ACCOUNTING FOR VARIATION IN POLITICAL PARTY CLOSURES: THE EU'S FRAMING IN DTP AND BATASUNA DECISIONS

by

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ABSTRACT

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This dissertation aims to provide an insight on the type of influence the European Union has on political party prohibition decisions in the receiving countries, by focusing on recent cases from a member state and a candidate country. For this purpose, justifications used in decisions to the ban DTP, the Kurdish nationalist political party in Turkey and Batasuna, the Basque nationalist political party in Spain are analyzed at legal and political levels. Selection of cases enables to develop a comparative approach to internal and external dimensions of the transformative impact of the Union's human rights policies. Adopting a Communicative Action Perspective, arguments are analyzed in accordance with three criteria: utility, values and rights. It is argued that both Spanish and Turkish judges refer to EU norms, principles and practices when justifying their decisions. This indicates a right-based influence for the EU on receiving countries at the legal level. The continuous references to the previous EU practices reveal that when making a decision, actors in the receiving countries consider not only the official statements but the practices of the EU. Thus, the effectiveness of the EU's human rights policies depends on consistency in its practices. Right-based arguments are used also by Turkish politicians whereas Spanish politicians rely on costs and benefits of Batasuna ban. Hence, in the discussions on DTP's prohibition, in a candidate country, Turkey, the EU emerges as a right-based legitimation mechanism both at political and legal levels. However, in a member state, Spain, the EU is absent as a reference point in the political argumentation on Batasuna's prohibition.

ÖZET

SİYASİ PARTİ YASAKLAMALARINDAKİ FARKLILIĞI AÇIKLAMAK: DTP VE BATASUNA KARARLARINDA AB ÇERÇEVELEMESİ

Merzuka Selin Türkeş Kılıç

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Anahtar Kelimeler: Avrupa Birliği, insan hakları, siyasi parti yasaklamaları, DTP, Batasuna

Bu doktora tezi, Avrupa Birliği'nin alıcı ülkelerdeki siyasi parti yasaklama kararları üzerinde ne tip bir etkisi olduğunu, bir aday ülke ve bir üye ülkede yakın zamanda gerçekleşen davalara odaklanarak aydınlatmayı amaçlamaktadır. Bu amaçla, Türkiye'deki Kürt milliyetçi siyasi parti DTP ve İspanya'daki Bask milliyetçi siyasi parti Batasuna kararlarında yasal ve siyasi düzlemlerde kullanılan gerekçeleri tahlil etmektedir. Vaka seçimi, Birlik'in dönüştürücü etkisinin içsel ve dışsal boyutlarına karşılaştırmalı bir yaklaşım geliştirmeyi mümkün kılmaktadır. İletişimsel Eylem Görüşü'nü benimseyerek söz konusu gerekçeler üç ölçüte göre değerlendirilir: fayda, hak ve değer. Hem Türk hem İspanyol yargıçların, kararlarını gerekçelendirirken ana bağlamda AB ilke, esas ve uygulamalarına atıfta bulundukları ileri sürülmektedir. Bu, yasal düzlemde AB'nin alıcı ülkeler üzerinde hak-temelli bir etkisi olduğuna işaret etmektedir. AB'nin önceki ilgili uygulamalarına yapılan sürekli atıflar, alıcı ülkelerdeki aktörlerin karar verme aşamasında AB'nin sadece resmi açıklamalarını değil uygulamalarını da göz önüne aldıklarını ortaya koymaktadır. Bu da gösterir ki, AB'nin insan hakları politikalarının etkinliği, uygulamalarındaki tutarlılığa bağlıdır. Siyasi düzlemde ise, hak odaklı gerekçeler Türkiye'deki siyasetçiler tarafından da kullanılmaktayken İspanya'daki siyasetçiler Batasuna'nın kapatılmasının fayda ve zararları üzerinden tartışmaktadırlar. Yani aday ülke olan Türkiye'de AB, DTP'nin kapatılması tartışmalarında hem siyasi hem yasal düzlemde hak-odaklı bir meşulaştırma meanizması olarak ortaya çıkmaktadır. Üye ülke olan İspanya'da Batasuna üzerine süregelen siyasi tartışmalarda ise AB bir atıf merkezi işlevi görmemektedir.

Nilüfer ve Abdullah Güray'a

sevgi, saygı ve özlemle…

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ABBREVIATIONS

AKP	Adalet ve Kalkınma Partisi (Justice and Development Party)
ANAP	Anavatan Partisi (Motherland Party)
CEES	Central and Eastern European States
CFSP	Common Foreign and Security Policy
CoE	Council of Europe
DEHAP	Demokratik Halk Partisi (Democratic People's Party)
DEP	Demokrasi Partisi (Democracy Party)
Decaf	Democratic Control of the Armed Forces
DSP	Demokratik Sol Parti (Democratic Left Party)
DTP	Demokratik Toplum Partisi (Democratic Society Party)
EC	European Community
EEC	European Economic Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ENP	European Neighborhood Policy
EP	European Parliament
ESDP	European Security and Defense Policy
ESS	European Security Strategy
ETA	Euskadi Ta Askatasuna (Basque Fatherland and Liberty)
EU	European Union
HADEP	Halkın Demokrasi Partisi (People's Democracy Party)
HEP	Halkın Emek Partisi (People's Labor Party)
LOPP	Ley Orgánica de Partidos Políticos (Law of Political Parties)

MHP	Milliyetçi Hareket Partisi (Nationalist Action Party)
ÖZDEP	Özgürlük ve Demokrasi Partisi (Freedom and Democracy Party)
PKK	Partiya Karkerên Kurdistan (Kurdistan Workers' Party)
SHP	Sosyal Demokrat Halk Partisi (Social Democratic People's Party)
TEU	Treaty on European Union
U.S.	United States

INTRODUCTION

"... unity in Europe does not create a new kind of great power; it is a method for introducing change in Europe and consequently in the world."

(Monnet, 1963)

"The European Union is well placed to promote democracy and human rights. It is continually seeking to improve its own democratic governance (...) Uniquely amongst international actors, all fifteen member states of the Union are democracies espousing the same Treaty-based principles in their internal and external policies. This gives the EU substantial political and moral weight. Furthermore, as an economic and political player with global diplomatic reach, and with a substantial budget for external assistance, the EU has both influence and leverage, which it can deploy on behalf of democratisation and human rights."

(European Commission 2001, p.3)

Since the early days of its launch, European integration has aimed to bring about a change in Europe. This dissertation is an attempt to shed some light on the normative change that the EU is willing to induce both within its borders and in its external policies. Accordingly, it puts the EU as a human rights promoter under scrutiny and questions what type of an influence the EU has as a human rights promoter on the receiving countries. For this purpose, it focuses on the recent party prohibition cases in Turkey and Spain then analyzes the EU's influence on the decisions to ban DTP; the Kurdish nationalist political party in Turkey, and Batasuna; the Basque nationalist political party in Spain. The analysis builds up on the data obtained from newspaper coverage and official court decisions. The data have been collected and thoroughly investigated throughout the field research conducted in Turkey and Spain. Selection of cases serves the purpose of developing a comparative approach to the EU's

transformative impact in human rights. That is, studying on two similar cases from Turkey and Spain, i.e. from a candidate country and member state respectively, enables to make a comparison between the internal and external dimension of the transformative impact of the Union's human rights policies. As such, this dissertation aims not only to provide insights on the EU's influence as a human rights promoter but also to do so by introducing an internal and external dimension to the analysis. In this respect this piece of work has the potential to contribute to the consistency and coherence questions with regard to the EU's human rights policies; the questions that have been challenging the minds of EU scholars over the last decade.

0.1. European Integration and Change

When the Treaty of Rome started the European integration process in 1958 between France, Germany, Italy and the Benelux countries under the European Economic Community (EEC), the primary aim was to foster peace in the postwar Europe through establishing a customs union, integrating markets in particular sectors, and harmonizing policy regulations in areas such as agriculture, transport and competition. Since then, the project has resulted in a union with twenty-seven member states as of 2007; the world's largest trade block with an estimated GDP of 15.39 trillion dollars ("CIA - The World Factbook," 2012); a political system with its own institutions pooling the delegation of specific powers and competences as well as its own legislation and jurisprudence which supersede national laws. In other words, the integration process has evolved through both "widening" and "deepening" in the last fifty years and has produced "an ever changing political, legal, and economic system": the European Union (Morgan, 2005, p.6). Accordingly, throughout the process, the ambitions of integration have multiplified and diversified tremendously, encompassing "a much broader array of responsibilities than originally planned" (Meunier & McNamara, 2007).

Today, being the current product of the European integration, the EU undertakes the goal of inducing change both within its borders and in its periphery. What kind of a change one expects from the EU is tied to what type of organization or polity that he/she thinks the EU is. For some, the change is economic, for some it is political; some others consider the security related changes more important, while some argue that the normative change that the EU brings about is what crucially matters. As the time stands now, the EU has already introduced significant novelties in economic, political, and legislative areas. With the completion of market integration via the Single Market and the Single Currency, it maintained the freedom of goods, capital, services, and people within the internal market among the member states. As set by the 2009 Lisbon Treaty, the Union has exclusive competence to make directives on the customs union, competition rules, conservation of marine biological resources and commercial policies as well as monetary policies of the euro-countries (Article 3, "Consolidated Version of the Treaty on the Functioning of the European Union," 2010) and shared competence with member states on internal market, social policy, economic, social and territorial cohesion, environment, transport, trans-European networks, energy, consumer protection and agriculture and fisheries (Article 4, *Ibid*). As such, the EU can be said to have set up a peerless system of pooling competences among member states in major policy areas; a system which has transformed the economic and political structure of Europe exceptionally.

Moreover, it introduced a legal system that would supersede national ones given that "European Union law gives member state nationals rights which they can invoke in their national courts, and is even, albeit on a basis that is subject to frequent contestation, often held to be supreme over any national law of the member states with which it is in conflict" (Warleigh, 2004, p.2). The judicial advisory and common administrative bodies of this unique system, in return, have dramatically changed the shape of Europe and its relations with other actors. The change that the EU aims to bring about externally has been tied to the clauses and conditions embedded in international trade, financial aid cooperation agreements, more directly through the Common and Foreign Security Policy (CFSP) and extensively through the conditionality for candidate countries. Further, the initiative for a "wider Europe", the EU has assumed a duty to ensure continuing social cohesion and economic dynamism not only towards the EU citizens but also towards the citizens of the Union's present

and future neighbors (European Commission of the Communities, 2003). In this respect, various tools in the form of strategies and policies, such as European Security and Defense Policy (ESDP), the European Security Strategy (ESS) and European Neighborhood Policy (ENP) are available to the EU to induce change externally in the candidate countries, in the neighbor countries and in trade partners. What is particular to the foreign policy that the EU aims to pursue is the objective of transforming the ideas in third countries; an objective that is connected to its ideal of spreading good governance, democracy, human rights and respect to rule of law which it also seeks to perpetuate within its borders. As Börzel and Risse put it, while "European integration itself can be described as an effort to promote the diffusion of ideas across Europe (…) Europe and the EU also serve as active promoters of diffusion processes toward the outside world" (Börzel & Risse, 2009, p.5). For this purpose, the EU has developed and institutionalized specific instruments such as the ENP, the Euro-Mediterranean Partnership, conditionality, cooperation agreements etc... This is why the change that the EU envisages to promote within its borders and towards the outside world has been conceptualized by scholars to have a normative dimension.

Among the structural transformations that the EU has led to, the normative dimension deserves a particular attention as it is claimed to differentiate the EU from other actors (Diez & Manners, 2007; Lucarelli, 2006a; Manners, 2002). As Manners put it, "we cannot overlook the extent to which the EU is normatively different to other polities with its commitment to individual rights and principles in accordance with the ECHR and the UN" (Manners 2002, p.241). With regard to its foreign policy, the scholars tend to explain the EU's peculiarity compared to the conventional interest maximizing, and state-centric foreign policy through the Union's preference for multilateralism, respect for international law and its overall goal to promote norms (Lucarelli 2006b, p.2; Smith 2006. p.15). The internal policies on the other hand, are articulated as the source of this peculiarity in the foreign policy. In other words, the normative dimension of foreign policy is considered to be stemming from what the EU is, what it represents at home. This is for example reflected in Jorgensen's work that points to the multitude of arguments as to the EU having "a multilateral 'soul', i.e. that the Union has been built on a multilateral edifice and is aiming at projecting this 'domestic' quality worldwide" (Jorgensen 2006, p.31).

Defining human rights, democracy and the rule of law as its core principles in its founding treaty since the 1997 Treaty of Amsterdam, the Union assumes a normative basis for its presence and therefore for the change that it is willing to introduce (Article 6, "Treaty of Amsterdam Amending the Treaty on European Union," 1997). Acknowledging the EU as an effort to diffuse values, norms and rules both internally and externally (Börzel & Risse, 2009), this dissertation focuses on the EU´s role as a human rights promoter. Increasingly since the 1990's the Union has identified human rights as a key feature of its collective identity and institutionalized them via the consolidated versions of its founding treaties as well as the charters that it signs. In this way, respect for human rights has exclusively been defined as a characteristic of member states which brings about both internal and external prospects for the Union's human rights policies. In terms of internal aspect, today, the EU assumes the member states to hold a certain degree of respect for human rights so that they can sustain their status. The 1997 Treaty of Amsterdam openly states that any member state that is determined to execute "a serious and persistent breach" (Article 3.9,"Treaty of Amsterdam Amending the Treaty on European Union" 1997) of "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms" (article F2, *The Maastricht Treaty on European Union* 1992) will be excluded from certain rights deriving from the Treaty. Entailing that membership rights might be suspended if a member state seriously breaches human rights, the Treaty of Amsterdam has equipped the EU with a measure to promote human rights internally. This can be considered as a momentous step in the evolution of the EU as a human rights promoter within the borders.

On the other hand, definition of respect for human rights as core characteristics of a member of the Union automatically makes it a membership condition for candidate states. Indeed, respect for human rights had been established as a criterion to determine an applicant's eligibility for EU membership in the 1993 Copenhagen Political Criteria, even before it was formulized as a member state feature in its founding treaty.

0.2. Research Question: Type of the EU's Influence as a Human Rights Promoter

So far it has been argued that, while the EU sets a standard of human rights for its members and the states who are seeking for membership, it undertakes the role of human rights promoter both within its borders and in its foreign policy. In the meantime, what this means for integration theories, its possible institutional openings, the means available to the EU to promote human rights within and abroad, as well as the failures and successes of the EU as a human rights promoter, have extensively provoked scholar attention. Notwithstanding the considerable literature on how and to what extent the EU spreads certain standards of human rights, how the states, whether third parties or member states, receive them remain rather mysterious. This study is an attempt to shed light on the receiver's side of the story by asking:

- What kind of an influence does the EU on the political party prohibition decisions in the receiving countries?

Human rights are a very broad concept analyzed by some scholars in three generations[1]; a doctrine with categorical cleavages[2]; a multidisciplinary research area; a principle requiring a wide-range set of freedoms (for more information on conceptualization of human rights please see: C. Beitz, 2003; C. R. Beitz, 2001; Donnelly, 1985, 2003, 2006; Freeman, 2011; Griffin, 2001; Ignatieff, 2001; Orend, 2002). Hence, for the purposes of this thesis, the general concept of human rights is operationalized through the particular example of political party prohibition cases,

[1] In 1979 Karel Vasak distinguished three generations of human rights as corresponding to the three ideals of French Revolution: egality, liberty and fraternity. Accordingly, civil and political rights constitute the first generation whereas economic, social and cultural rights are the second and solidarity rights constitute the third generation (Vasak, 1979, 1990; please also see Marks, 1981; Wellman, 2012).

[2] As human rights contain different sorts of rights and freedoms, in the literature there exist tensions between different categories, such as positive vs. negative rights, individual vs. group rights, rights vs. duties, etc...

which brings freedoms of association and expression under scrutiny. Given that freedoms of association and expression underpin pluralist democratic systems in which political parties are the essential elements, political party prohibition cases turn out to be venues where the limitations on people's political liberties are claimed to be necessary by the state institutions. Thus, political party prohibition decisions enable to test the limitation cases in democratic societies on fundamental freedoms as they are defined by the European Convention on Human Rights.

In this context, this research question is important as it touches to the core of the EU's role as a human rights promoter by focusing on the actors that are subjects in the EU´s human rights promotion. Börzel and Risse define the countries toward which the EU intends to diffuse ideas and norms as "receiving countries" (Börzel & Risse, 2009). In this respect, when the EU is regarded as a human rights promoter, both the member states and candidate countries would be the pioneer receiving countries. The third states which are tied to the EU's policies with cooperation and trade agreements are also by definition receiving countries but as the bond of conditionality brings about a higher and more concrete level of interaction between the EU and candidate countries and more concrete leverage at the EU side, for the purposes of this research the case selection is made from a candidate country: Turkey. Started its association process back in 1963 and has been a candidate country since 1999; Turkey has long been in this highly interactive and conditional relationship with the EU. As such, it provides the research with a perfect material to analyze the EU's promotion of human rights. Focusing on a candidate country is suitable for an analysis on the external dimension of the EU's human rights policies. However, the EU also claims to promote human rights internally. Thus, in order to understand and explain the EU's influence as a human rights promoter on receiving countries, one should take into account the member states as well. Accordingly, Spain is selected as the second case study and analyzed for the purposes of this research. The aim is to draw conclusions on what type of an EU is reflected to the receiving countries through its human rights policies by looking at the process in which the actors make human rights decisions. In this way, the potential answers to this question can help us understand the EU's human rights policy in action.

From a rationalist perspective, the EU's influence would be explained through cost and benefit calculations of an actor which would highlight the expected utility aspect of the decision. On the other hand, the institutional constructivist perspective

would focus on the identity and values that the EU represents. An alternative explanation which would open more space for norms would be that the EU can induce change in the candidate country's existing normative systems to the extent that the candidate country considers the EU's policy as valid and legitimate given the universally accepted rights and principles. In this regard, the fundamental question that this dissertation seeks for answers would be whether the EU's influence as a human rights promoter on the actors is utility, value or right-based.

Whether utility, value or right-based type of influence the EU has as a human rights promoter will be analyzed for two different actors; more particularly for a candidate country and a member state. In this way, the aim is to bring about an insight into the internal and external dimensions to the question by comparing the type of influence the EU has on a member state and on a candidate country. The recent example of party closures in Turkey and Spain provide this research with the empirical data for a comparative analysis. They enable a comparison between the role of the EU as a human rights promoter in a member state and a candidate state.

0.3. Theoretical Approach: Communicative Action

Since the end of the Cold War the principles of democracy, human rights and rule of law have gained prominence in international relations as "states and international organizations have systematically mainstreamed good governance in their development strategies for third countries" (Börzel, 2009, p.5). Establishing a cornerstone, a fundamental reference point in this new world order, human rights have been a very much cherished but very loosely adopted concept. This largely stems from the gap between the smooth illusion that the law creates by setting 'objective' human rights standards and the cumbersome reality of implementing those standards. From a theoretical perspective, Besson states that although human rights constitute an uncontestable part of contemporary law and politics, given that their positive guarantees are largely general and vague, their exact nature and consequences remain controversial

in moral theory (Besson, 2006). From a political perspective Freeman draws a parallel account as he highlights that they are the political motives which drive the governments to make human rights law and in return, they are the political factors which determine to what extent that human right law is going to be implemented. Hence, "the meaning and application of human rights standards is legally and politically very controversial" (Freeman, 2011, p.8). Such an assertion suggests that the implication of human rights standards is a political decision including different types of considerations. This recalls Guttman's argument that "human rights are (…) highly controversial when what is at stake is in no way obvious" (Gutmann 2001, p.xviii). In this regard, no matter how strong an actor's moral dedication to principles of human rights is, it also depends on what is at stake for actors on deciding on a human rights issue. It can be the economic and/or security interests of the actor as well as its identity or its consideration of legitimacy given the universally accepted norms and standards. Similarly, the influence of the EU's role as a human rights promoter is also related to what the actors consider to be important. At this point, it is crucial to ask what is at stake in a controversial decision on human rights in order to make an account of what kind of an influence the EU as a human rights promoter has on receiving countries.

The literature in explaining what is at stake when an actor makes a decision is heavily ruled by the distinction between the logic of consequentiality and logic of appropriateness. The distinction between the logics of consequences and appropriateness reflects the difference between rationalism and constructivism in International Relations Theory (March and Olsen 1989, pp.160-162). The logic of consequences is in line with the rational choice approach which assumes self-interested actors seeking to maximize their material interests defined in terms of security and economics. From this perspective, the influence of the EU would depend on cost and benefit calculations of the actors. Accordingly, the EU as a human rights promoter would have a utility based influence when the actors are considering the potential material benefits or impairments that a human rights decision holds.

Constructivists on the other hand focus on the role of social structures and interaction in explaining actors' actions. While rationalism treats the actor as homo economicus; i.e. a calculating machine who carefully assesses different courses of actions, choosing whichever provides the most efficient means to his/her ends; in constructivism, the actor would be more of a homo sociologicus; i.e. a norm-follower

who acts out of habit or decides on his/her perception of how a person in his/her role/identity supposed to act in given circumstances (Fearon and Wendt 2002, p.60). Following the logic of appropriateness, the actor is expected to identify what is appropriate. From this point of view, an actor would consider the appropriateness of any decision with regard to the human rights values that are identified with the EU. In this regard the influence that the EU has on actors will be considered to be value-based.

The distinction between the logic of consequentiality and logic of appropriateness provides the researcher with functional tools in explaining actor behavior in international relations. For methodological purposes, rationalist and constructivist approaches start with different assumptions, highlight different elements of the process and as a result come up with different explanations; the former focusing on power on interests and the latter on identity, norms and values. Nevertheless, focusing on one explanatory category requires turning a blind eye to the others. In studying actor behavior, this can be considered a methodological obligation so as to reach theoretical explanations. Yet, a different account which would be based on different assumptions so that it would consider both interests and norms as analytical categories, may allow the researcher to take into account the role of both categories in reaching explanations. Such an account would enable a broader picture of state behavior in which the interaction between norms and interests can also be traced.

Moreover, in order to be able to comprehend what types of norms are more relevant in explaining the influence of the EU on the actors' decisions, it is also needed to make an analytical distinction among norms. As stated by Sjursen, "to argue that norms are important is just the beginning. There are numerous rule-sets, norms and identities" (Sjursen, 2002, p.502). Hence, for the purpose of enriching the analytical framework, it is important to distinguish between norms as those which are followed because they are appropriate and those which are followed because they are considered legitimate given the universally accepted norms and principles. For instance, if this distinction is applied to rule compliance behavior, in the former case, following a rule according to its appropriateness with identity is related to ethical concerns. This is the type of actor behavior that is reflected in logic of appropriateness. On the other hand, rule compliance can also be a result of legitimacy assessment and in this case the process led by moral considerations. Thus, while they are the values that drive the former process, in the latter they are the moral norms and principles. Such a distinction

is not only analytical but also refers to different processes of rule adoption. According to Habermas "[b]ecause norms and principles, in virtue of their deontological character can claim to be *universally binding* and not just *specially preferred*, they must possess a greater justificatory force than values" (Habermas 1996, p.259).

It is in this context that I suggest a third approach, which would be in line with a third logic of action, and which would help us to make an analytical distinction between the ethical and moral norms at the first place and then to further reach conclusions on whether material interests, ethical values and/or moral norms better explain the influence of the EU's influence as a human rights promoter on a receiving country. I argue that Habermas' communicative action theory, which makes an analytical distinction between pragmatic, ethical-political and moral arguments and encompasses the possible effects of all three categories on a policy choice, can be helpful in explaining the EU's influence on receiving countries when they are making a decision on human rights.

