# The Impact of the European Convention on Human Rights on the Legal Order of Turkey: Achievements and Problems*

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The European Convention on Human Rights (ECHR/the Convention) is an effective legal supervision system that has made significant contributions to the improvement of human rights in the Member States of the Council of Europe. Turkey became party to the ECHR back in 1954, although it can be said that the effects of the Convention on the legal order in Turkey were seen only after the recognition of the jurisdiction of the European Court of Human Rights (ECtHR) in 1990. In this study, the effect of the Convention and the ECtHR case law that birthed the Convention on the judicial decisions and legislation in Turkey is examined. In this review, the transformative effect of ECtHR case law on the judicial decisions in Turkey is assessed, along with the constitutional and legal reforms carried to bring the country in line with the ECtHR. It is stressed that two constitutional amendments were of particular importance in this interaction process, the first of which prioritized the ECHR before the laws in 2004, and the second that gave individuals the right to submit individual applications to the Constitutional Court in 2012. That the reforms carried out on the legal platform and the action plan adopted in 2014 failed to establish full compliance with the ECtHR case law is one of the main conclusions reached in this study.

**Keywords**: ECHR, ECtHR Case Law, Constitution, Individual Application, Reforms

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# İnsan Hakları Avrupa Sözleşmesi'nin Türkiye'nin Hukuk Düzenine Etkisi: Kazanımlar ve Sorunlar

**Öz:** Etkili bir hukuki denetim sistemine sahip olan İnsan Hakları Avrupa Sözleşmesi (İHAS/Sözleşme), Avrupa Konseyi'ne üye ülkelerde insan hakları standartlarının gelişimine önemli katkılar sunmuştur. Türkiye İHAS'a 1954 yılı gibi çok erken bir tarihte taraf olmuştur. Fakat Sözleşme'nin Türkiye'nin hukuk düzeni üzerindeki etkisinin, 1990 yılında İnsan Hakları Avrupa Mahkemesinin (İHAM) yargı yetkisinin tanınması ile belirgin bir hal aldığı söylenebilir. Bu çalışmada, Sözleşme'nin ve Sözleşme'yi somutlaştıran İHAM içtihadının, Türkiye'deki yargı kararları ve mevzuat üzerindeki etkisi incelenmiştir. Bu incelemede bir yandan İHAM içtihadının Türkiye'deki yargı kararları üzerindeki dönüştürücü işlevi, diğer yandan İHAM içtihadı doğrultusunda gerçekleştirilen anayasal ve yasal reformlar değerlendirilmiştir. Bu etkileşim sürecinde iki anayasa değişikliğinin özel önemi olduğu vurgulanmıştır. Bu anayasa değişikliklerinden ilki, 2004 yılında İHAS'a kanunlar karşısında öncelik tanınması; ikincisi ise 2012 yılında bireylere, Anayasa Mahkemesi'ne bireysel başvuruda bulunma imkânı getirilmesidir. Hukuki düzlemde gerçekleştirilen reformların ve 2014 yılında kabul edilen eylem planının, uygulamada İHAM içtihadı ile tam anlamıyla bir uyumu sağlamakta yeterli olmadığı, bu çalışma kapsamında ulaşılan temel sonuçlardan biri olmuştur.

**Anahtar Kelimeler**: İHAS, İHAM İçtihadı, Anayasa, Bireysel Başvuru, Reformlar

## INTRODUCTION

The European Convention on Human Rights (ECHR/the Convention), defined as the constitutional basis of European public order, takes a wide catalogue of fundamental rights under protection through additional protocols. The European Court of Human Rights (ECtHR) is an effective legal supervision mechanism within the Convention, acting as a guarantor of the rights. With these qualifications, the ECHR and ECtHR confirm that human rights are not a matter that individual states can regulate without limit within the scope of their sovereign power, and so take human rights under protection on the basis of a supranational platform. State Parties undertake to ensure that every person on their sovereign territory is able to benefit from the fundamental rights provided for by the Convention, and agree to abide by the decisions of the ECtHR. For all Member States of the Council of Eu-

rope, becoming party to the Convention is important for the development of common standards for the protection of human rights at a European level.

Turkey became a member of the European Council in 1950, and became party to the ECHR in 1954. Turkey acknowledged the authority of the European Commission on Human Rights (Commission) in cases of individual applications in 1987, and recognized the jurisdiction of the ECtHR in 1990. Since that date, the ECtHR has issued important decisions related to human rights violations in Turkey. In this study, the impact of the ECHR and the ECtHR case law on the 1982 Constitution and the decisions of the Constitutional Court (CC) will first be examined. The interactions of the CC related to the case-law of the ECtHR will be analyzed, particularly with regards to the decisions of the CC on the closure of political parties, individual applications and the review of norms, considering the constitutional amendments realized during the process. Then, the approach of the Turkish appellate courts to the case-law of the ECtHR will be evaluated. Finally, the effects of the legal reforms made within the framework of the alignment with the case-law of the ECtHR will be opened up for discussion.

## I. THE 1982 CONSTITUTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The effect of the ECHR on Turkey's legal order can be examined in four periods. The first period covers the years between Turkey becoming party to the Convention and Turkey recognizing the jurisdiction of the Commission to review individual applications in 1987. The second period covers the period that starts in 1987 and concludes with the constitutional amendment made in 2004. As a result of the amendments to the Constitution of 1982, came into force in 2004, the obligation to implement the human rights conventions was introduced in case of any conflict between the international human rights conventions and the laws. The period between the constitutional amendment in 2004 and 2012 can be referred to as the third period, while the granting of authority to the CC to review individual applications in 2012 can be accepted as the start of the fourth period.[1]

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1 NALBANT Atilla, "İnsan Hakları Avrupa Hukuku İlkeleri Işığında Yüksek Mahkemelerin Yaklaşımı Hakkında Bir Değerlendirme", **Anayasa Hukuku Dergisi**, C. 4, S. 7, 2015, p. 229.

