This project is co-funded by the European Union
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STRENGTHENING CIVIL SOCIETY DEVELOPMENT AND CIVIL SOCIETY-PUBLIC SECTOR DIALOGUE IN TURKEY PROJECT

ACTIVE PARTICIPATION IN CIVIL SOCIETY: INTERNATIONAL STANDARDS, OBSTACLES IN NATIONAL LEGISLATION, RECOMMENDATIONS

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THIRD SECTOR FOUNDATION OF TURKEY (TUSEV)

TUSEV was established in 1993 by 23 foundations and associations and has now grown to support a network of over 110 civil society organizations that share a vision of strengthening the legal, fiscal and operational infrastructure of the third (non-profit) sector in Turkey. TUSEV's programmes are designed to; promote a legally and fiscally enabling environment for non-profit organisations, encourage strategic and effective giving, facilitate partnerships across the public, private and third sectors and support and engage the international community in learning about and collaborating with the third sector in Turkey. For more information, visit http://www.tusev.org.tr and follow us on @tusev, facebook.com/tusevtr.

Türkiye Üçüncü Sektör Vakfı
Third Sector Foundation of Turkey

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FOREWORD

Third Sector Foundation of Turkey (TUSEV), together with Civil Society Development Center Association (STGM) and YADA Foundation (YADA) have been implementing the **"Strengthening Civil Society Development and Civil Society-Public Sector Dialogue in Turkey"** project since June 2012. This project aims to ensure the existence of strong democratic institutions and civil society promoting pluralism and the values of European integration in Turkey. Within this context, TUSEV is implementing activities aiming to improve the legal environment which civil society organizations (CSOs) operate in and strengthen civil society and public sector cooperation. This project is funded by the European Union and the Republic of Turkey Ministry for EU Affairs.

Active Participation in Civil Society: International Standards, Obstacles in National Legislation and Proposals report, one of the major outcomes of the project, was co-authored by Istanbul Bilgi University Human Rights Law Research Center Expert Gökçeçiçek Ayata and Asst. Prof. Ulaş Karan from Istanbul Bilgi University Faculty of Law, aims to describe the legal barriers before civil society's active participation in decision making processes and to provide recommendations for improvement. The report is composed of three sections. The first section outlines the international standards of freedom of association in reference with international human rights law and compares the compatibility of the provisions with the Turkish Constitution. The second section addresses related freedoms under freedom of association, freedom of expression and freedom of assembly, right to information, hate speech and access to justice. In the final section, legislative regulations under Turkish Legislation related to freedom of association were presented along with the recommendations for improvement.

Before the finalization of the Report, TUSEV held consultation meetings in Istanbul, Ankara, Bursa and Mersin to collect opinions and feedback from civil society representatives. More than 60 representatives from 48 CSOs were consulted in these meetings. Policy recommendations of the report were also presented to public authorities of the relevant public institutions.

TUSEV believes that this report will be a reference publication guiding both public institutions and civil society organizations to understand the nature of the existing barriers before active participation. More than that, findings of the report will play a major role in determining TUSEV's advocacy priorities.

We would like to express our most sincere thanks to authors of this report and all other institutions, experts and civil society organizations that have contributed with their valuable feedback and contributions.

TUSEV

ABBREVIATIONS*

EU:	EUROPEAN UNION
ECTHR:	EUROPEAN COURT OF HUMAN RIGHTS
ECHR:	EUROPEAN CONVENTION ON HUMAN RIGHTS
APPL. NO.:	APPLICATION NO.
BEHK:	RIGHT TO INFORMATION ACT (BİLGİ EDİNME HAKKI KANUNU)
SEE:	SEE
CMK:	CRIMINAL PROCEDURE CODE (CEZA MUHAKEMESİ KANUNU)
ECRI:	EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE
HMK:	CIVIL PROCEDURE CODE (HUKUK MUHAKEMELERİ KANUNU)
İYUK:	ADMINISTRATIVE JURISDICTION PROCEDURES LAW (İDARİ YARGILAMA USULÜ KANUNU)
PARA:	PARAGRAPH
P:	PAGE
PP:	PAGES
CSO:	CIVIL SOCIETY ORGANIZATION
TCK:	TURKISH PENAL CODE (TÜRK CEZA KANUNU)
TGYK:	LAW ON MEETINGS AND DEMONSTRATIONS (TOPLANTI VE GÖSTERİ YÜRÜYÜŞLERİ KANUNU)
TMK:	TURKISH ANTI-TERROR LAW (TERÖRLE MÜCADELE KANUNU)
TUSEV:	THIRD SECTOR FOUNDATION OF TURKEY (TÜRKİYE ÜÇÜNCÜ SEKTÖR VAKFI)
CONT.:	AND CONTINUED

* When available, official translations of relevant legislation or readily accessible online translations have been used. Abbreviations have been maintained in Turkish for reference purposes.

INTRODUCTION

The report aims to identify the legal obstacles before active participation in civil society in Turkey and present recommendations to overcome these obstacles. This study, which seeks to promote active participation, has been prepared with a comparative perspective in light of international standards. In identifying obstacles that stem from national legislation and provisions that forestall or hinder participation in civil society, the first consideration has been how the freedom of association is defined and restricted in international documents, case law issued by international mechanisms and in European Union (EU) standards. The freedom of association provides protection for numerous forms of organizing including political parties, unions and civil society organizations. However, in scope of this report the focus will specifically be on associations and foundations as civil society organizations.

The report is comprised of three sections. The first section outlines standards of the freedom of association emerging from international human rights law. The freedom of association is a right that should be regulated in constitutions in the first place, and be safeguarded in concrete legislation to follow. Therefore, in the framework of the human rights dimension of the freedom of association, firstly the scope of the freedom of association in international law, and the extent to which the Republic of Turkey's Constitution complies with this scope has been addressed. The second section of the report addresses issues of freedom of expression, right to information and right to assembly, hate speech and access to justice, which come to the fore in conjunction with the freedom of association. For the above mentioned issues, once again the Constitution has been compared to international standards. The right to information, freedom of assembly, and access to justice have been assessed in the third section of the report in scope of the legislation that pertains specifically to these issues.

Finally, certain emerging issues in scope of the freedom of association have been identified in the report and the corresponding provisions in Turkey's law have been discussed. Here, legal texts that may be regarded as secondary legislation such as bylaws, regulations, statutes, circulars have been excluded from the analysis and an evaluation has been made on the level of laws. However, it should be noted that in general secondary legislation entails a more limiting and restrictive approach to the right of association as compared to laws. Alongside a reform of the Constitution and laws the secondary legislation will have to be redrafted, therefore this report does not focus on secondary legislation. Under each heading, the study attempts to propose concrete recommendations for amendments to the extent possible. These recommendations are largely based upon shortcomings identified through a desk research and are far from being completely exhaustive. At this point, as civil society organizations (CSO) voice the problems they encounter in their own activities, other necessary changes that need to be made to the legislation on the freedom of association will become more evident. Therefore, it is of utmost importance that this report be periodically reviewed in light of the feedback from CSOs.

This report has been prepared in scope of the "Strengthening Civil Society Development and Civil Society-Public Sector Dialogue in Turkey project" financed by the European Union and the Republic of Turkey of which the Third Sector Foundation of Turkey (TUSEV) is an implementing partner and has been drafted by İstanbul Bilgi University Human Rights Law Implementation and Research Center Expert Gökçeçiçek Ayata and İstanbul Bilgi University Faculty of Law Assistant Professor Ulaş Karan.

February 2014
Gökçeçiçek Ayata, Ulaş Karan

1 FREEDOM OF ASSOCIATION

A- FREEDOM OF ASSOCIATION: OVERVIEW

1. International Law

Freedom of association can be defined as the freedom of individuals to come together and form an organization representing themselves to protect their interests.[1] Freedom of association safeguards numerous forms of organizing such as political parties, unions and civil society organizations (CSOs). Therefore this right entails both a civil and political aspect and an economic aspect. While its civil right element protects individuals against unlawful intervention by the state into the individuals who wish to associate with others, its economic element allows individuals to promote their financial interests in the area of labor market, especially by means of trade unions. The political aspect of the right helps individuals defend their interests against the state or other groups of individuals in an organized way.[2] However, this study mostly focuses on the civil element of the right, only on institutions that can be defined as CSOs, and particularly associations and foundations, which are forms in which such institutions are established in Turkey's law. The fact that the political element of the right has been excluded from the research does not imply that the issue of freedoms of political parties is not included in the research. Of course the civil element of the right does not preclude CSOs from working on political issues[3] and therefore provisions forestalling CSO activity on political issues have also been included in the report. Throughout the text, the expression freedom of association must be perceived in its narrow sense and as limited to associations and foundations.

The freedom of association has been safeguarded in Article 20 of the Universal Declaration of Human Rights and Article 22 of the International Covenant on Civil and Political Rights that Turkey is party to, and Article 11 of the European Convention on Human Rights (ECHR). Turkey has signed all these documents addressing freedom of association and endorsed them in the appropriate way. As per Article 90 of the Constitution,[4] these documents have become part of Turkey's legislation. In a potential reform initiative pertaining to the freedom of association, the primary standards that should be taken into consideration are the standards that are set by these conventions or particularly those set by convention organs such as the European Court of Human Rights (ECtHR).

There are many norms on the freedom of association in international law. In the framework of this study, mostly standards emerging in scope of ECHR will be referenced. The primary regulation in this sphere is ECHR Article 11. According to the article "Everyone has the right to freedom of peaceful assembly and to freedom of association with others (...) for the protection of his interests." As such the article safeguards both the freedom of assembly and the freedom of association. These freedoms are also closely linked to the freedom of expression. At this point freedom of expression can be accepted as *lex generalis*, and freedom of association and assembly as *lex specialis*. The freedom of expression as *lex generalis* forms the basis for the full enjoyment of a wide range of other human rights and is integral to the enjoyment of the rights to freedom of assembly and association.[5] The ECtHR also states that "(...) given that the

1 David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights*, 2. ed., Oxford University Press, Oxford, 2009, p. 525.

2 Venice Commission, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*, CDL-AD(2011)035, para. 40.

3 *Zhechev v. Bulgaria*, Appl. No. 57045/00, 21.06.2007.

4 According to the last sentence of the final paragraph of article 90 of the Constitution, "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

5 Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, para 4.

implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions, the Court has also recognised that the protection of opinions and the freedom of expression within the meaning of Article 10 of the Convention is one of the objectives of the freedom of association."[6] The interrelation between these freedoms inevitably leads to the inclusion of other freedoms in such a study on the freedom of association. Therefore, in the study, under the heading of "Other Rights Related to the Freedom of Association" freedoms of expression and assembly have also been addressed and certain legal provisions regarding these rights have been examined.

Another issue that sometimes comes to the fore in relation to the freedom of association is freedom of religion or faith. This issue emerges especially in terms of religious organizations. In this case it is necessary to respond to the question whether the analysis will be made in scope of freedom of religion or faith, or freedom of association. The issue of religious associations is an issue that generally comes up not in the framework of freedom of association but rather in the scope of freedom of religion or faith. According to ECtHR "the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention."[7] Since this issue is assessed in the framework of Article 9 of ECHR, it has also been addressed in scope of this study. The foundations of non-Muslim communities who are citizens of the Republic of Turkey that are called community foundations in Turkey's legislation have been founded in the Ottoman era and have a different status. These communities are not legal entities. As will be elaborated upon in the relevant section on foundations, except for the foundations that have been established by communities in the past, new foundations cannot be established with the specific aim of promoting a religious community. Therefore, this report does not address religious foundations. Of course this does not mean that there are no restrictions or problems concerning to the freedom of association of these foundations.

In ECHR Article 11, everyone has the freedom of association. Whether a person is a citizen of a country or not or if they are stateless is irrelevant to them being the subject of this right. The article includes a statement that reads "This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State." This implies that restrictions may be imposed on the right of association of state administration officials, members of the army and security forces. This is the only exception to the subject of the right. However, this regulation does not offer a blank check to such restrictions.[8] Therefore it does not seem possible to impose an overall restriction to the abovementioned professions.

Individuals can organize around various purposes in the framework of the freedom of association. There is no restriction as to the purpose of organizing. The aim of the organization is not a determinant in terms of exercising the freedom of association. The expression "protection of his interests" in Article 11 of the ECHR refers to this situation. It is possible to establish an "organization" with ethnic, religious, linguistic, cultural, social, political, professional, sportive or philanthropic purposes. At this point, what is

6 *Gorzelik v. Poland,* Appl. No. 44158/98, 17.02.2004, para 91.

7 *The Moscow Branch of the Salvation Army v. Russia*, Appl. No. 72881/01, 05.10.2006, para 58.

8 Tüm Haber Sen and Çınar v. Turkey, *Appl. No. 28602/95, 21.02.2006.*

determinant is that the operation of the given "organization" is independent from the state.[9]

2. The Constitution

Through the 2004 amendment to Article 90 of the Constitution that states "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail", international conventions can supersede and be applied instead of provisions in domestic law under certain conditions. The fact that the Constitution and international conventions supersede laws does not preclude the necessity of legal reforms.

There are presently legislations that restrict the freedom of association and that are in violation of the Constitution or international conventions. Rather than introducing a clear responsibility to the legislative branch for repealing legislation that is in violation of international conventions, Article 90 introduces a responsibility for the judiciary and executive branches to apply international law when the international convention and national legislation are in contradiction. In this respect Article 90 of the Constitution does not offer the necessary protection. Article 90 causes the approach of particularly the judiciary organs to be significant in the approach to the freedom of association. Due to the limited knowledge and experience of the judiciary in international law, this may lead to the inadequate implementation of international standards in terms of the freedom of association. Therefore there is great need for a legal reform initiative in this field. This should be taken into consideration by the law makers and international standards should be taken into account in a reform initiative pertaining to the freedom of association. A failure to do so may lead to a further deterioration of Turkey's human rights report card in the international level.[10] The basic provisions on the freedom of association in Turkey's law are regulated in the Constitution. The issue has been regulated separately for associations and foundations, labor unions, and political parties. However, in scope of this study, the primary provision is Article 33 of the Constitution titled "Freedom to Form an Association". According to the article, everybody has the right to found an association without seeking permission, become a member of an association, withdraw from membership, and no one can be forced to be or continue to be a member of an association. The subject of the right has been defined as everyone and there is no restriction in regard to the purpose of the organization. The content of the article appears to be in line with the protection foreseen by ECHR Article 11.

According to Article 33 of the Constitution the freedom to form associations, or become a member of an association, or withdraw from membership without prior permission "shall not prevent imposition of restrictions on the rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require." As mentioned above, a similar provision also exists in ECHR Article 11. In this respect also there is compliance between the Constitution and ECHR.

While Article 33 of the Constitution bears the title "freedom of association", with the final paragraph of the article that reads "The provisions of this article shall also apply to foundations."

9 Olgun Akbulut, "Toplantı ve Örgütlenme Özgürlükleri" (Freedom of Assembly and Association), *İnsan Hakları Avrupa Sözleşmesi ve Anayasa: Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme* (ECHR and the Constitution: A review within the context of individual applications to the Constitutional Court), Sibel İnceoğlu (editor), Beta, İstanbul, p. 397.

10 As of the end of 2012, of the 141 decisions the ECtHR has issued on violations of the freedom of assembly and association, 57 have been against Turkey. See, ECHR, Overview 1959-2012, p. 7, http://www.echr.coe.int/Documents/Overview_19592012_ENG.pdf (accessed:15.08.2013)

it is recognized that the regulation on associations applies to foundations as well. Even though the term "association" in the article text does not fully correspond to the term "organization" in ECHR Article 11, within the scope of this study it applies to both associations and foundations.[11] Still the references to associations and foundations in the article text should be removed and the article should be amended in a way to be open to other forms of freedom of association and organizing such as platforms, initiatives, groups, etc. It can be observed that the Constitution is in line with ECHR in terms of the subject of freedom of association, however, it still adopts a limited approach in terms of scope. The above mentioned amendment will make the Article harmonious with ECHR Article 11.

B- THE STATE'S OBLIGATIONS CONCERNING FREEDOM OF ASSOCIATION

1. International Law

All human rights engender a dual obligation for states. States have to take positive administrative and legal measures and implement these measures. States also have negative obligations and this obligation denotes that the state itself should not cause human rights violations. First generation rights, which also include freedom of association, are generally regarded as foreseeing negative obligations. Of course the state has a negative obligation not to violate this right. When freedom of association is at stake, the state should adopt a "negative" attitude such as not acting, not interfering, and avoiding violations. While states should adopt a negative attitude in terms of freedom of association, such an attitude is not adequate in itself for the exercise of this right. To ensure freedom of association, the state has had to take certain measures such as make the necessary legislation, establish institutional structure, and take administrative measures.

In scope of another classification in regard to obligations, states have a series of obligations such as respecting, protecting, fulfilling and advancing human rights. States' respecting human rights requires them not to obstruct individuals who have rights from enjoying these rights. The obligation of protection of human rights refers to ensuring that human rights are not violated by the state or a third party. The obligation to fulfil human rights means that the state has to actively take measures to ensure everyone can benefit from human rights. Finally, advancing human rights means increasing awareness of human rights and the possibilities of defending rights, and raising awareness in terms of the responsibility to respect other people's rights. All these obligations pertain to any human right at various levels and all of these obligations bear the same level of importance. In terms of freedom of association, the state, natural persons or legal entities should not interfere with this freedom, and when a natural person or legal entity interferes with this freedom the state should protect the individual exercising this freedom and take necessary measures for individuals to exercise the freedom of association.

Human rights provide protection both in the sphere of relations between the individual and the state and relations among individuals. The ultimate aim of the institution of human rights is to constitute rules for the relations between the individual and the state, and delimit the state's power over the individual. States are not only under the obligation to avoid human rights violations. The duty to protect individuals from behavior of other individuals that will cause violations has also been attributed to the state. Human rights, which have been addressed more in the framework of individual-state relations in the past, are now relevant also in inter-individual relations with the diversification and development of social relations.

11 Akbulut, p. 398.

For example, in the case of an individual being fired for being member of an association there is also a violation in terms of freedom of association.

Human rights violations generally take place in two ways. While these violations may be intentional, in other words, by acts of commission, they may also be by omission. Acts of commission occur through state or non-state actors taking an intentional action against a person or a group. Acts of omission may occur when states fail to take action, intervene or pass a law which will result in a human rights violation. While only one of these forms may be in question in any human rights violation, both can also be in place simultaneously.

As in all other human rights, it is highly probable that disadvantaged groups in society face obstacles in exercising their freedom of association. At this point various legal and administrative measures should be taken. These measures may include some special measures such as providing certain opportunities for members of disadvantaged groups that do not apply to other groups, or simplifying the foreseen procedures. Special measures should also entail protective measures in addition to facilitating the freedom of association. The rights and freedoms of organizations established to safeguard the rights of disadvantaged groups, including primarily the right and freedom of expression, assembly and association, should be protected. The state should take stringent measures to eliminate obstructions and threats from both the administration and third parties and make sure the protection offered by the law is enforced.[12]

From ECHR perspective negative obligations pertaining to the freedom of association are inherent to the Convention itself. As for the positive obligations, there are direct and indirect provisions.[13]According to ECtHR, "Under Article 1 (art. 1) of the Convention, each Contracting State 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention'; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged."[14] The interference of non-state actors may ensue from the shortcomings of the legislative branch or the implementation of the legislation and in both cases it is possible to engage the state's obligation.[15] According to the Court, "the State could have breached its positive obligation to protect the applicant against interferences with her liberty by private persons."[16]

2. The Constitution

The obligations pertaining to the freedom of association in Turkey's law are addressed in various ways in the Constitution. Even though the negative obligations are not clearly stated in Constitution Article 33, as in ECHR, they are inherent to this article. As for the positive obligations, the main provision of protection is Constitution Article 5. According to the article, the fundamental aim and duty of the state is "... to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the

12 Colombia, ICCPR, A/52/40 vol. I (1997) 44, para. 296.

13 Oya Boyar, "Devletin Pozitif Yükümlülükleri ve Dolaylı Etki" (Positive Obligations of States and Indirect Horizontal Effect), *İnsan Hakları Avrupa Sözleşmesi ve Anayasa: Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme (European Convention on Human Rights and the Constitution - A review within the context of individual applications to the Constitutional Court)*, Sibel İnceoğlu (editor), Beta, İstanbul, p. 54.

14 *Young, James and Webster v. U.K.*, Appl. No.7601/76, 7806/77, 13.08.1981, para. 49.

15 Boyar, p. 63.

16 *Storck v. Germany*, Appl. No. 61603/00, 16.06.2005, para 88.

individual's material and spiritual existence." The justification of the article becomes the guarantee of positive obligations as it states that "in order for everyone to benefit from fundamental rights and freedoms, that is for them to be exercised by everyone, since the state's "no intervention" approach is not sufficient, the need for the state to support rights and freedoms, that is the necessity of the state to facilitate the realization of these rights and freedoms is also adopted."[17] As in other rights and freedoms, the article has been drafted as the normative basis for the positive obligations that include the protection, fulfillment and advancement of the freedom of association. Therefore there does not appear to be a need for a constitutional amendment regarding negative and positive obligations for the freedom of association.

However, in order to eliminate any confusion concerning obligations regarding rights and freedoms in the Constitution and to provide a guideline for the legislative, executive and judiciary branches, it would be more helpful for the obligations to be defined more clearly. Such a provision should be included in the section on fundamental rights and freedoms, and openly state that legislative, executive and judiciary branches are under the obligation of not violating the basic rights and freedoms of private legal natural and legal entities , and that they are under the obligation of protecting individuals in cases where these rights are violated by non-state actors, and that the state is required to eliminate obstacles before the exercising of and benefitting from these rights and freedoms.

It is not possible to include sanctions on interferences on the freedom of association in the Constitution. The provisions entailing sanctions can only be included in penal laws. Punitive sanctions are stipulated in national legislation for the safeguarding of the freedom of association. Article 114 of the Turkish Penal Code Law no. 5237 foresees punitive measures for the use of threat or violence to force someone to be or not be a member of a political party, participate or not participate in activities of a political party, leave their position in a political party or its management. Article 118 stipulates punitive measures for the crime of using threat or violence to force someone to be or not be a member of a union, or to participate or not to participate in the activities of the union, or to cancel his membership from the union or to declare his resignation from the management of the union. As such, freedom of association for political purposes and freedom of unionizing are safeguarded. However, there are no punitive measures to this end in regard to associations and foundations. Since associations and foundations are as significant forms of organizing as political parties and unions in terms of democracy, the lack of such a regulation emerges as a shortcoming. Therefore, the addition of a special provision to the Turkish Penal Code to this end or amending the existing provisions on the protection of the freedom of association to include associations and foundations under one section appear to be the most appropriate solution.

It is possible to stipulate sanctions against individuals exercising the freedom of association. In terms of sanctions, the first issue that comes to the fore is the phenomenon of hate speech. The stipulation of a sanction in this case is considered legitimate and is even expected to be proportional to the act and deterrent. Other sanctions should be assessed in the framework of the restriction of the freedom of association.[18] Furthermore, the sanctions should be subject to judicial review.

17 *Constitution of the Republic of Turkey, Articles with Justifications*, https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf (accessed: 15.08.2013)

18 Egypt, ICCPR, A/58/40 vol I (2003) 31, para. 77(21).

C- THE RESTRICTION OF FREEDOM OF ASSOCIATION

1. International Law

Freedom of association is not among absolute rights and can be restricted. The restriction of human rights is of great significance in terms of the safeguarding of the exercise of all rights and freedoms. The restriction regime regulates in which cases, how and to what extent the fundamental rights and freedoms can be restricted, in order words it regulates the limits of restriction. A restriction system in line with international standards prevents the arbitrary restrictions to rights imposed by the state and becomes a guarantee for rights and freedoms as it delimits the restriction.

The most commonly adopted approach to restrictions has emerged in the ECHR system. According to Article 11 of ECHR regulating the exercise of the freedom of association, "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." In light of this approach any interference by public mechanisms to the freedom of association should be stipulated in the law, follow one of the specified legitimate objectives and the interference has to be necessary in a democratic society.

In appeals concerning the violation of freedom of association, ECtHR first questions if there is an interference. There is no restriction in terms of the form of the interference to freedom of association. For example the application to the judiciary for the dissolution of an organization, the dissolution of the organization by a judicial decree, monetary penalty to the organization, withholding permission for the establishment of an organization, obstruction of an organization's activities are among typical examples of intervention to freedom of association. At this point, it is also important whether the interference leads to a deterrent effect. Even if the person has not met punitive sanction, for instance if the sentence was suspended or deferred, the threat of heavy penalty can be still be considered as an interference.[19] The underlying reason for this is the potential of such an interference to lead to other persons to refrain from exercising the freedom of association. According to ECtHR even if the person has not received a penalty, for instance his sentence was deferred or suspended, the threat of penalty can be found disproportionate.[20] Furthermore the award of damages and injunction also constitute interference.[21]

The first criterion in restriction is that it should be prescribed by law. This criterion is in effect the review of whether or not the interference has a legal basis. The restriction of a right should definitely have a legal basis.[22] To meet this criterion, it is not necessary for this restriction to be written as a legal rule. The settled case law of judicial organs can also be considered sufficient to meet this criterion.[23] In scope of this criterion, the existence of this rule of law is not sufficient by itself. The rule of law in question also has to be accessible and foreseeable.

According to ECtHR, "foreseeability (...) is one of the requirements inherent in the phrase 'prescribed by law'. A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree

19 *Erdoğdu and İnce v. Turkey* (Grand Chamber), Appl. No. 25067/94, 25068/94, 08.07.1999, para 53.

20 *Erdoğdu and İnce v. Turkey,* (Grand Chamber), Appl. No. 25067/94, 25068/94, 08.07.1999, para. 53.

21 *Tolstoy Miloslavsky v. U.K.*, Appl. No. 18139/91, 13.07.1995.

22 Harris, O'Boyle, Warbrick, p. 444.

23 *Leyla Şahin v. Turkey*, (Grand Chamber), Appl. No. 44774/98, 10.11.2005, para. 87 etc.

that is reasonable in the circumstances, the consequences which a given action may entail. (...)" [24] The complexity of the law used as basis of interference or its vagueness, which may necessitate appropriate legal assistance to be completely accessible, does not in itself make it in violation of the principle of foreseeability.[25] As such the issue of legal assistance which will be addressed below becomes significant.

In order for a rule of law to entail the sought quality, it must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. The rule of law allowing for the restriction should not confer unfettered discretion to public authorities for the restriction of the freedom of association. Laws must provide sufficient guidance to those charged with the execution of these laws, as well as to subjects of the freedom of association.[26] Legislation on freedom of association, which is of crucial importance for democracy, has to be drafted in a manner that is accessible and foreseeable for everyone, and does not grant unfettered discretionary power to state authorities.

The second criterion that is relevant in the restriction on freedoms is whether or not the interference has a legitimate purpose. The review conducted in this context does not lead to an important discussion at large. In regulations on freedom of association states usually interfere based on existent grounds that are almost impossible to define concretely. States readily resorting to grounds of restriction results in the criterion of legitimate purpose not providing sufficient guarantee. On the other hand, the limitation of these grounds and the further reduction of these reasons through future regulations and making their content more concrete are of great significance in terms of safeguarding the freedom of association.

The scope of legitimate purpose is outlined under five headings in Article 11 of ECHR as "the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals or for the protection of the rights and freedoms of others." These purposes are limited in number and cannot be expanded. Here, the most controversial legitimate ground is "the protection of morals."[27] The fact that there is no consensus regarding to the concept of morals in Europe has led the ECtHR to give signatory states more discretionary power in this field. However, this discretion is not unrestricted and subject to the review of ECtHR.

The existence of legitimate purpose does not in itself make an interference legitimate. In scope of the third criterion of necessity in a democratic society, ECtHR applies two sub criteria in the form of "proportionality" and "pressing social need". Under the "proportionality" criterion, it is expected that there is a just balance between the purpose necessitating the restriction of the freedom of expression and the means employed to respond to this necessity. The "pressing social need" makes reference to an existent social need for restriction.[28] This necessity should render the interference inevitable. All these criteria are assessed in the order denoted in each appeal and any criterion that is not met makes the restriction of the freedom of association in violation of ECHR.

2. The Constitution

In Turkey's law, freedom of association is addressed in Article 33 of the Constitution and the restrictions pertaining to this freedom in Article 13 of the

24 *Müller and Others v. Switzerland,* Appl. No. 10737/84, 24.05.1988, para 29.

25 *Sunday Times v. U.K.*, Appl. No. 6538/74, 26.04.1979, para. 49.

26 Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, para 25.

27 Harris, O'Boyle, Warbrick, p. 477.

28 Harris, O'Boyle, Warbrick, p. 444.

Constitution. freedom of association which is not an absolute right is subject to the restrictions of first generation rights in the Constitution. According to the article, "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

The phrase "may be restricted by law" in Article 13 in the Constitution gives the impression that only the legislative branch may impose restrictions. However, according to Article 11 of the Constitution, "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals." Therefore, not only the legislative organ, but also the executive and judicial organs have to comply with the restriction regime. According to Article 13 of the Constitution the freedom of association may be restricted, without infringing upon its essence, for reasons delineated in Article 33, only with laws and proportionally, and in compliance with the necessities of a democratic social order. These criteria are in line with those applied by ECtHR and there is no obstacle before judicial organs using the investigation method employed by ECtHR. When a restriction pertaining to Article 33 of the Constitution on freedom of association is taken to the Constitutional Court through individual appeal, it will be assessed in the scope of Article 13 and whether or not the limit of the restriction has been overstepped will be determined.

Article 13 of the Constitution states that freedom of association can only be restricted by law. It is of utmost importance that laws are drafted in a way to offer guidance to individuals who want to exercise the freedom of association and in a manner to facilitate rather than hinder the exercise of this freedom. The approach adopted by ECtHR in this respect has also been displayed by the Constitutional Court. The Constitutional Court has stated that "If where a restriction begins and ends is not specified, the restriction in question will exceed its purpose, not correspond to the needs of a democratic social of order, and the discretion on its content will be left to the governance, thereby making it objectionable. The restriction established by the discretion of the governance cannot be said to have been defined by law..."[29] The Court has also stated that legislations should comply with the principle of certainty. According to the Court, "the principle of certainty necessitates that the obligation is certain and absolute both for individuals and administratively, and that it enables relevant parties to foresee on a reasonable level what outcomes any given action may lead to under given circumstances."[30]

A second provision regarding restrictions is included in Article 14 of the Constitution. The article does not actually pertain to restrictions. However, even though the title of the article "Prohibition of abuse of fundamental rights and freedoms" suggests that the article makes reference to the protection of rights and freedoms, it is a provision that may be used for the restriction of the freedom of association. ECHR Article 17 titled "The prohibition of abuse of rights"[31] provides an additional guarantee for the protection of rights and freedoms against the actions of the state or individuals attempting to eliminate these rights that may lead to this outcome.[32] However,

29 Constitutional Court, E. 1987/16, K. 1988/8, K.T. 19.04.1988.

30 Constitutional Court, E. 2010/7, K. 2011/172, K.T. 22.12.2011.

31 The Convention's article 17 titled "Prohibition of abuse of rights" reads: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

32 Serap Yazıcı, *Yeni Bir Anayasa Hazırlığı ve Türkiye Seçkincilikten Toplum Sözleşmesine* (Preparation of a New Constitution and Turkey: From Elitism to Social Contract), İstanbul Bilgi University Publishing, İstanbul, 2009, p. 102.

the reason for the inclusion of the first version of the aforementioned article in the Constitution is to ensure the continuation of the anti-democratic state order. The existence of such an approach may lead to the use of Article 14 not to protect, but rather to restrict the freedom of association.

According to the first two paragraphs of Article 14 of the Constitution, "None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights. No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution." The word "activity" in the article text also refers to activities that may pertain to the freedom of association. With such an interpretation, Article 14 becomes another provision that may be applied to restrict freedom of association. In its current form, Article 14 has the potential of restricting freedom of association in terms of content. It has been noted that the article provides judicial organs with an extensive discretion to implement sanctions against not only dissolving or extinctive acts, but also against actions that are presumed to be aimed at dissolution or extinction.[33] Such a provision also entails the danger of serving as the basis for arbitrary restrictions in terms of objectives in the exercise of the freedom of association to be accepted as in line with the Constitution. At this stage, the emerging need is for Article 14 to be brought in line with the corresponding provision in ECHR Article 17. This compliance can be assured with the annulment of the first paragraph.

Article 33 of the Constitution states that freedom of association may be restricted for national security, public order, prevention of crime, public health, public morality and the protection of the freedom of others. Here, there is an overlap with the grounds of restriction listed in Article 11 of ECHR. The only difference between the Constitution and ECHR is the provision in the fifth paragraph of Article 33 of the Constitution which reads, "Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. However, where it is required for, and a delay constitutes a prejudice to, national security, public order, prevention of commission or continuation of a crime, or an arrest, an authority may be vested with power by law to suspend the association from activity. The decision of this authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his/her decision within forty-eight hours; otherwise, this administrative decision shall be annulled automatically." This provision allows for the suspension of an association's activities without the decision of a judge. Even if such a decision is temporary and should be submitted to the judge in 24 hours and the judge is obliged to announce the decision in 48 hours, still by allowing for an arbitrary interference on the right to association, it brings forth the danger of the violation of this right.

Except for the above mentioned discrepancy, the current content of Article 33 of the Constitution is in compliance with ECHR Article 11, and except for the repeal of paragraph 5, it does not require any amendments in terms of freedom of association. At the same time, a full compliance will be possible through a parallel interpretation of the two provisions. Such an interpretation necessitates the adoption of ECtHR's approach to restriction of the freedom of association by the judicial and executive branches in Turkey.

33 Yazıcı, p. 104.

II OTHER RIGHTS AND ISSUES RELATED TO FREEDOM OF ASSOCIATION

A- FREEDOM OF EXPRESSION

1. International Law

As mentioned above, two freedoms closely linked to the freedom of association are freedom of expression and freedom of assembly. It is rather difficult to consider these freedoms separately and the absence of one of these freedoms may make the protection of the rights of citizens impossible.[34] As is frequently cited, according to ECtHR, "Freedom of expression constitutes one of the essential foundations of such a society... it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."[35] Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.[36]

Freedom of expression applies to everyone. In other words it is a right for all without the distinction of natural or legal persons or professions. The status or function of the person exercising this right or the expression used can only be relevant in the restriction of the freedom.[37] Therefore there is no categorical restriction in terms of the subject of the right. Freedom of expression is a right that may be restricted, but the authority for its restriction is not unlimited and can be exercised in the framework of certain criteria. These criteria are the same ones as those listed above for freedom of association. Differences emerge in terms of legitimate objectives. According to Article 10, "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." As the article demonstrates restrictions may be imposed on the freedom of expression on many more grounds as compared to the freedom of association. The restriction takes place with an interference on the exercise of the right. These may include obvious interferences such as the administration preventing publication, confiscation of published material, as well as interferences such as launching criminal or disciplinary proceedings against the person exercising the freedom of expression after the publication.[38]

The protection foreseen by freedom of expression not only involves content, but also includes the different forms and tools through which information and thoughts are expressed, communicated and accessed.[39] The expression may be communicated through any medium such as paintings, books, films, brochures and with any content.[40] Access and dissemination of information and opinion has become even more widespread with the advance of new technologies like the internet in the present day and age. Today, the internet also falls within the ambit of the protection of freedom of expression. In the light of its accessibility and its capacity to store and communicate vast amounts of information,

34 Venice Commission, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*, CDL-AD(2011)035, para. 102.

35 *Handyside v. United Kingdom*, Appl. No. 5493/72, 07.12.1976, para 49.

36 Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, para 3.

37 P. Van Dijk, G.J.H. Van Hoof, Arjen Van Rijn, Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Antwerpen, Oxford, 2006, p. 776.

38 Clare Ovey, Robin White, *Jacobs and White, The European Convention on Human Rights*, Oxford University Press, Oxford, 2002, p. 277.

39 Harris, O'Boyle, Warbrick, p. 445.

40 Ovey-White, p. 276.

the internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general.[41] The opinions and thoughts expressed via the internet are also in the scope of freedom of expression. Freedom of expression also includes the negative aspect of freedom of expression in the form of the right to remain silent. Therefore, silent protests are also a part of the freedom of expression.

There are no limitations to the form of the expression, as there are no limitations to its content and it includes all types of political, artistic, commercial expressions. The scope of the protection from interferences on the freedom of expression from the narrowest to the broadest is as follows: expressions directed at judiciary organs, ordinary citizens, high level bureaucrats, and politicians. The scope of protection from interferences on freedom of expression for politicians and artists is rather broad.

The category of expression that comes to the fore in this regard is political expressions. According to ECtHR, the freedom of political debate is at "the very core of the concept of a democratic society."[42] Governments have to both tolerate the harshest of criticism and also make sure that the restrictions they stipulate do not have a deterrent effect on the freedom of expression. According to ECtHR, governments must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion and mass media.[43] The monitoring of public organs is a citizenship duty and citizens may use a harsh and sharp tone as they are undertaking this duty. The government is in a position to effectively respond to the harsh criticism directed at it.[44] The limits of criticism directed at politicians are broader than that of private individuals and this has become an established principle in the present day.[45] Unlike private individuals, politicians knowingly lay themselves open to the close scrutiny of the press and public at large and choose to be public figures[46] and for this reason must show a greater degree of tolerance in the face of criticism.[47] This attitude pertaining to freedom of expression also holds for freedom of association.

Freedom of expression applies not only in relations between private law real persons and legal entities and the state, but also in relations between private law real persons or legal entities. In the former, as it emerges as an obstruction or interference by the state of an individual exercising the freedom of expression, it usually entails negative obligations for states. The latter involves obstructions and interferences caused by non-state actors. In this case, the state has an obligation to prevent these and safeguard the freedom of expression, that is to say it has a positive obligation. As mentioned above, a similar approach also applies to freedom of association.

Freedom of expression also entails freedom of holding an opinion. For instance, the dismissal of a civil servant from her post for being a member of a political party is considered an interference in the scope of the right to hold an opinion.[48] This also constitutes an interference to the freedom of association. In such cases freedom of expression and freedom of association may be intertwined. In such a case, a negative effect resulting from being member of an CSO also relates to the freedom of expression.

41 *Times Newspapers Limited v. the United Kingdom* (No. 1 and 2), Appl. No. 3002/03, 23676/03, para 27.

42 *Lingens v. Austria,* Appl. No. 9815/82, 08.07.1986, para 41-42.

43 *Sener v. Turkey,* Appl. No. 26680/95, 18.07.2000, para 40.

44 Harris, O'Boyle, Warbrick, p. 455.

45 *Brasilier c. France,* Req. No. 71343/01, 11.04.2006, para 41.

46 *Lingens v. Austria,* Appl. No. 9815/82, 08.07.1986, para 42; *Prager and Oberschlick v. Austria,* Appl. No. 15974/90, 26.04.1995, para 57-59*; Incal v. Turkey (Grand Chamber),* Appl. No. 22678/93, 09.06.1998, para 54

47 *Dabrowski v. Poland,* Appl. No. 18235/02, 19.12.2006, para 35.

48 *Vogt v. Germany* (Grand Chamber), Appl. No. 17851/91, 26.09.1995.

2. The Constitution

There are numerous provisions on freedom of expression in the Constitution. These include provisions regarding both the means employed for exercising freedom of expression and the form of exercising freedom of expression. ECHR Article 10 has defined freedom of expression with a rather brief text and the current scope of freedom of expression has been established through ECtHR decisions. Meanwhile, the Constitution entails quite comprehensive provisions in certain areas and foremost concerning the freedom of the press. However, in line with the confines of this study, freedom of the press will not be addressed at length as it is not directly related to the freedom of association.[49]

Constitution Article 25, under the heading "freedom of thought and opinion", states that "Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions." Worded as such, this regulation differentiates between the acts of having an opinion and expressing an opinion.[50] ECHR Article 10 on freedom expression also includes a right in the form of the freedom to "hold opinions". For instance, a civil servant's removal from office due to his or her membership in an association constitutes an interference to freedom of expression. This approach indirectly indicates that the right to hold an opinion falls under the protection of Article 10. It can be held that Article 25 of the Constitution corresponds to the "freedom to hold opinions" in ECHR Article 10. An association or foundation reprimanded for or accused of an opinion it advocates is under the protection of this right and as such freedom of association and freedom of expression are again intertwined.

A regulation parallel to the right to receive and impart information and ideas safeguarded by ECHR Article 10 is included in Article 26 of the Constitution. First paragraph of Article 26 of the Constitution reads, "Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities". The article text identifies the means to be employed in the practice of freedom of expression as "speech, writing, pictures or other media", and uses the phrase "other media", thus manifesting that there is no restriction on the means. Therefore, it is possible and even necessary for the relevant provisions on freedom of expression to ensure similar protection regarding new communication technologies such as the internet.[51] This regulation in Article 26 of the Constitution provides an explicit basis in positive law for the approach set forth by ECtHR in its case law regarding the means to be employed in the practice of the freedom of expression.

According to the grounds for restriction in Article 26 of the Constitution, freedom of expression may be restricted for the purposes of "national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State

49 As is the case with freedom of association, the constitutional provision on the positive obligation concerning freedom of expression is found in article 5 of the Constitution. Apart from this general provision there is another separate and explicit regulation that includes a positive obligation specific to freedom of the press. According to the second paragraph of article 28 of the Constitution, "The State shall take the necessary measures to ensure freedom of the press and information". This provision implies an explicit positive obligation of the state concerningg freedom of the press and information.

50 In fact the justification of the article also confirms this situation. See: *Constitution of the Republic of Turkey, Articles with Justifications*, TGNA, Ankara, 2011, p. 45 https://yenianayasa.tbmm.gov.tr/docs/gerekceli_1982_anayasasi.pdf (accessed:15.08.2013)

51 Osman Can, "Düşünceyi Açıklama Özgürlüğü: Anayasal Sınırlar Açısından Neler Değişti?" [Freedom of Expressing Opinions: What Has Changed in regard to Constitutional Boundaries?], *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti [Theoretical and Practical Dimensions of Freedom of Expression]*, Bekir Berat Özipek (Ed.), LDT, Ankara, 2003, p. 384.

with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary". Even though the aforementioned do not completely overlap with those stated in ECHR Article 10, they may be interpreted along the same line.