The communicative action theory is useful for the purposes of this research primarily because it brings about an extended understanding of rationality that reaches beyond its conceptualization in the rational choice theories. It does so by assuming the actors to follow logic of justification. According to this, an actor's capability of explaining and justifying his/her reasons for making a particular policy choice as well as evaluating the validity of the others' arguments is what makes the actors rational. Strikingly, the reasons with which the actors back up their positions can be well related to material gain while they can also be deriving from "a sense of what is appropriate given an actor's role or duties or what is right given universal standards of justice" (Sjursen & Smith, 2004). As Eriksen puts it, states are not only rational actors who can form preferences and pursue them consistently, but also "entities having the capacity of being reasonable in the sense that they possess a notion of what is just and fair (Rawls 1993: 49) and what is communicatively rational (Habermas 1996: 5)" (Eriksen 2006, p.263). In this context, 'argument' is conceptualized as being more than rhetoric; as a tool over which the actors put forward their political positions. In her study on the role of ethical arguments in fostering change in world politics, Crawford explains the magnitude of arguments as she notes: "Even those who use brute force make arguments about why it was 'necessary' or 'wise' to do so" (Crawford 2004, p.12). In the light of this premise every kind of actor would be expected to resort to validity claims –

regardless of what type- for his/her actions. According to the communicative action theory, this is an attempt to refrain from a performative contradiction, i.e. a discrepancy between a performance and a proposition (Eriksen 1999, p.231). It is in this context that arguments can be claimed to be indispensable elements of policy making.

0.4. Methodology: Studying the Arguments

To account for the influence of the EU's role as a human rights promoter on subject states, building on Habermas' theory of communicative action, the methodological approach applied in this thesis is to study the arguments presented by the actors with regard to a decision. The data for such an analysis have been collected through field researches in Turkey and Spain which include newspaper analysis and in-depth and thorough investigation of court decisions. In this regard, the arguments that are used by legislatures, politicians and/or intellectuals; those that are reflected in newspaper coverage or in the original court decision are put under scrutiny at two levels and examined for both DTP and Batasuna cases accordingly.

DTP and Batasuna cases enable a most similar systems design for research. They are similar to the extent that they represent two political party prohibition cases due to alleged ties to terrorism in democratic societies while both of these societies fit into the definition of receiving countries in terms of the EU's human rights promotion. Plus, in both cases the parties deny any direct link to terrorism and hence, following the outlawing of their parties both have applied to the ECtHR for solution. On the other hand, a key feature that differs the two cases is the relevance of Spain and Turkey to the EU: that is, DTP is a case from a candidate country and Batasuna from a member state. In this regard, they provide a differentiation aspect between the internal and external aspects of the EU's role. Further, DTP and Batasuna cases differ on the EU's position towards their outcomes. That is, the Spanish Supreme Court's decision to ban Batasuna in 2003 was upheld by the European Court of Human Rights in 2003 while the European Commission denied any appointment to the former Batasuna members. In this

case, the ban on Batasuna and the EU's position was in conformity. In contrast, the EU's has been critical of the Turkish Constitutional Court's decision to ban DTP. During the process, the EU officials made statements pointing to the democratic predicaments of a possible ban on DTP. Moreover, right after the Court announced its decision; the Swedish Presidency issued a statement expressing their disappointment with the ban on DTP. In this respect, the DTP decision constitutes a case of divergence from the EU's position while the Batasuna decision is backed up by the EU. Hence, in terms of their convergence with the EU's position, the prohibitions of DTP and Batasuna lead to different outcomes. Although the aim of this thesis is not to explain the variance in the outcomes, it adopts a most similar system design in an attempt to account for the variation in the justifications used in these two similar cases. As Landman asserts, in such studies with few cases, where the country is often the unit of analysis, the focus tends to be on the similarities and differences among countries p.27. (Landman, 2000, p.27). Accordingly, this study compares and contrasts the justifications used in the Batasuna and DTP decisions to reflect any similarities and differences between the two.

The two-level design of analysis is conducted through legal and political argumentation. At the first level of analysis, I analyze the arguments put forward by the legislature in making a decision on a human rights issue. This enables me to draw conclusions about what an actor considers to be at stake when making a controversial decision on human rights with a specific focus on the references to the EU. This is important as it reveals whether utility, value or right-based considerations determine the influence of the EU's role as a human rights promoter. Then on the second level, I move on to consider what kind of an influence is articulated for the EU by other actors who are not decision makers but may have an influence on the process. Thus, I examine the arguments the politicians, intellectuals, state officials use in either criticizing or supporting the decision. In brief, both the reasons presented by the legislature to justify a decision on human rights and the supporting and/or criticizing arguments that the other influential actors use with regard to that decision are put under scrutiny. In so doing, the aim is to pinpoint the effects of material, ethical and moral considerations on how the EU promotes human rights from different perspectives.

There are significant advantages of analyzing the arguments at legal and political levels. First and foremost, it enables to account for any possible institutional variance.

Political party prohibitions are legal decisions made by the related national courts. However, they have serious political outcomes which bring about a political dimension to the cases. Hence, although politicians are not the decision makers in the political party prohibitions, they build up a political position towards the legal decisions and use arguments for their positions accordingly. As such, the prohibition of political parties is an issue at both legal and political spheres. In this regard, through studying the arguments at legal and political levels, it is possible to compare and contrast the argumentations used by judges and politicians. If the argumentations match, then more generalizable conclusions can be made with regard to the EU's role. If, however, the argumentations greatly differ from one another, then an institutional explanation can be sought.

Moreover, adding a second layer of analysis to the research framework facilitates a broadened explanatory power. That is to say, what types of arguments do different actors use to mobilize support for their positions would reveal a broader picture of what is considered legitimate at different spheres. If justifications are arguments used by actors to persuade their audiences, then analyzing justifications at two levels enable to take into account two types of actors which would use arguments to persuade two different audiences. In this regard, the analysis on legal argumentation will focus on the justifications used by court judges towards a legal audience while the analysis on political argumentation will focus on the justifications used by politicians towards a political audience. In this way, although the politicians are not the decision makers in the political party prohibition decisions, taking into account their justifications would enable to account for what political audience is expected to consider legitimate. Hence, the two-level design would enhance the analytical basis and make possible to test the conclusions drawn from the analysis on legal argumentation with the justifications used towards political audience.

The arguments in justifying, supporting and/or criticizing a controversial decision on human rights can be sorted out in accordance with three criteria: a) utility; b) values; c) rights (Fossum 2002, p.112). *Utility* refers to those arguments that focus on the outcomes of an action; that legitimize the action through material benefits it is expected to produce. They are the ones that reflect a cost and benefits analysis of the actors and this is why they generally reflect themselves on the security and economic considerations.

Value is about what is seen valuable, or ethically salient, and important to a group's sense of identity and conception of the good life. Value-based legitimizations would entail references to "what is considered appropriate given a particular group's conception of itself and what it represents" (Sjursen 2002, p.495). The value-based arguments can be further explained by appealing to what Crawford calls as 'identity arguments'. In this way such arguments would be expected to "posit that people of a certain kind act or don't act in certain ways and the audience of the argument either positively or negatively identifies with the people in question" (Crawford 2004, p.24). In this line of argumentation, certain types of action are associated with certain types of identities and therefore the value-based legitimizations often construct or reconstruct the identities of the groups in question. A typical example of such legitimation was present in the eastern enlargement of the EU, as the arguments for duties and responsibilities of the western Europeans to embrace the east constituted the eastern Europeans as the "kidnapped West" rather than an "other" to the Western identity (Sjursen 2002, p.505).

Right on the other hand is related to the principles that have mutual recognition and respect. If an actor is using rights based justifications, "policy would be legitimized with reference to principles that, all things considered, can be recognized as 'just' by all parties, irrespective of their particular interests, perceptions of the 'good life' or cultural identity" (Ibid). What really distinguishes the moral arguments from the ethical-political ones, in this regard, is their non-circumstantial, reciprocally respected source of legitimacy in comparison to the community-bound, identity driven values. In Riddervold's words: "While values ideal-typically are linked to a particular community's conception of good, i.e., are subjective norms that might vary between different societies, rights refer to higher order principles and claim universal validity" (Riddervold 2010, p.582). From this perspective, the legally binding norms and principles would be expected to provide the actors with such an objective source of legitimacy. In this respect, Fossum defines 'right' as "a legal entity which presupposes mutual recognition and respect, which every rights holder is compelled to offer and essentially entitled to receive from other rights holders" (Fossum 2002, p.112). Hence, references to international laws, to the norms and principles that are legally binding would be indicators of right-based arguments.

Accordingly, I develop three hypotheses in line with the larger research question:

1- An actor decides (does not decide) in accordance with human rights principles when those principles are likely to prosper (reduce) economic benefits and/or national security. If this is the case, the EU, as a human rights promoter, would have a utility-based influence.

2- An actor decides (does not decide) in accordance with human rights principles when those principles are in line with (contradicting with) the values with which the actor defines itself. If this is the case, the EU, as a human rights promoter, would have a value-based influence.

3- An actor decides (does not decide) in accordance with human rights principles when it recognizes (does not consider) that deciding so is just and legitimate given the universally binding rights and principles. If this is the case, the EU, as a human rights promoter, would have a right-based influence.

Table 1 Application of communicative action theory to the EU's influence as a human rights promoter

Type of the EU influence	**Discourse**	**Indicator**
Utility-based	Pragmatic	Utility, efficiency, security or economics interest maximization, expected costs and benefits
Value-based	Ethical-political	Shared values, common good, an appropriate behavior deriving from an identity of a community
Right-based	Moral	Rights, what is just for all, legally binding principles and norms, higher ranking law

A possible criticism to such an approach can be with regard to the credibility of the conclusions given that what actors say in public does not necessarily reflect their real intentions. In other words, it might be misleading to deduct the actors' motives from their speeches. More specifically, when the focus is on justifying arguments of a decision, a very much anticipated criticism would be that justifying arguments do not

necessarily reveal the actual motivations of an action. In politics, it is common for decision makers to use rhetorical justifications for their decisions to hide their instrumental interests. Plus, when a political actor wants to justify its decision, he/she might be using commonly accepted and respected arguments even if they are not the real motivations of the actor. This is what Schimmelfennig calls a 'rhetorical action', i.e. "the instrumental use of arguments to persuade others of the validity of one's selfish claims" (Schimmelfennig 2000, p.129). However, whether the arguments are used to cover the real motives or not is not a consideration of this research. This is simply because; this dissertation does not aim or claim to explain 'the real motivations' of the political actors but rather it seeks to identify the mobilizing or justifying arguments used for a policy choice. As Sjursen puts it, these mobilizing or justifying "arguments do not have to be valid by universal standards. Neither do they have to be the result of a deeply felt conviction on the part of the author. But they have to be able to mobilize support" (Sjursen 2002, p.496). From this perspective, even if the arguments are being used instrumentally they would still be the indicators of what the actors consider as legitimate for their audience, i.e. as having the capacity to mobilize support for their position. In this context, the condition for this support would be that the arguments are considered legitimate or reasonable (Sjursen, 2008, p.6). Hence, even the rhetorical use of arguments will serve the purposes of this dissertation in finding out what type of arguments are considered as legitimate, as reasonable to the extent that they influence the policy choice. Consequently, differentiating between rhetoric and action is not a research concern of this dissertation. At this point, the approach of this dissertation diverges from the studies that seek answers to what motivates the actors in making a policy choice.

Another possible criticism could be that communicative action theory does not rule out the rationalist explanations, that even if actors refer to values or rights in order to legitimately argue for a policy decision, they might still be driven by cost and benefit calculations. It should be noted that the communicative action theory offers "an alternative perspective, in addition to –not instead of- the realist one" (Sjursen 2003, p.35). This means that, the approach used in this dissertation acknowledges that actors make cost and benefit calculations and that these calculations can be influential in the decision making process. By focusing on whether these calculations are reflected in utility-based arguments in justifying one's position with regard to a decision, this

dissertation questions to what extent actors use cost and benefit calculations in order to mobilize support for their positions, i.e. to what extent the actors consider utility considerations legitimate. This is important as it enables different level of articulation of the influence of the rationalist arguments. This is primarily because, the three categories of arguments presented in this account are not conceptually but analytically distinct; that is, all three can be present in foreign policy (Sjursen & Smith, 2004). Hence, via communicative action theory, not only utility but also value and right-based considerations are taken into account in explaining the EU's influence as a human rights promoter. Moreover, given that "[s]trategic rationality presupposes communicative rationality" (Eriksen 2002, p.48), this study assumes the rationalist explanations to contain a certain degree of communicative rationality. In other words, it brings about a conceptualization of actors as being not only strategic but also communicative and as such adopts an extended understanding of rationality. Hence, the approach used in this research aims to reach conclusions supplementary to, rather than ruling out those of rational choice theory (Sjursen 2004, p.107).

A third attempt to respond to possible criticisms is the two levels design of the analysis. Accordingly, the analysis develops on the arguments of the legislature at the first level, on the arguments presented by the other influential actors in the process, at the second level. Such a design enables a comparison between the arguments used by different actors, i.e. different shareholders of a decision. In this regard, the second level brings about a layer of comparison between the justifications of the legislature and the arguments of the others, by introducing the perspective of the actors beside that of the legislature. Thus, the type of arguments used by the legislature are not accepted as the sole indicators of the EU's influence but rather, they are compared to the types of arguments used by other actors.

0.5. How to Study?

This dissertation's aim is to analyze the EU's influence as a human rights promoter on receiving countries. Given that the EU's overall goal of inducing a normative change through promoting human rights prevails not only in its internal but also in its external policies; the answers for the research question is investigated in a member state and a candidate state in an attempt to grasp any disparity that might exist between them. In so doing, the aim is to bring about a closer insight on the internal and external influence of the EU's role as a human rights promoter by looking at one receiving country from within the EU borders; i.e. a member state, and at one from the periphery; i.e. a candidate country.

Since the 1990s, promotion of human rights has evolved as a core value and self-image of the EU through internal constitutionalization as well as through directly tying it to its foreign policy. In the meantime, the issue of consistency or coherence between the EU's human rights policies towards third parties and member states has drawn considerable academic attention. Alston and Weiler state in *An 'Ever Closer Union' in Need of a Human Rights Policy* that internal and external dimensions of human rights policy of the EU are like two sides of the same coin and therefore cannot be kept separate (Alston and Weiler 1998, p.664). Following this premise, Andrew Williams attempts to map the incoherence between internal and external human rights policies of the Union by comparing them in the definitions of rights, in the methods and surveillance adopted and in the enforcement measures (Williams, 2005). In similar lines, after a scrutiny of the protection of human rights within the EU, Karen Smith points to a "legitimacy deficit" seeing that the EU presses the third countries to ratify international human-rights treaties while it is not a party to them (Smith 2006, p.101). However, the majority of the work which questions the internal-external coherence between the EU's human rights policies has the EU at its focal point. At this point, this

dissertation seeks to contribute to the EU literature by providing a different perspective with turning the focus on the receiving states.

The twofold structure of the analysis will allow making a comparison between a member state and a candidate state and in this way it is likely to contribute to the big question on whether there is a difference between the internal and external role of the EU as a human rights promoter. For an accurate comparison, a similar case of human rights in which the EU has involved and which has occurred in a member state and a candidate state is needed. The closure cases of the political parties Batasuna in Spain and DTP in Turkey provide us with the ideal material for such a comparative analysis. Batasuna is the Basque nationalist party which was banned by the Spanish Supreme Court in 2003 due to its alleged ties to ETA. In similar lines, Turkish Constitutional Court decided to illegalize the Kurdish nationalist party DTP in 2009 by pointing to its alleged ties to PKK. Acknowledging the differences in the contexts of the Kurdish and Basque problems in which these two cases take place -such as the rights that the Basque and Kurdish community enjoy or the number of political parties representing the two communities- I believe that the two cases provide a good basis for a comparative analysis for the objective of this dissertation. The primary aim of this research is not to make a comparison between the cases of Batasuna and DTP but to find out what kind of an influence the EU has as a human rights promoter on Spain and Turkey, through analyzing the arguments used in justifying, supporting and/or criticizing the decision on the illegalization of Batasuna and DTP. Hence, although an introductory account will be provided on the similarities and differences of these two processes; they will be out of the immediate scope of this analysis. Accordingly, Batasuna and DTP are regarded as two cases of political party closures due to their alleged ties to terrorism in a member state and a candidate state, and in this manner they are put under scrutiny to figure out the type of influence the EU has on these states as a human rights promoter. As such, the cases are compared based on their linkages with the EU.

The first and foremost reason in choosing these two cases is their representation of a similar instance in a member state and in a candidate state. Besides, the EU is involved in both cases through the statements that it made either during or after the process of decision making. Moreover, in both cases, after the decision was revealed, ex-political party members applied to the ECtHR for a solution. In this regard, they

present ample provisions for comparing the Union's influence in a member state and a candidate state. Another reason that makes the cases suitable for the objectives of this analysis is that both cases are related to terrorism as well as to rights of representation. Both in Batasuna and DTP decisions, the party that is banned considers the case to be one of human rights by pointing to the rights of representation and the courts of the state consider it to be an issue related to security, by emphasizing the alleged ties to terrorist organizations. Consequently, the two cases represent a good example of a controversial decision given that the cases both have a human rights and a security dimension. Moreover, the case of Batasuna and the EU's position towards it, have been widely used by the Turkish Constitutional Court and Turkish politicians in the decision to close DTP. Hence, there is a clear link between the two cases which demonstrates that the EU's position in a human rights position shapes its influence in another one. Stated as such, the selection of these cases has the potential to contribute to the larger debate on the coherence among the EU's human rights policies by comparing its influence internally and externally.

In sum, this research is an attempt to reach conclusions on the type of influence the EU as a human rights promoter has on subject states both within and in the periphery of the Union. It aims to do so by comparing a similar case in a member state and a candidate state. For this purpose, the cases of Batasuna and DTP; which are the recently banned political parties due to their alleged ties to terrorist organizations in Spain and Turkey, are selected. In order to account for the influence of the EU as a human rights promoter, firstly the arguments used by the legal actors to justify the decision to ban the political parties are analyzed. For this purpose, the legal decision to close the political party in two cases is put under scrutiny. In addition, if available, the statements of the legislature are also used to supplement the data in the legal decision. Accordingly, the arguments used by the legislature are classified as being utility, value or right-based in an attempt to comprehend what the legislature consider to be at stake when making a controversial decision on human rights. This will reveal through what type of influence the EU operates as a human rights promoter in a member state and in a candidate state. Secondly, the study moves on to consider how the politicians and intellectuals that have a public audience argue about the illegalization. Therefore, by carrying out newspaper searches, the public statements of the politicians and intellectuals on the legal decision to close the political party will be analyzed. Such an

analysis will provide the research with an additional layer of argumentation to that of the legal decision. In so doing, the rationale is to empirically test the conclusions of the two case studies as well as the general argumentation of the dissertation by comparing the arguments used by the legislature to justify the decision to those used by the other influential actors in criticizing or supporting the decision.

0.6. Chapter Overview

The thesis will be structured at six stages. The first two chapters mainly focus on the EU and seek to address the theoretical, conceptual and practical challenges of promotion of human rights by the Union. The remaining four chapters are devoted to the case studies and will develop a background and subsequently an empirical analysis on DTP and Batasuna cases. Accordingly, Chapter 1 deals with the general question of how we can conceptualize the EU as a human rights promoter. For this purpose, a literature review on the EU's actorness is granted by summarizing the main academic discussions on what kind of a power the EU is or might be. The aim is to locate the research question and the theoretical approach of this thesis into the general academic context. The theoretical account is followed by a historical explanation of the development of the EU's human rights policies since the very early days of the foundation of the Community. As such, the first chapter grants a coherent conceptualization of the EU as a human rights promoter both theoretically and historically.

Chapter 2 takes on one of the main assumptions of this thesis and seeks to reveal that the EU actually has an influence as a human rights promoter, that is to say, that the EU influences other actors' human rights policies. Hence, it focuses on the candidate state which has the longest process of application for membership: Turkey. The rationale on focusing on Turkey is the multiplicity of material that it provides due to the length and roughness of its process. In other words, the ups and downs in the relationship between Turkey and the EU as well as Turkey's long lasting aspiration to

become a member enable the researcher to make an analysis on the EU's influence on Turkey's human rights policies over a long time period with an eye on the strengths and the drawbacks of the EU as a human rights promoter. In this regard, the issue of (in)consistency among the applicants as well as among the member states and candidate states is scrutinized as a possible source of the drawbacks.

Chapter 3 shifts the focus of analysis to the case studies and provides a detailed historical account on the prohibition cases of DTP and Batasuna. Through shedding light to the development of the problems with these political parties in Turkey and in Spain, the aim is to provide the reader with familiarity with the historical background for the forthcoming empirical analysis on justifications.

Chapter 4 firstly makes an introduction on the EU's general position towards the prohibition of political parties and then offers a concise review on the legal standings of the prohibition cases of DTP and Batasuna with regard to the EU's position. Hence, the legal and official grounds on which the two parties were banned are examined in a comparative fashion in an attempt to bring about a legal insight on the cases. In this manner, this chapter also intends to lay out the similarities and differences between the legal codings of the two cases. Even though the main focus of this analysis is not to compare, contrast or assess either the two cases or the EU's policies towards them, for the purposes of providing a solid ground for empirical analysis, the legal underpinnings of the decisions will be briefly discussed in relation to the EU's general position.

Chapters 5 and 6 reflect the findings of the empirical analysis. In Chapter 5, the arguments presented by the legal and political actors in Turkey through DTP's illegalization process are put under inquiry in the light of communicative action theory. In Chapter 6, the same analytical framework is applied to the Batasuna case in Spain. Finally, conclusions of the empirical chapters are amplified in relation to the theoretical and historical propositions that have been made in the previous chapters.

A comprehensive research formulated as such is promising in terms of contributing to the literature on EU studies, International Relations, Comparative Politics as well as on the linkages between International Relations and Comparative Politics. In the first place, using an extended conceptualization of rationality, the aim is to reach an extended understanding of the EU's influence as a human rights promoter by taking into account utility, value and right-based considerations of an actor. This is

valuable because in the International Relations literature the rationalist and institutional constructivist approaches focus on one of these and develop their explanations accordingly. Such an encompassing approach will not only provide the EU literature with an extended understanding of the EU influence but also will enrich the International Relations literature with a broadened perspective. Secondly, by distinguishing between values and rights, this dissertation adopts a more detailed conceptualization of norms. The differentiation between the ethical and moral norms is likely to contribute particularly to the EU literature which very much leans on the normative dimension of the Union policies. As a result, it will be possible to say more on the influence of norms in the EU's promotion of human rights. Thirdly, the empirical analysis of this dissertation is built on similar human rights cases in a member state and in a candidate country. Based on that, it has the potential to shed light on what kind of an influence the EU has as a human rights promoter internally and externally. Hence, it can contribute to the discussion on the coherence and/or consistency among the internal and external dimensions of the EU's human rights policies. Finally, given that the focus of this dissertation is on the influence of the EU as a human rights promoter on domestic actors' decisions, the analysis is drawing on the linkages between the domestic and international factors. The impact of the international organizations on the transition to democracy has been an area of research where Comparative Politics and International Relations scholarships intersect (See for instance: Levitsky & Way, 2005; Mansfield & Pevehouse, 2006; Moravcsik, 1995; Pevehouse, 2002a, 2002b). Therefore, the conclusions of this analysis would bring about new insights about the influence of the international factors on domestic decisions and thus would feed into the linkages between Comparative Politics and International Relations.

