc.[3] In 1992 Turkey derogated from article 5 of the ECHR (right to liberty and security) with regard to provinces under the state of emergency, that is, in the southeast. Henceforward, two different laws were to be employed in two different parts of the country. In the area under the state of emergency the length of the detention was doubled, while the responsibility of the state officers was lowered. The State established a village guardian system and armed them with a view to creating local resistance to the PKK.[4] However, this irregular armed group have been one of main human rights violators. Since the evacuated villages and lands were occupied by village guards, they become one of the main obstacles for the returns of displaced people to their land.

[3] KHRP, April 2000, p.6.
[4] Yildiz, Hughes, 2003, p.16-20.



The response of the state was not limited with this war. The state also started a war against the intellectuals, journalists, human rights activists, trade unionists, etc. who criticized its policy. The state adopted the practice of 'unknown perpetrator' killing (yargisiz infaz) and the 'disappearances'. During this war people were kidnapped by unknown persons or arrested by the police or gendarmes and found dead as a result of torture. Torture has become part of detention and a lot of people have been subjected to torture or died as a result of it.

Any expression of a different ideology or view has been penalized without examination of the real threat to democracy in the government. Countless writers, journalists, and intellectuals faced hundreds of years of imprisonment. Turkey is still one of the countries in Europe where many journalists have been imprisoned.

Another outcome of this war has been the thousands of *'political prisoners'* who are still in prisons. The state's policy towards them was so harsh[5] since they were seen as enemies of the state and treated very badly. Indeed, violations against prisoners have always been one of the important problems in Turkey. Especially when the state decided to turn to 'room system' prisons a lot of prisoners were killed during transfer to 'F-type prisons' or after hunger strike in protest against the policy of the state towards them.

While Turkey has continued the practice of closing parties, especially Kurdish political Parties in 1990s, the restrictive electoral system has made difficult for minorities to be represented in Parliament. For instance, in the election of November 2002, despite receiving over 45% of the votes in five of Turkey's 81 provinces DEHAP could not get any seats in the Grand Assembly since it had not passed the 10% threshold.

However, following the general election in 1995 the Islamic Welfare Party (Refah Partisi) got the largest share of the votes and constituted a coalition government with the True Path Party (Dogru Yol Partisi). However, this government was out of office in 1997 as result of increasing pressure by the military, which was opposed to the growing power of the Islamic movement in Turkey. In the wake of marching of soldiers on the morning of 28 February 1998 in Ankara, this party was dissolved and its leader Necmettin Erbakan banned from political life for 5 years. The changing attitude of the state towards

[5] See, Application No.:31866/96, 10.10.2000, *Satik and others v. Turkey* concerned the assault on a group of prisoners.

Islamic organisations led them to show a severe reaction 'Hezbullah' which was alleged to be responsible for the 'unknown perpetrator' killing of Kurdish activist in south-eastern part of Turkey. In early 2000, Turkish society become shocked by revelations about the activities of 'Hezbullah' when a number of its 'hideouts uncovered a systematic practice of kidnapping, torture and murder by the group's activists'[6]. Alongside this development the state's started a new campaign, the so-called 'headscarf ban', and thousands of young women were stopped from entering universities with their headscarves. This conflict has caused another ongoing human rights problems in the country.[7]

The leader of the PKK, Abdullah Ocalan, was kidnapped from Kenya and brought to Turkey and in the same year, on 15 February 1999, the PKK announced a ceasefire and gradually withdrew its guerrillas from Turkey. This milder climate led Turkey to withdraw its derogation to the ECHR in January 2002. Following this the state of emergency was completely lifted on 30 November 2002 after 15 years of emergency rule in the east and southeast of Turkey.

After the Helsinki summit Turkey seems to have changed its policy and made many amendments to its legal system in order to comply with the EU's 'political criteria'. Amendments to the Constitution in 2001 removed the clause prohibiting the use of other languages except Turkish in education and broadcasting. On account of this, thousands of Kurdish students and families started a campaign to be allowed to have courses in Kurdish. However, this demand led to criminal charges being brought against students. Only a few years after that, with a view to harmonisation to EU standards Turkey amended The Law on High Audio-Visual Broadcasting (RTUK) and allowed for broadcasts in different languages and dialects used traditionally by Turkish citizens in daily life. For the first time in the history of Turkey a half hour daily broadcast in one of the minority languages of Turkey began in June 2004.

[6] KHRP, April 2000, p.6.
[7] See, *Leyla Sahin* v. Turkey, 29.06.2004.

1.2 The pattern of cases against Turkey

Turkey became a party to the ECHR on 4 November 1950 in Palazzo Barberini, Rome. In so doing, she made following declaration: 'The document we have just signed is perhaps yet unfinished and imperfect we but firmly believe that we will succeed in completing it within the very near future. I should like to express the hope that the principles we have stated here will be applied and respected not only by members of the Council of Europe but also by the members of the whole of humanity.'[8] However, this 'near future' still seems to far away.

Turkey accepted the jurisdiction of the European Commission on Human Rights on the right to individual petitions in 1987 and the jurisdiction of the European Court on Human Rights in 1990. However, before this date Turkey was brought before the Commission via inter-state applications. The first state application, which did not related to Cyprus invasion, was *France, Denmark, Sweden and The Netherlands v. Turkey*, concerned the serious human rights abuses after the military takeover. It was, however, withdrawn in the wake of the return to democracy. Nevertheless, even after acceptance of jurisdiction of the Court and the Commission two applications were lodged. In the *Cyprus v. Turkey* case, the ECtHR held that Turkey was responsible for breaching article 14 of the Convention with respect to human rights abuses in the northern part of Cyprus as well as for some other violations.[9] The second case was *Denmark v. Turkey* and concerned an examination of allegation by a Danish citizen concerning ill-treatment by Turkish authorities during his detention period and violation of article 3 of the ECHR. The case was, however, struck out of the list following a friendly settlement.[10]

The first case against Turkey through an individual application was *Yesilyurt v. Turkey*, and was concluded by a friendly settlement.[11] The case concerned the forcing of some Kurdish villagers to eat faeces by the soldiers. The Turkish judiciary sentenced those soldiers to only ten months imprisonment and released them on probation. However, the European Human Rights Commission, found Turkey in violation of the ECHR and the government paid compensation to the applicants. Since then the number of

[8] HRIB, No.50, Special issue, 2000, p. 46.
[9] Application number: 25781/94, 10.05.2001.
[10] See, Application No.:34382/97, 5.04.2000, *Denmark v. Turkey*.
[11] The reference not available in HUDOC.

the individual applications against Turkey has rapidly increased. This number was 1825 in 1998, the number of the applications up to 2004 is as follows:

Table 1[12]

	1998	**1999**	**2000**	**2001**	**2002**	**2003**
Number of registered applications	73	653	735			
Number of provisional files	220	515	909	2499	3036	2918
Applications declared inadmissible or struck out	8	153	394	384	1639	1632
Applications declared admissible	0	112	279	90	102	142
Friendly Settlement		-	12	57	45	44
Judgements		18	26	171	56	76

As seen in the table 1 above, although the number of applications is high, the numbers of cases given admissibility decisions are quite low. One of the reasons for that is that cases are poorly prepared due to lack of knowledge about the ECHR and the ECtHR case law among lawyers and applicants. Another important factor for this is the high number of the provisional files, which cannot trace the applicant later on.

Despite these facts Turkey has still been at the top of the list of the ECtHR with the number of judgements against her especially in the last few years. Indeed, in 2002 the highest number of judgements delivered and their percentage of the total number of judgements concerned the following states: Italy 391 (46.33%), Turkey 105 (12.44%) and France 75 (08.89%).[13] For 2003, even though the number of judgements against Turkey decreased Turkey remained near the top of the list: Italy 106 (15%), Turkey 76 (10.8%) and France 76 (10.8%).[14]

[12] In preparation of this table the ECHR Survey of Activities 1998, 1999, 2000, 2001, 2002 and 2003 has been used.
[13] Survey of Activities 2002, p.23.
[14] Survey of Activities 2003, p.25.

The estimated number of violations up to 2004 related to various articles can be seen in table 2 below. Except in *Cyprus v. Turkey*, Turkey has never been found in violation of article 14 even though it forms the main basis of challenge by applicants from the south-eastern part of the country. Another interesting outcome is that Turkey has never been found in breach of article 9 of the ECHR although the Commission did give an admissibility decision on *Kalac v. Turkey* This is a quite notable result and it shows the approach of the European Human Rights system to Turkey's two main human rights problems.

Table 2[15]

	Art 2	**Art 3**	**Art 5**	**Art 6**	**Art 8**	**Art 10**	**Art 11**	**Art 13**	**Art. 34**	**Art.1 of P.1**	**Other**
Number of violations	29	39	26	116	9	29	7	26	11	154	3

The violation of the right to life can mainly be deduced from the 'disappearance' cases which emerged especially during the period 1992-1996. A great number of persons disappeared either when they were in custody or when they were taken by the security forces or abducted by undefined civilians. The state never accepted responsibility, and it was also so difficult to prove state involvement in unlawful interference against the right to life of the disappeared person since it was happening behind closed doors. The ECtHR was itself confused when it was confronted with an unprecedented 'disappearance' case in *Kurt v. Turkey.*[16] The reaction of the ECtHR was disappointingly timid and the court found a violation of the 'right to liberty' in this case, not 'the right to life'. However, in the following 'disappearance' cases the Court traced the Inter-American Court and HRC's case law and adjusted its jurisprudence.[17]

Turkey was the first country in Europe to be found responsible for torture by the ECtHR in the *Aksoy v. Turkey* case.[18] Nevertheless, the ECtHR also interpreted the

[15] Also see Annex-1.
[16] Application No.: 24276/94, 25.05.1998, *Kurt v. Turkey.*
[17] See, Ovey & C.A.White, p. 44-47.
[18] Application No.2198793, 18.12.1997, *Aksoy v.Turkey.*

failure of the state to bring an effective investigation into the allegation of torture or ill-treatment as a breach of article 3 of the ECHR.

However, the other major violation of article 1 of the Protocol 1 has been deduced from the destruction of houses and possessions by the security forces or village guards.[19] The ECtHR in its first judgment on the issue, *Akdivar v. Turkey*, held that the state should make reparations for its consequences in such a way as to restore as far as possible the situation existing before the breach, "restitutio in integrum". However, on account of the ECtHR approach to article 41, it could not make declaratory statements and it was left to the state to choose the manner of implementation of this judgment. However, in its recent judgment the Court stated has ordered restitution.[20]

More seriously, Turkey has been found to be in violation of article 34 (former 25) of the ECHR, which guarantees the right to individual application while she had failed to give an effective investigation into those allegations. Indeed, she has been condemned on the ground of arbitrary intervention with this right in 11 different cases. Not surprisingly, it occurred especially in the cases of destruction of possessions and homes by security forces and disappearance[21], rape[22], torture, shooting of relatives by undefined assailants[23], and death in custody[24].

Since the implementation of the ECtHR judgments in respondent states is slow, following up applications "clono" increases the workload of the ECtHR. Indeed, an examination of the ECtHR case law on Turkey demonstrates that 50 % of judgments are results of Turkey's failure of implementation. Particularly the failure of Turkey to make necessary changes in order to decrease the length of the detention compatible with the standard of the ECtHR case law, to increase the rate for delayed payment of confiscated land, or to remove military judges from the composition of the State Security Courts and failure to introduce retrial proceeding are the main reasons for further cases on the same issues reaching the ECtHR. On the other hand, Turkey's failure to prevent the widespread

[19] Application No.: 31890/96, 26.11.2002 *Kinay v. Turkey*, (friendly settlement). See also, *Dulas v Turkey*, Application No.: 25801/94, 30.01.2001, Orhan v. Turkey, Application No.: 25656/94, 18.06.2002.
[20] Kerim Yildiz, Caitlin Hughes, p. 72.
[21], Application No.:25659/94, 17.07.2001 *Irfan Bilgin v. Turkey*, Application No.: 25704/94, 27.02.2000 Cicek v. Turkey.
[22] Application No.: 23178/94, 25.09.1997, *Aydin v. Turkey*.
[23] Application No.: 22876/93, 14.05.2002, *Semse Onen v. Turkey*.
[24] Application No.:31889/96, 14.02.2002, *Abdurrahman Orak*.

practice of torture, the arbitrary use of force by the security forces and the limited interpretation of the freedom of expression given by the judiciary remain among the main concerns in the country.

Chapter 2

The Effect of EU's Accession on Human Rights developments in Turkey

The aim of accession to the EU represents the final step in Turkey's journey towards the 'westernization' of the country, which began with the since establishment of the Republic (and arguably even prior to that). Because of this, Turkey gives a great deal of importance to finalizing its journey with a happy end. This was also mirrored in the preamble of the National Programme, when Turkey announced accession to EU as a 'social reform project' which is seen as fully corresponding to the founding philosophy of the Republic and Atatürk's vision for the nation's integration into contemporary civilization. Turkey has also renewed its determination to continue those developments until it reaches the ultimate stage of 'civilization'.[25]

However, one should not exaggerate the EU's influence on Turkey since it is the country of taboos. Indeed, when it comes to Turkey's official ideology and the way in which that relates to the Kurdish and the secularity issues, and the place of the military in state structure, etc. she shows more reluctance to comply with the EU's standards, which are based on democracy, rule of law, human rights, minority rights, etc.

On the other hand the lack of an EU human rights policy in its external relations for a long time also undermined the EU's influence on Turkey, since the EU, by not taking into consideration the gravity of human rights violations in Turkey, continued its relations for the sake of strategic considerations or economic interests. However, the EU began to strongly criticize this record when Turkey officially expressed the wish to join the EU in 1987. Since then the EU has referred more and more to the human rights situation in its relations with Turkey and made it a condition for Turkey's accession to EU. In so doing, the importance of the ECHR system in the assessment of *'political criteria'* becomes weighted. Especially, given emphasize to implementation of the ECtHR judgments has lead Turkey to undertake recent reforms in the so-called, '*EU Harmonization Packages*'. Strikingly, these have been mirrored as a part of the EU

[25] Turkey National Programme for the Adoption of the European Union Acquis of 24 March 2001, preamble pp. 1-2.

process in Turkey and not as part of Turkey's obligations under international human rights treaties.

In this chapter I therefore examine to what extent the EU has led Turkey's *reforms* on the human rights issue in general terms. In so doing I discuss the position of human rights and the ECHR in the EU's external relations and, in particular, I investigate how the EU accession process triggered an escalation in Turkey's compliance with the ECHR and the case-law of the ECtHR.

2.1 The position of human rights in the EU system

In examining the link between the EU legal orders to human rights, we have to distinguish between its internal legal order and that of its external relationship. The first element is about the extent to which the EU, in its internal legal system, applies, expects Member States to apply, or is itself bound by human rights norms. It is important to be aware of this internal applicability of human rights norms as this forms the backdrop against which the EU institutions act and are judged and, more importantly, it constitutes part of the EU *acquis* which any prospective Member country must be aware of and be expected to adhere to upon being accepted as a Member State. Inevitably, the applicability of human rights norms and standards are not restricted to the internal, but increasingly come to be of relevance at the 'external' level too. As stated, an expectation is applied to prospective Member States that they will conform to the demands of the EU's internal legal order. We find that in practice this demand comes to be articulated well before acceptance of membership and indeed as part of the conditionality for membership. We discuss these 'internal' and 'external' elements of the EU's human rights policies in the following sub-sections.

i. Human Rights in the EU's internal legal order

Since the EC treaties are based on the economic interest of the Member States, there was no reference to human rights in them for a long time. On the other hand, even at the very beginning the protection and promotion of human rights were explicitly incorporated into EC legislation, and human rights were described as a 'common European objective' in

the Treaty on European Union, in force since November 1993. Human rights therefore became a defining principle of the EU. Indeed, the entry into force of the Treaty of Amsterdam in May 1999 further strengthened the EU's internal human rights regime somewhat. Article 6 of the TEU, as amended by the Amsterdam Treaty, proclaims that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law'. Article 6(2) of the TEU states that Member States are bound to respect 'fundamental rights, as guaranteed by the Convention (ECHR)...and as they result from the constitutional traditions common to Member States, as general principles of Community law.'

In its internal relations the EU has also established a system of punishment in the form of suspension of Member State rights under article 7 of the TEU if a Member State commits 'serious and persistent' human rights violations. More recently, these principles were emphasised in the Nice European Council in December 2000, which also adopted a non-binding Charter of Human Rights and Fundamental Freedoms, which includes rights guaranteed in the European Convention on Human rights.

However, even this 'Bill of Human Rights' for the EU has not reduced the debates on the 'legitimacy deficit' in the EU's human rights policy. [26] Indeed, this debate started in the late 1970s, and was based on the EU's accession to the ECHR. Indeed, all Member States of the EU are parties to ECHR, and they therefore have to comply with human rights. However, since the EU is not a party to the ECHR, actions of the EU are left outside of the ECHR's protective ambit.

Although the EU is not party to the ECHR, the Maastricht Treaty, in article F(2), already provided that: 'the Union shall respect fundamental rights, as guaranteed by the ECHR signed in Rome on November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community Law'. The ECJ has tended to interpret legal provisions in line with the approach adopted by the ECtHR and it has recently begun to pay considerable attention to the jurisdiction of the Strasbourg organs.[27]

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[26] Karen E. Smith, 2003, p.101.

[27] *Krezmow v. Austria*, Case C-299/95, related to the question of ECHR provisions and the effect of a finding by the ECtHR of an infringement of the Convention. See, Paul Craig and Grianne de Burca, 1998, p. 317.

ii. Human rights in the EU's external relationships

The increasing importance of human rights in EC external relations goes back to the 1970s when the Member States decided to coordinate their foreign policies. However, since the social and political interests of the member states were diverse, it was important to determine the components of a European identity upon which their foreign policy could be based.[28] In 1973 the Copenhagen Declaration on European identity noted that Member States were 'determined to defend the principles of representative democracy, of the rule of law, of social justice and respect for human rights'[29] However, placing an importance on human rights never went beyond Member States' bilateral relations with third countries to become part of the EU's common foreign policy.

This inconsistency in EU human rights policy continued until the 1990s when the Cold War era ended. In 1993, with article 11 of the TEU, to 'develop democracy and the rule of law, and respect for human rights and fundamental freedoms' became one of the objectives of the Common Foreign and Security Policy of the EU. Indeed, in 1995 the EU started to use the 'human rights clause' which is supposed to be incorporated in all cooperation and association agreements with third countries. If such countries want to enter into a relationship with the EU, to receive aid or to benefit from trade preferences they must give an undertaking to respect human rights.[30] The EU has a range of funds for development co-operation initiatives which are made subject to human rights conditionalities under article 177 of the TEU. Besides these the EU has expanded its human rights interventions to the support of civil society, election monitoring and human rights monitoring.

In addition, the position of human rights has been stronger and more visible in the EU's enlargement policy. The political criteria for accession to be met by the candidate countries, formulated at the Copenhagen European Council meeting in June 1993, stipulate that those countries must have achieved the 'stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities' under article 46 of the TEU. As a consequence of this 'conditionality', the EU

[28] Toby King, 1999, p. 313.
[29] Bulletin of the European Communities 12/1973, at para. 2501, cited in Toby King, p. 314.
[30] Barbara Brandtner and A. Rosas, 1998, p. 468.

has become the principle external 'focal point' for reform in the applicant states and exerts its influence on applicant states.[31] On the other hand, the EU has also increased its assistance to applicant countries in order to prepare them for accession, through pre-accession strategies, which are also supported through pre-accession aids.