The impact of the ECHR on the Turkish legal system was restricted until the 1990s, as the jurisdiction of the ECtHR, which gave power to the Convention with its binding decisions, had at the time not been recognized by Turkey. The limited ECtHR case law accumulation in this period can also be described as an effect, and even in 1985, the number of decisions issued by the ECtHR within a year was only 11.[2] That said, academic interest in the ECHR goes back to its early days,[3] although the reflection of this interest on practice is quiet limited. In the era of the Constitution of 1961, which remained in force until the 1980 coup d'état, the CC referred to the ECHR for 13 decisions, although the reasoning was not based solely on the provisions of the Convention. The CC was content with referring to the relevant articles of the Convention to support the conclusion that was based on the norms of the Constitution.[4]

The effect of the ECHR in the preparatory works for the 1982 Constitution can be seen particularly in Article 13, regulating the regime for restricting fundamental rights. In contrast to the Constitution of 1961, "the requirements of the democratic order of the society" was stipulated in Article 13 of the Constitution of 1982 as the relevant criteria related to the restriction of fundamental rights. Countering the criticism that there was no need to add such a criteria to the Constitution during its preparatory works, the Vice-President of the Constitutional Committee emphasized that this was not a new criteria, but had been applied by the ECtHR for years. In line with the views of the vice-president, who stated that Turkey's democratic society was no different to those in the Western world, the criteria of "the requirements of the democratic order of the society" appeared the Constitution of 1982.[5] However, it was expressed that in view of the fact that the original version of the Constitution of 1982 had a very restrictive approach to fundamental rights, the said criteria could not be considered as a step

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2 LAWSON Rick, "The Achievements of the Strasbourg Court", **The conscience of Europe: 50 years of the European Court of Human Rights**, Edited by Egbert Myjer et al., Third Millennium Publishing, 2010, p. 165.

3 ARIK K. Fikret, "İnsan Haklarının Milletlerarası Korunması, (Avrupa İnsan Hakları Sözleşmesi Çerçevesinde)", **Ankara Üniversitesi SBF Dergisi**, C. 15, S. 4, 1960, pp. 113-150.

4 BAŞLAR Kemal, **Türk Mahkeme Kararlarında Avrupa İnsan Hakları Sözleşmesi**, Şen Matbaa, 2007, p. 19.

5 MEMİŞ Emin, "İnsan Hakları Avrupa Standardı ve İç Hukuk Etkileşimi Analizleri", **Anayasa Yargısı Dergisi**, C. 17, 2000, p. 153.

towards the effective protection of the human rights. It was stressed that the main purpose in introducing these criteria was to give a wider margin of appreciation to the restriction of fundamental rights. In fact, the state of Turkey, during the process of recognizing the jurisdiction of the Commission of Human Rights to review individual applications, made a reservation on "the requirements of the democratic order of society" criteria to be understood within the framework of the restrictions established in the Constitution of 1982, however this reservation was not accepted by the Commission.[6] Another similarity between the Constitution of 1982 and the ECHR in terms of the regime on the restriction of fundamental rights could be observed in the articles regulating the restriction of fundamental rights during states of emergency. In this sense, the contents of Article 15 of both the Constitution of 1982 and the ECHR are identical, with only the scope of the core rights being different.[7]

Another constitutional norm that is important in the relationship of the ECHR with the Turkish legal order is Article 90 of the Constitution, which regulates the effect of international conventions on domestic law. In the original version of the article, it is stipulated that international conventions have the force of law, and that applications cannot be made to the CC claiming that these conventions are unconstitutional. This norm raised significant arguments in the doctrine in terms of the effect of the ECHR on domestic law. While one view emphasizes, adhering to the text of Article 90, that the ECHR has statutory power, another view attributes special meaning to the fact that actions cannot be brought before the CC with the claim that an article of the ECHR is in violation with the Constitution. According to the latter

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6 TANÖR Bülent/YÜZBAŞIOĞLU Necmi, **1982 Anayasasına Göre Türk Anayasa Hukuku**, 17. bs, 2018, pp. 16, 158-161.

7 **The 1982 Constitution**, Article 15: In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated, https://global.tbmm.gov.tr, accessed 11.06.2018.

**European Convention on Human Rights**, Article 15: In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law, https://www.echr.coe.int, accessed 11.06.2018.

view, in the event of a conflict between the ECHR and the Constitution or laws, the ECHR must be applied, and the ECHR should be prioritized during constitutional review.[8]

## II. DIFFERENCES BETWEEN THE CASE LAW OF THE CONSTITUTIONAL COURT AND THE ECTHR IN THE ISSUE OF PARTY CLOSURES

The CC, in its constitutional review decisions in the 1980s, did not use the ECHR as the sole basis, in other words, it did not annul the reviewed laws solely on the grounds of being in violation of the ECHR. However, it uses the notion of the universal principles of law in the assessments made regarding the compliance with the principle of rule of law under Article 2 of the Constitution defining the characteristics of the Republic. The CC refers to international conventions within the scope of these universal principles. Article 2 of the Constitution of 1982 also states that the Republic of Turkey is a state that respects human rights, and the CC also refers to the international conventions in its assessments of compliance with this criteria.[9] It has been observed that the CC refers to international conventions in the reviews it carries out, mostly in the private law field, during this period. For example, the CC refers to international conventions in its assessments when it annuls provisions that discriminate against woman or against children born out of wedlock in the civil code.[10]

Following the recognition of the jurisdiction of the ECtHR by Turkey in 1990, many individual applications were made to the ECtHR, and as a result of those applications, the ECtHR decided several times that the Convention had been infringed. CC decisions to close political parties have an important

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8 YÜZBAŞIOĞLU Necmi, **Türk Anayasa Yargısında Anayasallık Bloku**, İstanbul Üniversitesi Yayınları, 1993, pp. 54-58; FENDOĞLU H. Tahsin, "Uluslararası İnsan Hakları Belgelerinin Uygulanmasında Bağımsız Ölçü Norm veya Destek Ölçü Norm Sorunu", **Anayasa Yargısı Dergisi**, C. 17, 2000, pp. 372-377.

9 ŞAHBAZ İbrahim, "Avrupa İnsan Hakları Sözleşmesi'nin Türk Yargı Sistemindeki Yeri", **Türkiye Barolar Birliği Dergisi**, S. 54, 2004, pp. 194-196.

10 E: 1987/1, K: 1987/18, 11.9.1987, **Official Gazette**, Issue No. 19769, 29.3.1988; E: 1990/30, K: 1990/31, 29.11.1990, **Official Gazette**, Issue No. 21272, 2.7.1992; E: 1990/15, K: 1991/5, 28.2.1991, **Official Gazette**, Issue No. 21184, 27.3.1992; ARSLAN Zühtü, "Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasa Yargısı: Uyum Sorunu ve Öneriler", **Anayasa Yargısı Dergisi**, C. 17, 2000, pp. 280-281.

place among the infringement decisions issued by the ECtHR under the Convention. Together with the 1961 Constitution, ensuring the conformity of the program and activities of political parties to the Constitution and making decisions to close political parties were duties that were assigned to the CC. To date, the CC has closed a total of 25 political parties, the last one being in 2009,[11] and a significant number of these closed parties have applied to the ECtHR, and apart from a single exception, the ECtHR determined that the Convention had been infringed in all of them.