CHAPTER 1

CONCEPTUALIZING THE EU AS A HUMAN RIGHTS PROMOTER

This dissertation is dedicated to analyze the influence of the EU as a human rights promoter. But what does "the EU as a human rights promoter" mean? What kind of an actor are we talking about and how can the EU be a human rights promoter? This chapter is an attempt to seek answers to these questions by providing an introductory account at theoretical and historical levels. For this purpose, it primarily deals with the theoretical conceptualization of the EU as a human rights promoter by presenting a brief literature review on how to conceptualize the Union's influence in international relations. Hence, the first section will focus on the academic discussion on what kind of a power the EU is or may be, by also reflecting the conjuncture of the time. In so doing, the aim is to shed light to the evolution of the argument that the EU is a normative power in world politics and further, to clarify the theoretical position of this dissertation with regard to the normative power argument. After the theoretical introduction, it will be moved on to provide a historical description on how human rights have been incorporated into the EU's position with regard to member states and candidate countries.

1.1. A Theoretical Look at the EU as a Human Rights Promoter

The European Union has a history of more than a half century and the debate on what kind of an entity the EU is, as well as, may and/or should become is still alive and hot. Through the European integration process, various portrayals of the EU have appeared in the literature. Partly to start with the entertaining part of the story, partly to provide a picture of the theoretical rush to explain the EU, one should mention the metaphoric portrayal of the EU as an elephant, recalling the episode of the blind men and the elephant. In 1972, Donald J. Puchala associated the experience of scholars who had been trying to understand and explain international integration with the blind men trying to discover an elephant but reaching different and imperfect conclusions based on the part of the huge animal that each touches (Puchala, 1972, p.267). What Puchala observed as a general tendency in the literature on international integration does not prove wrong in the specific case of the European integration when one considers the amount and variety of theories on the character of the EU. Hence, the EU's rather complex institutional design, its peculiar policy making structure, as well as deepening and widening strategies have been of great interest to scholars of social sciences, who have ended up with different explanations on what the EU is. According to Bomberg and Stubb, "students of politics, economics, law and international relations are interested in the EU not just because of its practical relevance, but also because of its analytical significance: it represents the most advanced experiment in multilevel cooperation and integration" (Bomberg & Stubb, 2003, p.4).

This section primarily deals with the theoretical accounts on the influence of the EU, the gigantic elephant which challenges any simple categorization as "it combines attributes of a state with those of an international organization, yet it closely resembles neither" (*Ibid*, p.3). This dissertation is an attempt to seek answers to what kind of an influence the EU has when the receiving countries are making a decision on human rights issues. As such, the research question on which this research is built up acknowledges that the EU has a significant international presence coupled with a unique

capacity to influence the other actors; particularly those that have been involved into its integration process. By further focusing on its influence as a human rights promoter, this dissertation assumes the Union's influence having a normative dimension. In an attempt to situate this research question into the existing theoretical literature, it is essential to provide a brief review of the theories that conceptualize the actorness and the influence of the EU in world politics.

1.2. The EU on the International Scene

The extent that the EU has reached in multilevel integration has evidently confronted the International Relations scholars who are accustomed to deal with states and international organizations with new questions. In this respect, the Union's "status as something more than an intergovernmental organisation but less than a fully-fledged European 'state'" posed major analytical challenges (Hill & Smith, 2005, p.4). While the fuzzy nature of the Union has made it difficult for scholars to conceptualize it, its impact on international politics has been so clear that its existence could not have been overlooked. In this regard, there have been different tendencies in the literature to conceptualize the EU on the international scene (see Hill & Smith, 2005; Hyde-Price, 2006; Lucarelli, 2006; Manners, 2002; Sjursen, 2006; K. E. Smith, 2006). The general trend in the literature can be said to vary between those theories that look at the Union through a state lens, attributing its features to state-like categories; and those having an intergovernmentalist perception of the EU, as being an international coordination system between the states. In similar lines, Filippo Andreatta distinguishes between the theoretical accounts on the EU's international role as those theories which analyze Europe's role as an autonomous actor with its own potential aggregate capabilities and those which conceptualize the Union as an institution capable of influencing its member states' foreign policies (Andreatta, 2005, p.33). Moreover, as Smith and Elgström put it, in between these two strands of theories, there are also "more or less exotic approaches dealing with notions such as 'presence', with the links and the tensions between institutionalization and the generation of collective identities and understandings, and

with the specific characteristics of EU actions and impacts in particular issue areas" (M. Smith & Elgström, 2006, p.1).

The existence of different conceptualizations of the EU's effect on the international scene, such as 'actorness', 'intergovernmental coordination', 'presence', 'role' and 'impact', reveals that besides the discussion on what kind of an actor the EU is, the discussion on whether it is an actor at all (Bull, 1982) very much paved the way for the evolution of the literature. For instance, Karen E. Smith argues that as long as other international actors are affected by the EU's internal policies and are aware of its resources, the EU has a significant 'presence' in international affairs which cannot be automatically interpreted as 'actorness'. This is because, in her own words, "the EU is not always able to translate presence into 'actorness', that is, the ability to function actively and deliberately in relation to other actors in the international system" (K. E. Smith, 2006, p.24). In similar lines, Ginsberg states that there is a consensus among the scholars on the EU's 'presence' as it is visible in regional and global arenas, and the EU's exhibition of some elements of 'actorness' as it is an international actor in some areas but not in others (Ginsberg, 1999, p.432). This thesis takes from the point that the academic world seems to agree upon, that the EU has a clear and unavoidable impact in international politics and then focuses on analyzing the specific type of the impact that it has on receiving countries in a particular issue area, i.e. human rights. Stated as such, the theoretical position of the research question of this thesis falls under the category of the "more or less exotic approaches" as Smith and Elgstörm define them (M. Smith & Elgström, 2006, p.1). This is to say, it attempts to look at the EU beyond the state framework and questions its ability to function as a human rights promoter in relation to other actors in the international system.

1.3. What Kind of Power?

The theoretical underpinnings of conceptualizing the EU as a human rights promoter recall the academic discussion on what kind of a power the EU is; a discussion

which is almost as old as the EU itself. This is because, "[t]he notion of the EU as a 'power' is particularly related to the impact of the EU on the international arena"(Hill & Smith, 2005, p.10) and it was quite clear since the 1970s that the European Community's (EC) impact on international arena was quite different than those of the customary international actors. That was primarily and apparently due to the EC's incompetence in military power, yet increasingly potent position in global economy. In this regard, in the early 1970s François Duchêne formulated the eminent image for the EC as a civilian power. He argued that the nuclear and superpower stalemate in Europe through the 1970's led to the devaluation of pure military power on the one hand while on the other hand civilian forms of influence and action were given much more scope (Duchêne, 1973, p.19). Still a very prevalent concept in the EU literature, civilian power is defined by Karen E. Smith as "an actor which uses civilian means for persuasion, to pursue civilian ends", 'civilian means' referring to non-military instruments and 'civilian ends' being "international cooperation, solidarity, domestication of international relations (…), responsibility for the global environment, and the diffusion of equality, justice and tolerance" (K. E. Smith, 2008, p.22). According to Maull's definition, a civilian power is the one which accepts the necessity of cooperation with others in the pursuit of international objectives, concentrates on non-military, primarily economic, means in order to secure national goals, leaves military power as a residual instrument serving essentially to safeguard other means of international interaction and wills to develop supranational structures to address critical issues of international management (Maull, 1990, pp.92-93).

Duchêne based his notion of Europe as a civilian power on the conjuncture of the time. Firstly, he pointed to the changing nature of interstate relations within Europe that moved from war towards civilized politics in which economics gained an unusual area to exert power. It is in this context that he considered the possibility of being a power without necessarily possessing military instruments. According to Duchêne, the limited military potential of the European Community was not stemming from material incompetence but on the contrary; it was "the spontaneous preference of an urbanized body of citizens, with rights, values and comforts to secure, for the 'democratic' and civil standards of the suburbs over those of the armed camp and the balance of power" (Duchêne, 1973, p.20). Thus, in an increasingly interdependent world order, he believed in the potential of a civilian power for constructive intervention. He declared that only

through remaining true to its inner characteristics could the EC make the most of its opportunities, while he defined the EC's inner characteristics as "civilian ends and means, and a built-in sense of collective action, which in turn express, however imperfectly, social values of equality, justice and tolerance" (*Ibid*). In Lucarelli's words, Duchene's depiction of the EC as a civilian power "was not just the description of an economic giant with little political power, but the representation of an international actor that spreads civilian and democratic standards of governance on the basis of 'ethics of responsibility' which is usually associated with home affairs" (Lucarelli, 2006b, p.5). In this sense, the conception of 'civilian power' seemed to capture the novelty that the EU was introducing to the conventional understanding of international relations. However, defining the Community solely through pursuing civilian ends through civilian means made the concept reluctant to realist criticism on the Union's actorness. Principally, the traits of civilian power were not considered as sufficient to consider one an international actor by realist theories. From this perspective, relying on the EC's lack of military power, in 1982 Hedley Bull concluded that "Europe is not an actor in international affairs, and does not seem likely to become one" (Bull, 1982, p.151). Bull criticized the notion of civilian power for its ineffectiveness and lack of self-sufficiency in military power. He was determined that the EU needed to transform into pure military power if it wanted to fit more appropriately to the bipolar world of the time.

Despite the realist criticisms, in the post-Cold War security setting, the idea of dealing with the threats to international peace and stability through civilian forms of power attracted scholarly attention. It is in this post-Cold War setting that Joseph Nye introduced the concept of "soft power" to define a new way of exercising power "which occurs when one country gets other countries *want* what it wants" (Nye, 1990, p.166); a concept that is distinct from "hard power" in which one country commands the others what it wants, generally by the agency of its military capabilities. Nye emphasized that soft power was as important as hard power especially in a world order where he observed power "becoming less transferrable, less coercive, and less tangible" (*Ibid*, p.167).

On the other hand, it was again the post-Cold War security setting in which the EU took the major steps in developing a military dimension and therefore challenged the theoretical concept of civilian power. The 1992 Treaty on European Union (TEU) –

also known as the Maastricht Treaty- introduced the Common Foreign and Security Policy (CFSP) which would seek to protect the Union's common values, fundamental interests and independence and to strengthen the security of the Union and the member states in all ways (Title V, *The Maastricht Treaty on European Union*, 1992). In explaining the driving forces in development of such a policy for the Union, Keukeleire and MacNaughtan point to the historical context in which the Maastricht Treaty negotiations took place. They argue that significantly after the Gulf War, the member states did not have the luxury of continuing on overlooking the military dimension of security and as a result, they "negotiated a treaty text that a year previous would have been unacceptable" (Keukeleire & MacNaughtan, 2008, p.50). Hence, they identify the CFSP as a response to the conjunctural settings which required some level of military establishment. Accordingly, although the Treaty did not develop a full-fledged military component, it shifted the direction of the Union towards a common defense policy as The Article J.4 stated that "[t]he common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence" (Title V, *The Maastricht Treaty on European Union*, 1992). While the means were not necessarily defined by military instruments, the emphasis on "all ways" hinted a more wide-ranged definition of the instruments that should be available to the Union. Moreover, through CFSP, the objectives that the EU set for itself were no more exclusively related to diffusion of tolerance, cooperation, justice and equality. The direct introduction of the security related elements into the EU's legal framework can be regarded as a twist in the EU's evolution as an international actor, plus, as a further academic challenge for those who aim to conceptualize its presence. For instance, Richard Whitman regards the Maastricht Treaty as signaling "the intent of the Member States of the Union to move beyond a 'civilian power Europe' and to develop a defence dimension to the international identity of the Union" (Whitman, 1998, pp.135-136). In similar lines, Nuttall argues that the most interesting implication of the Maastricht Treaty was the Union's refusal of the option of being a civilian power (Nuttall, 2000, p.178).

Although the introduction of a certain level of military dimension raised the expectations for a military power Union, the absence of a military achievement within the next seven years of the Treaty revealed that the Maastricht Treaty would not necessarily shift the EU from being civilian to military power; that in fact the Union might be evolving into a different type of power. At this point, there emerged the need

for a new conceptualization of the EU, as it was still not a military power but could not be considered as a civilian power any longer either. According to Karen E. Smith, given the recent developments, the insistence on characterizing the EU as a civilian power "not only stretches the term 'civilian' past its breaking point, but also tends to induce excessively rosy-eyed views of the EU as an international actor." (K. E. Smith, 2004).

It was in this context that the theoretical discussions on a normative impact that the EU might have on international politics emerged. Parallel to the developments of the 1990s, which seemed to bring together civilian and military components within the framework of the EU in a peculiar way that does not allow for a categorization through the either, in 1998, Richard Rosecrance reflected on the impact of the EU rather than on the means and ends available to it and suggested that "Europe's attainment is normative rather than empirical" (Rosecrance, 1998, p.22). In the same line, in 2001, Göran Therborn defined Europe, and particularly the EU as a normative area (Therborn, 2001). But it was Ian Manners's 2002 article which famously formulated the EU as a normative power (Manners, 2002). According to Manners, attempts to characterize the EU either as civilian or military power are discussing the EU with a focus on its capabilities and according to how much like a state it looks. Manners suggests that the concentration on the EU's state-like features is unhealthy and although evaluating the EU in terms of its capabilities is necessary and important, it is not adequate to understand its role in international relations. In this context, he draws attention to the EU's ability to shape the conceptions of 'normal' in international relations by analyzing the EU as a normative power. Different from the discussions on civilian and military power, "the notion of normative power is located in a discussion of the 'power over opinion', *idée force*, or 'ideological power' and the desire to move beyond the debate over state-like-features through an understanding of the EU's international identity" (*Ibid*, p.239).

The introduction of the concept of the normative power EU into the literature was followed by some concrete steps taken by the EU on the international scene in terms of operationalizing the military dimension and formulating a security related policy. Accordingly, in March 2003 the Union launched its first military mission Operation of Concordia, and then in June 2003 the Operation Artemis in the Democratic Republic of Congo took place. These two missions can be regarded as a confirmation of the EU's capacity in military missions. Meanwhile on the policy realm, in December 2003, the

European Security Strategy (ESS) was declared. The ESS was developed as a common strategic vision to back up the member states' common consensus on the need to develop more effective military capabilities. Under the title of "A Secure Europe in a Better World", the document identified key threats, strategic objectives and policy implications for Europe. The Strategy emphasized the urgency of building a secure neighborhood and relying on effective multilateral system to achieve a more active and more capable Europe. Accordingly, the ESS has provided a framework in which the Union's long term priorities such as promoting stability and strengthening of multilateralism were linked to its post-9/11 commitment to combat terrorism and prevent the proliferation of weapons of mass destruction (Bretherton & Vogler, 2006, p.187). In this regard, since 2003, military and security component have been tied to the EU's framework in an uncontestable manner.

Recognizing the recent military developments, in 2006 Manners reconsidered the continued relevance of the EU as a normative power. He acknowledged that since the 2003 ESS, the EU has deviated from the normative path of sustainable peace towards militarization led by 'martial potency' (Manners, 2006, p.189). Manners observed a tendency in the EU's policies to prioritize military intervention to non-military conciliation and according to him; this was risky for the sake of the EU's normative power. He recalled Jean Monnet's words regarding the creation of the EU for the purpose of escaping great power mentality (*Ibid*, p.183), and argued that "the militarization of the EU risks making it more like bigger and better great powers, whilst leaving the problems of interstate politics precisely where they were" (*Ibid*, p.194). According to Manners, the idea of EU battle groups or combat forces peace-making in Kurdish areas or Chechnya would jeopardize the willingness of Turkey and Russia to accept norms such as 'equality' and 'sustainable development'. As such, the EU's ability to influence the actors by shaping their understanding of the "normal" would weaken (Ibid, p.239). While Manners attempted to draw attention on the risks of the form of militarization that the EU is going through, he also noted that it is not the militarization per se which diminishes the EU's normative power but the way the EU militarizes. He argued that normative power and militarization can get along, if critical reflection characterizes the process of militarization (Ibid, p.183). This argument is further emphasized in a joint article by Thomas Diez and Ian Manners as they stated that military and economic forms of power are not necessarily in contradiction with the

notion of normative power and indeed they might underpin the normative power. Drawing on a research, they concluded that "the EU is most likely to 'shape conceptions of the normal' (and therefore have greater normative power) in the context of EU membership candidacies, when perceived economic benefits of joining the EU can be assumed to be important factors for compliance with EU norms" (Diez & Manners, 2007, p.176).

Put as such, the normative power EU generated an academic discussion, not necessarily as to whether it is a normative power or not but as to why and how it can be a normative power. It is in this context that Helene Sjursen asked "if the EU were to be a 'normative', 'civilian' or 'civilizing' power, what might be its core identifying features – how do we know a 'normative' or 'civilizing' power when we see it?" (Sjursen, 2006b, p.236). While the discussion is rich in terms of how to define the 'normative power', it is the Union's capacity to impact the actors and its commitment to pursue and promote norms which stands at the center of the EU literature. In other words, what matters is what some scholars (Börzel & Risse, 2009; Leonard, 2005) define as a 'transformative power', i.e. an EU "which aims to reshape the world in a longer timescale and which cannot be measured in terms of military measures budgets and missiles" (Leonard, 2005, p.2). This perspective is in line with the EU's self-definition as the 'force for good' in the European Security Strategy, a Union seeking to establish a rule-based international order (*A secure europe in a better world*, 2003). For this purpose, the EU seeks to diffuse its norms and ideas within and outside of its borders. As Börzel and Risse note, while "European integration itself can be described as an effort to promote diffusion of ideas across Europe (…) Europe and the EU also serve as active promoters of diffusion processes toward the outside world (…) –both in its immediate neighborhood and worldwide" (Börzel & Risse, 2009). The enlargement process stands out as a prominent area in which transformative power of the EU makes a difference. Accordingly, candidate countries' aspiration for membership makes them more willing to adopt to European ideas and values and therefore more open to EU influence compared to other external actors. For instance, a study in which Börzel explores the effectiveness of Europeanization approaches in promoting diffusion of ideas, she argues that a credible accession process is a factor determining the EU's transformative power: "the EU is unlikely to deploy much transformative power in its South Eastern and Eastern neighborhood as long as it does not adjust its 'accession tool

box' that it uses to engage with countries that are unlikely be given EU membership prospective in the foreseeble future" (Börzel, 2010, p.7).

On the other hand, from a structural realist perspective, Hyde-Price argues that the EU would pursue norms in its policies as long as they do not conflict with the core interests of the member states (Hyde-Price, 2006, p.223). Richard Youngs also highlights the strategic interest dimension in the EU's policies of promoting values and norms (Youngs, 2004). Such critiques, however, make a distinction between strategic thinking and promoting norms. As Müller states, rationalists can simply deny the relevance of moral issues, that "for rational actors morality is not relevant" (Muller, 2004, p.401) At this point it is crucial to have a theory that would combine the promotion of norms, or the ideational transformation as some scholars might prefer to say, with strategic calculations. The communicative action theory which considers norms to have a rational basis can be helpful in combining the rationalist and institutional constructivist approaches.

Following the argumentative rationality as put by Habermas, the actors are expected to rely on arguments that can mobilize support for one's position. In this context, the EU is presumed to be communicatively rational, that it is capable of making validity claims for its actions and evaluate the validity claims of other actors. Put as such, communicative rationality suggests that norms should and would be critically assessed and justified (Eriksen & Weigård, 1997, p.228). This is to say, from this perspective, the EU is not necessarily considered as a normative power but instead, it is recognized that it might have a normative dimension in its actions and in its impact given that "normativity and communicative rationality *intersect* with one another where the justification of moral insights is concerned" (Habermas, 1996, p.5). Hence, the compliance with norms would be tied to whether actors accept their validity or not, while the mechanism through which this happens would be the exchange of arguments (Riddervold, 2010, p.584) following the presentation of validity claims by the actors. As the conception of rationality is extended from actors willing to maximizing self interests to actors being able to justify their positions with either norms and interests, compliance with and the promotion of norms can be analyzed from a rationality perspective. Furthermore, through distinguishing between the norms which are culturally or socially specific values or conceptions of what is good on the one hand and a conception of what

is right, fair or just on the other hand, the theory of communicative action enables a further level of operationalization of the norms.

1.4. The Evolution of the EU's Human Rights Policies

Although legal documents refer to human rights as one of its core values, human rights were not incorporated into the Community framework for a long time. This is simply because when the Rome Treaty established the European Economic Community (EEC) in 1958, the primary concern was to maintain trade and economic stability in the region. This is why, even though the Treaty establishing the European Economic Community contained some social chapters which guarantee the rights of the workers they were mainly addressing "the need to promote improved working conditions and an improved standard of living for workers" and as such the fundamental goal of the social provisions in the Treaty of Rome was to promote the economic productivity (Article 117, "The Treaty of Rome," 1957). The dedication of the EEC to solely economic matters can be further understood by the existence of a separate organization; the Council of Europe (CoE) which was established in 1949 with the aim of promoting the rule of law, human rights and democracy. While the EEC and the CoE were (and today the EU and the CoE are) entirely separate bodies, the EEC was an exclusively economic organization such that when the CoE drafted the European Convention for the Protection of Human Rights and Freedom (also known as European Convention of Human Rights – ECHR) in 1950, and after the Convention entered into force in 1953, the EEC did not become a party to it.[3] Nevertheless, over 55 years now, through the integration process, what started as an economic project, evolved into a political entity claiming to be a human rights promoter. This section aims to provide an account on how human rights have been incorporated into the EU's framework with a specific

[3] As of 2012, the EU is still not a party to the ECHR, however in 1995 European Court of Justice recognized the constitutional significance of the Convention and the 2007 Lisbon Treaty required the Union's accession to the ECHR.

focus on the historical evolution on the Union's human rights position towards the candidate countries on the one hand and towards member states on the other hand.

Looking back at the economically oriented framework of the early years of European integration, the first references to human rights can be traced in the attempts to establish an international identity for the EC based on respect for human rights. The 1961 Birkelbach Report which was adopted by the European Parliament determined the eligibility for membership as restricted to those states which guarantee truly democratic practice and respect for human rights and freedoms on their territories (Birkelbach, 1961). Similarly, the 1973 Copenhagen Declaration on European Identity defined an identity for the Community through the principles of democracy, rule of law, social justice and respect of human rights ("Declaration on European Identity," 1973). However, to speak of the emergence of the EU's position on human rights, one needs to go back to the 1978 European Council which officially declared the respect for human rights as a political condition for the EC membership. In the 1978 Session of European Council, which was held in Copenhagen, the Heads of State and Government declared the respect for and maintenance of human rights as well as representative democracy among the essential elements of membership of the European Communities (*Declaration on Democracy*, 1978). This could have been taken as a turning point on the EU's human rights policy. Nonetheless, while this declaration indicated that respect for human rights would be a precondition of entry to the European Community, as Andrew Williams suggests, "[d]espite the implied conditionality in operation, there was nevertheless little reluctance to allow 'selective entry' for some of those European states that did not appear to satisfy the basic conditions of 'full' entry"(Williams, 2005, p.55). For instance, when Greece became a full member in 1981 and Spain and Portugal in 1986, it was immediately in the aftermath of the fall of their dictatorial regimes. However, there was no stance taken by the Community with regard to past violations of human rights and their possible repetition and this was not raised as an issue blocking their accession by the community members. According to Williams, it was only the return of democracy that the Community relied on when accepting these states as full-fledged members (*Ibid*, p.58). This reveals that through the 1980's, although respect for human rights was declared as an essential element of the EC membership, it was not established as a membership criterion. Respect for human rights was to be formalized as a precondition of entry fifteen years after the 1978 European Council, in the 1993

Copenhagen Criteria following the Treaty on European Union (TEU). Moreover, although the commitment to promoting human rights in international relations was already present in the Community documents, such as the 1986 Declaration on Human Rights by the Foreign Ministers of the then 12 member states of the EC in which the member states stated that "the Twelve seek universal observance of human rights" (Foreign Ministers of the European Community, 1987) it was still not clear how the Community was planning to realize this goal. As Toby King asserted, "the Declaration was silent as to what steps the Twelve intended to take to promote human rights" (King, 1999, p.316).