A recent review of the European Union's human rights policy suggested that an annual report on Human rights based on reports from the Commission' overseas delegations should be drawn up to ensure that human rights forms a 'constant and stable feature of the Union's foreign policy posture'. In its Declaration on the 50th anniversary of the Universal Declaration of Human Rights in December 1998 the European Council agreed to consider the possible publication of an annual human rights report which could draw public attention in Europe to human rights abuses thereby stimulating greater public pressure for action.[32] In this way, the EU has decided to consider each candidate's situation on a case by case basis through such reports.

In fact, relations between third countries and the EU have become increasingly politically oriented since the late 1980s. In this sense, Turkey's application for membership in 1987 was notable since it occurred at the same time that the EU began to establish an active human rights policy as part of its external relations. After Turkey's application the EU's approach to political issues, including human rights in Turkey, has become more visible and more coherent than before Despite its shortcomings, the EU has been one of main actors in Turkey forcing her to respect human rights standards.

2.3. The history of the EU-Turkey relationship

Turkey's long journey on the road to EU accession began in September 1959 when the Council of Ministers of the European Economic Community declared that it accepted the application of Turkey as an associate member, suggesting that association could, when circumstances permitted, lead to Turkey's accession. The Association Agreement, known as the Ankara Agreement, came into force on 1 December 1964.[33] Meanwhile the first

[31] John K. Glenn, 2003. p. 220.
[32] Toby King, 1999, p. 326.
[33] The agreement was signed on 12 September 1963 and aimed at securing Turkey's full membership in EEC through the establishment in three phases of a customs union which would serve as an instrument to bring about integration between EEC and Turkey. It envisaged the free circulation of goods, natural

financial protocol was also signed.[34] The Additional Protocol followed on 13 November 1970 allowing further trade preferences between both sides.

As seen above the relations between the EEC and Turkey rested on economic structures at the very beginning. The economic interests of the EEC and the strategic considerations of the Cold War era also induced it to close its eyes to human rights violations in Turkey and to subordinate human rights issues to strategic considerations. Indeed, the strategic importance of Turkey against the USSR's threat had increased especially after the withdrawal of Greece from NATO's military command in 1974. The political instability and wide-spread political violence in Turkey did not obtain the attention of societal pressure within EU states since the public opinion in the EU was occupied with the image of political turbulence in 1970s in Turkey rather than the poor political human rights record. [35] More interestingly, the negotiations leading to those agreements took place in the aftermath of military interventions in 1960 and 1971. The EU adopted a strongly critical position only when the military came to power in 1980.

i. In the wake of the military takeover

The EU's interest in Turkey's human rights record began only a few months prior to the military take over, and was initiated by the European Parliament (EP) following its first direct elections in 1979. After the publication of an Amnesty International (AI) Report on 9 June 1980, the Socialist Group of the EP decided to raise the issue of human rights violations[36] and to ask the Turkish authorities about the allegations contained in the AI report[37] in the next EU-Turkey JPC meeting. However, after the military coup on 12 September 1980 this meeting did not take place.

The first response to the military takeover came from the Commission on 13 September 1980. It stated that '...it is following developments in Turkey with greatest concerns' and that the EU 'hopes to see human rights will be fully respected' The

persons, services and capital between the parties, but excluded Turkey from the EEC decision making mechanism and precluded Turkey from recourse to the ECJ for dispute settlement.

[34] Which covered the period 1963-1970, and under this the EEC provided Turkey with loans worth 175 million ECU.

[35] Arikan, 2003, p.115.

[36] Agence Europe, 16/17.06.1980, p.4.

[37] Agence Europe, 02.07.1980, p. 4.

reaction of the EP, on the other hand, was somewhat stricter. It adopted a resolution indicating that the current situation in Turkey was incompatible with Turkey's commitment under the Convention and its association with the EU, and suggested that the suspension of relations would be considered if Turkey did not return to democratic rule as soon as possible. [38]

Unfortunately, the reaction of the EU was to reassure the new regime rather than condemning the military intervention, since total isolation of the military regime from the EEC would not be compatible with the latter's political and security interests. The EEC continued its relations with the Turkish authorities on various issues[39] having neither the human rights situation nor the legitimacy of the regime in Turkey on its agenda. In the meantime, the Council of Europe, on 1 October 1980, declared that Turkey 'cannot remain a member unless it returns to democracy as soon as possible'.[40] Interestingly enough this statement was also supported by some EU Member States[41], which had just decided not to suspend the EU Turkey association.

However, a range of developments had changed the EEC's attitude towards Turkey. First of all the flow of asylum seekers to EEC countries had changed public opinion and it compelled the EEC to take a firm stand against human rights violations in Turkey.[42] Also it did not seem as if the military regime would keep their promises about returning to democracy as soon as possible. The EP dissolved the JPC delegation on 22 January 1982[43] until a general election was held and a parliament established in Turkey. On the other hand, France, Denmark and the Netherlands placed an application action against Turkey before the European Commission of Human Rights on 1 July 1982 on the ground that 'a public emergency did not exist in Turkey that would allow her to derogate

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[38] Arikan, 2003, p.116.

[39] See, Ugur, 1999, p. 220. On the utilization of the emergency aid of 75 million units of account, which had been granted in 1979 when Turkey was faced with a balance of payment crisis and the imposition of visas by the Benelux countries, Germany and France. Moreover, the EEC invited Turkey for consultations within the EPC mechanism in order to alleviate its concerns about the accession of Greece in 1981. Also see, Official Journal of the EC- Debates no.1-294, February 1983, p. 70, Meanwhile, Germany began to prepare the release of financial aid to Turkey in late 1981 and lifted the ban on 2 December 1982. Germany also indicated that it was in favour of releasing the ECU 600 million EU assistance approved in fourth financial protocol of 1980.

[40] Agence Europe 02.10.1980, p, 4.

[41] Germany, UK and to some extent Italy.

[42] Birand, 1986, pp. 423-424.

[43] Ugur, 1999, p. 221.

from her commitments under the European Convention'. These developments motivated the EEC Council and it eventually informed Turkey in January 1982 that it must fulfil various conditions if it wanted to maintain its association with the EU.[44]

Although the Turkish military regime seemed to brush these indications away by threatening to distance Turkey from Europe, the military regime immediately appointed a Consultative Assembly with instructions to draft a highly restrictive constitution, since the turbulence in the period 1960-1980 had been seen as a deficiency of the 1960 constitution, which had given more importance to rights and freedoms. This draft Constitution was passed by 91.37% of the vote in a referendum in November 1982. However, this referendum remained controversial, since it had banned voters from future elections if they failed to vote.[45] Following this, the National Security Council (Milli Guvenlik Kurulu) adopted an electoral law, which only allowed 'approved' political parties to participate in elections. An election was held in November 1983 and the Prime Minister Turgut Ozal formed the new civilian government. However, the EEC Commission and the EP were not satisfied and found the election undemocratic and unrepresentative.

ii. Relations with the civilian government

The civilian government tended to take the EEC's criticism more seriously.[46] When the new foreign minister visited the Commission, he was told that the normalisation of relations with Turkey depended on the continuation of the process on human rights and democratisation.[47] The EP listed a number of conditions for the reestablishment of the EU-Turkey Association by identifying specific areas where action needed to be taken including removing restrictions on freedom of expression, freedom of political activities and trade union rights, granting the right of individual application to the European

[44] O J EC-Debates, no.1-279, January 1982, p. 58.
[45] This law was withdrawn in April 1987 after the membership application to the EC.
[46] The Ozal Government declared accession to the ECC as an ultimate aim. Membership was also seen as important since was considered by some commentators as a guaranteeing the durability of Turkish democracy and lessening the prospects of another military intervention, as was the case for Greece, Portugal and Spain.
[47] Bulletin EC, 1/1984, p. 94, citied in Harun Arikan, 2003, 118.

Commission of Human Rights and the abolition of the death penalty.[48] The European Parliament was meanwhile raising the issue of the Armenians, Kurds, Greeks and Cypriots in Turkey and lack of human rights and parliamentary democracy as an obstacle to Turkey's accession to EEC.[49]

Following this, Turkey lifted political restrictions and started to pursue a strategy of eradicating the influence of the military in politics. For instance, the restrictions on trade unions and associations and on the forming of political parties were abandoned. Turkey agreed to a friendly settlement of the case brought against it by the France, Denmark and the Netherlands in 1986. For the sake of accession to the EU Turkey agreed to grant the right of individual application before the ECtHR for a period of three years on 23 January 1987, that is, before her application to join the EC. It also allowed an AI team to visit a prison in the city of Adana on 14 April 1987. The penalty of internal exile was abolished and the ban on former political party leaders was lifted. Turkey signed the European Convention on Prevention of Torture in January and became the first country to ratify it in February 1988.

Turkey had made some amendments in accordance with the EP's list of required reforms. In September 1989, before the decision of the Commission on its membership application was made public, the application of the death penalty was reduced from being applicable for 29 offences to 13 offences, and Turkey announced that it was extending the jurisdiction of the ECtHR beyond three years. Even after the Commission's negative answer on membership in December 1989, it lifted the law which prohibited the use of Kurdish languages in publications in February 1991 and abolished articles 141, 142 and 163 which were limiting freedom of expression on 12 April 1991.[50] It enacted an early release law and enabled the release of a large number of political prisoners on 16 July 1991.

iii. Customs Union: A contradiction to the EU's human rights policy

After the EU's opposition to Turkey's early application for EU membership both sides sought to reactivate the EU-Turkey Association. In this respect the debates were

[48] OJ, 1986.
[49] OJ, 1987.
[50] See chapter 3.

primarily centred on the completion of a customs union between Turkey and the EU. The Commission started to prepare a specific proposal for strengthening cooperation with Turkey. Talks began in 1994 and the customs union was finalized on 6 March 1995.

However the EU made it clear that the completion of the customs union was conditional upon Turkey's progress in aligning its political and human rights system in accordance with EU demands. Nevertheless, during negotiations in 1994 it was evident that the EU statement on the link between the customs union and improvements in Turkey's human rights record lacked credibility. Namely, prominent international and national NGOs were constantly pointing to the poor human rights situation in Turkey[51], while four Kurdish MPs were sentenced to 15 years imprisonment in December 1994. However, during the debate on the customs union agreement the EU member states stated that they did not oppose the completion of custom union on the grounds of human rights and the Kurdish issue.[52]

However, when the customs union came before the EP for its assent, the EP insisted on some conditions, seeking the elimination of legal and constitutional restrictions on civil society and political participation, a change to article 8 of the Anti-Terror law which forbade the issue of written or verbal propaganda and demonstrations. This article was important for the EP since Mehdi Zana the former Mayor of Diyarbakir, and a campaigner for Kurdish autonomy, was tried under the new article 8 in November 1995 for a speech he had made earlier in the EP plenary session. Finally, the EP asked for the release of the DEP representatives who had been jailed.

In response to the demands of the EP, Turkey made some amendments in the constitutional reforms on July 1995 removing the statements in the preamble of the Constitution praising the military coup of 12 September 1980, allowing students to

[51] See, Amnesty International report 1995, stating that 55 people had disappeared, that torture was wide spread and that at least 29 deaths had occurred in custody as a result of torture. The 'incommunicado' length of detention was 30 days in state of emergency areas. Also see, Annual Report of Human Rights Association 1994-1995.

[52] During the fight against Kurdish opponents, Turkey had been using German tanks and this received some attention by German opposition political parties. In the end, in April and May 1994, there was a short halt to arm sales to Turkey. A short time prior to the completion of the customs union Germany lifted the ban on the grounds that there was insufficient evidence that German military equipment was being used in action against the Kurds. See also, Nielsen, 2003, pp. 42-44.

become members of political parties, granting public sector employees rights to collective bargaining (but without the right to strike) and lowering the voting age from 21 to 18. However, during the examination of the *Erdagoz v. Turkey* case before the Committee of Ministers Turkey asserted that she had made these amendments and the changes to the CPL in 1992 in order to execute this decision.[53] Turkey also amended article 8 of the Anti-Terror Law in October 1995. On the other hand AI reported that public prosecutors in Turkey had begun to request charges under other articles of the penal code, for example article 312 of the TCC 'banning the incitement to hatred', to circumvent any constraints in sentences imposed by the amended article 8.[54]

Despite these efforts by Turkey to meet with the conditions of the EP, it did nothing about the release of the DEP representatives. Meanwhile, the Court of Appeal upheld the first instance court judgement and sentenced them to 15 years imprisonment. Turkey defended itself against criticism from EU Member States and from the EP on the ground that those concerned could appeal to the ECtHR and, in accordance with its obligations, it would accept the ECtHR decision.[55] However, when the ECtHR found Turkey in violation of article 6 (1) of the ECHR because of the unfair trial of the DEP representatives, Turkey forgot this comment for a long time. Despite the intensive pressure of the Committee of Minister, Turkey only released those MPs after criticism by the European Commission in its Regular Reports of 2002 and 2003.[56]

Eventually the EP consented to the customs union agreement on 13 December 1995 under intense pressure from the Commission and the Member States and the intensive lobbying efforts of the Turkish Government. An argument used by the Member States to persuade their deputies in the EP was that the rejection of the customs union would cause a sudden halt to the process of democratisation and an increase in radical nationalism and Islamic fundamentalism in Turkey.[57] Also the Commission stated that

[53] See Chapter –3.
[54] Amnesty International annual report 1996, pp. 17-19.
[55] Arikan, 2003, p. 131.
[56] See Chapter-3.
[57] The election success of the pro-Islamic Welfare Party in March 1994 used in order to push a custom union and political dialogue despite continued deterioration in Turkey's human rights record.

the customs union would bring substantial advantages to the EU and consolidate Turkey's role in the region.[58]

The European Commission continued to report on developments in relations with Turkey since the entry into force of the customs union adopted on 30 October 1996. It noted that Turkey had made little progress with economic and democratic reform, and that human rights violations continued. Although it pointed out the shortcomings on human rights, it concluded that 'Turkey remained an important partner with which the EU must keep open all possible channels of dialogue and cooperation.'[59]

The EP[60] had issued several times in its resolution the problems of freedom of expression in Turkey and had called on the Government to declare an amnesty for all prisoners convicted of offences under laws in conflict with the principles of free speech and human rights. However, the positive outcomes of this pressure occurred only after Turkey applied for EU accession. Indeed, Turkey enacted an 'amnesty law'[61] for the journalist after the EU institution pressure on freedom of expression in Turkey.

Meanwhile, the intensified war between the PKK and Turkey, began to worry the Member States of the EU, with the Kurdish refugee flow causing particular annoyance.[62] The EU increased its pressure for a solution to the issue, asking for official recognition for the cultural rights of the Kurds and a political solution to the Kurdish issue.[63] The EP also urged the Turkish Government to end its military operations in the south-east of the country and to open negotiations with all Kurdish organizations in order to move towards a peaceful political settlement of the problem. [64]

The same approach was shared, to a large extent, by the Commission and Member States, and they were insisting on a political solution of the Kurdish issue. In meetings of the EU-Turkey Association Council in April 1997, the Presidency statement on behalf of EU was that: ' The EU is aware of the extent of the problem Turkey is facing in the south-east, but the fight against terrorism must be conducted with due to respect for human rights and the rule of law, and calls for a political solution. Turkey should have no

[58] Ugur, 1999, p. 234.
[59] Bulletin EU, 10-1996.
[60] Bulletin EU, 6-1996.
[61] See Chapter-3.
[62] Nielsen, 2003, pp.39-40.
[63] OJ, 1996.
[64] Bulletin EU, 6-1996.

doubt that the Union upholds the territorial integrity of Turkey and all countries in the region and condemns terrorism.'[65]

However, Turkey has been reluctant to comply with the recommendations of the EU. The reasons behind this reluctance are, firstly, that Turkey denies the existence of the Kurds. Secondly, the state saw the polarization between the two sides as being a result of an international conspiracy against the 'borders of *Misak-i Milli*', not as a result of its policy of assimilation towards the Kurds. Thirdly, although Turkish nationalism has grown alongside the fight with Kurdish guerrillas, politicians have not dared say anything against this nationalist wave. Therefore, the EU has been less influential in relation to Turkey's policy on Kurdish issue.

The tension on the human rights situation led the EU to excluded Turkey from the EU's enlargement process at the Luxembourg Council meeting.[66] Meanwhile the EU confirmed Turkey's eligibility for accession. Turkey was in a great disappointment. The EU has taken a strong line[67] towards to Turkey and the member state made their criticism harder. The European Commission has prepared its first regular report[68] on Turkey in October 1998. In this report, the Commission stated that although, 'the Turkish government *(gives)* pledge to combat human rights violations in the country but this is still so far had any significant effect in practice'

iv. EU's initiatives to be an 'anchor' to reforms in Turkey

The Luxembourg decision caused anger in Turkey and she announced a package of reprisals for having been 'discriminated and snubbed'. Ankara decided to withdraw her attendance at the European Conference, to suspend the political negotiations and dialogue with the EU and refuse and reject debate or discussion on problems such as human rights, Cyprus or her relations with Greece. She also henceforward limited future discussion on existent agreements.[69] This sentimental reaction by Turkey, surprisingly, lead the EU to

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[65] Bulletin EU, 4-1997.
[66] The Luxembourg European Council, 1997, para. 31-36.
[67] Financial Times, 23 November 1997, President of the European Council Jean-Claude Juncker and stated that 'it cannot be that a country where torture is still practiced has a place at the EU table'
[68] The European Council in Cardiff, 1998.
[69] Sanguineti, 1999, p.7.

realize that the exclusion of Turkey from the enlargement process was incompatible, not only with its containment policy objectives, but also with its enlargement objective of promoting democratisation and political transformation in the applicant countries.

Thus, the EU finally recognized Turkey as a candidate country at the Helsinki Summit in December 1999.[70] On the other hand, the EU has asked Turkey to fulfil the same conditions as other applicant states wishing to join. The EU Commission prepared and adopted an Accession Partnership in 8 March 2001.[71] As political criteria EU asked Turkey to comply with some short term and medium term criteria.

In this positive climate of being a candidate, Turkey has intensified her work and prepared a National Programme for the adoption of the EU acquis in 26 March 2001. In fact the National Programme appeared as an attempt to find a balance between 'the need to meet with the Copenhagen criteria and the unwillingness to implement reforms on the most sensitive issues in the short-term'.[72] The EU described the National Programme as a welcome development, while pointing out the incompatibility of the National Programme with the Accession Partnership in terms of its precise content and schedule with respect to human rights[73] and urged Turkey to take concrete measures to implement the priorities of the Accession Partnership.[74]

In applying the National Programme Turkey, first of all, reviewed its Constitution in 2001. A new Civil law was adopted and came into force on 1 January 2001 introduced considerable amendments on the freedom of association and rights to assembly, gender equality and child protection. Although the EU strongly welcomed the steps taken and acknowledged the determination of the Turkish government to take further steps on the path of reform[75], it also urged the government to address swiftly all the remaining shortcomings on the political criteria, not only with regard to legislation but also

[70] Helsinki European Council, 1999, para.12.
[71] OJ, 2001.
[72] Onis, 2003, p.13.
[73] The State Minister and Substitute Prime Minister Mesut Yılmaz accepted these shortcomings of the National programme in his press conference on the Commission's 2001 Regular Report on 13 November 2001 stated that 'the criticisms (related to human rights violations) in this report unfortunately are mostly true. We should straighten them soon'. In the meantime the leader of the nationalist party in the coalition, Devlet Bahceli, regarded this report as 'unfair and does not have a right base' in his press conference on the Commission 2001 Regular Report.
[74] Goteborg European Council Summit, 15-16 June 2001, para. 10.
[75] Copenhagen European Council Summit, 12-13 December 2002, para. 18-19.

particularly with regard to implementation. The EU decided to open accession negotiations with Turkey without delay at the European Council in December 2004, if Turkey fulfils the Copenhagen political criteria. It also invited the Commission to prepare a revised Accession Partnership and to intensify the process of legislative scrutiny. The EU promised a significant increase in financial assistance for the pre-accession process.

v. Era of the AP Government: A 'sincere commitment' to human rights or an empty gesture?

