

## FREEDOM OF ASSOCIATION IN TURKEY: QUO VADIS?

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**Abstract:** *The freedom of association, as guaranteed under both the European Convention on Human Rights and the Constitution of the Republic of Turkey, is one of the most important freedoms which enables individuals to develop their moral existence, to come together around a goal and spread their ideas. A regulation causing injury to the freedom of association in Turkey entered into force by virtue of the “Law on the Prevention of Financing Proliferation of Weapons of Mass Destruction” which was hastily published in the Official Gazette on the last day of 2020, as to hide it from the public. Under this regulation, it has become possible to dismiss organs of associations which are under prosecution, to assign external guardians to the administration of the association and even to halt the activities of an association upon a discretionary decision from the Ministry of Internal Affairs. This paper aims to examine this regulation which, on the one hand, constitutes a violation of the presumption of innocence, a general principle of law, and which, on the other hand, enables the halting of the activities of associations by virtue of an arbitrary decision from the political power based on the justification that such activities constitute an “act of terror”. This paper also aims to expose the dangerous consequences that this regulation entails with regards to the rule of law.*

**Keywords:** *Freedom of association, presumption of innocence, authoritarianism, decline of democracy, acts of terror*

### 1. INTRODUCTION

In recent years, one of the developments that has echoed loudly in Turkish society and politics is the entry into force of the Law on the Prevention of Financing of Proliferation of Weapons of Mass Destruction (Law No. 7262). This is because this legislation has brought amendments to the Turkish legal system which some may consider grave. As its name dictates and as expressed in its first article, the purpose of the Law, which entered into force after being published in the Official Gazette of 31.12.2020, is “to regulate the procedures and principles regarding the implementation of sanction decisions of the United Nations Security Council for the prevention of financing of proliferation of weapons of mass destruction.” In essence, while in terms of the Turkish legal system this legislation aims to adopt, as domestic law norms, those principles formulated as a result of the United Nations Security Council resolutions on the prevention of financing of weapons of mass destruction, it also includes a regulation separate from the declared purpose. This, flares discussions on the axis of “those freedoms which were obtained in Turkey only with great effort, where are they going?” As commonly practiced nowadays – especially with the transition to a “Turkish type” presidential system in 2007 (after which the parliament became dysfunctional) -by the adoption of an “omnibus law” (which corresponds to artificially bringing together multiple non-related regulations under a single heading despite having serious drawbacks in terms of legal technique), several articles seriously undermining the freedom of association have suddenly entered into the Turkish legal system. During the

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enactment process, when the three opposition parties in Parliament had already placed their objection on the ground that it aimed to silence civil society, over 600 non-governmental organizations, including Amnesty International, made a statement expressing that this legislation was contrary to human rights conventions and vested rights. Finally on July 6, 2021, European Commission for Democracy Through Law (Venice Commission) adopted a comprehensive report on the compatibility with international human rights standards of Law No. 7262 and drew attention to the violations of human rights in this law (Opinion No.1028/2021).<sup>1</sup>

In this paper, before elaborating on the restrictive provisions of the Law No. 7262 (3) and criticisms targeting these provisions (4), we shall briefly deal with associations within the context of fundamental rights and freedoms (2).

## 2. FREEDOM OF ASSOCIATION AND ITS LIMITATIONS

Associations constitute one of the most important pillars of non-governmental organizations<sup>2</sup> because they are organizations independent from the state; consequently, they may serve purposes such as protecting the interests of the people who come together therein, as well as, due to constituting independent centers of power, balancing and limiting political power and allowing the system to renew itself.<sup>3</sup> The freedom of association even goes beyond the freedom of expression,<sup>4</sup> and it enables people to come together in order to organize around a common idea.<sup>5</sup> In this way, it ensures that the ideas and opinions that people may have difficulty in conveying on an individual basis to others and institutions within society are in fact easily communicated, and thus, it becomes easier to defend and implement those ideas.<sup>6</sup>

The freedom of association refers to the freedoms of persons to form an association with others,<sup>7</sup> to become a member of an existing association, and to not be compelled to become a member of any association.<sup>8</sup> As indispensable elements of societies, associations must be easily formed,<sup>9</sup> and their dissolution must be possible only if the strict conditions set forth under ECHR and Article 33 of the Turkish Constitution exist.<sup>10</sup>

<sup>1</sup> EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW. Opinion on the compatibility with international human rights standard of law No. 7262 on the prevention of financing of the proliferation of weapons of mass destruction. In: *Council of Europe* [online]. 6. 7. 2021 [2022-06-01]. Available at: <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)023cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)023cor-e)>.

<sup>2</sup> DURAL, M., ÖĞÜZ, T. *Türk Özel Hukuku C. II Kişiler Hukuku*. İstanbul: Filiz, 2019, p. 317.

<sup>3</sup> KARINCA, E. *Dernek Hak ve Özgürlüğü*. Ankara: Adil, 1997, p. 20.

<sup>4</sup> The freedom of association is initially treated as derivative to freedom of expression: EMERSON, T. Freedom of Association and Freedom of Expression. *Yale Law Journal*. 1964, Vol. 74, No.1, p. 2 ff.

<sup>5</sup> *Ibid.*

<sup>6</sup> GUTMANN, A. Freedom of Association, An Introductory Essay. *Freedom of Association edited by Amy Gutmann*. Princeton: Princeton University Press, 1998, pp. 3–4.

<sup>7</sup> DAS, A. Chilling Social Media – Warrantless Border Searches of Social Media Accounts Infringe Upon The Freedom Of Association And The Freedom to be Anonymous Under The First Amendment. *Brooklyn Law Review*. 2019, Vol. 84, No. 4, p. 1287 ff.

<sup>8</sup> METİN, Y., ASLAN, G. Avrupa İnsan Hakları Sözleşmesinde Dernek Özgürlüğü. *Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi*. 2007, Vol. 12, No. 3, p. 275; ÖZSUNAY, E. *Medeni Hukukumuzda Tüzel Kişiler*. İstanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1982, p. 231–232.

<sup>9</sup> ÖZSUNAY, E. *Medeni Hukukumuzda Tüzel Kişiler*, p. 232.

The scope of the freedom of association is much wider than the freedom to form and become a member of an association.<sup>11</sup> This freedom is guaranteed by the requirement to accept free will in the establishment of the “association charter” and the “organs of the association,” which are considered to be the founding elements of an association’s legal personality.<sup>12</sup>

According to paragraph 3 of Article 33 of the Constitution, the freedom of association can be restricted “*only on the grounds of national security, public order, prevention of crime, general health and public morals and protection of the freedom of others and by law.*” The essence of the right to form an association cannot be violated; this right can only be limited by law and according to those reasons stipulated under Art. 33 of the Constitution.<sup>13</sup> Moreover, the dissolution of an association or temporary suspension of its activities is only possible in cases stipulated by law and by the decision of a judge. However, in cases where it is required (due to national security or public order or for the prevention of a crime or continuation of a crime or for an arrest and if delay would prove prejudicial), an authority may be authorized by law to ban the association from activity. Even in this case, the decision of the relevant authority must be submitted to court approval within twenty-four hours, and the judge must pronounce the decision within forty-eight hours. Otherwise, it is regulated that this administrative decision will automatically be abolished (Article 33/5 of the Constitution).