According to the 1982 Constitution[12] and the Law on Political Parties,[13] "the statutes, programs and activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and the rule of law, the sovereignty of the nation, or the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorships or dictatorships of any kind, nor shall they incite citizens to crime". Parties violating these prohibitions shall be closed by the CC. In practice, many of the closure decisions passed by the CC were based on the violation of the principle concerning "the indivisible integrity of the State with its territory and nation", and in those decisions, the CC interpreted the "indivisible integrity" principle in a quite strict manner.[14] According to the CC, the "indivisible integrity" principle prohibits a political party to defend the federalism, and even the regional form of the state having autonomous administrative units, even through peaceful methods. This approach of the CC has been found contradictory and overly restrictive, and has been criticized, for good reason, since it prohibits even a regional form of state that is, in fact, a unitary state system.[15]

All the closure decisions passed by the CC on the grounds that the "indivisible integrity" principle had been violated have been considered by the

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11 E: 2007/1, 2009/4, 11.12.2009, **Official Gazette**, Issue No. 27449, 31.12.2009.

12 **The 1982 Constitution**, Article 68 and 69, https://global.tbmm.gov.tr, accessed 11.06.2018.

13 Law on Political Parties, **Official Gazette**, Issue No. 18027, 24.4.1983, Article 101.

14 ESEN Selin, "How Influential Are the Standards of the European Court of Human Rights on The Turkish Constitutional System in Banning Political Parties?", **Ankara Law Review**, C. 9, N. 2, 2012, p. 143.

15 ÖZBUDUN Ergun/TÜRKMEN Füsun, "Impact of the ECtHR Rulings on Turkey's Democratization: An Evaluation", **Human Rights Quarterly**, C. 35, 2013, p. 996.

ECtHR to be a violation of the freedom of association. According to the established case law of the ECtHR, the closing of a political party can only be accepted as being in compliance with the Convention if the said party uses illegal and non-democratic methods, and if the views it defends are in violation of democratic principles. From this point of view, the ECtHR concludes that closing parties that defend the cultural rights of minorities, the federal state system or autonomous governments, only because of these approaches are in violation of the Convention. According to the ECtHR, requests to change the state system do not constitute a violation of the ECHR, so long as they use peaceful methods and do not go against fundamental democratic values. If it is accepted that a party is supporting terrorism just because it defends the fundamental democratic requests related to the rights of the minority, such social requests will be forced to be expressed outside the democratic discussion environment, leaving the said social requests to end up in the hands of armed terrorist organizations.[16] According to the ECtHR, in accordance with freedom of expression, as one of the main elements in a democracy, a political party cannot be punished based on its will to discuss the problems of a certain section of the population and to seek solutions to these problems within the framework of democratic principles.[17]

The second most significant group of parties in terms of numbers that have been closed by the CC are those accused of violating of the principle of secularism. In the application to the ECtHR made by the Welfare Party, which has been closed on account of its violation of the secularity principle, the ECtHR concluded that the Convention had not been infringed. The ECtHR stated firstly that the threat of the foundation of a religion-based state in Turkey was conceivable, considering the country's historical background and social structure.[18] Then, the ECtHR ascertained that the multi-law system project based on faiths that was defended by the Welfare Party was not in line with the impartiality of the state and prohibitions on discrimination. Stating that the sharia system defended by the Welfare Party was contrary to the pluralism principle, the ECtHR concluded that the opinions defended by

16 Yazar And Others v. Turkey, 22723/93 22724/93 22725/93, 09.04.2002, § 49, 56-58; Socialist Party And Others v. Turkey, 21237/93, 25.05.1998, § 47.

17 Freedom and Democracy Party v. Turkey, 23885/94, 08.12.1999, § 44.

18 The Welfare Party And Others v. Turkey, 41340/98, 41342/98, 41343/98, 41344/98, 31.07.2001, § 65.

the Welfare Party were incompatible with the main democratic principles. [19] Furthermore, the ECtHR emphasized that the Party members supported the notion of *jihad*, meaning a war that would continue until Islamic supremacy was ensured. Considering the power held in Parliament by the Welfare Party, which had made statements defending violence, the ECtHR pointed out that there was a risk that the related party would establish a system that did not comply with democratic principles, and the Court thus concluded that there has been no violation of the Convention.[20]

The decision on the Welfare Party is also important in terms of the assessments made by the ECtHR in the framework of the doctrine on the margin of appreciation. Although the ECtHR reiterated its case law stating that governments shall have a narrow margin of appreciation in issues related to party closures, due to the importance of the pluralism of political opinions and parties in terms of a democratic society, it indicated that the party closure sanction may be accepted as reasonable when a party defends policies that constitute a threat to the democratic regime.[21]

It could be argued that the point of view of the ECtHR on the principle of secularism played an important role in this conclusion being reached. According to the ECtHR: "the principle of secularism in Turkey is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights. Any conduct which fails to respect that principle cannot be accepted as being part of freedom to manifest one's religion and is not protected by Article 9 of the Convention."[22] In this respect, the ECtHR attributed special importance to the protection of the principle of secularism not only in the decision concerning the Welfare Party, but also in applications made against the headscarf ban in universities [23] and against the discharge decisions given by the army due to the assertion of connection with religious organizations, [24] and did not consider the related measures to be a violation of the freedom of belief.

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19 Ibid, § 70-73.

20 Ibid, § 74-84.

21 Ibid, § 81.

22 Ibid, § 52.

23 Leyla Şahin v. Turkey, 44774/98, 29.06.2004, § 99.

24 Kalaç v. Turkey, 20704/92, 01.07.1997, § 30.

Different constitutional amendments have been made as a result of the evaluation of the party closure decisions of the CC by the ECtHR as an infringement of the Convention. These changes can be said to be based on the principle of proportionality of the main axis. In the original version of the Constitution, the parliamentary status of any members of the parliament who was ascertained to have caused the closing of a party by the CC through his/her acts and words was terminated. This sanction was considered by the ECtHR to be in violation of the right to free election on the grounds that it was not proportionate, [25] and the sanction in question was abolished in 2010.[26] Another change made within the scope of the principle of proportionality was the transition to a gradual sanction system towards political parties. According to an amendment made in 2001, the closure of political parties was no longer the only applicable sanction, in that it became possible to deprive a party, either partially or totally, of state aid, depending on the significance of the actions deemed to be unconstitutional.[27] With regards to the impact of the ECHR on domestic law, probably the most important amendment was realized in 2004. Together with a provision included in Article 90 of the Constitution, it was made compulsory to consider and implement the articles of an international human rights convention in the event of conflict between a law and a human rights convention.[28]

The ECtHR case-law and the constitutional amendments made in line with this case-law took effect in the case of Rights and Freedoms Party (HAKPAR). The CC implemented the party closure criteria meticulously, and in particular, the principle of proportionality. The CC emphasized that if the statements made by a party do not represent an explicit and direct threat to democratic life, they should be regarded as freedom of expression. The CC stated initially that the fact that the defendant party offers its own solutions for a problem, which they define as the Kurdish problem, cannot be de-

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25 Sadak and Others v. Turkey (No. 2), 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11.06.2002, § 40.