The new government formed after the general election of 3 November 2002 stated that the goal of the accession to EU has been amongst the government's main priorities.[76] The AP Government has often declared that its main objective is to meet the Copenhagen political criteria in time to allow a positive assessment by the Commission thereby paving the way for a decision by the European Council in December 2004 to start negotiations with Turkey.[77] However, problems in the area of the implementation have undermined the commitment of the AP Government.

Indeed, the government immediately passed a legislative package which was called the 'Copenhagen Package' which was drafted with due regard to the evaluation made in the 2001 regular report on Turkey.[78] The AP government declared its 'zero tolerance'[79]to the practice of torture and has made changes in order to remove all legal impediments for the prosecution of public officials who allegedly resort to torture and ill treatment and to strengthen the protection against torture during the pre-trail period. The new Turkish Grand Assembly members have been working overtime in order to pass new laws to bring the Turkish legal system in line with the Copenhagen criteria.

However, this legislation still stopped short of the political criteria and the limited scope of these reforms was noted by the European Commission: 'In some cases, executive and judicial bodies entrusted with implementation of the political reforms

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[76] Regular Report 2002, p. 46.
[77] See, the press release of the Ministry of Foreign Affairs on 15 April 2003 and the press release of the Turkish Cabinet on the evaluation of the Regular Report 2003 on 5 November 2003.
[78] In the Regular Report 2001 the EU concluded that 'Turkey does not meet the Copenhagen political criteria', p.33.
[79] The Ministry of Foreign Affairs, 'The Latest situation of Turkey-EU relations', 2002, p. 2.

relating to fundamental freedoms adopted by the Parliament have narrowed down the scope of these reforms by establishing restrictive conditions, hindering the objectives initially pursued.'[80]

First of all, the changes to legislation were not enough to stop torture and ill-treatment in practice in Turkey since the 'culture of torture' is deeply rooted in state tradition. This was confirmed once more when the Prime Minister Recep Tayyip Erdogan failed to dismissed his bodyguard, a former police officer who worked in the Anti-Terror branch, when accused of torture after having been identified by one of his victims. National and international NGOs have started to report changes in the methods of torture or ill treatment which make it difficult to find evidence for torture and an increase in the number of unlawful detentions.[81]

Further, neither the changes related to freedom of expression, making it more difficult to close down political parties in Constitutional terms, nor pressure from the EU bodies[82] impeded the Constitutional Court from dissolving the Kurdish political party, HADEP. Following the closure of HADEP in March 2003, the EU Presidency expressed its great concern about the verdict of the Turkish Constitutional Court.[83] However, the Commission stated in 2002 Regular Report that although considerable progress in meeting with the Copenhagen criteria, adopted reforms which were especially related to expand the limit of the freedom of expression, are far reaching.

Also, although Turkey amended most of its legislation regarding freedom of speech and association, the headquarters of the Human Rights Association of Turkey in Ankara was still raided by the police. The EP demonstrated its reaction by saying that 'these amendments still left ample scope for repressive actions by the police.' All these negative developments have brought into doubt the political will on the part of Turkey to make radical changes to ensure respect for the rule of law.[84] The EP's reaction was so

[80] Regular Report 2003, p. 41.
[81] Memorandum to the Turkish Prime Minister on the occasion of the visit to Turkey of a delegation led by Irene Khan, Amnesty International's secretary General, February 2004. Also see the Annual Report of 2003, Amnesty International on Turkey; and Ozgur Politika, 20 June 2004, issue: 20207.
[82] Bulletin EU 1/2-2002.
[83] Bulletin EU3-2003.
[84] Bulletin EU5-2003.

severe: 'the short and medium-term priorities have only been partially implemented in practice'.[85]

On the other hand, a revised Accession Partnership was adopted and supported by substantially increased pre-accession financial assistance at the European Council meeting in Thessalonica.[86] Following this, the Turkish Grand Assembly passed a revised National Programme for the adoption of the *acquis* on March 2003. Without mention of the lack of implementation of reforms, Turkey alleged that she 'has completed comprehensive constitutional and legislative reforms that reinforce and safeguard fundamental rights and freedoms, democracy, the rule of law, and the protection of and respect for minorities, as set out in the Turkey National Programme for the Adoption of the European Union Acquis of 24 March 2001'.[87]

In the light of these ongoing developments, the European Union Presidency stated that '(it) encourages the Turkish authorities to pursue energetically the process, not only with regard to legislation but also with regard to its effective implementation'.[88] This was reflected in the Regular Report 2003 which stated that 'in spite of positive developments on the ground, the reforms have produced limited practical effects. So far, implementation has been slow and uneven'.[89]

The problems in implementation of the reforms led the government to set up a Reform Monitoring Group in September 2003 with a view to ensuring effective implementation of the reforms and to comply with the criticism in the Regular Report 2002. The setting up of this Monitoring Group was interpreted as a signal, which showed the failure of the government in implementation reforms. It was said in the Regular Report of 2003 that: 'The government has recognized that the reforms are not being put into practice systematically and has set up a Reform Monitoring group in order to ensure their implementation.'[90]

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[85] Bulletin EU6-2003.
[86] Thessalonica European Council Decision, 2003.
[87] RG, 24 July 2003, No. 25178.
[88] Bulletin EU7/8-2003.
[89] Regular Report 2003, p. 15.
[90] Regular Report 2003, p. 41.

vi. The role of the EU in the execution of ECtHR judgements

The ECHR has become a part of cultural self-definition of European civilization.[91] Recent development in the EU's policy on human rights in the EU enlargement process demonstrates that the European Union enters into competition with the Council of Europe in so far as fundamental rights referring to a political model of 'the democratic society' are concerned. Recently the EU announced that 'the role of the Council of Europe complements the EU's common strategies towards a number of key states' and it further stated that 'the human rights standards and the values of the Council of Europe are also a reference framework for countries applying for EU membership'.[92] The importance given to the Council of Europe human rights system has been more apparent via the Commission's Regular Reports.

Indeed, the effect of prospective EU membership on Turkey's democratisation process is becoming more apparent in a number of important constitutional and legal changes that have been made since the EU Helsinki summit. Since the EU has recently started to give more importance of the execution of ECtHR judgements in Turkey in its Regular Reports and documents, implementation of the ECtHR judgements has been speeded up.

As explained above, the EU asked Turkey to comply with some short term and medium term criteria in the Helsinki submit. Strikingly, these criteria seem to be reflected in the wide range of cases against Turkey. Nevertheless, while the Accession Partnership made a reference to ECHR, there was no a clear reference to the ECtHR's judgment. Indeed, Turkey has been condemned before the ECtHR since 1995; however, the number of the judgements against Turkey was only 12 until end of 1997.[93] This number has rapidly increased since then. With the rise in the number of applications has come the concern of the Council of Europe about the execution of judgements and adequate implementation of the ECHR. In the meantime, Turkey's attitude towards compliance with international obligations has become more visible. Turkey showed manifest reluctance to execute some judgements eg. *Loizidiou v. Turkey, Incal v. Turkey, Sakik*

[91] Alston and Weiler, p. 30.
[92] The Council Europe 'EU Annual report on human rights', 2003.
[93] See table-1.

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and others v. Turkey and her failure to prevent violations in further similar cases eg. *Akdivar v. Turkey, Aksoy v. Turkey,* of the ECtHR has reached a serious level. Concerns about implementation of ECtHR judgements found an echo in the EU's assessment about Turkey's compliance with its 'political criteria'.

Indeed, the EU raised the issue first of all in the Commission's Regular Reports. It stated the need to take measures in order to incorporate ECtHR judgements into Turkey's legislation and identified the lack of direct effect of ECtHR judgements as problem. It has also emphasized the need to introduce the possibility of reparations for the consequences of acts found contrary to the ECHR. Other important measures need to be taken in order to speed up Turkey's compliance with judgements of the ECtHR.[94]

The Commission indicated that there are many deficiencies at the stage of implementation. It was stated that a number of important issues raised under the political criteria had to be adequately addressed. These include the fight against torture and ill treatment, civilian control of the military, the situation of persons imprisoned for expressing non-violent opinions and compliance with the decisions of the European Court.[95]

More, strikingly, the Commission increased its concern about ECtHR judgements and called the failure of the Turkey to execute ECtHR judgements as a 'serious problem'. It further indicated that 'there are, for example, 90 cases where Turkey did not ensure fully the payment of just satisfaction ordered by the Court and 18 cases, related to exercise of freedom of expression, where the authorities did not erase the consequence of criminal convictions violating the ECHR.'[96] Indeed, these remarks of the Commission were an indicator of the increasing significance of the ECtHR's individual application system in the EU's human rights assessment.

In this context a further step was taken in the Revised Accession Partnership decided at the Copenhagen European Council in 2002 and concluded with Turkey on 19 May 2003.[97] There were some differences from the first one, namely, the European Council asked Turkey to comply with not only the ECHR but also to take measures with

[94] Regular Report 2001, p. 17.
[95] Regular Report 2002, p. 47.
[96] Regular Report 2002, p. 26.
[97] OJ, 2003.

a view to ensure an obligation on all judicial authorities to take into account the case-law of the ECtHR. Furthermore, it advised the implementation of legal provisions on the right to retrial following the relevant judgements of the ECtHR and extension of training of judges and prosecutors on the application of the ECHR and the case law of the ECtHR. This development is important since it has raised the implementation of the ECtHR judgement to the level of 'political criteria'.

Chapter 3

The response of the Turkish administrative authorities to human rights findings

Turkey has often been a target of serious criticism by the international community due to its human rights abuses, for example, for torture, disappearances, village destruction and evictions, arbitrary interference to freedom of expression etc. The list is long. The main perpetrator of these violations is the state, and the nature of the political regime of the country including its level of democracy in has much to do with this situation. Although the basic features of a democratic system do exist in Turkey, the lack of social and institutional pluralism and of political participation by social groups are the key reasons behind the inadequacy of political system in Turkey.[98] However, one should also not forget the fact that democracy has never been observed continuously in Turkey; the presence of military regimes and the enforcement of a state of emergency have been the rule rather than the exception in the country for a long time. Especially the southeast part of the country has been run under a state of emergency, governed by civil governors who had special powers and enjoyed complete immunity from judicial review.[99] This immunity encouraged the unlawful behaviour by state security officers, and the southeast of Turkey became a land outside of the law.

The reason for this was the 'low intensity war' between Turkey and 'terrorist' (Kurdish guerrillas seeking independence) for 15 years.[100] Turkey always put forth this reality as a justification for its human rights abuses. It did not, however, receive sympathy from the Council of Europe's Committee of Ministers, which furthermore stipulated that 'despite the necessity of fighting against terrorism in the south-east of the country and the difficulties faced by the state in this fight, the means used must respect Turkey's obligations under the Convention, in particular as specified by the Court's

[98] Arikan, , 2003, p.110.
[99] KHRP, November 2002, , p.6.
[100] The State of Emergency was launched on 19 July 1987 and lifted on 30 July 2002 for most cities in the southeast of Turkey. However, for the province of Diyarbakir and Sirnak it was extended the last time for four months, and this period of time expired in November 2002.

judgments and by Committee of Ministers decisions.'[101] For its part, Turkey has not been completely blind to these criticisms and on account of these international pressures it has placated critics with half-measures and empty gestures.[102]

Human rights advocates will be well aware that accession to human rights instruments and obtaining judicial oversight of a country's implementation of these, as accepted by Turkey in the case of the ECHR, are significant steps in the road to protection of human rights. However, they are by no means the final stage in the realisation of human rights guarantees, as, for that to result, the steps taken consequent to critical findings by enforcement bodies too must be examined. In general, State parties do comply with the ECtHR's judgments and the Committee of Ministers decisions, and the examples of reluctance to execute a judgment have been relatively few in number.[103] However, among these examples of non-compliance Turkey is well represented. Specifically, the non-payment of just satisfaction, or delays in paying it, is a matter of particular concern. According to the last available annotated agenda[104], in February 2002 there were 47 cases where Turkey had not confirmed payment, and this number had decreased to 10 after 6 months. Although Turkey ultimately pays compensation the delays in making those payments are still of concern. Considering the high number of decision against Turkey that have not been implemented, the Assembly has been led to adopt a resolution that a special report should be submitted to it, in June 2002, after a special consultation procedure with the Turkish delegation and government.[105] In the recommendation it reiterates its recommendation to the Committee of Ministers to amend the ECHR so as to give the Committee of Ministers the power to ask the Court for a clarifying interpretation of its judgments where necessary, and to introduce a system of *astrentes* (daily fines for delays in the performance of a legal obligation) to be imposed on states that persistently fail to execute a Court judgment.[106]

However, the execution of some judgements require more than mere compensation, such as amendment of a legislation, release of an applicant, or the training

[101] Interim Resolution DH (99) 434.
[102] HRW Press release on Turkey's EU Candidacy, www.hrw.org/press/2000/turkeyeu0906.htm, 2000.
[103] Elisabeth Lambert-Abdelgawad, 2002, p.43.
[104] Annotated agenda of the 783rd meeting of the February 2002.
[105] Parliamentary Assembly Resolution 1268 (2002) and Recommendation 1546 (2002) 22 January 2002.
[106] HRIB, No.55, 2002, p.45-46.

of security forces. Turkey has, up to certain degree, introduced changes to its legal system in a way consistent with ECtHR judgments and it has also taken some general measures such as the provision of 'human rights' training to security forces[107] and dissemination of court judgments[108], etc. However, those 'reforms' have never reached 'desired' success since they have never gone beyond some cosmetic amendments to legislation so as to result in considerable changes in official state policy.[109] The Committee of Ministers urging Turkey to take adequate measures is all the more pressing in the case of repeated violations in serious cases such as those resulting from torture, inhuman treatment, destruction of property, illegal killings and disappearances.[110] It also announced that the supervision of the execution of the ECtHR's judgments is one of its main priorities. 'Speedy and efficient execution is essential for the credibility and efficiency of the ECHR as a constitutional instrument of European public order on which the democratic stability of the Continent depends.'[111]

What are the reasons for Turkey's reluctance about the implementation of ECtHR judgments? The Parliamentary Assembly classifies the problems of implementation of the ECtHR as: 'political reasons; reasons with the reforms required; practical reasons relating to national legislative procedures; budgetary reasons; reasons to do with public opinion; judgments drafted in casuistical or unclear manner; reasons relating to interference with obligations deriving from other institutions.'[112] If one closely scrutinizes the reasons in the case of Turkey it will be seen, first of all, that the implementation of the judgments have required reforms. Secondly, it can be seen that 'political reasons' have generally prevailed over the pressure of international obligations, as in the case of the Kurdish and Cyprus issues, upholding the principle of secularity, the military's position in the structure of the state, etc.

This chapter is therefore concerned with following up the implementation of ECtHR judgments and the Committee of Ministers' decisions by the Turkish authorities. The discussion is broken down according to some general heads under which many of the

[107] See, *Denmark v. Turkey.*
[108] HRIB, No: 43, 1998, p. 29.
[109] The Committee of Ministers' reply to Assembly's written Question No.390, 20001.
[110] See, Interim Resolution DH (99) 434.
[111] HRIB, No.59, 2003, p.57.
[112] Parliamentary Assembly Resolution 1226 (2000).

cases in which findings have been made against Turkey could be classified, in an effort to evaluate the compliance of Turkish authorities. We examine the performance of the Turkey consequent to such pressures and attempt to discover the reasons for the failure or success of Turkey in meeting such demands of the Council of Europe human rights institutions.

3.1. Prevention of Torture

Turkey has been found in violation of article 3 of the ECHR in several cases[113] and moreover torture was often seen as being a 'widespread and systematic practice'[114] in Turkey. Although political opponents of the incumbent political regime are the victims of torture; it is also a very common treatment for ordinary criminals.[115] A key reason for this is the long and incommunicado period of detention,[116] without being able to access a lawyer or doctor, which therefore leave the detainees more vulnerable to being subjected to torture. A second key reasons the 'impunity' granted to state security officers.

Indeed the ECtHR has not only found the mere fact of torture as a violation of the Convention but it has also condemned Turkey as being in violation for not providing effective investigation into allegations of torture which therefore provides de facto impunity to the security forces. On the other hand, the commencement of an investigation against the security forces in a case of allegation of torture has, until recently, been subject to permission being obtained from the Administrative Council.[117] In the limited number of cases where the Administrative Council gives such permission, it is normally claimed that those suspected of torture cannot be found with a view to bringing them to court, even though their salaries continue to be paid. Furthermore officers accused of

[113] *Aydin v. Turkey* , Application No: 23178/94, 25.09.1997, *Tekin v. Turkey* Application No: 22496/93, 09.06.1998.
[114] See, AI Annual Reports on Turkey, between 1995-2001.
[115] www.radikal.com, Radikal, 18.07.2000.
[116] See *Demir and Others v. Turkey,* Application No; 21380/93; 21381/93 and 21383/93, 23.09.1998.
[117] See below for more details.

torture have rarely been suspended from duty and in some cases even received promotions.[118]

In sum the failure[119] of the judicial and administrative bodies demonstrates that torture is not practice of individual members of the security forces in Turkey, but that there is also a kind of 'silent acknowledgement' of its use among the judiciary and administration.

i. Regulation of detention conditions and length of time

After the military take over in 1980, the length of detention was 90 days for crimes committed in an area under the state of emergency and 30 days for others. Turkey first of all adopted a new Criminal Procedure Law and reduced the detention period to 30 and 15 days respectively in 1992. It also introduced the rule, by adding a new article 135/a, that a statement which is taken by the use of unlawful means such as torture, ill-treatment, misleading, using medicine, etc. cannot be used as an evidence. Despite this, the Turkish judiciary has never applied this article properly, and even where there is reported torture during detention the statement of the accused person has been taken into account by the courts and used as evidence in order to give sentences.[120]

During examination of the *Erdagoz v. Turkey,*[121] case before the Committee of Ministers Turkey referred to this new procedural law, while indicating that between 1992 and 1995 it had taken some measures which were directed at preventing torture and ill-treatment during detention in police custody, in particular, as regards crimes committed outside the emergency regions and/or falling outside of the competence of the State Security Court.[122] It had issued new measurers, namely, the Ministry of Health Circular

[118] The most striking example is that of the bodyguard of Prime Minsiter Recep Tayyip Erdogan, who had been working in Anti-Terror Branch of Police, and had been accused of a torture allegation, 23.07.2004, Head news on Turkish ATV Television Channel.
[119] Akcam, 1992, p.324.
[120] Also see, CPT Report 2001, found that the practice of delaying access to a lawyer until a formal statement has been taken persists in many police stations. The majority of investigations by police and prosecutors are still geared towards obtaining a confession from the suspect, often without the presence of a lawyer, and confession are still accepted in courts without further supporting evidence.
[121] Application No: 21890/93, 22.10.1997, concerning allegations of ill-treatment, false imprisonment and defamation and unlawfulness of the 'detention in police custody' of the applicant.
[122] Resolution DH (96) 17.

on Medical Reports for detainees and the Interior Ministry Circular on establishment of a 'Detention Following Unit' which is in charge of giving information to detainees' relatives and other people on 03.07.1995. Meanwhile, the Turkish Ministry of Justice had already admitted the failure of these referred amendments when stating that 'torture was a widespread practice in particular during periods of custody when the detainee did not enjoy legal protection' before the Grand Assembly in 1995.