Similarly, Article 11 of the ECHR protects associations from unjustified intervention by the State that prevent the association from carrying out its activities, which is mostly manifested in the refusal of registration or the dissolution of the association, but which can also be carried out in different ways, for example, through inspections or restrictions on funding. An interference with the right to freedom of association is justified if it complies with the conditions set out in Article 11/2. According to this,

- 1) Intervention must be based on a clear and predictable legal basis;<sup>14</sup>
- 2) Intervention must serve one of the legitimate aims of national security, public safety, maintaining peace and order, preventing crime, protecting health and morals and protecting the rights and freedoms of others;<sup>15</sup>

<sup>10</sup> Concerning the fact that freedom of association is essential for the requirements of a pluralist democracy and that restrictions on this freedom can only be accepted for compelling reasons and should be interpreted narrowly, see *Altınkaynak and Others v. Turkey*. Application No. 12541/06. EctHR. 15 January 2019, paras 31–32.

<sup>11</sup> AYDIN, A. R. *Dernek Kurma Özgürlüğü ve Anayasa*. *Terazi Hukuk Dergisi*. 2007, Vol. 2, No. 5, p. 160.

<sup>12</sup> SAKA, Z. *Dernekler Hukuku*. İstanbul: Vedat Kitapçılık, 2010, p. 15; AYDIN, A. R. *Dernek Kurma Özgürlüğü ve Anayasa*, p. 160. To benefit from the freedom of association, to come together must be for “the purpose of protecting common interests and pursuing common goals” and must be a consequence of “freedom of choice” (*Young, James and Webster v. The United Kingdom*. Application Nos. 7601/76; 7806/77. EctHR. 18 October 1982). Professional associations established by state authorities, whose purpose and operation are in accordance with the principles of public law, do not have a voluntary nature. (*Sigurður A. Sigurjónsson v. Iceland*. Application No. 16130/90. EctHR. 30 June 1993).

<sup>13</sup> AYDIN, A. R. *Dernek Kurma Özgürlüğü ve Anayasa*, p. 159.

<sup>14</sup> Although it is mentioned in ECHR Art. 11/2 that the intervention must be foreseen by law, it is accepted that the legal regulation in question should be clear and foreseeable by the case-law of the EctHR. See, e.g. *Yefimov and Youth Human Rights Group v. Russia*. Application Nos. 12385/15 and 51619/15. EctHR. 7 December 2021.

<sup>15</sup> According to the EctHR, the dissolution of an association for supporting the right to education in a mother tongue other than the national language is contrary to Article 11. The Court held that the aim of promoting the culture of citizens with a mother tongue other than Turkish did not, in itself, constitute a breach of national security and a threat to public order. See *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*. Application No. 20641/05. EctHR. 25 September 2012.

- 3) Intervention must be a necessary limitation in a democratic society. While evaluating this last condition, the ECtHR checks whether there is a compelling social need, the proportionality of the measure with the aim pursued and whether appropriate and sufficient justification has been presented.<sup>16</sup>

### 3. A CLEAR THREAT TO THE FREEDOM OF ASSOCIATION IN TURKEY: THE LAW ON THE PREVENTION OF FINANCING OF PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

An article was added to the Law on Associations by virtue of Article 15 of the Law No. 7262, even though this provision had no relation to the aims of the latter legislation. According to this regulation, inserted into the Law on Associations via Article 30/A, in the case that prosecution is initiated within the scope of the activities of an association against those who work in the organs of the association (other than the general assembly or other related personal), these individuals or the organs where they work may be dismissed by the Minister of Internal Affairs. The crimes that would cause the said individuals to be dismissed by the Minister of Internal Affairs are defined as those crimes that appear within the scope of the Law on the Prevention of the Financing of Terrorism and the manufacture and trade of narcotic and stimulant substances and the laundering of assets arising from crime, as foreseen under the Turkish Penal Code. Concerning dismissal by the Minister of Internal Affairs of those individuals working in organs other than the general assembly of the association or other related personal, the existence of a finalized court judgement convicting these individuals for the commission of one of the crimes stipulated in the article is not deemed necessary; the initiation of prosecution is by itself seen sufficient in this regard.

On the other hand, according to the regulation, if the dismissal of these persons is not sufficient and delay would prove prejudicial, the Minister of Internal Affairs may temporarily suspend the activities of the association. Upon deciding to suspend the activities of

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<sup>16</sup> In the Case of *IPSD and others v. Turkey*. Application No. 35832/97. EctHR. 25 October 2005, the Association for Combating Unemployment and Expensiveness (IPSD) was dissolved even before it started its activities, on the grounds that the expressions in the statute were humiliating to the Turkish State and contrary to the principle of the indivisible integrity of the state and the nation. The Court found that in the statute of the IPSD, the economic and social situation of the country was analyzed and in this respect the policy of the government was criticized. The ECtHR has accepted that the principles defended by the IPSD are not contrary to the basic principles of democracy as such. According to the Court, there was no expression in the Statute that encouraged the use of violence or that resembled vengeful speech, although this is the main factor to be taken into account. As a result, since the IPSD does not have a political project that would endanger the democratic regime in the country, and it neither encourages nor justifies the use of force for political purposes, it cannot be reasonably considered that the dissolution of the association responds to a “pressing social need” and is “necessary in a democratic society”. There has therefore been a violation of Article 11 of the ECHR. Similarly, in the case of *Tunceli Kültür ve Dayanışma Derneği v. Turkey*. Application No. 61353/00. EctHR. 10 October 2006, a criminal case was brought against the chairman of the association and a member of the board of directors for the crime of making or allowing political statements despite the association's social purpose. The court hearing the case not only convicted the administrators, but also dissolved the association in accordance with Articles 5 and 76 of the former Law on Associations, although it was not the subject of the criminal case. In its decision on the subject, the ECtHR stated that the dissolution of the association was extremely severe even though it was not the subject of a criminal case, the measure was not based on a compulsory social need and therefore was not necessary in a democratic society, and ruled that Article 11 had been violated.

the association, the Minister of Internal Affairs will immediately apply to court, and the court will give its decision within forty-eight hours. The regulation also foresees that the relevant parties can always request the removal of the temporary suspension from activity decision and that the court will decide on such an application without delay.

This regulation, which brings a radical change to the Law on Associations, also stipulates that the governor (of the province where the headquarters of the association is located) may request the appointment of a trustee from the peace court (in the place where the headquarters of the association is located) in order to replace the organs and members of these bodies dismissed by the Minister of Internal Affairs. Within a week, the court will appoint trustees, primarily from the members of the association, as many as the number of those individuals dismissed. This decision shall also specify the duties and powers of the trustee and the wage to be provided to the trustee by the association. The duty of the trustee will continue until the conviction rendered as a result of the lawsuit is finalized. New trustees can also be appointed in the same manner in order to replace trustees who may have vacated for various reasons.

#### 4. CRITICISM OF THE LAW ON THE PREVENTION OF FINANCING OF PROLIFERATION OF WEAPONS OF MASS DESTRUCTION FROM THE PERSPECTIVE OF FREEDOM OF ASSOCIATION IN TURKEY

##### 4.1 IN TERMS OF THE PROCEDURE AND PROCESS OF ENACTMENT

The first criticism that can be brought against the legislation is related to the procedure and process of enactment. These regulations, which significantly limit the freedom of association, are incompatible with the name and purpose of the law in which they are included. In Turkey, especially in the practice of the Justice and Development Party governments, those regulations that the government wishes to enact are hidden under a heading to which the public would not object and that could create a consensus within society. By means of “omnibus laws,” which point to a systematic error in terms of legal technique, not only are many new rules introduced that have no relation with the purpose of that specific law,<sup>17</sup> but also substantial amendments are adopted to existing laws which are still in force.<sup>18</sup> The adoption of Law No. 6552 of 10.9.2014, again during the JDP government, which brought 76 modifications to unrelated legislation, clearly reveals the extent of the practice of omnibus laws in the context of Turkey.<sup>19</sup>

In the Law No. 7262, apart from the regulations concerning the appointment of trustees to associations, there are also many regulations that do not overlap with the purpose of the law, such as freezing the assets of individuals and making it more difficult for associations to collect aid.