From the internal perspective, notwithstanding the references to human rights in Community reports and documents, promotion and protection of human rights were not officially set as a Community concern in the Treaties. This is mainly because the European integration had started in the form of an economic cooperation and notwithstanding the Community's praises to human rights, in legal terms, the treaties only "contained guarantees for the member states' citizens considered as economic actors in line with the four freedoms established by the Treaties" (Balducci, 2008, p.7). The first reference to human rights in one of the Community Treaties was in 1986 Single European Act which put forward in its preamble the member states' awareness of "the responsibility incumbent on Europe (...) to display the principles of democracy and compliance with the law and with human rights that they are attached" (Preamble, *The Single European Act*, 1986). Neuwahl explains the need to refer to human rights in the Single European Act with the abolition of frontier controls and the intensification of controls at external borders as a result of the introduction of the Single Market (Neuwahl, 1995, p.2). However, the references to respect for human rights were made in the preamble not in the provisions and therefore did not have any legal binding nor provided the EU with any kind of mechanism to monitor or punish a member state in the cases of human rights breaches.

In the 1991 Council meeting, the member states once again repeated their resolution that respecting, promoting, safeguarding human rights was an essential part of the Community's international relations as well as one of the cornerstones of European Cooperation ("Resolution of the Council on human rights, democracy and development," 1991). Drawing on the universality of human rights on the one hand, the document was primarily about the foreign policy of the Union, reaffirming what had

been laid by the 1973 Declaration on European Identity and 1986 Council Declaration on Human Rights. Hence, once again, the member states expressed their dedication to promotion of human rights universally without defining policy steps for that and also without binding the member state with any kind of a human rights policy.

The year 1992 was a milestone in the European integration as the Maastricht Treaty founded the European Union. In the Treaty, the Union confirmed that it relies on "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law" (Article F(2), *The Maastricht Treaty on European Union*, 1992) and defined developing respect for human rights as a common foreign and security objective (Article J(2). *Ibid*). This was important as the human rights were explicitly referred to in a Treaty article for the first time, not solely in the preamble as this was the case in the Single European Act. In this way, the Maastricht Treaty was breaking the silence of the founding treaties and giving formal recognition to human rights within the Union's legal framework.

Following the Maastricht Treaty, the breakthrough in the EU's foreign policy in terms of its human rights stance came in 1993 with the Copenhagen Council, which officially established respect for human rights as the criterion to determine an applicant's eligibility for EU membership. The political aspects of the Copenhagen Criteria entailed stability of institutions guaranteeing democracy, the rule of law, as well as human rights and respect for and protection of minorities. Although the idea of applying human rights conditionality to the applicants was not a new phenomenon, its direct expression indicated "a substantially more transparent policy for full entry into the Community", which revealed the application of "good governance" in line with the World Bank and the international donor community (Williams, 2005, pp.64-5). Furthermore, the Copenhagen Criteria introduced the procedures for scrutiny and therefore established the basis for limited intervention into the applicant states (*Ibid*, p.65). Accordingly, after deciding on the political criteria for accession to be met by candidate countries by 1993; namely, the Central and Eastern European States, the European Council asked the Commission to assess the political criteria in the ten candidate countries. Until the publication of the action programme "Agenda 2000" in 1997, though, the EU's approach to the political and human rights situation in applicant countries remained in the form of *ad hoc* political dialogue. The Agenda 2000 was a

step towards a more concrete approach to the EU's political conditionality. It introduced a more detailed review procedure in which the Commission would be responsible for examining and reporting to the Council on the applicants' implementation of the accession partnerships and their progress in adopting the *acquis communautaire* (European Commission, 1997). In the 1997 Luxembourg European Council, the European Council adopted Agenda 2000 into the EU acquis and led the European Commission to annually evaluate these countries' progress (Bartels, 2005, p.53). This is how respect for human rights was gradually incorporated into the enlargement process through the tool of political conditionality. In addition, human rights clauses that have been included in all cooperation and association agreements since 1995 have brought about a concrete level of conditionality to the EU's relations with third parties. This is important as human rights policy was no longer restricted to the applicants, but included all associated states. The human rights clauses in its external agreements enable the EU to suspend the agreements in case of a failure from a third party complying with the EU's human rights principles (K. E. Smith, 2001, p.189). These developments increased the credibility of the EU's position on human rights and made the EU an important actor in promoting human rights as part of foreign policy.

Hence by 1997, human rights were essentially incorporated into the EU's relations with the candidate states whereas within its borders, the Union still lacked a concrete human rights position. In this regard, the external dimension of the EU's human rights policies can be regarded to get ahead of the internal dimension. At the treaty level, the only reference to human rights was still the Article F(2) of the Maastricht Treaty which defined fundamental laws as the a general principle of the Community law. However in 1997, the EU was awarded with a stronger role to promote human rights in the internal sphere through the Treaty of Amsterdam amending the Treaty of the European Union. The Treaty of Amsterdam introduced the Article 6(1) to the TEU which explicitly stated the founding principles of the EU as "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (Article 6(1), "Consolidated Version of the Treaty on European Union," 2002). What is crucial in terms of the Union's internal human rights policies is the open statement in the Treaty of Amsterdam that any member state that is determined to execute "a serious and persistent breach" (Article 3.9,"Treaty of Amsterdam Amending the Treaty on European Union" 1997) of "fundamental rights, as guaranteed

by the European Convention for the Protection of Human Rights and Fundamental Freedoms" (article F2, *The Maastricht Treaty on European Union* 1992) will be excluded from certain rights deriving from the Treaty. Entailing that membership rights might be suspended if a member state seriously breaches human rights, the Treaty of Amsterdam has provided the EU with power to act against a Member State in promoting human rights internally. As Elene Fierro puts it, the provisions of Amsterdam crystallized "at the internal and constitutional level what was already standard practice at the external dimension" (Fierro, 2002, p.90) In this way, the EU was equipped with the capacity "to develop a democracy and general human rights policy in relation to the Member States and a competence for a general monitoring role" (Bogdandy, 2000, p.1318). This competence was to be further strengthened in the 2000 Nice Treaty which was going to clearly define the conditions on which the existence of a serious breach by the member states of the principles set out in Article 6(1) can be determined as well as the conditions on deciding to suspend a member states' certain rights (Article 7, "Treaty of Nice Amending the Treaty on European Union, Treaties Establishing the European Communities and Certain Related Acts," 2001).

The human rights amendments introduced by the Amsterdam Treaty were not only related to the internal sphere. On the external sphere, it tied the political conditionality on human rights which was officially formalized in the 1993 Copenhagen Criteria to the founding treaties through the Article 49 of the TEU, as it asserted that only a European state "which respects the principles set out in Article 6(1) may apply to become a member of the Union" ("Treaty of Amsterdam Amending the Treaty on European Union," 1997) As such, application for the EU membership has become bound to respect for human rights and fundamental freedoms through a Treaty article.

In 1999, the European Council met in Cologne asked for "a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments" that would draft A Charter of Human Rights of the European Union (Annex IV, Cologne European Council, 1999). The next year, in the Nice European Council, the European Commission, the European Parliament and the heads of state and government of the EU member states proclaimed the Charter of Fundamental Rights of the European Union as part of the signing of the Nice Treaty and hence, the Charter was included to the Nice Treaty 2001 as an annex. Accordingly, a whole range of civil,

political and social rights for the EU was being set by relying heavily on the ECHR, on the constitutional traditions of member states and international conventions to which member states belonged (Balducci, 2008, p.12). In this way, distinct sets of rights that already existed in the landscape of the Community's laws would be brought together (Williams, 2005, p.2). However, the legal status of the Charter was not resolved in the Nice Treaty given that it was only attached as an annex and as such was not legally binding. It was the Treaty of Lisbon in which the European Union recognized the Charter "which shall have the same legal value as the Treaties" and in so doing gave the provisions a legal binding (Article 6(1), "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community," 2007). This is particularly important as human rights were formalized as an instrument of primary EU law. Further, Lisbon Treaty drew a legal relationship between the ECHR and the EU as it clearly stated that "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms" (Article 6(2), *Ibid*). As Paul Craig explains it, in this way the EU is not only empowered to accede to the ECHR, but also has a duty to do so (Craig, 2010, p.201). Hence, the Treaty of Lisbon initiated the process of the EU's accession to the ECHR. The accession to the ECHR is expected to fortify the Union's human rights policy on different grounds. As the time stands now, one can speak of two legal institutions that make human rights decisions on Europe; European Court of Human Rights (ECtHR) and European Court of Justice (ECJ). The ECtHR is a body of the Council of Europe, dedicated to protect human rights in Europe. The ECtHR is a part of the ECHR and as such, member states are but the EU as an institution is not subject to the ECtHR jurisdiction. The ECJ on the other hand, is the highest legal institution of the EU and currently it is the one through which the EU has a legal power to regulate the human rights policies of the member states. However, the ECJ is not a human rights safeguard by itself. Thus, the EU's accession to the ECHR will equip it with a specialized legal body in terms of protection human rights: the ECtHR. Accordingly, the ECtHR will be able to "attribute acts adopted by the institutions or bodies of the Union directly to the Union instead of attributing them – albeit implicitly – to 27 Member States collectively" (Reding, 2010, p.3). This becomes even more crucial when one considers the rights of individuals to take a case to the ECtHR in the case of a breach of their fundamental rights. Hence, this means that when the EU accedes to the ECHR, the individuals will be able to bring a complaint against the Union on front of the ECtHR. Moreover, the accession will remove the duality of

the human rights regimes and accordingly will enable the EU to have a more comprehensive and unified approach in protecting human rights in Europe.

1.5. Concluding Remarks

Today the EU claims to be an international actor which promotes human rights internally and externally. For this purpose, it has evolved a political and legal basis for regulating its Community acts as well as the policies of the member states and candidate states. Furthermore, it aims to impact the third parties through various sets of policies such as the European Neighborhood Policy and the human rights clauses incorporated into commercial and trade agreements. Primarily, "the EU is obliged to respect human rights when it acts on its competences, and compliance with this is monitored by the ECJ insofar as the EU acts through the Community" (Ahmed, T. and Butler, 2006, p.773). Moreover, it has started the process of acceding to the ECHR, which reflects that its actions are expected to be under a specialized human rights jurisdiction. When it comes to the member states' individual performances in terms of respecting human rights, this has been tied to the EU framework through the Article 3 of the Amsterdam Treaty and has been further strengthened in the Article 7 of the Nice Treaty. The candidate states, on the other hand are officially subject to the political Copenhagen Criteria which means that their membership cannot be confirmed before meeting certain human rights standards. Further, respecting human rights has been set as a condition to apply for membership in the founding treaty through the Article 49 of the Treaty of Amsterdam. In such a political and legal framework, the EU seeks to undertake the role of human rights promoter in its internal and external policies. The theoretical approaches to understand and explain the EU's human rights policies often pick up on the capabilities and the capacity of the Union. Firstly, through the 1970's Duchene pioneered the idea of the EC being a civilian power as it was assumed to use civilian means to persuade other actors in order to pursue civilian ends (K. E. Smith, 2008, p.22). Yet for realists, this was not enough to consider one an international actor. At that point there emerged the introduction of the military dimension into the Union, which

made the concept of civilian power almost impossible to survive. However, the operationalization of the military dimension was far from meeting the criteria of a military power Europe either. As such, a theoretical approach which focuses on the impact rather than the capabilities of the EU emerged and introduced the concept of a normative power EU. Since Manners first formulated it in 2002, the concept has been revised and adopted by different scholars while it has led to various academic discussions. The common point of these theoretical discussions have been the EU's transformative power whether it is pursued for strategic interests, out of lack of military capability or for sheer normative purposes. This thesis starts by acknowledging the transformative power of the EU as it puts the question on what type of an influence the EU has on receiving countries. However, it does not necessarily assume that this transformative power makes the Union a normative power. Rather, this thesis aims to adopt a comprehensive approach by considering that the EU's influence can be right and/or value based as much as it can be utility based. Hence, by following the communicative action theory the aim is to broaden the scope of explanation on the EU as a human rights promoter.

CHAPTER 2

THE EU AS A HUMAN PROMOTER IN ACTION:

ASPIRING EU MEMBERSHIP AND HUMAN RIGHTS REFORMS IN TURKEY

The theoretical and historical contexts in which the EU is put under scrutiny as a human rights promoter have been elaborated in the previous chapter. Further, it has already been suggested that this dissertation starts by acknowledging that the EU has a considerable influence on other actors as a human rights promoter. Before moving on to analyzing what type of an influence the EU has on the receiving countries, this chapter seeks to demonstrate that the EU actually has an influence on them in terms of human rights policies. For this purpose, it focuses on Turkey as a case study and examines the human rights reforms that Turkey has been undertaking in relation to the process of Turkish application for EU membership. In doing so, the primary aim is to provide a detailed answer as to whether the EU has affected Turkey in its human rights policies so far. Secondly, such a close look at the process of possible influences that the EU might have had on Turkey's human rights policies would allow pointing out the strengths and the drawbacks in the course. In this way, it would also be possible to take a critical stance towards the EU as a human rights promoter. For this purpose, an account on the Turkey's human rights reforms through its relationship with the EU will be followed by an analysis of these reforms in relation to the application of the EU's human rights policy on other parties. In the literature there is a general criticism that the EU's position on human rights policies has not been uniform. This criticism will be

elaborated through drawing upon academic discussions, official reports and practices. There are two main components to this criticism, one is the variation among the applicant countries and the other is the discrepancy between the member states and the acceding countries. The central proposition in this chapter is that such a lack of uniformity in the EU's human rights policies decreases its credibility as a human rights promoter and in turn, jeopardizes the effectiveness of the EU's human rights policies towards Turkey.

The underlying reason in the selection of Turkey as a case to study whether the EU has an influence as a human rights promoter is practical. First of all, Turkey is a country officially longing for EU membership since 1987. Turkey's endeavor to become a member equips the EU with a unique ability to affect Turkey's domestic policies. Given that the conditionality bound between the Union and the candidates as well as the candidate states' willingness for accession aggrandizes the EU's influence, focusing on a candidate country is expected to reveal considerable data to work with. Moreover, the 25 years of aspiration for EU membership is likely to provide the research with substantial material to analyze. Besides the sheer length of this process which as such multiplies the examples, also the bumpy nature of the relationship between Turkey and the EU is expected to provide suitable cases to examine strengths and drawbacks in the course of the EU's influence as a human rights promoter on Turkey.

2.1. Turkey and the EU's Human Rights Position

Until the 1980s, the EC did not have a critical human rights policy towards Turkey. While the EC's strategic interests in its relations with Turkey partially explain this lack, it is also due to the absence of an institutional arrangement and policy instruments on the EC side to apply a coherent and consistent human rights policy in its relations with third parties (Arıkan, 2002, pp.26-27). This situation changed dramatically with the 1980 military coup in Turkey, after which the EC started to

investigate human rights violations (*Ibid*, p.27). On 18 September 1980, the European Parliament (EP) adopted a resolution and reminded Turkey that respect for human rights was an essential criterion for a dialogue with a state associated with the Community. Yet, during the 1980s, the EC refrained from using coercive foreign policy instruments to punish human rights abuses and rested on the declaratory diplomacy of European Political Cooperation for promotion of human rights (Smith, 2001, p.186). Accordingly, Arıkan describes the EC's overall human rights policy towards Turkey between 1980-1987 as moderate and constructive, which points to a contradiction with regard to the European stance on human rights towards Turkey, given the EP's critical stance on Turkish politics (Arıkan, 2002, p.27). The change in the Community's human rights policy towards Turkey by 1987 can be explained by two consecutive developments.

On the EC side of the coin, in 1987 Community's human rights policy began to shift from being inward-looking to outward-looking. The Single European Act - which was signed in 1986 and came into force in 1987 - increased the EP's role in the decision-making process and therefore enabled the Parliament's critical position to affect the EC policies. This does not necessarily mean that the EP became an actor in EU foreign policy but its increased visibility was an important factor in the legitimation of EU foreign policy decisions. Accordingly, the EP refused to assent to financial protocols with Turkey due to human rights concerns in 1987 and 1988 (Dalacoura, 2003, p.187).

On the other side, Turkey applied for membership which made it "more vulnerable and more responsive to EU influence, but also made European concerns a source of greater pressure on the Turkish government, thus increasing EU leverage in the areas of democracy and respect for human rights" (Arıkan, 2002, P.28). Correspondingly, when Turkey ratified the Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which resulted in the recognition of the right of individual petition to the European Court of Human Rights two months before its formal application to the Community, in 1987, Turkish Government spokesman Hasan Celal Güzel expressed Turkey's hope for this decision to contribute to Turkey's relations with Europe (Dağı, 2001, p.35). Furthermore, two days after its application, on 16 April 1987, the Ministry of Internal Affairs approved the statute of the Human Rights Association (Office of the Prime Minister Directorate General of Press and Information, 1987a). This was followed by Prime Minister Turgut

Özal's announcement that his party was about to submit a draft constitutional amendment that would lift the political ban on pre-1980 coup leaders including Bülent Ecevit, Süleyman Demirel, Necmettin Erbakan and Alparslan Türkeş (Dağı, 2001, pp.35-36). Accordingly, a referendum was held on 6 September 1987 and led to lifting of the 10 years political ban of 242 people and 5 years political ban of 477 people based on the 50.23 percent yes vote for lifting of the ban (Office of the Prime Minister Directorate General of Press and Information, 1987b).

Similarly, following the signing of the agreement on Customs Union between Turkey and the EU member states, in the period of waiting for the European Parliament to give its assent to the accord, the government of Tansu Çiller amended the Article 8 of the Terrorism Law on 27 October 1995. The Article 8, which had plagued Turkey's relations with the EU for much of the year (Dorsey, 1995), had stated that "*[r]egardless of method or intent*, written or oral propaganda along with meetings, demonstrations, and marches that have the goal of destroying the indivisible unity of the state with its territory and nation of the Republic of Turkey cannot be conducted" (Human Rights Watch, 1999). The amendment removed the phrase "regardless of method or intent" from the clause, which resulted in the relief of 82 individuals who were being charged under the article (*Ibid*). The EU welcomed the amendment. The President of the Council of Ministers of the time, Javier Solana expressed his contentment as he stated that Turkey's recent attempts to revise its human rights record and particularly the regulation with regard to the Article 8 demonstrated that Turkey was now on the right track (Clayton, 1995). The EP approved the agreement on 14 December 1995. Strikingly, though, the Customs Union agreement did not contain a human rights clause. This is interesting in its implication that even in 1995 the EU did not yet directly tie human rights policy with its foreign policy goals on legal grounds– this coupling would not emerge until 1997.

Yet, the amendments made in the constitution during the signing of the Customs Union agreement failed to alter Turkey's human rights records. On the contrary, the EP noted in its 1996 Resolution on Turkey that "since the establishment of the customs union, the human rights situation in Turkey has noticeably deteriorated." (*Resolution on the political situation in Turkey*, 1996). That same year, Turkey started to receive its first financial aid under the MEDA Programme. The EU had launched a partnership between the EU and twelve Mediterranean countries including Turkey at the Barcelona

Conference of 27-28 October 1995. Within this framework, the EU adopted the Regulation on the MEDA as the "principal financial instrument for the implementation of the Euro-Mediterranean partnership and its activities" (*Barcelona Declaration and Euro-Mediterranean Partnership*, 2007). The concrete steps that the EU was taking in its attempt to link human rights policy to foreign policy became stronger with the adoption of the MEDA programme as the human rights clause in MEDA programme justified the adoption of appropriate measures in cases where the partner country violates human rights (*MEDA Programme*, 1996). Based on this legal ground, the EP called "on the Commission to block, with immediate effect, all appropriations set aside under the MEDA programme for projects in Turkey, except those concerning the promotion of democracy, human rights and civil society" declaring that "the continuing human rights violations in Turkey are in conflict with the letter and spirit of the agreement and irreconcilable with the specific financial aid instruments and the MEDA programme" (*Resolution on the political situation in Turkey*, 1996). In this way, Turkey's position was linked to the larger goals the EU had for the Mediterranean region.

Prior to the December 1997 Luxembourg Summit, evidently in another attempt to alter Turkey's human rights records before the EU makes a decision on Turkey's status, Prime Minister Mesut Yılmaz issued the circular 1997/73 entitled "Order concerning police custody, interrogation and statements" (Council of Europe & Congress of Local and Regional Authorities of Europe, 1999). The circular entailed clauses that would make public officials more accountable, enhance judicial supervision of detention, investigate disappearances, and lift restrictions on freedom of expression (Dalacoura, 2003, p.14). The last minute maneuver of Yılmaz's government was far from adequate to convince the European leaders to offer a candidacy status to Turkey in the Luxembourg Summit. As Cyprus and five Eastern European countries were invited to begin negotiations on EU membership on March 31, 1998, Luxembourg Prime Minister Jean-Claude Juncker justified the summit's decision to exclude Turkey from this invitation by stating that: "It cannot be that a country where torture is still practiced has a place at the European Union table" ("Turkey refused EU membership," 1987).

While the EU pointed to the dismal human rights record as the primary concern in excluding Turkey from the list of eleven prospective members, the EP continued to block development aid to Turkey with the same considerations (Human Rights Watch,

1999). Instead, in the Cardiff Summit in June 1998, the European Council put the Commission in charge with reviewing Turkey's ability to meet the Copenhagen criteria and report Turkey's related process ("Cardiff European Council Presidency Conclusions," 1998). This review and report process was in line with the policy introduced by the Agenda 2000 and applied to the eleven candidate countries. Hence, by asking the Commission to review and report Turkey's application of Copenhagen criteria, the Council confirmed Turkey's eligibility for the EU membership. Accordingly, the Commission submitted the first Regular Report on the Copenhagen Criteria as applied to Turkey in 1998. The Commission highlighted its concerns regarding persistent cases of torture, disappearances, and extra-judicial killings, the failure to assure freedom of expression and connectedly freedom of press, the conditions in prisons, and the limitations on the freedom of association and assembly. The Commission stated that Turkey needs to resolve these problems - not only in terms of reforming laws, but also in putting them into practice (European Commission, 1999, p.53).

Through a general evaluation of Turkey's human rights records during the interval between the Luxembourg and Helsinki Summits, it can be argued that the reforms stagnated between 1997 and 1999. When Mesut Yılmaz took office in June 1997; the new government expressed their commitment to make 1998 "the year of law."(Deputy Ayseli Göksoy Quoted in "33. Birleşim," 1997; Coalition party leader Hüsamettin Cindoruk quoted in Sarıkaya, 1998), The "Order concerning police custody, interrogation and statements" was an outcome of this enthusiasm of the new government. Yet, through 1998, the pace of the reforms, which might have been affected by the halt in the relationship with the EU after the Luxembourg Summit of 1997, was slower than expected. The U.S. State Department's report on Turkey's human rights practices in 1998 noted that despite "Yilmaz's stated commitment that human rights would be his government's highest priority in 1998, serious human rights abuses continued" (The Bureau of Democracy Human Rights and Labor, 1998). Similarly, Human Rights Watch Report on Turkey recorded that although there were "vigorous debates among state officials and in civil society on the 'rule of law,' laws were applied arbitrarily, especially to restrict freedom of expression and freedom of assembly" in 1998 (Human Rights Watch, 1999). Nonetheless, following the Cardiff Summit, in October 1998, Turkey adopted "Regulation on Apprehension, Detention and

Release Procedures" which included several legislative and administrative measures against torture practices. On the other hand, starting in October 1998, Turkish authorities closed several branches of the Turkish Human Rights Association either temporarily or for an indefinite period (European Commission, 1999). In this regard, despite Yılmaz government's promise, it is possible to argue that 1998 did not mark Turkish political history as "the year of law".