During the examination of the *Yagiz v. Turkey*[123] case by the Committee of Ministers, the Government of Turkey informed that it had made some major amendments on the issues raised by the case. Law No. 4229 had been passed on 6 March 1997 following the judgment of the ECtHR in the *Aksoy v. Turkey*[124] case. This new law reduced the maximum length of detention in police custody of persons suspected of having committed offences falling within jurisdiction of the State Security Courts. The law also provided for certain safeguards for detainees such as access to a lawyer at least when detention in police custody is extended beyond four days. Detainees' rights to challenge the lawfulness of detention before a judge, that is by *habeas corpus*[125] proceedings, were for the first time introduced by Law No. 4229, which grants the right to bring such proceedings to all persons irrespective of the offence with which they are charged and at any point in the legal process.[126] For a long time there was no provision in the Turkish legal system for the right to compensation for unlawful detention.[127] The violation of the right to claim compensation for illegal detention, under article 5 (5), was largely due to fact that under Act No. 466, the applicant could not validly claim compensation for violations of article 5 (3) and (4) unless her/his detention also violated the corresponding provisions of Turkish Law.[128] This provision has been changed

[123] Application No. 190/92 *Yagiz v. Turkey,* the European Human Rights Commission report 16.05.1995, the Committee of Ministers DH (99) 20, 18.01.1999. The case concerned an allegation of torture during the applicant's detention in police custody.
[124] Application No.21987/93, 18.12.1996.
[125] Turkey had been found in violation since it did not recognize habeas corpus see, Application No: 23878/95, 26.11.1997 *Sakik and Others v. Turkey.* Also see, Application No.: 26148/95 *Dinc v. Turkey,* Interim Resolution DH (99) 561, and Application No.: 28010/95 *Simsek v. Turkey,* Interim Resolution DH (99) 471, *Igdeli v. Turkey*, Application No.:29296/95, 20.06.2002.
[126] Appendix to Resolution DH (99) 434, HRIB, No. 46, p. 60.
[127] *Dalkilic v. Turkey*, Application No.:25756/94. 05.12.2002, Gundogan v. Turkey, Application No.:31877/96, 10.10.2002.
[128] HRIB, No.57, 2002, p.17.

recently in line with ECtHR judgments, and possibilities introduced for compensation, however, the amount of the compensation given by the Courts are still adequate.

Turkey also updated 'The Regulation on Apprehension' in 1 October 1998. This text sums up and clarifies the rules applicable under the existing legislation to the procedures for detention in custody and interrogation. An important innovation of the Regulation is that the registration of detainees now has penetrated into law, which is especially important in disappearance cases since the ECtHR tended to ground violations upon the irregularity or lack of registration of detainees. It has also introduced some measures in order to impede incommunicado detention. The first measure concerns detainees' contact with a lawyer and the right to meet with the lawyer 'at any time' in a place where the discussion between lawyer and detainee may not be heard by anyone else, and to give their statement in presence of the lawyer. This rule had not been applicable for detainees suspected of a crime under the jurisdiction of the State Security Courts - they could access a lawyer only after detention was extended beyond 4 days. The second measure concerns access to a doctor, in order to check detainees' state of health, when persons are taken into custody, apprehended by force, when they are transferred to a new place of detention, released or brought before the courts, when the period of custody is extended. The doctor who is in charge of the medical legal report was put in charge of examining the person apprehended in private, except when this is not possible because of restrictions due to the investigation or due to reasons of security.

The government was assuming that full implementation of the new legislation and regulation as above would effectively prevent torture and ill-treatment of persons in situations similar to those at issue in *Yagiz and Aksoy* and, in particular, those detained in connection with offences committed outside of the areas under the state of emergency and not falling within the competence of the State Security Courts. The government also supported its opinion with the fact that 'the European Commission of Human Rights is already reporting *virtually* no new complaints against Turkey in respect of ill treatment in these circumstances.'[129] In fact, the government was also admitting, at the same time, the insufficiency of the measures to prevent the practice of torture and ill-treatment in the

[129] Resolution DH (99) 20, HRIB, No.45, 1999, p. 25-26.

areas subjected to emergency rule or with respect to detentions on suspicions of crimes falling under the competence of the State Security Courts.

However, a short time later, the failure of the Turkish government's assumption was also acknowledged by the Committee of Ministers in its Interim Resolution DH (99) 434[130] which had not indicated that any significant improvement of the situation was recorded more than two years after the first judgments of the ECtHR denouncing the serious violations of human rights.

By the amendment of the Constitution's article 19 in 2001, the maximum length of police custody has been reduced to 48 hours but if it is a crime which is committed in concert the length of the detention is reduced to 4 days before having to present a detainee before a judge.[131] The *First Reform Package*[132], in parallel to the Constitutional amendment in 2001, introduced into article 107 of the CPL the right to have one's relatives informed about the detention (*yakalanan*) for the first time.[133] Article 16 of 'The Law on the Establishment and Prosecution Methods of the State Security Courts', amended the length of detention for a crime under the jurisdiction of the State Security Courts reduced to 4 days. Also the restriction on access to a lawyer was removed. Under the previous law the presence of a public officer at the meetings between the detainee and his/her lawyer was required. [134] In this way the rules of procedure with regard to preventing lawyers being present during statement taking for crimes under jurisdiction of State Security Court have been eliminated.

Indeed, the right to access a lawyer and doctor from start of the detention period is one of the guarantees of protection from torture. [135] However, the implementation of this regulation still falls short of providing adequate protection since the detainees are denied,

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[130] See, Interim Resolution DH (99) 434, HRIB, No. 46, p. 62.
[131] Article 4 of the Law No: 4709, (2001).
[132] Article 3 of the Law No. 4744, (2002).
[133] The article 6 and 7 of the Law No. 4744, (2002). It increased length of detention under state of emergency. from 4 to 7 days if so demanded by the public prosecutor and if so decided by the judge. However the judge before delivering his/her decision on the issue has to hear the detainees This article also, guarantees the right to access a lawyer at any time after 4 days for the detainees who was arrested in an area under the state of emergency.
[134] Article 7 (c) of Law no. 4748,(2002) Also this law introduced that with article 28 of Law No. 4778, amended the KHK No.430 of the article 3 paragraph (e) dated 15.12.1990 but it was not abolished thoroughly. It still allows interrogation of the prisoners and remand for 7 days by the demand of State of Emergency Province and decision of the judge.
[135] *Yolcu v. Turkey* Application No.:34684/97, 05.02.2002.

discouraged and are not being informed about the possibility of access to a lawyer.[136] According to the CPT report in June 2003, of those accused of crimes related to State Security Courts between 1 January and 31 March 2003, 1954 of the 2725 people accused did not seek to talk to their lawyer. The figures in the Annual Report of January to September 2003 of Human Rights Association[137] about the number of persons who alleged being subjected to torture was 1232. It demonstrated that Turkey has a long way to go in order to prevent this 'crime against humanity'.[138]

ii. The accountability of the state officials

Turkey has been found in breach of article 13 of the Convention 26 times.[139] Those cases arose from the lack of effective investigation into allegations of torture, disappearance[140], eviction from villages and killing[141] by the security forces. The reasons behind this were partly the attitude of the prosecutors and judiciary. Mostly, however, there was some legal obstacle that impeded the investigation of the unlawful wrongdoing of the security forces. The Committee of Ministers had also called upon Turkey to rapidly complete the reform of the present system of criminal proceedings against members of the security forces, in particular by abolishing the special powers of the local administrative councils to engage in criminal proceedings and to reform the prosecutor's office in order to ensure that prosecutors will in the future have the independence and necessary means to ensure the identification and punishment of members of the security forces who abuse their powers so as to violate human rights.[142]

In its Interim Resolution DH (2002) 98[143], which followed up Interim Resolution DH (99) 434, the Committee of Ministers pointed out its concerns at the continuing existence of new complaints of alleged torture and ill treatment as evidenced notably through new applications lodged with the ECtHR. It also drew attention to a CPT Report

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[136] Regular Report 2003, p.27.
[137] www.ihd.org.tr/rapor/ozet/2002.htm
[138] See, chapter- 4.
[139] See, chart-1.
[140] Application No:23657/94, *Cakici v. Turkey*, 08.07.1999.
[141] Application No: 21594/93, Ogur v. Turkey, 20.05.1999.
[142] Resolution DH (99) 434, HRIBNo. 46, p. 61.
[143] HRIB, No.57, 2002, p.18.

which noted a gradual improvement as regards the treatment of persons detained by the police in Istanbul while indicating the considerable number of allegations of serious forms of ill-treatment reported in South-Eastern regions and to the continuing existence at certain police stations in these regions of interrogation facilities of a highly intimidating character. Further, it urged Turkey to accelerate without delay the reform of its system of criminal prosecution for abuses by members of the security forces.

Thereupon, Turkey started some reforms in its legal system in order to combat torture. First of all it amended article 243 of the TCC[144] increasing the maximum penalty for torture from five to eight years and extending statutory definition of torture.[145] The amendment of article 354/4 of the TCC, which concerns the prosecution of doctors and other medical personnel charged with drafting false reports regarding cases of torture or ill treatment, increased the fine and the term of imprisonment from 4 up to 8 years.

Turkey has amended article 13 of the 'The Law on Rules of Procedure of Civil Servants and Other Public Officials'[146] introducing the possibility of rescinding the status of a civil servant who perpetrates torture and ill-treatment in the cases in which Turkey is found to be in violation of the ECHR by the ECtHR and for compensation which is recoverable from that civil servant. There is, however, no clear proof which shows the deterrent effect of this amendment.

The Fourth Reform Package[147]changed article 245 of the TCC so that the punishment requested in article 243 and 245 of the TCC for those convicted of torture, cannot be reduced neither to a fine or some other non-custodial sentence. Also this punishment cannot be suspended. In fact this change was the Turkish government's response to criticism of the Regular Report 2002 about light sentences for those found guilty of torture including the imposition of fines or suspension of the penalty.[148]

Article 2 of 'The Law on the Trial Procedural Rules for Civil Servant' has been amended[149] and it now provides that the procedure in article 154 of the Criminal Procedural Law, which requires obtaining permission from superiors in order to open

[144] Law No. 4449, (1999).
[145] For the problems which the old definition of torture had created, see Chapter –4.
[146] Article 3 of Law No. 4748, (2002).
[147] Article 1 of Law No. 4778, (2003).
[148] Regular report 2002, p.29.
[149] Article 33 of Law No. 4778, (2003), It had already been amended with some serious changes by Law No. 4483, 'The Law on Rules of Procedure of Civil Servants and Other Public Officials', (1999)

enquires about public officials, shall not be applicable in cases of torture and ill-treatment. In this way Turkish law makes an exception to the general rule on the trial procedure rules for civil servants, thereby making it easier to bring inquires against a civil servant in the case of torture or ill-treatment. Also, under 'additional article 7' introduced to the CPL, once an inquiry has been started, the investigation and prosecution of torture becomes a judicial priority and the hearings are not to be delayed by more than 30 days unless absolutely necessary in order to decrease the risk of impunity.[150]

Despite all these changes, the UN Committee of Against Torture (CAT) found in May 2003, that in spite of the large number of complaints, the prosecution and sanctioning of members of the security forces for torture and ill treatment are rare and that cases continued to be dropped because trials are discontinued due to elapse of time.

3.2. Fair Trail

Although the Turkish Constitution guarantees considerable protection for the 'right to fair trial' under section XIII of article 36, it did not actually contain the phrase of 'the right to fair trial'. In 2001 this article was amended[151] and this wording has specifically been added to it. In this way the 'right to fair trial' parallels the ECHR norm, and has also gained 'Constitutional protection'.

The impartiality of the Turkish judiciary has been a matter of concern because of the presence of military judges in the civil courts and the *'guardianship'* (vesayet) of the Ministry of Justice over the High Council of Judges and Prosecutors.[152] Also the length of the trial and the period of remand during/prior to trial is one of the serious problems in Turkey. The judiciary does not prefer to grant bail or other measures, which could impede an accused person to escape. As these two violations have generally occurred concurrently in Turkey, I will also examine developments related to article 5 (3) of the ECHR in this section.

The endemic problem of lack of notification of judicial acts and decisions to the accused or condemned person should also be noted. This has been a major shortcoming

[150] Article 5 of the Law No. 4963 (2003).
[151] Article 14 of the Law No: 4709, (2001)
[152] Karakus, 2001, p.336.

of the legal system. Specifically, letters of the Chief Prosecutor of the Court of Appeal on the merits of a case were not being sent to the parties in a case. As a result, Turkey has been found in breach of article 6 of the Convention in several cases.[153] Finally with the *Fourth EU Harmonization Package* it amended its Criminal Procedural Law in 2003, and added a new paragraph to 316 of the CPL, which obliges the Chief Prosecutor of the Court of Appeal to sent his letter to the parties.[154]

i. Length of trials and to be held on remand during the time

During the examination of the *Yagci and Sargin and Mansur v. Turkey* case[155], Turkey stated that it had amended article 110 of the CPL[156] to read that the detention period in a 'pending trial shall not exceed two years if the maximum sentence laid down by law is less than seven years' imprisonment. Turkey also informed that 'if the maximum sentence laid down by law is greater, detention pending trial may be continued if the circumstances of the case so warrant.'[157] However, this statement in the law does not reflect the actual position in practice since the Turkish authorities neglected to inform the Committee of Ministers that if a minimum sentence is greater than 7 years article 104 carries the presumption that the accused would abscond and therefore was more likely to be kept in detention. This article had been used as a tool in order to keep the accused person on remands, especially where trial was awaited for those crimes which fall within the jurisdiction of the State Security Court.

Indeed, trial on remand is not the exception in Turkey - it is the rule. This can be seen clearly in the statistics of the Ministry of Justice. Half the prison population is 'remanded' at present in Turkey. In 2004 296 persons were remanded for between 5 and 10 years, 594 persons for between 3 and 5 years, 1042 persons between 2-3 years and 1852 person 1-2 years. This shows us that the legal amendments are too cumbersome to guarantee liberty of the accused person during a period their innocence is presumed. The

[153] Application No. 36590/97, *Goc v. Turkey*, 09.11.2000. The case was referred to the Grand Chamber which it upheld the section's judgment on 11.07.2002.
[154] Article 2 of Law No. 4778, (2003).
[155] Application No.: 16419/90, 08.06.1995, Application No.: 16026/90, 08.06.1995.
[156] Article 7 of Law no. 3842, (1992).
[157] Resolutions DH (96) 22 and 23 of 9 February 1996.

lack of personnel and equipment are part of the reason for the length, which is itself a consequence of an insufficient budget. Indeed, the share of the Ministry of Justice from the general budget was only 0.77% in 2001.[158]

ii. Impartial Courts

Turkey had experience of harsh sentences with the Martial Law Court, which was established after the military take over in 1980, and through which were tried countless civilians. These courts were lifted in 1986. During the examination of the *Mitap and Muftuoglu v. Turkey* case[159] before the Committee of Ministers, Turkey argued that these powers had been transferred to the ordinary courts after a legislative amendment adopted on 27 December 1993. Meanwhile Turkey was assuming it has complied with the decision of the Committee of Ministers.[160] In fact, these courts had not been lifted thoroughly, they had only been reformed and replaced by the 'The State Security Court' which had a military judge in its composition and had special procedural rules which was not so different from the Martial Law Courts.

Meanwhile, the jurisdictions of the military court over were civilians continued, especially under article 58 of the MCC (inciting soldiers to mutiny and disobedience, discouraging the public from military duty and undermining national resistance). This article has been applied to persons who do not want go for their compulsory military service, so-called *'conscience refusals'*. Nevertheless, with amendments to article 11 of the 'Law on Establishment and Trial Procedures of Military Courts' these are no longer subject to the jurisdiction of the military courts in peace time.[161]

A few months after the Turkish government's reply, the ECtHR found the State Security Courts as not being impartial in the *Incal v. Turkey* case[162], which concerned the

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[158] It was 3.1% in 1950, %3 in 1961, %1 in 1971, %1.5 in 1986, %1.08 in 1995.
[159] Application No: 15530/89 and 155331/89. 'The applicants complained of the excessive subsequent criminal proceedings before the Martial Law Court, notably as regards the length and the fairness of the proceedings and the lawfulness, independence and impartiality of the court. The Committee of Ministers stated that there had been a violation of article 5 (3), as regards the excessive length of detention on remand; and of article 6 (1) as regards the fairness of the proceedings before the Martial Law Court and the lack of independence and impartiality of this court.' HRIB, No: 43, 1998, p.29.
[160] Resolution DH 82, 22.04.1998.
[161] Article 6 of the Law no: 4963, (2003).
[162] Application No. 22678/93, 09.06.1998.

conviction of the applicant by the State Security Court for incitement to racial hatred. The applicant complained that he did not receive a fair hearing and since a military judge sat in the court, the court was not independent and impartial. The ECtHR held that the presence of the military judge affected the impartiality of the court and was a violation of article 6/1 (right to an independent and impartial tribunal) of the Convention.

After *Incal v. Turkey*, the domestic law position remained the same and another violation was found in *Ciraklar v. Turkey*.[163] Following this judgement Turkey did not show any sign that she would change the composition of the State Security Courts. Interestingly, she made its mind to execute those judgments in the middle of the hearing of Öcalan. Thereupon, the composition of the State Security Courts was changed by amendment[164] to article 143 of the Turkish Constitution and the military judge was replaced with a civilian one. In fact the purpose of the Turkish authorities was neither to implement ECtHR judgments nor to develop the legal procedure in such a way as to align with ECHR standards. It was only to ensure that the trial of Abdullah Öcalan could not be challenged on that ground before the ECtHR. Nevertheless, pressure from the EU has not been forgotten. Indeed, the EP has expressed its concern at the fact that a State Security Court was being used in Mr Öcalan's trial, as the involvement of military judges compromises the independence of the process and reiterated its expectation for a public and fair trial for Mr Öcalan.[165]

Turkey's delay in implementing the judgment of the ECtHR laid the basis for further judgement against Turkey in similar cases.[166] Another reason is that the ECtHR considered that an appropriate redress for those cases could only be provided with a retrial of the applicant by sufficiently impartial and independent tribunals.[167] At the very end, the State Security Court has been abolished with the lifting of article 143 of the

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[163] Application No: 19601/92, 28.10.1998.
[164] Law No.4388, (1999), which entered into force on the day of its adoption, provided in particular, 'the State Security Court should be composed of a president, two regular members and a substitute member.'
[165] Bulletin E, 5-1999.
[166] Application No.: 45672/99 *Dertli and others v. Turkey*, 24.06.2003, also see; Application No.: *Selcuk Yildirim v. Turkey*, 30451/96, 25.09.2001.
[167] Application No.: 52665/99 *Akkas v. Turkey*, In this case the ECtHR found a breach of article 6/1 again after its previous judgment in similar cases in *Incal v. Turkey* and *Ciraklar v. Turkey* in 1998.

