

This project is co-funded by the European Union

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S T R E N G T H E N I N G C I V I L S O C I E T Y

D E V E L O P M E N T A N D C I V I L S O C I E T Y- P U B L I C SECTOR DIALOGUE IN TURKEY PROJECT

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

Authors

Gökçeçiçek Ayata, Ulaş Karan

Prepared By

 Third Sector Foundation of Turkey

**Türkiye Üçüncü Sektör Vakfı** 

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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**

**TUSEV Publications**, October 2015

**No** 66

**ISBN** 978-605-83950-2-2

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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

This report is prepared by TUSEV, in partnership with ECNL, through the Civic Space Initiative implemented by the International Center for Not-for-Profit Law, ARTICLE 19, CIVICUS: World Alliance for Citizen Participation, and the World Movement for Democracy. The English translation of this report is financed by the Government of Sweden. The Government of Sweden does not necessarily share the opinions here within expressed. TUSEV bears the sole responsibility for the content of this publication.



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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

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**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.

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**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*

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**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 issues3 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.

**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.

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

**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.

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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

**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.

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

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

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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

**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.

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.”

**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)

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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

**11** Akbulut, p. 398.

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.

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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

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

provisions.13According 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

**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 Hu man 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.

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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

**17** *Constitution of the Republic of Turkey, Articles with Justifications*, https://yenianayasa. tbmm.gov.tr/docs/gerekceli\_1982\_anayasasi.pdf (accessed: 15.08.2013)

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.

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

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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.

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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

**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.

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

**27** Harris, O’Boyle, Warbrick, p. 477.

**28** Harris, O’Boyle, Warbrick, p. 444.

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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.

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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.

**33** Yazıcı, p. 104.

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.

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**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

**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.

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,

**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.

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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

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

**44** Harris, O’Boyle, Warbrick, p. 455.

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 figures46 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.

**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.

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**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

**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)

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

**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.

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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

**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.

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

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

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

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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.

**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.

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

**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.

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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

**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.

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.

**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.

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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

**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.

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

**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.

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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,

**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.

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

**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.

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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

**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.

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

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

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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

**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.

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

**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.

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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

**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.

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

**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.

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**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

**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).

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;

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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

**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)

rights and combating racial discrimination.101 The pressures such as the arrest, detention102 and intimidation103of 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

**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.

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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

**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.

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

**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.

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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

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

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.

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**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

**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.

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

**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.

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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

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

“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 application127 or never respond to the

**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.

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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

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

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

**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.

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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.

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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

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*

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

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

*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.

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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.

**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.

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

**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.

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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

**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.

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

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

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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

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

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.

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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.

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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

**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.

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’

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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

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

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

**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

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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

**149** Rec(2007)14, para 21.

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

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

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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

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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.

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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

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

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.

**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 Macedo nia*, Appl. No. 74651/01, 15.01.2009.

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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

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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.

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

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.

**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

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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

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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.

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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

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

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.

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**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

**165** Rec(2007)14, para 42.

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

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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

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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

**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.

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

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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

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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

**169** Rec(2007)14, para 45.

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

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

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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

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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.

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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

**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.

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.

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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.

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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

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

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

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

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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

**175** Ministry of Interior Department of Associations, http://derbis.dernekler.gov.tr/SSL/istatis tik/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/webicer ik195.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/istatis tik/IzinAlmadanYardimToplamaHakkinaSahipDernekler.aspx, (accessed: 23.01.2014).

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

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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’

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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

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

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

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

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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

**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).

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

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

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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

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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

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

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

**184** Rec(2007)14, para 14.

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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).

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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

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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.

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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

**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).

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 2013194, 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

**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 (an nexed), 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).

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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 YTL196 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.

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

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

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