In light of all the aforementioned points, it can be asserted that Articles 25 and 26 of the Constitution on freedom of expression provide the necessary guarantee. Surely this situation does not mean the problems experienced in Turkey in regard to freedom of expression can be denied.[52] Certain laws such as the Anti-Terror Law mentioned below in regard to freedom of association create major problems also in terms of freedom of expression. Nonetheless, considering ECtHR's case law on freedom of expression, Article 26 of the Constitution is presently sufficient. However, it will be more favorable if certain discrepancies such as the grounds for restriction manifest in the article text are brought in line with ECHR Article 10.[53]

B- RIGHT TO ACCESS TO INFORMATION

1. International Law

Access to information constitutes the core of all the stages pertaining to CSOs' participation in decision making processes. In scope of their fields of activity, CSOs' access to information held by public authorities is of great significance. At this point, while public authorities may provide the information without being solicited in the framework of cooperation, and they may also present it upon the CSOs' request. Such an activity constitutes the subject matter of the right to access information.

Even though the right to receive information is not a right safeguarded by ECHR it has gradually started to be included in the Convention's field of protection through the ECtHR decisions. ECHR Article 10 safeguards the freedom to hold opinion, and the freedom to receive and impart information and ideas. The right of access to information bears aspects such as the person's right to access data and records kept on him or her by the state, right to access data kept by the state but not regarding that person themselves, and right to be informed on issues of public interest not related to that person but kept by the state. The phrase in Article 10 that makes reference to freedom to receive information has not been interpreted by ECtHR as the right of access to information.[54] In scope of Article 10, ECtHR merely recognizes the state's obstruction of access to current and available information as a violation. According to ECtHR, the right to freedom to receive information stated in ECHR Article 10 does not confer on the individual a right to request all sorts of information from the state, but it prohibits the state from restricting a person from receiving information that others wish or may be willing to impart to that person. However, this freedom cannot be construed as imposing on a state positive obligations to disclose to the public any secret documents or information concerning its military, intelligence service or police.[55]

52 As of the end of 2012, of the 512 decisions the ECtHR has issued on violations of freedom of expression, 215 have been delivered against Turkey. See, ECHR, Overview 1959-2012, p. 7, http://www.echr.coe.int/Documents/Overview_19592012_ENG.pdf (accessed:15.08.2013)

53 Though not specifically addressed in this report, there is no need to include articles 27, 28, 29 which constitute or may constitute problems regarding freedom of expression in the Constitution. Article 26 in itself can provide the necessary protection for freedom of expression.

54 *Leander v. Sweden,* Appl. No. 9248/81, 26.03.1987; *Gaskin v. U.K.,* Appl. No. 10454/83, 07.07.1989.

55 *Sirbu and others v. Moldova,* Appl. No. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01, 73973/01, para. 18.

ECtHR recognizes especially the press and CSOs' right to receive information in scope of Article 10. The Court has first found a refusal to provide an environmentalist organization with the requested administrative documents on a nuclear power station to be in line with the Convention, however, examining the aforementioned application in scope of Article 10 the Court has also recognized that in terms of the subject matter the right to receive information does not completely fall outside the scope of Article 10.[56] ECtHR takes particular note when the information sought by the applicant is ready and available at the public authorities.[57] Even though it is not possible to interpret the Court's decisions to assert that Article 10 includes the right to receive information, there has been a change in approach regarding the CSOs.

2. The Constitution

Contrary to ECHR the right to receive information has been explicitly recognized in the Constitution. The right to receive information has not been regulated in Article 26 of the Constitution on freedom of expression, but in scope of political rights and duties in Article 74. The Article text reads "Everyone has the right to receive information (...)." No differentiation has been made between real persons and legal entities. Furthermore, the article text entails no grounds for restriction and stipulates that the exercise of this right shall be determined by law. In light of the above mentioned, it is seen that there are no obstacles in the Constitution in regard to access to information. The subject has been regulated in detail in the Law on the Right to Information, and discussed below.

C- RIGHT TO ASSEMBLY

1. International Law

Like freedom of association, the freedom of assembly entails situations when the freedom of expression is exercised in a collective manner. A demonstration organized by one or several people in a public space is considered within the scope of freedom of expression, while if such an act is realized in the form of a meeting or demonstration by a more crowded group then it is considered under the freedom of assembly. The most important element of freedom of assembly is its peaceful character. In scope of this right, everyone's freedom of peaceful assembly has been recognized. At this point, the aim of the people organizing the demonstration or meeting and their attitude and behaviors during the exercise of this right are taken into consideration in determining whether the demonstration is peaceful or not. If a demonstration is determined to be not peaceful, in other words to contain violence, then it is considered reasonable to impose restrictions on this right.[58]

The content of the freedom of assembly is quite broad and it protects all sorts of gatherings such as demonstrations of protest, public press statements or conferences, rallies, sit-ins and occupations. Even activities organized for entertainment purposes such as exhibitions, concerts, fairs and seminars may be recognized in scope of the freedom of assembly.[59] This breadth is valid also regarding the aim of organizing the gathering. A demonstration can be held for any political, religious, cultural or social purpose and at this point there is no restriction in terms of the content.[60]

56 *Sdruzeni Jihoceske Matky c. Republique Tcheque,* (recevabilité), Req. No. 19101/03, 10.07.2006.

57 *Tarsasag a Szabadsagjogokert v. Hungary*, Appl. No. 37374/05, 14.04.2009, para. 36.

58 Akbulut, p. 383.

59 *Djavit An. v. Turkey*, Appl. No. 20652/92, 20.02.2003, para. 44, 60.

60 Harris, O'Boyle, Warbrick, p. 516.

Regarding the restriction of this right, the above mentioned approach to restrictions in scope of the freedom of association comes to the fore. In contrast to the freedom of expression, and parallel to the freedom of association, this right can be restricted only for reasons of national security or public safety, public order, prevention of crime, the protection of public health, morality or the rights and freedoms of others. Interference to the freedom of assembly is not limited only to the prevention of assembly or dispersion of the assembled people. Even if there is no interference to the people exercising their freedom of assembly during a meeting, the indictment of these people after the event or administrative or punitive measures taken after a meeting are also considered as interference to this freedom.[61] Here the point of consideration is whether or not the sanction in question creates a deterrent effect on the people who want to exercise their freedom of assembly. Restrictions to this freedom should be employed only as a last resort.[62]

Freedom of assembly, as in freedoms of association and expression, engenders both negative and positive obligations for the state. The scope of the state's negative obligation covers not interfering with a demonstration, and in scope of its positive obligation, the state should eliminate the circumstances that obstruct the exercise of this right and guarantee that non-state actors do not interfere with the individuals exercising this freedom.[63] According to ECtHR, "In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realization is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means."[64]

There is no obligation to seek permission in the exercise of the freedom of assembly. However, it may be considered reasonable to impose an obligation of notification regarding the demonstration. However, the purpose of this obligation is not to facilitate arrangements to obstruct the meeting but to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of the meeting with minimum disruption of public order.[65] Therefore the procedure of notification should pay due regard to the ability in practice of the individuals concerned fully to enjoy this right.[66] For instance, imposing the obligation for notification seven or fifteen days prior to a demonstration does not comply with the freedom of assembly.[67] Furthermore, in the absence of notification it should not be ruled that the demonstration in question automatically becomes illegal. At this point, whether or not notification has been made prior a demonstration should not be a determinant on its own, and whether or not the demonstration in question has been realized in a peaceful manner should be given precedence.[68] In an application on the freedom of assembly submitted to the United Nations Human Rights Committee, the Committee addressed the pecuniary penalty to a group of approximately 25 people for holding a public meeting without six hours prior notification on the occasion of a visit of a foreign head of state, where the group protested the visiting head of state by distributing leaflets and raising a banner critical of the human rights record of the country in question.

61 *Ezelin v. France*, Appl. No. 11800/05, 26.04.1991, para. 39.

62 Togo, ICCPR, A/58/40 vol. I (2003) 36, para. 78(18).

63 *Platform Arzte für Das Leben v. Austria*, Appl. No. 10126/82, 21.06.1988, para, 32.

64 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Appl. No. 29221/95 and 29225/95, 02.10.2001, para. 97.

65 *Sergey Kuznetsov v. Russia*, Appl. No. 10877/04, 23.10.2008, para. 42.

66 Republic of Moldova, ICCPR, A/57/40 vol. I (2002) 76, para. 84(15).

67 Mauritius, ICCPR, A/51/40 vol. I (1996) 24, para. 155; Belarus, ICCPR, A/53/40 vol. I (1998) 26, para. 145 and 154.

68 *Oya Ataman v. Turkey*, Appl. No. 74552/01, 05.12.2006, para. 39.

Though the decision notes that the subjection of public assemblies to a prior authorization procedure does not encroach upon the right to freedom of assembly, it has decreed that the pecuniary penalty is a violation of the freedom of assembly if it does not justify a restriction in scope of the grounds for restricting this right.[69] In actual circumstances taking place spontaneously where a politician is temporarily present without prior public notice and therefore preparation, the obligation of notification should be overlooked and not implemented rigorously.[70] At this point in order to prevent the violation of the right, the authorities are expected to adopt a tolerant attitude.

The physical space where the freedom of assembly is exercised may become an issue in the restriction of this freedom. First of all it should be noted that as a rule all kinds of public spaces are spaces where the freedom of assembly can be exercised and it is not possible to impose a general restriction on this matter. In every situation where there is a connection between the location and the aim of assembling the venue in question should be availed to the meeting. For instance, this connection is recognized in the case of the demand to commemorate May 1, 1977, when a great number of people lost their lives, at the same location.[71] The same holds when people, who want to protest the construction of a building at the site of a park, want to hold the demonstration at the park in question. Therefore, in this framework the choice of location as to where the freedom of assembly will be exercised belongs primarily to the people who want to exercise this freedom. Certain bans regarding demonstration venues will contradict with the freedom of assembly. For instance, ECtHR has ruled that the prohibition by law of all demonstrations on major roads in the capital of a country is a violation of the freedom of assembly.[72]

Imposing a wholesale ban on demonstrations is not compatible with the essence of this right to freedom of assembly.[73] The restriction to be imposed should definitely be place and time bound. The restriction should be as short as possible. In any given situation where a demonstration is held in a public space this demonstration will inevitably affect public order. A demonstration causing noise or disrupting traffic is not sufficient grounds for interfering with this right. Such an interference and the resulting sanction constitute the violation of this right.[74] In such situations the authorities are expected to be tolerant of the people exercising their freedom of assembly.[75]

The timing and duration of exercising the freedom of assembly is yet another important issue. There should be no restrictions on the freedom of assembly in terms of time and duration. Imposing a restriction of time and duration will be a direct violation of the ECHR. According to ECtHR, if there is a connection between the aim of the demonstration and its time and duration then there should be no restrictions in this sense.[76] In this case, it is possible to hold a demonstration at night or day, on the weekdays or the weekend and for several hours or several days. Moreover, in cases when the purpose of the meeting is to commemorate or celebrate a specific event then the demonstration in question is supposed to be held on a certain date. In such a situation, the realization of the demonstration at a specific time should not be obstructed by the state. Sufficient time should be given to the people exercising

69 *Kivenmaa v. Finland* (412/1990), ICCPR, CCPR/C/50/D/412/1990, para. 10.

70 *Bukta and others v. Hungary*, Appl. No. 25691/04, 17.07.2007.

71 *DİSK and KESK v. Turkey*, Appl. No. 38676/08, 27.11.2012.

72 Republic of Korea, ICCPR, A/55/40 vol. I (2000) 29, para. 150.

73 Lebanon, ICCPR, A/52/40 vol. I (1997) 53, para. 356.

74 Akbulut, p. 391.

75 *Sergey Kuznetsov v. Russia*, Appl. No. 10877/04, 23.10.2208, para. 44.

76 *Cisse v. France*, Appl. No. 51346/99, 09.04.2002, para. 37-39, 51-52.

their freedom of assembly to manifest their views to the public.[77]

Authorities may interfere with the freedom of assembly during the exercise of this freedom. The intervention cannot be based solely on the demonstration's violation of the national law. The possibility of an intervention should be entertained only if the demonstration is not peaceful. The intervention in question should have a legitimate aim, and the means used should be necessary, appropriate and proportionate. In the assessment of whether a demonstration is peaceful or not, the point of consideration should be whether the demonstration participants intend to resort to violence or not. In such a situation a distinction should be made between the demonstration participants who resort to violence and those who do not. A minority of demonstrators resorting to violence does not mean that the demonstration itself is not peaceful. At this point it is possible to impose sanctions on those who resort to violence provided that the sanctions are proportionate. However, no sanction should be imposed on a person who has not resorted to violence. In order for the sanction to be acceptable, the state bears the obligation to prove that the demonstration is not peaceful and that the person who has been restrained resorted to violence.

It is possible to require prior notification for the exercise of freedom of assembly, however, there should be recourse procedures availed for the individuals who want to exercise the right in question in case a ban is imposed by the administration following the notification.[78] Through appeal procedures that can revoke the administration's prohibition decisions, arbitrary bans that may be imposed by the administration can be prevented. Furthermore, appeal procedures should be processed rapidly. Otherwise it will not be possible to organize the demonstrations planned for certain dates in time.

Finally, it should be noted that the framework of restrictions on the freedom of assembly are more limited for organizations working in the field of human rights. Attacks against demonstrations involving human rights defenders should be promptly investigated, and the third parties or security forces responsible for the attack should be punished with disciplinary or other punitive measures.[79]

2. The Constitution

Freedom of assembly is safeguarded by Article 34 of the Constitution that reads, "Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission". Although it is not clearly specified in the ECHR, the Constitution explicitly states that there is no requisite to seek prior permission to hold meetings or demonstrations. No restrictions have been made regarding the subject of this right or the purpose of its exercise. The provision as is appears compatible with the ECHR Article 11. The obligations addressed above regarding the freedom of association are valid for the freedom of assembly as well. In terms of restrictions, Article 34 of the Constitution stipulates that the freedom of assembly can be restricted "on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others." These grounds are in complete compliance with ECHR Article 11. In light of all the cited points it is seen that there is no need for a constitutional amendment in terms of the freedom of assembly.[80]

77 *Samüt Karabulut v. Turkey*, Appl. No. 16999/04, 27.01.2009, para. 37-38.

78 MoCSOlia, ICCPR, A/47/40 (1992) 134, para. 601; Kyrgyzstan, ICCPR, A/55/40 vol. I (2000) 57, para. 418.

79 Argentina, ICCPR, A/56/40 vol. I (2001) 38, para. 74(13).

80 The fundamental and most problematic regulation on this issue that is the Law number 2911 on Assembly and Demonstration Marches will be addressed below.

D- HATE SPEECH

1. International Law

The issue of hate speech is one that is closely related to the freedoms of expression, association and assembly. Hate speech comes to the fore in virtue of the need to limit the freedom of association in order to protect the rights and freedoms of others. There are two main approaches on whether or not the freedoms of expression, association and assembly can be restricted in terms of their content, purpose and activities. The subject is firstly addressed in scope of the freedom of expression. In addition to views of absolute protectionism asserting that freedom of expression cannot be restricted in terms of content, there are also views advocating that freedom of expression can be restricted with certain legitimate purposes and proportionate to the stipulated purposes. The approach that propounds it can be restricted advocates that certain kind of expressions are categorically outside the protection afforded by the freedom of expression and that such expressions would even constitute an abuse of the freedom of expression.[81] Hate speech is one of the points of divergence in these different approaches. In case of hate speech, a conflict between two existent rights arises. This conflict is between the freedom of expression and the person's right to non-discrimination. At this point, a solution must be sought in concord with the notion of human rights and this conflict should be resolved. Surely it is not easy to resolve this conflict and different approaches on the issue have emerged in different countries.

Exclusion of expressions constituting hate speech from the ambit of the freedom of expression is an example of interference on this freedom. This situation implies that states can be authorized in the restriction of freedom of expression. Therefore, contrary to the efforts undertaken for the protection of the freedom of expression, this is a step taken for the state's restriction of the freedom of expression. Thus it leads to the voluntary constriction of the scope of freedom of expression. Advocating the grounds for admissibility of restricting the freedom of expression in this manner may cause states to seek other grounds for restriction in the same scope. Therefore, the recognition of hate speech as an exception should be aptly justified. This justification can be put forth by considering hate speech as a rejection of human rights, equality and diversity and an effort to eradicate rights. Hence, decisions of international human rights bodies also exclude hate speech from the ambit of freedom of expression based on this justification.[82]

A restriction on hate speech does not imply the silencing of conspicuous, shocking, disturbing information and opinions. Even though not punishing the speech itself provided it does not constitute an action may be an option to be considered, given the inhuman events hate speech led to in the past it becomes meaningless to wait for an action to manifest. Considering that hate speech usually targets the minority groups in the society, its proliferation causes these already invisible groups to become further invisible in order not to deal with such attitudes of the majority groups. In case an active stance against hate speech cannot be put forth by the state and expressions of this kind are protected in the name of freedom of expression, this will imply that the state opts for the proliferation of such views rather than protecting minority groups against intolerance and hatred. In that

81 Oktay Uygun, *Avrupa İnsan Hakları Sözleşmesi ve Türk Hukukunda İfade Özgürlüğünün Sınırları, Kamu Hukuku İncelemeleri*, [*Limits of the Freedom of Expression in ECHR and the Turkish Law, Public Law Studies*] XII Levha, İstanbul, 2011, p. 128.

82 *Féret v. Belgium*, Appl. No. 15615/07, 16.07.2009.

case the damage caused by the protection of the freedom of expression will have to be incurred by the minorities groups who were subjected to the expressions of hatred. The state should not be expected to assume the role of referee at this point and should not ascribe legitimacy to expressions inciting hatred. Having unlimited freedom of expression in this sense while minority groups struggle and resist against hate speech on their own holds no meaning considering the generally disadvantaged position of these groups and their incomparably limited access to media as opposed to the majority groups. In a democratic society comprised of groups with different identities, ensuring respect for everyone's identity is among the duties of the state and therefore certain freedoms may need to be limited.

Defining the concept of hate speech especially in the sphere of law is rather difficult. There is an ambiguity in terms of the scope of the concept as well. The only definition on this subject put forth in the international arena has been propounded by the Council of Europe. In its Recommendation number R (97) 20 adopted by the Committee of Ministers in 1997, hate speech is defined as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism and all forms of intolerance".[83] In line with this Recommendation on hate speech, ECtHR also defines it as all forms of expression which spread, incite, promote or justify hatred based on intolerance in a democratic society.[84] This definition includes only race or ethnicity based hatred and xenophobia or anti-Semitism. However, in present day and age discrimination may emerge on many grounds that were not addressed in the past. Therefore, it is also possible for hate speech to be considered outside the given framework in various fields, primarily such as religion or belief, gender, sexual orientation, sexual identity, age and disability.

In freedom of expression generally no differentiation is made based on the content of expression. Classifying expressions on whether or not they are "worthy-worthless", "for public interest or not" or "seek commercial profit-or not" does not hold any significance in terms of freedom of expression.[85] The same situation applies also to the freedom of association. However, like every right freedom of association also has a field of norms. In present day, it is generally accepted that fascism, racism, discrimination, war propaganda or hate speech are not in the field of norms of freedom of expression in terms of human rights law.[86] A restriction to this end may be recognized as a "positive" restriction of the freedom of expression. The same applies also to the freedom of association.

It is recognized that hate speech may cause violent reactions by the victims, provoke acts of violence against the victims and even if it does not cause harm as such it may inflict injury on the people subjected to such expressions.[87] However a line should be drawn here between expressions of hatred and expressions of harsh criticism. Expressions of hate speech are not considered harsh criticism and are not subject to protection.

In ECtHR case law, certain limits have been prescribed for freedom of speech in regard to the content of expression. It can be said that especially when hate speech is in question it is not assessed in scope of the freedom of expression and is regarded as an exception to this freedom. In the ECHR hate

83 Recommendation No. R (97) 20 of the Committee of Ministers to Members States on "Hate Speech" https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=568168&SecMode=1&DocId=582600&Usage=2 (accessed: 15.08.2013).

84 *Gündüz v. Turkey*, Appl. No. 35071/97, 14.06.2004, para. 40.

85 Can, p. 379.

86 Bülent Tanör, Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku (Turkish Constitutional Law According to the 1982 Constitution)*, Beta, İstanbul, 2006, p. 159.

87 Wojciech Sadurski, *Freedom of Speech and Its Limits*, Springer, New York, 1999.

speech is not directly excluded from the scope of freedom of expression categorically, however, it can readily become grounds for the restriction of the freedom of expression.[88] As one of its underlying reasons, reference is made to experiences such as the genocide of Jews, Gypsies and the disabled during the World War II in Europe.[89] Again the Court finds it compatible with the Convention to restrict freedom of expression on subjects such as the glorification of Nazi ideology, racism and anti-Semitism. ECtHR sometimes deems expressions of this kind unacceptable as an abuse of the human rights, and sometimes may find the interventions to such expressions justified through an analysis in the framework of the restriction of freedom of expression. It appears the same approach can be adopted in the framework of the freedom of assembly as well.

There are categories of expression such as incitement to violence, hate speech, provocation of rancor and hostility, denial of holocaust and crimes against humanity which are contentious as to whether or not they fall under the scope of the freedom of expression. ECtHR regards hate speech as a form of expression that causes direct harm.[90] The Court explicitly and without leaving any room for doubt has declared that like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify intolerance do not enjoy the protection afforded by Article 10 of the Convention.[91] According to ECtHR the states have the obligation under international law to prohibit any advocacy of hatred and to take measures to protect persons who may be subject to such threats especially as a result of their ethnic identity.[92] Imposing sanctions on hate speech and providing a protection system for the people who are subjected to such expressions are among the obligations of the state under international law and the Committee of Ministers decisions of the Council of Europe in particular.

In ECtHR's decisions on freedom of association, expressions that may be considered hate speech or the activities wherein such expressions are used have not been regarded in the ambit of the freedoms of expression and association. In the case of *Féret v. Belgium*[93] regarding an application for the chairman of the political party Front National to be subjected to legal and punitive measures for inciting xenophobia through the banners and leaflets distributed during the election campaigns held in 1999 and 2001, ECtHR stated that the distributed leaflets and banners incited xenophobia. The Court emphasized that while freedom of expression was important for everybody, it was especially so for politicians, however that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. Noting that to recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions, the Court stated that in the present case there had been a compelling social need for intervention to the freedom of expression.

A similar attitude was later adopted regarding an association. The dissolution of an association in the Republic of Hungary, founded with the aim of preserving Hungarian traditions and culture, for organizing anti Gypsy/Roma rallies and demonstrations has been deemed in compliance with the Convention Article 11.[94]

88 Ovey, White, p. 280.

89 Uygun, p. 141.

90 Kerem Altıparmak,"Kutsal Değerler Üzerine Tezler v. İfade Özgürlüğü: Toplu bir Cevap", *İfade Özgürlüğü*, ["Thesis on Sacred Values vs. Freedom of Expression" *Freedom of Expression*] İletişim, İstanbul, 2007, p. 92.

91 *Gündüz v. Turkey*, Appl. No. 35071/97, 14.12.2003, para. 51.

92 *Balsyté-Lideikiené v. Lithuania*, Appl. No. 72596/01, 04.11.2008, para. 78.

93 *Féret v. Belgium,* Appl No. 15615/07, 16.07.2009.

94 *Vona v. Hungary,* Appl No. 35943/10, 09.07.2013.

2. The Constitution

Hate speech, like in many other countries, is a phenomenon that comes to the fore also in Turkey. Therefore, in a potential reform initiative pertaining to the freedom of association there is need to adopt legislation that will prevent the exercise of this freedom from including hate crimes. This situation is voiced also by various international agencies. In the European Commission against Racism and Intolerance (ECRI)[95] reports on Turkey published in 1999, 2001, 2005 and 2011, attention has been drawn to issues including but not limited to the hostile attitude in the form of attacks and threats against Kurdish people and non-Muslim minorities, declarations of anti-Semitic opinions, and a series of statements made especially by politicians inciting hatred towards the Armenian and Greek minorities. The former and new version of the Turkish Penal Code Article 216, which makes it a criminal offence to incite enmity and hatred among the people, is criticized in the reports for its implementation whereby it is not used to protect the disadvantaged groups against hate speech but to the opposite effect; for not including ethnic origin, language etc. in the list of grounds set out in the article, and for making the penalization more difficult by stipulating that an offence will constitute incitement only if it involves "a clear and imminent danger" to the public order. Again a series of criticisms have been raised such as permitting the sale of publications like *Mein Kampf*, *the Protocols of the Elders of Zion* and general Holocaust denial material, and not implementing the sanctions in broadcast media on the hate speech directed against minority groups.[96]

In the absence of an explicit emphasis on hate speech in the provisions of the Constitution, the first thing to be addressed may be a Constitutional amendment. At this point adding hate speech as grounds for restriction to Articles 26 and 33 of the Constitution on freedoms of expression and association may be considered. This approach would mean to recognize that hate speech is within the field of norms of freedom of expression but that it may be subject to restriction. In its stead it can also be considered to make an addition to Article 14 of the Constitution, stating that expressions, actions and organizations inciting hatred constitute the abuse of fundamental rights and freedoms. In that case hate speech will be excluded from the field of norms of the freedom of expression. It is possible to adopt one of these two approaches.

In the event that no amendment is made to the current state of the Constitution, hate speech can be excluded from the protection of the freedom of expression by means of interpretation. If the restriction regime and prohibition on the abuse of rights stated in Articles 13 and 14 of the Constitution are assessed together with the relevant articles, it can be propounded that it will not be unconstitutional to prohibit by law the expressions of hatred, the verbalization of these expressions in an organized manner or during meetings and demonstrations. Such a prohibition can be recognized to be in compliance with Article 13 of the Constitution in the framework of protecting the rights and freedoms of others, and with Article 14 by assessing the use of such expressions as an abuse of the right.

An interpretation in the framework of Article 13 of the Constitution will not exclude hate speech from the protection of freedom of expression, therefore the restrictions in Article 13 of the Constitution will have to be abided by. According to Article 13 of the Constitution, the legislative branch may prohibit hate speech only by law; in conformity with the foreseen aim and the principle of proportionality;

95 For detailed information see, http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp (accessed: 15.08.2013)

96 Report on Turkey, CRI (99) 52, 09.11.1999; Second Report on Turkey, CRI (2001) 37, 03.07.2001; Third Report on Turkey, CRI (2005) 5, 15.02.2005; Fourth Report on Turkey, CRI (2011) 5, http://www.coe.int/t/dghl/monitoring/ecri/library/publications_en.asp (accessed: 15.08.2013).

without infringing upon the essence of the freedom of expression or contradicting the requirements of the democratic order of the society, and based on the grounds for restriction in Article 26 that is to protect the reputation and rights of others. A restriction imposed otherwise will be in violation of Article 13 of the Constitution and can be revoked by the Constitutional Court. Meanwhile, an interpretation in framework of Article 14 of the Constitution will enable the direct restriction of the right without requiring such an assessment. Again it is possible to adopt one of these two approaches. However, instead of interpretation, the explicit regulation of the subjects related to hate speech in the Constitution would be more appropriate.

Specific to the freedom of assembly, the failure to prohibit organizations that resort to hate speech, ban their activities, and declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred are recognized as violations of the International Convention on the Elimination of All Forms of Racial Discrimination Article 4.[97] Again the execution of punitive measures on such organizations or their members is not regarded as a violation of the freedom of association.[98] Furthermore, organizations promoting such views should not be registered or if registered should be dissolved.[99] States are expected to show more tolerance towards CSOs that are struggling against racism and discrimination as compared to other organizations.[100] States are held responsible for removing all legal, practical and administrative obstacles to the free functioning of civil society organizations that contribute to promoting human rights and combating racial discrimination.[101] The pressures such as the arrest, detention[102] and intimidation[103]of such organizations or their members cause the violation of the freedom of association. The State must ensure that such organizations function effectively.[104]

The legal prohibition of hate speech and opinions manifested by expression of hatred through amendments to be made in the Constitution or the laws in line with the provisions in the Constitution is a necessity for compliance with the indispensable values of a democratic society such as equality and human dignity also included in the Constitution. In this context, amendments should be made especially to Articles 125, 216 and 301 of the Turkish Penal Code (TCK). In terms of legislation, the adoption of legal regulations on hate speech entailing comprehensive, proportional and deterrent provisions, and the effective implementation of the legislation will be favorable.

E- ACCESS TO JUSTICE

1. International Law

According to Article 2 of the Constitution, the principle of being a state governed by the rule law is among the fundamental characteristics of the republic. The state governed by the rule of law may be defined as a form of government that safeguards rights and freedoms, is obliged to remove all obstacles before its citizens' right to legal remedies, restricts state power in favor of its citizens' freedom with the claim to establish a democratic, equal and just social order, and is committed to law and the general principles of

97 United Kingdom of Great Britain and Northern Ireland, CERD, A/48/18 (1993) 73, para. 416-421; Germany, CERD, A/48/18 (1993) 81 at para. 449; Canada, CERD, A/49/18 (1994) 47, para. 329; Finland, CERD, A/51/18 (1996) 29, para. 175.

98 *M. A. v. Italy* (117/1981), ICCPR, A/39/40 (10 April 1984) 190, para. 13.3.

99 Spain, CERD, A/51/18 (1996) 32, para. 209.

100 Argentina, ICCPR, A/56/40 vol. I (2001) 38, para. 74(13)

101 Belarus, CERD, A/59/18 (2004) 50, para. 271; Azerbaijan, CERD, A/60/18 (2005) 18, para. 66; Belarus, ICCPR, A/53/40 vol. I (1998) 26, para. 155.

102 Nigeria, ICCPR, A/51/40 vol. I (1996) 37, para. 289.

103 Bolivia, ICCPR, A/52/40 vol. I (1997) 35, para. 206; Colombia, ICCPR, A/52/40 vol. I (1997) 44, para. 296.

104 Uzbekistan, ICCPR, A/56/40 vol. I (2001) 59, para. 79(22); Liechtenstein, CERD, A/57/18 (2002) 33, para. 151.

law.[105] In the judicial system of a democratic state, everyone should be equal before the law and the laws should be applied equally for everyone. In a state of law, citizens should be able to resolve their conflicts in a reasonable period of time. This solution should be effective and fair, and the process employed should be transparent. Especially disadvantaged and discriminated groups should be aware of their rights and where they can demand them, should have access to the relevant mechanisms and institutions in order to claim their rights, and have trust in the judicial system. The concept of access to justice describes the universal right to enjoy justice equally without discrimination on any grounds and the removal of structural obstacles such as the difficulty in (physically) accessing courts due to obstacles stemming from economic and social injustices, complexity of legal process and procedures, unwieldiness of the justice system, and ineffective execution mechanisms. To cite among the economic obstacles faced are the legal representation fee, court fee and expenditures, absence and/or poor quality of the legal aid system, etc., and among the social obstacles are literacy, people not knowing their rights, legal literacy, language barrier, distrust in the justice system, bribery, etc.[106]

Access to justice entails several aspects such as trust in the justice system, access to legal information and counselling, representation by lawyer, resolution of cases within a reasonable period of time, reasonable court fees that do not dissuade people from opening a case, and the implementation of the decisions. Meanwhile, legal aid is a support mechanism that is much more narrowly interpreted in Turkey and available only dependent on financial means. However, the concept of legal aid today is no longer limited to judicial procedures. Legal aid service has become as important in terms of administrative appeal procedures and similar judicial application methods as well. Therefore the concept of legal aid should be considered not in its narrow sense but in the larger sense of "legal assistance".[107] When evaluated in the human rights context as well legal aid and access to justice have an inseparable connection to "the right to fair trial".

ECtHR has ruled that if the high cost of litigation expenses infringe on the essence of the right to litigation then it might be a violation of the right to fair trial. ECtHR states that if judicial assistance of a lawyer is required for the right of access to a court, then the state is obligated to provide legal aid also in cases pertaining to civil law. According to ECtHR the effective protection of rights can be ensured through the institution of a uniform legal aid scheme or the simplification of procedures. As grounds for its decision the Court has stated that there is no water-tight division separating civil and political rights from social and economic rights. This decision also points at the problems generated by the increasingly specialized procedural law.[108]

Besides the appointment of a lawyer, there is ECtHR case law pertaining to litigation expenses as well. In many cases the Court has held that it is a violation of Article 6 when a person cannot initiate proceedings due to the inability to pay the high court fees.[109] The Court has also noted that considering a person's financial situation litigation expenses can be included in scope of legal aid.[110]

105 Ergun Özbudun, *Türk Anayasa Hukuku*, [Turkish Constitutional Law] Yetkin Yayınları, Ankara, 1993, pp.88–98.

106 Gökçeçiçek Ayata, *Kadınların Adalete Erişimi: Mevzuat, Engeller, Uygulamalar ve Sivil Toplumun Rolü*, [Women's Access to Justice: Legislation, Obstacles, Practices and the Role of Civil Society] Unpublished MA thesis, İstanbul Bilgi University, Institute of Social Sciences, LLM, 2009.

107 İmmihan Yaşar, "Adli Yardım Uygulaması", [The Practice of Legal Aid] *İstanbul Bar Association Journal*, Volume 80, Issue 5, İstanbul, 2006, p. 2009.

108 *Airey v. Ireland*, Appl. No. 6289/73, 09.10.1979.

109 Ör. *Bakan v. Turkey*, Appl. No. 50939/99, 12.06.2007; *Mehmet and Suna Yiğit v. Turkey*, Appl. No. 52658/99, 17.07.2007; *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, Appl. No. 19986/06, 10.04.2012.

110 *Kreuz v. Poland*, Appl. No. 28249/95, 19.06.2001.

Assessing ECtHR case law on this subject it is seen that in cases when a warranty claim or requirement of expense payments is stipulated in order to secure instigation expenses, the Court reiterates that the financial means of the people who want to exercise their right to access a court should be taken into account, and it recognizes that if the person's financial means and the court expenses are not proportionate then there has been a disproportionate restriction on the person's right of access to a court.[111]

Access to justice is of great importance especially for CSOs working in the field of human rights or with disadvantaged groups. These CSOs encounter more severe obstacles in access to justice as compared to other CSOs in terms of the legal problems they face both during and after their establishment stage and also in the cases pertaining to their members that they want to follow. In countries where legal regulations pertaining especially to CSOs do not foster freedoms, it becomes almost imperative for CSOs to receive judicial support in regard to their access to justice. However, if there are legal provisions that restrict CSOs' access to financial resources, then due to the cost of accessing legal information and court fees and similar expenses inherent to the concept of access to justice, the CSOs' access to justice becomes almost impossible.

First of all, people who want to exercise their right to association should be allowed to access judicial information in order to overcome the legal obstacles they encounter. If CSOs cannot undertake legal and administrative actions to eliminate the rights violations they face during their establishment or operation stage or if these actions yield no results then it cannot be suggested that these CSOs' members have exercised their right to association. The structural obstacles stemming from financial conditions, social injustice and the judicial system preventing the CSOs' access to justice should be eliminated. Furthermore, CSOs should be enabled to enjoy justice equally without discrimination on any grounds. CSOs' access to justice is paramount to its members' ability to exercise their right to association and the CSOs to provide support for the groups they work with in line with their aims.

2. The Constitution

Judicial basis of legal aid in Turkey is present in various laws and primarily the Constitution. Statements of "respecting human rights" and "social state governed by the law" included among the characteristics of the Republic in Article 2 of the Constitution, and the duties of the state "to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence" articulated in Article 5 make up the constitutional basis of legal aid. Furthermore, in Article 36 of the Constitution under the heading "Freedom to claim rights" that reads "Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures" the connection between the right to fair trial and the freedom to claim rights, in other words with access to justice, has been emphasized. In recognition of the fact that legal aid is a duty imposed on the state, it bears the status of a public service. The provisions in the Constitution provide sufficient protection for access to justice. Nevertheless, in a possible Constitutional amendment it may be favorable to include an explicit statement referring to the right to legal aid in Article 36 that regulates the right to fair trial.

111 Sibel İnceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı*, [Right to Fair Trial in ECtHR Decisions] Beta, İstanbul, 2005, p. 131.

III FREEDOM OF ASSOCIATION AND CIVIL SOCIETY ORGANIZATIONS

According to Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe adopted in 2007 on the legal status of non-governmental organizations, CSOs are voluntary self-governing bodies or organizations established to pursue the essentially non-profit-making objectives of their founders or members.[112] For the recognition of an organization as a CSO in line with this definition, it is necessary for certain elements to converge. These elements are; coming together on a voluntary basis, pursuing a certain aim, carrying out activities autonomously towards a designated objective and not seeking profit. The organizations where all these elements converge can be recognized as CSOs. In the law of Turkey the only forms of organizing where these elements converge and are recognized by the laws are associations and foundations.

In terms of the first element that is to come together on a voluntary basis, CSOs can be established by the assembling of real persons or legal entities. Whether or not CSOs have a legal entity status is not a determining factor in this sense.[113] However, a CSO with legal personality can be subjected by law to certain rights and responsibilities.[114] Again in line with their objectives, CSOs can become members of other CSOs, federations and confederations.[115]

In terms of the second element that is the quality of being a group of people who have come together for a certain objective, CSOs should be accorded a complete freedom. CSOs should be free to choose their objectives and the means employed to pursue these objectives, provided both are consistent with the requirements of a democratic society.[116]

In terms of the third element that is to operate as a self-governing body, the first thing that comes to the fore is the place wherein the activity is carried out. CSOs can operate on the local, regional, national or international levels. In line with their objectives CSOs should be free to undertake activities such as research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy.[117] Within its field of activities are also economic or commercial activities that can be undertaken in order to support its not-for-profit activities without any special authorization being required, but subject to any licensing or regulatory requirements applicable to the activities concerned.[118] While carrying out activities autonomy is of essence and CSOs should not be subject to direction by public authorities regarding their activities. In carrying out their activities, CSOs should enjoy all human rights in full and primarily the right to freedom of expression, association and assembly.[119] The legislation applicable to CSOs is expected to encourage their establishment and continued operation.[120] Acts or omissions by public authorities affecting a CSO or its operations should be subject to administrative review and in case the administrative application is inconclusive, it should be open to challenge by the CSO in an independent and impartial court with full jurisdiction.[121]

Final element that is to be not-for-profit is among the most important qualities separating CSOs from commercial enterprises. CSOs should not distribute any profits which might arise from their activities to their members or founders but can use them to finance its activities.[122]

112 Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (hereinafter referred to as "Rec(2007)14"), para. 1.

113 Rec(2007)14, para 2-3.

114 Rec(2007)14, para 7.

115 Rec(2007)14, para 15.

116 Rec(2007)14, para 11.

117 Rec(2007)14, para 12.

118 Rec(2007)14, para 14.

119 Rec(2007)14, para 4-6.

120 Rec(2007)14, para 8.

121 Rec(2007)14, para 10.

122 Rec(2007)14, para 9.

The fundamental legislations in the law of Turkey, in scope of the study on the freedom of association, are the Law on Associations number 5253 and the Law on Foundations number 5737. Also the Turkish Civil Code number 4721 includes provisions pertaining to both associations and foundations. Article 5 of the Law on Foundations that reads "New foundations shall be established and shall operate in accordance with the provisions of Turkish Civil Code", and Article 36 of the Law on Associations stating "Where there is no provision in this Law on this subject, the relevant provisions of the Turkish Civil Code are applied" make the Civil Code one of the fundamental legal regulations on the subject. Law on Associations and the Law on Foundations are *lex specialis* and therefore will override the Civil Code. The provisions in the Civil Code will be applied only in the absence of any provisions in the aforementioned two laws. If there is a special provision in the Civil Code that provision can be applied before the other two laws. Aside from the abovementioned, there are a great number of legal regulations directly or indirectly related to the freedom of association.[123] In this report these legal regulations have not been analyzed under separate headings, instead the relevant legal regulations have been addressed on a subject basis predicated upon the classification in Recommendation CM/Rec (2007)14 of the Committee of Ministers.

A- ESTABLISHMENT AND MEMBERSHIP

1. Establishment

a- Establishment of CSOs

An important issue that comes to fore along with freedom of association is the scope of the term "organization". In international law there are no limitations regarding this point.[124]

However, an organization that is the subject of the freedom of association should first of all not bear the title of a public-legal entity. An organization must definitely be private legal entity. An "organization" vested with legal entity can be recognized as the subject of the freedom of association as long as it is not governmental and can operate with complete independence. However, an association, whose bylaw and its implementation are subject to public-authority approval and membership is compulsory though the chairperson is elected by its members, has also been recognized as the subject of the freedom of association.[125]

Whether an "organization" has a legal entity status may become relevant in the determination of whether or not it can enjoy the protection of the right. However, an "organization" cannot be left outside the scope of protection provided by the freedom of association solely on the grounds that it does not have a legal personality. Coming together on a regular basis and towards a specific objective, though not registered as a legal entity, falls within the scope of the freedom of association.[126] Making it mandatory for an organization to become a legal entity may be recognized as a severe restriction on the freedom of association. This situation, especially along with the requirement of registration may lead to the violation of the freedom of association in cases where public authorities arbitrarily complicate the registration procedure, deny the application for registration, delay the response to the application[127] or never respond to the

123 See the Annex for a list of legal regulations mentioned in the study.

124 *Sidiropoulos v. Greece*, Appl. No. 57/1997/841/1047, 10.07.1998, para. 40.

125 *Chassagnou and Others v. France*, Appl. No. 25088/94 28331/95 28443/95, 29.04.1999, para. 97-101.

126 Harris, O'Boyle, Warbrick, p. 526.

127 Kuwait, ICCPR, A/55/40 vol. I (2000) 65, para. 489.

application. Furthermore, an organization should not be forced to adopt a legal form that it does not seek by being subjected to conditions set by the state which prove to be insurmountable obstacles resulting in the effective obstruction of its freedom of association.[128]

The registration requirement for a CSO to be considered established is an interference to the freedom of association. Both regitered and unregistered CSOS should be recognized. In cases where registration is required for certain forms of CSOs, the rules stipulated for registration should be established previously in a clear manner that is not open to interpretation. The rules in question should not hinder the exercise of the freedom of association and the procedure should have the minimum cost possible. This implies that the legislation pertaining to registration should be flexible rather than bureaucratic. All forms of CSOs recognized in Turkey's legislation are required to register and registration is a constitutive prerequisite for activities. There are rather detailed regulations on this subject matter. These regulations have been discussed in relevant sections throughout the report. This section focuses only on the number of founders and qualities sought in founders.