Constitution in 2004.[168] However, the draft law on the replacement of those courts would not make so many changes.

The presence of the military judges was one part of the process. The other part is the organic link between the judiciary and the executive via the High Council of Judges and Prosecutors. This Council is in charge of appointment, promotion and discipline of all judges and prosecutors. The Ministry of Justice chairs the Council and the secretary of the Ministry of Justice is also a member, while the President appoints the rest of members of this Council. Since it does not have its own secretariat and premises it is completely dependent upon the directorate and inspection board of the Ministry of Justice for its administrative tasks. The judges are inspected by the inspector of the Ministry of Justice and the possibility of removal and transfer to less attractive regions of Turkey by High Council influences judges' attitudes and decisions. This concern has been expressed in the Regular Reports as well.[169]

iii. The ECtHR's justice in the domestic courts: The retrial of cases at the domestic level

The *Sadak, Zana, Dicle and Dogan v. Turkey* case[170] is one which has provided much cause for consternation to Turkey, since the execution of the judgment was being attentively observed not only by the Committee of Ministers but also by the Parliamentary Assembly[171] and outside the Council of Europe, notably by the European Union. Compliance with the judgment in the case has even been treated as one of the criteria for EU accession process. On the other hand domestic political concerns of the Turkey prevailed and the ECtHR's judgment could not be executed for a long time.

The Committee of Ministers, in its Interim Resolution (2001) 106, only a few days after *Sadak and others v. Turkey* judgment of 23 July 2001, pointed out that judgments of the ECtHR and measures needed to be incorporated into Turkish legislation to make reparation for consequences of the convictions. If not, it would be contrary to the

[168] Article 9 of the Law No.5170, (2004).
[169] See; Regular Report 2002 p.22 and 2003, p.21.
[170] Application No. 29900/96, 17.06.2001.
[171] This case was followed up by the Parliamentary Assembly, at its 4th part session when it adopted Resolution 1297 (2002) and Recommendation 1576 (2002).

ECHR. On 2-3 October 2001, the Committee of Ministers requested Turkey to consider urgently some specific measures so as to repair the violation of the right to a fair trial for the applicants. The Turkish authorities initially informed the Committee that possibilities for re-opening domestic proceedings following the ECtHR's judgments would shortly be introduced through legislation.

Since no progress in the execution of the judgment was reported, the Committee of Ministers at its 794th meeting adopted Interim Resolution ResDH (2002) 59 in which it strongly urged the Turkish authorities, without further delay, to respond to the Committee's repeated demands that the authorities urgently remedy the applicants' situation and take the necessary measures in order to reopen the proceedings impugned by the Court in this case, or to take other ad hoc measures erasing the consequences for the applicants of the violation. Thereupon, the Grand Assembly enacted a law which provided for the reopening of the domestic process. However, it was a disappointment, to discover that the new law was applicable only to new cases, lodged with the ECtHR after its entry into force and it did not cover the case in question. The criticism of the Committee of Ministers was supported by the EU regular report 2001 which raised the *Sadak and others v. Turkey* case, and further pushed Turkey to 'introduce the possibility of reparations for violations of the ECHR'.[172]

Eventually, almost two years after the first examination of the case by the Committee of Ministers, Turkey introduced its *Fifth EU Harmonization Package*[173] and reopened domestic proceedings in all cases, which had already been decided by the ECtHR prior to 4 February 2003, and those which would be decided in future. Those people concerned should, under the new law, demand a reopening of their case within one year. The provision, however, excluded the reopening of the cases which were presently pending before the Court or had been concluded with a friendly settlement. In reality, the reasons behind this strange law and the delay was mainly the political agenda of the Turkish politicians who did not want to be cornered into a situation that would necessitate a retrial of the Öcalan case, which is one of the cases excluded by this law.

[172] The 2001 Regular Report p.17-18; also see Regular Report 2002.
[173] The Law No.4793, (2003).

On the basis of the new law the Ankara State Security Court accepted the applicants' request as to the reopening of their cases. Nevertheless, the Court rejected their request for the suspension of the execution of the original prison sentences on 28 February 2002. After a 13-month trial the Court did not change its previous decision and condemned them to 15-year prison sentences on 21 April 2004. This decision of the Court was subjected to serious criticism from Europe. The Head Prosecutor of the Court of Appeal asked for the quashing of the first instance Court decision on the basis that the Court had not applied the standard of 'fair trial' in the way interpreted in the judgment of the ECtHR, that is, the trial had not taken place again from the beginning, witnesses were not heard by the Court, the decision of the court did not give the reason as to why the chairperson of the Court sat in the court even though there had been a disqualification against him.[174] This step of the Court of Appeal Head Prosecutor demonstrates that some important developments in human rights and democracy are imminent in Turkey.[175] On the same day, 09.06.2004 the 9th Chamber of the Court of Appeal released Zana and friends on the application of their lawyer.[176] The appeal of this case took place in 08.07.2004 and the Court of Appeal quashed the first instance court judgement on account of not to be met the rule of procedure.

3.3. Freedom of expression

Although a considerable free press exists in Turkey, the legal system retains numerous means to restrict and punish the expression of views with which it disagrees. The law used to punish the expression of dissentient opinions, in particular, articles 155, 158, 159, 312 of the TCC which prohibits 'inciting people to enmity and hatred by pointing to class, racial, religious, confessional or regional differences' and article 7 and 8 of Anti-Terror Law which outlaws 'propaganda against the state's indivisibility', have been used against persons seeking to discuss the Kurdish problem.

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[174] http://www.radikal.com.tr/haber.php?haberno=118670&tarih=07/06/2004.

[175] www.radikal.com.tr/haber.php?haberno=118823&tarih=09/06/2004, Av. Yusuf Alatas, the lawyer of Zana and friends commented that, for the first time in Turkey, instead of political anxieties, the law prevailed, www.radikal.com.tr/haber.php?haberno=118823&tarih=09/06/2004.

[176] http://www.radikal.com.tr/haber.php?haberno=118917&tarih=10/06/2004. After their release a lot of human rights organizations, the EU and spokespersons of Germany, France, Greece, etc. indicated their satisfaction about the matter.

Despite Turkey having been found to be in breach of article 10 of the ECHR, due to the application of the above mentioned domestic legal provisions in several cases,[177] it neither abolished those nor altered their definition in a way which would have broadened the scope of freedom of expression in accordance with the ECtHR's case law.[178] Nor has the Turkish judiciary interpreted them in a way that stops further violations in similar cases.

On the other hand, when the *Yagci and Sargin and Mansur v. Turkey* case was before the Committee of Ministers,[179] Turkey informed the Committees that it had repealed the main charge against the applicants in the case by removing article 141 and 142 of the TCC, which made it an offence to disseminate communist propaganda and article 163 of the TCC, which had been used against dissentient intellectuals after the military take over. In fact these changes had already been introduced by Law no. 3713, the Anti Terror Law, which had come into force on 12 April 1991 as a response to EU pressure. Also in 1995, the maximum penalty was reduced from five to three years for a breach of article 8 of Anti-terror Law and adjusted penalty for the editors or publishers. The Turkish government was expressing its aim of complying with the ECHR and the ECtHR's judgments in general reasoning of the law.[180] However, after that Turkey did not put any effort to stop violations of the 'freedom of expression', except to provide suspension of the trials and penalties for crimes committed via press on 28 August 1999.[181]

It was for that reason that paragraph 5 of the Preamble to the Turkish Constitution was amended. The amendment replaced the phrase, 'no protection shall be accorded to any thought and observation (*mulahaza*)' with 'no protection shall be accorded to any activity (*faaliyet*)'. In this manner, it demonstrated that the Constitution is no longer in favour of the prohibition of any expression of thought that does not result in an action.[182]

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[177] Application No.23462/94 *Arslan v. Turkey,* 08.07.1999, concerning a sentence against the applicant for the same book twice.
[178] Application. No. 21980/93, *Bladet Tromso & Stensaas v. Norway,* 1999, Also see, Jean-Paul Costa, 2003.
[179] Resolution DH (96) 22 and 23 of 9 February 1996.
[180] The Turkish Court of Cassation, Grand Penal Chamber's judgment 1999/9-58 E. 1999/69K. and dated 20.04.1999.
[181] The Law No. 4454 , (1999).
[182] Yuzbasioglu, 2002, p.2.

It also allows the expression of thought by all means and in any other language than Turkish.[183] One of the main restrictions with respect to the freedom of the press, the phrase 'publication shall not be made in any language prohibited by law' has been removed from article 28 of the Constitution. Also the principle of proportionality has been introduced and a number of restrictions, which have provided grounds for limiting fundamental rights and freedoms, have been removed in article 13 and 14.

The *First EU Harmonization Package*[184] intended to change the above articles in order to broaden limit of the freedom of expression. In fact, the proposal, which aimed to broaden the limit of the freedom of expression, related to article 159 and 312 caused a crisis among the ruling coalition parties, and was against the policy of the Nationalist Movement Party (MHP). Thereupon, the new Law was only able to reduce the maximum penalty under article 159 (insult to the State institutions) from 6 to 3 years, while the fine was abolished without redefining it. However, the definition of article 7 and 8 of Anti terror Law and article 312 of the TCC was amended.[185] Finally, with the *Sixth EU Harmonization Package*[186] article 8 of the Anti-Terror Law was abolished, and this new law also changes the definition of 'terror' in article 1 of the Anti-terror law with the phrase 'every kind of activity' being replaced by 'every kind of activity which constitutes a crime'.

Due to the strong opposition of the MHP during the debate on the *First EU Harmonization Package* article 159 of the TCC remained unchanged. It was later amended by the *Third EU Harmonization Package*[187] as follows: 'expression of criticism of the institutions is no longer subject to penalties unless they tend to 'insult' or 'deride' those institutions'. By the *Seventh EU Harmonization Package* this article was changed

[183] These phrases were lifted: 'A language prohibited by law cannot be used in the expression of thought' in article 26, and the phrase of 'A language prohibited by law cannot be used in broadcasting' in article 28 of the Constitution.
[184] The Law No. 4744, (2002).
[185] In article 312 (1) of TCC, the phrase of 'manifest incitement' was replaced by 'manifest incitement in a way dangerous for public order'. Also a new phrase was added which is 'the denigration of a segment of people in a way that hurts the honor of people'. However, what was given by the one hand was taken back with the other, with the amendment to article 7 (2) and 8 (1) of the Anti-Terror Law. Indeed, while the phrase of 'to make propaganda about the (illegal organizations)' in article 7 (2) was replaced by 'to make propaganda about an illegal organization in such a way as to cause to turn to terrorist methods', the scope of article 8, which includes 'visual propaganda' as well, was expanded.
[186] The Law No.4928, (2003).
[187] Article 2 (A) of Law No: 4771, (2002).

again to read 'without having the purpose to insult, to express an idea the purpose of which is to make a criticism does not require a penalty.' Also, article 30 of the new *Package* amended article 7 (2) of the Anti-Terror law to read as follows, 'to make propaganda for an illegal organization inciting violence or other terrorist methods'.

The *Third EU Harmonization Package* also modified the Press law by replacing prison sentences for crimes related to the press with heavy fines. In this way Turkey has changed its legislation in line with the ECtHR judgments in *Baskaya and Okcuoglu v. Turkey* [188] three years after the Court's judgment. The Court had found a violation of articles 10 and 6/1 and the Court held that there had been a breach of article 7 of the Convention as regards the second applicant, who was given a prison sentence corresponding to his position as publisher.

Although these changes aimed at stopping the penalization of 'thought' not turned to action, expectations have been disappointed given the practice of the judiciary. Public prosecutors have started to use other provisions especially article 169 of the TCC (support for an illegal armed organization) in order to limit freedom of expression.[189] This practice of prosecutors has been observed in the regular reports of the EU Commission.[190]

The *Second EU Harmonization Package* made it more difficult to prevent the distribution of newspapers by introducing judicial review of the public prosecutor's decision within 48 hours. This provision prohibited distribution of certain newspapers in an area under the state of emergency[191] and had been used against a daily newspaper between 31 May 1992 and April 1993. Confiscation orders had been used against 39 out of 228 issues of this newspaper, as a part of the state campaign of intimidation forcing closure of this newspaper.[192]

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[188] Application No. 23536/94 and 24408/94, 08.07.1999. Also see; Application No. 25067/94 and 25068/94 *Erdogdu and Ince v. Turkey*, 08.07.1999, editor in chief published an interview, which Mr. Ince had conducted with a Turkish sociologist, violation of 10. Application No. 23556/94 *Ceylan v. Turkey*, 08.07.1999; Application No. 24919/94 *Gerger v.* Turkey, 08.07.1999. Application No. 23168/94 *Karatas v. Turkey*, 08.07.1999.

[189] This was the particularly case for students who lodge a petition for a Kurdish language courses at university.

[190] Regular Report 2002, p.21 and also see Regular Report 2003.

[191] *Cetin and others v. Turkey*, Application No.: 40153/98 and 40160/98.

[192] *Ozgur Gundem v. Turkey*, Application No.: 23144/93, 16.03.2000.

3.4. Political Parties

The ECtHR has regarded political parties and pluralism as the main foundation of a European public order and democracy.[193] However, the Turkish version of democracy differs greatly from the traditional Western concept of democracy and is also further distinguished by its strict one nation one state idea, which does not recognize any other ethnicity except the Turks, and its unique, even odd practice of secularism. In the last half-century, the Turkish Constitutional Court and military regimes have banned more than thirty political parties.[194]

The *Turkiye Birlesik Komunist Parti and Others v. Turkey* case[195] was first the party closure case before the ECtHR. The case concerns the dissolution of the United Communist Party of Turkey, as ordered by the Constitutional Court. The closure entailed its liquidation and the transfer of its assets to the Treasury. As a consequence Mr. Sargin and Yagci, as founders and managers of the party were banned from holding similar office in any other political body. The Court found a violation of article 11 of the Convention.

This case was followed by *Socialist Party and Others v. Turkey.*[196] The case concerned the dissolution of a political party on account of certain statements made in 1991 by the Party's chairman Mr. Perincek and on the ground that its manifesto infringed the unity of the nation. The Court held that there had been a violation of article 11 of the Convention. After the judgment of the EctHR, the Court of Appeal confirmed the criminal conviction imposed on Mr Perincek by the First State Security Court of Ankara on 15 October 1996. The Court of Appeal based its judgment on statements which had been made by Mr. Perincek in 1991, even though the ECtHR had found that the dissolution of the Party, which had itself been based on those same statements, was a violation of the ECHR. He was sentenced to a 14-month prison sentence, which he

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[193] Application No: 19392/92 *Turkiye Birlesik Komunist Partisi and others v.Turkey* , 28/03/1998; Application No: 21237/93 *Sosyalist Party and others v. Turkiye*, 25/05/1999; Application No: 23885/94 *Ozgurluk ve Demokrasi Partisi (OZDEP) v. Turkey*, 08/12/1999; Application No:153118/89 *Loizidou v.Turkey*, 23/03/1995.

[194] See, Yuksel, fotenote, 443

[195] Application No: 19392/92, 30.01.1998.

[196] Application No: 26482/95, 25.05.1998.

started to serve on 29 September 1998, and has also, *inter alia* been banned from further political activities a sanction which the dissolution of the party also carried.

Later, in connection with both the *Socialist Party Turkiye Birlesik Komunist Parti* cases, the Parliamentary Assembly asked a written question No.378[197] to the Committee of Ministers concerning the execution of the judgments and whether Turkey envisaged the taking of any measures to allow the applicant political parties and their leaders in those cases to resume their political activities. Following this written question the Committee of Ministers adopted Interim Resolution DH(99)245, on 4 March 1999.[198] It recalled Turkey's obligation under article 53 of the Convention to erase, without delay, all the consequences resulting from the applicant's criminal conviction. A few months later, on 28 July 1999, it adopted another Interim Resolution DH(99)529[199], observing that the Chairperson of the Committee of Ministers had handed a letter dated 19 May 1999 to the Minister of Foreign Affairs of Turkey, urging that full effect be given to the judgment of ECtHR and interim resolution of the Committee of Ministers. In its response of 5 July 1999, Turkey noted with regret that action had still not been taken by the Turkish authorities and admitted that it had not complied with its obligation under the ECHR.

Mr. Princek was released following these exchanges and only 2 months after this embarrassing correspondence with the Committee of Ministers, Turkey amended[200] article 95 of the Political Parties Law and restricted the prohibition on founding or being a member, manager or inspector of a new political party to 5 years, a period which starts from publication of the Constitutional Court judgment?). However, such persons could still not stand for elections. The law also tried to make it difficult for a party to be dissolved by changing article 101 of the Political Parties law. However these changes were withdrawn by the Constitutional Court since it found them contrary to the Constitution.

As explained above Turkey has a consistent political party closure tradition. This reality is also mirrored in the case law of the ECtHR. Indeed, so far, the ECtHR has

[197] HRIB, No. 45, 1999, p. 46.
[198] HRIB, No. 46, 1999, p.21.
[199] HRIB, No. 47, 1999, p.29.
[200] Article 14 of the Law no. 4445, (1999).

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found violations of the ECHR in six cases and five of them were from Turkey.[201] However, with more recent legislation[202], the reasons for party closure were narrowed down to 'where the action(s) committed by members violating a number of basic principles are endorsed by the party as a whole'. Instead of closure of a political party the new measures have been introduced, such as partly or completely depriving a party of state funds. However, the grounds for banning a political party remain unchanged. Also the political parties have a right of review against the request of the Public Prosecutor of the Court of Appeal to dissolve a party.

However, these new regulations and the persistent case law of the ECtHR could not prevent the Turkish Constitutional Court endorsing the closure of People's Political Party (HADEP), an opposition Kurdish political party, in March 2003. As it is seen above there is still no sign that Turkey's "appetite to ban political parties has been quelled. Such repressive political actions have become routine practice in protecting the Turkish democracy.

3.5. The right to the peaceful enjoyment of a possession:

i. *Loizidou v. Turkey*: Political considerations

Loizidou v. Turkey[203] was the only case in which Turkey manifestly refused to implement its European human rights obligations because of the political and economic consequences flowing therefrom. The case concerned a claim for just satisfaction under article 50 arising from a judgment of the Court. In fact Turkey stated that 'the sums awarded by the ECtHR could only be paid to the applicant in the context of a global settlement of all property cases in Cyprus'. However, the Committee of Ministers did not consider the conditions of payment envisaged by Turkey as being in conformity with the obligations under the ECtHR's judgment. The Committee of Ministers strongly urged Turkey to 'review its position and to pay the just satisfaction awarded in this case in accordance with the conditions set by the ECtHR so as to ensure that Turkey, as a High

[201] See for detailed information, Derya Bayir-Kerim Yildiz, 2001, p.56.
[202] Article 25 of the Law No: 4709, (2001).
[203] Application No: 15318/89, 28.07.1998.