It was during the Helsinki Summit in December 1999 that the EU finally recognized Turkey as a candidate for membership and therefore brought it directly subject to the political conditionality for candidates set by the Copenhagen Criteria. Prior to Helsinki Summit, in July 1999, the Prime Ministry issued a circular aiming the effective implementation and stringent verification of the implementation of the October 1998 dated Regulation on Apprehension, Detention and Release Procedures (*Ibid*).

In March 2001, the Commission set out reform priorities to improve human rights standards in Turkey in an Accession Partnership document. Correspondingly, in October 2001, before the November 2001 Progress Report of the Commission, the Parliament approved 34 constitutional amendments in an attempt to meet the short-term criteria in the accession partnership process. Within the process of reforming laws and regulation for the purpose of complying with the political criteria, 8 reform packages were confirmed between 6 February 2002 and 14 July 2004. The most popular one was the third package of August 2002, in which the DSP-ANAP-MHP coalition government of the time passed a 14-article package of legislative reforms that abolished death penalty in peacetime, granted education and broadcasting rights in minority languages, and ended key restraints on free speech. These policies are marked as significant steps towards progress in Turkey's human rights record. As Ulusoy notes, although "never publicly acknowledged, the reform laws of August 2002 were designed to complete Turkey's acceptance of the Copenhagen criteria for EU membership and initiated a democratic regime structurally different from the previous one in terms of the basic conceptualization of political community in Turkey" (Ulusoy, 2009, p.364). Hence, following the election of the AKP government in 2002, the Prime Minister Erdoğan expressed his government's determination "to make Copenhagen political criteria Ankara criteria" as he described Turkey's full-membership prospect as a civilization project ("Erdoğan: AB hükümetin hedefi olmaya devam ediyor," 2003). The AKP

government agreed upon a new penal code in September 2004 - once again, right before the Council decided to start accession negotiations with Turkey in December of that year.

At each and every important step towards EU accession, then, Turkey has attempted to revise its human rights record and accordingly gone through considerable reform packages. In light of this, Turkey's aspiration for membership enables the EU's human rights concerns to affect Turkey's domestic policy. Therefore, the EU indisputably has the ability to act as a catalyst in Turkey's progress in human rights standards. However, putting the EU as a significant external factor in Turkey's reform process is not to say that the EU is the sole mechanism for democratic change in Turkey. Ulusoy argues against the univocal arguments that portray the EU as the main causal factor of the democratic progress in Turkey (Ulusoy, 2009, p.364). In similar lines, Müftüler-Baç and Narbone and Tocci underline that depiction of the EU as a key motivator in Turkey's human rights reforms does not mean that it "has been the principal explanatory variable of Turkey's domestic transformation" (Narbone & Tocci, 2007, p.233). Instead, it suggests that "the EU played a substantial role in stimulating internal change and Europeanization" (Müftüler Baç, 2005, p.18).This seems promising both in terms of Turkey's progress and the EU's role as a human rights promoter in its foreign policy. However, in practice, some of these reforms are not only superficial in regulation but also problematic in implementation: "[T]he evidence suggests that whilst progress has been made in some areas, the pro-EU reform process is far from ushering in a new era of openness and respect for human rights in Turkey" (Yildiz, 2005, p.41). Given this failure in implementation, the reforms that governments have adopted in search for approval from the EU seem to be little more than box-ticking in a list of the EU's requirements.

What is predicated in terms of the EU's foreign policy is its ineffectiveness in promoting properly implemented and functioning human rights standards, as well as its failure in monitoring the implementation of the human rights reforms that are taken *de jure* by the subject state. Predicaments in the promotion of human rights in candidate countries in general and in Turkey in particular can be explained through various aspects. There are studies which highlight the incompatibility of the EU's approach with a given country's context. For instance, in her analysis of the EU's imposition of Decaf (Democratic Control of the Armed Forces) in Turkey in comparison to the Central and

Eastern European Countries(CEEC), Cizre criticizes the EU for adopting a "one size fits all" approach in its course of promoting reforms. Cizre defines a problem in the EU's application of a model derived from the experiences of the CEEC given that experiences of the post-communist states do not pertain to the Turkish context (Cizre, 2004, p.111). It has further been argued that the EU's human rights policies to third states have been weak on institutional reflexivity, "meaning the capacity of EU foreign policy makers to critically analyse the EU's policy and adapt it according to the effects the policy is expected to have on the targeted area" (Bicchi, 2006, p.288). This view is also reflected by Börzel and Risse as they note that "[t]he EU follows one single cultural script that it uses to promote democracy, human rights, and the rule of law across the globe" (Börzel & Risse, 2004, p.28). This is to suggest that in the promotion of human rights the EU does not have policies specialized according to the peculiarities of the receiving countries. According to Bicchi, they apply an EU based policy to all. Putting the normative connotations of the European Foreign Policy under scrutiny, Bicchi argues that while the foreign policy of the EU can be regarded "as an intentional attempt to promote universal norms, it can also be seen as unreflexive behavior mirroring the deeply engrained belief that Europe's history is a lesson for everybody" (Bicchi, 2006, p.287). Such an assertion can also be found in the Cizre's work specialized on the EU's Decaf approach, which she describes as "basically a Western-liberal conception of civil-military relations" (Cizre, 2004, 117). The upshot is the shallow implementation of reforms when the EU led policy does not fit the context in Turkey.

The problematic implementation of human rights reforms in Turkey is further reinforced by the EU's lack of a proper monitoring mechanism to detect the problems in Turkey's implementation of human rights reforms. The Commission reports to the Council that the implementation of reforms appear to hold "a somewhat superficial assessment of change in Turkey, focusing on legislative and administrative reforms enacted by the current administration and putting forward little *de facto* analysis of the situation on the ground" (Yildiz, 2005, p.35). In similar lines, Cizre points to the institutional bias in the EU's approach which results in institutional changes in Turkey without the ideological and historical underpinnings. She criticizes the superficiality of the reports as she notes that: "the EU reports do occasionally show signs of recognizing the paucity of an approach that focuses exclusively on the design of institutions and the distribution of power between them" (Cizre, 2004, p.120).

Secondly, even if malfunctions in implementation are detected by proper monitoring mechanisms, the EU has limited ability to respond to Turkey's failure in the implementation of human rights reforms. This is because the means available to the EU to influence a third state's domestic politics are largely restricted to positive conditionality. Drawing on her analysis of the EU's effect on Turkey's human rights policies during the 1990's, Dalacoura concludes that "[a]s the 'reward' of EU membership became more distant for Turkey, policies of conditionality and pressure on human rights front ceased being tolerable, let alone effective" (Dalacoura, 2003, pp.21-22). To put it differently, negative conditionality policies such as lessening ties with Turkey or suspending the accession negotiations will be a still-born attempt to influence Turkey. This is because the EU's influence on Turkey depends on the nation's ties to the EU (Smith, 2001, p.198). Moreover, once Turkey completes the accession requirements on paper, it is even more difficult to put extra pressure for implementation without damaging the ties with Turkey, due to the fact that Turkey has already been perceiving human rights "as an excuse rather than a reason for keeping Turkey out of the EU" (Dalacoura, 2003, p.20). As a BBC correspondent once noted, "[t]here is a strong feeling amongst many in Turkey that the problem is not the country's human rights record but the fact that it is an overwhelmingly Muslim society" (Dymond, 2002). In similar lines, as concluding remarks of the 3rd Bosphorus Conference, organized by Turkish Economic and Social Studies Foundation, the British Council and the Center for European Reform in 2006, Katinka Barysch noted:

> "When discussing the EU, Turkish politicians, officials, journalists and experts frequently complain about double standards. They think that the EU is particularly tough on Turkey. (…) Turkey suspects that whatever else it accomplishes, the EU countries will not let it join due to their own deeply engrained prejudices" ("Key conclusions," 2006).

Such general opinion among the public is reflected by some Turkish intellectuals and politicians. For instance, in his column, well-known sociologist Emre Kongar accused the EU officials Barroso, Rehn and Lahendijk for emptying the concepts of democracy, human rights and secularism. According to Kongar the EU has been treating Turkey as a second class Islamic country rather than a contemporary partner with whom the EU can communicate on equal and just grounds. In his own words:

> "In terms of Turkey-EU relations, EU's double-standard practices; which infuriate anyone who can be at least a little bit objective, have been reshaped within the

framework of new imperialist approach with Greece's accession to the EU in 1980" (translated by author, Kongar, 2008).

A well-known journalist Güneri Civaoğlu also openly accused the EU of having double standards as he pointed to the prioritisations made in the accession processes of the candidate countries. Quoting from the Commission's Progress Reports on Romania, Lithuania and Slovakia, he pointed out the troubles in those countries' human records as they were reported by the European Commission and concluded that this did not jeopardize their accession process. At this point he asked:

"How can the EU, who advocates human rights based on equality, can adopt such an attitude with double standards?" (Civaoğlu, 2002).

Suspicions towards the EU's human rights policy are also present among the state officials. In 2006, the Prime Minister Recep Tayyip Erdogan stated that considerable progress has been made in terms of freedoms in Turkey and then accused the EU for applying double standards on this matter:

"In France the police trample students; Turks living in Germany cannot get education in their mother tongue. In Western Thrace Turks cannot elect their own leaders, in Athens there is no permission for the restoration of mosques (...) Do not ask us for the rights which yourselves refuse to give" (translated by author, "Erdoğan: AB Çifte Standart Yapmasın," 2006).

Similarly, the state minister and Deputy Prime Minister Cemil Çiçek once declared that member states do not want Turkey to become a member and accused the EU of applying double standards on Turkey on human rights:

"Turkey is an important country and this jeopardizes the affairs of some countries in the Union. In recent years, Turkey has made considerable progress in terms of reforms and in this way astonished them. This is why they are beating around the bush not to accept us into the Union. This is why they are applying double standards especially in human rights issues" ("Çiçek: AB çifte standart uyguluyor," 2008).

In this regard, one can speak of a general scepticism in Turkey towards the EU's human rights policies. Such scepticism can be explained by the perceived inconsistencies in the application of the EU's human rights policy both among the applicants and between applicants and member states.

So far, it has been argued that the goal of EU membership has been a significant motivator for Turkey in making human rights reforms. In this regard, the carrot of EU membership accelerates significant reform processes in Turkey. Table 2 illustrates how

each step towards EU accession has been coupled with significant human rights reforms in Turkey. Moving from this proposition, it has further been argued that Turkey's human rights reforms adoption is strongly tied to the prospect of membership. Hence, in order for the EU to effectively perform as human rights promoter, i.e. in order for the goal of EU membership to trigger off human rights reforms, Turkey should feel that membership is achievable. Müftüler-Baç highlights that "Turkey's most significant and ambitious adjustment to European norms became possible only when EU membership became a less distant possibility and when the EU finally made a more concrete commitment to Turkey" (Müftüler Baç, 2005, p.18). Moving from this premise it is further argued that, not only prospect for membership accelerates human rights reforms in Turkey, but also any disruption and delay in the course of accession would slow down this process. As Narbone and Tocci put it; "as Turkey's integration with the EU has proceeded, the ups and downs in EU–Turkey relations have increasingly interacted with Turkey's domestic transformation, at times promoting change while at other times hindering modernization and democratization" (Narbone & Tocci, 2007). This view is also reflected by Cengiz Aktar, a distinguished academician, as he stated in an interview he gave to the Germany's international broadcaster Deutsche Welle, that a reasonable date for possible membership is the only way to revive the reform process in Turkey: "Without such a concrete perspective, it would be almost impossible to regain the confidence of Turkey again" (quoted in Simsek, 2012). The wide spread perception that the EU is applying double standards to Turkey, especially in terms of human rights, decreases Turkey's commitment to fulfill the human rights standards in order to accede to the Union and therefore jeopardizes the effectiveness of the conditionality bond and eventually the EU's influence as a human rights promoter.

Table 2 Human rights reforms in Turkey through the accession process

Reforms in Turkey	Step towards EU accession
28 January 1987: Recognition of the right of individual petition to the ECtHR **16 April 1987:** The Ministry of Internal Affairs approved the statute of the Human Rights Association	**14 April 1987:** Turkey applied to the EC for full membership
27 October 1995: Article 8 of Terrorism Law is amended	**14 December 1995:** The EP approved the Customs Union agreement between the EU and Turkey
3 December 1997: Order Concerning Police Custody, Interrogation and Statements is issued	**12-13 December 1997:** Luxembourg Summit
14 July 1999: A circular on the effective implementation and its stringent verification of Regulation on Apprehension, Detention and Release Procedures is issued	**10-11 December 1999:** Helsinki Summit
3 October 2001: 34 constitutional amendments are approved	**13 November 2001**: Progress Report of the Commission
26 September 2004: New Penal Code is approved	**17 December 2004:** EU agrees to start accession negotiations with Turkey

2.2. Inconsistency among Applicants

It has already been mentioned that in Turkey the EU is commonly suspected not to be treating Turkey on equal grounds with the other and/or previous candidate countries. Such suspicions are widespread among public and uttered by intellectuals and state officials. For instance, the Secretary General for EU Affairs in 2007, Mustafa Oguz Demiralp implied the perceived inconsistencies in the way the EU treats Turkey as a candidate country by pointing out the challenges that have been brought to the table only in Turkey's accession process:

> "When Turkey was announced as a candidate country, the EU pointed out that the process would be conducted in terms of "fairness" and "equal treatment". Moreover, the enlargement commissioner at the time, Günter Verheugen, underlined that the EU would apply the same criteria and methods towards Turkey as to other new candidate countries. But when you review the negotiation framework which established general principles of the negotiation process, many new issues were added - for example, the term "digestion capacity" wasn't brought into the foreground as much before as it is in Turkey's negotiation process" ("Demiralp: 'Turks increasingly distrustful of EU membership process'," 2007)

The problem of multiple approaches in the EU's external human rights policy has long been an issue for the EU members as well. Back in 1995, Sir Leon Brittan, Vice-President of the EU Commission at the time, stated that: "To make progress, all the EU institutions should pursue human rights issues through a combination of carefully timed statements, formal private discussions and practical cooperation" (Sir Leon Brittan quoted in Clapham, 1999, p.646). This implies flexibility in determining human rights policy according to the reaction of an impugned state. This further means that, in its external human rights policies, the EU may be modifying its action according to the perceived sensitivities of the concerned state. In this regard, the EU is claimed to drop objective criteria in its implication of human rights policies (*Ibid*). Similarly, Karen E. Smith notes that "considerations of human rights compete with political, security and

commercial considerations in foreign policy-making and states ignore human rights violations in 'friendly' or 'important' countries" (Smith, 2001, p.193).

Recent studies have highlighted the prioritisations made in the implication of Copenhagen Criteria during the enlargement process. For instance, Nowak evaluates the human rights chapters in the Commission reports on the applicants' implementation of the accession partnerships and their progress in adopting the *acquis communautaire.* Nowak concludes that the analysis of civil, political, economic, social and political rights in these chapters are "rather superficial and relates more to the *de jure* than the *de facto* situations" (Nowak, 1999, p.691). These shortcomings of the Commission reports prepare the legal ground for the EU's flexible implementation of human rights policy. Moreover, not only the content but also the effectiveness of the reports is questionable. For instance, based on its reports on the Central and Eastern European States' (CEES) implication of Copenhagen Criteria, the Commission announced that only five of these states; namely, the Czech Republic, Estonia, Hungary, Poland and Slovenia, were ready to begin the accession process. The Commission also declared that Bulgaria, Latvia, Lithuania and Romania did not qualify for negotiations, and specifically Slovakia had not fulfilled the democratic and human rights standards required by the Copenhagen Criteria (*Ibid*). Nevertheless, the Council started -and completed- negotiations with all – except Romania and Bulgaria whose negotiations were completed three years later than the formers- at the same time, without any differentiation in enlargement policy towards to the applicants according to the differences in their human rights records. With regard to Turkey, on the other hand, the flexibility on implementation of human rights policy worked adversely.

Table 3 Applicant country ratings in Political Rights and Civil Liberties for 1990, 1991 and 1992

	1990		1991		1992	
	PR	CL	PR	CL	PR	CL
Hungary	2	2	2	2	2	2
Poland	2	2	2	2	2	2
Estonia	-	-	2	3	3	3
Latvia	-	-	2	3	3	3
Bulgaria	3	4	2	3	2	3
Turkey	2	4	2	4	2	4
Romania	6	5	5	5	4	4

Source: Freedom House, Country ratings, (www.freedomhouse.org). PR and CL stand for Political Rights and Civil Liberties. In Freedom House's index, political rights and civil liberties are measured on a one-to-seven scale, with 1 representing the most free and 7 the least free rating. (Lundgren, 2006).

Drawing on Freedom House index in 1990, 1991 and 1992, Lundgren compares the records of Turkey to those of the CEES prior to the establishment of Copenhagen Criteria in 1993. She notes that although Turkey was lagging behind the CEES in terms of political rights and civil liberties, the differences in their scores were relatively small. Moreover, it was Romania rather than Turkey that scored considerably lower than the CEES (Lundgren, 2006, p.133). Notwithstanding, by 2007, not only the CEES but also Romania have been accepted as full members to the EU, while Turkey was still in the early process of accession negotiations whose ambiguity is often emphasized by the EU leaders.

The Freedom House reports indicate a significant improvement in the political rights and civil liberties ratings of the CEES, particularly of Romania, in the years following the establishment of Copenhagen Criteria, whereas Turkey's ratings deteriorated. Accordingly, in 1997, when Turkey failed to receive a candidacy status in the Luxembourg Summit, it scored lower than Romania, and even lower than its own ratings in 1990, 1991 and 1992. The improvement in the CEES and particularly in Romania can be explained by the positive influence of the accession process to the EU. Yet, when the accession negotiations started between the EU and Turkey in 2005, although Turkey scored the lowest of all candidate countries, there was only a slight

difference between the scores of Turkey and Romania – whose accession negotiations were going on for five years, at the time.

Table 4 Turkey and Romania's ratings in Political Rights and Civil Liberties for 1997, 2000 and 2005

	1997		2000		2005	
	PR	CL	PR	CL	PR	CL
Turkey	4	5	4	5	3	3
Romania	2	3	2	2	3	2

Source: Freedom House, Freedom in the World, Tables and Charts (*Freedom in The World: The Annual Survey of Political Rights and Liberties 1999-2000*., *Freedom in The World: The Annual Survey of Political Rights and Liberties 1996-1997*, *Table of Independent Countries*, 2005).

In terms of the implication of the Copenhagen Criteria, then, the EU can be argued to be more responsive to the nuances between Turkey and the CEES than it is to those among the CEES. Karen E. Smith explains such inconsistencies in implementation through the importance that the subject state has to the EU. Accordingly, the EU is more likely to apply negative conditionality to the states which have less importance; meaning, the EU may have commercial and political interests that would block the use of negative measures (Smith, 2001, pp.193-196). While Smith's emphasis is on interests, according to Sjursen, European enlargement is not only an outcome of a simple utility maximization of rational member states but also a process motivated by ethical-political and moral reasons as well as pragmatic considerations. In other words, rights and values, along with utility, are characteristics that mobilize enlargement (Sjursen, 2002). In the case of differentiation in the implication of human rights policies towards Turkey and the CEES, the member states' value-based considerations seem to play a major role. Schimmelfennig mentions that despite the Commission's efforts to present its 'objective' Opinions on norms based Copenhagen Criteria and differentiation among the CEES, the Council decided to open up negotiations with all associated countries at the same time in an attempt to "avoid creating a new division of Europe and discourage democratic consolidation in the candidate countries it turned away" – an impartial argument justifiable on the Community's values and norms (Frank Schimmelfennig, 2001). It is in this context that Müftüler-Baç and McLaren argue that European enlargement does not only depend on a

candidate country's ability to fulfill the accession criteria but also on the member states' policy preferences and on their relative capacity to influence EU policy. According to them, "[e]vidence of this is that a candidate country such as Romania that was by all accounts a long way from meeting the Copenhagen criteria was included in the EU enlargement process in the Luxembourg summit" (Müftüler-Bac & Mclaren, 2003, p.28). The influence of the member states' preferences on the enlargement process is also highlighted by Lundgren. Noting that "Turkey has been treated differently than the other applicants during the process leading up to the 2004 enlargement" (Lundgren, 2006, p.138), she reveals that the EU has prioritized the grant of membership to the candidates towards which it assumes kinship based duty

The prioritizations made in the enlargement process foster the suspicions in Turkey with regard to the credibility of the EU's human rights policy. For instance, after the Luxembourg Summit during which Turkey was excluded from candidacy on the basis of not meeting the democratic and human rights standards whereas the lower ranking countries such as Romania was granted the candidate status, the "rejection, together with the EU's finger-pointing at Turkey's deficiencies, was perceived in Ankara as a clear case of discrimination" (Narbone & Tocci, 2007, p.234). Aydin and Cakir's work in which they interviewed in 2006 with AKP members of parliament and party political advisers substantiate this argument as it reveals that the government party officials perceive discrimination in the application of accession criteria to Turkey. As they quote one party official saying:

> "The main perception in the party is one of being discriminated against by the EU because we come from a different cultural and religious background. The EU cannot be explicit about this, so instead they are trying to make us give up on the way by asking for requirements not asked from other candidates" (quoted in Aydin & Cakir, 2007, pp.10-11).

The perceived difference in the EU's treatment towards the CEECs and Turkey has been commonly uttered in the politicians' speeches. For instance, in a 2002 speech, Prime Minister Erdoğan pointed to the poor human rights records of Latvia, which at the time was a candidate country, expected to be a member by 2004 and accused the EU of applying double standards in deciding on which countries might join the Union (Dymond, 2002). Moreover, it has also been a concern for well known journalists who wrote in their columns about their perceptions of double standards in the EU's human rights policies towards the applicants. For instance, Güneri Civaoğlu who was writing in

a national mainstream newspaper Milliyet at the time referred in his column in 2002 to the 1999-2000 Progress Reports on Romania, Lithuania, Latvia, Bulgaria and Slovakia and stated that they scored behind Turkey's records. According to Civaoğlu, the Progress Reports on Turkey were most probably right about Turkey's incompetencies, what is problematic was that such incompetencies were not considered as an obstacle for starting negations with the CEES but precluded the start of negotiations with Turkey. Civaoğlu questioned the suitability of adopting such an attitude with double standards by an actor like the EU who advocates equality based on human rights (Civaoğlu, 2002).

2.3. Inconsistency between Internal and External Policies

Respect to principles of human rights is tied to political conditionality in the EU's foreign policy in two ways: Firstly, within the enlargement process through Copenhagen Criteria; secondly, within the cooperation agreements through the human rights clauses, both constituting the legal basis for the EU to take necessary restrictions in the case of the third party failure. However, the EU's human rights policy which seems solely focused on the behaviour of the third parties is incoherent in the eyes of the rest of the world, as it fails to consider human rights issues within (Clapham, 1999, p.642).