The legislation on freedom of association allows for the establishment of certain forms of organizing. Under Turkish legislation, freedom of association can only be exercised under the forms of associations or foundations in the civil society area. This means that organizations other than associations and foundations are unable to register and freely implement their activities. The state should facilitate the use of freedom of association to the extent possible, and it should be possible for other forms of organizations to conduct their activities freely.[129] People who want to exercise the freedom of association should not be forced to organize under certain forms of association against their will through the limitations of forms of association.[130]

b- Number of Founders and Amount of Assets

In the framework of freedom of association everyone including real persons or legal entities, citizen or non-citizens have the right to form a CSO. According to Council of Europe Recommendation CM/Rec (2007)14, two persons are sufficient for the establishment of a membership based CSO. A higher number can be required where legal personality is to be acquired, so long as this number is not set at a level that discourages establishment.[131]

According to Article 56 of the Civil Code and Article 2 of the Associations Law in Turkey's legislation seven real persons or legal entities have to come together to form an association. While the required number is not high, it does not correspond to the "minimum two people" condition foreseen in the Council of Europe Recommendation. An amendment to the Law on Associations stipulating that at least two real persons or legal entities would be sufficient for the establishment of an association would be more appropriate for facilitating the use of freedom of association. However, even if such an amendment is made in regard to number of founders, Article 62 of the Civil Code that requires the first general assembly to be held and obligatory organs to be elected within six months of the foundation of the association constitutes a problem. According to Articles 84 and 86 of the Civil Code, at least 16 members are required to form the mandatory board of directors and

128 *Zhechev v Bulgaria*, Appl. No. 57045/00, 21.06.2007, para 56.

129 Slovakia, ICCPR, A/52/40 vol. I (1997) 58, para. 382.

130 Togo, ICCPR, A/58/40 vol. I (2003) 36, para. 78(19).

131 Rec(2007)14, para 16-17.

the auditors' board. Associations have to have at least 16 members within six months of their establishment. Under these circumstances diminishing the required number of founding members in itself bears no significance. Therefore, it would be a positive step in terms of freedom of association to extend the time frame for the holding of the first general assembly (for example to at least 18 months), to decrease the number of members for the board of directors and auditors, and allow for associations to determine the number of members to be on these boards in their statutes.

Since in Article 101 of the Civil Code foundations are defined as "charity groups in the status of a legal entity formed by real persons or legal entities dedicating their private property and rights for public use" for a specific sustained objective, they are not membership based CSOs. Therefore there are no restrictions as to number of founders. According to Article 5 of the Foundations Law the allocation of the minimum amount of assets determined by the Foundations Council each year according to its objective is sufficient for the establishment of a foundation. The important point here is for the determined amount of minimum assets not to forestall the establishment of foundations. In order to prevent such a potential decision by the Foundations Council, it would be a positive step to include a provision limiting the discretion of Council in the law. Furthermore, the right to seek legal remedy should be maintained for decisions taken by the Foundations Council.

c- Eligibility for Founders

It is normal that certain qualities are sought in people who want to found a CSO with a legal entity status. Under certain circumstances, some people may be prohibited from being a founder of a CSO. Such a ban may be introduced to someone who has been convicted of a crime through a judicial decree. However, the crime in question has to be one that makes the person unfit to form a CSO and the scope and duration of the disqualification should be proportionate. An indefinite ban without a defined scope would be in breach of this condition.[132]

The first paragraph of Article 3 of the Law on Associations stipulates in relation to people who can found an association, "Real and legal entities with capacity to act have the right to found an association without prior authorization." As such, the subject of this right is "everyone", as in the Constitution. However, a number of restrictions are also stipulated in the article. The first restriction pertains to the capacity to act in the first paragraph mentioned above. According to Article 10 of the Civil Code, everyone who possesses the capacity to discern, not in a state of disability and over 18 has the capacity to act. Article 13 of the law describes the state of not having the capacity to discern as being a minor, mentally defective, suffering from mental illness, being intoxicated or beyond self-control by similar reasons.

Another restriction in the article, in line with ECHR and the Constitution, is stated as follows: "there exist some limitations concerning members of armed forces, law enforcement officers and officials working in public institutions and organizations." Here, it should be noted that there is no overall restriction for these professions and the restrictions are delineated by other *lex specialis*.[133]

According to Law on Associations Article 32 paragraph (a), "An administrative fine, at the amount of five hundred Turkish lira, is imposed to those who establish associations although not entitled to do so; those who become a member of an association although his/her membership in

132 Rec(2007)14, para 30.

133 The above mentioned *lex specialis* are Law no. 657 on Civil Servants, Law no. 3201 on Law Enforcement Organization, and Turkish Armed Forces Internal Service Law no. 211.

associations is prohibited by the laws; the executives of the association who purposely admit persons to membership although his/her membership is prohibited by the laws or neglect to write off registration of such persons, or others who lost the credentials of a member." This regulation stipulates administrative fines for individuals who undertake the above listed acts. This provision is an interference on the freedom of association. The compliance of this interference with the grounds of restriction laid out in ECHR Article 11 have to be investigated in each concrete case. The deprivation of an individual from the freedom of association indefinitely is considered a clear violation of freedom of association.[134] In such circumstances the reason for the individual being prohibited from being a founder or member of an association and the proportionality of the foreseen sanction will be considered.

i. Foreigners

Even though Article 33 of the Constitution states that everyone can form an association without prior permission and does not introduce any restrictions for foreigners, there are a number of restrictions in laws. According to Article 93 of the Civil Code, "The real persons of foreign origin who possess the right for settlement in Turkey may found associations or become a member of the existing associations. This requirement is not sought for the honorable membership." As such not all foreigners in Turkey, but only those with the right to settlement can form associations in Turkey. In turkey, the right to settlement is regulated in the Law on The Residence and Voyages of the Foreigners. According to Article 1 of the Law, foreigners who are not forbidden from entering Turkey by law and come in accordance with the provisions stipulated in the Passport Law have the right to residence (...) in Turkey in line with the conditions and restrictions in the legislation. There are a number of detailed provisions on residence in the law. Foreigners coming to Turkey can acquire the right of residence only upon meeting the required conditions and this right is granted for a limited time period. This restriction for foreigners in terms of the use of the freedom of association does not seem to correspond to present day conditions, and the requirement for residence sought in forming an association should be removed from the Civil Code.

As far as foundations are concerned, there are more restrictions for foreigners to be founders of foundations. According to Article 5 of the Law on Foundations, "Foreigners shall be able to establish new foundations in Turkey in accordance with the principle of *de jure* and *de facto* reciprocity." The only stipulated condition in the article appears to be "*de jure* and *de facto* reciprocity." It is a contradiction for the principle of reciprocity to be foreseen for foundations, while it is not for associations. The application of the principle of reciprocity for foreigners, in addition to the existent obligations for the establishment of a foundation, will obstruct citizens of certain countries from exercising their freedom of association due to a reason that does not stem from themselves. Therefore the phrase "in accordance with the principle of *de jure* and *de facto* reciprocity" should be removed from Article 5.

ii. Children

Children are also the subjects of freedom of association. According to the Convention on the Rights of the Child, state parties have to specifically recognize this right for children on the legal level and determine how they will guarantee the *de facto* implementation of this right. It is not considered adequate that the legislation states "everyone" as the subject of the right. Therefore children's freedom of association should be clearly safeguarded in legislation.

134 *Paksas v. Lithunia* (Grand Chamber), Appl. No. 34932/04, 06.01.2011, para. 109, 112.

There are certain restrictions to children's freedom of association in the Law on Associations. The Law has made a distinction based on age and established a separate category under the title of "children's associations". Article 15 of the Convention on the Rights of the Child addresses children's freedom of association. In the context of freedom of association the participation of children in decisions concerning themselves should be systematically increased and the establishment of structures and organizations run by children for children should be promoted and encouraged. Interferences on particularly political activities of middle and high school students both on and off school campuses also qualify as restrictions against the freedom of association.[135]

According to Law on Associations Article 3 paragraph 3, children who are over the age of 15 but under the age of 18 and who have the capacity to discern "may either found child associations or be a member in order to enhance their psychical, mental and moral capabilities, to preserve their rights of sport, education and training, social and cultural existence, structure of their families and their private lives with a written permission given by their legal guardians." The use of the given freedom is only possible with the written permission of legal guardians. Children over 12 years of age but under 15 can become members of children's associations with the permission of their legal guardians, but cannot be association founders or serve on the boards of directors and auditors. Seeking the permission of legal guardians is not an approach that is upheld in international law.[136] In order to advance children's freedom of association the condition of seeking permission from legal guardians should be abolished.

The provisions pertaining to children in the Law on Associations do not appear to be in harmony with Article 15 of the Convention on the Rights of the Child. In its 2012 review of Turkey, the Committee on the Rights of the Child has stated that while the freedom of children to form and be members of associations is recognized in Turkey, there are extensive bureaucratic procedures for exercising these rights and the relevant provisions in legislation should be amended.[137] The requirement of written permission of legal guardians may lead to the imposition of an arbitrary restriction, and such a permission requirement is in contradiction with the article. Furthermore, limiting children's membership to only children's associations and delimiting the activity areas of children's associations is not in line with Article 15 of the Convention. For the implementation of the Convention, it is necessary to work in collaboration with civil society and particularly children's associations. It is recommended that a legislation that conforms to international standards and Article 15 of the Convention is adopted as a step in facilitating and strengthening children's participation.[138]

iii. Civil Servants

According to Article 33 of the Constitution, the right to form an association without prior permission "shall not prevent imposition of restrictions on the rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require." While Article 3 of the Law on Associations stipulates that natural or legal entities with capacity to act can form associations without prior authorization, it also introduces the provision "there exist some limitations concerning members of armed forces, law enforcement

135 Republic of Korea, CRC, CRC/124 (2003) 24, para. 114-115; Japan, CRC, CRC/C/137 (2004) 116 at para. 631.

136 Japan, CRC, CRC/C/137 (2004) 116 at para. 631-632.

137 Turkey, CRC, CRC/C/TUR/CO/2-3, para. 38.

138 Qatar, CRC, CRC/C/111 (2001) 59, para. 280; Cameroon, CRC, CRC/C/111 (2001) 71 at para. 345.

officers and officials working in public institutions and organizations."[139] Though no such restriction has been stipulated in the Civil Code or the Law on Associations, there are a series of laws entailing restrictions to this end.

According to Article 43 of the Turkish Armed Forces Internal Service Law, "It is permissible for members of the Armed Forces to form amateur military sports clubs and do activities at these clubs with their own troops, quarters and institutions. The establishment, activity and inspection of these clubs take place according to the special regulations drafted by the Ministry of National Defense." As the article foresees, armed forces officials can only be founders of the above mentioned sports clubs and cannot form associations with other purposes. As for law enforcement officials, according to additional Article 11 of the Law on Law Enforcement Organization "Law enforcement officials and bazaar and neighborhood wardens (...) cannot be association founders". Failure to comply with these restrictions results in disciplinary punishment as per the Police Disciplinary Statute. Except for these two professions, no regulations have been identified prohibiting civil servants from become founding members of associations.

There are also a number of restrictions for being the founder of a foundation. There is no legal restriction for Turkish Armed Forces officials in this respect. However, according to additional Article 11 of the Law on Law Enforcement Organization, "Law Enforcement officials and bazaar and neighborhood wardens becoming founders of and serving in the management of foundations established in accordance with the Turkish Civil Law no 743 dated 17/2/1926 is subject to the permission of the Minister of Interior upon the proposal of the General Director of Turkish National Police." Breach of this restriction results in disciplinary punishment, as in the case with associations according to the Police Disciplinary Statute.

There is need for extensive amendment in legislation that almost abolishes the freedom of association for Turkish Armed Forces and Law Enforcement officials. While certain restrictions can be stipulated for any specific profession in the context of freedom of association, such provisions entirely abolishing this freedom constitute a blatant violation of the freedom of association. For example, Public Procurement Law Article 53, paragraph (e) bans Public Procurement Board members, Banking Law Article 86 bans Banking Regulation and Auditing Board members, and Article 115 of the same law prohibits board members of the Savings Deposit Insurance Fund of Turkey from serving in managing positions in associations and foundations. The scope of these and similar restrictions should also be further limited.

Besides Turkish Armed Forces and Law Enforcement officials, restrictions to the right of association are imposed on civil servants in general. While restrictions within certain parameters may be imposed for the two mentioned professions, restrictions for other civil servants constitute a violation of the freedom of association.[140] According to Article 7 of the Civil Servants Law, "Civil servants are obliged to protect the interests of the state in all situations. They cannot engage in any activity that is against the Constitution and laws of the Republic of Turkey, that jeopardize the independence and integrity of the nation, threaten the security of the Republic of Turkey. They cannot join or support any movement, group, organization or association that undertakes such activities." There are no restrictions for civil

139 For a list of these laws, see Türkiye'de Derneklerin Örgütlenme Özgürlüğü Önündeki Engeller (Barriers to Freedom of Association of Associations in Turkey), TÜSEV, İstanbul, 2010, p. 57-58.

140 Lebanon, ICCPR, A/52/40 vol. I (1997) 53, para. 357-358.

servants to become association founders. However, civil servants cannot be founders or members of associations which undertake activities that are "against the Constitution and Laws of the Republic of Turkey, jeopardize the independence and integrity of the nation, and threaten to the security of the Republic of Turkey". The activities in this provision have not been detailed in a concrete manner. Particularly what the activities that would "jeopardize the independence and integrity of the nation, and threaten the security of the Republic of Turkey" would entail is completely vague. This uncertainty allows for an arbitrary exercise of authority that could easily lead to the restriction of civil servants' freedom of association. There is a need for a specific legal regulation delineating which associations civil servants cannot be members of. The new legislation should only impose restrictions that are specifically related to the duties of civil servants. These restrictions should be as limited as possible and should involve no ambiguity.

2. Association Statute or Foundation Deed

CSOs which are legal entities should have a statute or deed. These documents should at a minimum specify the CSO's name; its objectives; its duties and authorities; the highest governing body; the frequency of meetings of this body; the procedure by which such meetings are to be convened; the way in which this body is to approve financial and other reports; the procedure for changing the statutes or foundation deeds, and dissolving the organization or merging it with another CSO. The highest governing body of a CSO should be authorized to change the statute or charter and a certain majority should be sought for any change.[141]

For a membership based CSO to apply for legal status, it should be sufficient for it to present its statute, address and names of its founders, executives and legal representatives. For CSOs which are not membership based, the proof of assets for realizing the declared objective should suffice.

The main provision regarding association statutes is included in Law on Associations Article 4. According to the article, each association has to have a statute. The statute should include the name and headquarters of the association; its objective; their field of work and methods for pursuing their objective and field of activity; ways and principles for membership and exclusion from association; meeting procedures and dates of the general assembly; duties and authorities of general assembly, ways and principles for voting and decision making; duties and authorities of executive and auditing boards; conditions for being elected to these boards, the number of original and substitute board members; whether the association will have branches, if so the necessary details about how to open a branch and how it will be represented in the general assembly of the association with all its duties and authorities; the ways of determining the amount of membership and annual fees; ways of borrowing; ways of internal auditing; the conditions for changing the statute; in case of the dissolution of the association the liquidation ways of its properties. While these mandatory provisions required in association statutes appear to be in line with the above mentioned requirement, it is hard to say such a detailed regulation corresponds to the freedom of association. In the framework of the principle of the autonomy of CSOs discussed below, the required provisions in associations' statutes should be as limited as possible. Such a framework delimited by the definition and elements of CSOs will facilitate the use of freedom of association. As such it should suffice for CSO statutes to include the name, address and objective of the association.

141 Rec(2007)14, para 18-20.

Since foundations are not membership based organizations, they are established through different procedures. According to Article 102 of the Civil Code, "The will for forming a foundation is expressed by issuance of an official deed or title acquired after a deceased person. The foundation is regarded in the status of a legal entity when it is being registered in the records kept by the court of that location." Once a foundation attains a legal status, the foundation becomes the owner of the assets allocated to the foundation. Foundations are established with the issuance of a foundation deed. According to Article 106 of the Civil Code, "The title, object, property and rights dedicated for this purpose, organization and type of management, and domicile of the foundation are indicated in the foundation deed." There are fewer provisions for foundation deeds as compared to association statutes. The omissions in the foundation deed do not affect the registration of the foundation. Article 107 of the Civil Code stipulates, "Where the object or the property and rights dedicated for this purpose are not sufficiently indicated in the foundation deed, or in case of existence of other negligence in the declarations; this fact may not constitute grounds for the rejection of the application made to achieve the status of a legal entity. Such negligence may either be recovered under the supervision of the competent court before adjudication of registration or may be completed after the formation of the foundation by the local court upon request of the auditing authority, also obtaining the opinion of the foundation if there is chance to do so."

CSOs make their own statutes. As per the principle of autonomous activity, any change in these statutes should also be decided by the CSO itself. There should be no requirement for approval by a public authority for a subsequent change in their statutes, unless this affects their name or objectives. In such cases there may be a requirement to notify the relevant authority. Even if no procedure for approval has been stipulated for changes in statutes, it has been noted that there can be a requirement to notify the public authority of the amendment to their statutes before these can come into effect.[142]

There is no clear regulation on how association statutes can be changed. This issue has been left up to associations themselves with Article 4 of the Law on Associations. According to the article how the statute can be changed should be specified in the association statute. In this case it can be argued that associations are autonomous in terms of changing their statutes. As for foundations, changes in the objective and assets in the foundation deed can be done through court decision as per Civil Code Article 113. The article states, "Where the prevailing circumstances and conditions do not allow the realization of the object foreseen by the dedicator, then the court may change the object of the foundation upon request of the authorized organ or auditing body of the foundation and referring to the written opinion of the other party."

The same provision is applicable in abrogation or change of conditions and liabilities that considerably hinder the realization of the object. "Where there are justifiable reasons for replacement of the property and rights dedicated by more satisfactory assets, or conversion of the same into cash, the court may give permission for such changes upon request of the authorized organ or auditing body of the foundation subject to the written opinion of the other party." These provisions concerning changes to association statutes and foundation deeds appear to be in line with the freedom of association.

3. Membership

a- Right to Membership

The right to become a member of an CSO is a inseparable part of freedom of association. Any

142 Rec(2007)14, para 43.

person, be it natural or legal, citizen or foreigner should be able to join a membership based CSO. The legislation pertaining to this should be non-discriminatory and not be unduly restricted by law. Primarily CSOs themselves should be able to determine who can be a member of their membership based CSO.[143] Laws should also protect individuals from expulsion from CSOs contrary to their statutes. Another safeguard that should be provided along this line is from any sanction because of an individual's membership to an CSO. This should not preclude such membership being found incompatible with a particular position or employment, but these should be specified.[144]

Membership to associations is a right as stipulated in ECHR Article 11 with the clause "Everyone has the right to (...) freedom of association with others (...) for the protection of his interests" and Constitution Article 33, "Everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission." This does not mean that anyone can become a member of any association they want to or that associations are under the obligation to register everybody who applies to become a member.[145]

i. Foreigners

Even though ECHR and the Constitution protect everybody's right to membership, there are a series of restrictions on the right to membership in Turkey's legislation. The first of these pertains to foreigners. According to Article 93 of the Civil Code, "The real persons of foreign origin who possess the right for settlement in Turkey may incorporate association or become a member of the existing associations. This requirement is not seek for the honorable membership." Only foreigners who have residence permits can be members of associations. The above mentioned regulations in Voyages and Residence of Foreigners Law in Turkey in the section on "Eligibility for Founders" apply here as well. Foreigners in Turkey can get residence permits only if they fulfill the foreseen requirements and only for a limited time. This restriction for foreigner's freedom of association does not seem to correspond to the present day context, and the condition of residence for association membership should be removed from the Civil Code.

ii. Children

The second restriction on CSO membership concerns children. According to Law on Associations Article 3 paragraph 3, children over 15 years of age and under 18 with the necessary sensibility "may(...) be a member (of an association) in order to enhance their psychical, mental and moral capabilities, to preserve their rights of sport, education and training, social and cultural existence, structure of their families and their private lives with a written permission given by their legal guardians." Children over 12 but under 15 years of age cannot be founders of children's associations, but can become members with the permission of their legal guardians. However these children cannot serve on the board of directors or auditors. The above mentioned restrictions in the section on "Eligibility for Founders" regarding children being founders of an association also apply in terms of membership. The provisions in the Law on Associations for children's membership to associations are not in harmony with the Convention on the Rights of the Child Article 15. While the provision seeking the permission of the legal guardian for children in the 12-15 age group should be retained, the requirement for permission of the legal guardian for ages 15-18 should be removed.

iii. Civil Servants

While international human rights law accepts that certain restrictions may be imposed to Turkish Armed Forces and Law Enforcement officials'

143 Rec(2007)14, para 22.

144 Rec(2007)14, para 23-25.

145 *Cheall v. the United Kingdom,* Appl. No. 10550/83, 13.05.1985.

freedom of association, this does not imply states have a carte blanche.[146] Even though according to Constitution Article 33 everyone has the right to become a member or resign from an association without prior permission, this "shall not prevent imposition of restrictions on the rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require." Article 3 of Law on Associations stipulates "There exist some limitations concerning members of armed forces, law enforcement officers and officials working in public institutions and organizations." According to Turkish Armed Forces Internal Service Law Article 43, "Armed Forces officials may become non-active members of non-political associations and sports clubs whose names have been published by the Ministry of National Defense. Those who become members are obliged to notify the Ministry of National Defense of their membership as soon as possible. It is permissible for members of the Armed Forces to form amateur military sports clubs and do activities at these clubs with their own troops, quarters and institutions. The establishment, activity and inspection of these clubs take place according to the special regulations drafted by the Ministry of National Defense." Turkish Armed Forces officials can only be members of previously declared associations, and other than these, only sports clubs.

The restrictions in the context of "Eligibility for Founders" imposed on Turkish Armed Forces and Law Enforcement officials for being founders of associations or foundations also apply for their membership. Even though certain specific restrictions may be stipulated for any profession in the context of freedom of association, these regulations completely abolishing the freedom constitute an open violation of freedom of association.

There are also certain restrictions for civil servants other than Turkish Armed Forces and Law Enforcement officials. These restrictions do not always mean the freedom of association is being violated.[147] According to Article 7 of Civil Servants Law, "(...)Civil servants are obliged to protect the interests of the state in all situations. They cannot engage in any activity that is against the Constitution and laws of the Republic of Turkey, that disrupt the independence and unity of the nation, threaten the security of the Republic of Turkey. They cannot join or support any movement, group, organization or association that undertakes such activities." The criticism raised in regard to association founders in the "Eligibility for Founders" section applies here as well. It is completely unclear which activities fall under the scope of the ban to be members of associations that "(....)engage in activities against the Constitution and laws of the Republic of Turkey, that disrupt the independence and unity of the nation, threaten the security of the Republic of Turkey." This ambiguity allows for the arbitrary restriction of civil servants' freedom of association. There should be a clear regulation on which associations civil servants cannot be members of.

b- Right Not to Be a Member

Another issue that arises alongside the right to membership is the obligation of membership. Freedom of association involves not only the right to membership, but also the right not to become a member. The right not to be a member can be defined as the negative element of freedom of association.[148] The legislation should not make

146 *Vogt v. Germany* (Grand Chamber), Appl. No. 17851/91, 26.09.1995.

147 Lebanon, ICCPR, A/52/40 vol. I (1997) 53, para. 357-358.

148 *Sigurdur A. Sigurjonsson v. Iceland*, Appl. No. 16130/90, 30.06.1993; *Chassagnou and Others v. France*, Appl. No. 25088/94 28331/95 28443/95, 29.04.1999

membership to certain CSOs obligatory.[149] The only exception to this case are professional organizations, which are recognized as CSOs in many countries, however as per Article 135 of the Constitution in Turkey are recognized as public institutions and cannot really be considered as CSOs. These organizations are established by law to regulate a profession and membership is required by law. Therefore, this requirement cannot be considered as an obligation to become a member of a CSO. However, except for professional organizations with the status of public institutions, a membership requirement for any association or foundation that is a public legal entity does not correspond to the voluntary element of CSOs. The fact that CSO membership cannot be obligatory also incorporates not forcing anyone to make a payment to a CSO as a donation or under any other name. If such an obligation is against the restriction of the freedom of association regime, it will also constitute a violation of this freedom.[150] The clause "No one shall be compelled to become(...) a member of an association" in Article 33 of the Constitution and the provision in Article 63 of the Civil Code stating no one "may be forced to become a member of an association" safeguard the right not to be a member. Since there are no regulations making membership to any CSO obligatory in Turkey's law, there does not appear to be a problem about this aspect of the freedom of association.

c- Right to Resign from Membership

Another inseparable part of freedom of association is the right of an CSO member to resign from membership whenever they wish. No one should be forced to remain a member of an CSO. Since foundations are not membership based CSOs in Turkey, at this point once again only associations will be reviewed in this section. Constitution Article 33 states that everybody has the right to resign from association membership, and Civil Code Article 66 stipulates nobody can be forced to continue their membership in an association and can leave the association provided they give written notification. These provisions indicate that the right to resign from membership is safeguarded. Therefore there is no problem or need for amendment under this heading in terms of freedom of association.

d- Right Not to Accept Members

The final topic in relation to membership in terms of membership based CSOs is whether or not CSOs have to accept people who apply for membership as members. The principle of volunteerism also entails a CSO's right to refuse someone's membership. Membership to an association requires the mutual consent of the person wishing to be a member and the association. Introducing a requirement to accept members for associations which are private legal entities will be an interference to the freedom of association. In Turkey's legislation, this right is safeguarded under Article 63 of the Civil Code with the clause "... (no) association can be forced to accept members." For associations, acceptance of membership is regulated in Article 64 of the Civil Code. According to this article, "The board of directors passes its decision about the written application made for membership at most within thirty days and the result is notified to the applicant in writing. The member whose application is accepted is registered in the book kept for this purpose." Thus, the board of directors holds the authority to accept or reject a membership request. Membership requests have to be processed within 30 days. However, if this decision is not issued, this does not imply an acceptance or rejection of membership.

There are no clear regulations as to how the application will proceed if the outcome is not notified in writing in 30 days. There is an indirect

149 Rec(2007)14, para 21.

150 *Vörour Olafsson v. Iceland*, Appl. No. 200161/06, 27.04.2010.

provision on this issue in Civil Code Article 80. According to the Civil Code, the ultimate decision making body for acceptance and termination of membership is the association general assembly. Under these circumstances, an individual whose membership application is not accepted or finalized can appeal to the general assembly of the association. However, they will have to wait for the general assembly to be held in this case, which might take up to three years. This may constitute a problem in terms of freedom of association especially in cases when membership applications are rejected based on a discriminatory basis.

According to Article 68 of the Civil Code, "It is a basic principle to grant equal rights to the members of an association. The association may neither make discrimination among their members in respect of language, race, color, sex, religion, sect, lineage, society and class nor may adopt any behavior deteriorating the balance between the members." This provision applies to people who are already members of an association. There is no regulation prohibiting discrimination against non-members. At this point, there is a conflict between an association's right to not accept membership and the principle of non-discrimination. Another conflict is between the freedoms of association of two different people. For the resolution of this conflict in line with human rights, it would be more appropriate to apply the principle of not forcing an association to accept any members for any non-discriminatory reason, but in case there is a rejection based on discriminatory grounds then to require the association to accept the membership request. Therefore it would be appropriate to add the phrase "as long as it does not constitute discrimination" after the clause "no association should be forced to accept members" to Article 63 of the Civil Code, and again to strengthen this regulation add "people who want to be members" after the clause "and association members" to Article 68 of the Civil Code.

e- Termination of Membership or Dismissal from Membership

Another pertinent issue in the framework of the right to membership is a member being dismissed from membership against their will. The freedom of association also guarantees a member's right not be dismissed from an CSO in an arbitrary manner. According to Article 65 of the Civil Code, "The membership of a person automatically terminates if he/she later on loses the qualifications required by the law or by-laws of the association." The qualities foreseen in legislations (such as capacity to act) are objective qualities that are foreseen for everyone who wants to exercise the freedom of association and are not dependent on people's own wills. As for association statutes, they are drafted in the framework of the members' wills. Here, it is certain that associations have autonomy. Based on their own statutes associations can determine the qualities they seek in their members and terminate the membership of someone who later loses any one of these qualities. This stems from the autonomy of an association's activities. Thus, it is possible to assert that there is no problem in terms of termination of membership.

Even though membership to an CSO is considered in the framework of the principle of volunteerism for the exercise of freedom of association, members can be dismissed from CSOs against their will. Another provision regarding the termination of membership is in the Civil Code Article 67. Associations have the right to determine the grounds for termination of membership in their statutes. If there is no regulation in the statute, it is stated that members can be dismissed on justified grounds. The criterion of "justified grounds" is rather obscure and may allow for association organs to make arbitrary decisions. Therefore, it should be obligatory for statutes to indicate openly which reasons provide grounds for termination of membership and these reasons should be kept at

a minimum and specified concretely. The phrase "justified grounds" should be removed from the law thereby safeguarding freedom of association.

According to Article 80 of the Civil Code members have the right to object to the termination of their membership at the association general assembly. Civil Code Article 83 states that at the general assembly "each member who is present in the meeting but does not take part in the resolutions passed by the general assembly contrary to the laws and by-laws of the association, may file a petition to the competent court requesting cancellation of the resolution within one month as of the date of resolution; for those who is not present in the meeting, this period is accepted as one month upon acknowledgment of such resolution and in all circumstances, the application period is limited to three months as of the date of resolution." Thereby, means to apply to the judiciary to object to the termination of membership is maintained. Here, when the decision is made by the board of directors, it is required to first apply to the general assembly. In cases where the decision is taken directly by the general assembly, it is possible to apply to relevant judicial organs. The existent regulation seems in order in terms of freedom of association.

4. CSOs' Founding Objectives

Freedom of association allows people to come together for any objective. International law does not introduce any restriction based on objectives in the exercise of freedom of association. The only limitation that has emerged at this point is perhaps the promotion of discourse that qualifies as hate speech.

In Turkey's legislation, in Article 56 of the Civil Code, associations are defined as "a society formed by unity of at least seven real persons or legal entities for realization of a common object other than sharing of profit by collecting information and performing studies for such purpose." Article 2 of Law on Associations defines associations as "A nonprofit group which has legal personality formed by at least seven real or legal persons in order to fulfill a certain common goal which is not illegalized and enable constant exchange of knowledge and studies." Therefore, with the condition of not sharing profit, associations can be established to realize any objective that is not illegal.

Another restriction regarding purpose is included in Civil Code Article 56. This article prohibits the formation of associations against the law or ethics. Also, according to Article 47 of the Civil Code, groups comprising persons or properties whose aims are against the law or ethics cannot become legal entities. While references to the prohibition of the sharing of profit, and the requirement of objectives being not prohibited by or against the law are reasonable, the criterion of being "against ethics" is not a legally tangible prohibition. Such a provision offers an almost unlimited discretion to administrative and judicial organs in scope of the meanings they may attribute to ethics. All the references to morality or ethics should be removed from the legislation and Article 56 of the Civil Code should be amended accordingly.

According to the third paragraph of Article 3 of the Associations Law, children under 18 but over the age of 15 with the necessary sensibility, may be a member of a children's association "in order to enhance their psychical, mental and moral capabilities, to preserve their rights of sport, education and training, social and cultural existence, structure of their families and their private lives with a written permission given by their legal representatives." This imposes a restriction on children's freedom of association in terms of the objective of the organization as well. Limiting children's membership to associations with children's associations and restricting the activity areas of children's associations is not in line with Article 15 of the Convention on the Rights of the Child.

Civil Code Article 101 defines foundations. According to the article, "The foundations are the charity groups in the status of a legal entity formed by real persons or legal entities dedicating their private property and rights for public use." While at first glance the only criterion required for foundations appears to be dedicating their property for public use for "a specific and sustained objective", the same article introduces a series of restrictions in terms of the objectives of foundations. The article states, "Formation of a foundation contrary to the characteristics of the Republic defined by the Constitution, Constitutional rules, laws, ethics, national integrity and national interest, or with the aim of supporting a distinctive race or community, is restricted." Many of the aforementioned restrictions are based on obscure concepts. Concepts of "the characteristics of the Republic defined by the Constitution", "Constitutional rules", "national integrity" and "national interest" are far from being definable by law and foreseeable by individuals who want to establish foundations. This leaves rather extensive room for discretion to judiciary organs in the establishment of a foundation during the registration process. It would be more appropriate for these restrictions on objectives in Article 101 of the Civil Code to be entirely abolished and a regulation be introduced in line with the legitimate purposes foreseen in the freedom of association restriction regime.

The prohibition on the establishment of a foundation to support a certain ethnic or religious group is against the freedom of association.[151] According to Article 101 of the Civil Code, "Formation of a foundation with the aim of supporting a distinctive race or community, is restricted." This means that people from certain ethnic backgrounds or religious or faith groups cannot establish foundations to support people of the same groups. This is an open violation of ECHR. According to ECtHR, the promotion or support of a minority group does not pose a threat to democracy. In fact such groups should be protected and supported.[152] The provision in question should be amended.

The procedure for changing the objective of a foundation is regulated in Article 133 of the Civil Code. According to the Article, "Where the prevailing circumstances and conditions do not allow the realization of the object foreseen by the dedicator, then the court may change the object of the foundation upon request of the authorized organ or auditing body of the foundation and referring to the written opinion of the other party. The same provision is applicable in abrogation or change of conditions and liabilities that considerably hinder the realization of the object."

This provision allows for foundations to change their objectives for certain reasons. The change can be realized through the demand of the executive organs of the foundation but is made by the judiciary. Since the change can only take place with the demand of the foundation, it does not constitute an interference to the autonomy of the foundation and thus appears in line with the freedom of association.

5. Names of CSOs

The freedom for forms of organizing in scope of the freedom of association also applies for names of CSOs. Organizations not being registered because of its name or the attempt of the dissolution of an organization due to its name are clear interferences on the freedom of association.[153] Such interferences have to be in compliance with the restriction regime.

151 *Özbek and Others v. Turkey*, Appl. No. 35570/02, 06.10.2009

152 *Tourkiki Enosi Xhantis and Others v. Greece*, Appl. No. 26698/05, 27.03.2008.

153 *Association of Citizens Radko & Paunkovski v. The Former Yugoslav Republic of Macedonia*, Appl. No. 74651/01, 15.01.2009.

In Turkey's law, associations are free to choose their name. According to Article 4 of the Law on Associations the name of the association has to be included in the association's statute. As such, alongside the content of the statute, the name of the association can be freely decided by the association founders. However, there are restrictions to this freedom. According to Associations Law Article 28, "The names such as Türk (Turkish), Türkiye (Turkey), Milli (National), Cumhuriyet (Republic), Atatürk, Mustafa Kemal, and other phrases originated by adding abbreviations at the beginning or at the end of these words may only be used upon receiving permission from the Ministry of Interior." At this point it may be possible for this authority given to the Ministry of Interior to be exercised in an arbitrary manner, in other words, while some associations may be allowed to use these words, others might not be permitted to. Therefore, it would be better for either the use of these words to be entirely prohibited without being subject to permission, or to be entirely permitted. According to Article 29 of the Law on Associations, "Use of names, logos, symbols, rosette and similar other signs of a political party, union or supreme organization, association or supreme organization of an association which is active or subject to liquidation or dissolution under the court decision, or use of a flag, logo and pennant of another country or previously founded Turkish states is prohibited by the Law." A similar ban is included in the Turkish Flag Law. According to Article 7 of the law, no association or foundation is permitted to use the flag of Turkey in the front or back of their logo, pennants or symbols or the like in the background or the foreground.

There are sanctions stipulated for associations that violate Associations Law Articles 28 and 29. According to Article 32/n of the Law, "Unless the offenses do require heavier punishment, a punitive fine at the amount of not less than 100 day, is imposed to the executives of the associations who use the names in Article 28 without permission and act contrary to the prohibitions stated in Article 29, in spite of the warnings made in writing, and also decision is taken for the dissolution of the association." This means the failure to comply with the ban results in an initial written warning, followed by punitive measures and the dissolution of the association. Such a series of sanctions cannot be accepted as proportional from the perspective of Article 13 of the Constitution and Article 11 of ECHR. Therefore, clause (n) of Article 32 of the Law on Associations should either be repealed, or if the prohibition is retained, the given sanctions be amended to be more proportional.

Another ban pertaining to names of associations and foundations is included in the Law on Relations of Public Institutions with Associations and Foundations. According to Article 2(a) of the Law, associations and foundations "cannot be named after public institutions and organizations". Article 3 of the law delineates the sanction to this ban. According to the article text, "Public officials and directors of foundations acting against the principles mentioned in the second Article may be sentenced to imprisonment from three months to one year unless their acts constitute any other crime. Furthermore the directors of associations and foundations may be discharged." Furthermore, since the violation is drafted in the association statute or foundation deed, "The associations and foundations whose statute or foundation voucher or procedures are confirmed against this Law shall be closed according to general provisions." In case the organization is closed based on this provision "The goods belonging to the closed associations are reverted to the public purse while the goods belonging to closed foundations are reverted to the general directorate for foundations." As the article demonstrates, there are rather heavy penalties foreseen for associations, foundations, and their directors taking the names of public institutions. The above discussed situation in terms of these penalties applies here as well. Therefore, while

the ban can be maintained, the prison sentence provision should be repealed, and the association or foundation in question should be given the opportunity to change their name with a prior warning. Furthermore, introducing such legal regulations outside the Law on Associations and Law on Foundations, which are the primary legislation on associations and foundations, disrupt the systematic of the legislation pertaining to the exercise of freedom of association. Therefore, it would be a more apposite method to repeal such legal regulations and include these provisions in the relevant primary law.

B- LEGAL ENTITY

1. The Status of Legal Entity

CSOs may be distinguished as those with or without a legal identity, and as discussed above, the quality of being a legal entity in itself is not a determinant in whether or not an organization is a CSO. However, a CSO which is a legal entity should be considered as an entity separate from its founders or members since it has a separate legal personality. In some instances, two or more CSOs merge. In this case, the rights and liabilities of the CSO that was a legal entity before the merger are transferred to the CSO that becomes the umbrella organization. In other words, the CSO created through the merger of two or more CSOs succeeds to the rights and liabilities of the old CSO.[154]

In Turkey CSOs can only be established as legal entities. It is not possible to establish an CSO other than as an association or foundation such as a non-profit company or in any other form. This is a major shortcoming in itself. Freedom of association should be safeguarded for CSOs that are not legal entities and forms of CSOs should not be limited to associations and foundations.

In Turkey's law, legal entity is defined in Article 47 of the Civil Code as "Group of persons organized to create a single body and independent property groups constructed for special object...". The principle of "limited number" applies to legal entities; that is, it is not possible to become a legal entity other than in forms openly stated in the law. Article 47 of the Civil Code stipulates that people or property groups in breach of the law or ethics cannot become legal entities. In Turkey organizations that can be classified as CSOs and that have the status of a legal entity are only associations and foundations. Other than associations and foundations, the only organizations that are exceptions and recognized as legal entities by law are federations and confederations. There are sub categories again under the heading of associations such as children's associations,[155] youth and sports clubs,[156] sports clubs,[157] sports fan associations,[158] consumer associations,[159] and retired officers, retired sergeants, disabled veterans, widows and orphans of martyrs of war and duty, war veterans associations.[160]

As per Article 59 of the Civil Code, when an association presents the declaration of their incorporation, their statute and other required documents to the highest administrative locality of their domicile they become a legal entity. Therefore, the foundation of associations and their assuming a legal status happens simultaneously. The only exception to this is if they have an objective that is against the law or ethics. In such a case, they cannot become a legal entity.

154 Rec(2007)14, para 26-27.

155 Associations Law, article 3.

156 Associations Law, article 14.

157 Law Regarding Organization and Duties of the General Directorate of Youth and Sports, article 20.

158 Law on Prevention of Violence and Disorder in Sports, article 8.

159 Law on Consumer Protection, article 3.

160 Law on Retired Officers, Retired Sergeants, Disabled Veterans, Widows and Orphans of Martyrs of War and Duty, War Veterans Associations

Article 4 of the Law on Foundations that reads "Foundations enjoy a private legal entity status", openly acknowledges that foundations are also vested with legal identity. Civil Code Article 102 stipulates the application to judicial bodies as a precondition for the formation of foundations by saying, "The will for forming a foundation is expressed by issuance of an official deed or title acquired after a deceased person. The foundation is regarded in the status of a legal entity when it is being registered in the records kept by the court of that location." Where the court to which the application is made approves the request, the foundation acquires legal personality. Evidently unlike the associations, foundations acquire legal entity status not upon application but upon the court's approval of the request for registration. When a decision is decreed for the registration of a foundation, it is registered in the records kept by the competent court at the location of the foundation; also, it is registered in the central register of Directorate General of Foundations. An appeal may be made against the decision of refusal given by the competent courts at the time of the foundations' establishment. Duration for appeal in such a case is within one month as of the date of notification. Having recourse to appeal provides further security for the foundations' formation procedure, which is contingent upon a system of authorization rather than notification. Even though the decision is made by a judicial body, having recourse to appeal has in this sense been favorable.

Article 2 of the Law on Associations defines federations and confederations under the title of supreme institution and states that they are vested with legal entity. Associations' right to found and become member of federations and confederations pertains also to foreign federations and confederations. Provisions on federations and confederations are included in the Civil Code. Articles 96 and 97 of the Civil Code stipulate that federations are formed by a combination of at least five associations founded for the realization of the same objective and confederations are formed by a combination of at least three federations that join by establishing membership for the realization of the same purpose. Every federation and confederation has an ordinance. Federations and confederations acquire legal entity status upon submission of the incorporation declaration, ordinance and other required documents to the highest administrative authority of the location. Law on Associations Article 8 states that when the member number of federations drops below five and the member number of confederations drops below three and this situation cannot be reverted sunset provisions shall be immediately implemented automatically, that is the federation or confederation will be annulled within three months.

Clearly, federations and confederations have a separate legal personality from associations. However, analysis of the existing regulations shows that procedures for associations forming supreme institutions is being impeded rather than expedited. The first restriction is regarding the objective. Associations and federations can join together only with those associations and federations that have the same founding objective. Having an identical objective is an almost unattainable precondition. It would seem more appropriate to amend the law by replacing the phrase "same" with "similar", or use the phrase "with any objective" so as to not place any emphasis on the issue of the objective. Associations should be accorded full liberty on this matter. The second limitation is the condition of seeking the combination of at least five associations for a federation and at least three federations for a confederation. Taking account of the fact that the incidence of exercising freedom of association in Turkey is considerably low, it is clear that the stipulated minimum number of members is exceedingly high. Thus, the amendment of the terms "at least three" and "at least five" to read "at least two" seems imperative

for the facilitation of the exercise of freedom of association.