Contracting Party meets its obligation under the Convention.'[204] Turkey did not attempt to comply with this interim resolution. The Committee of Ministers adopted another interim resolution and declared that 'the refusal of Turkey to execute the judgment of the Court demonstrates a manifest disregard for its international obligations, both as a member state of the Council of Europe.'[205] In its third interim resolution the Committee stated that 'every member State of Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms; and that acceptance of the Convention, including the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership of the Organization.'[206] It thus gave a signal that Turkey's membership of the Council of Europe would be jeopardized if Turkey continued persisted in its attitude to *Loizidou* case. The non-execution of the judgment also received the attention of the EU, and the EU Commission referred to it in its Regular Report of 2001.[207] As a result of all this pressure Turkey has paid the just satisfaction awarded by the Court in 1998 in October 2003.

ii. Confiscation cases

In the last few years cases related to article 1 of Protocol 1 to the ECHR from Turkey have increased. In fact they all occurred from the failure of the Turkish government to pass legislation adjusting the default interest rate for delayed payment of confiscated lands. Indeed, the Law No.3095 in 1984 had fixed the statutory rate of default interest on state debts at 30%, whereas the average rate of inflation at the time was 70% per annum. For the first time in *Aka v. Turkey* case[208] Turkey was found to be in violation of the right to the peaceful enjoyment of a possession.

Following the Court's judgment in *Akkus v. Turkey* case the Council of Ministers, by decision adopted on 9 October 1997, increased the statutory rate of default interest on state debts from 30% to 50%. The Government subsequently concluded, however, that

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[204] Interim Resolution DH (99) 680, HRIBNo: 47, 1999, p.29.
[205] Interim Resolution DH (2000)105, HRIB No.51, 2000, p.21.
[206] ResDH (20001) 80, HRIBNo.53, 2001, p.20.
[207] The Regular Report 2001, p.21.
[208] Application No: 19639/92, 23.09.1998.

the increase in the statutory rate to 50% would not prevent further violations of article 1 of Protocol No.1 since the inflation rate was still close to, or even in excess of, 70%. On 15 December 1999, a law was adopted which, upon its coming into force on January 2000, brought the statutory rate of default interest into line with the annual rediscount rate applied by Turkish Central Bank to short term debts. The latter rate is fixed and permanently reviewed in relation notably to the country's inflation rate. The Government considers that this new method for determining the statutory rate of default interest will also encourage the relevant authorities to speed up payment procedures. Furthermore, by amending article 46 of the Turkish Constitution[209] introduced that when payment for confiscation is made in instalment and there is a delay in making such payments, then the state should apply the highest rate of interest for public debt.

[209] Article 18 of Law No: 4709, (2001).

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The response of judiciary bodies to ECHR

The case law of the domestic judicial bodies of a country give us significant clues to its human rights situation since, they are the only subject which gives a life to the dead human rights norms and establish their boundaries with their judgments. An open minded and independent attitude of the judges/judiciary which gives more weight to individual rights[210] in cases concerning human rights and freedoms are crucial to providing appropriate protection to them. Furthermore the judiciary is also in charge of implementation of international human rights obligations as much as the administrators since some violations of those rights would be the result of the misinterpretation and misapplication of laws by the judiciary.

As with other countries Turkey carries a great number of freedoms and human rights in its legal system although with some serious shortcomings especially in the sphere of minority rights. However, the judiciary responses to those rights are so limited and seem intent on protecting the state from the individual. The reasons for this could be found in the official ideology and not to have a tolerance culture and restrictive structure of the legislation. Since the understanding of the freedoms and human rights by the judiciary is conditioned by such ideas it would not be difficult to imagine its reaction to the reception of international human rights instrument and bodies.

In this chapter I will scrutinize the recent case law of the Turkish Supreme Courts and to examine how they have responded the ECHR and the ECtHR's case law which has been seen as a foundation of the EU legal order. First I will analyse the position of the ECHR in the Turkish legal system. In so doing I will only look at the case law of the Constitutional Court (Anayasa Mahkemesi), The Court of Appeal (Yargitay), The State of Council (Danistay) due to limited space. At this point I should also mention that beside these there are also four other supreme courts in Turkish legal system, which are the

[210] Caglar, 2000, p.51-52.

Court of Jurisdictional Disputes, The Court of Accounts, Military Courts and the Military Court of Appeals and the Supreme Military Administrative Court

4.1. The position of International law in the Turkish legal system

The place of international treaties in Turkish legal system has been designed in article 90 of the Turkish Constitution.[211] Article 90/5 reads; 'International treaties duly put into effect carry the force of law. No appeal to the 'Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional.' According to this article the ECHR has became a 'privileged' part of Turkish legal system.[212] Nevertheless, this vague formulation has created an unending debate among the Turkish judicial bodies and academics on the questions as to what the relation between domestic laws and international treaties is and, which should be preferred in the case of a conflict between them.

In doctrine some of the commentators defended a 'monist'[213] approach and say that the ECHR has a higher position than the Constitution in the hierarchy of norms and, when a conflict occurs between the domestic law and international treaties, the priority should be given to the ECHR norm. Since, except for getting the approval of the Turkish Grand Assembly there is nothing else required in order to implement them.[214] Whereas, the others who defended a 'dualistic'[215] approach allege that since article 90 of the Constitution has not clearly formulated the international treaties are superior domestic law, the monistic approach cannot be defended. Because domestic law and the ECHR stand on two different planes there is no hierarchical relation between them. Also the phrase of 'no appeal to the Constitutional Court' does not make the ECHR superior to domestic laws[216] and on account of this, in the case of a conflict, the principles, of '*lex*

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[211] Article 90/1 of the Constitution: *'The ratification of treaties concluded with foreign states and international organizations on behalf of Republic of Turkey shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.'*

[212] Arslan, 2000, p.277.

[213] For detailed analysis of the commentators' approach to doctrine see Tahsin Fendoglu, 2001, p.374-377.

[214] Turkmen, 2001, p.33.

[215] For detailed analyze of the commentators approach in doctrine see Tahsin Fendoglu, 2001, p.372-374.

[216] Ozbudun, p.355.

posterior derogate legi priori' or *'lex specialis derogate legi generalis'* should be applied.

These debates find them echo among the judiciary as well. The Constitutional Court does not have a consistent opinion and practice on the issue; it seems to be avoiding making a comment on the position of international treaties. It seems to favour a robust on position when it considered whether the ECHR has directly applicable articles in the Democratic Peace Movement Party case: (although) ECHR has the force of law... the Law on Political Parties has priority against the ECHR since it is a 'special law' and since 'the ECHR does not have directly applicable norms in cases of dissolving political parties' [217] The wording of the quotation gives us the impression that the court is close to the monistic approach and it could have applied the ECHR articles if they had directly applicable norms. Nonetheless, a year later it had made clear that the Constitutional court stands on the opposite side of the debate by saying that; '(although) in some countries international treaties are accepted as higher than the law and the Constitution, and although the same is defended by doctrine, it is not possible to extract the same conclusion from article 90 of the Constitution. In the Constitution there is no such article which states that the law could not be contrary to valid international treaties. For that reason, it is possible to enact a law which is contrary to the rule of treaties. Although these kinds of treaties bring responsibilities on states they will be in valid in the terms of domestic law.' [218]

On the other hand The Court of Appeal seems to have a slightly different approach[219] to the Constitutional Court. While the Court of Appeal considers international human rights treaties as 'a segment of our domestic law' and accepts that 'the treaties which have been approved by the Turkish Grand Assembly qualify as law'[220] The Council of State considers that 'the ECHR has some directly applicable articles. Article 90 of the Constitution has manifestly provided that if a treaty has directly

[217] 1996/3 E. 1997/3 K., 22.05.1997, RG: 02.062000, issued: 24067.
[218] The Constitutional Court 1996/55E and 1997/33 K.
[219] The Turkish Court of Appeal, 8. Penal Chamber's judgment 1998/10667 E. 1998/12819 K., 12.10.1998. Also see, Turkish Court of Appeal, 6. Chamber's judgment 1999/3019 E. 1998/4175 K., 23.06.1999. The Court of Appeal Grand Penal Chamber judgment 1999/8-109 E. 1999/164 K. 15.06.1999, the Court of Appeal Grand Penal Chamber 2000/4-25 E. 2000/44 K. 07.03.2000.
[220] The Turkish Court of Appeal, Grand Civil Law Chamber's judgment 1995/4-367 E. 1995/550 K., 24.05.1995.

applicable articles the judiciary and administrative bodies are bound by them.'[221] The Council of State has taken the most advanced position by supporting the idea that treaties are superior to domestic laws.

Nevertheless the situation as described above relates to the ECHR. What is the legal status of the case law of the ECtHR in the Turkish system? Indeed, neither in law nor in the practice of the judiciary bodies is there much except for few dissenting opinions of judges.[222] On the other hand, Turkey informed to Committee of the Minister that it disseminated translation of the ECtHR judgments to the Turkish Supreme Courts, the Council of State and The Court of Appeal, in order to allow them to align their interpretation of Turkish law to the requirements of the Convention as defined in the judgments of ECtHR.[223] However, as it will see below Turkish courts could not meet even the expectation of their government.

As seen the issue is not clear either in doctrine or among the judiciary bodies. This is mainly because of the vague wording of article 90 of the Constitution, which does not openly formulate the position of international treaties. If Turkey do not want to fail in their obligations under the ECHR and do not wish to get greater condemnation before the ECtHR they may have to change[224] this article in a way which will bring an end to this uncertainty and clearly determine the place of the ECHR in the Turkish legal system by introducing a law which provides for the direct applicability of the Convention and the case law of the ECtHR by the judiciary. In fact Turkish authorities has added a new paragraph to article 90,[225] which stipulates in case of clash between domestic law and international treaties on account of both has different phrase, that the international treaties has superiority to domestic law.

4.2.The Constitutional Court and the ECHR

The Constitutional Court was established by the Constitution of 1961. Its role is to examine all laws in respect to conformity with the Constitution. The major duty of the

[221] The Council of State 5. Chamber E.1986/1723 K.1991/933 dated in 22.5.1991.
[222] See below.
[223] Appendix to Resolution DH (99) 434, HRIBNo. 46, p.63.
[224] Ozer, p.5-7
[225] Article 7 of the Law No.5170, (2004).

Court is to monitor laws, decrees with the force of law and the Grand National Assembly internal procedural rules from the aspects of both form and substance. It is also vested with the duty of examining and monitoring constitutional amendments from the point of view of form and it is also the judicial body, which deals with cases of political party closure.

The President of the Republic, the Parliamentary Group of the government or main opposition party members or one-fifth of the total number of deputies in parliament may directly file a suit by means of 'abstract norm review' (soyut norm denetimi) with the Constitutional Court. In addition, should a court in the course of trial feel that the due process of law is being hindered or that there is doubt about the application of certain laws, or that certain laws are not in harmony with the Constitution, or that complaints of a similar nature warrant it, then the issue can be taken to the Constitutional Court by means of 'concert norm review' (somut norm denetimi). When decisions have been reached they are published in the government's Resmi Gazete".

As we pointed out above the Constitutional court supports the dualistic approach as to the position of the international treaties in general and in particular it has not given any significance to ECHR more than any other international treaties in its case law so far. Also, since it makes review as to only constitutionality it only cities the parallels between the Constitutional norms and the ECHR. It generally makes a comment to this effect that 'domestic rules are consistent with the ECHR' rather than referring to the ECHR as a source of Constitutional rules.[226]

A loose examination of the Constitutional Court shows us that it has only used international human rights norms as 'supportive norms' (destek olcu norm)[227] in those cases[228] when it has examined rights and freedoms related to private la such as 'discrimination between men and women'[229] or 'inequality between child born out of wedlock'[230] and annulled the laws as well as in the case of the annulment of article 292 of

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[226] Cavusoglu, 2003, p.27.
[227] Also see for more detailed information; Tahsin Fendoglu, 2000. p.363-381.
[228] The Constitutional Court 1996/68 E. 1999/1 K., 06.01.1999 RG: 19 Ocak 200, issued: 24292.
[229] The Constitutional Court 1990/30 E. 1990/31. K, 29.11.1990, the Constitutional Court 1998/3 E. 1998/28 K., 23.6.1998, RG: 13 Mart 1999, issued: 23638.
[230] The Constitutional Court 1987/1 E. 1987/18 K., 11.02.1987, The Turkish Court of Appeal, Grand *Ictihadi Birlestirme* Law Chamber's judgment 1996/1 E. 1996/1 K., 22.02.1997.

the civil law which prohibited the 'recognition of the child who were born the result of an adultery' by his/her father.[231]

On the other hand the reflexes of the Constitutional Court in the Party closure cases[232] were quite different than in the above cases. It has referred generally to the rights guaranteed in the ECHR especially article 11 (2) which allows interference by the authorities of the right to association and article 17 of ECHR which prohibits the abuse of rights. However it has utilized the ECHR's articles both in order to reject the defense of the appellants and to justify its decision on limiting rights and freedoms or to show that the Constitution covers[233] all these rights and freedoms.[234]

Indeed, the Constitutional Court considers that since the Constitution guarantees all human rights and freedoms a conflict between the constitution and the human rights treaties would not be possible.[235] It frequently adopts the wording that 'the Constitution has been inspired from the International human rights treaties'.[236] The Constitutional court, in a recent judgment on dissolution of the *Virtue Party* even went one step further and concluded that 'there is no clash between domestic norms and international norms...there are a lot of common points between the constitutional court's judgments on the meaning and content of laicism and freedom of expression and the European Human Rights Commission's consideration of the same issue'.[237]

In fact the Constitutional Court appears to forget that Turkey has been found in breach of the Convention five times in party closure cases and a countless number of times in freedom of expression cases. The ECtHR, when it examined the party closure decisions of the Court, has used 'necessity in a democratic society' as a criterion in order to decide whether the limitation is needed or not. In this sense it has also seen pluralism as one of the main component of the democratic societies. However, the authoritarian

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[231] The Constitutional Court 1990/15 E., 1991/5K., 28.02.1991.
[232] The Constitutional Court 1999/2 E, 2001/2 K., 22.06.2001, RG: 05.01.2002 issued: 24631 also see Welfare Party decision which was closured due to its action against to the principle of the laicism.
[233] Also see, The Constitutional Court 1996/59 E. 1997/70 K., 09.12.1997, RG: 16.01.2003, issued: 24995, The Constitutional Court 1997/19 E. 1997/66 K., 23.10.1997, RG: 16.01.1999, issued: 23585.
[234] The Court of Constitution, 1992/1 E. 1993/1 K.,14.7.1993, RG 18.08.1993, issued: 21672.
[235] R.Aybay 'The International Human Rights instruments and the Turkish Law' sets out this argument to criticize the practice of Constitutional Court of the Turkish Constitution of 1961 on the same issue. Citied in Zuhtu Arslan, 2001, p.283.
[236] The Constitutional Court, 1990/15 K. 1991/5 E., 28.02.1991, look also for similar wording of the court to 1997/62 K. 1998/52 E, 16.09.1998 RG: 20.10.2000, issued: 24206.
[237] The Constitutional Court, 1997/1 E. 1998/1 K., 16.01.1998, RG: 22.02.1998, issued: 23266.

construction of the Constitution and the positivist and the status quo approach of the Constitutional Court gives more importance to the idea of an official Turkish identity which cover 'one culture[238], one nation, laicism' which is seen as necessary to be upheld above all else.[239] Any other ideas have always been seen as a threat to democracy.[240]

The Court had also lost an opportunity to reform its erroneous practice when it refused in February 1999 the applicants claim on retrial of their case, having had a judgment against Turkey in *Turkiye Birlesik Komunist Partisi v. Turkey* case an that occasion the Court of Constitution said 'the article 11 of the ECHR is not directly applicable'. This is a good example, which shows the reluctance of the Constitutional Court to implement the ECtHR.

In the last few years there have been some insufficient and superficial changes in the attitude of the Constitutional Court. At the end it has softened its tough position and started to make refer to the case law of the ECtHR[241]. For instance in its concluding statement the Virtue Party v. Turkey case it referred to *L.B v. Turkey, S.K v. Turkey* and Dahlab v. Switzerland[242] cases which were about wearing the headscarf in some official places and in which the ECtHR did not find violations of the Convention. Nevertheless, these reference either to the text of the ECHR or their case laws do not contain any analytical discussions or any interpretation, which widen the limits of rights and freedoms. Also, the references are generally made only by name and besides this they do not contain any other necessary information about the cases.[243]

The reason behind these small changes could be the number of judgments against Turkey which has increased recently and Turkey has seen condemned to pay quite a considerable amount of money.[244] Surely, the Constitutional Court could not have carried

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[238] Turmen, 2001, p.35.
[239] Orucu, 2003, p.136.
[240] OZDEP 1993/1 E, 1993/2 K. dated in 23.11.1993, RG :14.02.1994, issued: 21849, DEP 1993/3 E. 1994/2 K., 16.6.1994, RG: 30.06.1994, issued: 21976 (Mükerrer), HADEP 1999/1 E. 2003/1 K., 13.3.2003, RG: 19.07.2003, issued: 25173.
[241] The Constitutional Court, 2001/5 E. 2002/42 K., 28.03.2002,RG: 05.092002, issued:24867, also see, the Constitutional Court, 2002/112 E. 2003/33 K., 10.04.2003, RG: 04.11.2003, issued: 25279.
[242] Application no: 42393/98 and dated 15.2.2001.
[243] The Constitutional Court, 1992/8 E. 1992/39K.,16.06.1992, RG: 06.101992 issued: 21367.
[244] According to the Turkish members of Parliamentarian Assembly Report's, Turkey in 184 case has paid 1 million 484 thousand 464 dollar, 6 billion 979 thousand 610 French Franc, 2 million 100 thousand 257 sterling, 16 thousand 109 Euro, 57 thousand 539 Mark, 9 billion Turkish Lira. Turkey also in 106 friendly settlement cases has paid 323 thousand 727 Dollar, 7 billion 699 thousand Frank, 3 billion 168 thousand

on with its unconcern attitude toward the ECtHR's judgments. It seems to wish to prevent Turkey's further condemnation without daring to challenge the official idea of classic 'absolute state sovereignty' which cannot be shared by any other authority and official state ideology of 'national security' and 'state integrity and unity'. Also it seems to want to get back its lost prestige mostly due to the party closure cases by showing that it is aware of the existence of human rights, the ECHR and the ECtHR's case law. When a group of MP brought the law, which have provided the retrial for the cases if the ECtHR have found in breach of the Convention, before The Constitutional Court with argument of that the power to trial is only belongs to the Turkish Courts and could not be shared by the ECtHR. The court held that since judges has possibility to upheld its previous judgment and also the judicial will decide according to law and acts and their conscious this law is contrary to the Constitution.[245] The reasoning of the Court is striking in a sense show the reluctance of the Courts to accept the monitoring of the ECtHR.

4.3. The Council of State and the ECHR

The Council of State is the superior court in the area of administrative justice and as such it is the Court of last instance to review and decide upon all rulings rendered by Administrative Courts, unless the laws specifically refer these to other judicial authorities. Similar to the Court of Appeals, the Council of State, too, is the court of first and final instance for specific cases defined by laws. It also ensures the consistency of rulings among the administrative courts. The Council of State is also the highest consultative body of the state, and in this capacity, expresses its opinions on draft legislation when requested to do so by the Prime Minister and the Council of Ministers. It also examines draft regulations and concessional contracts, and is responsible for resolving administrative disputes.