Problems in the EU's internal human rights policies stem from both monitoring and enforcement. Accordingly, "A Human Rights Agenda for the European Union for the Year 2000" issued by the Comité des Sages in 1999 stated that the EU "currently lacks any systemic approach to the collection of information on human rights" within the Community (Williams, 2005, p.95). Furthermore, Williams points to the fundamental restriction on enforcement action inherent within the Community's legal structure due to Article 51 of the EU Charter of Fundamental Rights which ensures that the provisions of the Charter are addressed to member states "only when they are implementing Union law" (*Ibid*, p.107). Given that the EU is experiencing difficulties in

implementing a single and effective human rights policy in its internal affairs, the pressure it puts on the third parties either through accession criteria or human rights clause in its foreign policy reveals itself as an inconsistency.

The Framework Convention on National Minorities constitutes a good example of the inconsistency between internal and external EU's human rights policies as it illustrates that a provision that has not been ratified by all of its member states can be an external requirement for applicant states. Accordingly, 2001 Regular Report on Turkey's Progress towards Application states with implicit disapproval that "Turkey has not signed the Council of Europe Framework Convention for the Protection of National Minorities and does not recognise minorities other than those defined by the 1923 Lausanne Peace Treaty" (European Commission, 2001, p.29). However, the EU remained inactive to France's failure to sign and ratify the Framework Convention the same year. According to Lerch and Schwellnus this was "an obvious case of incoherence that the FCNM is presented as constituting the 'European standard' without being signed, let alone ratified, by all 'old' EU member states" (Lerch & Schwellnus, 2006, p.315). As Tocci asserts, the discrepancy in the member states' minority policies is perceived by Turkish officials as evidence of EU double standards (Tocci, 2005, p.79).

Indeed, the old member states hardly have a clear record of human rights, let alone the new member states. The statistical data on the ECtHR judgments by country for the period between 1959 and 2011 reveals that with 2,404 violation judgments out of a total 2,747, Turkey is the country with the worst record of human rights violations (European Court of Human Rights, 2011). Strikingly, in terms of the highest number of violation judgments, Turkey is followed by an "old" EU member state, Italy. According to the report, from 1959 to 2011, the Court found Italy guilty of human rights violations in 1,651 cases out of 2,166.

Table 5 Number of the ECtHR judgments on violations by states between 1959 and 2011

1959-2011	Total Number of Judgments	Judgments finding at least one violation	Judgments finding no violation
Greece	686	610	16
France	848	627	125
Romania	859	777	24
Poland	945	815	77
Italy	2166	1651	54
Turkey	2747	2404	57

Source: The Chart on "Violation by Article and by State", European Court of Human Rights, 2011.

In 2011 alone, there were 8702 applications against Turkey while this number was 5207 in Romania, 5035 in Poland and 1206 in Bulgaria. In terms of the old members, these numbers were 4733 in Italy, 1899 in Sweden and 1754 in Germany ("The European Court of Human Rights in Facts and Figures," 2011).

Table 6 Applications to the ECtHR against states in 2011

State	Applications allocated to a judicial formation
Bulgaria	1206
Germany	1754
Sweden	1899
Italy	4733
Poland	5035
Romania	5207
Turkey	8702

Source: The Chart on "Throughput of applications in 2011" in The European Court of Human Rights in Facts and Figures 2011.

Any misfit in the adoption of the human rights policy that the EU pursues in its external relations to its internal affairs can be regarded as problematic in terms of the EU's foreign policy in three ways. Firstly, if the adoption of a discourse of universality and indivisibility is not mirrored by internal approaches, it leads to a shady external human rights policy (Williams, 2005, P.7). Unless the third parties see the internal application of the human rights policies that the EU makes them subject to, they would not take the EU seriously and therefore its foreign policy would become futile. Secondly, the incoherence between internal and external policies will damage the EU's credibility, by making the EU susceptible to criticisms for its "unilateralism and double standards" (*Ibid*). Alston and Weiler stress that "in an era when universality and indivisibility are the touchstones of human rights, an external policy which is not underpinned by a comparably comprehensive and authentic internal policy can have no hope of being taken seriously" (Alston & Weiler, 1998, p.664). Thirdly, it jeopardizes the EU's endeavour to acquire an identity in the sense that a Community that fails to adopt a "strong human rights policy for itself is highly unlikely to develop a fully-fledged external policy and apply it with energy or consistency" (*Ibid*).

The perceived inconsistencies in the EU's internal and external human rights policies have decreased the credibility of the EU as a human rights promoter and led to a reflex in Turkey to blame the EU with applying double standards when the EU pushes Turkey to adopt a serious human rights reform. Such a reflex is partly fed by the above-mentioned suspicions on the credibility of the EU's human rights policy and partly by the frustration in Turkey about being kept on the waiting list of accession for so long. Describing this tendency as a reflex suggests that with regard to the EU initiated human rights reforms, the Turkish public responds on a presupposed existence of inconsistency between internal and external applications of the EU's human rights policy. This means that the public resistance against a human rights policy of the EU may occur without questioning either its content or its actual consistency with internal practices. In this sense, public remains receptive to manipulations by some politicians and intellectuals who have a stake in not adopting a particular human rights policy. The 2007 debates on the Article 301 of the Turkish Penal Code substantiate this assertion. The Article 301 was a law which between 2005 and 2008 called for punishment of the denigration of Turkishness, the Republic or the Grand National Assembly of Turkey, the Government of Turkey, the judicial institutions of the State, the military or security organizations. As the definition of "denigration of Turkishness" can be quite inclusive, the vague wording of the law resulted in bringing many people under charge, including recently murdered Turkish journalist with Armenian descent Hrant Dink, popular journalist Perihan Mağden popular novelist Elif Şafak and 2006 Nobel laureate Orhan Pamuk. Until it was amended in 2008, the EU was heavily criticizing the Article 301 on the basis of the threat it poses to freedom of expression and standing firm on its resolution that Turkey should repeal it if it wants to complete the accession process. In an interview that Olli Rehn gave to a Turkish journalist on 27 March 2007, he re-emphasized that there was no way that Turkey would be let in unless it modified the implication of the Article 301 according to the European standards (Birand, 2007).

However, by 2007, Turkish officials were still reluctant to make a change in the related article while Minister of Justice Cemil Çiçek argued that some EU member states, namely Germany and Italy, have equivalent articles in their penal codes ("Çiçek'ten AB'ye terör eleştirisi," 2006). Similarly, Deniz Baykal, the leader of the main opponent party CHP, who hardly come to a common point with the AKP government, agreed with Cemil Çiçek as he referred to the Penal Codes of Italy, France,

Spain and the Netherlands as containing regulations similar to the Article 301 ("2006-09-26 CHP Grup Toplantisi," 2006). Çiçek and Baykal's argument launched a public debate in Turkey. In mass media, legal experts, journalists and academics have explained the inaccuracy of Çiçek and Baykal's argument by highlighting the differences between the related articles in European states' penal codes and in Turkish Penal Code. For instance, in his column, Turkish journalist and former politician Altan Öymen referred to Çiçek and Baykal's argument that the exact content of the Article 301 exists in the penal codes of some European states and wrote: "This information is wrong" (Öymen, 2006). According to Öymen, the Article 301 differed from the relevant article in the Italian Penal Code, the Article 291, because in the Italian case "insult of the Italian nation" is prohibited while in the Turkish case "denigration of Turkishness" is prohibited. Öymen stresses that "Turkishness" is a broader concept than the "Turkish nation" and it enables to bring any criticism of any Turkish group that has ever existed or still exists wherever in time and wherever on earth under the domain of the Article 301. In similar lines, Turkish academic and columnist Murat Belge examines the similar articles in Italian, Slovakian, Austrian and German Law and concludes that none of them includes a concept similar to "Turkishness" (Belge, 2007). From another point, Levent Korkut, a Turkish academic and a member of International Amnesty Board of Directors stresses that even though among the European states' law there might exist some similar regulations to the Article 301, they are not implemented as those states primarily adopts the jurisprudence of the European Court of Human Rights ("İfade Özgürlüğü ve 301. Madde," 2008). Yet, a considerable portion of politicians and public remained committed to the argument. The support for Çiçek and Baykal's arguments can be explained via already established skepticism towards the EU's foreign policy based on prior experiences of inconsistency in its internal and external policies of human rights (Düzel, 2007). It is in this regard that "the credibility of the Community is at stake both as an institution concerned with human rights and in its ability to fashion a workable policy that will attain its objectives" (Williams, 2005, p.7).

2.4. Concluding Remarks

For over forty years, Turkey and the EU (more specifically; the European Community until 1993, the EU from 1993 onwards) have a long-lasting relationship with ups and downs. Depending on the intensity of this relationship, the EU has been affecting Turkey in many ways at various levels. Given that Turkey's aspiration for the EU membership equips the EU with an exclusive ability to influence Turkey's domestic politics, the EU has been a significant push factor in the human rights reforms that Turkey has undergone in the last quarter century. In this sense, a superficial conclusion could be that the EU has been effective in its human rights policy towards Turkey. However, a closer analysis of the practice of its policy would detect that the reforms that Turkey has made in the direction of the EU's will, have largely turned out to be shallow and non-implemented. With regard to implementation of human rights reforms, this chapter criticized the EU for being inefficient both in terms of monitoring and enforcement in Turkey. While the EU's ability to monitor and enforce human rights reforms partially explain the problems in Turkey's implementation of human rights reforms, it might also be related to the EU's credibility as a foreign policy actor. It has been further argued that a political actor's credibility depends on the consistency in its policies. With regard to consistency in the EU's human rights policies, two main areas of trouble have been highlighted: Firstly, despite its emphasis on the universality of human rights, in practicing its foreign policy, the EU is largely criticized for being inconsistent among the subject states. The data presented in this chapter have suggested that the EU might be modifying its foreign policy depending on the importance that the particular state holds for the EU. More particularly, a comparison between the human rights records of the candidate countries before 2004, as they are provided by the European Commission's progress reports and Freedom House Index, reveals that countries with lower scores in human rights than Turkey have been let in the Union as full members. This suggests that human rights records might not be decisive in deciding on the eligibility of a country for membership if the EU, for some other reasons, is

already willing to accept that country into the Union. This in return leads to wide-range suspicions in Turkey with regard to the legitimacy of the human rights standards that are put in front of Turkey through the accession process. That is, for many Turks human rights are not the real reason but just an excuse to keep Turkey out of the Union. Such perceptions in Turkey slow down the human rights reform process.

The EU is also criticized for inconsistencies in the EU's practice of human rights in internal and external policies; for holding an attitude as if the human rights breaches can only be done by non-Europeans. With regard to the EU's human rights policy towards member states and candidate states, it is put forward in this chapter that such perceptions of inconsistencies stem from the cases in which the EU asks the candidate countries to accept some human rights documents which are not ratified by all member states. It has further been argued that the perception of "the EU asks us to adopt human rights policies that it does not adopt itself" leads to a common suspicion of double-standards in Turkey. Once again, this leads to an ineffectiveness of the EU as a human rights promoter in Turkey.

Yet, it is still too early to conclude for the failure of the EU's human rights policy towards Turkey since the reform process that Turkey has been going through in the light of the EU's foreign policy merits some time for a complete assessment of efficiency. The discrepancy between the rhetoric and practice of the EU's human rights policy towards Turkey can erode through time, if Turkey implements the *de jure* reforms and the EU brings about standardizations in its human rights policy applications.

This chapter has provided a detailed study of the relationship between the EU and Turkey on human rights grounds. As such, it has substantiated the primary assumption of this thesis, i.e. the EU has an influence on receiving countries as a human rights promoter. The assertions that have been put forward in this chapter confirm the significance of the research structure of this thesis. Having stated that the EU's influence can be tied to the EU's consistency in its policies towards member states and candidate states, an analysis on the type of influence the EU has had in Spain and in Turkey will enable to reach more prudent conclusions on the relevance of (in)consistency with the EU's influence as a human rights promoter.

CHAPTER 3

THE PROHIBITION CASES OF DTP AND BATASUNA

"Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation."

(Section 6, *Spanish Constitution*, 1978)

"Political parties are indispensable elements of the democratic political life."

(Article 68, *The Constitution of the Republic of Turkey*, 1982)

As the time stands now, in a world where the concepts of democracy and human rights are very much cherished, political parties are widely acknowledged as essential elements of a functioning democracy, as tools deriving from basic human rights principles, and accordingly, are encoded in the national constitutions as such. Nevertheless, from time to time we are still facing instances of illegalization of these political instruments of democracy and human rights. This chapter is an attempt to provide a historical account on two recent examples of political party illegalization, namely of DTP in Turkey and Batasuna in Spain. Such an account serves to the purposes of this thesis as it aims to provide the reader with some familiarity with the cases. Furthermore, it aims to introduce a national and international historical context in which the general research question can be situated.

Before starting, a rationalization of the decision to leave the other political parties out of the scope of this analysis and to focus on DTP should be made. DTP is neither

the first nor the only Kurdish nationalist party that has been outlawed by the Turkish Constitutional Court. The rationale behind choosing DTP for analysis among the others can be explained by the time frame and the related international dynamics. To begin with, there is a deliberative choice to exclude the parties which have either been banned or led to dissolve themselves prior to 11 September 2001. Given that the general research question this thesis addresses is the type of the influence of the EU as a human rights promoter on subject states, the EU's attitude towards terrorism will eventually affect the conclusions drawn from the analysis. Making this distinction is crucial simply because the September 11 attacks have increased the sensitivity towards terrorism in the EU along with the whole world, tremendously. According to Andrew Mango, until September 11, public opinion in democratic Western countries was far from recognizing the nastiness of ethnic terrorism while "well-meaning liberals, and even the authorities of democratic states, listened to the excuses offered for terrorist crimes." In this regard, September 11 was a "rude awakening from fancy to reality" for the whole world but significantly for the Western countries (Mango, 2005, p.31). Hence, recognizing the difference that the September 11 has made on the strength of the EU's position towards terrorism, the EU's policies on the Kurdish nationalist party illegalization cases in Turkey prior to September 11 will be kept out of the analysis, yet will be included in the historical overview in an attempt to provide a better understanding of the setting in which DTP was closed.

After September 11, three Kurdish nationalist parties have faced closure cases in Turkey; namely, HADEP which was banned by the Constitutional Court on 13 March 2003, and DEHAP which dissolved itself on 19 November 2005 before the Constitutional Court reached a decision on its closure case and finally DTP which was banned by the Constitutional Court on 11 December 2009. In the Constitutional Court decisions with regard to the dissolutions of both HADEP and DTP, there were clear references to the parties' links to the terrorist organization PKK ("HADEP'in Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2003). In this regard, both HADEP and DTP seem to provide the necessary conditions for an analysis of the EU's related policy after September 11. The motivation in selecting DTP over HADEP can be explained through the case's relevance with a similar case from within the EU.

In the post-September 11 period, within the EU a political party illegalization case occurred in Spain. On 17 March 2003, the Spanish Supreme Court denounced Batasuna

as being the adjunct of the terrorist organization ETA and decided on its permanent illegalization. Batasuna appealed to the Constitutional Court but was turned down on 16 January 2004, and then took the case to the ECtHR. The ECtHR upheld the Spanish state's decision to outlaw Batasuna in its decision on 30 June 2009. This is to say, the decision with regard to the dissolution of DTP was made after the ECtHR decided in favor of the outlawing of Batasuna. This is significant in the sense that not only the President of the Constitutional Court Haşim Kılıç announced the decision to illegalize DTP by referring to the ECtHR decision on Batasuna while he was announcing the Court decision on DTP ("AIHM'e göre de terörün odağı," 2009), but also the reasoned decision on DTP, as it was published on the Official Gazette on 31 December 2009, backed up its conclusions with a detailed study of the ECtHR ruling on Batasuna ("DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009). This means that the cases of DTP and Batasuna not only overlap in their time frames but also Batasuna case is used to justify the Turkish Constitutional Court's decision. As such, an analysis on DTP fits perfectly into a comparison between the EU influence as a human rights promoter on a member state and a candidate country.

3.1. Historical Account on Batasuna

On 4 August 2002, a car exploded in Santa Pola in Allicante and killed two bystanders. The next week, Euskadi Ta Askatasuna (Basque Fatherland and Liberty, hereafter referred to as ETA) claimed responsibility for the explosion ("ETA Claims Last Week's Deadly Car Bomb Blast - 2002-08-14 | News | English," 2002). This was not the first or the most violent attack of ETA, yet, it marked the Spanish political history in the sense that it triggered the process to outlaw the Basque nationalist political party Batasuna.

Batasuna was a Basque nationalist political party which was disclosed by Spanish Supreme Court[4] in 2003, a decision confirmed by the ECtHR in 2009 due to the party's alleged ties with ETA although the party still denies any ties with terrorism. Although the party was founded in 2001, its roots laid back in 1978, to the party that was founded under the name of Herri Batasuna (Political Unity), and Euskal Herritarrok (Basque Citizens) which replaced Herri Batasuna in 1998. The political significance of the party was remarkable in the Basque region. Between 1980 and 1998, either Herri Batasuna or Euskal Herritok coalition received a vote share varying from 14.7 percent to 17.7 percent in 6 elections and accordingly occupied from 11 to 14 seats in the Basque parliament. Except the 1980 election in which Herri Batasuna came the second party out of the ballot box, in all of the elections it took the third party position.[5] According to Gregory Tardi, it was due to the party's remarkable vote share that "the Government of Spain perceived the need to give itself the power, through the revised Article 9, to declare a party illegal" (Tardi, 2004, p.97).

Only a little more than a month before the Santa Pola incident, on 27 June 2002, a new Law of Political Parties (Ley Orgánica de Partidos Políticos, hereafter referred as LOPP) came into force in Spain. This new LOPP was significant in the sense that it founded the legal basis for the Spanish Supreme Court to dissolve certain political parties. Although the relevant article was worded in general terms and did not refer to a particular party or organization, the timing and the conjuncture of the adoption of the new law revealed it as an attempt to address the threat that the state perceived from the political party Batasuna. Right after the law coming into force, the Spanish parliament (Cortes) passed a motion and urged the Government to bring a case against Batasuna for violating certain articles of the LOPP (Turano, 2003, p.730). Building on the absence of condemnation from Batasuna on ETA's 4 August attack in Santa Pola, the Government

[4] Supreme Court is the second highest court in Spain, Constitutional Court being the highest.

[5] In 1980 Herri Batasuna received 16.5 percent of the votes and 11 seats, in 1984 Herri Batasuna received 14.7 percent of the votes and 11 seats, in 1986 Herri Batasuna received 17.4 percent of the votes and 13 seats, in 1990 Herri Batasuna received 18.2 percent of the votes and 13 seats, in 1994 Herri Batasuna received 16.0 percent of the votes and 11 seats, in 1998 Euskal Herritarok received 17.7 percent of the votes and 14 seats. For details please see the related years' election results in euskadi totals on http://www.electionresources.org/es/eus/index_en.html. As Batasuna was banned in 2003, it could not run in 2005 elections.

mandated its Attorney General and its Director of Public Prosecutions to launch proceedings to outlaw the party on 6 August 2002. On August 22, as a compensation for the damage that the party had caused, the Court asked Batasuna for all the electoral funding that it had received from the state since the 1980s (Tardi, 2004, p.98). On August 26, Judge Baltasar Garzón declared for a three years suspension for Batasuna on the ground that it was a part of the terrorist network of ETA ("Batasuna banned permanently," 2003). In the meantime, Garzón was going to investigate the party's ties with ETA.

While the legal bodies were working on the Batasuna case, there was a pursuit of permanent ban for Batasuna within the political circles of the state. Accordingly, on August 13, in a joint message which was sent to the Parliament by the two largest represented parties, namely, the governing Popular Party and the opposition Socialist Party asked for a resolution that would declare Batasuna illegal (Tardi, 2004, p.97). The Government's accusation of Batasuna was composed of twenty three arguments including party's failure to condemn the Santa Pola attack neither in Parliament nor in a press conference. It was argued in the accusation that in an event held in Vitoria-Gasteiz all the parties with the exception of the representative of Euskal Herritarrok, who was also present in the event, condemned the killing of a 6 year-old child and 57 year-old man with the car bomb in Santa Pola. In general, the arguments aimed to expose linkages between the party and ETA. For instance, one of them quoted Batasuna spokesman José Enrique Bert in June 2002 as he said that his political party does not aspire ETA to stop killing. Another one referred to a demonstration called by Batasuna in San Sebastian on 11 August 2002 in which slogans in favor of ETA were shouted. A significant argument in the accusation was with regard to the double membership to Batasuna and ETA. It was argued that neither before nor after the Political Parties' Law's entry in force, no disciplinary measures were taken in Batasuna with regard to those who have double membership in the party and ETA ("Proceso de ilegalizacion de Batasuna: Posturas de los partidos," 2002). On August 26, on the same day that the Court imposed three-year suspension on Batasuna, the Parliament passed the resolution to outlaw Batasuna as illegal based on the Article 9 of the Political Parties' Law, with an overwhelming majority of 95 percent of the deputies, while only smaller left-wing parties from Catalonia, Basque country and Galicia voted negatively (Wilkinson, 2002).

In the following days, all offices of the Herri Batasuna/Euskal Herritarrok/Batasuna conglomerate of organizations, which were treated as one in the legal process, were closed. Not only all the public and private activities of the conglomerate were stopped but also some police actions against them were ordered. The conglomerate's all ties to mass communication were cut off as the party's website was banned and any access to media was forbidden. Moreover, they were precluded from any state aid. According to Tardi, the judgment to suspension "outlined the 'civil death' of Batasuna and its partner organizations, incapacitating them from being able to contact or conduct any political or other activities" (Tardi, 2004, p.98).

The 'civil death' of Batasuna delighted the mainstream Spanish media. The Barcelona daily La Vanguardia described the Spanish parliament's voting on August 26 as historic and expressed its satisfaction as such: "[T]here are more than enough reasons to think that things will be more difficult for ETA without a lawful sphere which gives it oxygen." One of the largest printed newspapers of Spain, El Mundo published an interview with the Interior Minister Angel Acebes in which he stated that the Parliament's move "shows that a state under the rule of law has the duty to defend itself from those who only seek to destroy it through violence" (quoted in "Spain's press approves ban," 2002). Batasuna was described as "not a normal political party with conventional structures and methods but an all-embracing, alternative Basque society inspired by ETA" in La Vanguardia and as "a lawful party, intensifies, joins in with, increases the fear-generating effect" in the interview with Acebes (*Ibid*). In the view of these quotes, it can be concluded that the major political parties and the mainstream Spanish media were in favor of outlawing Batasuna due to its alleged links to ETA. However, the decision was not met with enthusiasm in the Basque Country. While Batasuna continued to deny any ties with ETA, several demonstrations against its illegalization, such as marches and silent protests, were held in the Basque cities. The New York Times notes that not only the ETA supporters but also those Basque nationalists who are strongly against violence are in opposition to the ban (Daly, 2002). At this point it would be proper to argue that the opposition against the ban on Batasuna focused on the freedom of association for Basque people. The banner used in the silent protest in Guernica substantiates this argument as it read "For Freedom" (*Ibid*). Significantly, the protest was held by Eusko Alkartasuna, another Basque nationalist party which also seeks independence. The New York Times describes the party as one

which shares Batasuna's aims "but not its tactics" implying that Batasuna is resorting to violence while Eusko Alkartasuna uses peaceful means. Holding of a protest against Batasuna's suspension by a political rival of Batasuna, which is defined to be "more peaceful", is remarkable as it suggests that Batasuna was not just a marginal pro-violence party whose closure is a relief for all. The reactions of the parties which are known to be "more peaceful" imply that the state's decision against Batasuna is taken as a Basque problem in general. Correspondingly, BBC News highlights the dissatisfaction of the "mainstream Basque leaders" with the attempts to ban Batasuna, as the leaders warn that these attempts "may backfire and lead to more violence" ("Basque protests as party ban looms," 2002).