Another body that can be formed, albeit without a legal entity, is platforms. Law on Associations Article 2 asserts that associations can form temporary unions with each other or with foundations, unions and similar CSOs to fulfill a common goal by adopting names such as initiative, movement, etc. and that these unions have no legal personality. According to Article 25 of the Law on Associations, associations may exercise their right to establish platforms, concerning fields relevant to their own objectives and not prohibited by law, with each other or foundations, unions and similar civil society organizations in order to fulfill a common goal upon a decree taken by their authorized bodies. Prohibitions stipulated for associations apply for platforms as well. According to Article 25 of the Law on Association, "Platforms shall not be established and shall not come into effect in line with its objectives and activities prohibited by law. Those who act against this prohibition are subject to the relevant penal provisions." This regulation makes it impossible for associations to operate under the name of various platforms in order to bypass the prohibitions defined by law.

There appears to be no another limitation in the law regarding platforms except for the restriction pertaining to the objectives. This situation should be maintained and no limitation should be introduced through by-laws or similar administrative regulatory measures. That said, having no legal personality platforms are not accorded the safeguards availed to federations and confederations, which stands out as a shortcoming. In order for platforms to be able to benefit from certain guarantees in scope of the freedom of association, it will be favorable to define and recognize them as not only temporary but permanent institutions vested with legal entity status and amend the Associations Law to this end. Ascribing legal basis for platforms will enable them to collect donations and raise funds, employ staff, carry out projects and activities similar to those of associations and by this means the freedom of association will be guaranteed also in the case of platforms.

2. Acquisition of Legal Personality

For CSOs that are legal entities, the legislation governing the acquisition of this legal personality should be framed objectively and in detail. The legislation for acquiring legal personality is expected to be accessible for all and the process involved should be easy to understand.[161] As mentioned above, the procedure of acquiring legal personality is expected to be simple. Legal personality for membership-based CSOs should only be sought after a resolution has been passed by a meeting where all the members are invited. It has been deemed reasonable to charge fees for an application for legal personality. However, the fees in question should not be set at a level that discourages applications.[162]

CSOs' acquisition of legal entity should not be subject to the exercise of a free discretion by the relevant public authorities.[163] An application for legal entity can only be refused in specific situations. These reasons are; a failure to submit all the clearly prescribed documents required, using a name that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person, or having an objective in the statutes which is clearly inconsistent with the requirements of a democratic society. Any evaluation of the objectives should be unprejudiced and respectful of the notion of pluralism. Where it is decided to grant an CSO legal personality, this decision should apply indefinitely, CSOs should not be

161 Rec(2007)14, para 28-29.

162 Rec(2007)14, para 31-33.

163 Rec(2007)14, para 28.

required to renew their legal personality on a periodic basis. The body responsible for granting legal personality should act independently and impartially, and should have sufficient and appropriately qualified staff for the performance of its functions. This body is expected to take a decision to grant or refuse legal personality in a reasonable timeframe. It is emphasized that this decision should be definitely communicated to the applicant and any refusal should include written reasons and be subject to appeal to a court.[164]

In the law of Turkey, the issue of associations acquiring legal entity status has been regulated by Article 59 of the Civil Code which reads, "The associations are regarded as legal entity from the very moment they present declaration of incorporation, by-laws and other documents required for incorporation to the highest administrative authority at the locality of their domicile." According to this regulation the administrative authority does not have the power to reject the application. However, the application and acquisition of legal entity status does not directly warrant the association's registration in the log reserved for associations. According to Article 60 of the Civil Code, "The correctness of the file comprising incorporation declaration, required documents and by-laws of the association is examined by the highest administrative authority within sixty days. In case of determination of contraries to the laws in the incorporation declaration, by-laws and incorrect information the status of the founders, or negligences in the presented documents; the founders are requested to recover such negligences or complete the file. If it is failed to recover the contraries to the law, or recover the negligences within thirty days as of notification date; the highest administrative authority informs the Public Prosecution Office about necessity for filing an action in the competent court of first instance for the abolition of association. The Public Prosecutor may claim from the court to give judgment for the suspension of activities of the said association. In case the incorporation declaration, by-laws and information about the status of the founders are found to be accurate and complete, or the negligences or contraries to the law are recovered within the specified period; then this fact is notified to the association in writing and the association is registered in the log reserved for associations." The absence of elements required by law may lead to the termination of legal entity status. The investigation to be carried out by the administration is intended to discover if there is any breach of the current legislation in the incorporation declaration, by-laws and the legal status of its founders.

In practice, the City Directorate of Associations receives the applications of associations and registers them in the log reserved for associations. However, this form of registration denotes the existence of a notification system, rather than a permission procedure. Youth and sports associations meanwhile are registered in the log kept by the General Directorate of Youth and Sport.

The establishment procedure of foundations is regulated by Article 102 of the Civil Code. According to the article, foundations are founded by issuance of an official deed, by real persons or legal entities or title acquired after a deceased person, declaring sufficient properties and rights to be dedicated to a permanent objective. The foundation acquires legal entity status upon being registered in the records kept by the court of that location. No permission procedure has been stipulated in the process of registration. In this sense the legislation on associations and foundations acquiring legal personality seems in line with the freedom of association.

164 Rec(2007)14, para 34-41.

3. Establishing Branches

As the number of places where CSOs operate increases they often establish various branch offices. CSOs should not require any authorization to establish branches in the event they decide to open branch offices. This should apply for branches to be established both in the country and abroad.[165]

In Turkey associations are allowed to establish branches. Article 2 of the Law on Associations defines the branch as "A subunit affiliated with an association for conducting activities of associations which has no legal entity and organs of its own." However, in order for an association to be able to establish branches there must be a provision in its statute to this end. Article 4 of the same law notes that among the points to be included in an association statute are whether or not an association will have braches and "in case an association has branches, the necessary details about how to open a branch and how it will be represented in board of associations with all its duties and authorities." Again associations may establish branches abroad without requiring any permission.

However, including the subject in the association statute is not enough to establish branches. According to Article 94 of the Civil Code, a branch can be opened only upon the decision of the general assembly. This in turn means that an association cannot open branches during the period between two general assemblies. This restriction should be removed by amending the relevant provision and the decision to open branches should be left to an authorized association body to be appointed by the association itself. The regulation on opening branches applies to the closing of branches as well. Again the authority lies with the general assembly. The regulation on the closing of branches should also be amended as proposed above.

Another restriction on opening branches emerges at the stage of establishment. According to Article 94 of the Civil Code, the board of founders comprising at least three persons and authorized by the association board of directors should submit the incorporation declaration and other documents required for opening a branch to the highest administrative authority of the location. This obligation requires at least three association members to be at the locality of the branch. Furthermore, the phrase "other documents required for opening a branch" in the legislation is very vague. The article clause, "The content of the declaration for opening of a branch and other required information is set out in the regulations" provides the administration with the authority to undertake administrative regulatory action which may obstruct the opening of branches. Therefore, the required number of people for the establishment of a branch should be dropped to one and the foundation procedure should be reified and not left to the discretion of the administration.

The final restriction on opening branches pertains to the mandatory organs of the branches. According to Article 95 of the Civil Code, "Each branch must constitute a general assembly, board of directors, auditors' board, or appoint an auditor." Even though the Law on Associations Article 4 stipulates that the association statute shall include how the branches will be opened and represented in the general assembly of the association with all its duties and authorities, the above mentioned provisions regarding the formation of associations' mandatory organs apply here as well.

The legislation provides that foreign associations may open branches in Turkey with the permission of the Ministry of Interior in consultation with the Ministry of Foreign Affairs. It would be more

165 Rec(2007)14, para 42.

suitable for the advancement of foreigners' freedom of association to stipulate a notification procedure rather than one of authorization by amending the provision on this issue set forth in Article 92 of the Civil Code and Article 5 of the Law on Associations. Since foreign associations upon opening branches will be faced with sanctions specified in the legislation on associations if they undertake activities in breach of existing legislation, there is no need for an additional procedure of permission. Article 32(g) of the Law on Associations states that an administrative fine, at the amount of one thousand Turkish liras, will be imposed to those who open or operate representations or branches of or cooperate with or admit member to foreign associations and nonprofit organizations with head offices domiciled abroad without the permission of the concerned authorities in Turkey. The representations and branches opened illegally will be closed. The aforementioned provision imposes an administrative fine along with the sanction of dissolution. This is in violation of the proportionality principle and it would be more appropriate to first issue a warning and then enforce dissolution.

Associations are allowed to open representations. Article 24 of the Law on Associations provides that associations may open representations in order to carry out their activities where they deem necessary. Representations can be opened not by the branches but the association itself. Though opening representations is not subject to permission, the representatives authorized upon the decision of the board are required to give written notice of the representation address to the local administrative authority.

In the law of Turkey foundations are also allowed to open branches. Article 3 of the Law on Foundations has defined the branch as a "subunit opened under the (...) foundations in order to pursue the operations of the foundation, which lack a legal body status and which comprise bodies." The branches do not have legal personality. According to Article 5 of the Law, "(...) foundations may establish branches and representative offices for the purposes of achieving its objects laid down in the deeds of trust, provided that they have to file a declaration with the Directorate General of Foundations. The rules and procedures for the issue of a declaration shall be governed in the respective regulations." This provision accords the authority of decision on opening branches and representations completely to the foundation itself. However, the Directorate General of Foundations has to be notified of such a decision. Such an obligation of notification does not appear in breach of the freedom of association. However, such a notification should not be regulated in a manner that would obstruct the exercise of this right. The reference in the Law to the respective regulations regarding the procedures for issuing the declaration brings forth the possibility of obstructing the use of this right. Therefore, it would be favorable to briefly state the declaration content within the Law and remove any reference to the regulations.

Foundations may open branches and representations abroad as well. Article 25 of the Foundations Law regulates the international activities of foundations. According to the article, "Foundations may establish branches and representation offices abroad; or carry out international operations and cooperation; set up high entities or may become members of organizations established abroad in accordance with their objectives and activities, provided that it is contained in their deed of trust." Even though foundations have been accorded the right to open branches and representation offices abroad, this right may be used only if there is a previous provision to this end in their deed of trust. Therefore, if at the time of its establishment, the foundation was not envisioned to operate abroad, then in order to carry out such an activity in the future this subject matter must be added to the deed of trust. The opening of a branch has

been hindered by this regulation. It is necessary to remove the phrase "provided that it is contained in their deed of trust" from Article 25 of the Foundations Law in order to facilitate the exercise of the freedom of association.

4. Termination of Legal Personality

The foremost element among the fundamentals in the formation of an CSO is the voluntary coalescence of individuals. The same situation applies also in the termination of legal personality of an CSO that has a legal entity status. Only the members of an CSO can decide to terminate the legal personality of that CSO. In the case of non-membership-based CSOs, its legal personality can be terminated by the act of its governing body – or in the event of bankruptcy, prolonged inactivity or serious misconduct.[166]

The dissolution of a CSO can be considered legitimate only when it constitutes an open threat to democratic society, rejects the principles of democracy, incites or resorts to violence.[167] Furthermore, a CSO should not be disbanded on grounds that its statute is in breach of the legislation provided that its statute does not entail hate speech or expressions that incite and call for violence.[168] The sanction of dissolution should be executed as the last resort and the existence of such a threat should be clearly evidenced. The legislations pertaining to the sanction should be clear and not entail any ambiguity.

The termination of an association's legal entity takes place in the form of either its disbanding or dissolution. An association can be disbanded by the resolution of its authorized body. Associations can also be dissolved with court order. The Civil Code lists a limited number of circumstances that result in the termination of associations. Firstly associations can be *ipso facto* dissolved, that is dissolve on their own. According to Article 87 of the Civil Code, dissolution *ipso facto* may occur under the following circumstances: If the objects of the association are not realized, or it becomes impossible to reach the goals and objects of the association, or in the event of expiry of lawful period; if it is failed to convene the general assembly meeting within the lawful period and one of the legal organs of the association is not constituted; if the association is declared insolvent; if the board of directors is not elected during the period specified in the by-laws; if it is failed to convene the general assembly meeting repeatedly two times. If these circumstances occur then in line with the legislation, the association is *ipso fact* dissolved and there is no need for any association body to take a decision of disbanding. Among the aforementioned reasons, especially the "failure to convene the general assembly meeting within the lawful period and to constitute one of the legal organs of the association" is a rather problematic regulation. At this point, the six month period stipulated for the first general assembly and the minimum number of members (16 people) required for the legal organs leads to an open and disproportionate intervention to the freedom of association. Therefore, the regulation in question should be repealed.

The regulations on the dissolution *ipso facto* of associations apply to federations and confederation founded by associations as well. According to Article 8 of the Associations Law, when the member number of federations drops below five and the member number of confederations drops below three, sunset provisions shall be immediately implemented automatically, that is, the organizations in question will be considered disbanded. In case it is accepted that to facilitate the exercise of the freedom of association it will be more favorable to decrease the stipulated number of

166 Rec(2007)14, para 44.

167 *Tourkiki Enosi Xhantis and Others v. Greece*, Appl. No. 26698/05, 27.03.2008.

168 *IPSD et Autres c. Turquie*, Rec. No. 35832/97, 25.10.2005.

members for the establishment of federations and confederations to two, dissolution will become an issue only when the number of members drops down to one.

Associations can also decide to dissolve themselves with the decision of their general assembly. Article 88 of the Civil Code states that this authority can be used at any given time. This authority may only be exercised by the association general assembly. According to Article 78 of the Civil Code, "The general assembly convenes with absolute majority of the members having the right to participate in the meeting; in cases where the meeting is held for amendment of by-laws or dissolution of association, the quorum is reached with the participation of two third of the members. Where the meeting is postponed due to failure in providing the quorum, a second meeting is held without requirement of majority. However, the number of members participating in this meeting may not be less than the double of absolute number of members comprising the board of directors and the auditors' board." Participation of a specific number of people has been set as a condition for the general assembly. Again according to Article 88 of the Civil Code, while the general assembly passes its resolutions with the simple majority of the members attending the meeting, a decision relating to the dissolution of the association may only be passed with the two-thirds majority of the members attending the meeting. Regulations on the dissolution of an association upon the resolution of its own general assembly seem compatible with the freedom of association.

Finally associations may be terminated also with court order. According to Article 89 of the Civil Code, "If the objects of the association are not compatible with the legislation and ethics, the court may give judgment for the dissolution of the association upon request of the Public Prosecutor or any other concerned person. The court takes all the necessary measures during the proceeding of the case, including suspension of activity." The phrases of "not compatible with the legislation and ethics" in the aforementioned article accord the judicial organs with a considerably broad discretionary power. Even if the term "not compatible with the legislation" can be inferred as the legislation in effect, the relativity of the concept of ethics leaves room for arbitrary restrictions on the freedom of association. Therefore, as in all other provisions in the legislation, the term "not compatible with ethics" should be repealed here as well.

Dissolution of foundations has been regulated by Article 116 of the Civil Code. According to this article, where the realization of the founding object becomes impossible and amendment of the object is out of question, foundations may dissolve *ipso facto* or upon obtaining court decision by deleting the foundation's name from the official records. Secondly, where the foundation is revealed to have prohibited objectives at the time of formation even if it is realized at a later time, or carries out prohibited activities, or its object becomes prohibited later; the foundation is dissolved upon request of the Supervision Authority or the Public Prosecutor by trial. However, where the object of the foundation is later prohibited, in order for the foundation to be dissolved there should be no possibility to amend the object. Clearly, foundations can only be dissolved on grounds of their founding objectives or activities. However, Article 101 of the Civil Code describes the grounds for restricting the formation of a foundation as "[being] contrary to the characteristics of the Republic defined by the Constitution, Constitutional rules, laws, ethics, national integrity and national interest, or [aiming to] support a distinctive race or community." As mentioned above, these prohibitions on the founding objectives of the foundations are rather vague and therefore provide a rather broad discretionary authority in terms of the dissolution of foundations. With the above mentioned amendment to Article 101 of the Civil Code, the

regulations pertaining to dissolution on grounds of prohibited objective can be brought in line with the freedom of association. Another problem at this point is the provision for the sanction of dissolution where there is a prohibited objective or prohibited activity. Such a sanction paves the way for an absolute intervention on the freedom of association. Therefore, amending Article 101 of the Civil Code to first issue a warning and then impose gradual sanctions would bring the aforementioned regulation more in line with the freedom of association.

5. Legal Personality of Foreign CSOs

Despite the fact that everyone, be it a natural person, legal entity, citizen or foreigner, has the right to be an CSO founder, foreign CSOs can be required to obtain approval to operate in a host country. However, the envisioned procedure here should be consistent with the procedure applicable to local CSOs. Foreign CSOs should not be required to establish a new and separate legal entity to carry out its activities. The approval to operate can be withdrawn in the event of bankruptcy, prolonged inactivity or serious misconduct.[169]

This right has been restricted by Article 5 of the Law on Associations that reads, "Foreign associations may pursue their activities; cooperate and open representations or branches, found associations or supreme committees or join existing associations or supreme committees in Turkey upon permission of Ministry of Interior and consult of Ministry of Foreign Affairs." This restriction bestows the executive power with an unlimited discretionary authority. Ministry of Interior and Ministry of Foreign Affairs can impose a restriction on the freedom of association without providing any justification. There are no exceptions in the law on this matter. This situation causes even organizations that are indisputably working for the public good such as environmental or human rights organizations to not be able to operate in Turkey without approval. It would be more appropriate for the current prohibition in Article 5 of the Associations Law to be completely revoked or be limited to associations operating in specific fields and the given specified fields to be clearly stated in the law.

C- MANAGEMENT

The persons responsible for the management of membership-based CSOs are expected to be elected or designated by the highest governing body or by an organ to which it has delegated this task. The management of non-membership-based CSOs should be appointed in accordance with their statutes. CSOs may be held liable for ensuring that their management and decision-making bodies are in accordance with their statutes but they are otherwise free to determine the arrangements for pursuing their objectives. Therefore, CSOs should not require any authorization from a public authority in order to change their internal structure. The same applies to having non-nationals in their management or on their staff as well. The appointment, election or replacement of officers, and, provided it is in line with laws and CSO's statute, the admission or exclusion of members should be a matter for the CSOs concerned. The only exception is where a person has been convicted for an offence. In that case CSOs may lose their discretionary authority.[170]

Article 72 of the Civil Code regulates that the statutory organs of the association are the general assembly, board of directors and auditors' board and that associations may institute others besides

169 Rec(2007)14, para 45.

170 Rec(2007)14, para 46-49.

these statutory organs. General assembly is the highest authorized body of the association and it comprises members registered in the association. It supervises the other organs of the association and is entitled to dismiss them from office at any time on justified grounds. The board of directors on the other hand is the administration and representation body of the association; it may however delegate its representation power to one of the members or to a third person. According to Article 4 of the Law on Associations, the statute of an association should include meeting procedures and dates of the general assembly, duties and responsibilities of the general assembly, ways and principles for voting and decision making, duties and responsibilities of executive and auditing boards, conditions for being elected, the number of original and substitute members. Article 23 of the same law makes it obligatory to declare the general assembly meetings and the list of elected members of the organs to the local administrative authority. The obligation of making a notification also applies for the changes made in association organs.

Bodies of management in foundations have been regulated more flexibly as compared to associations. Article 3 of the Law on Foundations names the foundation management as the body authorized to administer and represent the foundation according to the legislation in effect. Again according to the same legislation, foundation manager refers to those persons authorized to manage and represent the foundation, or those holding an office in the authorized and competent bodies. According to Article 6 of the Law on Foundations, management body of new foundations shall be appointed according to the deed of trust. According to Article 109 of the Civil Code "It is compulsory to constitute an administrative organ within the body of the foundation. The dedicator may also indicate other organs in the foundation if he deems necessary." Evidently unlike the associations, the foundations have been granted a liberty. Foundations can form the management body according to their own deeds. In terms of management, the Law only regulates the management body and no minimum has been set for the number of people assigned to this body.

According to Article 8 of the Law on Foundations, in the event that there is a vacancy in the foundations' management bodies due to death, resignation or any other reason, a new member shall be appointed by the court according to the provisions in the deed of trust; where there is no provision, according to the resolution by the body competent to amend the deed of trust; and where there is no such body, then according to the resolution by the body authorized to carry out execution and upon consultation with the Directorate General of Foundations. Here again the deed of trust has been accorded precedence and it has been stipulated that the vacancies in the management body be filled primarily according to the deed of trust. Article 10 of the same Law regulates the dismissal from office of foundation managers who are found to fail to act in accordance with the purpose of the foundation, not to have used the goods and income of the foundation in accordance with its purposes; to cause the foundation to suffer a loss because of his/her gross negligence and deliberate acts; to have failed to complete or amend in the permitted term the errors and missing points identified by the Directorate General of Foundations, which is the Supervision Authority, or insist on acting in violation; to have lost his/her legal competence to exercise civil rights; or to have contracted a disease or disability which prevents him/her from fulfilling his/her task on a permanent basis. Decision of dismissal is issued by the court upon the application by the Supervision Authority.

The legislation foresees certain restrictions regarding the people who can take office in the managements. For instance, according to the Law on the Prevention of Violence and Disorderliness in Sport Competition, certain people may

be banned from becoming managers in fan associations and sports clubs. Article 18 of the Law states that as a security measure a decision can be issued in certain situations banning people from attending sport competitions as spectators. People who have been banned from spectating sport competitions are also banned from becoming managers in sport clubs and fan associations throughout the duration of the ban.

In Turkey's law, the Turkish Penal Code (TCK) is the fundamental law on punitive sanctions. Article 53 of TCK regulates the rights that a person may be deprived of and disqualified from using in case he or she has been sentenced to imprisonment due to a felonious intent, if the sentence has not been suspended, until the punishment of imprisonment is fully executed. Employment or appointment as manager or auditor in the foundations or associations has also been listed among the rights a person may be deprived of. Furthermore, where a person is sentenced to imprisonment due to misuse of his or her rights and powers as an association and foundation manager or auditor, the use of these rights and powers may be further prohibited even after the execution of the sentence by increasing the punishment from one half up to one folds. The aforementioned provision does not differentiate among crimes. This regulation leads to a deprivation of rights in all crimes committed with felonious intent regardless of if they pertain to associations and foundations or not. This in turns implies the imposition of a blanket restriction on the freedom of association. It would be in good measure to maintain the regulation on misuse in Article 53 of the TCK. However, the scope of the provision disqualifying a person from becoming association and foundation manager or auditor should be as limited as possible, and the crimes for which it will be executed should be enumerated and specified.

Article 60 of the TCK regulates security precautions concerning legal entities. Given the personality principle of punitive liability, penal sanctions can be imposed on natural persons only. Where it is a legal entity in question then the sanction is referred to as security precaution. Article 60 of the TCK entails two different security precautions for legal entities, cancelation of license of operation and confiscation. License of operation may be cancelled if the legal entity is operating under the license granted by a public institution and a crime is committed with felonious intent to drive benefit for the legal entity by misuse of authorization conferred upon by this license. The organs or representatives of the private legal entity must have been complicit in the committed crime. As for the confiscation measure, the property and pecuniary advantages related to the crime committed to drive benefit for the legal entity may be confiscated, that is, their ownership may be appropriated by the state.

The security precautions stipulated in Article 60 of the TCK can be enacted not for all crimes but for those specifically stated in the law. The crimes that fall within this scope are, for instance, genocide, crimes against humanity, migrant smuggling, human trafficking, experimentation on humans, trafficking in organs or tissue, threat, blackmail, coercion, deprivation of a person from their liberty, violation of the right to privacy and communication, theft, abuse of confidence, fraud, intentional environmental pollution, production and trading of habit-forming drugs or excitant substances, obscenity, prostitution, arranging a place or facility for gambling, collusive tendering, usury, cybercrimes, bribery, laundering of assets acquired as a result of offense, breach of national unity and territorial integrity, provocation of war against the state, and violation of the constitution. It would be in good measure to maintain this approach. In cases where application of the security precautions to private legal entities is likely to create heavier consequences (i.e. large number of people becoming unemployed) than the act committed, the judge may refrain from imposition of such precautions based on the principle of proportionality.

Similar restrictions are foreseen also for people who will be in the management bodies of foundations. According to Article 9 of the Law on Foundations, "Those who are convicted on the grounds of larceny, qualified larceny, sacking, looting, organized looting, fraud, organized fraud, fraudulent bankrupt, rigging a competitive bidding process, breach of trust, smuggling or for any crime committed against the security of the State shall not be eligible for the manager position." This restriction applies not only to those who want to be a manager but also to those who were previously a manager but were convicted on one of the aforementioned grounds at a later date. This situation has been openly set forth in the same article that reads, "Any person who is convicted of above-mentioned crimes after having been appointed as the manager shall be automatically deprived of his position." The list of crimes in the article that render a person ineligible for foundation management is quite extensive. Especially those falling under the scope of "any crime committed against the security of the state" and the crime of "securing tangible benefit for himself or others with the aim of taking action against basic national interests" regulated in TCK are rather problematic regulations in terms of the freedom of expression. An absolute prohibition is imposed on the freedom of association of those convicted for this crime. A second problem regarding the regulation is the long duration of the aforementioned prohibition.[171] Absence of any duration specified in the Law and 5-30 years required to expunge the criminal record based on the Judicial Records Code implies that the freedom of association of anyone convicted for one of the aforementioned crimes may be restricted without a reasonable and objective justification. The law should be amended to specify a duration for this prohibition. Furthermore, it should be taken into consideration whether or not a person convicted of these crimes has committed this crime in association with any CSO and the likelihood of recidivism, in other words, the restriction to be imposed should be assessed on an individual basis. Finally the phrase "any crime committed against the security of the state" should be replaced with one that openly lists the relevant crimes; an entire crime category should not be applied as grounds for restriction.

According to Article 6 of the Law on Foundations, the management body of new foundations shall be appointed according to the deed of trust and the majority of those parties holding an office in the management bodies of the foundations should have a domicile in Turkey. This regulation makes a distinction between foreigners who do and those who do not have the right for settlement in Turkey. Even though the aforementioned regulation allows foreigners to become members of the board of directors, by limiting this with a specific number and only to those with the right for settlement, it infers a restriction in terms of the foreigners who are the subject of the freedom of association. In order to eliminate this situation, it would be favorable to remove the reference to the right for settlement in the article text.

According to Additional Article 11 of the Law on Law Enforcement Organization, members of the Law Enforcement Agency cannot be founders or members of bazaar and neighborhood wardens' associations. However, they may be members of sport associations. They may take office in the management and audit boards of associations founded with the objective of sports within the body of the Law Enforcement Agency. In the failure to abide by this restriction, disciplinary penalty shall be given in line with the Police Disciplinary Statute.

171 According to article 12 of the Judicial Records Code number 5352, following the execution of the sentence the criminal record may be expunged 5, 15 or 30 years later, depending on the subject matter of the conviction.

There are a series of restrictions also regarding certain groups of public officials taking office in foundations' management bodies. Though there are no legal restrictions for members of the Turkish Armed Forces, according to the Additional Article 11 of the Law on Law Enforcement Organization, the participation of Law Enforcement Agency members and bazaar and neighborhood wardens in the management bodies of foundations (...) falling in scope of the former Turkish Civil Code number 743 dated 17/2/1926 is subject to the Law Enforcement General Directorate recommendation upon permission of the Ministry of Interior. As was the case in associations, here as well, in the failure to abide by this restriction disciplinary penalty shall be given in line with the Police Disciplinary Statute.

The situation noted above in the relevant section of the study in the context of the regulations pertaining to members of the Turkish Armed Forces and Law Enforcement Agency restricting them from becoming founders of associations and foundations, applies also for their participation in management bodies. Even though specific restrictions may be proposed for each occupational group in terms of freedom of association, such regulations that completely eliminate this freedom constitute an open violation of the freedom of association. Prohibitions of an absolute nature that restrict the freedom of association of the members of armed forces, law enforcement officials and other public officials should be abolished.

D- FUNDRAISING, RIGHT TO PROPERTY AND PUBLIC SUPPORT

1. Fundraising and Donations

CSOs need financial resources to carry out their activities and one of the principle methods of generating this resource is to collect cash and in-kind donations. CSOs may solicit and receive funding and donations from public bodies, other states, intergovernmental agencies, or private law natural persons and legal entities. Fundraising activities may be limited subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.[172] CSOs' fundraising activities are an unalienable element of the freedom of association.

In the law of Turkey though the rules on the regulation of donations and aid seem to be defined, there is no clear distinction between the two concepts. For instance, while association dues are recognized as donation, the people and institutions authorized to solicit aid, and the objectives with which they may collect aid and the rules on collecting, using and auditing aid are regulated in the Law on Collection of Aid. Almost all across the world, every monetary and in-kind support is recognized as donation and named as such, that is, a single concept is used. Using two different concepts in Turkey, namely aid and donation, and furthermore not making a clear distinction as to their differences in the legislation, leads to problems in implementation. It would be better to use a single concept in Turkey like in the rest of the world and amend the relevant legislation accordingly.

In the law of Turkey, the main legislation on collecting donations is the Law on Collection of Aid. Overall, the Law has been structured around restricting the activity of collecting aid, and the content of the Law has been an issue of debate for years. Even if the law maker thinks that there is need for such a law it would still be more appropriate to implement the Law not for CSOs but for natural persons and other legal entities collecting aid. Activities of fundraising are an inalienable aspect of the freedom of association and collecting aid is among the basic activities

172 Rec(2007)14, para 50.

of CSOs. Therefore, it would be favorable to exclude the CSOs' fundraising activities from the Law on Collection of Aid. Moreover, if the legislation on associations, principles of criminal and civil law, and the standards on the freedom of association and related rights and freedoms upheld by international documents are taken into consideration, it is probable that there will be no need for the Law on Collection of Aid. Despite all these discussions and criticisms, in April 2013 a new draft law was prepared to amend the Law on Collection of Aid by the Department of Associations. Following the consultation process conducted by the Department of Associations the draft was finalized in July 2013. As the draft has not yet become the law, this section addresses the regulations in the current Law in effect.[173]

According to the Law, associations and foundations may collect aid compatible with public interest to realize their objectives, provide assistance to people in need and provide or support the provision of one or more public services. The general rule is that persons and institutions may not collect aid without obtaining permission from authorized bodies. However, the aid collection activities carried out by Turkish Armed Forces within its organization, and the aid and donations made by the members and other persons to associations, trade unions and their high committees, sport clubs, professional organizations and foundations authorized to collect donations according to their statutes and the revenues they incur through their equity capital are beyond the scope of this Law. That is, associations and foundations do not have to obtain permission for the donations of their members (such as membership fees) and other people's donations, or the income they will generate through their own equity capital. Associations, institutions and foundations serving for public interest and allowed by the Cabinet to collect aid without permission are also not subject to this procedure of permission.

According to the Law apart from the aforementioned exceptions, it is mandatory to obtain permission in order to collect aid. While there are legal warranties such as auditing procedures and punitive regulations in place, imposing the obligation of permission to collect aid cannot be said to have the objective of preventing the misappropriation of the collected money. The regulation of subjecting the collection of aid to permission does not comply with the freedom based approach. Imposing the obligation of obtaining permission from the state in cases where the monetary aid is given by private law natural or legal entities is considered an illegitimate intervention to the freedom of association. Though certain restrictions apply in such instances, requirement of obtaining governmental authorization prior to receiving grants from donors has been recognized as a violation.[174]

The associations, institutions and foundations serving for public interest that will be allowed to collect aid without permission are determined and announced by the Cabinet upon recommendation of the Ministry of Interior. The stipulation of different conditions for collecting aid among CSOs that enjoy and do not enjoy the status of public interest creates further inequality regarding these statuses the existence of which is already contested. In order to eradicate this situation which disrupts the equality among CSOs it would be more appropriate to institute a regulation that only requires notification for aid collection. Moreover, the number of associations

173 For TÜSEV's opinions on the Draft, see http://www.tusev.org.tr/tr/yasal-calismalar/yardim-toplama-kanunu (accessed: 11.02.2014).

174 Nepal, CRC, CRC/C/150 (2005) 66, para. 314-315.

with public benefit status and tax exempt foundations in Turkey is very low. According to the data published by the Department of Associations, as of January 2014 there are 99,032 active associations in Turkey, while the number of associations with the status of association for public benefit is only 404.[175] According to the data published by Directorate General of Foundations on the other hand, as of August 2013 there are 4,734 foundations in Turkey in the status of new foundations.[176] The number of tax exempt foundations meanwhile is 252.[177] The total number of associations and foundations that have the right to collect aid without permission is only 20.[178] According to the Law, the authorities entitled to issue permission are the province or district governors. These authorities review the importance of the work, competence of those who will engage in the aid collection activity, the compatibility of the service to be rendered with the object and the public interest, whether the aid collection activity will be satisfactory or not, and other matters which are deemed necessary. The outcome of the review is notified to the applicants latest within two months. How the criteria upon which the authorized bodies are to conduct the review are determined, and how objectivity is to be ensured is unknown. Having ambiguous concepts such as the "importance of the work", "compatibility with public interest", "competency of those who will collect aid" be the subject of the review, and addressing headings that require predictive judgment such as "whether the aid collection activity will be satisfactory or not" makes the process of issuing permission even more disputable. Moreover, having "authorized bodies" determine the CSOs' competency in the subject of aid collection is an approach that disregards the CSOs' autonomy and volition. It should not be the task of public institutions to measure the importance of the objective CSOs have identified for their aid collection activities and their competency in aid collection. If such an assessment shall be made this task should be realized by independent experts.

Despite the aforementioned reservations and criticisms, the Law not only assigns this task to public institutions but also endows public institutions with rather broad discretionary authority with regard to the issue of granting permission. The phrase "other matters which are deemed necessary" in the article allows for a wide interpretation of the provision and this broad discretionary authority accorded to the administration begets the risk of arbitrary implementations. The extensive discretionary authority with vague content formulated in favor of the district and province governorships is at such a scale that it can completely hinder the activities of aid collection. The power of discretion accorded to the authorities entitled to issue permission should be limited so as not to violate the freedom of association.

Even if the legislator deems it necessary to have a separate law on aid collection, the permission condition should be revoked and notification should be considered sufficient. In terms of notification, it should be sufficient for CSOs to fulfill the necessary formal conditions. Issues such as the objectives of aid collection, whether or not it will be successful, etc. should be left to the discretion of the CSO that is collecting the aid.

The Law requires the establishment of a responsible committee or board for the activity of aid collection and recognizes that

175 Ministry of Interior Department of Associations, http://derbis.dernekler.gov.tr/SSL/istatistik/FaalFesihdernek.aspx and http://derbis.dernekler.gov.tr/SSL/istatistik/KamuYarari.aspx, (accessed: 23.01.2014).

176 For more information on foundations, see http://www.vgm.gov.tr/db/dosyalar/webicerik195.pdf (accessed: 05.02.2014). In addition to new foundations there are 275 annexed foundations, 165 community foundations and 1 artisan foundation. Out of the 4,734 foundations, 973 are Social Assistance and Solidarity Foundations of the public sector that are established by law; with governors in provinces and the district governors in the districts presiding.

177 Directorate of Revenue Administration, list of foundations accorded tax exemption by the Cabinet, http://www.gib.gov.tr/index.php?id=406 (accessed: 02.02.2014).

178 Ministry of Interior Department of Associations, http://derbis.dernekler.gov.tr/SSL/istatistik/IzinAlmadanYardimToplamaHakkinaSahipDernekler.aspx, (accessed: 23.01.2014).

the authorized board of legal entities is their management bodies. It is unnecessary to establish a responsible board for the activity of aid collection. Considering the fact that any natural or legal entity must act in line with the current laws, it is clear that creating a separate board has no effect except to introduce a new bureaucratic inconvenience. Moreover, the Law regulates that those engaged in the activity of aid collection are responsible for the orderly and efficient implementation of this activity, its finalization within the specified period, the preservation and use of the collected money and property in line with the objective. Therefore, a separate assessment to be conducted by administrative authorities and the obligation of permission is not only unnecessary but also hinders the collection of aid through bureaucratic procedures.

According to the Law the duration and place of aid collection is also left to the discretion of the authority issuing the permission. The general rule is that this period may not exceed one year. However, if there are justified reasons, the specified period may be extended by the authority issuing the permission another year at most, that is, in any event the duration of aid collection may not exceed two years. Regulations geared towards incapacitating the aid collecting person or institution should be abandoned alongside those that leave the decisions regarding the duration and place of aid collection to the discretion of the administration. A freedom based approach should be adopted that recognizes the autonomy of CSOs, and instead of imposing the obligation of permission, limiting the duration and specifying the place of aid collection, if deemed necessary the auditing mechanisms in the Law should be strengthened. However, even this is an issue that calls for debate.

The audit procedures and sanctions in the Law are exceedingly demanding. The activities carried out by associations and foundations are already subject to audit. Subjecting activities of aid collection to a separate audit only tasks the related parties with a new bureaucratic burden and increases the CSOs' workload by creating excessive supervision. The activities of aid collection can easily be followed in the association and foundation declarations. Additional procedures of audit should be repealed, even if a separate control mechanism is deemed necessary then tolerant methods in line with international standards should be adopted rather than methods that violate the freedom of association. In terms of sanctions, if the aid collection constitutes a crime or if a crime has been committed during the utilization of the collected aid, then the regulations in the Turkish Penal Code are sufficient to prosecute and penalize these crimes. It is incongruous to have determined new punishments in addition to those in the TCK.

According to the Law, the aid collection activity carried out without permission is immediately prohibited and the property and money collected is confiscated by security forces and those responsible for this act are prosecuted. Where the amount of aid collected is not sufficient to achieve the object or an amount is remaining after realization of object, these aid amounts are transferred by the authority issuing the permission to one or more institutions to be used for the same or similar purpose. The regulation on activities of aid collection undertaken without permission, whereby the collected money and property is confiscated without any investigation or exceptions is erroneous. As long as there is no element of crime, the practice of confiscating the collected aid merely on grounds of the absence of permission should be avoided. The volition of the donor should not be disregarded, and right to property should be respected. Moreover, where the collected aid is less than or exceeding the required amount, the transfer of the entire or exceeding amount to institutions deemed appropriate by the authorities is also a practice that disregards the donors' volition and the CSOs'

autonomy and violates the right to property. It would be favorable to revoke this regulation.

According to the Law, aid may be collected against receipt or by installing boxes at certain places, opening bank accounts, issuing aid stamps, organizing raffles, cultural shows and exhibitions, sporting contests, trips and entertainments or by use of systems where the data is processed automatically or electronically. In the present day, donations made by credit cards through informatics and especially the internet constitute important financial resources for CSOs. Including this procedure in the scope of the Law whereby it is perceived as an activity of aid collection subject to permission inconveniences the donors and deprives the CSOs from a considerable support. Moreover, when such activities are considered to be in scope of the Law, they must be restricted with a certain period of time. The review and amendment of the relevant provision will resolve these problems.

The autonomous operation of associations and foundations applies also for the financial aid of foreign quality (aid received from foreign natural persons and legal entities or other states or international institutions such as intergovernmental organizations). An approach requiring permission to be obtained from the state will impede on the freedom of association.[179]

Restriction of foreign funding may limit the effectiveness and independence of CSOs.[180]

According to the Law of Associations, associations may receive monetary or in-kind aid from persons, institutions or organization abroad provided they declare this to the local administrative authority beforehand. It is obligatory to receive monetary fund by means of banks, and fulfil the declaration obligation before using the funds. The same applies for foundations as well. According to the Law of Foundations, foundations may receive in-kind and in cash endowments and grants from individuals, institutions and bodies at home or abroad. They may give grants and donations in cash or in-kind to the foundations and associations located at home and abroad with similar purposes. Cash aid that come from or are sent abroad shall be remitted and received through and over the banks and shall be notified to the Directorate General. The numerous documents required for the declaration of funds received from abroad creates an unnecessary workload; furthermore, the process has been disproportionately complicated and almost turned into a permission procedure. The activities of aid collection can easily be followed through association and foundation declarations. Therefore, it should be reevaluated whether or not a separate auditing mechanism is necessary, and even if it is deemed necessary then methods that violate the freedom of association should be revoked and progressive methods in line with international standards should be identified.

According to the Civil Code, foreign associations and foundations may operate, open branches, incorporate or join high-level organizations in Turkey with the permission of Ministry of Interior and consultation of Ministry of Foreign Affairs. For foreign CSOs to collect aid in Turkey they must first obtain the permission of "Pursuing activities in Turkey". Permissions may be issued for a maximum of five years. At least one person must be authorized for carrying out activities of the foreign CSO in Turkey, and if this is a foreign person then he or she must obtain a residence permit to reside in Turkey. The CSOs who want to obtain the permission must apply to the Department of Associations and submit

179 Egypt, ICCPR, A/58/40 vol I (2003) 31. para. 77(21).

180 Belarus, CRC, CRC/C/118 (2002) 54, para. 221.

the required documents.[181] According to the Law on Collection of Aid, collection of aid by the foreign representations in Turkey is subject to the permission of the Ministry of Foreign Affairs. The rather unsurmountable procedures set for foreign CSOs suggest that there is a prejudice against these organizations, deeming them "dangerous". A foreign CSO that has obtained the right to operate in Turkey in accordance with the law should be able to collect aid through the same procedures as other CSOs in Turkey. The permission and other procedures regarding aid collection are already criticized for the problems they create. The stricter procedures set for foreign CSOs make it near impossible for these CSOs to collect aid. Therefore, it will be appropriate to revoke the different procedures formulated for foreign CSOs.

2. Right to Property

CSOs that are legal entities should have access to banking facilities. CSOs with legal personality should be able to use legal proceedings to sue for harm caused to its property or assets it has acquired through its legal status. CSOs can be required to act on independent advice when selling or acquiring any land, premises or other major assets where they receive any form of public support. CSOs should not utilize property acquired on a tax-exempt basis for a non-tax-exempt purpose. CSOs can use their assets or property to pay their staff and can also reimburse all staff and volunteers acting on their behalf for reasonable expenses thereby incurred. In the event of termination of the legal entity, CSOs can designate a successor to receive their property, but only after their liabilities have been cleared and any rights of donors to repayment have been honored. However, in the event of no successor being designated or the CSO concerned having recently benefited from public funding or other form of support, it can be required that the property either be transferred to another CSO or legal entity that conforms to its objectives. Moreover, the state can be the successor where either the objectives or the means used by the CSO to achieve those objectives have been found to be inadmissible.[182]

Right to property is one of the fundamental rights that is protected under the Constitution. Everyone has property and inheritance rights and these rights can only be restricted by law for the public good. The right to property cannot be exercised against public interest. Right to property allows everyone to use and dispose of the property they own and benefit from its products as they see fit provided that they do not violate other people's rights and comply with restrictions defined by law. There is no doubt that "everyone" in the article refers to both natural persons and legal entities.

Article 1 of the ECHR Protocol 1 stipulates, "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." Therefore, the provision in the Constitution and the Convention are in line. Both provisions indicate that the right can be restricted for public interest, in accordance with the principle of legality. Furthermore, from the perspective

181 Department of Associations, Application Guide for Foreign CSOs, Procedures Regarding Activities of Foreign CSOs (Associations, Foundations, Nonprofit Organizations) in Turkey, http://www.dernekler.gov.tr/media/templates/dernekler/images/Application_Guide_for_Foreign_CSOs.pdf , (accessed: 23.01.2014).