As explained above the Council of State has the most advanced approach to the ECHR among all the judicial bodies. It has been using the ECHR and the ECtHR's case law for a long time in order to justify its judgments. This was seen in a case when it

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sterling, 2 billion 663 million 400 thousand Turkish Lira, www213.243.28.6/haber.php?haberno=27974&tarih=31/01/2002.

[245] The Constitutional Court, 2002/146 E. 2002/201 K., 27.12.2002, RG: 11.12.2003, issued :25313.

annulled article II (3) of the Ministry of Justice Penal and Prisons General Manager's Circular of which provided for transferring of the remand prisoners to prisons outside of the jurisdiction of the courts where their trail is pending. It based its judgment on articles 5(3) and 6 of the ECHR. The Court annulled the Circular by reasoning that to transfer the remands prisoners to prisons far away would violate the ECHR which guarantees the right to liberty in article 5, the right to be brought promptly before a judicial body in article 5 (3) and the principle of the equality of arms and fair trail in article 6 as well as being incompatible with the law.[246]

The Court annulled the Ministry of Interior's decision refusing the plaintiff's passport application on account of 'security reasons'. The court has invoked its judgment with reference to 4. Protocol of ECHR which stipulates that 'everybody has right to leave a country which also includes his/her own country' and the Constitutional Law and other law which is related with the issue. This judgment is also important because while the public prosecutor had requested the annulment of the decision of the Ministry of Interior, s/he had not referred to Protocol 4 of the ECHR and had only invoked relevant Constitutional rules.[247]

The Court has manifestly referred to the European Human Rights Commission's *LB v. Turkey and S v. Turkey* decisions, in its advisory opinion which was about a woman journalist who applied to the Press Card Commission in order to get a 'Yellow Press Card' and had been refused for the reason that she had provided the Commission with headscarfed pictures of herself. In those decisions the Commission had not found a violation of article 9 of the ECHR when students who did not get their school diplomas because they had not provided appropriate pictures consistent with the secular university system. The Court ruled that 'it has evaluated the explained decisions of the Commission' in its decision and has reached the conclusion that 'to use headscarfed picture of the women journalist on the Yellow Press Card is contrary to the principle of 'secularism and equality' of the Turkish Constitution'.[248]

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[246] The Council of State 10. Chamber's judgment 1996/7166 E. 1998/5511 K. 03.11.1998.
[247] The Council of State 10. Chamber's judgment 1998/4442 E. 1998/4832 K., 14.10.1998. Also see, the Council of State10. Chamber's judgment 1996/7166 E. 1998/5511 K. dated 03.11.1998.
[248] The Council of State10, 1. Chamber's judgment 1999/98 E. 1999/116 K., 12.07.1999.

Nonetheless, although the Council of State has a better approach to the ECHR and makes some reference to case law of the ECtHR in its judgments it is still far from the level which is desirable since its practice is not constant and such reference are made not in all cases related to human rights and freedoms.

4.4 The Court of Appeal and the ECHR

The Court of Appeals is the tribunal of last resort to review the rulings and judgments rendered by first instant courts, provided that they are not referred by laws to another place of jurisdiction. The opinions so rendered by the Court of Appeals are taken as precedents for a legal ruling in the lower courts throughout the country, so that uniform application may be achieved. It is also able to modify its own ruling upon request. For that reason its attitude is so significant in order to increase the knowledge about the ECHR and the case law of the ECtHR among the judges all over Turkey.

The response of the Court of Appeal to the ECHR and other international treaties is slightly different than that of the Constitutional Court. Especially when it concerns the principle of fair trial the Court of Appeal always refers to international laws.[249] This approach leans on the Preamble of the Constitution, which announces the 'universal principle of the law' as an accepted standard. However, this does not that mean the Court of Appeal applies this principle as broadly as it should be applied. Indeed, the references to 'universal principle of the law' [250] by the all Supreme Courts are much more common than reference to ECHR in their case law.

i. Fair trial

When the Court has been faced with a question as to whether the accused person should be charged for the interpreter's expenses it has ruled that *'the ECHR which was signed on 4 November in 1950 in Rome and since then it has been in force on the basis of the Turkish Constitution article 90.'* The Court has also observed that, the ECHR article 6 (3)

[249] The Court of Appeal Grant Penal Chamber's judgment 1996/8-74 E. 1996/116 K., 28.05.1996.
[250] The Turkish Court of Appeal, Grand Chamber's judgment 1980/333 E. 1981/72 K. and dated 02.03.1981.

(e) manifestly prohibits charging on accused person for the interpreter's expenses and that *'since it is contrary to the article 6(3 (e) of the ECHR, it is in violation of the law.'* [251]

However this judgment was appealed by the Head Public Prosecutor of the Court of Appeal. The Court of Appeal Grand Penal Chamber dismissed this appeal by upholding the Chamber's judgments and added that 'The Turkish Criminal Code article 39 and the Criminal Procedure Law article 406 delinatetes that who is to be responsible for the expenses of the trial. The article 6 (3) (e) of the ECHR, which provides assistance of a free interpreter to the accused person constitutes a special law beside the general law TCC and TCPL. ' The court further more ruled in another case that free interpreter should be provided during the whole phase of the trial.[252] However the response of the first-degree court to this judgment was not so fast and, even several years after this decision, some cases went up to the Court of Appeal on the same point. [253]

A short time after this important judgment the Court failed to read the right to fair trial as broad in scope when it examined Mr. Ocalan's appeal[254]. It concluded that to change the composition of the Court during the hearing and to replace the military judge with a civil judge, who had been following the hearing from the beginning, and to continue the trial with this new judge who had also participated in the pretrial stage of the case would not violate article 22 of the Turkish Procedure Law and it was not incompatible with the right to fair trial. Also the Court of Appeal had not found contrary to law that not to be given enough time and opportunity to accused person to prepare his/her defense.[255] However this ignorant attitude of the court has caused again the condemnation of the Turkey by closing its eyes the consistent case law[256] of the ECtHR. The Court has held that if a judge who took part in the pretrial stage also sits in the court, which gives the final judgment that, violate article 6 of the ECHR. Part of the reason for the Court Appeal's failure was the scope and seriousness of the Ocalan case which received a great deal of national and international attention and took place under unusual

[251] The Court of Appeal 6. Penal Chamber, 11619 /E.12124K., 20.11.1995.
[252] The Turkish Court of Appeal, Grand Penal Chamber's judgment 1996/6-2 E. 1996/33 K., 12.03.1996.
[253] The Court of Appeal, 8. Penal Chamber's judgment 1997/10699 E. 1997/12012 K. dated 19.09.1997, the Turkish Court of Appeal, 9. Chamber's judgment 2001/2125 E. 2001/2765 K. and dated 08.11.2001.
[254] The Turkish Court of Appeal, 9. Chamber's judgment 1999/1296 E. 1999/3623 K., 22.11.1999.
[255] The Constitutional Court, 1992/8 E. 1992/39K., 16.06.1992, RG: 06.101992 issued: 21367.
[256] *Karakoc and others v. Trukey,* application number : 27692/95, 28138/95, 28498/95, dated in 15.10.2002.

conditions and received pressure from the administrative. Due to these facts the Court could not dare to order a retrial of this case.

However, in one of latest its judgment when the Court of Appeal was not under the pressure of the political situation it has ruled that without considering the plaintiff's allegation that he has property rights on the land in question and without being given an opportunity to take his case before the court, to refuse the case by saying that '*there is no possibility to hear this case'* is contrary to article 6(1) of the ECHR.[257]

ii. Torture cases

The ECtHR, for the first time in its history, found a State guilty of torture in Aksoy v. Turkey[258] It was followed in other cases and all this condemnation ensured that Turkey had a really hard time before the international community. Nevertheless, one of the responsible organs for the practice of torture in Turkey are the judicial bodies which fail to give appropriate protection in such cases. Not surprisingly, in each of the torture cases Turkey was found to be in violation of article 13 of the ECHR which guarantees an effective domestic remedy as well.

One of the ongoing problems of the Turkish jurisprudence on the torture cases was the misinterpretation of the article 243 of the TCC, surely, if one does not look at the political and cultural reasons behind of it.[259]

The Turkish judiciary looked for three components in order to consider an action as torture Firstly, the accused person should have a special purpose such as to get a confession for example in one case the victims were arrested with an allegation of theft by the gendarmes and during their detention they were beaten up, given electric shocks and forced to stay in cold conditions for a long time. The first instance court had found that that treatment amounted to torture and it ordered punishment according to article 243 of the Turkish Criminal Code. However the Court of Appeal ruled that 'the victims had been taken to gendarme's station in order to get their statement about a theft. However it

[257] The Turkish Court of Appeal, Grand Civil Law Chamber's judgment 2003/7-438 E. 2003/463 K. 02.07.2003.
[258] Clare Ovey & Robin, 2002,p.63.
[259] See previous Chapter 3.

has not been manifestly disclosed that the accused gendarmes had tortured the victims by intending to get a confession from them. For that reason the principle of 'the accused person get benefits from the doubt' the action of the accused person should be accepted as an excessive use of discretion of the duty but could not be accepted as a torture and because of this they should be punished according to article 245 of the Turkish Criminal Code.' [260] Thus in this case it was not enough that the treatment itself amounted to torture, but the Court looks for the intention behind the perpetrator's action.

Secondly, the victim must be suspected of a 'crime' not a mere 'offense', the former being the more serious form of wrongdoing under Turkish law. For example, the Court of Appeal did not find is being beaten up by police as torture although the appellant had 7 days report due to this tortures as a component of the definition of the torture. The reasoning of the court was that 'the victim had been arrested due to gambling which is regulated as an offence in the TCC not a crime and yet, the action of the police could not be defined as torture.'[261]

Third, the victim should be the suspect of this crime and not a witness or another person. For example the Court quashed the first instance court decision on account of the intention of the accused police cannot be understood unless the result of the allegation against the victim of torture were investigated.[262] This false definition of the torture is partly deduced from the wording of the law but mostly, as seen above, is due to the wrong interpretation by the judiciary which did not take into consideration the human rights texts and international tribunals or committee's interpretation. Also, in the cases discussed above there is no reference to the ECHR or other international human rights treaties which guarantee the right not to be subjected to torture.

Unfortunately, this jurisprudence of the Court has started to change only after the amendment of the TCC article 243 by the law numbered 4449 and dated 26.08.1999. This fact shows us that neither the pressure of the increasing case law of the ECtHR against Turkey on the violation of the article 3 of ECHR nor the EU accession talks which are ongoing since 1960s seems have had a significant influence. Since then it has started to

[260] The Turkish Court of Appeal Penal Grant Chamber's judgment 1993/8-314 E. 1994/11 K., 31.01.1994
[261] The Court of Appeal 8. Penal Chamber, 1995/9314 E. 1995/10352 K.
[262] The Court of Appeal 8. Penal Chamber, 1981/2821 E. 1981/4069 K, 19.06.1981, The Court of Appeal 8. Penal Chamber, 1981/3143 E. 1981/407 K., 19.06.1981, The Court of Appeal Grand Penal Chamber, 1987/8-186 E. 1987/423 K., 05.10.1987.

refer to the UN Treaty on the Prevention of the Torture article 1 for the definition of torture.[263] It has recently considered in an case that *'only'* being beaten up as torture[264] or to be taken to police station and beaten up and to have one's mustache cut as a degrading treatment.[265] On the one hand, while the Court did not find the police officer who tortured the suspected person not having the intention of getting a confession, guilty of article 243 of TCC.[266] However, in its recent judgment it stated that it gave up to look for a special intention (saik), which is to get a confession and it ruled that 'similar intention to this' would be enough and it considered the action of the security forces torture. This show the effort of the Court of Appeal being able to catch the ECtHR's standard when it elaborated its judgment on the definition of torture inhuman and degrading treatment and the importance of doctors in combating the practice of torture, the Court also defined torture as 'a crime against humanity'.[267] Nevertheless, the inconsistent attitude of the Turkish judiciary in general has lead the Committee of Ministers to adopted another Interim Resolution[268] on the issue which stated that 'official statistic demonstrating that where crimes of torture or ill-treatment are established, they are sanctioned by light custodial sentences, which are frequently converted into fine and, in most cases, subsequently suspended, thus confirming the persistence of the serious shortcomings in the criminal-law protection against abuses highlighted in the ECtHR's judgments.'

iii. Freedom of expression

Freedom of expression has been understood by the Court of Appeal within the limits of 'state security' or 'state integrity' and any attempts at criticism have been seen as a threat to the State and the Democracy. On account of EU pressure Turkey had removed the phrase of article 8 of the Anti-terror law which automatically condemned any written, or spoken propaganda meeting demonstration that impaired the integrity of the state, its territory and its nation and it introduced consideration to judge the intention behind the

[263] The Court of Appeal, 1999/8-109 E. 1999/164 K., 15.06.1999.
[264] The Court of Appeal 8. Penal Chamber, 2001/2093 E. 2002/5380 K.
[265] The Court of Appeal 8. Penal Chamber, 2002/6686 E. 2002/8949 K.
[266] The Court of Appeal 8. Penal Chamber, 2001/2093 E. 2002/5360 K., 24.4.2002.
[267] The Court of Appeal, Grand Penal Chamber's judgment 2002/8-191 E. 2002/362 K. dated 15.10.2002. In this judgment it has referred to UN Prevention of torture and CPT ve ECtHR's case law.
[268] HRIBNo.57, 2002, p.18-19.

act. Although it had devised in order to prevent 'thought crime' and to allow judges to implement the new law in the light of the ECHR[269], however, the judicial did not applied this article in that way.

Indeed the Courts in Turkey have always been more conservative when the issue comes to 'freedom of expression'. In this sense one of the dissenting opinion[270] of the Chairperson of the Court of Appeal provides an interesting and meaningful impulsion of the level of tolerance among the judiciary: 'Giving above some examples of the case law of the ECtHR which I perceive as a defame, has been seen within the scope of the freedom of expression by the ECtHR has even made me amazed. On the other hand, even we do not share the same idea with the court, that the tolerance of the Western world and the ECtHR on the freedom of the expression would lead us to reconsider our jurisprudence.' He concluded by saying that 'It is impossible to share, to approve the idea in question. However, if the case law of the ECtHR and the Western countries examples are taken into account, these words should be considered/accepted within the limit of the tolerance and criticism...'

After the judgment of the ECtHR in *Socialist Party and Others v. Turkey*[271], the Court of Appeal, without taking into account this judgment of the ECtHR, confirmed a criminal conviction imposed on Mr. Perincek by the First State Security Court of Ankara on 15 October 1996 and on account of this he was sentenced to a 14 month prison sentence. The Court of Appeal based its judgment on the statements which had also led to the dissolution of the Party, even though the ECtHR had found that earlier action to be in violation of the ECHR.

On this issue one of the latest examples of the Court of Appeal's practice causes also some concern. Both the author, Fikret Baskaya, and the publisher of his academic critique of state ideology, *'Westernisation, Modernisation, Development - Collapse of a Paradigm/An Introduction to the Critique of the Official Ideology'*, were found guilty of separatist propaganda under article 8 of Anti-Terror Law. However, the ECtHR found Turkey to be in breach of article 10 and 6(1).[272] In the wake of this condemnation, the

[269] Arikan, 2003, p.130.
[270] The Turkish Court of Appeal, 4. Penal Chamber's judgment 1999/3859 E. 1999/4503 K., 26.04.1999.
[271] Application No: 26482/95, 25.05.1998.
[272] *Baskaya and Okcuoglu v. Turkey*, Application No: 23536/94, 24408/94, 8 July 1999.

book was published by the writer again. Unfortunately, the prosecutor of the Ankara State Security Court brought two criminal charges against the writer for the same book in 2003.[273] The first one was for the retrial of the old case under the new law, and the second for the new edition of the book.[274]

After the abolition of article 8 of the Anti-Terror Law the expectation was that the freedom of expression would have been interpreted in parallel to the ECtHR's case law. However, this did not happen. The Turkish judicial bodies have used article 169 of the TCC which criminalizes the helping of an illegal organization whose aim is the destruction of the state's integrity and unity. For example when a provincial head of a political party referred to Abdullah Ocalan as 'Dear Mr. Ocalan' he was punished with 10 months imprisonment by the Erzurum State Security Court.[275] On the other hand, in another case, the Diyarbakir State Security Court acquitted the persons charged for their speech in a political meeting giving the reason that 'Since this speech is within the scope of the freedom of expression as provided by the Turkish Constitution and article 10 of the ECHR it does not constitute a crime'. Significantly, the title of the news report covering this case was 'Acquittal for EU Harmonisation'.[276] However, there is as yet little sign that the interpretation of the law by the judges takes into account into rights of the defendant under the case-law of the ECtHR.

iv. Confiscation Cases

The response of the Court of Appeal to the ECHR and especially to the ECtHR can manifestly be seen in the unchanged case law of the Court on confiscation cases. When it came across a claim to increase the rate due to delay of payment for confiscated land, the Court ruled that 'even if inflation is higher than the rate of interest which was determined by the state, the court could not increase this rate' and refused the claim of the plaintiff who had also taken his case before the European Human Rights Commission and had an admissibility decision. However, the court in its judgment did even not mention the fact

[273] After this event when the Ministry of Justice, Cemil Cicek expressed his dismay '...on the one hand we are passing new laws; on the other hand there is this picture...' Radikal, 14.05.2003.
[274] KHRP, September 2003, p.10-11.
[275] http://www.radikal.com.tr/haber.php?haberno=117317&tarih=24/05/2004.
[276] http://www.radikal.com.tr/haber.php?haberno=117455&tarih=26/05/2004.

that this case was before the ECtHR while, as usual, the judge who gave a dissenting opinion referred to this admissibility decision of the European Human Rights Commission. He further said that since the international treaties have the same power as the law according to article 90/last of the Constitution 'they shall be directly applicable. Since turkey has accepted the jurisdiction of the Commission and the ECtHR it has to accept its judgments as well. The Court of Appeal should have followed the Commission's decision, and not given a decision which is contrary to Turkey's obligations under the international treaties.'[277]

The judge was proved right in his dissenting opinion a year later from this judgment when the ECtHR found Turkey in violation its obligation under article 1 of Protocol 1of ECHR in the *Akkus v. Turkey* case.[278] However, the Court of Appeal have insisted on its case law[279] even after found in breach of the convention in *Aka v.Turkey* [280] However, the consistent case law of the Court of Appeal still has not changed. On the other hand the Turksih Government during the examination of implementation of *Aka v. Turkey* case by the Committee of Ministers was citing that information, '(we) would like to point out a positive evolution of internal jurisprudence[281] which refers henceforth directly to the requirements of article 1 of Protocol No.1, as they are set out in ECtHR judgments. The recent examples are indicative of the will of the high national judicial authorities to ensure effective respect for the ECtHR judgments in the interpretation of Turkish law...The Government is further more convinced that the evaluation of domestic jurisprudence, which tends to grant a direct effect to the ECtHR judgment, should continue and extend to all spheres protected by the Convention.'[282] Nevertheless, the judgment of the Court of Appeal shows us the Turkish Government comment above does not mirror the actual response of domestic judicial bodies.