<sup>17</sup> HAZAMA, Y., İBA, Ş. Legislative agenda setting by a delegative democracy: Omnibus bills in the Turkish parliamentary system. *Turkish Studies*. 2017, Vol. 18, No. 2 p. 313 ff.

<sup>18</sup> KANADOĞLU, O. K., DUYGUN, A. M. *Anayasa Hukukunun Genel Esasları*. İstanbul: On İki Levha, 2020, p. 372; TARMİZİ, U. Legal Simplification of Land Regulation Associated with Increased Investment as the Basis for Conceptualization of the Omnibus Law. *Journal of Advanced Research in Law and Economics*. 2020, Vol. 11, No. 1, p. 203, 206.

<sup>19</sup> KANADOĞLU, O. K., DUYGUN, A. M. *Anayasa Hukukunun Genel Esasları*, p. 373.

On the other hand, the negotiation phase, which should be complied with during the enactment process, has also been ignored. Although it is a requirement for democratic administrations, no opinions were sought from universities, from non-governmental organizations and, more importantly, from the associations that are in fact the subject of the regulation. However, as stated in the Venice Commission's opinion (No. 1028/2021) on Law No. 7262 “Associations should be consulted in the process of introducing and implementing any regulations or practices that concern their operations” (§ 80). Also, regulations on associations were practically hidden in a law that needed to be enacted promptly; the principles of transparency and publicity, which are necessary in terms of law-making processes, were not observed.<sup>20</sup>

When the omnibus bill was brought to the Turkish Grand National Assembly in December 2020, the JDP government aimed to kill two birds with one stone. The government's proposal, on one hand, put serious pressure on opposition parties due to it being based on the threat that Turkey would be put on the grey list if the principles imposed by the FATF (Financial Action Task Force) established within the Organisation for Economic Co-operation and Development (OECD) were not enacted within a month; on the other hand, by including regulations which were not related to these principles and which envisaged amendments to seven different laws (including the Law on Associations), the proposal was used as a tool to serve the reinforcement of authoritarian tendencies.<sup>21</sup>

#### 4.2 IN TERMS OF RESTRICTING THE FREEDOM OF ASSOCIATION

Associations have been accepted as indispensable elements of a democratic society, both under the ECHR and the Turkish Constitution and therefore they are regulated from a libertarian approach. As can be understood from the jurisprudence of the ECtHR, in terms of organization of an association, freedom is accepted as the general rule while

<sup>20</sup> The reason for the hasty enactment of the Law No. 7262 can be explained as follows: Turkey is one of the 39 members of the FATF (Financial Action Task Force) organization established within the OECD. FATF aims to establish international standards in the fight against “laundering of assets resulting from crime, financing of terrorism and the financing of proliferation of weapons of mass destruction” and to take legal and institutional measures in line with these standards and to implement these measures in an operationally effective manner. Although the State of the Republic of Turkey has put many regulations into effect in line with the principles set forth by FATF, it can be observed that Turkey has not taken the necessary steps, especially with regards to recommendations no. 7 and 12. For this reason, FATF stated in December 2019 that Turkey entered the monitoring process for the duration of one year and that if necessary arrangements were not made by the end of 2020, Turkey would be put on the “grey list” which includes countries such as Pakistan, Yemen, and Mongolia. See Turkey warned over lapses in money laundering and terror financing. In: *Financial Times* [online]. [2022-06-01]. Available at: <<https://www.ft.com/content/620570ac-1f16-11ea-b8a1-584213ee7b2b>>.

The JDP government, which has been ruling Turkey for 19 years, hastily passed the bill on the Prevention of Financing of Proliferation of Weapons of Mass Destruction, in line with recommendation 7, in order to prevent the Republic of Turkey from being declared one of the countries that is not financially reliable and not recommended for investment by the FATF. The legislation was brought to the Turkish Grand National Assembly one month before the deadline for this issue.

<sup>21</sup> Varol counts this situation as one of the primary mechanisms of stealth authoritarianism. According to him, the new generation of authoritarians, cloaking repressive measures under the mask of law, adopt surveillance laws to combat organized crime and terrorism with the backing of international organizations, but use those laws to blackmail or discredit political opponents. See VAROL, O. Stealth Authoritarianism. *Iowa Law Review*. 2015, Vol. 100, No. 4, p. 1673, 1679.



restrictions are an exception. According to the ECtHR jurisprudence, freedom of association can only be restricted based on a compulsory social need, and the dissolution of the association can only be considered if it is necessary in a democratic society.<sup>22</sup> One of the most important criticisms of the Venice Commission about Law No. 7262 is towards this point. Accordingly, the dissolution of associations or the suspension of their activities may only be possible in exceptional cases and as *ultimum remedium* (§ 90). Indeed, it is seen that the amendments brought to the Law on Associations by virtue of Law No. 7262 seriously restrict the freedom of association:

#### 4.2.1 Individuals are disproportionately deprived of the right to be the director and auditor of an association

A new clause was added to Article 3 of the Law on Associations via the Omnibus Law. With this regulation, it is foreseen that those convicted for crimes within the scope of the Law on the Prevention of the Financing of Terrorism and the manufacture and trade of narcotic and stimulant substances and the laundering of assets arising from crime, as foreseen under the Turkish Penal Code, could not work in organs of associations except that of the general assembly. Additionally, the duty of individuals who are convicted for these crimes after having been elected to such organs will terminate. This is reasonable since it is based on the existence of a criminal conviction.

However, the new regulation also stipulates that such individuals will not be able to work in the organs of an association (other than the general assembly) even if the period specified in Article 53 of the Turkish Penal Code has passed<sup>23</sup> or the punishment has been pardoned.

The regulation introduced by the omnibus law clearly violates the freedom of association as it deprives the person of their right to be director and auditor of an association even though the execution of their sentence has ended; the scope of freedom of association includes the formation of association organs by the will of their members.

<sup>22</sup> In the events that are the subject of the Adana TAYAD v. Turkey judgment, the Mutual Aid and Solidarity with the Families of Prisoners and Convicts Association in Adana was dissolved by the Civil Court of First Instance on the grounds that certain members of the board of directors were involved in criminal activities such as making propaganda for the PKK terrorist organization and hanging posters of members of this organization although the verdicts against these individuals were not finalized. The ECtHR, on the other hand, stated that any interference with the freedom of association should be based on a “compelling social need” and that it should be examined whether the dissolution of the association was necessary in a democratic society, and that some events on which the national court based its decision, cannot, on their own, constitute acts promoting terrorism.

According to the ECtHR, even assuming that the acts imputed to the association were proven, the domestic courts were not inclined to take other less serious measures, such as judicial fines or suspension of the association's activities for a certain period of time; moreover, the Turkish government had failed to sufficiently demonstrate that the decision to dissolve the association, a measure violating the essence of freedom of association, was the only viable option to achieve its objectives. For these reasons, the ECtHR decided that the freedom of association, which is protected under Article 11 of the ECHR, had been violated. See *Adana TAYAD v. Turkey*. Application No. 59835/10. EctHR. 21 July 2020. Similarly, see *Yefimov And Youth Human Rights Group v. Russia*. Application Nos. 12385/15 and 51619/15. EctHR. 7 December 2021.

<sup>23</sup> The period until the completion of the execution of the prison sentence to which the person was convicted for the crime committed (Turkish Penal Code Art. 53/2).

This restriction on the freedom of association, on the other hand, is far from serving the purpose of preventing those prohibited activities determined by the United Nations Security Council, which is the aim of Law No. 7262 on the Prevention of Financing of Proliferation of Weapons of Mass Destruction. The said law aims to prevent fundraising for individuals or organizations related with those prohibited activities.<sup>24</sup> If the association engages in unlawful activities, the association should be dissolved by a court judgment (Turkish Civil Code Art. 89). Apart from this sanction, there is no need to restrict the freedom of association of the above-mentioned individuals. It is obvious that this restriction on the freedom of association is disproportionate in terms of the desired result and violates the essence of the right to form an association.