182 Rec(2007)14, para 51-56.

of both articles a just balance must be sought between the rights of the individual and public interest. When ECtHR evaluates if there is a violation of the right to property, it considers whether a just balance has been ensured between the interest of the public and protection of the individual's right, that is to say what the public interest entails and if individuals are left under an extra and disproportionate burden. The appraisal of public interest is in essence left to the authority of the states party to the Convention. There is no objective definition of public interest, it is accepted that it varies based on time and place. However, if the principle of restriction by law is not abided by, whether or not there is just balance between public interest and rights is irrelevant. The restriction must definitely be imposed by law. ECtHR conducts a progressive review based on legality, legitimate grounds for restriction, that is, whether public interest is at stake, and proportionality.

According to the Law on Associations, with permission from the general assembly, associations can buy or sell immovable property through board of directors' decisions. Associations have to notify local authorities within a month of the registration of the purchased property at the land registry. As for foundations, according to the Civil Code, when they become legal entities, the ownership of the property allocated to the foundation and related rights passes on to the foundation. The liabilities of the foundation established through testamentary disposition incurring from the legator are limited to the allocated property and rights. If the property and rights allocated to the foundation to be registered through testamentary disposition are insufficient for the realization of its objectives, unless the endower has expressed a will to the contrary, these property and rights are allocated to a foundation with similar objectives by the judge upon the recommendation of supervision authorities. The minimum amount of assets to be allocated to foundations at establishment according to their objectives is determined every year by the Foundations Council as per the Law on Foundations. Foundations can acquire property and exercise all decisions regarding their property.

The decisions foundations make regarding their assets have to be in line with the objectives of the foundations. The provisions regarding foundations in the Civil Code and the audits for compliance with objectives done by the Directorate General of Foundations as per the Law on Foundations relate to this matter. According to Article 111 of the Civil Code, "The foundations are audited by the General Directorate and higher organizations in order to determine whether the requirements of the foundation deed are fulfilled or not, the assets of the foundation are being used for the specified purpose and the income of the foundation is spent reasonably. The auditing of the foundations by higher organizations is subject to the provisions of the private law." Articles 33, 36, and 60 of the Foundations Law that regulate the auditing of Foundations, the duties of the Directorate General of Foundations and the Guidance and Inspection Services pertain to this issue. Also, according to Article 10 of the Foundations Law, foundation managers may be dismissed from office under a judgment rendered by the court if the foundation fails to act in accordance with its objectives, or use the property and income of the foundation in line with its aims.

According to Article 12 paragraph 3 of the Law on Foundations, these property and rights allocated to the foundation at establishment may be replaced with more useful ones or converted to cash with a court decision if there are justified reasons, following the application by the foundation's management body and consultation with the Supervision Authority, whereas their property and rights acquired at a later stage may be replaced with more useful ones or converted to cash upon the decision of the competent body

of the foundation and on the basis of the report to be prepared by independent expert institutions. If the foundation deed allows for disposition on the foundation's property and rights, or changing these, or if the interest of the foundation necessitates the dispositions in question, it is possible for the property and rights of the foundation to be subject to disposition.[183] According to Civil Code, Article 113, paragraph 3, "Where there are justifiable reasons for replacement of the property and rights dedicated by more satisfactory assets, or conversion of the same into cash, the court may give permission for such changes upon request of the authorized organ or auditing body of the foundation subject to the written opinion of the other party." Even if there is a provision to the contrary in the foundation deed, acts of disposition on the property of the foundation are possible. According to Article 113, if there are justifiable reasons for replacement of the property and rights allocated to the objectives at the establishment of the foundation to more satisfactory assets, or conversion of the same into cash, the court may give permission for such changes.

According to Article 26 of the Law on Foundations foundations can establish economic enterprises or companies. In order to facilitate the realization of their objectives and generate income for the foundation, foundations can establish economic enterprises or companies or become partners of existent ones, given they notify the Directorate General of Foundations. However, the profit from economic enterprises including companies cannot be used for any purpose other than the objective of the foundation. Yet, according to Articles 12 and 26 of the Law on Foundations regarding foundations where the majority of the founders are foreign nationals and companies established by these foundations or where more than half of the shares are owned by such foundations, the acquisition of property will be subject to the property acquisition provisions stipulated in Article 35 of the Land Registry Law regulating the rights of foreigners to acquire immovable property and limited estate rights in Turkey. Associations can also engage in economic activities, but they can only open dormitories, pensions and clubs upon permission. According to Article 26 of the Law on Associations, associations can open dormitories for pursuing education and training activities besides opening pensions and clubs for their members in line with the objectives stated in their statutes. However, the management of these facilities is dependent on permission from local authorities. CSOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorization being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned.[184]

Article 16 of the Turkish Commercial Code regulates the legal entity status of commercial enterprises owned by associations and foundations. According to the article, foundations and associations that manage a commercial enterprise to attain their purposes are considered merchants. However, associations working for public benefit or foundations that spend more than half their income for activities qualifying as public duty are not considered merchants even if they manage a commercial enterprise directly or through a legal entity governed and managed by public law. Since economic enterprises founded by associations and foundations are not considered legal entities and

183 Constitutional Court, Decision no K.: 2010/82 dated 17.6.2010 http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=karar&id=2905&content (accessed: 28.01.2014).

184 Rec(2007)14, para 14.

these enterprises are not legally recognized as merchants, the merchant status and responsibility for commercial activities falls directly to the association or foundation with the principal legal status. The exception to the regulation for the consideration of associations and foundations managing a commercial enterprise as merchants are associations with public benefit status and foundations that spend over half their income on activities that qualify as public duty. Being a merchant implies being subject to bankruptcy. Furthermore, each merchant has to register their commercial enterprise to commercial register, keep the books required by legislation and act with prudence in commercial activities. Merchants are also subject to sanctions stipulated in the Turkish Commercial Code. The existence of the commercial enterprise of associations and foundations that have a merchant status is possible through the continuation of the legal personality of these associations and foundations. In case when the legal entity of associations or foundations is dissolved, the existence of their commercial enterprise also terminates.

According to Article 99 of the Civil Code, membership fees, profit gained from the activities of the association or from its assets, and contributions and donations constitute the income of the association. The addition of other sources of income such as public financing and support, grants and tenders would be a favorable amendment to the article.

Article 21 of the Law on Associations stipulates that associations may receive monetary and in-kind aid from persons, institutions and organizations abroad provided that they declare this to the local administrative authority beforehand. It is obligatory to receive monetary funds by means of banks. Foundations can also receive in-kind and monetary aid or donations from persons, institutions and organizations abroad. Additionally, foundations can make in-kind or monetary donations or give aid to foundations and associations with similar purposes in Turkey and abroad. The monetary funds have to be transferred or received by means of banks and it is obligatory to notify the Directorate General of Foundations of the transaction. It is possible to conclude that the notification requirement pertaining to foreign aid is unnecessary, considering the obligation for associations' and foundations' incomes and expenses to comply with the law, and the requirement for documentation, as well as the fact that their operations are subject to audit. The notification has no impact other than imposing another bureaucratic inconvenience and therefore a legal amendment regarding this issue would be appropriate.

According to Article 10 of the Law on Associations, associations may receive financial support from employee and employer unions, political parties, professional organizations and associations with similar aims in order to realize the objectives in their statutes, and may provide financial support to the above listed institutions except for political parties. While the older version of the article allowed associations to provide financial support to political parties, the section that read "...and the aforementioned institutions shall be given monetary aid" was repealed by the Constitutional Court for political parties.[185] Through the decree of the Constitutional Court, associations have been prohibited from giving aid to political parties. The aim of the restriction is to prevent the constitutional ban on political parties receiving foreign support from being overstepped through laws. This restriction, which pertains more to political parties than to the freedom of associations and foundations in using their assets, may be considered reasonable from the perspective of associations and foundations.

185 Constitutional Court, Decision no. E.:2004/107, K.:2007/44 and dated 5.4.2007 http://www.anayasa.gov.tr/en/content/detail/149/ (accessed: 27.01.2014).

This does not imply an obstruction to associations and foundations acquiring income or making donations. It only prohibits associations and foundations from making donations to political parties. Whether or not the regulation that prohibits political parties from receiving foreign aid is appropriate falls beyond the scope of this research.

According to Article 10 of the Law on Associations, associations may implement joint projects with public institutions and organizations about issues that fall within their duties. In these projects, public institutions and organizations may provide aid in-kind and monetary aid amounting to maximum 50% of projects costs. According to Article 75 paragraph (c) of the Municipal Law, municipalities may implement joint service projects that fall into the scope of their duties and responsibilities with associations operating for public interest and tax exempt foundations on the basis of the contracts to be concluded pursuant to the decision of the Municipal Council. For joint service projects with other associations and foundations it is necessary to obtain permission from the highest local administrative authority. However, according to the final paragraph of the same article, municipalities may not allocate aid to associations and foundations from their budgets. As per Public Financial Management and Control Law Article 29, grants to associations and foundations may be given by aiming public interest, provided that they are foreseen in the budgets of public administrations, social security institutions and local administrations within the scope of general government. However, as per the final paragraph of the aforementioned Article 75 of the Municipal Law, this provision cannot be applied for municipalities, special provincial administrations and affiliated institutions, the unions these are members of and companies they are partners of which are subject to Court of Accounts audits; these institutions cannot give aid from their budgets to associations and foundations. This regulation obstructs aid to associations and foundations and there is no reasonable ground for this restriction. Therefore, the paragraph in question should be removed from the article.

According to the Law on Associations associations conduct their services through volunteers or staff who are employed by the decision of the board of directors. Presidents and members of the directors and auditors boards of associations who are not public servants may receive remuneration. Those who are not members of the boards of directors or auditors cannot receive any compensation under the name of salary, honorarium or other. The work load, legal responsibility and the risk of sanction this responsibility entails for the members of the directors and auditors boards makes remuneration to these individuals legitimate. It is obvious that association members who are not on these boards do not hold the same responsibility or risk. However, Article 13 of the Law on Associations leads to serious problems in implementation. According to the article, an CSO member is not allowed to work for pay at the CSO she or he is a member of, and if they do, they are asked to resign from membership or work without pay. Furthermore, an individual can initially form a professional relationship with an CSO and begin to work there for pay and subsequently decide to become a member. The obstruction of this membership request solely due to the fact that this person is working at that CSO hinders the exercise of freedom of association. As such, the provision leads to two different problems and should be amended. It should be accepted that association members can simultaneously work for pay at the association they are members of and an employee of the association can later become a member.

According to the Associations Law, the properties, money and rights belonging to an association annulled upon decree of the general assembly or dissolved *ipso facto* are liquidated according

to the principles stated in its statute. If the means of annulment in the statute is left to the decision of general assembly and the general assembly does not take a decision or does not meet or the association is annulled by court decision, all properties, money and rights of the association shall be handed by court decision to an association which has the most similar aims with the annulled association and the highest number of members on its closure date. This provision stipulating the transfer of properties and rights to the association with the most similar aim seems appropriate as it takes into consideration the will of the association members. However, it should not be forgotten that there are two different associations in question here. While this is a positive provision for the association taking over the property and rights, the possibility that the association members may refuse this transfer should not be overlooked. It would be appropriate to also regulate provisions for what would happen in case the association appointed based on the article text refuses to take over the property and rights. The criteria of similar aims and highest number of members are sought together for the transfer. Even though it can be assumed that the lawmakers have made this regulation with the intent of ensuring the best use of property and rights, the criterion of most members should not be considered as a precondition to fulfil this objective. In such a transfer, whether or not the objectives and activities of the two associations are compatible should be assessed by an objective expert and this assessment should be taken into consideration in the transfer. If an association which is officially investigated or sued for annulment takes a decision of termination and thereby the transfer of association properties, it cannot conduct transfer transactions until the investigation and case are concluded.

The debts of liquidated foundations are paid off first. Unless there is a special provision in the foundation deed, the remaining rights and property may be transferred to a foundation with a similar purpose in line with the provisions stipulated in the foundation deed with a court decree taking into consideration the recommendation of the Directorate General of Foundations. It would be appropriate to seek not only the recommendation of the Directorate General of Foundations, but also the executive organ of the liquidated foundation in this matter.

3. Public Support

CSOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.[186]

Any form of public support for CSOs should be governed by clear and objective criteria. The nature and beneficiaries of the activities undertaken by an CSO can be relevant considerations in deciding whether or not to grant it any form of public support. The grant of public support can also be contingent on an CSO falling into a particular category or regime defined by law or having a particular legal form. A material change in the statutes or activities of an CSO can lead to the alteration or termination of any grant of public support.[187]

Financial support is quite important for CSOs to sustain their activities. While financial support can be provided by the state, it can also be provided by private legal entities and legal entities under the name of donations. However, it is also possible for foreign states, intergovernmental

186 Rec(2007)14, para 57-61.

187 Rec(2007)14, para 57-61.

organizations, and foreign natural or legal persons to provide financial aid. The approach of the state in this regard is rather important. It is possible for the state to provide assistance to some organizations, while not to others. First and foremost there should be no discriminatory treatment in this matter. Any different treatment of associations and foundations without an objective justification and based on any discriminatory grounds will constitute discrimination. Secondly, associations and foundations may be subject to different treatment in the framework of their fields of activity. Here, it is possible to make a distinction between associations and foundations that provide public services and those that do not. Providing financial support to organizations that offer public services may be considered among the state's obligations. However, in cases where such an obligation is met, this should not make way for an interference with the association's or foundation's autonomy. In other words the provision of financial support should not allow for interference with the operations of the association or foundation.[188]

The requirement of obtaining state authorization in cases where financial support is provided by private legal or legal entities is considered to be an illegitimate interference on the freedom of association. While certain restrictions may be foreseen in such a case, the requirement of obtaining prior authorization from the state is considered a violation.[189]

Associations and foundations being able to work autonomously also applies for receiving financial support from abroad. An approach that stipulates state authorization in this case will constitute an obstacle before the freedom of association.[190]

Restrictions on foreign aid limit the effectiveness and independence of organizations.[191]

Whether or not CSOs have the status of an CSO for public benefit is one of the determining factors for receiving public support. According to the report of the State Audit Board on the status of public benefit associations, "Public benefit in scope of civil society is defined as the state providing financial support and certain practices that afford respectability and privileges to organizations meeting certain criteria in order to identify the service fields and forms of civil society organizations and ensure their institutionalization."[192] According to the data of Department of Associations, as of January 2014, there are 99,032 active associations in Turkey, while the number of associations which have the public benefit status are only 404.[193] According to data published by the Directorate General of Foundations, there are 4,734 foundations under the status of new foundations as of 2013[194], while 252 foundations have tax exempt status.[195]

The public benefit status for associations and foundations is subject to different procedures and regulated under different sections of the legislation. For associations, this subject is regulated in the Law on Associations and the Associations Regulation. According to Article 27 of

188 Slovenia, CRC, CRC/C/137 (2004) 104, para. 552.

189 Nepal, CRC, CRC/C/150 (2005) 66, para. 314-315.

190 Egypt, ICCPR, A/58/40 vol I (2003) 31. para. 77(21).

191 Belarus, CRC, CRC/C/118 (2002) 54, para. 221.

192 Devlet Denetleme Teşkilatı, Araştırma ve İnceleme Raporu: Kamuya Yararlı Dernek Statüsünün İrdelenmesi ile Kamuya Yararlı Derneklerle İlgili Yürütülen İş ve İşlemlerin Değerlendirilmesi (State Audit Board, Research and Evaluation Report: An Examination of Public Benefit Association Status and Evaluation of Work and Operations Pertaining to Public Benefit Associations), 2010, p. 335-336, http://www.tccb.gov.tr/ddk/ddk32.pdf (accessed: 01.02.2014).

193 Ministry of Interior Affairs Department of Associations, http://derbis.dernekler.gov.tr/SSL/istatistik/FaalFesihdernek.aspx and http://derbis.dernekler.gov.tr/SSL/istatistik/KamuYarari.aspx, (accessed: 23.01.2014).

194 For information on foundations see: http://www.vgm.gov.tr/db/dosyalar/webicerik195.pdf (accessed: 05.02.2014). In addition to new foundations, there are 275 mülhak (annexed), 165 community and 1 artisan foundation. 973 of the 4,734 foundations are Social Welfare and Solidarity Foundations established by the state per law by governors in cities and district governors in counties.

195 Revenue Administration, List of Foundations Granted Tax Exemption by the Cabinet, http://www.gib.gov.tr/index.php?id=406 (accessed: 02.02.2014).

the Law on Associations and Article 49 of the Associations Regulation, in order for an association to become a public benefit association, the association has to be operational for at least a year and its objective and the activities it undertakes to realize this objective should have the qualifications and be of scale to yield socially beneficial outcomes. Article 49 of the Association Regulation introduces some additional conditions to the requirements outlined in the Law on Associations. According the article, the association has to:

- Be operational for at least a year,
- To have made any procurement and sales transactions exceeding the identified amount of 55,500 YTL[196] for 2005 in compliance with rules of competition over the previous year,
- Have objectives and implement activities that will address the needs and problems of society on the local or international levels beyond those of its members and contribute to social development,
- Spend at least half of its annual income to this purpose,
- Have the adequate amount of assets and annual income to realize its objective as specified in its statute.

According to the Regulation whether or not the association has the above mentioned qualities can be established through the report prepared by Ministry of Interior auditors. Associations that have been found to lack these qualities cannot reapply for public benefit status for the next three years following this decision. According to Article 31 of the Regulation, public benefit associations cannot keep books according to the operating account like other associations; they have to keep books on the balance sheet basis.

According to the Law on Associations, public benefit associations are identified with the Cabinet Decree upon the proposal of the Ministry of Interior in consultation with relevant ministries and the Ministry of Finance. On the other hand, the Regulation stipulates that the application of associations to obtain public benefit status will be sent within a month to the Ministry of Interior with the opinion of the governorship, and then status will be granted with the Cabinet Decree upon the proposal of the Ministry of Interior in consultation with relevant ministries and the Ministry of Finance. Furthermore, the governorship recommendation should clearly indicate if the objectives and activities of the association are of the quality and scale to yield socially beneficial outcomes and if the association can be considered a public benefit association. If associations confirmed to work for public benefit lose this qualification upon the audits, the decree of their public benefit status is annulled through the same procedure.

As for Foundations, the status is primarily regulated in Law no 4962 on Amendment to Certain Laws and Tax Exemption for Foundations, Ministry of Finance General Notification on Tax Exemption to Foundations (Serial No:1) and Notification on the Amendment (Serial No:2) to Ministry of Finance General Notification on Tax Exemption to Foundations (Serial No:1). Article 20 of the Law includes the provision, "Foundations that are established with the objective of providing a service or services that are included in the budgets of general, annexed or special budget administrations, and which allocate at least two thirds of their income can be granted Tax Exemption by the Cabinet upon the recommendation of the Ministry of Finance." According to the Notification, the foundation to be declared tax exempt by the Cabinet should have a health, social aid, education, scientific research and development, culture, environmental protection or forestation purpose. The activities of the foundation can be focused on one or the

196 The given amount is updated annually through the circular published by the Department of Associations.

combination of more than one of the above. However, the foundation demanding tax exemption must operate publicly and its activities must have a diminishing effect on the state's public service burden. Foundations that aim to service a certain region or group cannot benefit from tax exemption. According to Article 1.2 of the Notification, "The foundation must have started to operate publicly for at least a year prior to the application for tax exemption and their activities within this period must have had a diminishing effect on the state's public service burden. However, for foundations whose assets and income exceed twice the amount determined for the year the tax exemption application is submitted, instead of the condition of being operational for at least a year, the condition of being operational for at least six months is sought (...)."

Conditions, procedures and principles for foundations to benefit from tax exemption and lose their exemption are established by the Ministry of Finance. The tax exemptions of foundations which have been found to have lost their qualification for tax exempt status can be cancelled by the Cabinet upon the recommendation of the Ministry of Finance. According to the Notification, following the first assessment by the Ministry of Finance regarding foundations' application for tax exemption, the opinions of the Directorate General of Foundations and other relevant organizations depending on the fields of objective specified in the foundation deed are sought regarding whether the foundation should be tax exempt. If the opinion is affirmative and no objection is raised to the granting of tax exemption, the foundation's activities and accounts are subjected to an investigation by a central audit official. These opinions are expected to report the extent to which the foundation has diminished the state's public service burden since its establishment until the date it has applied for tax exemption. Opinions that do not pertain to an investigation to this end are not taken into consideration.

According to the Notification, tax exempt foundations have to keep books on the balance sheet basis. Furthermore, according to Article 1.4 of the Notification, "(...)on the date of application for tax exemption, the foundations should have at least 505,000 YTL (five hundred five thousand New Turkish Liras)[197] of income generating assets and at least 49,000 YTL (forty nine thousand New Turkish Liras)[198] annual income. Financial support from general and special budget administrations and donations are not taken into consideration in the calculation of annual income."

The first striking issue regarding regulations on public benefit status is that while there are similarities in the conditions for associations and foundations to acquire this status, there are also differences, and the most notable one pertains to the content of the public benefit concept. An association is considered to be operating for public benefit if its objectives and the activities it undertakes to realize this objective are of the quality and scale to benefit the public and if it addresses the needs and problems of society on the local or national levels beyond those of its members and contributes to social development. In order to acquire public benefit status and be granted tax exemption, foundations have to have the aim of allocating at least two thirds of their income to activities of health, social aid, education, scientific research and development, culture, environmental protection or forestation purposes and these activities should not be limited to serving a certain region or group and they should be public and have a diminishing effect on the state's public service burden.

197 The amount in question is raised every year according to the re-evaluation rate announced by the Directorate General of Foundations.

198 The amount in question is raised every year according to the re-evaluation rate announced by the Directorate General of Foundations.

Thus, there are two different definitions of public benefit for associations and foundations. There is no reasonable justification for defining public benefit differently for different forms of organizing. While certain differences in criteria sought for associations and foundations to acquire this status may be acceptable, the use of the same concept with different content depending on the forms of organizing undermines the consistency of the legislation and the concept of "public benefit". Therefore it is important to have one single definition that will apply to both associations and foundations.

Besides the fact that the concept of public benefit is different for associations and foundations, there are also other issues that need to be discussed regarding the scope of the concept and conditions sought to acquire this status. Since the definition of public benefit for associations is not clear, it allows for a rather broad discretion of public officials authorized to grant this status. While this vague definition can be inadequate in providing a guideline for the administration, it also bears the risk of allowing for arbitrary practices. A more precise definition based on objective criteria without the purpose of restriction should be established.

As for foundations the criteria of having the purpose of working in the fields of health, social aid, education, scientific research and development, culture, environmental protection or forestation is sought and the regulation is more concrete in comparison to that for associations. However, the fields of activity enumerated for foundations are very limited; for example many areas such as human rights and law have not been included in this scope. However, it is possible to find foundations such as Foundation to Support the Justice Agencies, Foundation to Support Court of Audit Services, Foundation to Support Turkish Police Organization, Turkish Wrestling Foundation among the list of tax exempt foundations. It is unclear under which field of activity these foundations have been granted tax exemption. Many foundations in Turkey establish their field of objectives very broadly in their foundation deeds. The fields mentioned in the Notification may have been included among the purposes of the aforementioned foundations. However, after the Ministry of Finance makes the initial assessment regarding the application for tax exemption, it requests the opinion of the Directorate General of Foundations on the foundation's activities and to what extent these activities diminish the public service burden on the state. This reveals whether or not the activities conducted in scope of the objectives in the foundation deed correspond to the fields of activity in the Notification. Considering this regulation, it can be concluded that it is not sufficient for the fields in question to be only addressed in the foundation deed. However, as an exception, it has been stated in the Notification that if the Directorate General of Foundation's opinion is not based on any investigation, then it will not be taken into consideration for granting tax exemption to the foundation in question. In such a case, either the activity fields in question are interpreted broadly or there is a shortcoming in the content of the opinion provided by the Directorate General of Foundations. This procedure expands the discretion of the administration and increases the risk of arbitrariness. However, the enumeration of fields of activity one by one is both technically difficult, and can be over-restrictive and lead to interpretations that are not open to change. For this reason, it would be in order to establish a regulation that does not give extensive power of discretion to the administration yet is also not too restrictive. To this end, the state's obligations as a social state of law, the rights and freedoms in the Constitution, and human rights conventions and documents the state is party to should be taken into consideration, and a more comprehensive perspective should be adopted, thus establishing the parameters of the administration's discretional

authority. As for the measure to prevent a restrictive approach, it would be appropriate to add a statement along the lines of "and any other activity to support or promote public benefit" to the amended provision. Here the expression "public benefit" should be understood not as meeting the conditions for the public benefit status, but as realizing activities for public benefit.

The State Audit Board report also alludes to the problems caused by the ambiguity of the scope of the concept, and comments: "It has been concluded that there is not a definition of public benefit to facilitate an effective cooperation between state and civil society and establish the limits of state-civil society relations, and no sufficient clarity in our legislation regarding which objectives and activities the institution of public benefit entails. It has been observed that in the process of acquiring public benefit status, there are discrepancies among ministries' regulations and the criteria for establishing the status are based on limited substantial indicators, thus all along the status has not been granted in an objective framework in accordance with the public benefit status. It has also been noted that since the framework and principles of the system pertaining to public benefit status have not been established adequately, there is not an effective procedure for the processes for the rescinding of the status."[199]

Governorships provide the initial opinion on whether or not associations work for public benefit, the governorship opinion is sent to the Ministry of Interior. Afterwards, the opinions of relevant ministries and the Ministry of Finance are sought and the Cabinet decides upon the proposal of the Ministry of Interior whether or not the association will be granted public benefit association status. The initial assessment of foundations' application for tax exemption is conducted by the Ministry of Finance. Afterwards the opinion of the Directorate General of Foundations, and according to the objectives in the official foundation deed, that of other organizations are sought regarding tax exemption. Foundations are granted tax exemption by the Cabinet upon the proposal of the Ministry of Finance. It is observed that the process takes a long time both for associations and foundations and also for public institutions and is very cumbersome. The fact that the Cabinet makes the decision not only adds unnecessary work to the Cabinet's burden of labor, but the Cabinet has a political view and public policy is shaped according to this view. In order to decrease bureaucracy and procedural discrepancies there should be one authority to make the decision and this authority should be the same for all CSOs. Furthermore, in order to eliminate political influence, it would be a positive measure to establish the application authority as a board comprised of independent experts, or at least require the opinion of an independent board of consultants and make the decision taking into account this opinion.

When their application is rejected associations have to wait for three years to reapply and get the public benefit status. However, in the legislation there is no time frame set for reapplication in case associations lose this status. For foundations there is no time limit established for reapplication in case their application is rejected. However, foundations whose tax exemption is revoked cannot reapply for tax exemption in the subsequent five years. It is not clear how these time frames in the legislation are established and what purpose they serve. Even if the aim could be surmised to be alleviating the work load of the administration, this is not a legitimate justification. Considering that what is important

199 Devlet Denetleme Teşkilatı, Araştırma ve İnceleme Raporu: Kamuya Yararlı Dernek Statüsünün İrdelenmesi ile Kamuya Yararlı Derneklerle İlgili Yürütülen İş ve İşlemlerin Değerlendirilmesi (State Audit Board, Research and Evaluation Report: An Examination of Public Benefit Association Status and Evaluation of Work and Operations Pertaining to Public Benefit Associations), 2010, p. 338, http://www.tccb.gov.tr/ddk/ddk32.pdf (accessed: 01.02.2014).

in the establishment of public benefit is whether or not associations and foundations meet the criteria stipulated in the legislation, they should be allowed to reapply as soon as they are able to meet these criteria and these time limitations should be removed from the legislation.

Certain exceptions and privileges are stipulated for public benefit associations and tax exempt foundations in different laws. The most pertinent among these are:

- According to Article 5/1(ı) of the Corporate Tax Law capital gains from the management of rehabilitation centers of tax exempt foundations and public benefit associations is exempt from corporate tax for five fiscal periods.
- According to Article 10/1(c) of the Corporate Tax Law, in the corporate tax base assessment, a tax deduction of up to 5% of the corporation's annual income is made for the total of donations and aid given to tax exempt foundations and public benefit associations against receipt.
- According to Article 10/1(d) of the Corporate Tax Law in the corporate tax base assessment, tax exempt foundations' and public benefit associations' expenses for cultural activities listed in the article and donations and aid against receipt are 100% deductible from corporation profit.
- According to Article 89(4) of the Income Tax Law, up to 5% of the annual income declared by public benefit associations and tax exempt foundations is deduced for donations and aid against receipt made by these organizations.
- According to Article 89(7) of the Income Tax Law, in the income tax base assessment, tax exempt foundations' and public benefit associations' expenses for cultural activities listed in the article and donations and aid for this objective against receipt are 100% deductible from income tax.
- According to the Act of Fees Article 38 ultimate paragraph the establishment procedures of tax exempt foundations and donations to these foundations are not subject to fees.
- According to Articles 4(e) and 14(c) of the Real Estate Tax Law buildings and lots belonging to public benefit associations are exempt from real estate tax provided that they are not rented out and do not belong to or are not allocated to corporations subject to corporate tax.
- According to Articles IV(11) and V(19) of Table no. 2 annexed to the Stamp Tax Law donation receipts of public benefit association and all documents for all types of procedures and operations the tax stamp of which are payable by these associations are exempt from stamp tax.
- According to Article V(19) of Table no. 2 annexed to the Stamp Tax Law tax exempt foundations are exempt from all stamp taxes for documents pertaining to their establishment procedures.
- According to Article 19(3) of the Law on Municipal Revenues entertainment events organized at public benefit associations are exempt from entertainment tax.
- According to Article 1 of the Law on the Exemption of Certain Associations and Institutions from Certain Taxes, All Fees and Dues; Turkey Red Crescent Association, Turkish Aeronautical Association, General Directorate of Social Services and Child Protection Agency, Turkey Charity Association, official hospice institutions and Darüşşafaka Society and Green Crescent Association are exempt from all taxes, fees, dues, bonds and funds as long as the institutions are liable for incumbent taxes, fees and dues.

- According to the Law on Collection of Aid the public benefit associations and foundations that can collect aid without permission is determined by the Cabinet upon the recommendation of the Ministry of Interior.
- According to Article 1(d) of the Vehicle Law public benefit associations have the right to get official license plates.
- According to Article 17 of the Value Added Tax Law, deliveries and service provisions regarding cultural, educational and social purpose activities of tax exempt foundations and public benefit associations are exempt from value added tax.
- According to Article 59 (b) of the Stamp Tax Law the registration of immovable property acquired by tax exempt foundations and public benefit associations and other property rights and procedures for annotation, and premises of these associations and foundations and the registration of the immovable property to be acquired by these premises and other property rights and procedures for annotation and the cancellation of these are exempt from fees.
- According to Article 4(m) of the Real Estate Tax Law buildings that belong to tax exempt foundations are exempt from real estate tax given that they are not rented out and are allocated to the purpose in the foundation deed.
- According to Article 4(k) of the Inheritance and Gift Tax Law property that are allocated to tax exempt foundations for their establishment or after their establishment is exempt from inheritance and gift tax.

As seen in the above mentioned provisions the public support provided to public benefit associations and foundations primarily occur in the framework of exemption from certain taxes. Only the last four of these exemptions are included in the Ministry of Finance Notification that regulates tax exemption for foundations. However, as demonstrated above, there are also other provisions tax exempt foundations can benefit from. However, these exceptions and privileges are not included in the Notification, but rather addressed in the relevant laws. This shortcoming in the Notification can lead to misleading outcomes for foundations. A similar problem may arise not just for tax exempt foundations, but also on the part of associations. There is no document in which the foundations and associations in question can find the entirety of rights they acquire with this status. This issue should either be regulated in the legislation as a whole in one document or the Department of Associations and the Directorate General of Foundations should keep these provisions regularly updated and make them readily accessible for foundations and associations.

According to the second paragraph of Associations Law Article 10, associations can implement joint projects with public institutions and organizations on issues that fall under their duty. In these projects, public institutions and organizations can provide a maximum of fifty percent in-kind or monetary contribution to the association they are collaborating with for the project costs. According to Civil Code Article 99, membership fees, profit gained from the activities of the association or from its assets, contributions and donations constitute the income of the association. It would be an appropriate amendment to include public support among associations' financial resources.

According to Article 75 paragraph (c) of the Municipal Law, municipalities may realize joint service projects with public benefit associations and tax exempt foundations in their fields of jurisdiction and on the basis of the contracts to be concluded pursuant to the decision of the Municipal Council. For joint service projects with

other associations and foundations, the permission of the highest local administrative authority is required. However, according to the ultimate paragraph of the same article, municipalities cannot give grants to associations and foundations from their budgets. As per Public Financial Management and Control Law Article 29, grants to associations and foundations may be given by aiming public interest, on condition that they are foreseen in the budgets of public administrations, social security institutions and local administrations within the scope of central government. However, according to the ultimate paragraph of the Municipal Law Article 75, this provision cannot be applied for municipalities, special provincial administrations, their affiliated institutions, the unions these are members of and companies they are partners of which are subject to Court of Accounts audits; these cannot give grants to associations and foundations from their budgets. This regulation forestalls support to associations and foundations and there is no reasonable ground for this obstruction. The paragraph in question should be removed from the article.

The Law on Relations of Public Institutions with Associations and Foundations regulates the relations of public institutions and organizations with associations established to support public institutions and organizations, public services or personnel, and foundations established as per the Turkish Civil Code. According to the law, associations and foundations cannot receive any remuneration from natural and legal entities for services provided by public institutions and organizations under the name of fees, donations, contribution or others. While the article is drafted in poor Turkish, this amendment is a provision against CSOs that collect "obligatory donations" such as Traffic Foundation, Foundation to Support Population Services, Foundation to Support Turkish Police, Justice Foundation and school association and foundations. Even though it is a regulation to this end, there are also other associations and foundations that are affected by this Law. According to Article 1.2 of the Ministry of Finance General Notification (No.1) on Tax Exemption to Foundations, foundations which apply for tax exemption have to undertake activities that diminish the state's public service burden. When the Law and Notification are considered together, tax exempt foundations have to diminish the state's public service burden with their activities, but they cannot get any remuneration for the services they provide from natural persons or legal entities under the name of fees, donations, contributions, etc.

There are many controversial points regarding this issue such as, associations and foundations having such close ties with public institutions; the state "transferring" public services which fall within its duty to these foundations and associations; the acquiring of income under any name for the public service provided; CSOs' autonomy being damaged with the state-CSO relationship that becomes "dependent"; the state creating small subcontractor CSOs for itself; in cases where CSOs have to provide public services, the generation of the financial support for these CSOs not from the state but from citizens, etc. Despite all these debates, it is not right for the Law on Relations of Public Institutions with Associations and Foundations to go into effect without a consideration of the negative problems it will create in implementation, an adequate impact assessment, a discussion of the issue of public services being provided by CSOs including the above-raised points, and collecting sufficient information from stakeholders. The positive and negative impact of the Law should be assessed and reported, and it should be shared with all stakeholders to seek a solution to the problems collectively.

It can be deduced that the public support CSOs benefit from is quite limited and especially confined to certain methods such as tax exemption and that these methods are not

sufficiently comprehensive either. For instance, there is no provision that stipulates that there will be a proportionate tax reduction for natural persons who are not income taxpayers for the donations they make to CSOs. The scope of public support should be revisited to include many diverse methods in a way to enable not just the CSOs but also the donors to benefit from tax reductions; remove the obstacles before CSOs engaging in income generating activities in line with their objectives; allocate a certain percentage of all collected taxes to CSOs, and grant making.

E- ACCOUNTABILITY

CSOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated supervising body, have their accounts audited by independent institutions or persons, and make known the proportion of their funds used for fundraising and administration. All reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality. Foreign CSOs should be subject to these requirements only in respect of their activities in the host country.[200]

The activities of CSOs should be presumed to be lawful in the absence of contrary evidence. CSOs can be required to submit their books, records and activities to inspection by a supervising agency where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent. CSOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorization. No external intervention in the running of CSOs should take place unless a serious breach of the legal requirements applicable to CSOs has been established or is reasonably believed to be imminent. It is possible that administrative measures are taken against CSOs on occasion. In such cases, CSOs should generally be able to request suspension of any administrative measure taken in respect of them. Refusal of a request for suspension should be subject to prompt judicial challenge.

The appropriate sanction against CSOs for breach of the legal requirements applicable to them should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality. Foreign CSOs should be subject to these sanctions only in respect of their activities in the host country. The termination of an CSO or, in the case of a foreign CSO, the withdrawal of its approval to operate should only be ordered by a court decision. Administrative authorities have no such jurisdiction. Such a court order should only be issued where there is compelling evidence necessitating the dissolution of the CSO and such an order should be subject to prompt appeal.[201]

The officers, directors and staff of an CSO with legal personality should not be personally liable for its debts, liabilities and obligations. However, they can be made liable to the CSO, third parties or all of them for professional misconduct or neglect of duties.[202]

Sanctions are expected to be proportional. For example, the decision for the dissolution of an

200 Rec(2007)14, para 62-66.

201 Rec(2007)14, para 67-74.

202 Rec(2007)14, para 75.

CSO which cannot hold its general assembly within the time frame prescribed by law is considered to be a disproportionate sanction. In such cases other alternative sanctions such as a fine or withdrawal of tax benefits are expected to be introduced.[203]

According to ECtHR, freedom of association does not preclude states from laying down in their legislation rules and requirements on corporate governance and management and from satisfying themselves that these rules and requirements are observed. At this point the participation of association members in management mechanisms and the prevention of any possible abuse of the economic privileges are considered to be legitimate grounds. According to ECtHR, if associations do not meet the obligations foreseen by law they should first be given enough time to rectify the breaches. This period should not be too short, for example like only 10 days.[204] An CSO which states that it will rectify the breaches provided there is enough time should be granted the necessary time.[205]

Article 11 of the Law on Associations stipulates that associations have the obligation to keep books and records. The scope of the books to be kept is not specified in the Law, but detailed in regulations. According to the Associations Regulation currently in effect associations have to keep at least six books. If the books are not duly kept, sanctions may be imposed. According to Associations Law Article 32, "Executives of the association who do not keep the statutory books or records of the association or use uncertified statutory books shall be punished by a fine of three months to one year in prison or a judicial money fine. Executives of the association and persons who are responsible for keeping the books shall be imposed an administrative fine of five hundred Turkish liras in case of not keeping these statutory books or records of the association properly." The obligation in question applies to all associations without distinction. This implies that people who want to exercise their freedom of association have to deal with a heavy bureaucratic burden. Article 11 of the Associations Law includes a detailed regulation on the documentation of associations' income and expenses and has paved the way for a further detailed procedural guideline for the issue in the Regulation. Again, a rather bureaucratic procedure has been established regarding how associations should keep these records.

Another obligation regarding books and records is the provision that reads "the associations shall use Turkish language in their books and records and correspondences with the official authorities of the Turkish Republic" in Article 31 of the Law on Associations. While the requirement to use Turkish in correspondence with official authorities may be regarded as a reasonable situation, the prohibition of using any other language than Turkish in books and records is not reasonable. Correspondences in languages other than Turkish and keeping records of these correspondences in the original language in the framework of international or local collaborations are very likely scenarios.

Article 19 of the Law on Associations regulates associations' obligation to submit declarations. Associations are responsible for submitting a declaration detailing the income-expense outputs and their activities of the preceding year to the local administrative authority by the end of April every year. If deemed necessary, the Interior Minister or local administrative authority may audit whether the associations conduct their activities in adherence to the objectives stated in their statutes and whether the records and books of associations are kept in line with the

203 *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, Appl. No. 37083/03, 08.10.2009.
204 *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, Appl. No. 37083/03, 08.10.2009
205 *Özbek and Others v. Turkey*, Appl. No. 35570/02, 06.10.2009.

legislation. Law enforcement officers cannot be commissioned for this audit, which shall be done during office hours; and the associations shall be notified about the auditing at least twenty four hours prior. Any information, document or record required by commissioned officers shall be shown and their request of entering the extensions and enterprises shall be met by the association officials during auditing. When any act constituting a crime is established during auditing, the local administrative authority shall notify the public prosecution office immediately.

According to Article 32 of the Law on Associations, the foundation's management shall submit to the Directorate General, within the initial six months of each calendar year, a statement containing a list showing the managers or the members of the board of the foundation; budget and financial statements, activity reports, real estate details, financial charts of the preceding year, documents confirming that these statements are published via appropriate media and means, financial statements of its business operations and subsidiaries as well as other information to be stipulated in the Foundations Regulation. Article 33 of the Law states that "internal auditing is a must in (...) foundations". The foundation may be audited by its own bodies or by independent audit firms. Foundation managers shall submit the reports and the results of in-house audits which are to be conducted at least once a year to the Directorate General within two months following the date of the report, at the latest. The Directorate General carries out the audit for checking compliance of the foundation to its objectives and the laws as well as for compliance of its economic enterprises with the legislation and its activities. Foundations' obligation of declaration and statement, audits and accountings are regulated in detail in the Foundations Regulation.

An amendment to be made in light of the aforementioned issues should revoke the administration's discretionary authority in determining the mandatory books and records to be kept, and its stead enumerate these explicitly in the law, decrease the number of books, affirm that books and records can be kept electronically and stipulate proportional sanctions to be imposed in the failure to comply with these obligations.

F- RELATIONS BETWEEN PUBLIC INSTITUTIONS AND CSOS

1. General Terms of State-CSO Collaboration

In the present day and age, CSOs are as essential a component in the realization of democracy as political parties. CSOs' participation in the provision of public services or decision making processes at all levels, be it national, regional or local, has become indispensable for democracy. The foremost reason for this is that CSOs' participation is essential for the very legitimacy of existing democracy. It is quite important for local, regional and national authorities and international organizations to draw on the relevant experience and expertise of CSOs in devising and implementing their policies. By enabling their members and society to voice their concerns and interests, CSOs provide crucial input into policy development.[206] Relations between public institutions and CSOs may emerge at two different levels, that is, provision of public services and participation in policy and decision making processes.