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[277] The Turkish Court of Appeal, Grand Civil Law Chamber's judgment 1996/5-144 E. 1996/503 K.
[278] Application No.: 19263/92, dated in 09.07.1997.
[279] The Court of Appeal, Grand Civil Law Chamber's judgment 2000/18-1186 E. 2000/1300 K., 18.10.2000 This judgment was criticized by a judge who had written a dissenting opinion. He stated that Turkey standing of the gate of EU. The case law of ECtHR are bounding for Turkey since we accepted its jurisdiction.
[280] Application No.: 21893/93, 09.07.1997.
[281] The Constitutional Court judgement, 29.12.1999, RG: 29.06.2000.
[282] Appendix to Resolution Res DH (2001) 70 HRIBNo.53, 2001,p.18.

v. Public attention

When dealing with a case, which had received a wide public attention[283] and reaction the Court of Appeal generally gives a much elaborated judgment in terms of the norms of the ECHR and other international human rights documents. The *'Manisali Cocuklar'* case is one such striking example. In this case a group of students between 16-17 years old had been arrested by the Manisa Anti Terror Branch Police with the allegation that they had hang an illegal poster and were suspected of being members of an illegal organization. They were held in detention for 10 days and tortured. The Court of Appeal after evaluating article 3 of ECHR and CPT and article 1 of UN Convention on Prevention of Torture, ruled that 'it is an unavoidable conclusion that the treatment which the victims had been subjected to amount to torture' and quashed the first degree court's decision to acquit the accused police officers.[284] The same approach can be seen in another case, which found the Prime Minister Recep Tayyip Erdogan guilty[285] of breaching article 312 of TCC which punishes 'praising a felony or inciting people to disobey laws'. The European Parliament voiced its concern at the implications for freedom of political expression of the sentence against Recep Tayyip Erdogan, a member of the Fazilet party, and said it trusted that the supreme court of appeal would reverse the security court verdict against him.[286]

vi. Dissenting opinions

It is more common for Turkish judges to use the rules of international human rights norms and case law when they do not agree with the opinion of the majority of the judges.[287] In their dissenting opinion they always use the ECHR or the ECtHR as a

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[283] The Committee of the Ministers noted that it is following closely the procedure both before the Internal Turkish courts and before the organs of the Convention in its respond to the written question No:377 of the Parliamentary Assembly on the fate of the *'Manisa children'* in Turkey.
[284] The Turkish Court of Appeal, 8. Chamber's judgment 1998/10667 E. 1998/12819 K. dated 12.10.1998.
[285] The Turkish Court of Appeal, 8. Penal Chamber's judgment 1998/10296 E. 1998/11672 K. dated 23.09.1998.
[286] Bulletin, EU, 5-1998.
[287] The Court of Appeal, 4. Chamber's judgment 1999/3859 E. 1999/4503 K., 26.04.1999, The Court of Appeal 4. Penal Chambers, 1999/4309 E. 1999/6209 K., 27.05.1999, The Court of Appeal, Grand Civil Law Chamber's judgment 2003/13-657 E. 2003/628 K., 05.11.2003, Turkish Court of Appeal, Grand Civil

reference. In one case when the Court of Appeal found guilty of contempt of court a lawyer who criticized the first degree court's decision, one of the judges in his dissenting opinion stated that 'the limit of criticism should be widened. Democracy and the ECtHR's case law require this as well.'[288] Sometimes judges also use it for the sake of weakening the ECHR's guarantees.[289]

In another dissenting opinion the judge pointed to the European Human Rights Commission report dated 25.02.1997: 'The Commission has annually ruled that by not holding a hearing the Turkish Supreme Courts had misunderstood and misapplied the rules of law. Undoubedtly this is a hurtful and offensive (onur kirici) situation. The conflict between the Court of Appeal and the international tribunals should be solved in a way which meets to the report of the Commission.' However it does not give a proper reference to the report.[290]

In fact this is another shortcoming of the Supreme Courts in Turkey. Namely, when they mention the case law of the ECtHR they mention it in general words and, do not give the proper references of these judgments.[291] However they are more precise when they are referring to the text of the ECHR or other international human rights treaties. Indeed the giving of proper references is important in order to increase awareness about human rights among the judiciary.

The Court has started to make reference to the case law of the ECtHR in the last few years. However, it has often used such references as a contra argument[292] in order to undermine the defences of the appellant. Prior to that, however, it was only making reference to the text of the treaties. Also this generally emerged following changes within the domestic legal system intended to bring it into line with international human rights treaties.

Law Chamber's judgment 2003/5-281 E. 2003/284 K. dated 09.04.2003 again shows a dissenting opinion and reference to ECtHR case law.

[288] The Court of Appeal, Grand Penal Chamber's judgment 1998/4-225 E. 1998/316 K. dated 20.10.1998.

[289] The Court of Appeal, Grand Civil Law Chamber's judgment 1994/4-493 E. 1995/1075 K., 06.12.1995.

[290] The Turkish Court of Appeal, Grant Penal Chamber's judgment 1998/6-18 E. 1998/91 K.,17.03.1998.

[291] Also see, The Court of Appeal, Grand Penal Chamber's judgment 2001/17-281 E. 2001/284 K., 11.12.2001.

[292] The Court of Appeal, 9. Chamber's judgment 1999/1296 E. 1999/3623 K., 22.11.1999. In legal assessment it has invoked its judgment by the international human rights treaties and also referred to article 11 (2) and 17 of the ECHR and *Zana v. Turkey* decision of the ECtHR which the Court had assessed the PKK as a terrorist organization.

Conclusion

Turkey has been suffering from the pains of being reborn according to the guidelines set by the ECHR enforcement system and the EU accession process. It has been making efforts to align its legislation with the EU and the ECHR. However, the influence of the EU on that process is more visible than that of the ECHR enforcement system. Nonetheless, the ECHR enforcement system, especially the jurisprudence of the ECtHR, provides important data for the EU's assessments as to its political criteria. Meanwhile, the changes to the legislation are so fast and very difficult to follow up.

However, the scope of this legislation is generally not adequate to meet with the expectations of either the EU nor the Committee of Ministers, and it continues to be the target of their criticism. Each negative evaluation only forces Turkey to do something in order to stem it the criticism for a while. This is mainly due to the fact that amending legislation has been spinning around the same issues, for example, limits to freedom of expression, education or broadcasting on minority rights, adjusting the length of the detention, etc. The impact of these gradual developments on the human rights practice of the country is still blurred.

The new AP Government seems to have the *will* for democratisation. However, human rights still does not figure prominently among their concerns, and there are considerable shortcomings in its practice. This is also obvious in its policy on minority rights, especially as regards the Kurdish minority. For instance, the Turkish Grand Assembly ratified the ICCPR and the ICESCR in June 2003. On the other hand, Turkey made a reservation to the latter convention in relation to rights to education and to minorities rights in article 27 of ICCPR. As a result, the scope of the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language, has been limited. In addition, this reservation provides that this right will be interpreted and applied in accordance with the relevant provisions of the Turkish Constitution and the 1923 Treaty of Lausanne.[293]

The AP government regards itself as a *reformist government* and considers that its efforts are sufficient to satisfy the EU. Therefore it often accuses the EU of not being

[293] In June 2003 Turkey ratified Protocol No. 6 to ECHR and signed Protocol No. 13.

fair to Turkey if it would not be accepted into the Union. Nevertheless, developments on human rights issue demonstrate that they have a long way to go.

As argued in this dissertation, the implementation of the ECtHR judgments mainly comes about as a result of EU pressure. It is also clear that the government's aim in amending key human rights legislation is 'Turkey's obligation to align with the EU's conditions'.[294] In this sense the timing of the amendments is also significant, since they overlap with the timing of increased pressure by the EU rather than the timing of the decisions of the Committee of Ministers or the judgments of the ECtHR. This provides a clear demonstration as to whether it is the will of Turkey to comply with its international obligations or its enthusiasm about EU accession which is the principal inspiration for the reforms in Turkey.

The Turkish Supreme Court has used those international human rights treaties and the ECHR in order to protect the state from the action of the individual rather than to protect the individual from the state's unlawful actions. This clearly shows us that it has not comprehended the real aim of these treaties, which is based on the idea of protection of *humans' rights.* However, one should find encouraging the changing attitude of the courts towards the ECHR.[295] Nevertheless, it is disappointing that many judges and public prosecutors are still far from understanding the meaning of 'human rights and freedoms'.

For an overall evaluation it is notable that the pressure from civil society and NGOs has never prevailed to lead governments in Turkey to make necessary reforms. Indeed, it is international organizations, which have always guided reforms on human rights in Turkey. Since these reforms are not based upon the initiative of an open-minded executive, judges etc. who necessarily believe in them, it may not be realistic to expect their adequate implementation. While this author considers that one should not undermine the importance of these reforms, because they are the result of political and economic pressure from the EU rather than the will of society or as a result of a wave from the bottom, their future effectiveness remains a matter of concern.

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[294] See for the government purpose the reasons for the draft Laws No.4793, 4778, 4771, 4754, 4963, 4793, see, www.tbmm.gov.tr.

[295] The Constitutional Court 2002/55 E. and 2003/8 11.03.2003 issued in RG: 25318 and published in 16 December 2003, Ankara 7. First Instant Civil Court, had used article 1 of Protocol No.4 of ECHR and amended article 38 of the Constitution in order to challenge a the Tax Procedure Law.

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ANNEX-1

no	Application name	Application no	date	2	3	5	6	8	10	11	13	25	P.1/1	Others
1	Loizidou v. Turkey	15318/89	18.12.1996										P.1/1	
2	Sadi Mansure v.Turkey	16026/90	08.06.1995			5/3	6/1							
3	Yagci and Sargin v. Turkey	16419/90	08.06.1995			5/3	6/1							
4	Mitap and Muftuoglu v. Turkey	15530/89 15531/89	25.03.1996				6/1							
5	Akdivar v. Turkey	21893/93	16.09.1996					8				25	P.1/1	
6	Aksoy v. Turkey	21987/93	18.12.1996		3	5/3					13			
7	Akkus v. Turkey	19263/92	09.07.1997										P.1/1	
8	Aydin v. Turkey	23178/94	25.09.1997		3						13			
9	Erdaloz v. Turkey	21890/93	22.10.1997		3	5/1-c								
10	Zana v. Turkey	18954/91	25.11.1997				6/1 6/3-c							
11	Sakik v. Turkey	23878-83/94	26.11.1997			5/3,4,5								
12	Mentes and others v. Turkey	23186/94	28.11.1997					8			13			
13	TBKP v. Turkey	19392/92	30.01.1998							11				
14	Kaya v. Turkey	22729/93	19.02.1998	2							13			
15	Selcuk Asker and others v. Turkey	23184-85/94	24.04.1998		3			8			13		P.1/1	
16	Sosyalist Party and others v. Turkey	21237/93	25.05.1998							11				
17	Kurt v. Turkey	24276/94	25.05.1998		3	5					13	25		
18	Tekin v. Turkey	22496/93	09.06.1998		3						13			
19	Incal v. Turkey	22678/93	09.06.1998				6/1		10					
20	Gulec v. Turkey	21593/93	27.07.1998	2							13			
21	Ergi v. Turkey	23818/94	28.07.1998	2							13	25		
22	Yasa v. Turkey	22495/93	02.09.1998	2							13			
23	Demir and others v. Turkey	21380-83	23.09.1998			5/3								
24	Aka v. Turkey												P.1/1	
25	Ciraklar v. Turkey	1960/92	28.10.1998				6/1							
26	Ogur v. Turkey	21594/93	20.05.1999	2							13			
27	Ceylan v. Turkey	23556/94	08.07.1999						10					
28	Arslan v. Turkey	23462/94	08.07.1999						10					
29	Gerger v. Turkey	24919/94	08.07.1999				6/1		10					
30	Polat v. Turkey	23500/94	08.07.1999						10					
31	Karatas v. Turkey	23168/94	08.07.1999				6/1		10					
32	Erdogdu and Ince v. Turkey	25067-68/94	08.07.1999						10					
33	Baskaya and Okcuoglu v. Turkey	23536/94, 24408/94	08.07.1999				6/1		10					7
34	Okcuoglu v. Turkey	24246/94	08.07.1999				6/1		10					
35	Surek and Ozdemir v. Turkey	23927/94; 24277/94	08.07.1999				6/1		10					
36	Surek v. Turkey (no 1)	26682/95	08.07.1999						10					
37	Surek v. Turkey (no 2)	24122/94	08.07.1999						10					
38	Surek v. Turkey (no 3)	24735/94	08.07.1999				6/1		10					
39	Surek v. Turkey (no 4)	24762/94	08.07.1999				6/1		10					
40	Cakici v. Turkey	23657/94	08.07.1999	2	3	5					13			
41	Tanrikulu v. Turkey	23763/94	08.07.1999	2							13	25		
42	Ozturk v. Turkey	22479/93	28.09.1999						10					

43	Ozgurluk ve Demokrasi Partisi v. Turkey	23885/94	08.12.1999							11				
44	Ozgur Gundem v. Turkey	23144/94	16.03.2000						10					
45	Mahmut Kaya v. Turkey	22535/93	28.03.2000	2	3						13			
46	Kilic v. Turkey	22492/93	28.03.2000	2							13			
47	Veznedaroglu v. Turkey	32357/96	05.04.2000		3									
48	Ertak v. Turkey	20764/92	09.05.2000	2										
49	Timurtas v. Turkey	23531/94	13.06.2000	2	3						13			
50	Erdogdu v. Turkey	25723/94	15.06.2000						10					
51	Ilhan v. Turkey	22277/93	27.06.2000		3						13			
52	Salman v. Turkey	21986/93	27.06.2000	2	3						13			
53	Dikme v. Turkey	20869/92	11.07.2000		3	5/3								
54	Jabari v. Turkey	400035/98	11.07.2000		3						13			
55	Sener v. Turkey	26680/95	18.07.2000				6/1		10					
56	Ekinci v. Turkey	25652/94	18.07.2000	2										
57	Satik and others v. Turkey	31866/96	10.10.2000		3									
58	Ibrahm Aksoy v.Turkey	28635/95; 30171/96; 34535/97	10.10.2000						10					
59	Akkoc v. Turkey	2294748/93	10.10.2000	2	3						13	25		
60	K. and Boga and others v. Turkey	24669/94	17.10.2000		3									
61	Buker v. Turkey	29921/96	24.10.2000				6/1							
62	Goc v. Turkey	36590/97	09.11.2000				6/1							
64	Tas vTurkey	24396/94	14.11.2000	2	3						13			
65	Yasar and others v. Turkey	27697-98/95	14.11.2000										P.1/1	
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67	Tanribilir v. Turkey	21422/93	16.11.2000	2	3									
68	Demiray v. Turkey	27308/95	21.11.2000	2										
69	Gul v. Turkey	22676/93	14.12.2000	2							13			
70	Buyukdag v. Turkey	28340/95	21.12.2000		3		6/1				13			
71	Dulas v. Turkey	25801/94	30.01.2001		3			8			13	25		
72	Aktas and others v. Turkey	19264/96	30.01.2001										P.1/1	
73	Atak and others v. Turkey	19265/6	30.01.2001										P.1/1	
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85	Danis v. Turkey	19277/96	30.01.2001										P.1/1	
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99	Ismihan Ozel and others v. Turkey	31963/96	27.02.2001										P.1/1	
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312	Y.F. v. Turkey	00024209/94	22/07/2003					8						
313	Yaz v. Turkey	29485/95	22/07/2003		3									
314	Esen v. Turkey	29484/95	22/07/2003		3									
315	Ayse Tepe v. Turkey	29422/95	22/07/2003		3	5/3								
316	Yoyler v. Turkey	26973/95	24/07/2003		3			8					P.1/1	
317	Karkin v. Turkey	43928/98	23/09/2003				6/1		10					
318	Sophia Gudrun Hansen v. Turkey	36141/97	23/09/2003					8						
319	Kizilyaprak v. Turkey	27528/95	02/10/2003				6/1							
320	Gonulsen v. Turkey	59649/00	09/10/2003				6/1							
321	Ertan Ozkan v. Turkey	47311/99	09/10/2003				6/1							
322	Fadime Ozkan v. Turkey	47165/99	09/10/2003											
323	Demirtas v. Turkey	37452/97	16/10/2003				6/1							
324	Ayse Kilic v. Turkey	49164/99	16/10/2003				6/1							
325	Dalgic v. Turkey	51416/99	23/10/2003				6/1							
326	Suvariogullari And others v. Turkey	50119/99	23/10/2003				6/1							
327	Simsek v. Turkey	50118/99	23/10/2003				6/1							
328	Eren v. Turkey	46106/98	23/10/2003				6/1							
329	Cavus and Bulut v. Turkey	41580/98; 42439/98	23/10/2003				6/1							
340	Mesut Erdogan v. Turkey	53895/00	23/10/2003				6/1							
341	Gencel v. Turkey	53431/99	23/10/2003				6/1							
342	Peker v. Turkey	53014/99	23/10/2003				6/1							
343	Ergul and Engin v. Turkey	52744/99	23/10/2003				6/1							
344	Akkas v. Turkey	52665/99	23/10/2003				6/1							
345	Tutmaz and others v. Turkey	51053/99	23/10/2003				6/1							
346	Hayrettin Barbaros Yilmaz v. Turkey	50743/99	23/10/2003				6/1							
347	Ozyol v. Turkey	48617/99	23/10/2003				6/1							
348	Cakar v. Turkey	42741/98	23/10/2003				6/1							
349	Alfatli and others v. Turkey	32984/96	30/10/2003				6/1							
350	Al and others v. Turkey	59234/00	13/11/2003				6/1							

351	Ismail Gunes v. Turkey	53968/00	13/11/2003				6/1								
352	Kenan Yavuz v. Turkey	52661/99	13/11/2003				6/1								
353	Ucar and others v. Turkey	55951/00	27/11/2003				6/1								
354	Ozulku v. Turkey	51289/99	27/11/2003				6/1								
355	Kirman v. Turkey	48263/99	27/11/2003				6/1								
356	Gunel v. Turkey	47296/99	27/11/2003				6/1								
357	Tuncel and others v. Turkey	42738/98	27/11/2003				6/1								
358	Can v. Turkey	38389/97	27/11/2003				6/1								
359	Muslum Gunduz v. Turkey	35071/97	04/12/2003				6/1								
360	Taskin v. Turkey	49517/99	04/12/2003				6/1								
361	Yesim Tas v. Turkey	48134/99	04/12/2003				6/1								
362	Sarioglu v. Turkey	48054/99	04/12/2003				6/1								
363	Cavusoglu and others v. Turkey	47757/99	04/12/2003				6/1								
364	Duran v. Turkey	47654/99	04/12/2003				6/1								
365	Bilal Bozkurt and others v. Turkey	46388/99	04/12/2003				6/1								
366	Dursun and others v. Turkey	44267/98	04/12/2003				6/1								
367	Ukunc and Gunes v. Turkey	42775/98	18/12/2003				6/1								
368	Cetinkaya and others v. Turkey	57944/00	18/12/2003				6/1								
369	Becerikli and Altekin v. Turkey	57562/00	08/01/2004				6/1								
370	Toprak v. Turkey	57561/00	08/01/2004				6/1								
371	Ilkay v. Turkey	42786/98	08/01/2004										P.1/1		
371	Guclu and others v. Turkey	42670/98	08/01/2004												
372	Colak And Filizer V. Turkey	32578/96 ; 32579/96	08/01/2004		3										
373	Sadik Onder v. Turkey	28520/95	08/01/2004		3										
	Total			**29**	**39**	**26**	**116**	**9**	**29**	**7**	**26**	**9**	**154**	**4**	

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