#### 4.2.2 The dismissal of the directors and auditors of associations and the appointment of trustees in their place, has been left to the discretion of the Minister of Internal Affairs

Article 30/A was added to the Law on Associations by virtue of the Law on the Prevention of Financing of the Proliferation of Weapons of Mass Destruction, introducing important changes to the said legislation. According to the first paragraph of the aforementioned article, *“In case of commencing criminal prosecution of those who work in the organs other than the general assembly of the association or other related personnel due to the crimes found under the Law on the Prevention of the Financing of Terrorism and the crime of manufacture and trade of narcotics or stimulants or laundering assets arising from crime, as foreseen under the Turkish Criminal Code, these persons or the organs where these persons work may be suspended by the Minister of Internal Affairs as a temporary measure.”* Again, according to the last paragraph of the same article, *“Concerning appointments in place of the organs and members of these organs which are temporarily suspended from duty by virtue of the first paragraph and sub paragraph (f) of the first paragraph of Article 32, Article 27 and the relevant provisions of the Turkish Civil Code are to be applied.”* Article 27 of the Law on Associations foresees that the governor is to request the appointment of a trustee from the peace court in order to replace those organs that have been dismissed and that the duty of the trustee is to continue until the court reaches a final judgment.

The legal issue here concerns the fact that upon initiation of criminal prosecution for certain crimes of persons working in the organs of the association other than the general assembly, these persons may be dismissed from their duties solely based on the discretion of the Minister of Internal Affairs. Besides the violation of the presumption of in-

<sup>24</sup> According to Article 2/1 of the Law No. 7262, depending on the scope of the United Nations Security Council resolutions:

- a) Collecting for or providing all kinds of funds to persons or organizations involved in these decisions, or persons or organizations directly or indirectly controlled by them, or persons or organizations acting in their name or on their behalf, or for their benefit, or entering into their business partnership in Turkey or entering into other business relationships,
- b) Collecting of or providing all kinds of funds to organizations related to nuclear, ballistic missile programs or other activities prohibited in these decisions, or to persons or organizations directly or indirectly controlled by them, or to persons or organizations acting in their name or on their behalf, or for their benefit, is forbidden.



nocence<sup>25</sup> and even though there is no finalized court judgment against a person, not only is that person penalized but also the association where that person works is penalized since its activities are hindered. The initiation of prosecution of an individual who works within the organ of an association entails a disproportionate sanction in the form of appointment of a replacement trustee by the Ministry of Internal Affairs, consequently liquidating the organs of the association which were instituted by the latter's own free will.

The dismissal of directors and auditors of associations against whom prosecution<sup>26</sup> has been initiated and the appointment of trustees in their place is left to the discretion of the Minister of Internal Affairs. This may lead to arbitrary execution by the Minister of Internal Affairs. By use of the Ministry of Internal Affairs, political authority will be able to exercise this competence against those associations which act in opposition to its policies; yet this competence will not be used against those associations which are seen close to it.<sup>27</sup> In Turkey, where judicial process takes an extensive amount of time,<sup>28</sup> the dismissal of directors and auditors of associations in lack of a finalized court judgment and the appointment of trustees replacing them with an arbitrary decision of the Minister of Internal Affairs may enable state tutelage over associations that constitute the most important pillar of civil society. Moreover, as the Venice Commission noted, “*the introduction into the bodies of the association of one or more persons without approval and without clear guarantees that they act in the best interest of the association and its members, constitutes a serious infringement of the right of associations to conduct their own affairs*” (§ 87).

<sup>25</sup> Concerning the violation of the presumption of innocence *see infra* 4.3.

<sup>26</sup> In the Turkish legal system, the period from when competent authorities learn of the suspicion of crime to the acceptance of the indictment by the court is the investigation, while the process from the acceptance of the indictment to the finalization of the verdict constitutes the prosecution phase. *See* ÖZTÜRK, B. *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku*. Ankara: Seçkin, 2017, p. 597.

<sup>27</sup> The Minister of Internal Affairs statement after the adoption of this regulation is a remarkable indication that arbitrary practice may come to the fore. Religious and conservative associations opposed this regulation as well as these associations objecting to the JDP government's policies. The statement of the Minister of Internal Affairs on this matter provides the first signs that Islamic associations will be favored. The statement of the Minister of Internal Affairs is as follows: “*It is out of the question that the Islamic activities of non-governmental organizations are prevented; I will be the first to oppose it.*” *See* Derneklere kayyım yasası: Kaplan “Çok tehlikeli, felaket olur” dedi, Soylu ‘İslâmî çalışmalar’ için garanti Verdi. In: *Cumhuriyet* [online]. [2022-06-01]. Available at: <<https://www.cumhuriyet.com.tr/haber/derneklere-kayyim-yasasi-kaplan-cok-tehlikeli-felaket-olur-dedi-soylu-islami-calismalar-icin-garanti-verdi-1801761>>; Yusuf Kaplan: İçişleri Bakanımız aradı; ‘STK’ların İslâmî çalışmalarının engellenmesi’ söz konusu olmayacak’ dedi. In: *T24* [online]. [2022-06-01]. Available at: <<https://t24.com.tr/haber/yusuf-kaplan-icisleri-bakanimiz-aradi-stk-larin-islami-calismalarinin-engellenmesi-soz-konusu-olmayacak.923140>>. Faced with this statement, it remains unanswered whether the Minister of Internal Affairs can adopt the same stance concerning the prevention of the activities of an association that does not have Islamic sensitivities, for example, the Atheism Association operating in Turkey.

<sup>28</sup> According to the statistics of the Ministry of Justice, in 2019, the average duration of a criminal case before a court of first instance is 270 days.

*See* ADLİ SİCİL VE İSTATİSTİK GENEL MÜDÜRLÜĞÜ. Adli İstatistikler 2019. In: *Adli Sicil Ve İstatistik Genel Müdürlüğü* [online]. [2022-08-02]. Available at: <<https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1062020170359HizmeteOzel-2019-bask%C4%B1-%C4%B0SA.pdf>>. After the judgment of the court of first instance, when the appeal and cassation periods are added, it can be seen that the completion of the judicial process exceeds three years. This will thus result in the association being administered by a trustee for a period of at least three years.

On the other hand, paragraph 2 of Art. 30/A of the Law on Associations also authorizes the Minister of Internal Affairs to temporarily suspend the activities of the association. If the dismissal of persons working in the organs other than the general assembly of the association and appointment of trustees are deemed not sufficient and delay would prove prejudicial, the Minister of Internal Affairs may temporarily suspend the activities of the association and apply to the court immediately. According to the regulation, the court has to rule on the temporary suspension of activity within 48 hours. However, it is unclear how within 48 hours and according to which criteria the court will evaluate the decision of Minister of the Internal Affairs on the temporary suspension of activities. With this regulation, the court is forced to decide without waiting for the outcome of those cases brought against the directors of the association.