26 Law No 5982, **Official Gazette**, Issue No. 27580, 7.5.2010, Article 9.

27 **The 1982 Constitution**, Article 69/7, https://global.tbmm.gov.tr, accessed 11.06.2018.

28 **The 1982 Constitution**, Article 90/5: 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. https://global.tbmm.gov.tr, accessed 11.06.2018.

scribed as denial of nationalism based on citizenship. The CC also remarked that the closure case had been opened shortly after the establishment of the party, and emphasized that no evidence had been provided, either in the indictment or in the following stages, indicating that the party would pursue extra-constitutional methods to accomplish its goals. In conclusion, the CC concluded that the statements relating to the presence of a certain problem and to the solutions for this problem should be assessed within the scope of freedom of thought and expression that are inherent in a democratic regime, and rejected the demand to close HAKPAR.[29]

Following this decision, the CC examined the case filed against the Justice and Development Party (AKP) based on an allegation that it had become a focus of anti-secular activity. In its decision, the CC highlighted the importance of the constitutional amendment made in 2004, stating that human right conventions had to be implemented as a priority, and emphasized that this rule required the consideration of the freedom standards established in the ECHR. In this context, the CC reminded that the party closure sanction would be accepted only as a last resort in the case-law of the ECtHR. Following its evaluation, the CC determined that the AKP was a focus of anti-secular activity, but underlined the many examples in which the power held by the party had been used to reach the standard of modern Western democracies in the country. Furthermore, the CC decided to apply a sanction temporarily depriving the party of state aid rather than closing the party, considering that the party had made no concrete efforts to abolish democracy and the secular state order.[30] Concerning the decision given by the CC on the AKP, which still holds the political power in Turkey, it may be argued that the CC acted in accordance with the case-law of the ECtHR on proportionality in regards to the applied sanctions.

The CC did not maintain this liberal approach when interpreting the principle concerning "the indivisible integrity of the State with its territory and nation". Around one year after its decision related to the AKP, the CC closed the Democratic Society Party (DTP) on the grounds that it had become a focus of action against the principle of indivisible integrity. The CC concluded that the defendant party had become a focus of actions against the

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29 E: 2002/1, K: 2008/1, 29.01.2008, **Official Gazette**, Issue No. 26923, 1.7.2008.

30 E: 2008/1, K: 2008/2, 30.07.2008, **Official Gazette**, Issue No. 27034, 24.10.2008.

integrity of the territory and nation, stating that DTP members shared the same ideology and objective as the Kurdistan Workers' Party (PKK); that it was taking action to support the leaders and members of this terrorist organization; that they supported the involvement of the PKK as an addressee in the resolution of the Kurdish problem; and that they showed tolerance to the actions of the terrorist organization. Furthermore, the CC emphasized that there were many examples of the DTP being connected to the PKK terrorist organization, and working in solidarity with it. Considering the intensity of such actions, the CC stated that the closure of the party was a reasonable sanction.[31]

In its DTP decision, the CC made references to the decision given by the ECtHR in Herri Batasuna and Batusuna v. Spain, implementing the justifications made by the ECtHR in this case in its justification that the closure of the DTP was conformity with the Convention. The CC also draw attention to the similarities between the ideologies and actions of the two parties.[32] However, following an application from the DTP, the ECtHR concluded that the closure decision of the CC on the DTP had violated its freedom of organization.[33] In the examination it made with regards to necessity in a democratic society, the ECtHR first questioned whether or not the political opinions defended by the DTP were in harmony with democratic principles, and found that the DTP case and the Batasuna case were different in this regard. Stating that the DTP was the most important political party in the country in search for a peaceful solution to the Kurdish problem, the ECtHR pointed out that many separatist parties were continuing their existence in the different autonomous administrative regions of Spain.[34] Then, the ECtHR established that the DTP program neither promoted anti-democratic principles nor defended violence.[35] In its evaluations on the activities of the DTP, the ECtHR examined the discourse of the party's co-presidents and members, and point-

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31 E: 2007/1, K: 2009/4, 11.12.2009, **Official Gazette**, Issue No. 27432, 14.12.2009.

32 Ibid.

33 For a detailed review and comparison of the DTP decisions of the CC and ECtHR see ÇELİK Demirhan Burak, "İHAM'ın DTP ve Diğerleri/Türkiye Kararı Üzerine", **Galatasaray Üniversitesi Hukuk Fakültesi Dergisi**, Sayı: 2, 2015, pp. 23-66.

34 Party for a Democratic Society (DTP) and Others v. Turkey, 3840/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10, 12.01.2016, § 74.

35 Ibid, § 77.

ed out that although some discourse that could be associated with violence existed, they had a final objective of peacebuilding when considered in their context, and so the Court concluded that the Convention had been infringed, considering the severity of the closure sanction that had been applied.[36]

When the closure decisions of the CC are examined as a whole, it may be argued that the impact of the case-law of the ECtHR increased especially following the constitutional amendment of 2004 giving a priority to the ECHR over national laws, although it can be accepted that a full alignment does not exist at the current time. An important development in ensuring this alignment was the entry into force in 2011 of a new law regulating the adjudication procedure of the CC. According to Article 67 of the Law, if the ECtHR finds that the party closing decision passed by the CC was in violation of the ECHR, an application may be made to the CC for a retrial. That said, according to Article 67, a violation decision of the ECtHR will not automatically result in a retrial. The Law, at this point, leaves it to the discretion of the CC, but if, however, the CC concludes that the violation decision of the ECtHR has a significant effect on a previous party closure decision, it will retry the case.[37] Whereas, in the case where the ECtHR has determined that a party closure decision is in violation of the ECHR, it is inevitable that this violation decision will have an important impact on the case. Accordingly, it is not possible to associate the entitlement of such broad authority to the CC with the obligation of Turkey to apply the decisions of the ECtHR. Since there yet to be any application made to the CC for a retrial since this law entered into force, how the CC will use this discretion is something that will be observed in the future.