As expected, the reactions against the illegalization of Batasuna were not only coming from the other Basque nationalist parties. Batasuna leaders themselves reacted bitterly to the decision as they accused the government of waging a politically motivated campaign against them. Further, they utterly denied being the political arm of ETA. The first response from the party was to continue with the party activity despite the ban. Batasuna's lawyer Jone Goirizelaia recalled the dictatorship years under General Franco and stated: "We were made illegal, but the pro-independence movement continued". Likewise, Batasuna spokesman Joseba Permach made an analogy between the Spanish state and the rule of Franco as he stated: "Basques will remember this day as the one when the Franco state let its mask fall". He signaled the continuation of the movement when he declared: "We will continue to fight" ("Basque party to fight ban," 2002). Permach also noted that neither Mr. Garzón nor anyone else could finish the party off ("Basque protests as party ban looms," 2002). Secondly, the party declared that they will fight on legal grounds as well. The party lawyer Goirizelaia said Batasuna would appeal against the ruling and would even take its appeal to the European Court of Justice, if necessary. In her speech, she pointed to the ECtHR's condemnation of Turkey in the April of that year, for banning a Kurdish political party due to its alleged ties with the terrorist organization PKK ("Basque party to fight ban," 2002).

As promised, Goirizelaia presented the appeal on the 29th of August ("Basque separatist party appeals closure of offices," 2002) but the appeal to three-year suspension was overturned in October 2002 ("Batasuna banned permanently," 2003). On February 2003, the Court closed the Basque-language newspaper Euskaldunon

Egunkaria and arrested 10 of its staff while the Judge Juan del Olmo declared that Euskaldunon Egunkaria's publisher was shaped, financed and directed by ETA ("Spain Bans Basque Political Party, Closes Newspaper," 2003). On 10 March 2003, Batasuna applied to the Constitutional Court arguing that "certain sections of the LOPP violated the rights to freedom of association, freedom of expression, freedom of thought, and the principles of lawfulness, judicial certainty, the non-retrospective nature of less favourable criminal laws, proportionality and non bis in idem, and also the right to participate in public affairs" (*Affaires Herri Batasuna et Batasuna c. Espagne*, 2009). Nevertheless, on 12 March, the Constitutional Court dismissed Batasuna's objections on the constitutionality of LOPP. Consequently, on 17 March 2003, the Supreme Court decided unanimously by sixteen judges on the confirmation of the permanent illegalization of Herri Batasuna, Euskal Herritarrok and Batasuna; dissolved the party and demanded the cease of all its political activities in addition to the liquidation of all its assets (Tardi, 2004, p.99). Although the Special Chamber defined Batasuna as the adjunct of ETA in its conclusions, Batasuna argued that the only evidence to ban was the party's refusal of condemning ETA attacks, and further claimed that this does not suffice for illegalization of a political party (Turano, 2003, p.739). It is in this context that Batasuna appealed the Supreme Court's decision to the Constitutional Court, however the Constitutional Court upheld the ban by two unanimous decisions on 16 January 2004 (*Affaires Herri Batasuna et Batasuna c. Espagne*, 2009). As a response, Batasuna's lawyer Inigo Iruin declared that they will appeal to the ECtHR ("Spain maintains Basque party ban," 2004).

Nonetheless, the legal dissolution of the party did not bring an end to the story of Batasuna. Although Batasuna ceased to exist as a legal political party, it continued to its party activity on secret grounds. Hence, from 17 March 2003 when the Supreme Court's decided to dissolve the political party, the Spanish state started a new combat against Batasuna to avoid its reorganization under a new name and to prevent it from gaining legal status. Only in two months time, the Supreme Court denounced nearly 1,500 Basque nationalists to be "camouflaged members of the outlawed radical nationalist Batasuna Party" and forbade them from running in local elections on the 25th of May ("World Briefing | Europe: Spain: Election Ban On Radical Basque Parties - New York Times," 2003).

On 27 May 2004, the Spanish Constitutional Tribunal ruled out the nationalist Basque party Herritarren Zerrenda (HZ) in the forthcoming European elections on the ground that the party was a reformation of Batasuna. The legal basis for such a ban was laid via the Article 9/4 of the 2002 Law of Political Parties which addresses prevention of reformation of a banned party under another name ("Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos," 2002). Similarly, within the same week of September 2008, EAE (Basque Nationalist Action Party) and EHAK (Communist Party of the Basque Homelands) were suspended consecutively for a period of three years by the Spanish Supreme Court, based on the argument that they had clear links with Batasuna ("Spanish Supreme Court makes a third Basque party illegal this week," 2008, "Spanish Supreme Court outlaws Basque Nationalist Action," 2008).

The state's response to the restructuring in Batasuna was not merely about party closures. To prevent regeneration of a Basque separatist political group, the police stroke the riots from time to time in order to arrest the leading figures in the movement. One of the most prominent among them was in October 2007, when the Spanish police arrested twenty three people in a raid on a clandestine Batasuna summit in the Basque village of Segura. "The Batasuna leaders, including their spokesman Joseba Permach, were led away in handcuffs by plain-clothed officers whose faces were hidden by hooded tops and balaclavas" (Nash, 2007). In October 2009, ten senior members of Batasuna, including its ex-spokesman Arnoldo Otegui, were arrested in San Sebastian on accusation that they were holding secret meetings to reestablish Batasuna (Goodman, 2009; "Spain seizes Basque party leaders," 2009). This was not the first time that Otegui was arrested since the ban on Batasuna. In 2005, he was sentenced to one year in jail on allegations of slander made against King Juan Carlos. The reason was a speech he made during a press conference in 2003 in which he accused King Carlos for "being responsible the torturers" ("Basque convicted for king insult," 2005). Also in 2007, he was arrested for glorifying terrorism at a memorial in December 2003 for a dead ETA leader (Goodman, 2009).

The same year, Udalbiltza[6] issued an institutional declaration condemning the party closures. With regard to the suspension of EAE and EHAK as well as to the arrests of a number of politicians belonging to the Basque nationalist left, Udalbiltza stated that "[t]he law governing political parties *(Ley de Partidos),* the banning of political parties and the arrests of their leaders aggravates the conflict we are enduring at present in Euskal Herria even more" (Udalbiltza, 2008).

In the meantime, Batasuna applied to the ECtHR in 2004 on the basis of Articles 10, 11 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which stand for freedom of expression and freedom of assembly and association and right to an effective remedy, respectively. The main complaint of Batasuna was "that the LOPP was not accessible or foreseeable, was applied retrospectively and had no legitimate aim" and they further argued against the measure imposed on them which, they claimed, could not be "considered necessary in a democratic society and compatible with the principle of proportionality" (*Affaires Herri Batasuna et Batasuna c. Espagne*, 2009). It took five years for the ECtHR to reach to a conclusion on the Batasuna case. In 2007, the Court agreed that Batasuna's claims against the Spanish Government on Article 10 and 11 fulfill the criteria for admission while the objection on Article 13 does not. Eventually, on 30 June 2009, the ECtHR upheld the ban on Batasuna, siding with the Spanish state's decision concluding that it was not necessary to examine Article 10 for the case and there was no violation of Article 11 of the Convention. Article 11 of the Convention recognizes "the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests" to everyone; yet, defines the limits of state intervention to those "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" (The Council of Europe, 2010). Accordingly, the ECtHR concluded that Spanish Court's decision on the dissolution of parties was interference to freedom of association; yet, it was "prescribed by law" and pursued a "legitimate aim" as it corresponded to a "pressing social need". With the

[6] Udalbiltza is an association, created in 1999 by the Basque nationalist parties to bring together mayors and councilors in the Basque Country, Navarra and the French Basque country.

same reasons, the Court did not see it necessary to examine the objections of Batasuna under Article 10 (*Affaires Herri Batasuna et Batasuna c. Espagne*, 2009).

3.2. Historical Account on DTP

While the illegalization of Batasuna can be connected to the upheaval of existing tensions with a single event, i.e. the ETA attack in Santa Palo, DTP's illegalization should be considered as a point in a continuing process. From this perspective, it can be argued that while the case of Batasuna launched the process of outlawing Basque nationalist parties which are alleged to have ties with ETA, the DTP's case is currently the last one in the process of outlawing Kurdish nationalist parties due to their alleged ties to PKK.

HEP (Halkın Emek Partisi - People's Labor Party) is the first legal and explicitly Kurdish nationalist party that has had a parliamentary representation in Turkey (Barkey & Fuller, 1998, p.84). It was founded on 7 June 1990 by the members of parliament who have formerly disengaged from the central left SHP (Sosyal Demokrat Halk Partisi - Social Democratic People's Party). In the 1991 elections, HEP won twenty-two seats in the parliament owing to the electoral pact it had concluded with SHP, which enabled them to overcome the 10 percent threshold obstacle in the Turkish election law. Yet, the oath taking ceremony in the Turkish National Assembly on 6 November 1992 was marked with turmoil when deputy Leyla Zana ascended the pulpit wearing a headband in the colors of PKK's flag; i.e. yellow, green, red; opened a handkerchief in the same colors and held it on her chest. Afterwards, at the end of her oath of office, she switched to Kurdish from Turkish and said: "I take this oath for the brotherhood of the Kurdish and Turkish people" in Kurdish language.[7] The Kurdish sentence that Zana used at the final of her oath was noted by the stenographs in the Assembly as "some words in an unknown language" (Batur, 2009). In December 1994, Zana was arrested for having links with PKK and stayed in jail until 2004. In the meantime, the Amnesty

[7] In Turkey, speaking Kurdish in the Parliament is considered as a constitutional breach.

International recognized her as Prisoner of Conscience, and the European Parliament awarded her the Sakharov Prize.[8] Zana became an issue in the Turkish-EU relations throughout Turkey's application process as the EU continually called for her release on human rights grounds. In a 2004 formal sitting in the European Parliament, where Leyla Zana and her husband Mehdi Zana were the guests, the Chair Mr. Friedrich explained why the EP has awarded Zana the Sakharov Prize, "the freedom of conscience prize" as Mr. Friedrich puts it. According to him, this was because she had been imprisoned for promising "-in Kurdish- to fight to ensure that Kurds and Turks could live together" in the Parliament but even after that, she had remained firm on her democratic fight for the rights of her people ("Debates - Thursday, 14 October - Formal sitting," 2004).

Apart from Zana's headband, handkerchief and Kurdish conclusion of her oath, the refusal of some newly elected Kurdish deputies to repeat particular parts of the oath in which they are supposed to promise to preserve "the indivisible integrity of the country and the Nation" also constituted a source of furor in the Assembly that day (Kirişçi & Winrow, 1997, p.137). The tension in the Assembly reflected itself on the relations of HEP and SHP, and resulted in the abolishment of the electoral pact between the two (Barkey & Fuller, 1998, p.85). Following SHP's renewal of the extension of the emergency-rule in the Kurdish populated regions in the eastern and southeastern Turkey and the security forces' violent repression of Newroz celebrations (traditional celebrations to welcome spring) in Kurdish populated provinces, 14 HEP deputies who had entered the Parliament under SHP, resigned from the party and rejoined HEP in March 1992 (Kirişçi & Winrow, 1997, p.137). On 3 July 1992, the Chief Public Prosecutor of the Republic applied to the Turkish Constitutional Court for the dissolution of HEP "on the ground that it had undermined the integrity of the State on account of statements made by its leaders and officers which were contrary to the Constitution and in breach of the legislation on political parties, but also on account of the fact that it had lent its protection and assistance to some of its members who had committed illegal acts" (*Judgment on Case of Yazar and Others v. Turkey*, 2002)and on 14 July 1993, the Constitutional Court decided to dissolve HEP on the ground that its activities were undermining the territorial integrity of the state and the unity of the

[8] Since 1998, every year European Parliament awards Sakharov Prize for Freedom of Thought to an individual or organization that has dedicated their lives to human rights and freedom.

Nation. In its decision, the Constitutional Court expressed its criticism of HEP for demanding the right to self-determination for the Kurds, advocating the setting up of "Kurdish provinces" and describing the terrorist acts committed by the PKK as acts of international war. Moreover, HEP was accused of regarding PKK terrorists as freedom fighters and of claiming that the Turkish security forces were in fact seeking to bring about the mass extermination of the Kurdish people. On 24 September 1993, former HEP leaders Yazar, Karataş and Aksoy applied to the ECtHR alleging that Turkish Court's dissolution order had infringed their right to freedom of association secured under the Article 11 of the Convention. In its judgment, the Court found a violation of the Article 11, and sentenced Turkey to the sum of 40,000 Euros: 10,000 Euros to each of the three applicants for non-pecuniary damage and 10,000 Euros to the applicants jointly for costs and expenses. Strikingly, in the judgment, the Commission expressed that it admits "the PKK had used various principles advocated by the HEP, such as the right to self-determination and recognition of language rights, as pretexts to justify its acts of terrorism" but concludes that "HEP could not be criticized for having supported those principles – which in themselves did not conflict with the values of a democratic society – without calling for the use of violence" (*Judgment on Case of Yazar and Others v. Turkey*, 2002).

Following the Chief Public Prosecutor of the Republic's application to the Constitutional Court for dissolution of HEP, before the Constitutional Court gave its decision to dissolve the party, ÖZDEP (Özgürlük ve Demokrasi Partisi - Freedom and Democracy Party) was founded on 19 October 1992. Nevertheless, it shared a similar fate with its processor when the Chief Public Prosecutor of the Republic applied to the Constitutional Court on 29 January 1993 for dissolution of ÖZDEP on the ground that its programme was undermining the territorial integrity and secular nature of the state and the unity of the nation. Subsequent to the application, ÖZDEP voluntarily dissolved itself on 30 April 1993 before the Constitutional Court reached to a conclusion on the party's closure case. This dissolution was an attempt to protect themselves and party leaders from a ban on carrying on similar activities in other political parties; a ban which would come with a Constitutional Court's dissolution order. Despite the fact that the party had already dissolved itself, the Constitutional Court outlawed ÖZDEP on 14 July 1993 and concluded that since the party's voluntary decision to dissolve itself was made later than the foundation of the party, it did not affect the Constitutional Court's

decision making with regard to the closure case. On 16 March 1993, ÖZDEP applied to the ECtHR against Turkey, complaining that its dissolution by the Constitutional Court had infringed Article 11 of the European Convention on Human Rights, namely; the right of the party's members to freedom of association. Despite the Turkish Government's preliminary objection pleading that ÖZDEP could not be the victim of its dissolution since it dissolved itself voluntarily before the Constitutional Court's decision, the ECtHR concluded that the dissolution of ÖZDEP breached the Article 11 of the Convention that it was disproportionate to the aim pursued and consequently unnecessary in a democratic society. Accordingly the ECtHR amerced Turkey in the non-pecuniary damage fine of 30,000 French francs to the ÖZDEP representative and 40,000 French francs for costs and damages (*Judgment on the Case of Freedom and Democtracy Party (ÖZDEP) v. Turkey*, 1999).

While the dissolution case of ÖZDEP was still pending, a new Kurdish nationalist party was founded on 7 May 1993 under the name DEP (Demokrasi Partisi – Democracy Party). 18 former HEP deputies, who were still in the Parliament at the time, joined the party. This time, the party was determined to play a role in the resolution of the Kurdish conflict such that it pushed aside many of the intra-Kurdish divisions that had been an obstacle in the previous attempts. Accordingly, they started the "Campaign for Peace" which determined an agenda including the Turkish state's recognition of Kurdish identity, the abolition of emergency rule in the Kurdish populated provinces, the removal of special security forces and vanguards from those provinces and the introduction of economic and judicial reforms (Barkey & Fuller, 1998, p.85). However, provided that the state prosecutors initiated the legal process for the dissolution of the party on 2 November 1993, the "Campaign for Peace" could not go too far. The party was outlawed and the immunities of 13 DEP members in the Parliament were lifted as they were disqualified from office on 16 June 1994 on the ground that the party's activities were undermining the territorial integrity of the State and the unity of the nation. As the rationale for its decision, the Constitutional Court pointed to the declarations and speeches of DEP members in which the acts of a terrorist organization had been depicted as a struggle for independence as there had been references to the existence of a distinct Kurdish people in Turkey fighting for their independence. Hatip Dicle; who was one of the 13 DEP members disqualified from office, took the case to the ECtHR and on 10 November 2002, the ECtHR concluded

that the dissolution of DEP was violating the Article 11 of the Convention and awarded Hatip Dicle 200,000 Euros for non-pecuniary damage, to be transferred to the members and leaders of the DEP, and 10,000 Euros for costs and expenses. Indeed, the ECtHR came to a common point with the Turkish Constitutional Court as it noted that in a speech in Iraq, the former DEP president compared the activities of the armed movement within the PKK to a war to liberate the northern Kurdistan and to found a Kurdish state in that region. Furthermore, the Court noted, in this speech he labeled the DEP's political opponents, in particular the Turkish Government, as disreputable. The ECtHR found these as evidences to support for the use of force as a political tool, in this sense, as evidence to a call to use force. Nevertheless, it concluded that these words' potential impact on "national security", public "order" or the "territorial integrity" of Turkey were limited given that "what was at issue was a single speech by a former leader of the party that had been made overseas in a language other than Turkish and to an audience that was not directly concerned by the situation in Turkey" (*Judgment on Dicle on behalf of the Democratic Party (DEP) v Turkey*, 2002).

Once again, while the closure case was still pending, HADEP **(**Halkın Demokrasi Partisi - People's Democracy Party) was founded on 11 May 1994 (for a detailed study on the Kurdish nationalist political parties from HEP to HADEP please see: Watts, 2012). The texture of HADEP was quite different from its predecessors in the sense that it not only included a number of Turks who were attracted by the party's left-wing message but also did not contain many of the prominent Kurdish leaders (Barkey & Fuller, 1998, p.86). Kirisci and Gareth describe HADEP's approach towards the Kurdish problem as moderate compared to that of DEP provided that the party "has maintained a distance from the PKK and has avoided any discourse that could be construed as separatist" (Kirişçi & Winrow, 1997, p.147). HADEP participated in 1995 national elections, and received the 4.17 percent of the national votes, staying below the 10 percent threshold and therefore was not represented in the Parliament ("1995 Yili Genel Secim Sonuclari," n.d.)**.** Barkey and Fuller point to the threshold-led disproportion as they note that despite its 46.3 percent vote in Diyarbakir, HADEP could not get a single representative elected from this electoral district; whereas, Welfare Party received five of the ten parliamentarians from Diyarbakir with a vote share of 18.8 percent. The Chief Public Prosecutor of the Republic, Vural Savaş initiated a closure case against HADEP on 29 January 1999 on the ground that the party

was a center of action undermining the integrity of the country and the nation. In the indictment, Savaş noted that there existed an organic tie between HADEP and PKK and substantiated his claim by referring to the party's Second Ordinary General Assembly of 23 June 1993, in which cloths in the colors symbolizing PKK as well as posters of Abdullah Öcalan were being circulated in the hall while the crowd was shouting slogans in favor of Öcalan in Kurdish: 'Biji Serok APO[9]' meaning "Long Live President Apo" ("Hadep Davasi 49 Ay Sonra Sonuçlandi," 2003). Three months later, on 18 April 1999, HADEP won 37 mayor posts in the local elections ("1999 Yili Belediye Secimi Sonuclari," n.d.) but no seats in the Parliament in the general elections due to the threshold ("18 Nisan 1999 - Milletvekili Genel Seçimleri sonuçları," n.d.). The case of HADEP pended in the Constitutional Court longer than its predecessors' cases. In the meantime, on 26 February 2002, the European Parliament called for the case against HADEP to be dropped as **"**HADEP denies any organic link with the PKK or any terrorist organisation outlawed" and reminded Turkey that as a candidate country it had responsibilities and commitments vis-à-vis the EU (European Parliament, 2002). Even so, on 13 March 2003, the Constitutional Court decided on dissolution of HADEP and prohibited 29 of its members from politics for 5 years. The president of the Constitutional Court, Mustafa Bumin explained the ground of the dissolution with the HADEP's support and assistance to PKK ("HADEP Kapatildi," 2003). When Bumin was asked about the recent judicial reforms that Turkey had undergone in the name of compliance with the EU norms which included a change that made the illegalization of political parties legally more complicated, Bumin declared that this decision on HADEP had nothing to do the with the reforms as the files in the case evidenced that the prohibited 29 members of the party effectively supports and assists the terrorist organization (Keskin, 2003)**.**

Meanwhile, DEHAP (Demokratik Halk Partisi - Democratic People's Party) was founded on 24 October 1997. In the 2002 national elections, DEHAP received a 6.14 per cent country-wide vote share and stayed below the threshold (Turkiye'de Genel Secimler, 2002). Following the dissolution of HADEP, the Chief Public Prosecutor of the Republic Sabih Kanadoğlu opened a closure case against DEHAP on 13 March 2003, on the ground that the party violated the Article 10 of the Turkish Political Parties

[9] While Apo is a diminutive for Abdullah widely used in the daily language, it is also the Kurdish word for "uncle". Therefore, there Abdullah Öcalan is frequently referred as Apo.

Law; which is about a technical procedure to be followed by the political parties to become eligible to enter the elections. As Kanadoğlu put it, this made DEHAP a center of executions in conflict with the principles of democratic Republic, equality and rule of law as stated in the article 68/4 ("Kanadoğlu'ndan DEHAP'a kapatma davası," 2003). The following month, on 29 April 2003, Kanadoğlu submitted an additional indictment against DEHAP, this time claiming that the party had links to the terrorist organization PKK/KADEK ("DEHAP: PKK'nın yan kuruluşu değiliz," 2004) and therefore was a center of executions violating territorial and national integrity of the state ("Dehap'a Ikinci Kapatma Davasi," 2003).

By the time, the segregation between PKK and DEHAP became more apparent in the March 2004 elections in which, DEHAP once again allied with SHP. For the election DEHAP announced Osman Baydemir as the new candidate for the post of Diyarbakır mayor. PKK/KADEK/KONGRA-GEL militants backed the old mayor Feridun Çelik against the DEHAP candidate. Although Baydemir was elected for the post, DEHAP/SHP coalition's country-wide vote share remained lower with 4.8 per cent than the 6.3 per cent vote share that DEHAP alone had achieved in 2002 general elections (Mango, 2005, p.50). The next month, the leader of DEHAP, Tuncer Bakırhan denied any ties between the party and PKK as an answer to a journalist's question on the accusation of DEHAP for being the political tool of PKK ("DEHAP: PKK'nın yan kuruluşu değiliz," 2004). On 19 November 2005, before the case was concluded, DEHAP dissolved itself ("HEP, DEP ve HADEP kapatılmıştı," 2009).