After the law in question came into force, on April 30, 2021 a trustee committee has been appointed to the administrative board of the Retired Military Officers Association of Turkey (TESUD), which was dismissed by the Ministry of Internal Affairs for “not condemning” the statement made by retired admirals regarding the Montreux Convention and the new sect formations in the Turkish Armed Forces.<sup>29</sup> In this case, it is seen that the administration of the association which did not have any action or discourse to disrupt the social order or public security, was dismissed simply because it didn't take sides with the political authority. Since this interference with the administration of the association was purely political, was not based on any of the legitimate aims sought in Article 11 of the ECHR and there was no compelling social need in this regard, it cannot be qualified as a necessary restriction in a democratic society.<sup>30</sup>

#### 4.3 IN TERMS OF VIOLATION OF THE PRESUMPTION OF INNOCENCE

Another one of the most important criticisms that may be brought against the regulation is that by virtue of the provision 30/A inserted to the Law on Associations, the presumption of innocence has been disregarded. With the aforementioned regulation, initiation of prosecution for the offenses stipulated in the law of persons who work in the organs other than the general assembly of an association is deemed sufficient to dismiss these persons. However, the fact that prosecution has been initiated

<sup>29</sup> In the aforementioned statement made by 104 retired admirals on April 3, 2021, it was pointed out that the opening of the Montreux Convention for discussion was met with concern and the sect formations that emerged in the Turkish Armed Forces in recent years should not be allowed. Following this statement, the Ministry of National Defense announced that the TESUD administration paid a support visit to them and condemned the statement of the retired admirals. However, TESUD denied this announcement made by the Ministry of National Defense. Shortly after this development, the house of the TESUD's president was searched and the president was summoned to testify. Finally, the Ministry of Internal Affairs dismissed the TESUD administration. See Gov't removes military association executives from duty for 'not condemning' ex-admirals' declaration. In: *duvaR.english* [online]. 20. 4. 2021 [2022-06-01]. Available at: <<https://www.duvarenglish.com/turkish-interior-ministry-dismisses-retired-army-officers-association-tesud-executives-for-not-condemning-ex-admirals-declaration-on-montreux-convention-news-57161>>.

<sup>30</sup> As Varol points out, “*the fewer informal and formal restraints on discretion, the more room there is for selective enforcement of laws. Selective enforcement refers to selection of parties against whom the law is enforced and selection of the occasions when the law is enforced. The possibility of selective enforcement, in turn, fuels stealth authoritarianism*”. See VAROL, O. O. *Stealth Authoritarianism*, p. 1719.

by judicial authorities against a person does not mean that this person is guilty. This shows that the principle known as the presumption of innocence is clearly violated<sup>31</sup>.

The presumption of innocence or the principle of “[when] in doubt, for the accused (*in dubio pro reo*)” states that the court can only convict the accused if sure of his guilt.<sup>32</sup> If the court cannot overcome suspicion as to whether the accused has committed the crime, it must acquit the accused.<sup>33</sup> The principle of “the accused benefits from suspicion” is one of the most important and universal principles of criminal procedure, which aims to achieve justice in the concrete case, to punish the perpetrator who is proven to have committed a crime and to restore public order. The essence of this principle is that in order to punish the accused, suspicion must be assessed in favor of the defendant in all matters requiring proof.<sup>34</sup> Conviction in criminal proceedings must not be based on a probability but rather on definite and clear proof.<sup>35</sup>

The presumption of innocence is guaranteed under the European Convention on Human Rights and the Turkish Constitution.<sup>36, 37</sup> This principle states that no one may be convicted unless their guilt is proven in accordance with the law.<sup>38</sup> However, under Art. 30/A /1 inserted into the Law on Associations, the mere fact that prosecution is initiated against persons working in the organs of associations is deemed sufficient for their dismissal by the Minister of Internal Affairs.

In Turkey, in recent years, initiating prosecution upon the instructions from political authority and bringing criminal charges against individuals based on unfounded accu-

<sup>31</sup> The Venice Commission, in its opinion (No. 1028/2021) on Law No. 7262, stated that the Article 30/A violated the principle of “presumption of innocence” as well as “no punishment without a crime”, “non-retroactivity of the law” and “non bis in idem” (§ 70).

<sup>32</sup> BARADARAN, S. Restoring the Presumption of Innocence. *Ohio State Law Journal*. 2011, Vol. 72, No. 4, p. 723, 730; TADROS, V., TIERNEY, S. The Presumption of Innocence and the Human Rights Act. *Modern Law Review* 2004, Vol. 67, No. 3, p. 402.

<sup>33</sup> CENTEL, N., ZAFER, H. *Ceza Muhakemesi Hukuku*. İstanbul: Beta, 2016, p. 747; YURTCAN, E. *Ceza Yargılaması Hukuku*. Ankara: Adalet, 2017, p. 75; ÖZTÜRK, B. *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku*, p. 139; DE JONG, E., VAN LENT, L. The Presumption of Innocence as a Counterfactual Principle. *Utrecht Law Review*. 2016, Vol. 12, No. 1, p. 32, 35.

<sup>34</sup> YURTCAN, E. *Ceza Yargılaması Hukuku*, p. 76; CENTEL, N., ZAFER, H. *Ceza Muhakemesi Hukuku*, p. 747; RAVESTEIN, E. In Dubio Pro Reo: À Propos De La Mansuétude Supposée Des Jurés Sous La Révolution. *Annales historiques de la Révolution française*. 2019, Vol. 4, No. 398, p. 93, 112; DE JONG, E., VAN LENT, L. The Presumption of Innocence as a Counterfactual Principle, p. 35; BARADARAN, S. Restoring the Presumption of Innocence, p. 725.

<sup>35</sup> In its decision, the Criminal General Council of the Court of Cassation stressed the importance of this principle by stating, “[...] In that case, conviction in criminal proceedings should be based on a certainty that is far from any doubt, not on a big or small probability. This is the only way to prevent judicial errors.” See YCGK, 1-51/42, 12.04.2011.

<sup>36</sup> According to ECHR Art. 6/2, “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. In the paragraph 4 of Article 38 of the Turkish Constitution, the provision “no one shall be considered guilty until proven guilty in a court of law” is stipulated.

<sup>37</sup> While it is accepted that this principle began to prevail in Continental Europe with the French Declaration of the Rights of Man and of the Citizen dated 26.8.1789, before that, Beccaria emphasized the importance of this principle by writing in his book *On Crimes and Punishments* that “A man cannot be regarded as guilty before the judgment of the judge; similarly, society will not lift its protection over this man until it is firmly convinced that he has violated the public order to which he subject”. See BECCARIA, C. *Suçlar ve Cezalar yahut Beşeriyetin Mecellesi*. M. Göklü (tr.). İstanbul: İnkılap, 1964, p. 157–158.

<sup>38</sup> BARBU, D. In Dubio Pro Reo – Myth or Reality. *Supplement of Law Review* 2019, Vol. 10, p. 170; BARADARAN, S. Restoring the Presumption of Innocence, p. 734.

sations has unfortunately become a common occurrence.<sup>39</sup> Consequently, one can observe that the discussed amendment will lead to arbitrary practice, and by virtue of this legislation, it will be possible for political authority to silence associations which are considered as acting against its interests. On the other hand, the fact that the Minister of Internal Affairs has the authority to temporarily suspend the activities of associations in the event that the dismissal of the person from the association as a temporary measure is deemed insufficient (Art. 30/A/2), clearly demonstrates that in addition to the accused not benefiting from doubt, the association in which they occupy positions in various organs is directly affected by the violation of this principle. Arbitrary violations of the freedom of association by political authority will lead to democratic backsliding and undermine the rule of law. Today, a common form of democratic backsliding is through executive aggrandizement. This form of backsliding occurs when elected executives weaken controls on executive power one by one, making a series of institutional changes that hamper the opposition's power to challenge the executive's choices. Indeed, the defining feature of executive aggrandizement is that institutional change is either put to some sort of vote or legally decided by a freely elected official, meaning that the change is presented as occurring within a democratic framework. The career of Turkey's president Recep Tayyip Erdoğan and his Justice and Development Party provide an illustrative example. In his first two years in office, Erdoğan had more than 500 laws passed. Many of these laws undermine institutions of accountability.<sup>40</sup>

In recent years, developments in silencing opposing non-governmental organizations with various excuses have also been seen in Europe. For example, Hungary adopted a law in 2017, which was presented to ensure the transparency of non-governmental organizations receiving donations from abroad. According to this law, these organizations must register with the Hungarian courts as an 'organization in receipt of support from abroad' if the amount of the donations sent to them from other Member States or third countries exceeds a threshold within one year.