## III. ECTHR CASE LAW, AS THE MAIN ELEMENT IN THE CONSTITUTIONAL COURT'S DECISIONS ON INDIVIDUAL APPLICATIONS

The development, which led to the fact that the case-law of the ECtHR created a much more significant effect on the decisions of the CC, was in the year 2012. As a result of the constitutional amendment, those who have had

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36 Ibid, § 87-109.

37 Code on Establishment and Rules of Procedures of the Constitutional Court, Law no 6216, **Official Gazette**, Issue No. 67894, 3.4.2011.

their fundamental rights violated were given the right to make an individual application before the CC. The increase in the effect of the ECtHR case law in this period is related mostly to the scope of the individual application procedure and the justification of the acceptance of this procedure. In accordance with the 2010 amendments to the Constitution, individuals cannot make individual applications solely based on a claim that any of their rights under the Constitution of 1982 were violated, as the right that is alleged to have been violated must be protected in both the Constitution and the ECHR.[38] The reasoning behind this interesting criteria can be found in the justification of the constitutional amendment:

"Every year, a number of actions are brought before the European Court of Human Rights against Turkey, and Turkey is directed to provide compensation in many actions ... It is considered that an important proportion of those who allege that have been subjected to a violation of rights since the introduction of the individual application institution can be satisfied at the individual application stage, that is, before taking the issue up with the European Court of Human Rights. In this way, actions against Turkey and decisions issued related to violations will decrease. In this respect, the establishment of a well-functioning individual application system also in Turkey will increase the standards based on rights and the rule of law."[39]

It is apparent that the main purpose in bringing into force the individual application procedure is to create a mechanism that will decrease the number of applications to the ECtHR, rather than increasing the standards of human rights in Turkey. For this very reason, individual applications to the CC related to the rights stipulated in the Constitution but not included in the ECHR are not granted.

An analysis of the decisions given by the CC following individual applications reveals that it frequently refers to the case-law of the ECtHR. The CC, in its decisions, reiterates specifically the fundamental principles determined by the ECtHR on the freedom of belief, the freedom of expression, and the freedom of assembly in the framework of its pluralistic and liberal

38 **The 1982 Constitution**, Article 148/3, https://global.tbmm.gov.tr, accessed 11.06.2018.

39 Report of the Constitutional Commission, E: 2/656, 29.04.2010, p. 18, https://www.tbmm.gov.tr, accessed 11.06.2018.

democracy approach.[40] Furthermore, in the decisions on individual applications it has given, the CC established a case-law on how to implement Article 90 of the Constitution that regulates the conflict between the ECHR and the laws. According to the CC, in the event of conflict between the ECHR and a law, the ECHR must be applied within the framework of the ECtHR case law. The subject of the law that forms basis to the CC's case law is Article 187 of the Civil Code that obliges married women to use the surname of their husband, and the request of a woman who wanted to use only her maiden name was rejected by the inferior court on the basis of this article. As a result of this decision, an individual application was made to the CC, which first found the law in question to be in conflict with the ECHR and the decision of the ECtHR that embodied this Convention with its decisions:

"In many of its decisions, the ECtHR has considered the surname of a person within the scope of private life, and finds that forcing a woman to use her husband's surname is an interference into private life. According to the ECtHR, the decision of national authorities to not allow a woman to use her maiden name after marriage is in breach of Article 14 of the Convention that prohibits discrimination, in connection with Article 8 that stipulates privacy of life."[41]

Subsequently, the CC emphasized the obligation to comply with the Convention, in accordance with the Constitution, in the event of a conflict between the provisions of law and the international conventions on human rights, as follows:

"In accordance with paragraph five of Article 90 of the Constitution, conventions are a part of our legal system and have the feature of being applied as laws. In the same paragraph, it states in the event of a conflict between a law provision and a convention provision regarding fundamental rights and freedoms in practice, the convention provisions shall prevail. This rule is an implicit abolition rule, and overrules the applicability of the law provisions that are in conflict with the convention provisions with regards to fundamental rights and freedoms. First instance courts that resolve such

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40 Tuğba Arslan [GK], B. No: 2014/256, 25.06.2014, § 51, 56, 60; Abdullah Öcalan [GK], B. No: 2013/409, 25.06.2014, § 95, 99-101; Ali Rıza Özer ve diğerleri [GK], B. No: 2013/3924, 06.01.2015, § 115-119.

41 Sevim Akat Eşki, B. No: 2013/2187, 19.12.2013, § 42.

conflicts should take into consideration the provisions of the international convention that must be applied in accordance with Article 90 of the Constitution in terms of the conflict subject to the application by disregarding article ..... of the Law ..... that is in conflict with the ECHR and other international human rights conventions, in their decisions."[42]

The CC, in the same decision, underlined that the first instance court, when evaluating the state of conflict between the law and the ECHR, should take ECtHR case law into consideration. From this point forward, the CC stated that a court cannot make a decision based on Article 187 of the Civil Code, which has lost its applicability. According to the CC, since Article 187 of the Civil Code has lost its applicability, actions taken based on this article lack any legal basis, while according to the Constitution of 1982, any action restricting fundamental rights must absolutely have a legal basis. Accordingly, refusing to allow a woman to use her maiden name violates the Constitution.[43] The CC confirmed this case law in 2014 and 2015.[44]

## IV. ECTHR CASE LAW AND CONSTITUTIONAL REVIEW

Although the CC gives clear priority to the ECHR and to the case-law of the ECtHR in its decisions on individual applications, it takes a different approach in decisions in which it reviews the constitutionality of laws. Until today, implementations of laws considered by the ECtHR to be inconsistent with the Convention have been brought to the attention of the CC on many occasions, although in such applications, the CC has ignored the case-law of the ECtHR on the subject, and reviewed the constitutionality of the law considering only the text of the 1982 Constitution. An important example of this was experienced when the Court examined the constitutionality of the law prohibiting the opening of a case before the administrative courts with regards to the warning and reprimanding of civil servants. Previously, the ECtHR considered this to be a violation of the right to an effective remedy, established in Article 13 of the ECHR when an applicant was deprived of