Accomplishing state-CSO cooperation in the planning and provision of all public services by the public or private sectors is of utmost importance. All governmental and quasi-governmental mechanisms at all levels and all relevant institutions

206 Code of Good Practice for Civil Participation in the Decision-Making Process (Hereon referred to as "Code of Good Practice"), CONF/PLE(2009)CODE1, The Conference of International Non-governmental Organisations of the Council of Europe, 01.10.2009, p. 5, http://www.coe.int/t/CSO/code_good_prac_en.asp (accessed:15.08.2013)

and organizations should ensure the effective participation of CSOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people's opinions as to the functioning of society. In this framework, appropriate disclosure of official information should be ensured or CSOs' access to this information should be facilitated. CSOs should definitely be consulted during the drafting of primary and secondary legislation which may affect their statute, financing or spheres of operation.[207]

Human rights protection mechanisms such as the United Nations Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child explicitly recommend the states to strengthen their cooperation with CSOs for the implementation of international human rights conventions.[208] There is no specific obligation delimiting the fields of cooperation between public institutions and CSOs. Since the aforementioned conventions encompass most every field of life there is no restriction in terms of the field of cooperation. Furthermore, the establishment of this cooperation is of particular importance for the elimination of human rights violations.

The cooperation among public institutions and CSOs may occur at various levels. The level of the cooperation determines the CSOs' participation level in the decision making processes. For instance, ensuring participation only at the central or only at the local level implies that there is limited participation. It is possible and even crucial for the central government, local governments and all organizations and institutions with public legal entity status to cooperate with CSOs.

In Turkey's law, the cooperation between public institutions and CSOs may take place at all levels. Several laws stipulate certain provisions on this issue. The regulations entail both central government and two different decentralized governance institutions in Turkey, that is, municipalities and special provincial administration. However, participation on the levels of central government and institutions and organizations with public legal entity status is limited in the legislation. Meanwhile, there is a wider legal framework on participation in the legislation pertaining to local governments.

2. CSO Participation in Decision-Making Processes

CSOs' participation in decision-making processes constitutes an important part of the relationship between public institutions and CSOs. A document that may serve as a guideline on this issue is the "Code of Good Practice for Civil Participation in the Decision-Making Process" adopted by the Council of Europe considered as a Council recommendation. According to this document the relationships between public institutions and CSOs must be based on the principles of participation, trust, accountability and transparency, and the independence of CSOs. As per this recommendation, processes for participation are expected to be open and accessible. CSOs' participation in decision-making processes should be enabled without discrimination, the relevant legislation should delineate open and clear procedures, the necessary resource should be availed to the CSOs and finally a political will to this end should be exerted.[209]

Code of Good Practice identifies four levels of participation from the least to the most participatory; these are information, consultation, dialogue, and partnership. Access to information which is required in all steps of the decision-

207 Rec(2007)14, para 67-74.

208 Slovenia, CRC, CRC/C/137 (2004) 104, para. 552.; Qatar, CRC, CRC/C/111 (2001) 59, para. 279-280; Belarus, CEDAW, A/59/38 part I (2004) 55, para. 343-344.

209 Code of Good Practice, pp. 5-6.

making process is the lowest level of participation where no interaction or involvement with CSOs is required or expected. Consultation is the step where public authorities put forth the initiatives and policy topics and then ask CSOs for their opinion, upon which CSOs give their views and feedback. Dialogue entails a two-way communication and may occur at every step of the decision-making cycle. Dialogue may either be broad on a regular basis or collaborative on a specific issue. The final and highest form of participation is partnership which may take place at every step of the decision-making processes and entails shared responsibility from agenda setting to joint implementation of the activity.[210]

In Turkey, in terms of participation in decision-making processes in the framework of cooperation among public institutions and CSOs, public institutions may consult the opinions and experiences of CSOs pertaining to the policies they will implement. At this point participation is limited merely to giving information and at times consultation. In other words, the policy in question originates with the public authorities.[211] The lack of a legal framework to regulate this issue is the most important problem in this field. However, in order to pave the way for such participation, albeit limited, the issue should not be left only to the initiative of public institutions and a legislation that will clearly regulate and safeguard such a cooperation should be put in effect.

a- Participation at the Levels of Central and Local Government

In the law of Turkey, various advisory bodies are established in scope of central government and local governments under the names of assembly, board or council. Such bodies can be comprised of academicians and representatives from relevant public institutions and organizations, professional organizations with the status of public institutions, and labor and employers unions. However, CSOs enjoy limited representation on these advisory bodies and their participation should be ensured in all sorts of decision-making processes both in local and central government bodies.

In terms of central government there are dispersed regulations as can be seen below. At the central level the most important piece of legislation on the issue is not a law but a regulation. Regulation on the Procedures and Principles of Drafting Legislation[212] foresees that legislation drafts shall be sent to related ministries and public institutions and organizations to solicit their opinions. However, the Regulation does not make it obligatory to submit to the CSOs the laws, decree laws, statutes, bylaws, annexed decisions of Cabinet decrees and other regulatory proceedings to be prepared by the Prime Ministry, ministries, their affiliated, related and associated institutions and agencies and other public institutions and organizations. Regulation Article 6 paragraph 2 says that "Relevant (...) non-governmental organizations shall be consulted about drafts". Thus here, rather than an obligation a discretionary authority has been accorded.

Regulation Article 7 paragraph 2 states, "(...) non-governmental organizations shall submit their opinions regarding the drafts within 30 days. Where no response is received in this time the lack of response will be treated as an affirmative opinion". These provisions indicate that it is not obligatory to send the legislation amendments to CSOs to solicit their opinion, however, where it is sent and CSOs do not reply within a certain period then their lack of response is treated as an affirmative opinion. Considering their limited

210 Code of Good Practice, p. 8.

211 Code of Good Practice, p. 8.

212 Official Gazette no 26083 dated 17.02.2006.

institutional capacity, expecting CSOs to respond within 30 days is most often not realistic. The most important underlying reason is the lack of sufficient human and financial resources that would enable the CSOs to evaluate such legal regulations. At this point providing support for CSOs through public resources is of great significance. The Regulation should be amended to read that all drafts will be made public and CSOs can submit their opinions regardless of whether they have been solicited for opinions or not if they would like to do so.

In terms of decentralized governance institutions, Special Provincial Administration Law, Greater City Law and Municipal Law allow CSOs' participation at two different levels both in processes of decision-making and strategic planning. According to Article 15 of the Greater City Law and Article 24 of the Municipal Law, specialized committees may be, and in some situations must be, formed with several members to be elected from the municipal council, and representatives of non-governmental organizations may participate and declare their opinion in the meetings of the specialized committees where the subjects within their field of activity and competence are discussed. However, they shall not be entitled to vote during these meetings. Article 16 of the Special Provincial Administration Law states that specialized committees will be formed with members to be elected from the provincial assembly, and CSO representatives without right of vote may participate in the meetings of specialized committees that fall within their field of activity and competence and express their opinions. Yet, this participation will be realized not with the CSOs' initiative but a decision of local government bodies to this end, and will be limited to the meetings of specialized committees that fall within the field of activity and competence of the given CSOs. In the first instance, CSOs should be free to participate and their participation should not be subject to the decision of the relevant body. In the second instance, the criterion of "field of activity and competence" should be revoked and the CSOs' motion should be determinant in this matter. It is not always possible to classify an CSOs' "field of activity and competence." For instance, the field of activity of an CSO working on human rights may touch upon all issues that fall within the decentralized governance bodies' jurisdiction.

Another important regulation concerning municipalities has been included in Article 76 of the Municipal Law. According to the article, city councils will be established and they "shall be responsible for the promotion of urbanization and fellow-citizenship vision, preservation of urban rights and law, and the realization of the principles of sustainable development, environmental awareness, social assistance and solidarity, transparency, accountability, participation and local governing", and "concerned" CSOs will be able to partake in the council. Municipalities shall provide the necessary assistance and support to the City Council to enable its effective and efficient performance. Decisions of the city council on the other hand are not binding, but they "shall be put on the agenda and assessed during the first meeting of the Municipal Council." Working principles and procedures of the city council have not been elucidated and instead are to be determined with a regulation to be prepared by the Ministry of Interior. At this point it would be more appropriate to regulate the rules of participation not with a bylaw but the law. Thereby the administration's interventions towards limiting participation can be prevented and cooperation can be further safeguarded. There are no similar regulations pertaining to city councils in the Greater City Law. Even though in line with Article 28 of the Greater City Law it is possible to apply the Municipal Law provision for greater cities as well, the current shortcoming should be resolved with an amendment to the law.

Second level of participation in decision-making processes pertaining to regulations of decentralized governance institutions is participation in devising the strategic plans. Following their election the decision-making bodies of decentralized governance have to prepare a strategic plan. According to Article 38 of the Municipal Law, among the duties and powers of the Mayor is "to manage the municipality according to the strategic plan." Article 41 of the Municipal Law that regulates strategic plans says that the strategic plan and performance program to be prepared by the Mayor shall be prepared by obtaining the opinion of related CSOs and shall be put into force upon approval of the municipal council. The same article underscores the importance of strategic plan and performance program for the operations of the municipality by noting that this plan shall constitute the basis of the budget and shall have to be discussed and approved by the municipal council before the budget.

Greater City Law also makes it obligatory for the Mayors to develop a strategic plan. However, there is no provision in the Greater City Law for soliciting the opinions of CSOs. This again points at an inconsistency. Even though Article 28 of the Greater City Law stipulating that "Provisions of the Municipal Law and other relevant laws that are not contrary to this Law are relatively applied to the greater city, county and first degree municipalities within the greater city" allows for the Municipal Law provision to be applied in greater cities as well, the current shortcoming should be removed by an amendment to the law.

According to Article 31 of the Special Provincial Administration Law, the strategic plan and performance plan will be prepared by the governors "in consultation with (...) civil society organizations concerned with the issue" and submitted to the general provincial assembly and take effect upon approval. The law regulates issues such as conducting joint projects, financement of these projects, participation in general provincial assembly without right of vote and participation in the development of strategic plans. One shortcoming on this matter is the lack of an explicit obligation stated among the duties of special provincial administrations to cooperate with CSOs. Apart from this there does not appear to be a deficiency in the legal framework pertaining to state-CSO cooperation in terms of special provincial administrations. The Law states that the development of the budget shall be based on the strategic plan which shall be discussed and adopted in the general provincial assembly before the budget.

In all three laws discussed above there is mention of participation in the development of strategic plans and the phrase "prepared in consultation with civil society organizations concerned with the issue" creates the impression of an obligation to solicit the CSOs' opinions; however, the criterion of "concerned with the issue" manifests an ambiguity in the identification of the CSOs to be consulted as mentioned above regarding participation in decision-making processes. Therefore, the current legislations should enable the willing CSOs to express their opinions without having to obtain any permission on this matter and regardless of being "concerned with the issue". Finally, none of the three legislations provide for CSOs to partake in the making of an important decision such as the budget. This is an important shortcoming in terms of CSOs' participation in decision-making processes and amendments should be made enabling CSOs' participation in the preparation of the budget.

An analysis of the provisions in these three laws in regard to CSOs' participation in policy and decision-making processes shows that though CSOs' participation is possible, there is no obligation on the decentralized governance bodies to enable the CSOs' participation in policy and decision-making

processes. Furthermore, according to the relevant regulations, CSOs may only "participate in the meetings of specialized committees where the subjects within their field of activity and competence are discussed and declare their opinion." In addition to this restriction, the lack of a regulation that clearly and explicitly asserts the criteria for determining which CSOs can participate in the processes paves the way for arbitrary attitudes on this issue. Such a situation is also incompatible with the principle of transparency. Therefore, there should be legal regulations in the laws pertaining to the decentralized governance bodies making it obligatory to ensure CSOs' participation in decision-making processes and stipulating that in the failure to do so the decisions will be treated as defunct.

b- Procedure of Forming Advisory Bodies

There are three different approaches in the legislation on whether or not advisory bodies are to be formed. In the first approach it has been clearly stated that CSO representatives shall partake in the advisory body. An example of this is the Working Assembly founded with Article 26 of the Law on the Organization and Functions of the Ministry of Labor and Social Security. According to the article, among the Assembly members are also "(...) civil society organizations' representatives (...) invited regarding to the issues on the agenda." The Assembly will convene at least once a year and is responsible to "meet on the day and with agenda determined by the Ministry, investigate and discuss the issues on the agenda and submit its opinions." As for local governments, Article 76 of the Municipal Law regulates that the city council will be formed with the participation of "concerned civil society organizations." While such an approach entails CSOs' participation, it accords the administration with extensive discretion for determining the CSOs that will partake in the bodies and leaves room for arbitrary practices.

The second approach on the subject of CSOs' partaking in advisory organs is one that grants wide discretionary powers to the administration whereby the CSOs' participation is not made obligatory but may be entertained depending on the meeting agenda. For instance, the Higher Board of Environment founded in line with Article 4 of the Environment Law does not foresee the regular participation of CSOs. Accordingly, CSOs will participate, only upon invitation, in the meetings held in order to make preliminary preparation and assessment on the subjects related to the Board's studies.[213] Here the issue that comes to the fore is not CSOs' direct participation in all policy and decision-making processes but participation upon invitation merely in the initial stages of the decision-making process.

The third approach is to formulate and implement structures like assemblies or boards in line with the discretion of the administration. For instance, according to Article 7 of the Law on the Organization and Duties of the Presidency of Religious Affairs, "The Presidency; in order to conduct studies on subjects in its jurisdiction and responsibility, and develop research and implementation projects and implement these; may found advisory and specialized commissions, permanent or temporary councils, boards and working groups with the participation of (...) non-governmental organizations".[214] The discretionary authority here is even wider as compared to the other two approaches and allows a complete arbitrariness in terms of seeking cooperation.

In all three approaches on advisory bodies discussed above the participation of CSOs in the advisory organs is not guaranteed and the

213 Also see, Law on the Establishment and Functioning of the Economic and Social Council, article 2.

214 Also see, Energy Efficiency Law, article 4; Law on the Regulation of Publications on the Internet and Combatting Crimes Committed by Means of Such Publications, article 10.

administration is granted a considerably extensive discretionary power on this matter. In order to enable the CSOs' active participation in all levels of policy and decision making processes the legislation should make it mandatory to form advisory bodies in all decision making processes both at the central and local level, and the rules to be followed in establishing these bodies should be regulated without leaving any room for interpretation.

c- Procedure of Identifying the CSOs that will Partake in the Advisory Bodies

Different approaches have been adopted also for the identification of the CSOs that will partake in the public bodies of advisory quality. As an approach in legislation, open references have been made to certain CSOs by name. For instance, according to Article 9 of the Law on the Organization and Duties of the General Directorate of Sports, in the Central Advisory Board that is among the permanent boards of the General Directorate of Sports, there is one representative of the Turkish Sports Writers Association to be elected by and among the members of the association. Participation of CSOs in such boards is favorable; however, making an open reference in the legislation to a single CSO by name implies a distinction made among CSOs. Therefore, it would be more appropriate not to mention any CSOs by name in the selection of CSOs to partake in such boards and identify objective criteria instead.

Secondly, no criterion has been put forth on how the CSOs will be determined. Legislation leaves this issue completely to the discretion of the executive body. Such a regulation can be found in the Law on the Establishment and Duties of the Agriculture and Rural Development Support Institution. Article 9 of the Law states that "representatives of civil society organizations concerned" will be among the members of the Monitoring and Steering Committee founded with the "aim to ensure that the relevant public institutions and agencies, natural persons, private legal entities and civil society organizations attend and contribute to the process of monitoring and evaluation of the rural development program." However, the number of representatives and how they will be selected is unclear. According to Article 5 of the Law for the Incorporation of the Investment Support and Promotion Agency of Turkey, "depending on the necessity and according to the nature and characteristics of the subjects to be discussed in the Board meeting, the Prime Minister may decide to invite representatives from other public institutions and corporations, and civil society organizations to attend the meeting" of the Consultancy Board to be established within the Agency. Here, an unlimited authority has been bestowed on the Prime Minister concerning the participation of CSOs, and whether or not cooperation will be sought or with which CSOs has been left completely unclear.[215]

Another approach is included in the Law on Probation Services. According to Article 9 of the Law, duties of the Department of Probation Services include, "to carry out all decisions and proceedings related to the works of directorates and protection boards and in line with their duties and to cooperate with (...) foundations and associations working for public benefit along with volunteer real and legal entities deemed appropriate." In the aforementioned regulation, cooperation has been confined to foundations and associations with public benefit status. The expression "natural and legal entities deemed appropriate" in the article text grants the administration an unlimited discretion in the selection of CSOs to cooperate with. In such legislations, the CSOs' participation in the

215 Also see, Law on the Establishment and Functioning of the Economic and Social Council, article 2; Law on Agriculture, article 16; Law on the Organization and Duties of the Disaster and Emergency Management Presidency, article 3.

process should be guaranteed, and the framework of procedures and criteria to determine the participating CSOs should be regulated clearly, therefore, this legislation should be amended.

As the third approach, an unlimited power of discretion has been given to the administration in the regulations pertaining to the relations between public institutions and CSOs; however, the administration has been assigned with the duty and authority to determine the criteria in terms of exercising this discretion. In several legislations it is stated that the scope of this authority will be determined by the relevant regulation. Even though this creates the impression that certain criteria will be established, it is unclear whether or not the regulation to be issued by the administration will provide any tangible criteria. For instance, "the organization, procedures and principles of work" of the Monitoring Committee to be established in line with Article 9 of the Law on the Establishment and Duties of the Agriculture and Rural Development Support Institution "shall be determined with a regulation to be issued by the Ministry upon consultation with the institutions represented in the Committee."[216] Such a regulation may pave the way for the administration's arbitrary determination of the principles on how CSOs will be represented. Therefore, the number of representatives and the procedure of determining the representatives should be explicitly stated in the law with objective criteria, taking into consideration the quality of the contribution to be made and the influence on the decisions to be taken. At this point, a regulation providing for all parties to be represented in equal numbers is of great significance for the actual realization of cooperation.

According to Article 5 of the Law on Soil Preservation and Land Utilization, among the members of the Soil Preservation Boards to be established in every province are also "three local representatives of professional organizations with the status of public institutions, and civil society organizations operating at the national scale on the subjects of planning and/or soil preservation." However, the number of CSO representatives and how they will be elected is once again unclear. According to Article 8 of another regulation, namely the Law on the Establishment, Coordination and Duties of the Development Agencies, there will be CSO representatives among the members of the Development Council to be established within every development agency, however, "the number of representatives, term of office and other provisions" will be determined "with the decree of establishment". The aforementioned rules will be set forth with the Cabinet's decree on the establishment of development agencies.

In some instances, the CSOs considered for cooperation may also be subject to an accreditation process. The CSOs to be cooperated with are expected to first become accredited. For instance, Article 5 of the Law on the Organization and Duties of the Disaster and Emergency Management Presidency envisions the foundation of an Earthquake Advisory Board. Among the members to partake in the board are also CSOs. However, these members, which are limited to three CSOs, will be appointed by the Disaster and Emergency Management Director General from among the relevant accredited CSOs. The law has defined accreditation as "certifying private sector companies and civil society organizations to qualify to work in the coordination of the Presidency." Therefore, the administration has discretion over the accreditation. Regarding which accredited CSOs will be members of the board again the Presidency has discretionary power. As such, the accreditation mechanism seems to fall short of limiting the power of

216 Also see, Environment Law, article 4; Organic Farming Law, article 4; Law on the Evaluation, Classification and Support of Cinema Films, article 5.

discretion. The qualities an CSO should have in order to be accredited should be openly stated and the discretionary power of the administration on this subject should be limited. Secondly, the determination of accredited institutions that can participate on such boards should be based on concrete criteria.

In some regulations, no criterion has been identified for the number of CSOs that can participate in structures like assemblies or boards to be formed or how these CSOs will be selected. In such an approach the level of CSOs' participation may be determined unilaterally by the administration. Article 5 of the Law on the Evaluation, Classification and Support of Cinema Films stipulates that representatives of civil society organizations in the sector will partake in the advisory council to be established "to research and evaluate the basic approaches to the art of cinema and industry trends and create an efficient communication." The scope of CSOs' participation is completely unknown.

Finally, certain criteria may be foreseen in some regulations regarding the processes and means of determining the CSOs that will participate in the bodies. For instance, according to Article 20 of the Statistics Law of Turkey, the Statistical Council that shall actually be established as an advisory body, is to be composed of the "President of the Journalists Association of Turkey, Chairman of the civil society organization engaged in the field of statistics and having the highest number of academic staff in its membership, Chairman of the civil society organization having the highest number of real persons or private legal entities that are engaged in surveys and researches with statistical outcomes." Firstly, the Journalists Association of Turkey is an association with legal entity. Making reference to a single association in a manner as to exclude other associations founded with the same objective is not appropriate for reasons mentioned above. However, the following criteria differ from other selection procedures as they set relatively objective benchmarks: "the civil society organization engaged in the field of statistics and having the highest number of academic staff in its membership" and "the civil society organization having the highest number of real persons or private legal entities that are engaged in surveys and researches with statistical outcomes". Though in some instances the multitude of members may be acceptable as a criterion, in other instances the participation of organizations such as human rights organizations, think tanks, and specialized agencies is of utmost importance and it would be more favorable to not seek such a criterion. Similarly, in the Board of Advertisement to be established in line with Article 63 of the Law on Consumer Protection, there will be "a member selected by advertising agencies associations or their higher bodies" and "a member selected by advertisers' associations or their higher bodies." Though the stipulated criterion seems objective there is unclarity as to which associations will be recognized as "advertising agencies", and whether their names or founding objectives will be taken into consideration in such a situation. Though it sometimes appears as though a concrete criterion has been foreseen in the selection of CSOs, where the power of determining the criteria is assigned to the administration these criteria may not be considered a sufficient guarantee.

It would be more compatible with the freedom of association to introduce concrete criteria for the appointment procedures of CSOs. It would be appropriate to make the criteria in question more tangible and objective, and amend the aforementioned laws and other laws entailing such provisions to this end. Although certain criteria are foreseen for CSOs such as field of expertise, duration of operation, it is crucial to determine these criteria by way of incorporating the diversity of the society and allowing the CSOs to participate in decision-making processes.

3. CSO Participation in the Delivery of Public Services

CSOs may at times assume duties in the implementation of certain public services, and especially in organizing and carrying out activities of social service or social assistance. According to the legislation such an activity may take place in the form of a project. It should be stated that this is a limited approach. Article 10 of the Associations Law states that associations may implement joint projects with public institutions and organizations on subjects within their field of duties. Public institutions and organizations may provide in-kind and monetary aid amounting to maximum 50% of projects costs. Detailed provisions on these projects have been provided in Article 91 of the Associations Regulation. The regulations have limited cooperation to the implementation of joint projects. According to the Regulation, "projects should be geared towards creating solutions for the society's needs and problems and contribute to social advancement." The aforementioned qualities are rather vague. Again in the Regulation it has been noted that public institutions and organizations have considerable authority in conducting joint projects and that expenditures may be audited by public institutions and organizations or local authorities. The relevant legislation on associations should be amended to remove from the article text the expression regarding the rate of support provided by public institutions and organizations and stipulate no limitations on this matter, and assert tangible criteria on the fields and objectives of the joint projects to be conducted. According to Article 29 of the Public Financial Management and Control Law, public administrations, social security institutions and local administrations in scope of the central government may give grants to associations and foundations, provided that it is foreseen in their budgets and aims public interest. However pursuant to Article 75 of the Municipal Law, this regulation does not include municipalities, special provincial administrations, their affiliated institutions and the unions these are members of and the corporations these are partners of that are subject to Court of Accounts audit.

There is a series of regulations in terms of central government regarding CSOs' participation in the delivery of public services. First one pertains to the Ministry of Culture and Tourism. According to Article 2 of the Law on the Organization and Duties of the Ministry of Culture and Tourism, among the duties of the Ministry is also "to improve communication and cooperate with (...) local governments, civil society organizations and private sector (...) related to culture and tourism (...), to provide monetary support to the associations and foundations which have a primary goal of carrying out cultural, artistic, touristic, and promotion related activities and to the projects conducted by private theatres." In Article 11/A of the Law, among the duties of the General Directorate of Cinema is "(...) to cooperate with banks, finance institutions, professional unions, unions, associations, foundations and other civil society organizations". However, there is no such obligation of cooperation in the relevant legislations of other ministries. Such an obligation should be explicitly included in all legislations pertaining to ministries.

Article 4 of the Law on Social Services stipulates that activities pertaining to social services will be carried out under state supervision and monitoring by ensuring the voluntary contribution and participation of CSOs. Article 3 of the Law states that social service centers are responsible for providing "protection, prevention, support, rehabilitation, guidance and consultancy services (...) when necessary (...) in cooperation with civil society organizations and volunteers." However, except this provision there is no tangible regulation concerning the framework of cooperation.

According to Article 7 of the Law to Encourage Social Assistance and Solidarity, in the social assistance and solidarity foundations to be established in every province and district there will be two representatives selected by and among the directors of civil society organizations founded in that province and operating with the objectives specified by the law, and one representative selected by and among the directors of civil society organizations founded in that district and operating with the objectives specified by the law along with administrative authorities, mayors and various administrators. Nevertheless, how these CSO representatives will be determined is unclear. Providing for the election to be made by the CSOs themselves is favorable, however, what constitutes an CSO "operating with the objectives specified by the law" and the election procedure are important subjects that should be covered by the Law.

Law to Protect the Family and Prevent Violence against Women foresees the establishment of violence prevention and monitoring centers. Among the services to be provided by these centers to be founded in line with Article 15 of the Law is also "to cooperate with the civil society organizations working to end violence within the scope of this Law".[217] Article 16 of the Law states that the informative materials that have to be broadcast on TVs and radios each month on women's participation in the labor force, the mechanisms and policies to fight against the violence especially against children and women are prepared with the opinions of related CSOs.[218] In the aforementioned regulations it is evident that phrases such as "cooperate with" and "solicit for opinion" are not envisioned as an obligation. Rather than securing cooperation such regulations only propose a guideline. In instances where the administration genuinely seeks cooperation and solicits opinions, it has been left unclear how the CSOs' participation in these processes will be realized. For instance, the number of CSOs to cooperate with, which CSOs these will be, or the scope of cooperation with CSOs remain unknown.

Certain legislations on state-CSO cooperation may incorporate such a cooperation under the name of fundamental or general principles in the framework of relevant public service. For instance, Article 3 of the Environment Law identifies the general principles regarding environmental protection, improvement and the prevention of environmental pollution. These general principles include paragraph (b) that reads "In all activities regarding the environmental protection, prevention of environmental disruption and removal of pollution, the Ministry and local governments shall cooperate with, in case of necessity, trade associations, unions and civil society organizations" and paragraph (e) which reads "Right to participation is essential in constituting of environmental policies. The Ministry and local governments shall be liable for creating the milieu of participation where trade associations, unions, civil society organizations and citizens use their environmental rights." These stand out as positive provisions on state-CSO cooperation in terms of the legislations included in the report.

A similar provision is included in the Child Protection Law. According to Article 4 of the Law, among the fundamental principles to be observed in the implementation of the Law with the aim of protecting the rights of the child is "cooperation between the child, his/her family, the related authorities, public institutions and civil society organizations." According to Article 30 of the Law, among the duties of the child bureaus to be established at the Chief Public Prosecutor's

217 Also see, Law on the Execution of Penalties and Security Measures, article 77.

218 Also see, Law on the Prevention and Control of Hazards of Tobacco Products, article 4; Law on the Organization and Duties of the Ministry of Labor and Social Security, Additional Article 2.

Offices is "to work in cooperation with the relevant (...) civil society organizations for the purpose of providing the necessary support services to children who need help, education, employment or shelter, from among children who need protection, who are victims of a crime or who are pushed to delinquency." A similar obligation has been included in Article 77 of the Law on the Execution of Penalties and Security Measures. According to the article, "There may be cooperation with associations, foundations and voluntary organizations and individuals for the success of rehabilitation efforts towards convicts. With this aim, governmental agencies must extend the required assistance to the extent permitted by their available means." The phrase "there may be cooperation" in the regulation again grants the administration a wide field of discretion. Therefore, it would be more favorable to adopt an amendment making cooperation mandatory.

There is no explicit regulation in the legislations regarding decentralized governance bodies in terms of the scope of cooperation. In terms of municipalities there are two laws that come to the fore: according to Article 75 paragraph (c) of the Municipal Law, on the basis of the contracts to be concluded pursuant to the decision of the Municipal Council, and on issues within the field of its duties and responsibilities, the municipalities may realize joint service projects with associations operating for public interest and foundations exempted from tax by the Cabinet. For joint service projects to be realized with other associations and foundations a permission must be obtained from the highest local administrative authority. At this point there is a distinction being made between associations with public benefit status and others, as well as tax exempt foundations and others. Projects wherein other associations and foundations participate are subject to the permission of the administration.

The second law on decentralized governance bodies is the Greater City Law: according to its Article 7 paragraph (v) establishing cooperation with civil society organizations while performing certain public services is among the functions and responsibilities of the greater city municipalities. There is no similar obligation in the Municipal Law. Imposing such an obligation only to the greater city municipalities is a major shortcoming. Such an obligation should be explicitly stipulated in the laws pertaining to special provincial administrations, and province and district municipalities.

Greater City Law Article 7 and Municipal Law Article 15 that regulate the authorities and prerogatives of municipalities do not entail any regulations on CSOs' participation in the delivery of public services. The article foresees that other persons may be permitted to carry out certain public services. However, this is in reference to the delegation of public services to be carried out by third parties through a procedure similar to privatization. This perspective, though seems to facilitate CSOs' participation in the delivery of public services, assesses commercial companies and CSOs based on the same criteria despite the significant inequality between their capacities of financial and human resources. Therefore, it can be observed that in practice the number of CSOs providing public services is extremely low.

Besides the aforementioned provisions there are a number of other regulations on "cooperation" as well. Article 64 of the Law on Special Provincial Administration regulates the relations of special provincial administrations with other organizations. Accordingly, in matters within their purview, and in accordance with agreements reached by a resolution of the general provincial council, the special provincial administration may carry out joint service projects with associations and foundations. According to Article 43 of the Law, among the expenditures of the special provincial administration are "expenditures on

joint services and other projects carried out with (...) civil society organizations" as well. The aforementioned provision indicates that it is possible to allocate resources from the special provincial administration budget for works carried out in the framework of state-CSO cooperation.

Article 24 of the Greater City Law and Article 60 of the Municipal Law include expenses relating to the projects and services jointly performed with civil community organizations among the expenditures of municipalities. This also implies that resources may be allocated from the municipality budget for the activities to be carried out in cooperation of municipalities and CSOs. At this point a parallel may be drawn between the Law on Special Provincial Administration, Greater City Law and Municipality Law.

Besides the central government and local governments, there are also institutions with public legal entity status, administrative and financial autonomy and special budget. The obligation of cooperating with CSOs may also be imposed on such institutions. One of these institutions founded through the Law on Establishment and Duties of the Agriculture and Rural Development Support Institution is the Agriculture and Rural Development Support Institution, and among its duties is "to enable the necessary cooperation and coordination (with) ... civil society organizations... on issues in its jurisdiction." Similarly, among the founding objectives of the agencies established through the Law on the Establishment, Coordination and Duties of Development Agencies, is "to improve the cooperation between the public sector, private sector and civil society organizations", and among their duties and authorities is "to improve the cooperation between the public sector, private sector and civil society organizations towards the realization of the regional development goals." However, this approach has not been set forth for other institutions and organizations. This is a major shortcoming and should be remedied by amending the establishment laws of the relevant institutions and organizations to this end.

Having the status of an association for public benefit or a tax exempt foundation may be a determinant in terms of the cooperation between public institutions and CSOs. According to Article 75 of the Municipal Law, on the basis of the contracts to be concluded pursuant to the decision of the Municipal Council, the Municipality, and on issues within the field of its duties and responsibilities, the municipalities may realize joint service projects with associations operating for public interest, associations and foundations exempted from the tax by the Cabinet. However, for joint service projects to be realized with other associations and foundations a permission must be obtained from the highest local administrative authority. Evidently for associations with public benefits status and tax exempt foundations to realize joint service projects with municipalities the decision of the Municipal Council is sufficient, while for other associations and foundations the permission of the administrative authority is required. Undoubtedly this situation hinders the cooperation of other associations and foundations with municipalities. Another example is Articles 9, 15, 16 and 25 of the Law on Probation Services that introduce the condition of working for public benefit for the CSOs to be cooperated with. In such regulations it is unfortunately ambiguous whether or not the emphasis on "public benefit" in general refers to such a legal status specifically. While the requirement for such a status is a problem on its own, also seeking the condition of working for public interest in general aside from the official status means granting the administration with an unlimited power of discretion. Therefore, it is of considerable importance that the scope of the term "public benefit" is used in the legislation in a manner that eliminates such a discussion.

4. Quasi-Judicial Functions

CSOs may at times assume duties in extrajudicial conflict resolution mechanisms as well. For instance, according to Article 30 of the Insurance Law and "in order to settle the disputes arising from the insurance contract between the policy holder or people benefiting from the insurance contract on the one side and the party undertaking the risk on the other side" an Insurance Arbitration Commission shall be established within the Association of the Insurance and Reinsurance Companies of Turkey. Among the members of this Commission will be one representative of a consumers' association, who shall be elected by the Undersecretariat of Treasury from among three candidates nominated by the consumers' association with the highest number of members in Turkey. Similarly as per Article 66 of the Law on Consumer Protection, at least one arbitration committee for consumer problems will be established at city and district centers to resolve the disputes arising from the application of the law. In the committees composed of a total of five members, there will also be one member elected by consumer organizations. Representation of CSOs with only one person in a five people committee is a big handicap and makes it impossible for CSOs to have any impact on the decision making process. This provision should be changed to include at least two CSO representatives.

Meanwhile in some legislation CSOs have been hindered from assuming any quasi-judicial power. For instance, CSO representatives have not been included among the members of the Board of Review of Access to Information established in line with Article 14 of the Law on the Right to Information. The cabinet has been given full authority in the constitution of this body which is composed of judges, prosecutors, academicians and lawyers. It is quite important for CSOs to participate in this board which is the body of appeal before judicial review in case of the rejected applications for access to information, which are of great significance for the CSOs' activities. CSOs may only be invited to Board meetings to "acquire information" and do not have the right to directly participate in the Board assessments. Therefore, it would be favorable to amend the law to read that a certain ratio of the Board (for example four out of nine) members are to be elected by CSOs.

G- ACTIVITIES

1. Overview

State intervention to the autonomy of CSOs is limited to the setting of certain rules regarding internal operations. Where an CSO is in breach of its own charter, it is not possible to impose sanctions on this CSO to rectify this breach.[219] The most fundamental obligation of the state in the domain of the freedom of association is to not interfere with the activities of people or organizations that want to exercise their freedom of association.[220] Freedom of association should be exercised without encouraging or enticing violence and within the framework of activities compliant to the principles of democracy and human rights envisioned by the ECHR. Organizations should have full autonomy in the practice of the freedom of association. At this point states are expected to introduce all measures, including legislative and administrative measures as necessary, to create an environment for the organizations to operate autonomously.[221]

Operational autonomy of associations is an inalienable part of the freedom of association. Associations should be able to carry out their activities without the interference from state authorities. A provision stating that the

219 *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, Appl. No. 37083/03, 08.10.2009

220 Harris, O'Boyle, Warbrick, p. 535.

221 Lao People's Democratic Republic, CEDAW, A/60/38 part I (2005) 16, para. 112-113.

"Cabinet has the authority to dissolve the organs of the Red Crescent of Turkey and the Turkish Aeronautical Association, and to establish temporary bodies in order to carry out the functions of the associations, as well as to amend, repeal or redraft the statutes of those associations" was annulled by the Constitutional Court decision that read, "It was a clear interference with the right of association, safeguarded by Constitution Article 33, to give the executive power the competence to dissolve the organs of the Red Crescent of Turkey against its will, to establish temporary committees or to change its statutes. Such interference had to be based on one of the reasons mentioned in the relevant article of the Constitution. Since none of the reasons mentioned in Article 33 of the Constitution that would have permitted restriction existed, the impugned provision was contrary to the Constitution." This decision that declares it unconstitutional to interfere with two institutions that do not have absolute autonomy such as the Turkish Red Crescent Society and Turkish Aeronautical Association, the statutes of which are approved by the Cabinet in line with Article 27 of the Associations Law, implies that such interferences to the autonomy of all associations will be in violation of the Constitution. Therefore, Article 33 of the Constitution implies that interferences with the autonomy of associations are subject to the restriction regime foreseen in Article 13 of the Constitution. Hence, the state may only interfere with the autonomy of an CSO provided it is in line with the principle of proportionality and only on the grounds stated in Article 33 of the Constitution, that is to protect national security and public order, or prevent crime commitment, or protect public morals and public health.

Activities of an association should not be delimited by the objectives in its program and statute.[222] According to Article 90 of the Civil Code, "The associations carry out their activities according to the working procedures and in compliance with the objects set out in the by-laws of the association." Article 30 paragraph (a) of the Associations Law says, "The associations may not carry out activities other than those indicated in the Statute as the objective of the association." The sanction of this ban is regulated in Article 32/0 of the Law that reads, "A punitive fine, at the amount of not less than 50 day is imposed to the executives of the association who act contrary to the restrictions stipulated." Evidently activities of the association must be confined to the fields stated in their statutes and otherwise they will be subject to punitive fines. Such a restriction limits the association's fields of activities and necessitates a statute change in order to carry out any activity not previously stated in its statute. In order to eliminate any problems that might arise in the future it becomes imperative to define a quite extensive field of activities in the association statute. At this point it becomes superfluous to limit the subject of activity in the statute since activities of criminal nature will already be prohibited by law. Consequently, restricting the freedom of activity to fields specified in the statute is a breach of the freedom of association and should be repealed.

The legislation stipulates another series of restrictions on the activities of CSOs. According to Article 19 of the Law number 6112 on the Establishment of Radio and Television Enterprises and their Media Services, the broadcast license required to provide radio, television and on demand broadcast service may only be granted to joint stock companies. The same article stipulates that a broadcast license cannot be granted to associations, foundations and any companies which are established by them and any of which

222 Lithuania, ICCPR, A/53/40 vol. I (1998) 30, para. 177.

they are in direct or indirect shareholders, and associations and foundations cannot be direct or indirect shareholders of media service providers. With the aforementioned regulation associations and foundations have been prohibited from radio and television broadcasting. It is difficult to understand the reason for such restrictions, which are in violation of the freedoms of expression and association. Therefore, this prohibition should be removed from the aforementioned law.

As for the fan associations an obligation of activity has been introduced with the Law on the Prevention of Violence and Disorder in Sports. In scope of the responsibilities stated in Article 8 of the Law, fan associations "organize educational activities geared towards enabling the fans to spectate sports activities in line with sports ethics and principles." This provision has been formulated as an obligation to realize an activity rather than permission for a field of activity. Such an obligation cannot be compatible with the freedom of association or the principle of autonomous operation and should be repealed.

2. International Activities of CSOs

According to Article 91 of the Civil Code and Article 5 of the Associations Law, associations can undertake international activities and collaborations, open representative and branch offices abroad, or establish associations or headquarters abroad, or become members of foreign associations or institutions with international headquarters in order to realize their aims as specified in their statutes. Therefore, for associations there are no restrictions for international activity and no permission or notification procedure is foreseen on this matter. Since Article 117 of the Civil Code stipulates, "The provisions relating to performance of activities by the foundations in international arena and formation of higher organizations may also be applicable to the foundation by way of comparison," the same applies for foundations. Furthermore, according to Foundations Law Article 25, "Foundations may establish branches and representation offices abroad; or carry out international operations and cooperation; set up high entities or may become members of organizations established abroad in accordance with their objectives and activities, provided that it is contained in their deed of trust." The maintaining of this approach and not introducing regulations that will imply restricting this freedom bears great significance for the advancement of freedom of association.

3. Activities of Foreign CSOs in Turkey

Association Law Article 5 introduces a restriction to this right with the provision, "Foreign associations may pursue their activities; cooperate and open representations or branches, found associations or supreme committees or join existing associations or supreme committees in Turkey upon permission of Ministry of Interior and consult of Ministry of Foreign Affairs." However, the restriction in question gives the executive branch unlimited power of discretion. The fact that there are no exceptions included on this matter in the law, obstructs organizations such as human rights or environmentalist organizations, which indisputably work for public interest, from undertaking activities without permission in Turkey. It would be more appropriate for either the existent restriction to be completely removed from the article, or be limited by the law to apply only to certain associations except for those such as human rights and environmentalist associations working in specific fields. The same situation also concerns foundations due to provision in Civil Code Article 117 that reads "The provisions relating to performance of activities by the foundations in international arena and formation of higher organizations may also be applicable to the foundation by way of comparison."

4. Right to Access to Information

Another important issue for CSOs' activities is access to information. This right which

is expressed as the right to information is also subject to a constitutional regulation as mentioned above. According to Article 4 of the Law on the Right to Information (BEHK), "Everyone has the right to information." Therefore, there is no distinction made between natural persons or legal entities here either. The phrase "All natural and legal persons who apply to the institutions by way of exercising the right to information" in Article 3 of the Law pertaining to "applicants", and the phrase "where the applicant is a company" further substantiates this. Therefore, it can be asserted that in Turkey's law CSOs are subjects of the right to information.

There is a restriction for foreign CSOs regarding this matter. According to Article 4 of the law, "Foreigners domiciled in Turkey and the foreign legal entities operating in Turkey can exercise the right in this law, on the condition that the information that they require is related to them or the field of their activities; and on the basis of the principle of reciprocity." Two criteria are introduced here: "principle of reciprocity" and "related to the field of their activities." The principle of reciprocity in the article constitutes an obstacle to freedom of association.

Since the provisions on the limitations of right to information stipulated in Articles 15 through 28 already makes it possible to withhold any information deemed unsuitable from foreign CSOs, such a restriction is a discriminatory provision only hindering foreign CSOs' activities. The 2nd paragraph of Article 4 of the Law referring to the principle of reciprocity should be removed. The phrase in the article text pertaining to the criterion of being "related to the field of their activities" for foreign CSOs implies that for non-foreign CSOs the scope of the right to information is not limited to their fields. However, in order to avoid the limitation of the scope of this right through interpretation, it would be favorable to add "regardless of whether or not related to their fields" to the article text. For foreign CSOs, in addition to the principle of reciprocity, the phrase "related to them or the fields of their activity" should also be removed from the article text.

Article 5 of BEHK regulates the obligations of public institutions and organizations and professional organizations with the status of public institutions, to provide information. Article 7 of the Law regulates the quality of the information or document that can be requested. According to the article, "The application for access to information should relate to the information or the document that the institutions which are applied possess or should have possessed due to their tasks and activities." However, the relevant institutions "may turn down the applications for any information or document that require a separate or special work, research, examination or analysis." Such a provision provides room for extensive discretion towards the rejection of the application to access information. The discretion in question should be restricted. The presentation of information to the public by relevant institutions and organizations in a transparent manner prior to the application, and the documenting of information to facilitate research, examination or analysis through access to information units to be established can prevent the rejection of access to information applications to a certain extent. Therefore, the addition of such an obligation to Article 5 will be favorable.