Upon this development, in the application made by the EU Commission to the Court of Justice, the Court, considering that Hungary imposes registration, declaration and publication obligations on some of the non-governmental organizations that receive support directly or indirectly from abroad and penal sanctions on organizations that do not fulfill this obligation, found that the adoption of this law was contrary to Hungary's obligations, especially those to ensure free movement of capital and freedom of association.<sup>41</sup> The

<sup>39</sup> According to the data provided by the Ministry of Justice, the number of prosecutions initiated in the year 2019 was 1.684.483. See ADLİ SİCİL VE İSTATİSTİK GENEL MÜDÜRLÜĞÜ. Adli İstatistikler 2019. In: *Adli Sicil Ve İstatistik Genel Müdürlüğü* [online]. [2022-08-02]. Available at: <<https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1062020170359HizmeteOzel-2019-bask%C4%B1-%C4%B0SA.pdf>>.

<sup>40</sup> BERMEO, N. On Democratic Backsliding. *Journal of Democracy*. 2016, Vol. 27, No. 1, p. 5, 10; DALY, T., Democratic Decay: Conceptualising an Emerging Research Field. *Hague Journal on the Rule of Law*. 2019, Vol. 11, No. 1, p. 9, 28.

<sup>41</sup> Commission v. Hungary (Transparency of Associations – C-78/18), 18 June 2020. In: *InfoCuria* [online]. 18. 6. 2020 [2022-06-01]. Available at: <<https://curia.europa.eu/juris/document/document.jsf?jsessionid=00F27B387C2D6BD9E6DC54E3347D92A0?text=&docid=227569&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=701362>>.

Court, noting that the freedom of association constitutes a basis for a democratic and pluralistic society, ruled that the measures envisaged by this Law limited this right because the actions and functioning of associations within the scope of this law were significantly hampered.<sup>42</sup>

#### 4.4 IN TERMS OF ENABLING THE CHARACTERIZATION OF ASSOCIATION ACTIVITIES AS “TERRORIST ACTS”

The dismissal of persons working in the organs of the association and the appointment of a trustee in their place is conditioned upon the initiation of prosecution for offenses within the scope of the Law on the Prevention of the Financing of Terrorism and the manufacture and trade of narcotic or stimulant substances or the laundering of assets arising from crime (Article 30/A added to the Law on Associations, 1<sup>st</sup> paragraph). The reference to the Law on the Prevention of the Financing of Terrorism brings with it great uncertainties.

This law, which mainly aims to implement the United Nations Security Council resolutions on the fight against terrorism and financing of terrorism, and which entered into force on 16 February 2013, refers to the Anti-Terrorism Law of 1991 and states that it is prohibited to provide funds for the financing of all acts which are regulated as the crime of terrorism under the latter.

What is to be understood from acts considered as terrorist crimes needs clarification. Because a single definition of terrorism has not been adopted in international treaties, legal regulations, and scientific studies, in order for an act to qualify as an “act of terrorism,” certain elements must definitely be found in a concrete case.<sup>43</sup> The first of these elements is the existence of an act of violence.<sup>44</sup> Violence must be carried out by a specific group and under a plan oriented towards a specific aim.<sup>45</sup> Another element of the act of

<sup>42</sup> In fact, the EU Commission has a method at its disposal, such as promptly activating Article 7 of the Treaty on European Union (TEU) in order to bring rogue Member States bent on establishing authoritarian regimes back to the rule of law. Despite this, it is seen that the EU institutions have avoided triggering Article 7 on Hungary and Poland, in the face of overwhelming evidence that they care not a whit for the rule of law. See PECH, L., SCHEPPELE, K. L. Illiberalism Within: Rule of Law Backsliding in the EU. *Cambridge Yearbook of European Legal Studies*. 2017, Vol. 19, p. 17–21. On the proposal for a more effective mechanism for democracy and rule of law protection in the European Union countries, see also MÜLLER, J.-W. Should the EU Protect Democracy and the Rule of Law inside Member States? *European Law Journal*. 2015, Vol. 21, No. 2, p. 141, 150–151. See also HALMAL, G. A. Coup Against Constitutional Democracy: The Case of Hungary. In: M. A. Graber – S. Levinson – M. Tushnet (eds.). *Constitutional Democracy in Crisis?* Oxford: Oxford University Press, 2018, p. 243, 254 and SADURSKI, W. Constitutional Crisis in Poland. In: M. A. Graber – S. Levinson – M. Tushnet (eds.). *Constitutional Democracy in Crisis?* Oxford: Oxford University Press, 2018, p. 257, 270.

<sup>43</sup> LAURENT, M., KASTRIOT L. Aspects choisis de l’incrimination du terrorisme. Étude de droit comparé suisse, allemand, français et anglais. *Revue pénale suisse*. 2018, Vol. 1, No. 2, p. 499, 503.

<sup>44</sup> BADEY, T. J. Defining International Terrorism: A Pragmatic Approach. *Terrorism and Political Violence*. 1998, Vol. 10, No. 1, p. 90, 92; MULLINS, C. W., YOUNG J. K. Cultures of Violence and Acts of Terror: Applying a Legitimation-Habituation Model to Terrorism. *Crime and Delinquency*. 2012, Vol. 58, No. 1, p. 28, 29; LEVITT, G. Is Terrorism Worth Defining? *Ohio Northern University Law Review*. 1986, Vol. 13, No. 1, p. 97, 100, 104; GOLDER, B., WILLIAMS, G. What is Terrorism – Problems of Legal Definition. *University of New South Wales Law Journal*. 2004, Vol. 27, No. 2, p. 270, 279, 281, 284; SETTY, S. What’s in a Name – How Nations Define Terrorism Ten Years after 9/11. *University of Pennsylvania Journal of International Law*. 2011, Vol. 33, No. 1, p. 31-32; GREENE, A. Defining Terrorism: One Size Fits All? *International and Comparative Law Quarterly*. 2017, Vol. 66, No. 2, p. 411, 413, 418.

terrorism is that the act must be carried out with the aim of spreading fear, panic, and terror in society.<sup>46</sup> Additionally, the perpetrator must aim to achieve political, religious and similar purposes while carrying out the act of terrorism.<sup>47</sup> These aims are to obtain certain concessions from the political power or the state; to compel certain authorities and jurisdictions to act in a certain way or to force respect for their own ideology.<sup>48</sup>

As can be seen, it is not possible to talk about terrorist acts in lack of the resort to violence for political purposes and the spread of fear and panic in society. At this point, it is of great importance to determine the boundaries between terrorist activity and the freedom of expression<sup>49</sup>. According to the Universal Declaration of Human Rights, every individual on Earth has the right to freedom of thought and expression.<sup>50</sup> Freedom of expression, as a fundamental and indispensable human right, allows the individual to have a certain opinion without being confronted with any interference; it means, without any limitation, being able to research, obtain, defend, and communicate to others information and ideas.<sup>51</sup>

Freedom of expression is one of the indispensable elements of a democratic society; it serves the development of a person's material and spiritual existence.<sup>52</sup> This freedom can be limited for the peace and security of society; however, arbitrariness should be avoided in its limitation.<sup>53</sup> Freedom of expression, in relation to the second paragraph of Article 10 of the ECHR, does not only concern ideas and thoughts that are accepted by the general

<sup>45</sup> KARAARSLAN, A. *İfade Özgürlüğü Bağlamında Terör Propogandasının Yasaklanması Sorunu. Uyuşmazlık Mahkemesi Dergisi/Journal of Judgments by the Court of Jurisdictional Disputes*. 2014, Vol. 4, p. 311, 317.