42 Ibid, § 44-45.

43 Ibid, § 46-47.

44 Gülsim Genç, B. No: 2013/4439, 06.03.2014, § 39; Adalet Mehtap Buluryer, B. No: 2013/5447, 16.10.2014, § 47; Neşe Aslanbay Akbıyık, B. No: 2014/5836, 16.04.2015, § 44.

the right to open a case after receiving a warning.[45] However, the CC did not take this case-law into consideration, and decided that the related law was in conformity with the Constitution.[46] Another example was faced in an action brought to abolish the provision of law that obliges a woman to use her husband's surname. Despite the fact that the ECtHR considered this application as a breach of the prohibition of discrimination in connection with the right to private life,[47] the CC concluded that the law was constitutional.[48] More recently, the CC dismissed a case calling for the annulment of a law regulating the offense of insulting the president. What is interesting about this case is that although the case-law of the ECtHR has been mentioned extensively in the arguments put forward for the annulment of the law;[49] the CC dismissed the request without making any reference to the case-law of the ECtHR.[50] According to the case-law of the ECtHR, provisions in law protecting a president more than any other citizen are considered to be a violation of the freedom of expression.[51] In an action brought for the annulment of some of the articles of the Law on Meetings and Demonstrations, the CC did not consider the provision that entitled governors with unlimited discretion on determining the places at which meetings and demonstrations can be organized, unconstitutional. In this decision the CC held also that the provision that deems spontaneous demonstrations to be illegal does not violate the constitution.[52] Whereas, according to the ECtHR case law, measures that place extreme restrictions on the places where meetings and demonstrations are to be organized, and hence, prevent meetings and demonstrations from reaching the targeted mass,[53] and regulations that deem spontaneous meet-

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45 Karaçay v. Turkey, 6615/03, 27.03.2007, § 45.

46 E: 2002/169, K: 2007/88, 27.11.2007, **Official Gazette**, Issue No. 26792, 19.2.2008.

47 Ünal Tekeli v. Turkey, 29865/96, 16.11.2014, § 68.

48 E: 2009/85, K: 2011/49, 10.03.2011, **Official Gazette**, Issue No. 28091, 21.10.2011.

49 Otegi Mondragon v. Spain, 2034/07, 15.03.2011; Colomboni v. France, 51279/99, 25.06.2002; Pakdemirli v. Turkey, 35839/97, 22.2.2005; Artun and Güvener v. Turkey, 75510/01, 26.06.2007.

50 E: 2016/25, K: 2016/186, 14.12.2016, § 21, **Official Gazette**, Issue No. 29937, 3.1.2017.

51 ALTIPARMAK Kerem/AKDENİZ Yaman, "TCK 299: Olmayan Hükmün Gazabı mı?", **Bianet**, 03.10.2015, www.bianet.org, accessed 11.06.2018.

52 E: 2014/101, K: 2017/142, 28.09.2017, § 38, 90-93, **Official Gazette**, Issue No. 30283, 27.12.2017.

53 Lashmankin and Others v. Russia, 57818/09, 07.02.2017, § 426.

ings and demonstrations to be illegal that do not comply with the notification condition,[54] constitute violations of the Convention.

It is interesting that the CC gives priority to the case-law of the ECtHR in individual applications, but disregards the case-law of the ECtHR when reviewing the constitutionality of laws. The different conclusions of the CC in its constitutional review and individual application decisions regarding the regulation that obliges a woman to use her husband's surname is, in this sense, an interesting example. As expressed above, the CC concluded in its decision on the norm review that the relevant law did not breach the prohibition of discrimination, despite ECtHR case law saying otherwise, although later, in a review within the scope of the individual application, it determined that the law was in conflict with ECtHR case law, and found that it violated the Constitution. It may be argued that the different applications are based on the fact that the CC does not consider the Constitution and the ECHR to be at the same level, and that it attaches a greater importance to the Constitution in the last instance. In this respect, when reviewing the constitutionality of a law, the CC considers only the text of the Constitution, but accepts that it shall implement the ECHR in the event of a contradiction between the national laws and the ECHR when examining individual applications. Thus, the CC positions the ECHR in the hierarchy of norms above the law, but under the Constitution, and this approach leads to significant contradictions. First of all, the ECHR and the case-laws of the ECtHR are binding for all judicial bodies in Turkey, including the CC. That said, the fact that the case-law of the ECtHR is considered only in individual applications does not eliminate human rights violations, but rather only mitigates their consequences. This situation turns human rights violations into a structural problem, since the noncancellation of the law related to the violation of rights leads to new human rights violations. In this framework, for the realization of the aim to protect human rights in line with universal standards, and ensuring Turkey acts in line with its obligations arising from international law, the ECHR should be prioritized in any constitutional reviews carried out related to the compatibility of laws with fundamental rights.

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54 Bukta And Others v. Hungary, 25691/04, 17.7.2007, § 36-37; Sergey Kuznetsov v. Russia, 10877/04, 23.10.2008, § 43; Oya Ataman v. Turkey, 74552/01, 05.12.2006, § 38.

## V. THE IMPACT OF THE ECTHR CASE LAW ON THE DECISIONS OF THE COURT OF CASSATION AND COUNCIL OF STATE

Along with the case law of the CC; the case law of the Court of Cassation *(Yargıtay)*, which is the highest court of appeal in civil and criminal cases, as well as the case law of the Council of State *(Danıştay)*, which is the highest court of appeal for administrative cases, are also important in ensuring the alignment of the legal system of Turkey with the ECHR. The decisions of the CC have increased its capacity to effect the first instance courts decisions, especially after the acceptance of individual applications, although appeal reviews carried out by the Court of Cassation and the Council of State have a more direct effect on the first instance courts, involving a much more extensive legal review.

When the decisions of the Court of Cassation and Council of State are examined, an approach that observes the ECHR can be identified. Since its earliest decisions, the Council of State has accepted the ECHR above the laws and the Constitution.[55] It is observed in many different decisions of the Council of State, direct references have been made to many different articles of the Convention.[56] The Court of Cassation, however, takes a different attitude in this regard, and accepts the ECHR as equal to the law.[57] In the early 2000s, two important developments aimed at increasing the impact of the ECHR on the decisions of the appeal courts, as well as those of the courts of first instance. The first of those developments related to the amendments to the law made within the framework of the European Union harmonization efforts. Together with the law amendments made in 2003, the infringement decisions given by the ECtHR were accepted as grounds for the direct and unconditional retrial of civil litigations, criminal proceedings and administrative suits.[58] The second development was the constitutional amendment made in 2004, setting out the need to implement the ECHR in the event of a conflict between the ECHR and the national laws. Following this amend-

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55 Danıştay 5. Dairesi, E: 1986/1723, K: 1991/1993, 22.05.1991.