BEHK Article 10 makes it possible to charge a fee for applicants in the framework of the response to the application for information. According to the ultimate paragraph of the article, "The applied institution will charge the applicant for the cost of the procedure, to be added as an income to the budget." Such a regulation may have a deterrent effect in terms of the exercising of the right to information and may cause the obstruction of the applicant CSO's activities if the organization does not have the necessary financial resources. The reduction of such a cost to a minimum will be possible through the transfer of the information

and documents in question to electronic media. Therefore, the phrase "in case where it is not possible to provide the information electronically" should be added to the end of the sentence.

Article 11 of the Law stipulates that if the requested fee is not paid, the application will be considered withdrawn. However, such a decision that considers the application withdrawn in all cases across the board when the fee is not paid is not fair. It seems more appropriate to make a distinction in terms of applicant CSOs. For instance, it may be possible to grant an exemption to all CSOs or introduce criteria based on field of activity for the exemption. Furthermore, allocating funds in the budget of the applied institutions or organizations for persons who cannot meet the fee obligation would be more effectual in terms of facilitating access to the right.

The final issue that needs to be addressed about BEHK is the restrictions imposed to the right. A significant part of the Law has been dedicated to the exceptions to the right. While it is positive that the exceptions are drafted clearly, the fact that there are so many exceptions has narrowed the scope of the law to a great extent. The following have been excluded from the scope of the right to information: the transactions that affect the working life and professional honor of the persons which are not subject to the judicial review; the information and documents which qualify as state secrets the disclosure of which clearly cause harm to the security of the state or foreign affairs or national defense and national security; the information or documents of which their disclosure or untimely disclosure cause harm to the economic interests of the state or will cause unfair competition or enrichment; the information and documents regarding the duties and activities of the civil and military intelligence units; in certain cases the information or the documents that is related to the administrative investigation held by the administrative authorities; in certain cases the information or documents pertaining the judicial investigation and prosecution; the information and documents that will unjustly interfere with the health records, private and family life, honor and dignity, and the economical and professional interests of an individual; the information and documents that will violate the privacy of communication; the information and documents that are qualified as commercial secret in laws, and the commercial and financial information that are obtained by the institutions from the private or corporate persons with the condition of keeping secret; the information and documents of the institutions that do not concern the public and are solely in connection with their personnel and the internal affairs. Among the exceptions listed above, provisions making reference to "state secrets" in Article 16 and to "economic interests of the state" in Article 17 allows applied institutions to reject such demands in an arbitrary manner. It is very important that these exceptions be defined more concretely. Therefore, Articles 16 and 17 of the Law should be subject to revision.

The Law on Right to Information which regulates the issue while enabling CSOs access to information has also limited the exercise of the right with a series of restrictions. While the right in question has been partially recognized in international human rights documents, it has been clearly recognized in Article 74 of the Constitution. Therefore, the Law should be brought in compliance with the Constitution.

5. Access to Justice

When addressing the issue of access to justice, first the issue of trial proceeding costs should be discussed. Trial proceeding costs are comprised of all necessary expenses for a work and service in the trial of a case. Expenses in the process of a trial should not create an obstacle that will undermine the essence of the right to appeal to court. A balance should be sought between the fees charged by judicial authorities for court expenses to try the case and the applicants'

interest to prove their claim through the court. The essence of the right to access the court should not be harmed by very costly trial expenses. In case when legal aid is not available, high trial costs in civil and administrative cases may violate the right to effectively access court.

In Turkey, there are three types of adjudicatory procedures: civil proceedings, penal proceedings and administrative proceedings. According to Article 150 of the Turkish Criminal Procedure Code, if a criminal case is opened against people exercising their freedom of association, the person has a right to a lawyer in any criminal case regardless of the crime.[223] Furthermore, since the defendant does not have to pay any fees in a criminal case there is no problem in regard to legal aid.

As for cases against organizations, they fall under the scope of administrative proceedings and civil proceedings. In Turkey, representation by lawyer is not obligatory in civil and administrative proceedings. While it is not obligatory to be represented by a lawyer, judicial proceedings that are becoming increasing complicated have turned this into a necessity by default in many cases. The issue of legal aid is regulated in Articles 334-340 of the Civil Procedure Law (HMK). Article 334 of HMK stipulates that people who are unable to pay partial or full proceeding and trial costs without significantly damaging the livelihood of themselves or their family can benefit from legal aid in their prosecution and defense, demand for temporary legal protection, and execution proceedings, unless their demands are clearly without justification. According to the article, public benefit associations and foundations can receive legal aid if they are considered to be in the right in their claim or defense and if they are in a situation where they cannot pay the required expense partially or fully without falling to financial hardship. Rather than offering the possibility to receive legal aid only to public benefit associations and tax exempt foundations, this service should be available to all associations and foundations meeting the other conditions listed in the article.

As explained above, there has been a distinction made between public benefit and other CSOs. This means only few CSOs can benefit from the right to legal aid. Here, a positive regulation has been stipulated for consumer associations. According to Article 73 of the Law on Consumer Protection, consumer organizations are exempt from fees for cases they open in consumer courts. Furthermore, there is also exemption for expert fees in these trials. A similar approach should be adopted for other CSOs. For legal aid, the distinction between public benefit associations and foundations and others should be abolished.

Additionally, Article 334 of HMK seeks reciprocity for foreigners. Therefore, for foreigners, in addition to poverty and not being openly devoid of justification, there is a third criterion introduced based on the principle of reciprocity. This means that foreign associations and foundations in Turkey can only benefit from legal aid services in Turkey if the country the foreign associations and foundations in question are registered in provides legal aid services to associations and foundations established in Turkey. This reciprocity criterion for foreign CSOs should be rescinded.

6. Meetings and Demonstrations

As mentioned above freedom of assembly is closely linked to freedom of association and constitutes one of the significant activity areas of CSOs. The main legislation on freedom of assembly is the Law on Meetings and Demonstrations (TGYK), which was adopted

223 According to the article, during the investigation or prosecution for crimes that carry a punishment of imprisonment at the lower level of more than five years, a defense counsel shall be appointed without the request of the defendant. For the investigation or prosecution for crimes that carry lesser punishment, the appointment of a defense counsel is optional.

by the September 12, 1980 military regime and still remains in effect. Even though there is no need for a Constitutional amendment in terms of freedom of assembly, TGYK has restricted the exercise of this right considerably. This is in breach of both the ECHR and the Constitution. The approach of the administration, the judiciary and security forces to implement this law rather than the ECHR and the Constitution constitutes a clear violation of both international and national obligations. Therefore, TGYK should be repealed as soon as possible and a new law that safeguards rather than restricts freedom of assembly should be put in effect.

Article 3 of TGYK states that everyone has the right to hold unarmed and peaceful meetings and demonstrations without prior permission for certain purposes that are not considered a crime by law. Thus, the subject of the right is everyone. However, the second paragraph of the article introduces a restriction that almost abolishes this right for foreigners. According to the paragraph, "Foreigners must request an authorization from the Ministry of Interior to organize meetings and demonstrations." It is quite difficult to fulfil the condition of permission from the Ministry of Interior, since this would necessitate applying for permission a long time before the meeting and demonstration is to be organized. There are also certain restrictions as to the exercise of the right upon the acquirement of this permission. According to the paragraph, "It is possible for foreigners to address groups in meetings and demonstration marches arranged according to this Law and to carry posters, banners, pictures, flags, signs, tools and equipment by informing the most senior local civil servant of the district where the meeting will be held at least 48 hours prior to the meeting." Thus a notification obligation has been introduced for all sorts of activities that can be undertaken in meetings and demonstrations. Even though a notification rather than a permission obligation has been stipulated, such an obligation requires any meeting or demonstration to be previously planned and designed almost like a theatre play and keeping all attending participants under control. Such a strict regulation is in blatant violation of freedom of assembly and these restrictions for foreigners in Article 3 of TGYK should be annulled.

Article 4 of the Law regulates which events fall outside the scope of the Law and particularly defines indoor meetings organized by political parties, vocational chambers that qualify as public institutions, trade unions, foundations, associations, commercial partnerships and other legal entities in accordance with their statutes to fall outside the scope of the law. There is no permission requirement for these meetings. However, here the emphasis on the meeting being in line with the statute is confusing. Such an accentuation should be considered inapplicable for associations. Otherwise the justification for all the indoor meetings will have to be stated in association statutes beforehand. Such a situation cannot be acceptable in terms of freedom of association.

Regarding meetings to be organized in scope of the Law, TGYK Article 9 states that an organizing committee must be established and the members of the committee should be over 18 with the capacity to act and meet a number of other preconditions. Therefore the right to organize outdoor meetings and demonstrations has only been granted to individuals over 18 years of age. Even though children's associations do not need to get any permission to hold indoor meetings, they do not have the right to organize outdoor meetings. This condition of being 18 years old to organize outdoor meetings makes the exercise of children's right to assembly impossible. In its concluding observations on Turkey in 2012, the Committee on the Rights of the Child has recommended that this restriction be abolished.[224]

224 Turkey, CRC, CRC/C/TUR/CO/2-3, para. 38.

Therefore, the regulation in domestic law is not in harmony with Article 15 of the Convention on the Rights of the Child and should be repealed. In the context of freedom of assembly there are no obstacles before children's participation in meetings and demonstrations in domestic legislation.

While TGYK requires a detailed examination, many of its provisions are disharmonious with the ECHR and the Constitution. According to Article 9 of TGYK, there has to be an organizing committee comprised of seven people over 18 years of age and with the capacity to act for the organization of a meeting, and according to Article 11 it is obligatory for these people to participate in the meeting. If these people fail to meet this obligation, as per Article 28 they may be sentenced to imprisonment for six months to two years. Also, according to the same article if the seven people in the organizing committee are not present during the meeting, the meeting in question becomes unlawful and security forces have the authority to dissolve the meeting.

According to Article 10 of TGYK a notification signed by all members of the organizing committee formed as per Article 9 should be given to the province or district governorship of the place where the meeting will be held during working hours at least 48 hours prior to the meeting. In the notification the organizers must provide the purpose of the meeting; the date and the place of the meeting along with the starting and ending time; the IDs of the chair and members of the organizing committee; information regarding their occupation; their residence certificate and if available the address of their work. The condition of notification 48 hours prior to the meeting makes spontaneous meetings and demonstrations directly against the law. Moreover, it has been stipulated that alongside the notification additional documents may be requested through bylaws. This allows for the further hindering of the exercise of the right through the request of other documents in addition to the obligation for organizing committee members to collect a large number of documents. As per Article 23, if the notification is not submitted prior to the meeting, the meeting becomes illegal and this in turn gives security forces the authority to intervene according to Article 24. Such provisions clearly present an infringement on the freedom of assembly.[225]

TGYK is also very restrictive in terms of venues where the freedom of assembly can be exercised. First of all, the authority to determine the venues has been given to governorships and district governorships. According to TGYK Article 6/2, "The venues and routes where meetings and demonstrations can be held in cities and districts are determined by the highest local administrative authority in a way not to disrupt public order and peace and inconvenience the daily lives of citizens and in compliance with the restrictions enumerated in the first paragraph of Article 22; in consultation with the city and district representatives of political parties which have parliamentary groups at the Grand National Assembly of Turkey, mayors of the cities and districts where the meeting or demonstration will be held, the city and district representatives of three unions with the highest number of members and of professional organizations with the status of public institutions. More than one meeting venue and demonstration route may be designated taking into account the size, level of development and settlement patterns of the city and district." This makes it against the law to hold meetings and demonstrations in places other than those designated by administrative authorities. Article 22 of TGYK bans the organization of meetings and demonstrations in many public places. These include general roads, intercity roads, parks, temples, and buildings that provide

225 *Samüt Karabulut v. Turkey*, Appl. No. 16999/04, 27.01.2009.

public services and their premises, and the area surrounding one kilometer of the Grand National Assembly of Turkey. All of the above listed venues are places where freedom of assembly can be exercised according to ECtHR decisions and such a blanket restriction is a direct violation of ECHR.[226]

Another striking restriction in TGYK pertains to the time and duration of meetings and demonstrations. According to Article 7 of TGYK, meetings and demonstrations have to be held during daytime. This regulation is an infringement of the ECHR and the Constitution.

Another legal regulation that relates to TGYK is Article 16 of the Law on Duties and Powers of the Police. The clause that reads "In cases of resistance by persons whose arrest is necessary or by groups whose dispersal is necessary or of their threatening to attack or carrying out an attack, the police may use violence to subdue these actions. Use of violence refers to the use of bodily force, physical force and all types of weapons specified in the law and it gradually increases according to the nature and level of resistance and attack in such a way as to restore calm" makes it legal to interfere with all types of demonstrations held without notification and to physically interfere where individuals exercising their freedoms of assembly do not want to disperse. While Article 16 of the Law on Duties and Powers of the Polis does not create a problem directly in terms of freedom of association, because TGYK considers meetings and demonstrations without notification to be against the law, this often leads to disproportionate police intervention. In order to prevent this, the provision that stipulates meetings and demonstrations without notification are against the law should be abolished.

All regulations in TGYK afford the administration with unlimited power of interference to the exercise of the freedom of assembly. According to Article 24 of the Law, "If a meeting or a demonstration that starts out in compliance with the law later turns into a meeting or demonstration against the Law due to the occurrence of one or more of the instances stipulated in Article 23: a) The organizing committee or the chair of the committee announces to the crowd that the meeting or demonstration is terminated and immediately reports the situation to the law enforcement official in charge. b) In case the organizing committee or the chair of the committee fails to fulfill this duty, the law enforcement official in charge reports the situation to the highest local administrative authority. The highest local administrative authority decides whether or not the meeting will be terminated. c) The highest local administrative authority issues a written order, or in urgent situations an oral order to later be confirmed in writing, assigning the security forces or one of them to go to the scene. This official warns the crowd to disperse in line with the Law and that violence will be used in case they do not comply. If the crowd does not disperse, it is dispersed by force." Thus, in situations where an administrative authority decides a meeting has become against the law, he or she has the authority to order the security forces to disperse the meeting. Article 23 of the Law lists numerous grounds, some of which are vague, that may cause a meeting to become against the law. Any one of the enumerated reasons can make a meeting unlawful and lead to its dispersal. Such an instance can bring forth arbitrariness in the restriction of the freedom of assembly.

Another important authority given to the administration is assigned to governorships and district governorships. According to Article 17 of TGYK "(...) the governor or district governor may postpone a specific meeting for up to a

226 Olgun Akbulut, p. 389.

maximum of one month for reasons of national security, public order, prevention of crime, protection of public health, public morality or the rights and freedoms of others, or may ban the meeting in case there is a clear and imminent threat of a crime being committed." Even though the reasons stated for the postponement of the meeting correspond to the restriction grounds in Article 33 of the Constitution, there is no reference made to the principles of democratic society and proportionality in Article 13 of the Constitution. Therefore, the reasons listed become a justification rather than a safeguard. The duration of postponement is also quite long and may make it impossible to realize certain demonstrations that are intended to be organized for certain aims and on certain dates such as May 1st international labor day. Furthermore, TGYK Article 18 states, "The organization of the meeting at a later date than the day of postponement is conditional to a new notification by the organizing committee in accordance to Article 10", thus requiring the above mentioned bureaucratic notification procedure to be repeated in case the meeting is to be organized again. The authority to ban the meeting in case "there is a clear and imminent threat of a crime being committed" in the article gives the administration the authority to ban meetings whenever it likes by claiming there is such a ground. Contrary to the decision to postpone, the decision to ban is valid indefinitely. In light of the points discussed above, the broad authority given to the administration in TGYK should be rescinded and amendments should be made as to make it possible to ban or postpone meetings only through judicial decree.

TGYK Article 18 regulates the notification of the decision to ban or postpone. According to the article, "the decision with justification pertaining to the meeting (...) postponed or banned by the governors or district governors is communicated in writing to the president of the organizing committee or in case he or she is not found to one of the members at least 24 hours prior to the starting time of the meeting." Thus, the postponement or ban decision has to be taken and communicated at least one day beforehand. However, the subsequent part of the article reads, "in cases mentioned in Article 17, the instances where the meeting can be postponed or banned by regional governorships, governorships or district governorships without seeking the condition of at least 24 hours prior notification are stated in the Regulation", to imply that the notification condition might not be sought. Furthermore, by stating that these conditions will be stipulated in the regulation, the administration has been afforded with the authority to decide for itself which cases fall in this category.

Article 19 of TGYK gives the administration the authority to postpone and ban all meetings in cities and districts. Governors have been vested with the authority to ban all meetings for up to one month in one or several districts of the province for the protection of national security, public order, prevention of crime, protection of public health, public morality and the rights and freedoms of others or in case of a clear and imminent danger of a crime being committed. The points raised above regarding postponement and bans apply here as well. Such an authority means the absolute abolishment of the exercise of the right, and such an authority should not be granted to any organ including the judiciary, except for extraordinary forms of rule such as state of emergency or martial law. Whether or not the limits of the right have been breached is an important issue in cases where freedom of assembly is exercised. Sanctions may be introduced in case the limits of the right are overstepped. A rather lengthy article of TGYK, Article 23, enumerates grounds upon which a meeting or demonstration march can become illegal in most all situations: holding a meeting or march without notification, or holding it at a place other than the specified places or the notified

venue or before or after the notified date and time, or outside daytime; bearing any kind of firearms, explosives, cutting and perforating tools, stones, sticks, iron or rubber bars, contusing or strangling tools like wires or chains, or caustic, abrasive, wounding chemicals or all other types of poisons, or all types of fog, gas and similar materials; as well as symbols of illegal organizations, or attires resembling uniforms with these symbols; partially or completely covering faces to prevent identification; carrying banners, posters, placards, pictures, signs, tools and equipment defined to be illegal by the laws, or chanting or broadcasting with a sound device slogans of this nature; transgressing its own aims as stated in the notification or with purposes defined to be a crime by law, holding it before the end of the postponing or banning period; continuing the meeting after government official has terminated it; noncompliance with provisions on foreigners, all make a meeting or demonstration march illegal. As such any meeting or demonstration can be considered in breach of the law.

The meeting or demonstration can be identified to have become against the law by the organizing committee organizing the meeting or the chair of this committee or the highest local administrative authority. In case the highest local administrative authority decides to terminate the meeting, according to Article 24 of TGYK, "The highest local administrative authority issues a written order, or in urgent situations an oral order to later be confirmed in writing, assigning the security forces or one of them to go to the scene. This official warns the crowd to disperse in line with the Law and that violence will be used in case they do not comply. If the crowd does not disperse, it is dispersed by force. In situations regulated under paragraph one ... if there is an actual attack on security forces or resistance or a state of assault on places or persons they are protecting, force may be used without warning." If the above specified "firearms, explosives, tools, materials or slogans are used by participants, these participants are removed by the security forces and the meeting and demonstration continues. However, if the number and behavior of these are deemed to make the meeting or demonstration against the law, the provisions of the paragraph above are applied." Moreover, "If the meeting or demonstration commences in a manner against the Law, the security forces notify the highest local administrative authority as swiftly as possible, while taking the necessary measures within existent means and the chief of security forces intervening with the demonstration warns the crowd to disperse or they will be forcibly dispersed and if the crowd does not disperse it is dispersed by force." The above mentioned authorities give security forces the authority to disperse all kinds of meetings and demonstrations they find to be in breach of the law. Along with the changes to be made to situations making a meeting or demonstration unlawful, such authorities given to security forces should also be repealed. Therefore, Articles 23 and 24 of TGYK have to be subject to an extensive amendment.

Article 26 of the Law introduces restrictions on the exercise of freedom of expression before and during meetings and demonstrations. The article makes it obligatory for the inclusion of the names and surnames of organizing committee members on the materials calling or propagating the meeting, and prohibits the use of "text or pictures encouraging or inciting the public to commit a crime" on these materials. The statement in question is rather vague and it is not possible for people who want to use these materials to foresee how they should act. Also in Article 27 of the Law it is prohibited to use various materials to encourage participation and provoke meetings and demonstrations considered to be unlawful.

TGYK Articles 28 through 34 stipulate rather extensive punitive measures. Even merely conveying these sanctions within the framework of this report is quite difficult. These crimes

and sanctions define a large number of actions as crimes and foresee heavy penalties for these crimes. Almost all these sanctions are disproportionate, and have a deterrent effect on individuals who want to exercise their freedom of association. Extensive amendments have to be made to these sanctions. However, one of the provisions among the sanctions is a clause that can also be used to protect the people exercising their freedom of assembly. As per TGYK Article 29, "The person who obstructs the meeting or demonstration or violates the meeting or march with schemes forestalling its continuation is sentenced to nine months to one year and six months unless the act constitutes a separate crime necessitating a higher sentence." The article refers to possible outside interferences to the people exercising this freedom, and if it is implemented in this manner, retaining it is possible according to international standards.

First and foremost it should be stated that all the above mentioned provisions are in breach of the Constitution and ECHR. No peaceful demonstration should be subject to permission or notification and it is not possible to qualify any demonstration as a "demonstration without permission" unless it entails violence. While even the compatibility of introducing a legal obligation for notification with ECHR and the Constitution remains disputable, the interpretation and execution of the notification obligation in the form of permission allows for the indefinite restriction of the freedom of assembly. Particularly for certain spontaneous meetings not having met the notification obligation results in the meeting being considered unlawful. As for demonstrations that cannot be considered peaceful, disproportionate interventions which undermine the essence of the right and entirely abolish the freedom of assembly of people not resorting to violence should be prevented. Finally, it should be noted that the points raised regarding TGYK indicate that introducing amendments to this law is inadequate for the advancement of freedom of assembly. In order to abolish these restrictions that make the exercise of the right almost impossible, there is a need for a new law in the framework of a title such as "Law on the Freedom of Meetings and Demonstrations" that will approach the issue not from the basis of restrictions but rather with a view to safeguard the right.

7. "Combatting Terrorism"

One of the grounds for restrictions in the sphere of freedom of association is the concept of combatting terrorism. There can be extensive interference to freedom of association based on this concept. There is no definition of the concept of terrorism in international law yet. This has led to the emergence of differing approaches from country to country in terms of the concept of terrorism. The concept of "combatting/counter terrorism" has been introduced in Turkey as the grounds for extensive interferences to human rights. However, this concept should not be interpreted as a carte blanche affording public authorities with an unlimited restriction authority, beyond the internationally recognized framework for restrictions, on the fundamental rights and freedoms. This study only addresses the question of whether or not the restrictions on freedom of association in the name of "combatting terrorism" are harmonious with restrictions that may be imposed on freedom of association.

In practice, there can be interventions to the freedom of association through crimes in penal codes such as "encouragement of terrorism", "extremist activity", "praising" or "justifying terrorism." Such crimes should be clearly defined in criminal laws to ensure that they do not lead to an unnecessary or disproportionate interference with freedom of expression.[227] First of all, crimes of terrorism and being a member of a terrorist

227 Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, para 46.

organization should be defined not in a broad or vague manner, but concretely and clearly.[228] The legislation should be drafted in a way to exclude any possibility of arbitrary application and to give notice to persons concerned regarding actions for which they will be held criminally liable.[229]

The main legislation in the field of combatting terrorism is the Anti-Terror Law (TMK). Since the date it went into effect, the Law has been subject to countless points of criticism in terms of human rights and numerous amendments. Since an assessment of the entire Law will not correspond to the objective of this study on freedom of association and exceed its scope, only certain points are addressed here. The first article of TMK defines terrorism which does not yet have a definition in international law. According to Article 1, "Terrorism is every kind of acts which are perpetrated by any of the methods of extortion, intimidation, discouragement, menace and threat by using force and violence by a person or by persons belonging to an organization with a view to changing the nature of the Republic as defined in the Constitution and its political, legal, social, secular and economic order, impairing the indispensable integrity of the State with its country and nation, endangering the existence of the Turkish State and Republic, weakening or annihilating or overtaking the State authority, eliminating the basic rights and freedoms and damaging the internal and external safety, public order or general health of the country." According to the given definition, any act involving threat and violence which constitutes a crime done by a person or persons belonging to an organization, to realize certain aims with certain methods is considered to be an act of terrorism. In terms of purpose, this definition includes a rather broad and unacceptable list.

Article 6 of TMK introduces restrictions to freedom of expression. The provision in the second paragraph of the article that reads "Persons who print or disseminate statements or declarations justifying or praising the methods of terrorist organizations involving force, violence or threat or encouraging resorting to these methods will be punished with imprisonment between one to three years" stipulates that publishing the statements or declarations of terrorist organizations is a criminal offense. The expression "justifying or praising or encouraging resorting to those methods" is rather vague and all sorts of declarations of opinion including those not exceeding the limits of criticism may fall under this scope. Therefore, the elements of the crime should be clearly defined and amended in a way to conform to freedom of expression.

The first paragraph of TMK Article 7 defines the concept of "terrorist organization". According to the paragraph, organizations established to "commit crimes in furtherance of aims specified under Article 1 through use of force and violence, by means of coercion, intimidation, suppression or threat" are terrorist organizations. The second paragraph of the article regulates the crime of "propaganda of terrorist organizations". According to the paragraph, "Any person making propaganda for a terrorist organization in a manner to legitimize or praise the use of its methods involving force, violence or threat, on in a way to encourage resorting to these methods will be punished with imprisonment from one to five years." The concepts of "legitimizing", "praising" or "encouraging" are vague. Furthermore, according to the article, "covering the face in part or in whole, with the intention of concealing identities, during public meetings and demonstrations that have been turned into a propaganda for a terrorist organization", and "even if not during the public meeting or demonstration, (...) carrying insignia and signs belonging to the organization, shouting slogans (...) as to imply being a member or follower of

228 Estonia, ICCPR, A/58/40 vol. I (2003) 41, para. 79(8); Iceland, ICCPR, A/60/40 vol. I (2005) 50, para. 87(10).

229 Russian Federation, ICCPR, A/59/40 vol. I (2003) 20, para. 64(20).

a terrorist organization" are punishable under the same provision. Thus, even if the meeting or march is not organized by a terrorist organization, covering the face in part or as a whole and shouting slogans during demonstration is considered to be terrorist propaganda. This is a severe interference to freedom of expression and may cause a person to be convicted of this crime even if she or he does not have a propaganda purpose. Therefore, this provision which stipulates that people, other than those who make propaganda for the organization in a manner to openly promote or provoke violence, can be punished under TMK just for participating in a demonstration should be repealed.

There are certain provisions in TMK that directly pertain to freedom of association. According to a provision in Article 7 of TMK that directly relates to freedom of association, if the offense of terrorist organization propaganda "is committed within the buildings, locales, offices or their annexes belonging to associations, foundations, political parties, trade unions or professional organizations or their subsidiaries, or within educational institutions, students' dormitories or their annexes the penalty will be doubled." Thus, this stipulation increases the punishment twofold for a crime, which is already rather vague, if it is committed in a building, locale, office or annex of a foundation or association. The provision in question will cause persons exercising their freedom of expression to be subject to heavy penalties if they voice their opinions on certain political matters at a place belonging to the CSO they are a member of. Through such a restriction CSOs are almost forced to be as silent as possible in political matters. Paragraph 3 of TMK Article 7 should be completely abolished with a legal amendment.

Article 8/B of the article defines the responsibility of legal entities. According to the article, "If the crimes that fall under the scope of this Law are committed within the framework of the activities of a legal entity, special security precautions applicable to those shall be ruled upon, according to Article 60 of the Turkish Penal Code." As also mentioned above, Article 60 of the Penal Code includes two security precautions: the cancellation of license to operate and confiscation. Since the security precautions in TCK Article 60 can be applied not for all criminal offenses, but for crimes specifically defined in laws, crimes of terrorism have been included in this scope with a clear provision in TMK. Through such a regulation CSOs can also be held responsible alongside natural persons in crimes of terrorism. What is in question is the personal responsibility of persons undertaking the given act, therefore the imposing of punitive measures also on the CSO is against freedom of association. This provision should be removed from the law.

There are restrictions imposed to freedom of association in the framework of the concept of combatting terrorism in Turkey. The vagueness of the concept of a terrorist act and the high number of cases opened against people exercising their freedom of expression has been subject to criticism. It has been stated that the vagueness and obscurity in the definition of a terrorist organization in the law leads to the restriction of freedom of association.[230] Therefore, not only legal provisions pertaining to freedom of association, but all legal provisions for combatting terrorism should be amended. Otherwise there is room to restrict CSOs' activities with "the purpose of combatting terrorism." For instance, recently there has been a case opened for the dissolution of 10 CSOs in Van including Van Women's Association (VAKAD) for this reason, but the case has been rejected at the end of the proceedings.[231]

230 Turkey, ICCPR, CCPR/C/TUR/CO/1, para 16-19.

231 See, "VAKAD ve On Derneğin Kapatılma Davasına Red" (Trial for Dissolution of VAKAD and Ten Associations Rejected), http://bianet.org/bianet/kadin/146693-vakad-ve-on-dernegin-kapatilma-davasina-red (accessed:15.08.2013).

8. Participation in Judicial Proceedings

Another issue regarding CSOs' activities is participation in judicial proceedings. Participation in judicial proceedings means a person's right to bring any dispute to judiciary organs. While as a rule CSOs can only participate in judicial proceedings in disputes concerning themselves, today CSOs which have been founded to support disadvantaged groups participating in proceedings together with or as representatives of these people or groups has also become an important field of CSOs' activities.

Most of the time adjudications take place with two parties. Judicial proceedings can be initiated by one of the parties. In this case, it is only possible for judicial proceedings to be initiated upon the will of a party to this end. Persons from disadvantaged groups are sometimes not able to display such a will. Victims may not be able to appeal to the judiciary due to financial difficulties, not wanting to be re-victimized psychologically or to avoid retaliation due to such an appeal. In such circumstances, the question of CSOs appealing to judicial proceedings on behalf of the victim comes to the fore. In the law of Turkey, this right is only granted to consumer organizations with Articles 73 and 74 of the Law on Consumer Protection.

Participation in judicial proceedings on behalf of victims may be subject to certain criteria. First of all, it may be required that the given organization is registered as a legal entity. A second criterion may be that one of the aims of the organization should be to redress the harm done to the people partaking in the judicial proceedings. A third criterion is the duration the organization has been operational. A condition such as having worked actively for a certain period of time may be introduced at this point. A final criterion for participation in judicial proceedings in this manner is the organization in question having a legitimate interest. An organization meeting these conditions can be permitted to participate in civil, criminal or administrative cases. It can be considered normal that such strict conditions are foreseen for organizations participating in judicial proceedings on behalf of victims, and at this point, being a legal entity can be a defining factor. Also, if there is a specific victim concerned in the proceeding in question, it is necessary to get the victim's permission.

In addition to participating in judicial proceedings on behalf of the victim, participating in proceedings with the victims to support them also bears great significance for the victims. Through such a regulation, CSOs can partake in the proceedings as a party. In this case, the given CSO participates in the proceedings vested with the status of one of the parties. Due to this status, the compensation that can be demanded by the victim for instance can also be demanded by the CSO.

Another situation in terms of participating in judicial proceedings may arise in cases that necessitate substantially complicated legal knowledge. In that event, without being an actual party to the case, it is possible to "intervene as a third party". In these circumstances, CSOs present information on the dispute as a "friend of the court" (*amicus curiae*) in the framework of their expertise. This procedure is different from the expert report presented to the judge. Expert reports are only prepared upon the request of the judge. As for *amicus curiae* it can be presented to the court by an organization with expertise on the matter even if it is not requested by the judge. There may be some conditions foreseen for this method of participation as well. However, here it may not always be necessary to obtain the permission of the victim. In cases where the CSO participates in the proceeding as a third party, it will not be possible to demand compensation as was the case in participation on behalf of the victim and only the victim will be able to demand this.

In the last course of action namely the class action suit, it is possible to open a case on behalf of

people from a certain group irrespective of their number or identity. This can be done through an organization that has been vested with the power to open such a case by the members of this group. For example consumer rights associations may exercise this authority.

In Turkey's law, the procedure of participating has been foreseen in criminal proceedings. This procedure titled "intervening to the public claim" can be defined as affecting an ongoing public case siding with the prosecutor with the aim of assuming certain rights and responsibilities. In criminal proceedings, it is possible for other people who have been harmed by the crime along with the victim to participate in the proceedings. Participation in criminal proceedings is regulated in CMK Article 237 and "The victim, real persons or legal entities, who have been damaged by the crime, as well as the individuals liable for pecuniary compensation, are entitled to intervene in the public prosecution during the prosecution phase at the court of the first instance at any stage, until the judgment has been rendered, announcing that they are putting forward their claim."

The person who demands to intervene in the criminal proceeding has to be one damaged by the crime. In other words, it is not possible for people who have been indirectly harmed or not harmed by the crime to participate in the case. According to CMK Article 237, legal entities are also able to intervene in the case in addition to real persons. However, as stated above, this is only applicable for legal entities that have been directly harmed by the crime. Therefore, except for the victim, it does not seem possible for CSOs to participate in a criminal proceeding to support a disadvantaged group, unless they are directly damaged by the crime. At this point, a legal amendment should be made to Article 237 of CMK to allow for CSOs to participate in the proceedings by adding a phrase along the lines of "civil society organizations that are legal entities", following the phrase of "liable for pecuniary compensation."

In Turkey civil proceeding is based on the two party system and there are two sides in each case as the plaintiff and the defendant. According to Articles 65 and 66 of the Civil Procedure Law, it is possible for a third party to intervene in a civil proceeding under certain circumstances. However, this possibility is not foreseen to support a victim (secondary intervention), but for those who do not want to be affected by the case, or those whose legal interests clash with the parties or concerned sides regarding the issue or right in question in the proceeding (principal intervention). Neither secondary nor principal intervention allows for CSOs to participate in the proceedings to support victims of disadvantaged groups. A new provision should be drafted in HMK to enable CSOs to participate in civil proceedings.

A new type of case, which was previously not recognized in civil proceedings, but is now possible with Article 113 of HMK is class action. Class action suits have become a part of Turkey's law through the provision in the article that reads "associations and other legal entities may commence civil proceedings with respect to their status and on behalf of themselves in order to protect their members' and associates' rights or to protect the interests of groups they represent. The protection involves claims to establish a right or legal status, to cease unlawful acts and to prevent unlawful acts which are deemed imminent."

The grounds for introducing the possibility of class action suits have been stated in the justification of Article 113 of HMK as follows: "... In this framework, the civil proceedings associations and other legal entities commence with respect to their status and on behalf of themselves in order to protect their members' and associates' rights or to protect the interests of groups they represent, which involves claims to establish a right or legal status, to cease unlawful acts and to

prevent unlawful acts which are deemed imminent is clearly defined as a class action proceeding. Class action proceedings facilitate the protection of public interest and a furtherance of the concept of legal interest beyond its narrow and technical sense."[232]

Class action has been accepted as a means because when common interests concerning many people are at stake and these interests are damaged, each person filing cases individually is both difficult and unnecessary, and also adds to the workload of the judiciary with the repetition of the same issues, thereby being against procedural economy. Not only the association or legal entity representing the group who opens the case, but everyone who holds that interest or has that right can benefit from the outcome of the case.[233] CSOs can open cases on behalf of and instead of disadvantaged groups to protect their rights. The wording of the article does not foresee compensation for damages, but the decision for the class action may be used for future individual lawsuits and as evidence even if the decision in favor or against does not lead to a definitive judgment.[234]

As opposed to civil proceedings, in administrative proceedings, according to Article 2 of the Administrative Procedure Law, in addition to the capacity to be a party and open a case, there has to be a violation of interest for annulment actions, and a rights violation for full remedy actions.[235] For the annulment case, if the administrative act that is to be annulled does not violate the person's interest, he or she cannot open a case. Additionally, the interest is expected to be legitimate, personal and current. Legal entities can open cases through their authorized bodies where their interests are violated. In administrative proceedings it is possible for third parties to participate in the case. For participation in the case, depending on which party the participant sides with, the participant in question has to have an interest in the winning or rejection of the case. The problems regarding civil procedural law are also pertinent for administrative law. Particularly the condition of violation of interest for the proceedings allows for CSOs to appear before administrative judicial bodies on behalf of or instead of or together with victims of disadvantaged groups only through a broad interpretation of the condition. Due to the various attitudes that can be adopted by judicial bodies, a clear regulation should be drafted for CSOs as mentioned in the context of HMK.

In conclusion, overarching amendments should be made to CMK, HMK and İYUK to allow CSOs which are legal entities to participate in judicial proceedings on behalf of or instead of or together with victims. The recognition of this regulation in all judicial proceedings is significant not only for advancing freedom of association, but also for empowering individuals from disadvantaged groups and facilitating their access to justice.

232 Hukuk Muhakemeleri Kanunu Tasarısı ve Adalet Komisyonu Raporu (1/574) [Civil Procedure Code Draft and Justice Commission Report], p. 42, http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss393.pdf (accessed:15.08.2013)

233 Hakan Pekcanıtez; Oğuz Atalay; Muhammet Özekes, Medeni Usul Hukuku [Civil Procedure Code], Yetkin, Ankara, 2011, p. 318.

234 Hakan Pekcanıtez; Oğuz Atalay; Muhammet Özekes, Medeni Usul Hukuku [Civil Procedure Code], Yetkin, Ankara, 2011, p. 319.

235 A. Şeref Gözübüyük; Turgut Tan, İdare Hukuku, Cilt 2, *İdari Yargılama Hukuku* [Administrative Law, Volume 2, *Adminstrative Proceeding Law*], Turhan Kitabevi, Ankara, 2010, p. 187.

IV CONCLUSION

The improvements to be made in the legislative sphere evidently cannot create a difference for CSOs overnight. However, it is of utmost importance for the legislation to be drafted in a manner that rather than impeding facilitates and provides guidelines for the practice of freedom of association for those individuals who want to exercise this freedom. Below is a compilation of legal amendment recommendations in line with the categorization that emerged in the study. As mentioned in the introduction, the proposals in question are largely based upon the shortcomings identified through a desk research. Therefore, this report should not be regarded as an exhaustive study that addresses all the problems experienced in the field of freedom of association. There may be certain problems in practice and experienced by CSOs that are not covered in this research. Such a limitation can only be remedied through a periodical, for instance yearly, review of this study wherein CSOs can also convey their experiences.

Constitutional regulations pertaining to the freedom of association are to a great extent in compliance with ECHR and other international conventions. It is possible for some of the incompatibilities raised in scope of the report to be remedied by way of interpretation. However, in order to provide an actual safeguard for freedom of association, the constitutional provisions should be worded explicitly in a manner that does not require interpretation. This will enable the restriction of the legislative body's discretionary power in the legal regulations to be introduced pertaining to the exercise of this right and prevent arbitrary interventions.

Regulations pertaining to the freedom of association are quite extensive in scope and scattered. There are both separate laws on associations and foundations and also provisions in numerous laws and primarily the Civil Code regulating these organizations. The scattered and complex nature of the legislation hinders CSOs from being informed about the regulations that pertain to them. There is no public mechanism providing support to CSOs on this subject. This constitutes an obstacle before CSOs' access to justice as well as information on their rights and responsibilities, and creates the necessity for CSOs to constantly seek legal consult.

In the current legislation there are numerous incompatibilities with the international standards on freedom of association. It is crucial for a reform initiative to be undertaken with a view to encompass all aspects of the freedom of association in line with the Constitution and ECHR and address the issue in a framework wherein freedom is the principle and restriction is an exception. Regulations on issues like the freedom of association should be drafted as explicitly and in detail as possible. In order to prevent arbitrary interventions to the exercising of the right, the subject matter should be regulated by the laws without necessitating regulatory measures by the administration. Even though it has not been addressed in detail in this study, the regulations and circulars in effect have led to the violation of the freedom of association by hindering the practice of this right on subjects not regulated by the Constitution and the laws.

Finally, we would like to underscore once again that this report has been drafted to analyze solely and exclusively the constitutional and the legal regulations. However, the fields in which the freedom of association is restricted are not limited to constitutional and legal legislation and the advancement of the freedom of association will be possible not only through the amendments to be made in the legislation but also by preventing the arbitrary and erroneous practices encountered in this field.

V RECOMMENDATIONS

FREEDOM OF ASSOCIATION AND OTHER RELATED RIGHTS AND ISSUES

Standing of International Human Rights Conventions in Domestic Law

According to Article 90 of the Constitution, in the case of conflict between international agreements concerning human rights and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. The aforementioned regulation is more of an appeal to the judicial bodies and administrative authorities. Despite this amendment adopted in 2004, a large number of regulations in breach of the international conventions continue to be implemented. This situation demonstrates that this amendment remains inadequate. Moreover, international human rights conventions mainly incorporate framework legislations and the application of relevant articles to actual cases is determined by review mechanism such as the ECtHR. As such the scope of convention articles in terms of the subject matter gradually extends through case law. For instance, even though ECHR Article 11 on the freedom of association does not make any reference to political parties or the right to strike and collective bargaining, today the freedoms of political parties and aforementioned rights are recognized within the scope of freedom of association. Therefore, it would be favorable to amend Article 90 of the Constitution to read where international agreements, duly put into effect, and the decrees of protection mechanisms established by these conventions concerning fundamental rights and freedoms are in conflict with the laws due to differences in provisions, or with the case law of judicial bodies due to a different approach on the same matter, the relevant legal provision will be considered void and the relevant judicial case law will not be implemented.

The State's Obligations Concerning Human Rights

- There is no explicit regulation in the Constitution regarding the obligations engendered by human rights. Therefore, the section on fundamental rights and freedoms should openly state that the legislative, executive and judicial bodies are obligated to not violate the fundamental rights and freedoms of private legal natural persons and legal entities, and protect the persons whose rights and freedoms have been violated by non-state actors; and that the state is responsible for eliminating the obstacles that hinder the exercise or enjoyment of these rights and freedoms.
- Criminal law provisions in the legislation that safeguard the freedom of association are quite limited. Though Articles 114 and 118 of the Turkish Penal Code impose sanctions in case where the freedoms of political parties and trade unions have been impeded, no such sanction has been stipulated for associations and foundations. This shortcoming should be remedied by an amendment to the law.

The Exercise of the Freedom of Association

The freedom to establish associations is stated in Article 33 of the Constitution. The same article stipulates that the foreseen rights and grounds for restriction shall apply for foundations as well. This may be interpreted to mean that the Constitution only allows for CSOs to be established in the form of associations and foundations. Similarly, the legal regulations only entail provisions on associations and foundations. Today it is inconceivable to limit the CSOs only to these two forms of organizing. It would be more appropriate to remove the references to associations and foundations in Article 33 of the Constitution and instead use the phrase "organization" which does not allude to any specific form of organizing.