<sup>46</sup> SERVIER, J. *Le terrorisme*. Paris: Presses Universitaires de France, Que sais-je?, 1992, p. 5; SETTY, S. *What's in a Name – How Nations Define Terrorism Ten Years after 9/11*, p. 31, 42; GREENE, A. *Defining Terrorism: One Size Fits All?* p. 413, 418, 424.

<sup>47</sup> MULLINS, C. W., YOUNG J. K. *Cultures of Violence and Acts of Terror: Applying a Legitimation-Habituation Model to Terrorism*, p. 29-30; LEVITT, G. *Is Terrorism Worth Defining*, p. 111; GOLDER, B., WILLIAMS, G. *What is Terrorism – Problems of Legal Definition*, p. 289; SETTY, S. *What's in a Name – How Nations Define Terrorism Ten Years after 9/11*, p. 48.

<sup>48</sup> LEVITT, G. *Is Terrorism Worth Defining?*, p. 99, 103.

<sup>49</sup> According to the ECtHR, the dissolution of a political party or association found to have links “with terror” is not unlawful and in such a case, a violation of Article 11 cannot be mentioned. In this context, ECtHR in *Batasuna* decision, stated that the dissolution of the political party responded to a “basic social need” and that the Spanish judiciary had reached sufficient results to prove that there was a link between ETA and the parties in question. The ECtHR expressed that ETA and party affiliations posed a threat to democracy, given the terrorist attacks that took place in Spain in those years. The court also ruled that the sanction for dissolution of parties were not disproportionate due to the ‘grave danger’ to Spanish democracy. See *Herri Batasuna and Batasuna v. Spain*. Application Nos. 25803/04 and 25817/04. ECtHR. 30 June 2009.

<sup>50</sup> See Universal Declaration on Human Rights, Art. 19. Freedom of expression is also protected under ECHR Art. 10.

<sup>51</sup> TODOROVA, E. *Restrictions On Freedom Of Expression- Necessity In A Democratic Society. Vizione*. 2020, Vol. 34, p. 69, 70; ESKILDSSEN, L. S., BJØRNSKOV, C. *Does Freedom of Expression Cause Less Terrorism? Political Studies*. 2022, Vol. 70, No. 1, p. 131, 134; ŞİRİN, T. *İfade Özgürlüğü, Dinin Veya Dini Duyguların Korunması Amacıyla Sınırlanabilir Mi? Anayasa Hukuku Dergisi/Constitutional Law Journal*. 2016, Vol. 10, p. 527, 529–530; KARAARSLAN, A. *İfade Özgürlüğü Bağlamında Terör Propogandasının Yasaklanması Sorunu*, p. 313.

<sup>52</sup> GREENAWALT, K. *Speech, Crime and The Uses of Language*. Oxford: Oxford University Press, 1989, p. 4; HOWIE, E. *Protecting the human right to freedom of expression in international law. International Journal of Speech-Language Pathology*. 2018, Vol. 20, No. 1, p. 12, 13.

<sup>53</sup> According to ECHR Art. 10/2, the freedom of expression may be subject to restrictions that “[...] are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime [...]”.



public and that can be described as harmless or unimportant; it also covers those ideas and thoughts that might be deemed disturbing or even shocking by political authority or a certain segment of society.<sup>54</sup> This is a requirement of pluralism, tolerance, and open-mindedness; it is not possible to talk about a democratic society without the freedom of expression.<sup>55</sup> The ECtHR evaluates whether an interference with the freedom of expression is in accordance with law by assessing whether it is “*prescribed by law*”, “*based on legitimate aims*” and “*necessary in a democratic society*.”<sup>56</sup>

Despite the jurisprudence of the ECtHR to this respect, in Turkey, even peaceful demonstrations and protests which should be considered within the scope of freedom of expression are considered by the political power as acts of terrorism.<sup>57</sup> In other words, the scope of acts that are considered as constituting the crime of terrorism is interpreted extensively, and in practice criminal charges alleging commission of terrorism are brought against numerous individuals.

In this context, the inclusion into terrorism of the peaceful demonstrations and protests of May 2013 (which were initiated by people sensitive to environmental protection and were led by university students in order to prevent the construction of a military barrack in Taksim Gezi Park, one of the rare green areas in Istanbul) and the indictment of numerous individuals (including the businessman Osman Kavala on the grounds of providing funds for terrorist activities)<sup>58</sup> is an important indicator in terms of revealing the interpre-

<sup>54</sup> VERPEAUX, M. *Freedom of Expression: In Constitutional and International Case Law*. Strasbourg: Council of Europe Publishing, 2010, p. 184; ROUSSIN, P. Liberté d’expression et nouvelles théories de la censure. *Communications*. 2020, Vol. 106, No. 1, p. 17, 22; TODOROVA, E. *Restrictions On Freedom Of Expression- Necessity In A Democratic Society*, p. 70. Freedom of association is in question not only for those whose views are not favorable or offensive, but also for individuals and organizations whose views hurt and disturb. See *Redfern v. The United Kingdom*. Application No. 47335/06. EctHR. 6 November 2012.

<sup>55</sup> See *Handyside v. United Kingdom*. Application No. 5493/72. EctHR. 7 December 1976, para 60.

<sup>56</sup> On this subject see AKDENİZ, Y., ALTIPARMAK, K. ‘Türkiye’de Muhafif Düşüncenin Susturulması ve İfade Özgürlüğü [The silencing effect on dissent and freedom of expression in Turkey] in Onur Andreotti (ed), *Tehlike Altında Gazetecilik – Tehditler, Mücadele Alanları, Yaklaşımlar* [Journalism at risk – Threats, challenges and perspectives] (İstanbul Bilgi Üniversitesi Yayınları 2016) 173; *Atilla Taş v. Turkey*. Application No. 72/17. EctHR. 19 January 2021, para 189; *Şahin Alpay v. Turkey*. Application No. 16538/17. EctHR. 20 March 2018, para 172; *Mehmet Hasan Altan v. Turkey*. Application No. 13237/17. EctHR. 20 March 2018, para 202.

<sup>57</sup> ŞİRİN, T. Türkiye’de Toplantı ve Gösteri Yürüyüşü Düzenleme Hakkına İlişkin Sorunlar [Constitutional Problems of Freedom of Assembly in Turkey]. *Anayasa Hukuku Dergisi/Constitutional Law Journal*. 2013, Vol. 2, No. 4, p. 289, 311 et seq.; AKDENİZ, Y., ALTIPARMAK, K. Turkey: Freedom of Expression in Jeopardy: Violations of the rights of authors, publishers and academics under the State of Emergency. 2018, p. 60. [2022-06-01]. Available at: <<https://doi.org/10.13140/RG.2.2.21017.72808>>.