56 **BAŞLAR**, 2007, pp. 141-173.

57 **ŞAHBAZ**, 2004, pp 200-201.

58 Law no 4793, **Official Gazette**, Issue No: : 25014, 04.03.2013; Law no 4928, **Official Gazette**, Issue No: 25173, 19.07.2013.

ment, 9,000 judges and public prosecutors received vocational training on the ECHR.[59]

At this point, it is possible to give some positive examples. For example, the Council of State examined the forfeiture of allowances paid to a teacher who stopped working upon a call of the labor union to join a protest. The Council of State cancelled the penalty against the teacher, making reference to the infringement decisions given by the ECtHR on this subject.[60] Similarly, administrative courts also cancel disciplinary punishments given to labor union members for stoppages of work by making reference to the decisions the ECtHR.[61] When examining penalties given by the courts of first instance on the praising of crime and criminals, the Court of Cassation made a reference to the case-law of the ECtHR, and stated that the fact that a person, who is referred in an opinion, had committed an offense was not sufficient to penalize the person expressing that opinion. The Court of Cassation pointed out that in a criminal act, the expressions shall involve violence, armed resistance, rebellion or detestation.[62]

## VI. LEGAL REFORMS AND PROBLEMS IN IMPLEMENTATON

In parallel to the evolution in the decisions of the Court of Cassation and those of the Council of State in the framework of the alignment with the case-law of the ECtHR, it may be argued that a transformation occurred also in legal arrangements. For example, in the 1990s, a number of amendments were made to the expropriation law related to problems with delays and deficiencies in payments, as violations of property rights, considering the violation decisions of the ECtHR. Furthermore, the membership of the judge advocate members in the State Security Courts, who led to the violation of the right to fair trial, has been cancelled.[63] Moreover, alongside the

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59 **NALBANT**, 2015, p. 230.

60 Danıştay Dava Daireleri Genel Kurulu, E: 2009/1063, K: 2013/1998, 22.05.2013.

61 Ankara 17. İdare Mahkemesi, E: 2016/4141, K: 2017/1025, 12.04.2017; Malatya İdare Mahkemesi, E: 2017/472, K: 2017/919, 31.05.2017.

62 Yargıtay 8. Ceza Dairesi: E: 2013/1567, K: 2013/5627, 15.02.2013.

63 CENGİZ Serkan, "AİHM Kararlarının İç Hukuka Etkisi", **Türkiye Barolar Birliği Dergisi**, S. 79, 2008, p. 342; Law no 4650, **Official Gazette**, Issue No. 24393, 05.05.2001; Law no 4390, **Official Gazette**, Issue No. 23733, 22.06.1999.

intensification of efforts towards EU membership that started in the 2000s, some important amendments have been realized especially in the field of freedom of expression by considering the case-laws of the ECtHR. For example, with regards to crime of praising of crime and criminals mentioned above, it was stipulated that the given expression would be subject to penalty only in the event of a clear and imminent danger to public order.[64] Another important amendment with regards to the freedom of expression has been the concretization of the scope of crimes related the dissemination of terrorist organization propaganda, which was previously undetermined.[65] The removal of the statute of limitations in 2013 for offences involving torture is another important amendment realized within the content of these reforms.[66]

In order to reflect the decisions of the courts of first instance regarding the amendments made at a legal level, in 2014 the Council of Ministers adopted an action plan related to the prevention of ECHR violations.[67] It was mentioned in the action plan that a considerable number of pending adjudications and infringement decisions were existing against Turkey, and in this context, the main objectives were determined as being to improve this image which called into question the ideal of protecting fundamental rights, solving structural and practical problems, and to this end, continuing legal reform efforts resolutely and systematically.[68]

As emphasized in the action plan, when statistics from the 1959–2017 period are examined, it can be observed that Turkey is in the first rank of countries in terms of ECHR infringements among the countries that are party to the ECHR, with 2,988 infringement decisions given against Turkey during this period.[69] With regards to the statistics for 2017, Turkey ranks second after the Russian Federation with 99 violation decisions.[70] Analyzing the

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64 Law no 6459, **Official Gazette**, Issue No. 28633, 30.04.2013.

65 Ibid.

66 DEMİRKOL Selami/AKBULUT Emre, "Avrupa İnsan Hakları Mahkemesi Kararlarına Dayanılarak Türkiye'de Yapılan Anayasa ve Yasa Değişiklikleri", **Türkiye Adalet Akademisi**, 2015, pp. 45-46; Law no 6459, Official Gazette, Issue No. 28633, 30.04.2013.

67 Decision no 2014/5984, **Official Gazette**, Issue No. 28928, 01.03.2014.

68 The Action Plan on Prevention of ECHR Violations, 2014, p. 2, http://www.humanrights.justice.gov.tr, accessed 11.06.2018.

69 ECHR, Overview: 1959-2017, p. 9, https://www.echr.coe.int, accessed 11.06.2018.

70 The ECHR in Facts & Figures, 2017, p. 11, https://www.echr.coe.int, accessed 11.06.2018.

implementation processes behind these decisions, it can be observed that 61 percent of the decisions given against Turkey which are in the supervision process have been closed with a final decision, and that Turkey had fulfilled its responsibilities in this regard.[71] This may be considered a success when compared to the Russian Federation, which only fulfilled 25 percent of the decisions given against it,[72] which may be regarded as insufficient, considering the constitutional and legal reforms realized in Turkey that are explained above.

At this point, some major issues can be raised with regards to the alignment with the ECHR and the case-law of the ECtHR, especially in some critical fields. In the field of freedom of belief, the ECtHR concluded that Turkey had infringed the Convention in cases opened related to the compulsory religious instruction given in primary and secondary schools,[73] the religion box on identity cards,[74] and the lack of the right to conscientious objection.[75] Even though a significant period of time has elapsed since the related decisions were issued, Turkey has made no efforts to abolish such practices, in which represents a problem in regards to freedom of belief. The use of violence by the police against individuals exercising their right to freedom of assembly is also still present as a structural problem. The decisions given against Turkey related to such violations are being examined by the Committee of Ministers of the European Council within the framework of the advanced supervision procedure.[76]

Another field in which a lack of harmony can be observed with the case-law of the ECtHR is freedom of expression. In this respect, it can be argued that the manner of application is inconsistent with the case-law of the EC-

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71 Department for the Execution of Judgments of the European Court of Human Rights, Turkey - Country Factsheet, 12.04.2018, p. 1, https://www.echr.coe.int, accessed 11.06.2018.