Restriction of the Freedom of Association

- Article 14 of the Constitution entails the prohibition of abuse of fundamental rights and freedoms. However, there is a significant discrepancy between the article text and ECHR Article 17 that regulates the same issue. According to the first paragraph of Article 14, "None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights." The phrase "the indivisible integrity of the State with its territory and nation" in this provision is rather abstract and restricts the field of activity of CSOs that may operate outside the official ideology; moreover it paves the way for punitive sanctions against such activities. Therefore, in order to extend the scope of freedom of association, the first paragraph of Article 14 should be repealed.
- The paragraph in Article 33 of the Constitution that reads, "Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. However, where it is required for, and a delay constitutes a prejudice to, national security, public order, prevention of commission or continuation of a crime, or an arrest, an authority may be vested with power by law to suspend the association from activity. The decision of this authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his/her decision within forty-eight hours; otherwise, this administrative decision shall be annulled automatically." should be removed from the article text and Article 33 should be brought in line with Article 11 of the ECHR.

Hate Speech

- Article 14 of the Constitution should be brought in line with the relevant regulation in ECHR Article 17. It would be favorable to openly state in Article 14 that the use of expressions considered hate speech shall constitute abuse of the rights to expression, association and assembly.
- As for laws, an amendment should be made to Articles 216 and 301 of the Turkish Penal Code facilitating the criminalization of expressions that constitute hate speech, and expressions of hate speech targeting other ethnic groups in Turkey should also be openly included in scope of the article.

FREEDOM OF ASSOCIATION AND NON-GOVERNMENTAL ORGANIZATIONS

Establishment and Membership

Number of Founders in Associations

- Article 56 of the Civil Code and Article 2 of the Law on Associations stipulate that associations can be established by seven natural or legal persons; amending the number "seven" to read "two" in the relevant regulations would facilitate the exercise of the freedom of association and bring the legislation in line with international standards.
- Article 62 of the Civil Code on mandatory bodies should be amended to decrease the number of these mandatory bodies. Presently, Articles 84 and 86 of the Civil Code require a total of 16 people for the mandatory bodies. In addition to Article 62 that requires the general assembly to be held within the first six months, the newly founded associations are expected to have 16 members and form their mandatory boards within six months. The aforementioned regulations should be brought in line with the above proposed amendment to Article 56 of the Civil Code and Article 2 of the Law on Associations. To this end, it would be favorable to extend the time frame for holding the first general assembly to 18 months and decrease the number of members in mandatory bodies from five to three.

Assets to be Allocated to Foundations

According to Article 5 of the Law on Foundations, for the establishment of a foundation, assets, the minimum amount of which is annually determined by the Foundations Council, has to be allocated to the foundation. The law should be amended to identify a minimum and maximum limit and the Council should be allowed to increase or decrease the amount within the identified limits. The amounts to be determined should aim to facilitate and not impede the establishment of the foundation.

Foreigners Becoming Founders of Associations or Foundations

The requirement to "possess the right for settlement in Turkey" sought for foreigners to become association founders or members stipulated in Article 93 of the Civil Code should be repealed. As for foundations, the condition of "de jure and de facto reciprocity" stipulated in Article 5 of the Law on Foundations should be repealed.

Children Becoming Association Founders or Members

The condition of seeking the permission of legal guardian should be removed from Article 3 of the Law on Associations stipulating that children who are over the age of 15 but under the age of 18 and have the capacity to discern can found or become members of children's associations.

Armed Forces and Law Enforcement Officials Becoming Founders or Members of Associations and Foundations

- The legal regulations pertaining to freedom of association entail numerous restrictive provisions concerning the subjects of this right. Prohibitions of absolute nature regarding members of armed forces, law enforcement and other public officials should be abolished, and concrete criteria should be introduced in regard to the right to become association founders and members.
- The regulations in Article 43 of the Turkish Armed Forces Internal Service Law and additional Article 11 of the Law on Law Enforcement Organization that restrict the right to become association founders should be replaced with clear and concrete regulations on the type of associations to which membership is prohibited. As for foundations, the procedure of permission stipulated for law enforcement officials as per additional Article 11 of the Law on Law Enforcement Organization should be repealed.
- The scope of the right to be a member which is currently limited to being "non-active members of non-political associations and sports clubs whose names have been published by the Ministry of National Defense" as per Article 43 of the Turkish Armed Forces Internal Service Law should be expanded. The same situation applies for law enforcement officials. The practice of permitting membership only to sports associations as per article additional 11 of the Law on Law Enforcement Organization should be repealed and the types of associations for which membership is prohibited should be openly stated.

Mandatory Provisions for Association Statutes

The number of mandatory provisions to be included in the association statutes stipulated in Article 4 of the Law on Associations should be decreased. Points to be included in the association statutes should be limited to the name, address and objective of the association.

Foreigners Becoming Association Members

The phrase "who possess the right for settlement in Turkey" should be removed from Article 93 of the Civil Code which seeks the condition of residence permit for foreigners to become association members in Turkey.

Children Becoming Members of Children's Associations

The provisions in Article 3 of the Law on Associations regulating children's membership to associations are not compatible with the Convention on the Rights of the Child Article 15. The requirement for permission of the legal guardian for children in the 15-18 age group should be removed.

Turkish Armed Forces Officials Being Only Permitted to Become Members of Approved Associations

The condition permitting the membership of Turkish Armed Forces officials only in non-political associations and sports clubs whose names have been published by the Ministry of National Defense should be removed from the regulation in Article 43 of the Turkish Armed Forces Internal Service Law.

Law Enforcement Officials Not Being Able to Become Member of Associations

The prohibition on law enforcement officials becoming association members stipulated in additional Article 11 of the Law on Law Enforcement Organization should be abolished.

Civil Servants Not Being Able to Become Member of Associations of Certain Purposes

The following provision in Article 7 of Civil Servants Law is vague and abstract and therefore should be abolished: "(Civil servants) cannot engage in any activity that is against the Constitution and laws of the Republic of Turkey, that jeopardize the independence and integrity of the nation, threaten the security of the Republic of Turkey. They cannot join or support any movement, group, organization or association that undertakes such activities."

Right Not to Accept Members

Associations reserve the right not to accept members, however, they should not treat people who want to become members differently in a discriminatory manner. Article 68 of the Civil Code prohibits discrimination only among members. In order to not force an association to accept any members for any non-discriminatory reason, but to require the association to accept the membership request in case there is a rejection based on discriminatory grounds, it would be appropriate to add the phrase "as long as it does not constitute discrimination" after the clause "no association should be forced to accept members" to Article 63 of the Civil Code, and again to strengthen this regulation add "people who want to be members" after the clause "and association members" to Article 68 of the Civil Code.

Dismissal from Association Membership

The regulation on the associations' right to determine the grounds for termination of membership in their statutes stipulated in Article 67 of the Civil Code is appropriate; however, the condition of "justified grounds" foreseen in the absence of any such regulation in the statute is quite vague and should be removed.

Founding Objectives of Associations

The reference to the concept of "against ethics" in Articles 47 and 56 of the Civil Code should be removed.

Founding Objectives of Children's Associations

According to Article 3 of the Associations Law, children can only establish associations in order "to enhance their psychical, mental and moral capabilities, to preserve their rights of sport, education and training, social and cultural existence, structure of their families and their private lives". The present restriction on the founding objectives of children's associations should be abolished. Especially the children under 18 but over the age of 15 should be subject to the same regulations with adults in terms of objective.

Founding Objectives of Foundations

According to Article 101 of the Civil Code, "Formation of a foundation contrary to the characteristics of the Republic defined by the Constitution, Constitutional rules, laws, ethics, national integrity and national interest, or with the aim of supporting a distinctive race or community, is restricted." Most of the aforementioned terms are vague and should be removed from the article text.

Names of Associations

Article 28 of the Law on Associations stipulates the condition of permission on the use of names such as "Türk (Turkish), Türkiye (Turkey), Milli (National), Cumhuriyet (Republic), Atatürk, Mustafa Kemal", which leaves room for arbitrary practices, therefore, it would be better for either the use of these words to be entirely prohibited or entirely permitted. The sanction foreseen in Articles 28 and 29 of the Law on Associations is not proportionate and therefore should be abolished. Furthermore, the imprisonment provision in Article 3 of the Law on Relations of Public Institutions with Associations and Foundations should be repealed.

Legal Entity

Associations and Supreme Institutions

Articles 96 and 97 of the Civil Code stipulate that federations are formed by a combination of at least five associations founded for the realization of the same objective and confederations are formed by a combination of at least three federations that join by establishing membership for the realization of the same purpose. The aforementioned numbers should be amended to read "at least two" and the phrase "same" should be replaced with "similar". Furthermore, Article 2 of the Law on Associations should be amended to recognize platforms as institutions with legal personalities.

Procedure of Establishing Branches

The provision in Article 94 of the Civil Code stipulating that a branch can be opened only upon the resolution of the general assembly should be removed and the authority in question should be left to the board of directors. The required number of three members stipulated in the same article for the establishment of a branch should be dropped to one. The documents required for opening a branch should be clearly stated in the law. The number of mandatory bodies to be established within the branches as per Article 95 of the Civil Code should be decreased as mentioned above also in terms of associations. According to Article 5 of the Law on Associations foreign associations may open branches in Turkey only with the permission of the Ministry of Interior in consultation with the Ministry of Foreign Affairs. A notification rather than an authorization procedure should be introduced to the aforementioned article. Accordingly Article 32(g) of the Law on Associations should be amended. As for foundations, the phrase "provided that it is contained in their deed of trust" should be removed from Article 25 of the Foundations Law that regulates the establishment of branches and representations abroad.

Grounds for Dissolution of Associations

Two of the grounds for termination of the association as per Article 87 of the Civil Code, namely the six month period stipulated for the first general assembly and the minimum number of members (16 people) required for the mandatory bodies lead to an blatant and disproportionate intervention to the freedom of association, and therefore should be removed from the provisions on the grounds for termination. Along the same line, Article 8 of the Associations Law stipulating that when the member number of federations and confederations drops below five and three respectively the organizations in question will be considered disbanded, should be amended to read that the organizations in question will be considered disbanded only when the number of members drops down to one.
The term "not compatible with ethics" should be removed from Article 89 of the Civil Code which stipulates that the association may be terminated "If (its) objects (...) are not compatible with the legislation and ethics."

Grounds for Dissolution of Foundations

Foundations can only be dissolved on grounds of their founding objectives or activities. The prohibited objectives described in Article 101 of the Civil Code are quite vague and should be made more concrete. With the above mentioned amendment to Article 101 of the Civil Code, the dissolution on grounds of prohibited objective can be brought more in line with the freedom of association. Furthermore, the amendment to Article 101 of the Civil Code should adopt the approach of first issuing a warning and then imposing gradual sanctions.

Management

- Article 13 of the Law on Associations leads to serious problems in implementation. Based on this article, an CSO member is not allowed to work for pay at the CSO she or he is a member of, and if they do, they are asked to resign from membership or work without pay. Furthermore, an individual can initially form a professional relationship with an CSO and begin to work there for pay and subsequently decide to become a member. The obstruction of this membership request solely due to the fact that this person is working at that CSO hinders the exercise of freedom of association. As such, the provision leads to two different problems and should be amended. It should be accepted that association members can simultaneously work for pay at the association they are members of and an employee of the association can later become a member.
- Article 53 of the Turkish Penal Code prohibits a person from becoming a manager or auditor if she or he is sentenced to imprisonment even if it is for crimes that do not pertain to being an association or foundation manager. The scope of the provision should be narrowed as much as possible, and the crimes for which it will be executed should be enumerated and specified.
- Article 9 of the Law on Foundations prohibits a person from becoming a foundation manager if they were convicted for certain crimes. The crimes listed in the article should be decreased, especially the phrase “any crime committed against the security of the state” should be replaced with one that openly delineates the relevant crimes. Moreover, a reasonable duration should be specified for the prohibition foreseen in the article.
- Condition of having a domicile in Turkey in order to hold an office in the management bodies of the foundations stipulated in Article 6 of the Foundations Law should be removed from the article text. Prohibitions of an absolute nature in the regulations on the members of armed forces, law enforcement officials and other public officials holding office in the management bodies of CSOs that restrict the freedom of association should be abolished.

Fundraising and Donations

- In the law of Turkey though the rules on the regulation of donations and aid seem to be defined, neither these rules nor the content of these concepts are sufficiently clear. Almost all across the world, every monetary and in-kind support is recognized as donation and named as such, that is, a single concept is used. Using two different concepts in Turkey, namely aid and donation, and furthermore not making a clear distinction as to their differences in the legislation leads to problems in implementation.
- It would be better to use a single concept in Turkey as in the rest of the world and amend the relevant legislation accordingly.
- The main legislation on collecting donations in the law of Turkey, the Law on Aid Collection has overall been structured around restricting the activity of collecting aid. Activities of fundraising are an inalienable aspect of the freedom of association and collecting aid is among the basic activities of CSOs. Therefore, it would be favorable to exclude the CSOs’ fundraising activities from the Law on Aid Collection. Moreover, the legislation on associations, principles of criminal and civil

law, and the standards on the freedom of association and related rights and freedoms upheld by international documents are sufficient to regulate the subject matter and there is no need for a separate law. If the Law is not repealed or CSOs are not excluded from the scope of this Law then the recommendations below should be taken into consideration and major amendments should be made to the Law.

- Despite the legal warranties such as auditing procedures and punitive regulations in place, the Law on Aid Collection imposes the obligation of permission to collect aid. Subjecting the collection of aid to permission does not comply with the freedom based approach. It would be more appropriate to introduce a regulation subjecting the collection of aid only to notification. In terms of notification, it should be sufficient for CSOs to fulfill the necessary formal conditions.
- Associations, institutions and foundations working for public interest and allowed by the Cabinet to collect aid without permission are not subject to this procedure of permission. The Cabinet allowing only certain CSOs with the status of public benefit to collect aid without permission, while this very status itself is contested, creates a further inequality among CSOs. The Law should be amended to enable all CSOs to collect aid through the procedure of notification only.
- The authorities entitled to issue permission are the province or district governors.
- It should not be the task of public institutions to measure the importance of the objective CSOs have identified for their aid collection activities and their competency in aid collection. If such an assessment shall be made this task should be realized by independent experts, and an assessment procedure should be introduced that does not disregard the autonomy and volition of the CSOs.
- The extensive discretionary authority with equivocal content granted to the district and province governorships concerning the permission for aid collection is at such a scale that it can pave the way for arbitrary treatment and completely hinder the activities of aid collection. If the permission condition is not revoked and the province and district governors continue to be the authorities entitled to issue permission, then this discretionary power of equivocal content and undefined scope accorded to these authorities should be limited so as not to violate the freedom of association.
- Since CSOs must act in line with the current laws there is no need to establish a responsible board for the activity of aid collection. This has no effect except to introduce a new bureaucratic inconvenience. Therefore, the aforementioned regulation should be revoked.
- Regulations geared towards incapacitating the aid collecting person or institution such as leaving the decisions regarding the duration and place of aid collection to the discretion of the administration should be abandoned.
- The audit procedures and sanctions in the Law are exceedingly demanding. The activities carried out by associations and foundations are already subject to audit, and the activities of aid collection can easily be followed in the association and foundation declarations. Subjecting these activities to a separate audit only creates a new bureaucratic burden and increases the CSOs' workload. Additional procedures of audit should be repealed; even if a separate control mechanism is

deemed necessary tolerant methods in line with international standards should be adopted rather than methods that violate the freedom of association.

- The sanctions in the Law regarding aid collection are quite severe. If the aid collection constitutes a crime or if a crime has been committed during the utilization of the collected aid, then the regulations in the Turkish Penal Code are sufficient to prosecute and penalize these crimes. It is incongruous to have determined new punishments in addition to those in the TCK, and the sanctions outside the Penal Code should be repealed.
- The regulation stipulating that where the collected aid is less than or exceeding the required amount for realizing the objective the entire or exceeding amount is transferred to institutions deemed appropriate by the authorities is a practice that disregards the donors' volition and the CSOs' autonomy and violates the right to property. It would be appropriate to annul this regulation.
- The regulation on activities of aid collection undertaken without permission, whereby the collected money and property is confiscated without any investigation or exceptions is erroneous. This regulation should be amended to respect the volition of the donor and the right to property.
- In the present day, donations made by credit cards through informatics and especially the internet constitute important financial resources for CSOs. Including this procedure in the scope of the Law whereby it is perceived as an activity of aid collection subject to permission inconveniences the donors and deprives the CSOs from a considerable support. Moreover, when such activities are considered to be in scope of the Law, they must be restricted to a certain period of time. The review and amendment of the relevant provision will resolve these problems.
- Restriction of financial aid of foreign quality limits the effectiveness and independence of CSOs. The numerous documents required for the declaration of funds received from abroad creates an unnecessary workload; furthermore, the process is disproportionately complicated and is almost turned into a permission procedure. This approach constitutes an obstacle before the freedom of association and should be amended.
- The rather unsurmountable procedures set for foreign CSOs in terms of aid collection suggest that there is a prejudice against these organizations, deeming them "dangerous". A foreign CSO that has obtained the right to operate in Turkey in accordance with the law should be able to collect aid through the same procedures as other CSOs in Turkey. The stricter procedures set for foreign CSOs make it near impossible for these CSOs to collect aid. Therefore, it will be appropriate to revoke the different procedures formulated for foreign CSOs.

Right to Property

- The addition of other sources of income such as public financing and support, grants and tenders to Article 99 of the Civil Code enumerating associations' sources of income would be a positive amendment.
- Considering the obligation for associations' and foundations' incomes and expenses to comply with the law, and the requirement for documentation, as well as the fact that their operations are subject to audit, it would be appropriate to revoke the notification obligation for aid from abroad.
- As per Public Financial Management and Control Law Article 29, grants to associations and foundations may be given by aiming public interest, provided that they are foreseen in the budgets of public administrations, social security institutions and local administrations within the scope of general government. However, as per Article 75 of the Municipal Law, this provision cannot be applied for municipalities, special provincial administrations and affiliated institutions, the unions these are members of and companies they are partners of which are subject to Court of Accounts audits; these institutions cannot give aid from their budgets to associations and foundations. This regulation obstructs aid to associations and foundations and there is no reasonable ground for this restriction. It would be a positive amendment to remove the paragraph in question from the article.
- According to the Law on Associations, if the means of annulment in the association statute is left to the decision of general assembly and the general assembly does not take a decision or does not meet or the association is annulled by court decision, all properties, money and rights of the association shall be handed by court decision to an association which has the most similar aims with the annulled association and the highest number of members on its closure date. While this is a positive provision for the association taking over the property and rights, the possibility that the association members may refuse this transfer should not be overlooked. It would be appropriate to also regulate provisions for what would happen in case the appointed association refuses to take over the property and rights.
- In cases where the association's assets, property and rights are transferred to the association with the most similar aims and highest number of member on its date of closure through a court decision, for this transfer the criterion of highest number of members is sought together with that of similar aims. Even though it can be assumed that the lawmakers have made this regulation with the intent of ensuring the best use of property and rights, the criterion of highest number of members should not be considered as a precondition to fulfil this objective. In such a transfer, whether or not the objectives and activities of the two associations are compatible should be assessed by an objective expert and this assessment should be taken into consideration in the transfer.
- After the debts of liquidated foundations are paid off, unless there is a special provision in the foundation deed, the remaining rights and property may be transferred to a foundation with a similar purpose with a court decree taking into consideration the recommendation of the Directorate General of Foundations. It would be appropriate to seek not only the recommendation of the Directorate General of Foundations, but also the executive organ of the liquidated foundation in this matter.

Public Support

- There are two different definitions of public benefit for associations and foundations. There is no reasonable justification for defining public benefit differently for different forms of organizing. While certain differences in criteria sought for associations and foundations to acquire this status may be acceptable, the use of the same concept with different content depending on the forms of organizing undermines the consistency of the legislation and the concept of "public benefit". Therefore it is important to have one single definition.
- Since the definition of public benefit for associations is not clear, it allows for a rather broad discretion of public officials authorized to grant this status. While this vague definition can be inadequate in providing a guideline for the administration, it also bears the risk of allowing for arbitrary practices. A more precise definition based on objective criteria without the purpose of restriction should be established.
- As for foundations conditions for being granted tax exemption is more concrete, however the fields of activity enumerated for foundations to be tax exempt are very limited. In the delineation of fields of activity, the state's obligations as a social state of law, the rights and freedoms in the Constitution, and human rights conventions and documents the state is party to, should be taken into consideration, and a more comprehensive perspective should be adopted, thus establishing the parameters of the administration's discretional authority. As for the measure to prevent a restrictive approach, it would be appropriate to add a statement along the lines of "and any other activity to support or promote public benefit" to the amended provision. Here the expression "public benefit" should be understood not as meeting the conditions for the public benefit status, but as realizing activities for public benefit.
- In order to decrease bureaucracy and procedural discrepancies there should be one authority to make the decision and this authority should be the same for all CSOs. Furthermore, in order to eliminate political influence, it would be a positive measure to establish the application authority as a board comprised of independent experts, or at least require the opinion of an independent board of consultants and make the decision taking into account this opinion.
- When their application is rejected associations have to wait for three years to reapply and get the public benefit status. Foundations whose tax exemption is revoked cannot reapply for tax exemption in the subsequent five years. It is not clear how these time frames in the legislation are established and what purpose they serve. Even if the aim could be surmised to be alleviating the work load of the administration, this is not a legitimate justification. Considering that what is important in the establishment of public benefit is whether or not associations and foundations meet the criteria stipulated in the legislation, they should be allowed to reapply as soon as they are able to meet these criteria and these time limitations should be removed from the legislation.
- There is no document in which tax exempt foundations and associations working for public benefit can find the entirety of rights they acquire with this status. This issue should either be regulated in the legislation as a whole in one document or the Department of Associations and the Directorate General of Foundations should keep these provisions regularly updated and make them readily accessible for foundations and associations.

- According to Civil Code Article 99, membership fees, profit gained from the activities of the association or from its assets, contributions and donations constitute the income of the association. It would be an appropriate amendment to include public support among associations' financial resources.
- It is problematic for the Law on Relations of Public Institutions with Associations and Foundations to go into effect without a consideration of the negative problems it will create in implementation, an adequate impact assessment, a discussion of the issue of public services being provided by CSOs, and collecting sufficient information from stakeholders. The positive and negative impact of the Law should be assessed and reported, and it should be shared with all stakeholders to seek a solution to the problems collectively.
- It can be deduced that the public support CSOs benefit from is quite limited and especially confined to certain methods such as tax exemption and that these methods are not sufficiently comprehensive either. The scope of public support should be revisited to include many diverse methods in a way to enable not just the CSOs but also the donors to benefit from tax reductions; remove the obstacles before CSOs engaging in income generating activities in line with their objectives; allocate a certain percentage of all collected taxes to CSOs, and grant making.

Accountability

The administration's discretionary authority in determining the mandatory books and records to be kept should be revoked; the books and records to be kept should be enumerated explicitly in the law; the number of books should be decreased; it should be stated that books and records can be kept electronically, and sanctions to be imposed in the failure to comply with these obligations should be amended as to be proportionate.

State-CSO Collaboration

Developing State-CSO Collaboration

There is no legislation to provide a basis for State-CSO collaboration. There is little allusion or open reference to CSOs in the legal framework of collaboration. The subject of collaboration is drafted in general terms, and there is no provision on the form and content of the collaboration. The scattered regulations in different laws should be simplified as much as possible, and by clearly imposing obligations on public institutions a single framework regulation should be devised and the relevant laws should be amended to comply with this framework.

Participation in Local Governments and Decision Making Processes: Specialized Committees of the Municipal Council and Provincial Assembly

Amendments should be made to enable the participation of CSO representatives who want to partake in the meetings of specialized committees to be formed in municipal councils as per Article 15 of the Greater City Law and Article 24 of the Municipal Law, and in provincial assemblies as per Article 16 of the Special Provincial Administration Law. CSOs' participation should not be subject to the committee decision and should not be limited with the CSOs' field of activity and competence.

Participation in Local Governments and Decision Making Processes: City Councils

Another form of participation in the decision making processes of local governments is participation in the city councils. According to Article 76 of the Municipal Law "concerned civil society organizations" may also participate in the city councils. An amendment should be made at this point enabling CSOs to participate regardless of whether they are concerned or not. The regulation on CSOs' participation should be included in the law itself and not regulated by a bylaw to be issued by the Ministry of Interior. Since there is no such regulation in the Greater City Law a similar provision should be introduced to this Law as well.

Participation in Local Governments and Decision Making Processes: Strategic Plans

Article 41 of the Municipal Law and Article 31 of the Special Provincial Administration Law provide that related CSOs' opinions will be solicited in the preparation of strategic plans to be devised by municipalities and governors respectively. The phrase "concerned with the issue" should be removed from the article text in both laws, and participation of CSOs that want to partake in strategic planning should be ensured without being subject to any permission procedure. Since there is no such provision in Greater City Law, a regulation similar to Article 41 of the Municipal Law should be introduced to this law as well. Finally, none of the three legislations allow CSOs to partake in the preparation of the budget, therefore, amendments should be made to the laws enabling CSOs' participation at the stage of annual budget preparation.

CSO Participation in Advisory Bodies

The decision making processes of central governments may at times also involve the participation of CSOs. There are different regulations regarding this issue in different laws. The legislation employs phrases such as, “civil society organizations invited regarding to the issues on the agenda”, “concerned civil society organizations”, “related civil society organizations depending on the meeting agenda”, etc. In some laws the names of CSOs are openly stated, and in some the administration is granted unlimited power of discretion regarding which CSOs may partake in the advisory bodies. CSO participation in all institutions and organizations of the central government should be enabled and this participation should not be subject to a permission system but to the voluntary participation of the CSOs. The rules to be followed in establishing advisory bodies should be regulated openly without leaving any room for interpretation. It would be more compatible with the freedom of association to introduce concrete criteria for the appointment of CSOs. It would be appropriate to make the criteria in question more tangible and objective, and amend the aforementioned laws and other laws entailing such provisions to this end. Even though certain criteria are foreseen for CSOs such as field of expertise, duration of operation, it is crucial to determine these criteria by way of incorporating the diversity of the society and allowing the CSOs to participate in decision-making processes.

CSO Participation in the Delivery of Public Services

In Article 10 of the Law on Associations stating that public institutions and organizations may provide in-kind and monetary aid amounting to maximum 50% of projects costs in the joint projects they implement with associations, the phrase limiting the rate of support to 50% should be removed. Regulations on cooperation with CSOs in the laws pertaining to central government are quite limited; an obligation to this end should be included in all laws pertaining to the organization and duties of ministries or the laws on every institution or organization. A similar situation applies to local governments as well, and except for Article 7 of the Greater City Law cooperation with CSOs in the delivery of public services has not been included among the duties of the municipality or the special provincial administration in the Municipal Law or the Law on Special Provincial Administration. It would be appropriate to introduce a similar obligation in both laws. The distinction made in Article 75 of the Municipal Law between associations and foundations that have public benefit status or tax exemption and those that do not should be abolished.

Activities

Associations Being Autonomous in Their Activities

- The obligation to carry out activities in line with the objective stated in the statute as per Article 90 of the Civil Code and Article 30 paragraph (a) of the Law on Associations should be repealed and the related sanction stipulated in Article 32/0 of the Law on Associations in the failure to comply with this obligation should be annulled.
- The obligation of fan associations to "organize educational activities geared towards enabling the fans to spectate sports activities in line with sports ethics and principles" stipulated by Article 8 of the Law on the Prevention of Violence and Disorder in Sports should be repealed.
- The punitive and administrative fines stipulated in Article 32 of the Law on Associations where the books and records are not kept according to procedure should be repealed and a more proportionate system of sanctions should be introduced. The requirement to use Turkish language only in books, records and correspondences stipulated in Article 31 of the Law should also be repealed.

Foreign CSOs' Activities in Turkey

The regulation on foreign associations stipulated in Article 5 of the Law on Associations that reads, "Foreign associations may pursue their activities; cooperate and open representations or branches, found associations or supreme committees or join existing associations or supreme committees in Turkey upon permission of Ministry of Interior and consult of Ministry of Foreign Affairs" should either be repealed or be limited to associations operating in specific fields and the given specified fields should be clearly stated in the law.

Right to Access to Information

- The Law on the Right to Information, which specifically addresses the right to information, bears great importance for CSOs' access to information held by public authorities that the CSOs may need for their activities. There are a series of amendments that need to be made to the law. The principle of reciprocity stipulated for foreign CSOs in Article 4 of the Law should be repealed. The phrase "The application for access to information should relate to the information or the document that the applied institutions possess or should have possessed due to their tasks and activities" in Article 7 of the Law accords extensive power of discretion to institutions and organizations; therefore, it should be amended to obligate public institutions and organizations to document the information they keep in a manner to facilitate research, examination or analysis, and to present this information to the public. Article 10 of the Law should be amended to read that a fee may be charged for the requested information and documents "in case where it is not possible to provide the information electronically." The obligation to pay fees should not be absolute and exemption should be granted by foreseeing certain criteria such as operating for public interest.
- The numerous exceptions listed in the law restrict the exercise of the right to a great extent. Among these exceptions, particularly the provisions making reference to "state secrets" in Article 16 and to "economic interests of the state" in Article 17 allows applied institutions to reject such demands in an arbitrary manner, and they should be removed from the article text.

Access to Justice

- People who want to exercise their right to association should be allowed to access judicial information in order to overcome the legal obstacles they encounter. If CSOs cannot undertake legal and administrative actions to eliminate the rights violations they face during their establishment or operation stages or if these actions yield no results then it cannot be said that these CSOs' members have exercised their right to association. The structural obstacles stemming from financial conditions, social injustice and the judicial system preventing the CSOs' access to justice should be eliminated. Furthermore, CSOs should be enabled to enjoy justice equally without discrimination on any grounds. CSOs' access to justice is paramount to its members' ability to exercise their right to association and the CSOs to provide support for the groups they work with in line with their aims.
- The provisions in the Constitution provide sufficient protection for access to justice; nevertheless, in a potential Constitutional amendment it may be favorable to include an explicit statement referring to the right to legal aid in Article 36 that regulates the right to fair trial.
- Article 334 of the Civil Procedure Law should be amended to abolish the condition of "public benefit" stipulated for CSOs to benefit from legal aid and equality should be instated among CSOs in terms of benefiting from legal aid. The reciprocity criterion sought for legal aid as per the article should be rescinded, and foreign CSOs should also be allowed to benefit from this service.

Meetings and Demonstrations

The Law on Meetings and Demonstrations, which was adopted by the September 12, 1980 military regime and has been subject only to a few amendments to date, should be annulled and in its stead a "Law on the Freedom of Meetings and Demonstrations" in line with international standards should be adopted.

"Combatting Terrorism"

The Anti-Terror Law should be annulled as a whole. If the Law is not repealed then many of its articles should be amended. Firstly the definition of terrorism in its Article 1 should be brought in line with international standards, the rather vague expressions of "justifying or praising or encouraging resorting to those methods" in Article 6 and "propaganda of terrorist organizations" in Article 7 should be clearly defined and the number of situations considered to be propaganda of terrorist organizations should be decreased.

CSO Participation in Judicial Proceedings

Since it is not possible for CSOs to participate in a criminal proceeding unless they are directly damaged by the crime, an explicit legal regulation should be introduced in Article 237 of CMK to facilitate CSO participation by adding a phrase along the lines of "civil society organizations that are legal entities", following the phrase of "liable for pecuniary compensation." The same situation applies for civil and administrative proceedings as well, and the Civil Procedure Law and the Administrative Jurisdiction Procedures Law should be amended to enable CSOs' participation in continuing cases.

RELEVANT LEGISLATION AND CASE LAW

INTERNATIONAL LAW

- European Convention on Human Rights (Official Gazette No. 8662 dated 19.03.1954)
- Convention on the Rights of the Child (Official Gazette No. 22184 dated 27.01.1995)
- International Covenant on Economic, Social and Cultural Rights (Official Gazette No. 25196 dated 11.08.2003)
- International Convention on the Elimination of All Forms of Racial Discrimination (Official Gazette No. 24787 dated 16.06.2002)
- Universal Declaration of Human Rights (Official Gazette No. 7217 dated 27.05.1949)
- International Covenant on Civil and Political Rights (Official Gazette No. 25175 dated 21.07.2003)

NATIONAL LEGISLATION

- Afet ve Acil Durum Yönetimi Başkanlığının Teşkilat ve Görevleri Hakkında Kanun (Law on the Organization and Duties of the Disaster and Emergency Management Presidency) (No. 5902)
- Ailenin Korunması ve Kadın Yönelik Şiddetin Önlenmesine Dair Kanun (Law on the Protection of Family and Prevention of Violence against Women) (No. 6284)
- Avukatlık Kanunu (Attorneyship Law) (No. 1136)
- Bankacılık Kanunu (Banking Law) (No. 5411)
- Bazı Dernek ve Kurumların Bazı Vergilerden, Bütün Harç ve Resimlerden Muaf Tutulmasına İlişkin Kanun (Law on the Exemption of Certain Associations and Institutions from Certain Taxes, All Fees and Dues) (No. 1606)
- Bazı Kanunlarda Değişiklik Yapılması ve Vakıflara Vergi Muafiyeti Tanınması Hakkında Kanun (Law on the Amendment to Certain Laws and Tax Exemption for Foundations) (No. 4962)
- Belediye Kanunu (Municipal Law) (No.5393)
- Belediye Gelirleri Kanunu (Law on Municipal Revenues (No. 2464)
- Bilgi Edinme Hakkı Kanunu (Law on the Right to Information) (No.4982)
- Büyükşehir Belediyesi Kanunu (Greater City Law) (No. 5216)
- Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun (Law on the Execution of Penalties and Security Measures) (No. 5275)
- Ceza Muhakemesi Kanunu (Criminal Procedure Code) (No. 5271)
- Çalışma ve Sosyal Güvenlik Bakanlığının Teşkilat ve Görevleri Hakkında Kanun (Law on the Organization and Duties of Ministry of Labor and Social Security) (No. 3146)
- Çevre Kanunu (Environment Law (No. 2872)
- Çocuk Koruma Kanunu (Child Protection Law) (No. 5395)
- Damga Vergisi Kanunu (Tax Stamp Law) (No. 488)
- Denetimli Serbestlik Hizmetleri Kanunu (Law on Probation Services) (No.5402)
- Dernek ve Vakıfların Kamu Kurum ve Kuruluşları ile İlişkilerine Dair Kanun (Law on the Relations of Public Institutions with Associations and Foundations) (No. 5072)
- Dernekler Kanunu (Associations Law) (No. 5253)
- Dernekler Yönetmeliği (Associations Regulation)
- Denetimli Serbestlik Hizmetleri Kanunu (Law on Probation Services) (No.5402)
- Devlet Memurları Kanunu (Civil Servants Law) (No. 657)
- Diyanet İşleri Başkanlığı Kuruluş ve Görevleri Hakkında Kanun (Law on the Organization and Duties of the Presidency of Religious Affairs) (No. 633)

- Ekonomik ve Sosyal Konseyin Kuruluşu, Çalışma ve Yöntemleri Hakkında Kanun (Law on the Establishment and Functioning of the Economic and Social Council) (No. 4641)
- Emlak Vergisi Kanunu (Real Estate Tax Law) (No. 1319)
- Emniyet Teşkilatı Kanunu (Law on Law Enforcement Organization) (No. 3201)
- Enerji Verimliliği Kanunu (Energy Efficiency Law (No. 5627)
- Gelir Vergisi Kanunu (Income Tax Law) (No. 193)
- Harçlar Kanunu (Act of Fees) (No. 492)
- Hayvanları Koruma Kanunu (Animal Protection Law) (No. 5199)
- Hukuk Muhakemeleri Kanunu (Civil Procedure Code) (No. 6100)
- İdari Yargılama Usulü Kanunu (Administrative Jurisdiction Procedures Law) (No. 2577)
- İl Özel İdaresi Kanunu (Special Provincial Administration Law) (No. 5302)
- İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve Bu Yayınlar Yoluyla İşlenen Suçlarla Mücadele Edilmesi Hakkında Kanun (Law on the Regulation of Publications on the Internet and Combatting Crimes Committed by Means of Such Publications) (No. 5651)
- Kalkınma Ajanslarının Kuruluşu, Koordinasyonu ve Görevleri Hakkında Kanun (Law on the Establishment, Coordination and Duties of the Development Agencies) (No. 5449)
- Kamu İhale Kanunu (Public Procurement Law) (No. 4734)
- Kamu Mali Yönetimi ve Kontrol Kanunu (Public Financial Management and Control Law) (No. 5018)
- Karayolları Trafik Kanunu (Road Traffic Law) (No. 2918)
- Katma Değer Vergisi Kanunu (Value Added Tax Law) (No. 3065)
- Kurumlar Vergisi Kanunu (Corporate Tax Law) (No. 5520)
- Kültür ve Tabiat Varlıklarını Koruma Kanunu (Law on the Conservation of Cultural and Natural Property (No. 2863)
- Kültür ve Turizm Bakanlığı Teşkilat ve Görevleri Hakkında Kanun (Law on the Organization and Duties of the Ministry of Culture and Tourism) (No. 4848)
- Organik Tarım Kanunu (Organic Farming Law) (No. 5262)
- Polis Vazife ve Selahiyet Kanunu (Law on Duties and Powers of the Police) (No. 2559)
- Radyo ve Televizyonların Kuruluş ve Görevleri Hakkında Kanun (Law on the Establishment of Radio and Television Enterprises and Their Media Services (No. 6112)
- Sigortacılık Kanunu (Insurance Law) (No. 5684)
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ECTHR CASE LAW

- *Airey v. Ireland*, Appl. No. 6289/73, 09.10.1979
- *Association of Citizens Radko & Paunkovski v. The Former Yugoslav Republic of Macedonia*, Appl. No. 74651/01, 15.01.2009

- *Bakan v. Turkey*, Appl. No. 50939/99, 12.06.2007
- *Balsyté-Lideikiené v. Lithuania*, Appl. No. 72596/01, 04.11.2008
- *Bukta and others v. Hungary*, Appl. No. 25691/04, 17.07.2007
- *Brasilier c. France,* Req. No. 71343/01, 11.04.2006
- *Chassagnou and Others v. France*, Appl. No. 25088/94 28331/95 28443/95, 29.04.1999
- *Cheall v. the United Kingdom,* Appl. No. 10550/83, 13.05.1985
- *Cisse v. France*, Appl. No. 51346/99, 09.04.2002
- *Dabrowski v. Poland,* Appl. No. 18235/02, 19.12.2006
- *DİSK and KESK v. Turkey*, Appl. No. 38676/08, 27.11.2012
- *Djavit An. v. Turkey*, Appl. No. 20652/92, 20.02.2003
- *Erdoğdu and İnce v. Turkey* (Grand Chamber), Appl. No. 25067/94, 25068/94, 08.07.1999
- *Ezelin v. France*, Appl. No. 11800/05, 26.04.1991
- *Féret v. Belgium*, Appl. No. 15615/07, 16.07.2009
- *Gaskin v. U.K.,* Appl. No. 10454/83, 07.07.1989
- *Gorzelik v. Poland,* Appl. No. 44158/98, 17.02.2004
- *Gündüz v. Turkey*, Appl. No. 35071/97, 14.06.2004
- *Handyside v. United Kingdom*, Appl. No. 5493/72, 07.12.1976
- *Incal v. Turkey (Grand Chamber),* Appl. No. 22678/93, 09.06.1998
- *IPSD et Autres c. Turquie*, Rec. No. 35832/97, 25.10.2005
- *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, Appl. No. 19986/06, 10.04.2012
- *Kreuz v. Poland*, Appl. No. 28249/95, 19.06.2001
- *Leander v. Sweden,* Appl. No. 9248/81, 26.03.1987
- *Leyla Şahin v. Turkey*, (Grand Chamber), Appl. No. 44774/98, 10.11.2005
- *Lingens v. Austria,* Appl. No. 9815/82, 08.07.1986
- *Mehmet and Suna Yiğit v. Turkey*, Appl. No. 52658/99, 17.07.2007
- *Müller and Others v. Switzerland,* Appl. No. 10737/84, 24.05.1988
- *Oya Ataman v. Turkey*, Appl. No. 74552/01, 05.12.2006
- *Özbek and Others v. Turkey*, Appl. No. 35570/02, 06.10.2009
- *Platform Arzte für Das Leben v. Austria*, Appl. No. 10126/82, 21.06.1988
- *Prager and Oberschlick v. Austria,* Appl. No. 15974/90, 26.04.1995
- *Samüt Karabulut v. Turkey*, Appl. No. 16999/04, 27.01.2009
- *Sdruzeni Jihoceske Matky c. Republique Tcheque,* (recevabilité), Req. No. 19101/03, 10.07.2006
- *Sergey Kuznetsov v. Russia*, Appl. No. 10877/04, 23.10.2008
- *Sidiropoulos v. Greece*, Appl. No. 26695/95, 10.07.1998
- *Sigurdur A. Sigurjonsson v. Iceland*, Appl. No. 16130/90, 30.06.1993
- *Sîrbu and others v. Moldova,* Appl. No. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01, 73973/01
- *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Appl. No. 29221/95, 29225/95, 02.10.2001
- *Storck v. Germany*, Appl. No. 61603/00, 16.06.2005

- *Sunday Times v. U.K.*, Appl. No. 6538/74, 26.04.1979
- *Şener v. Turkey,* Appl. No. 26680/95, 18.07.2000
- *Tarsasag a Szabadsagjogokert v. Hungary*, Appl. No. 37374/05, 14.04.2009
- *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, Appl. No. 37083/03, 08.10.2009
- *The Moscow Branch of the Salvation Army v. Russia*, Appl. No. 72881/01, 05.10.2006
- *Times Newspapers Limited v. the United Kingdom* (No. 1 and 2), Appl. No. 3002/03, 23676/03
- *Tolstoy Miloslavsky v. U.K.*, Appl. No. 18139/91, 13.07.1995
- *Tourkiki Enosi Xhantis and Others v. Greece*, Appl. No. 26698/05, 27.03.2008
- *Tüm Haber Sen and Çınar v. Turkey,* Appl. No. 28602/95, 21.02.2006
- *Vogt v. Germany* (Grand Chamber), Appl. No. 17851/91, 26.09.1995
- *Vona v. Hungary,* Appl No. 35943/10, 09.07.2013
- *Vörour Olafsson v. Iceland*, Appl. No. 200161/06, 27.04.2010
- *Young, James and Webster v. U.K.*, Appl. No.7601/76, 7806/77, 13.08.1981
- *Zhechev v Bulgaria*, Appl. No. 57045/00, 21.06.2007

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