<sup>58</sup> From the indictment against the businessman Osman Kavala: “[...] in the organization of the suspect Mehmet Osman KAVALA, who aimed to render the legal, legitimate, elected government of the Republic of Turkey unable to work, unable to function, in the broadest sense dysfunctional, which took place in 2013 and which is known in public opinion as the Gezi Insurrection, with the legitimate government, masses in society were mobilized on the pretext of protecting the environment, nature and cultural assets and intense, far beyond the purpose of violence events were commenced, in the continuing period with the necessary work being done to increase these violence events and spread them all over the country besides Istanbul, the events spreading to whole of the country, by providing manipulative information to foreign countries with the aim of placing the legal and legitimate government in a difficult situation and putting pressure on it both the state administrations of these countries and international NGO’s were attempted to be included in the process”. In: *Bianet* [online]. [2022-06-01]. Available at: <<https://bianet.org/system/uploads/1/files/attachments/000/003/213/original/iddianame.pdf?1602230718>>. Kavala was sentenced to an aggravated life sentence by the Istanbul 13th High Criminal Court for “attempting to overthrow the government” on April 25, 2022. Thus, Osman Kavala has been imprisoned for 1687 days as of 14 June 2022.

tation of the definition of terrorism. Considering this fact, it is highly probable that criminal prosecutions for terrorist offenses would be initiated against persons working in the organs of opposition associations and that these persons would be dismissed on the basis of this new regulation introduced into the Law on Associations.<sup>59</sup> A similar development regarding the dissolution of associations on the pretext of aiding terrorism or spying took place very recently in Russia. Memorial International, one of the country's well-known human rights associations, was dissolved by Russia's Supreme Court on 28 December 2021 on the grounds that it violated the so-called "Foreign Agent Law". The said regulation (Law No. 121-FZ) which came into force in November 2012, obliges non-profit organizations that receive funding from abroad and engage in political activities to register as a 'foreign agent' and to use this title officially. Within the framework of this law, more than 140 non-governmental organizations, including Memorial, were registered on the "foreign agent" list. Amnesty International had declared that the regulation in question would give the Russian authorities a wider scope to put pressure on opposition politicians and independent media. In November 2021, the Russian Prosecutor General's Office filed a lawsuit against Memorial for failing to add the "foreign agent" note to more than 20 publications of the association, including its website. Memorial was also accused of justifying "terrorists" and "marginal organizations" for keeping a list of political prisoners.

This regulation in Russia has set a model for governments aiming to silence dissident NGOs. Similar bills are on the agenda in many countries such as Ukraine, Poland, Bulgaria, Israel, Azerbaijan, and Kyrgyzstan, and discussions on this issue currently occupy the public mind. These developments point to the democratic decline in the mentioned countries. Democratic decline is characterized, in particular, by the collapse of democratic checks

<sup>59</sup> In recent years, one can observe that accusations of the crime of terrorism occupy an extensive place not only in the prosecution phase but also within the discourse of political authority. President of the Republic of Turkey, Recep Tayyip Erdoğan, in January 2021, addressed university students protesting his appointment of a rector by from outside of the institution stating, "Are you students or are you terrorists trying to raid and occupy the room of the rector?". See KUCUKGOCMEN, A., ERKOYUN, E., GUMRUKCU, T. Erdogan says will not let Turkish university protests swell. In: *Reuters* [online]. 3. 2. 2021 [2022-06-01]. Available at: <<https://www.reuters.com/article/turkey-security-bogazici-int-idUSKBN2A30SX>>; Turkey's Erdogan describes student protesters as terrorists. In: *AP News* [online]. 3. 2. 2021 [2022-06-01]. Available at: <<https://apnews.com/article/turkey-ankara-receptayyip-erdogan-istanbul-c2b3592d03c9e8320f6511475675c04f>>.

Similarly, in a speech on 12 January 2017, President Erdoğan used the phrase concerning the loss of value experienced in the Turkish Lira, "There is no difference in purpose between a terrorist who has a gun and a bomb at hand and a terrorist who has dollars, euros and interest." See DOĞAN, Z. Erdogan calls dollar and euro holders 'terrorists'. In: *AL-Monitor* [online]. 17. 1. 2017 [2022-06-01]. Available at: <<https://www.al-monitor.com/originals/2017/01/turkey-erdogan-says-dollar-euro-holders-are-terrorists.html>>; AFP. TURKEY: Erdogan equates lira fall to 'terrorism'. In: *Insider* [online]. 12. 1. 2017 [2022-06-01]. Available at: <<https://www.businessinsider.com/afp-turkeys-erdogan-equates-lira-fall-to-terrorism-2017-1->>.

One can still remember that on 16 April 2017, before the referendum on the modification of the governmental system, Erdoğan accused those voting "no" to the presidential system with terrorism. See LOWEN, M. Turkey says 'No' to saying 'No', ahead of its referendum. In: *BBC* [online]. 24. 2. 2017 [2022-06-01]. Available at: <<https://www.bbc.com/news/world-europe-39064657>>; DUNHAM, M., HINTZ, L. Turkey's President Erdogan has gone to extremes to win Sunday's referendum. Here's why. In: *The Washington Post* [online]. 14. 4. 2017 [2022-06-01]. Available at: <<https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/14/turkish-president-erdogan-resorted-to-unusual-tactics-before-sundays-referendum-vote-heres-why/>>. In particular see ÇINAR, Ö. H., ŞİRİN T. Turkey's human rights agenda. *Research and Policy on Turkey* 2017, Vol. 2, No. 2, p. 133, 139.

and balances, steps that undermine the judicial independence and pressures on the media or NGOs.<sup>60</sup> The pressures on the media and NGOs undermine not only liberty, but also democracy; because accountability in elections requires that voters are properly informed by discursive civil society institutions.<sup>61</sup> The exclusion or vilification of certain groups or individuals as internal or external threats is also one of the indicators of democratic decline.<sup>62</sup>

## 5. CONCLUSION

The new regulations inserted into the Law on Associations in Turkey with the adoption of the “front” Law on the Prevention of Financing of Proliferation of Weapons of Mass Destruction clearly violate the freedom of association as guaranteed by the Turkish Constitution and ECHR. By virtue of this legal amendment, directors and auditors of associations who are prosecuted are accepted as potential criminals; at the discretion of the Minister of Internal Affairs, the duties of these individuals within the association are terminated and a trustee may be appointed in their place. Moreover, based on the inadequacy of adopted measures, again by way of a decision of the Minister of Internal Affairs, it may even be possible to suspend the activities of the association which these individuals are part of. Our aim is to reveal how easily the presumption of innocence, which is one of the basic principles of law, and the freedom of association, which is one of the requirements of a democratic and pluralistic society, are violated due to these changes in Turkish law. These new regulations also reveal the decline of democracy through executive aggrandizement in Turkey. The simultaneous but gradual erosion of the three basic elements of democracy, namely competitive elections; freedom of expression and association; and the rule of law, is defined as constitutional regression.<sup>63</sup> Turkey suffers from the constitutional regression to a large extent. The transition to the Turkish type presidential system with the constitutional amendment in 2017 and the adoption of laws aiming to abolish the freedom of press and judicial independence have created an increasingly authoritarian political power through executive aggrandizement. One of the features of authoritarian governments is to constantly express that the country is under threat of terrorism so as to present people and organizations that oppose the administration as terrorists or as people or organizations that aid terrorism. This, however, greatly undermines the rule of law, and it severely undermines the public’s trust in law and justice.

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<sup>60</sup> MUIZNIEKS, N. The Council of Europe’s Response to Recent Democratic Backsliding. In: P. Czech and others (eds.). *European Yearbook on Human Rights*. Cambridge: Intersentia, 2019, p. 3, 4; SCHEPPELE, K. Autocratic Legalism. *University of Chicago Law Review*. 2018, Vol. 85, p. 545, 581; BERMEO, N. *On Democratic Backsliding*, p. 10.

<sup>61</sup> KHAITAN, T. Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism. *International Journal of Constitutional Law*. 2019, Vol. 17, No. 1, p. 342, 350.

<sup>62</sup> ÇALI, B., DEMİR GÜRSEL E. The Council of Europe’s Responses to the Decay of the Rule of Law and Human Rights Protections: A Comparative Appraisal. *European Convention on Human Rights Law Review* 2021, Vol. 2, p. 165, 171.

<sup>63</sup> HUQ A. and GINSBURG T., How to Lose a Constitutional Democracy. *UCLA Law Review*. 2018, Vol. 65, p. 78, 96.