72 Department for the Execution of Judgments of the European Court of Human Rights, Russian Federation - Country Factsheet, 12.04.2018, p. 1, https://www.echr.coe.int, accessed 11.06.2018.

73 Hasan Eylem Zengin and Others v. Turkey, 1448/04, 09.10.2007, § 75-76; Mansur Yalçın and Others v. Turkey, 21163/11, 16.09.2014, § 76.

74 Sinan Işık v. Turkey, 21924/05, 02.02.2010, § 40-44.

75 Ülke v. Turkey, 39437/98, 04.01.2006; Erçep v. Turkey, 43964/04, 22.11.2011; Savda v. Turkey, 42730/05, 12.06.2012.

76 Ministers' Deputies, 1310th meeting, 15 March 2018 (DH), H46-21 Oya Ataman Group v. Turkey, https://www.echr.coe.int, accessed 11.06.2018.

tHR in especially two types of crime. The first of these is the offense of insulting the president. The penalties given for such crimes have increased considerably in recent years. While 133 cases were opened and 28 sentences of condemnation were handed down for this crime in 2010, 4,187 such cases were opened in 2016 and 2,285 sentences of condemnations were made, with an announcement of the verdict being deferred in 890 of those cases.[77] In a recent example, a member of parliament was sentenced to 14 months in prison for using the expression "that would-be sultan in the palace" and his deputyship was terminated since his sentence exceeded 1 year.[78] The fact that the offense of insulting the president is used in this manner, and the frequency is against the case-law of the ECtHR mentioned above, it is apparent that the regulation providing special protection to presidents is incompatible with freedom of expression. The ECtHR confirmed this case-law once again in a very recent decision. When a photo of the king of Spain was burned during a demonstration, the ECtHR considered this to be a symbolic action in the context of political criticism, and concluded that freedom of expression had been violated, taking into consideration the severity of the prison sentence of 15 months that was handed down.[79]

Another problem faced in the field of the freedom of expression relates to the way the crime of disseminating terrorist organization propaganda is enforced by the courts of first instance. As mentioned above, together with the amendment made in 2013 as part of the efforts to align with the case-laws of the ECtHR, the scope of the crime of disseminating terrorist organization propaganda was clarified. The amendment sought to penalize statements that are deemed to legitimize, praise or encourage the acts of terrorist organizations involving compulsion, violence or threats.[80] Thus, praising violence has become the basic element of the crime in accordance with the case-laws of the ECtHR. That said, despite this amendment, it has been observed that criticisms of military operations realized aimed at suppress-

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77 AKDENİZ Yaman/ALTIPARMAK **Kerem, Turkey: freedom of expression in jeopardy**, 2018, p. 7, www.englishpen.org, accessed 11.06.2018.

78 "HDP'li Ahmet Yıldırım ve İbrahim Ayhan'ın Vekillikleri Düşürüldü", **Bianet**, 27.02.2018, www.bianet.org, accessed 11.06.2018.

79 Stern Taulats and Roura Capellera v. Spain, 51168/15, 13.03.2018, § 36-42.

80 Law on Fight against Terrorism, Law no 3713, Article 7/2, Official Gazette, Issue No. 20843, 12/4/1991.

ing the violence in the South Eastern region of Turkey have been deemed to be in contravention of the laws against the dissemination of terrorist organization propaganda. In the related decisions, statements that contained no expressions praising, or deemed to legitimize, the violent actions of the terrorist organization have been indirectly qualified as terrorist organization propaganda, on the account of the fact that they contained serious criticisms of security forces[81] and did not include criticisms of the terrorist organization against which the security forces were struggling.[82] However, as mentioned in the recent Dmitriyevsky v. Russia decision of the ECtHR, "it is in the nature of political speech to be controversial and often virulent, and the fact that statements contain hard-hitting criticisms of official policy and communicate a one-sided view of the origin of, and responsibility for, the situation addressed by them is insufficient, in itself, to justify an interference with freedom of expression."[83]

## CONCLUSION

The effect of the ECHR on the legal order of Turkey has a long historical background, and the breaking point in terms of this effect can be said to be the recognition of the jurisdiction of the ECtHR. The violations noted by the ECtHR since the 1990s have played an important role in the evolution of the legal order of Turkey in a more liberal direction. The second breaking point was the constitutional amendment of 2004 and that stipulated that the ECHR would prevail in the event of conflict between the ECHR and the national laws. Furthermore, in the second half of the 1990s, important constitutional and legal amendments were made related to some fundamental issues that caused the ECtHR to render violation decisions against Turkey.

The third development, related to the incremental alignment of ECtHR case law and Turkish law, was the entry into force of procedures of individual application to the CC in 2012. The CC, in decisions rendered within the scope of individual application procedures, refers to the ECtHR case law intensely and deterministically. The CC also has formed an established case law on the direct application of ECtHR case law in the event of conflict be-

81 Bakırköy 2. Ağır Ceza Mahkemesi, K: 2017/150, 26.04.2017.

82 İstanbul 32. Ağır Ceza Mahkemesi, K: 2018/50, 23.02.2018.

83 Dmitriyevskiy v. Russia, 42168/06, 03.10.2017, § 106.

tween ECtHR case law and the national laws. Taking into consideration the article of the Constitution that states clearly that the decisions of the CC are binding on the legislative, executive, judicial organs, administrative authorities, individuals and legal persons, it can be said that this established case law of the CC is of great importance. That said, despite the entry into force of the individual application procedure in 2012 and the adoption of the action plan on the prevention of ECHR violations by the Council of Ministers in 2014, it cannot be said that complete harmony with the ECtHR case laws has yet been achieved in practice.

In order to strengthen the alignment with the case-law of the ECtHR, it may be useful for the CC not only to consider the text of the Constitution, but also to directly and comprehensively act in line with the case-law of the ECtHR, as it does in decisions given in individual applications, especially in the examinations made in the context of abstract and concrete norm reviews. Thus, it would be possible to eliminate the reasons for the human rights violations rather than compensating for the consequences of human rights violations. On the other hand, putting into practice the measures and reforms indicated in the action plan accepted in 2014 is crucial in alignment of the decisions of the appellate courts and those of the courts of first instance with the case-law of the ECtHR. The reforms to be realized by the political power could certainly play a determining role in ensuring that the administration and judicial institutions accept the ECHR and the case-law of the ECtHR as the principal elements of the Turkish legal order.

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