In the immediate aftermath of DEHAP's dissolution of itself, DTP was founded on 9 November 2005. In the case of DTP, the legal process to outlaw the party was triggered when three DTP deputies travelled to northern Iraq on 4 November 2007 in order to receive the release of eight soldiers whom the PKK had captured in the October 21 raid. Following this incident, Turkish state prosecutors initiated legal proceedings to remove the parliamentary immunity of all twenty DTP parliamentarians (Rainsford, 2007). On 16 November 2007, the Chief Public Prosecutor of the Republic, Abdurrahman Yalçınkaya lodged a 121 pages long indictment with the Constitutional Court for the permanent ban on DTP. The indictment was based on the article 69/6 of the Constitution and articles 101/1-b and 103/2 of the Political Parties Law by reason of the party's acts that violate the Article 68/4 of the Constitution. The Article 69/6 provided the right to permanent ban on political parties which become a focal point of

activities against the Article 68/4 which preserves the sovereignty of the state and the indivisible unity of the country and the nation (*İddianame*, 2007, pp.1-3). In the indictment, Yalçınkaya used quotations of Abdullah Öcalan from the "Meeting Notes"[10] in an attempt to substantiate his argument that DTP is founded by PKK. For instance, Yalçınkaya presented quotations from the 5 May 2004 dated meeting notes, where Öcalan clearly stated the need for a new party which might be founded under the name Demokratik Toplum Partisi –DTP (Ibid, p.18). Moreover, in the indictment 141 instances are presented to reveal the praise of Öcalan and/or PKK from the party speeches or acts, after the foundation of DTP. These included allegation on the DTP Karaçoban district governor Fehtah Dadaş for providing financial support to terrorist organization members, on the DTP Van governor Hadice Adıbelli for dispatching a member to the terrorist organization, participation of the DTP deputy Sabahat Tuncel to the terrorist organization congress as a commissioner, and accommodation of a terrorist organization member who comes to Istanbul for a protest in DTP's Istanbul building as well as provision of logistic support for him.

Strikingly, in the indictment there was a clear reference to Turkey's relations with the EU as a reason to outlaw DTP. According to Yalçınkaya, as the EU criticizes DTP for its close ties with PKK, it is a "democracy disgrace" for Turkey to identify DTP as a political party in the area of national and international law given that it is founded on Öcalan's order and works as not only the supporter but also as the apparatus of the terrorist organization (Ibid, pp.42-44). On 11 December 2009, the Constitutional Court declared its unanimous decision to ban DTP and 37 of its members. In his statement, the President of the Constitutional Court Haşim Kılıç argued that the decision was in accordance with the ECtHR as the Turkish Constitutional Court was guided by the example of Batasuna in reaching to a decision ("AIHM'e göre de terörün odağı," 2009). The same day, the Presidency of the European Union released a statement on the closure of the DTP and expressed its concern for the dissolution of a political party although it denounced violence and terrorism (Swedish Presidency of the European Union, 2009).

This chapter has provided a detailed summary of the illegalization cases of Batasuna and DTP in an attempt to contextualize them in their historical settings. It is

[10] The "Meeting Notes" or the "Lawyers' notes" are notes taken by Öcalan's lawyers during their meeting with Öcalan in İmralı where Öcalan is serving his life sentence. The notes are released to press by his lawyers.

intended to contribute to the overall aim of this thesis by providing the analysis with a solid ground for comparison as well as by enabling the reader to have familiarity with the subject. The historical accounts of the two cases reveal significant lines of differences as well as similarities. How they can be articulated and what kind of a position the EU takes towards them are questions to be dealt in the following chapter.

CHAPTER 4

THE EU'S POSITION TOWARDS POLITICAL PARTY PROHIBITIONS AND THE LEGAL GROUNDS OF BATASUNA AND DTP BANS

The prohibition of political parties leads to a predicament in democracies. At the outset, the political parties are by definition instruments of democracies; they are channels of representation. As such, any interference on their representation capacity would be a breach of some fundamental rights defined in democratic societies. However, in some cases, democracies end up banning particular political parties, often for purposes of maintaining democratic principles. Hence, prohibition of political parties presents a democratic puzzle. This chapter aims to elaborate on the EU's position towards this puzzle. For this purpose, firstly a brief analysis of the official and legal documents that can be associated with the EU's position towards political party prohibitions will be made. Then, in an attempt to be able to articulate on where the prohibition cases of Batasuna and DTP fall into with regard to the EU's general position on the issue, the legal grounds on which Batasuna and DTP were closed will be examined. An account on the legal standings of the two cases in relation to the EU's general position towards political party prohibitions is expected to provide a solid basis for an analysis of the justifications used in Batasuna and DTP decisions.

4.1. EU and Party Prohibition Cases

The EU does not have a binding regulation on the closure of political parties; yet, it has a clear position which can be traced in the Guidelines on Prohibition and Dissolution of Political Parties and Analogues Measures, Venice 10-11 December 1999, CDL-INF 2000, 1. The Guideline was prepared by the European Commission for Democracy through Law (the Venice Commission), which is an advisory body that prepares reports upon request for the EU institutions and member states on constitutional matters since 1990. Defined as an "independent legal think-tank" on its official website, the Venice Commission adopts a non-directive approach based on dialogue and does not have binding solutions ("Venice Commission," n.d.). Yet, as a member of the Commission, as Ergun Özbudun puts it, "while its decisions are of advisory nature, there is no doubt that they are highly regarded in the council circles" (Özbudun, 2008).

The part III of the 1999 Guidelines openly states that prohibition of political parties can be possible only if it is necessary for the maintenance of the democratic system and when there are concrete evidences that the party is advocating violence in all forms as part of its political programme or aiming to overthrow the existing constitutional order by means of armed struggle, terrorism or the organization of any subversive activity (Part III, Paragraph 9, *Explanatory Report on Guidelines of Prohibition and Dissolution of Political Parties and Analogous Measures*, 1999). In this regard, there are two rationales under which prohibition of political parties is possible. The first one is the cases in which the change that any political party aims to bring about collides with the principles of a democratic system. The second one is using violence as a means of achieving its goals. This understanding is also reinforced in the ECtHR rulings. For instance, in its judgment on HEP (People's Labor Party) case, the ECtHR clearly stated that one of the two clear fundamental reasons should exist for the prohibition of a political party; accordingly the party should either use means that are not legal and democratic, or aim to bring about a change that is not compatible with fundamental democratic principles. It further added that:

> "a political party whose leaders incite to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds" (Paragraph 49, *Judgment on Case of Yazar and Others v. Turkey*, 2002).

The Convention's protection is related to the aforementioned articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms on freedom of expression and freedom of assembly and association. With regard to both freedoms, restrictions are only possible when **"**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" (Articles 10 and 11, The Council of Europe, 2010). Therefore, while the operation of political parties are defined as the main requirements for freedom of expression and freedom of assembly and association, it is recognized that in cases where political party uses violence as a means, or has aims that contradict with the principles of democracy, prohibition may be possible. Within such a framework, the prohibition of political parties is evaluated with considerations of freedom of expression, association and assembly on the one hand, the use of violence means or non-democratic ends on the other hand.

4.2. The Legal Grounds on which Batasuna and DTP were Banned

In the Turkish Constitution the conditions under which the dissolution of a political party is possible are defined in the Articles 68 and 69 as established in 1982 and amended in 1995 and 2001. The Article 68 acknowledges the political parties as "indispensible elements of the democratic political life" yet describes in its fourth paragraph a permitted scope for the statutes, programmes and activities that the political parties may pursue:

> "The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law,

> sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime" (*The Constitution of the Republic of Turkey*, 1982).

Accordingly, the Article 69 states that dissolution of a political party is possible only when the Constitutional Court determines that the party has become a center for the violation of the provisions in the fourth paragraph of the Article 68. The Articles 101 and 103 of the 1983 Political Parties Law reinforce the terms that are stated under the Article 68 and 69 of the Constitution ("Siyasi Partiler Kanunu," 1983). The procedure to dissolve parties is defined by the Article 98 of the Political Parties Law and the Article 69/5 of the Constitution through a legal process which will be initiated by the filling of a suit by the office of the Chief Public Prosecutor of the Republic and finalized by the decision of the Constitutional Court (for more information on political party closures in Turkey please see: Albayrak Coşkun, 2008; Bale, 2007; Hakyemez & Akgun, 2002; Kogacioglu, 2003; Wigley, 2009; Özbudun, 2010). In this regard, following the indictment of the Chief Public Prosecutor of the Republic Abdurrahman Yalçınkaya, the Constitutional Court decided to dissolve DTP on the ground of the Articles 68 and 69 of the Constitution and the Articles 101 and 103 of the Political Parties Law. The Constitutional Court's decision, as it was published on the official gazette emphasized that not only actions but also its ties with the terrorist organization were considered when reaching to the conclusion that the party has become the center of actions in conflict with the indivisible national and territorial integrity of the state (Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009).

In the case of Batasuna, the proceedings seeking the dissolution of the party was brought before the Spanish Supreme Court by two agents; namely, the State Counsel, acting on behalf of the Spanish Government and the Public Prosecutor's Office. Both of the agents based their proceedings on the ground that Batasuna was repeatedly violating the democratic principles as laid out in the LOPP and particularly in the Article 10 (*Affaires Herri Batasuna et Batasuna c. Espagne*, 2009). Accordingly, the Article 10/2 of the LOPP defines three conditions under which dissolution of a political party is possible as such: if the party a) commits criminal offences, b) repeatedly and continuously violates the requirements of the democratic structure and function as provided in the Articles 7 and 8 c) repeatedly and seriously engages in activities that violate democratic principles, pursue damages or destroy the system of freedoms,

preclude or eliminate the democratic system as referred in the Article 9. As the paragraphs 4 and 5 of the Article 10 indicate, when a party commits criminal offences (Paragraph a of the Article 10/2, "Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos," 2002), the case will be resolved by the Criminal Court in accordance with the provisions of the Organic Law of the Judiciary, the Criminal Procedure Act and the Penal Code; but, when a party violates the requirements of the democratic structure and function laid out in the Articles 7 and 8 (Paragraph b of the Article 10/2) or engages in activities listed in the Article 9 (Paragraph c of the Article 10/2), the case shall be settled by the Special Chamber of the Supreme Court established by Article 61 of Law on the Judiciary. Among the activities listed in the Article 9, there are promoting or legitimizing violence as a means to achieve political aims or removing the requirements for the exercise of democracy, pluralism and political freedoms and assisting and giving political support to terrorist organizations to achieve their goal of overthrowing the constitutional order, disrupting public peace (Paragraph c of the Article 9/2). In this regard, the Supreme Court pointed to the alleged ties that Batasuna had with ETA as the reason for closing the party.

The fundamental difference between the Court decisions to dissolve Batasuna and DTP is the legal ground on which the parties are illegalized. Basically, in the Turkish case, the legal article referred to in dissolving DTP indicates that the party is a threat to the indivisible national and territorial integrity of the state whereas in the Spanish case, Batasuna is dissolved by referring to the article which enables the dissolution of a party if it is giving political support to a terrorist organization. Despite pages long explanations of the DTP's links to terrorism and citations of the ECHR's Batasuna decision, ultimately DTP is dissolved on the legal ground of being a center of actions in conflict with the national and territorial integrity of the state. As the reasons to outlaw DTP, the Constitutional Court pointed to dividing the Turkish nation based on ethnic origins, making unrealistic assumptions about the existence of an oppressed and exploited people, defining their culture and language in a discriminatory way, and based on these assumption, eventually supporting the policies and actions of the illegal terrorist organization PKK, whose armed actions resulted in the death of tens of thousands of people, and of its convict ringleader. According to the Turkish Constitutional Court, DTP hereby has become a party which extensively violates the indivisible unity of the country and the nation state (Section VIII, "DTP'nin

Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009). This means that not only its alleged ties with the terrorist organization but also its political agenda seeking rights for a distinct Kurdish minority group has been the reason for DTP's closure. This is decisive in the sense that in the Turkish case, it is the ideology of the party which leads to its dissolution order whereas in the Spanish case it is the means. This has been made clear by the Spanish Constitutional Court as a response to the Basque regional government's application with regard to the constitutionality of the LOPP. Following the case opened at the Supreme Court to dissolve Batasuna, on 27 September 2002, the Basque regional government went to the Constitutional Court on the ground that the LOPP "interfered with the freedom of association guaranteed under Art 22 of the Constitution in a disproportionate manner" (Cram, 2008, p.86). Yet, the Court confirmed the validity of the LOPP by stating that under the LOPP only the actions, not the ideology of a political party can lead to its dissolution (Navot, 2008, p.755). As the Court put it, the legal infringement could only spring from legal provisions and never from proposals or legislative intentions and once framed as such, they may have any content (Acierno, 2005, p.691). Therefore, "any idea was legitimate within the framework of the Constitution, provided that it was not accompanied by actions that were repugnant to democratic values or human rights" (Navot, 2008, p.755).

In this regard, the legal formulation for the prohibition of political parties as it is laid down in the LOPP is in line with the ECHR rulings. Yet, the history of party closures in Turkey to a great extent contradicts with the ECHR understanding, which is apparent in the judgments with regard to HEP, ÖZDEP and DEP where the ECHR found Turkish state violating Articles 10 and 11 of the Convention. A view shared by Zühtü Arslan and Ergun Özbudun explains this contradiction as follows: with regard to political party cases, Turkish Constitutional Court tends to make ideology-based decisions in which the state and society are favored over the individual, whereas ECHR decisions are generally rights-based, considering the individuals and their rights; and above all, respecting the free operation of political parties (Arslan, 2002; Özbudun, 2010). Arslan further explains the distinction as authoritarian paradigm in opposition to liberal paradigm. In the authoritarian paradigm as the Turkish Constitutional adopts it, rights are recognized only to the extent that they do not conflict with or undermine the official ideology of the state (Arslan, 2002, p.15). As the Constitutional Court Decision on DTP reveals, the Constitutional Court operates on the understanding that "state's

duty and basis of existence is to prevent exploitation of rights and freedoms" (Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009). As far as one can tell, there are limits to the rights and freedoms even in the most liberal societies and supreme courts and constitutional courts are in charge of deciding on those restrictions for the sake of a functioning democratic order; however, defining the limits with the principle of indivisible integrity of the state with its territory and nation leads to a broad and vague conceptualization for the term 'exploitation of rights and freedoms'. Therefore, the ideology-based frontiers that the Turkish Constitutional Court draws around rights and freedoms results in a boom in the number of parties closed in Turkish political history. Under the 1961 constitution six parties, under the 1982 constitution 19 parties are outlawed by the Constitutional Court. This clearly contradicts with the European Convention of Human Rights and the European practice of banning political parties.

Given that DTP is selected as the political party prohibition case from Turkey for the purposes of this research, the focus of the historical and legal account on political party closures in Turkey has been on the Kurdish nationalist political parties. At this point it should be noted that if national integrity has been the first and foremost cause for political party prohibitions in Turkey, secularism has been the second. While the former resulted in closure cases against Kurdish nationalist political parties, the latter has been the grounds on which prosecutors lodged cases against the parties associated with political Islam. For instance, recently the governing party AKP has faced a closure case, in which the Constitutional Court ruled not to dissolve the party but to cut off public financial aid as the party has become a focal point of anti-secular activities in 2008 ("Anayasa Mahkemesi Karari," 2008). AKP had been formed by the modernizing wing of the previously banned Fazilet Party, which indeed was the successor of the even more previously banned Refah Party, thus they were coming from a party tradition that had already faced closure cases (for more information on the closure cases against the political parties that are alleged to pursue anti-secular activities please see for instance: Dağı, 2008; Gulalp, 1999; Gumuscu & Sert, 2009; Kogacioglu, 2003; Kosebalaban, 2008; Yesilada, 2002). It is in this context that AKP officials have been critical of political party prohibitions in general terms. DTP was banned by the Turkish Constitutional Court during the term of the AKP's governance. This information is useful to keep in mind when reading the politicians' responses to the Court decision.

With regard to the Constitutional Court's decision to ban, on 20 January 2010, Şırnak deputy of BDP (the successor party of DTP) Hasip Kaplan took the Constitutonal Court's decision to close DTP and to expel the two members of parliament Aysel Tuğluk and Ahmet Türk from the Parliament to the ECHR. The ECHR has not reached a decision yet, but given the fates of the cases of DTP's processor parties, it will not be surprising if it decides in favor of DTP, and once again finds the Turkish State violating the Articles 10 and 11, due to the legal framing of the Turkish Constitutional Court's decision to close a political party.

Turkish Constitutional Court's ideology-based restrictions on rights and freedoms as well as its disreputable tradition of political party closures might lay the legal basis for the EU's criticisms for the prohibition of yet another political party in Turkey. When Turkish Constitutional Court decided to close DTP, it cut off a representation channel which was essential for democracy. On the other hand, DTP is a party whose ties to the terrorist organization PKK is recognized by the EU. In this regard, the problem that DTP presents is one of a democracy on the one hand and one of terrorism on the other hand. It is at this point that a similarity can be claimed between the DTP and Batasuna cases. Batasuna, which was an established party, was closed down by the Spanish Supreme Court due to its alleged ties to ETA. Although the legal coding of the closure of Batasuna was in accordance with the Venice Commission guidelines and ECHR principles, with its dissolution its representation capacity was lost. In this regard, the problem of Batasuna is also one of democracy and terrorism.

In the light of the similarities and the differences between the legal grounds of the two cases, the justifications used by the actors with regard to the decisions to ban Batasuna and DTP can be analyzed by also taking their content into account. Justifications, by definition, do not necessarily reflect the real motivations for an act and thus, they can also be sheer lies. Crawford suggests that the contents of justifications are not incidental but rather they tell a lot about the culture. It is therefore "important to trace the content of justifications, even if we know they are not the 'real' or only reasons for action" (Crawford, 2004, p.128). Although determining what type of culture the countries in question have is not among the objectives of this dissertation, being familiar to what the actual legal standing of the cases are would enable to bring about a sophisticated look in the analysis of justifications.

CHAPTER 5

THE EU AS A HUMAN RIGHTS PROMOTER IN TURKEY: THE PROHIBITION OF DTP

On 11 December 2009, Turkish Constitutional Court decided to ban the Kurdish nationalist political party DTP. The decision was clearly at odds with the EU position on this issue, which was to prevent the only Kurdish nationalist political party in the Turkish Parliament at the time, from being illegalized. In line with this position, the Swedish Presidency of the European Council issued a statement in the immediate aftermath of the Turkish Constitutional Court decision and expressed the Council's concerns on the closure of a political party (Swedish Presidency of the European Union, 2009). Furthermore, the statement highlighted the democratic standards that Turkey has to catch up with as a candidate country, and in this way reminded Turkey that DTP's illegalization was in contradiction with its duties in the accession process ("DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009). This is important as it exposes that the EU acknowledged the case of DTP as one of democracy and human rights, and hence attached importance to the available representation channels to the Kurdish minority population in Turkey. The articulation of the case as such enables the EU to have an intrinsic position towards illegalization of a Kurdish nationalist political party in Turkey provided that promoting democracy and human rights in candidate countries have been defined as key foreign policy objectives of the Union and are tied to political conditionality through Copenhagen Criteria since 1993. In this context, preventing the banning of DTP was a part of the EU's human rights policy towards Turkey. Considering the asymmetrical relationship inherent in the accession process, Turkey, being a candidate country, was expected to comply with this policy. Based on these premises, the decision to illegalize DTP can be regarded as a case of non-

compliance of Turkey with the EU's human rights policy. This chapter is an attempt to answer why Turkey did not comply with the EU's human rights policy in DTP case. For this purpose, it adopts a communicative action perspective and analyzes the arguments as to why Turkey decided to close DTP and as such contradicted with the EU's human rights policy.

5.1. Significance of Analyzing the DTP Case

Turkey is a country longing for EU membership since 1987. Turkey's endeavor to become a member equips the EU with a unique ability to affect Turkey's domestic policies in many ways at various levels. Parallel to the developments in the EU's human rights policy, in an increasing fashion the EU has been a push factor in the human rights reforms that Turkey has been undergoing in the last two decades. This process is even further strengthened with Turkey's nomination as an official candidate and being directly tied to the political Copenhagen Criteria in 1999. Accordingly, its aspiration to become an EU member makes Turkey receptive to the EU's human rights policy. Yet, while the EU membership is a significant motivation for Turkey to make human rights reforms in line with the EU's human rights policy, it alone cannot fully explain why Turkey makes those reforms given that Turkey complies with certain EU's human rights policy and does not comply with certain others. If it was only Turkey's aspiration for membership which led Turkey to comply with the EU's human rights policy, then one would expect Turkey's compliance to happen automatically as long as Turkey's aspiration for the EU membership continues. At this point, an analysis of the justifications used in a case of Turkey's non-compliance with the EU's human rights policy is crucial as it has the potential to contribute to the existing literature on Europeanization and conditionality, and eventually to the academic discussions on what kind of an actor the EU is. Schimmelfennig and Sedelmeier pointed to the lacunae in the literature on the eastern enlargement of the EU as they stated: "even though it is generally agreed that the adoption of EU rules is a central condition of membership, the process of adoption in the candidate countries is seriously understudied"

(Schimmelfennig & Sedelmeier, 2005, p.4). Hence, this chapter is intended to bring about a genuine perspective to the adoption of the EU-led human rights policies by a candidate state through focusing on a non-compliance case.

5.2. Analytical framework: Studying the illegalization of DTP

The dissolution of political parties in Turkey is a legal process which is initiated by the filling of a suit by the office of the Chief Public Prosecutor of the Republic and finalized by the decision of the Constitutional Court. Thus, the Parliament is not involved at any stage of the decision making on the closure case. In view of that, this analysis will start with a primary focus on the reasons presented by the Constitutional Court in justifying its decision to ban DTP. When studying the justifications, an analytical distinction will be made among three types of reasons: pragmatic, ethical-political and moral (Habermas, 1993). Such an analytical structure would reveal what type of arguments are considered by the Turkish Constitutional Court as a legitimate source for justification and in this way would facilitate to draw conclusions on whether the EU has a utility, value or right-based influence the EU as a human rights promoter on Turkey.

A major challenge which arises in such empirical case studies is to control the time variable which might have an effect on the accuracy of conclusions. For instance, Finnemore's analysis demonstrates that "while humanitarian justifications for action have been important for centuries, the content and application of those justifications have changed over time" (Finnemore, 2002). Hence, in an attempt to account for the changes through time, a time factor will be introduced via a comparison between the reasons used in the Constitutional Court's reasoned decision on DTP and on HADEP, which is the previously banned Kurdish nationalist political party in 2003. In this way it will be possible to detect whether there is anything specific to the justifications used for the illegalization of DTP or whether the same reasons have been presented in both cases. Such an insight is important as it has the potential to place the EU's influence as

a human rights promoter in a conjunctural framework. Basically, if the two cases reveal similar courses of argumentation made through same type of reasons, then this will point to the absence of a significant change in the EU's influence on Turkey's human rights policies since 2003. Given that accession negotiations between Turkey and the EU started in 2005, comparing the reasons used by the Constitutional Court in justifying the closure of HADEP in 2003 and DTP in 2009 would serve to testing whether the accession process has been leading to a change on the type of influence that the EU's human rights policies have on the legal decision makers in Turkey.

Analysis of legal argumentation is crucial in understanding what the legislature consider to be legitimate in justifying a decision. However, as none of the states is, Turkey is not a unitary actor; it contains different domestic actors with different and in some cases challenging policy preferences. Moving from this premise, for the purpose of bringing about a multi perspective dimension to the analysis, the second section will focus on the arguments presented by the political actors in supporting or criticizing the Court's decision to illegalize DTP. The logic in focusing on the politicians among the other domestic actors is that although the banning of DTP is a legal decision following a legal process, it is a critical political incident which has a public audience. Hence, while politicians have no say in the decision making process, as a major political issue touching upon Turkey's pivotal concerns such as human rights, democracy, Kurdish problem, PKK and Turkey-EU relations, DTP case has been commented on by the politicians. Therefore, the reasons that the politicians present in favor or against the divergence from the EU's human rights policy through illegalizing DTP would enable us to see whether legal argumentation has common points with political argumentation on the issue, whether the reasons used by the Constitutional Court are also shared by the politicians. Taking two different lines of argumentation into account provides an insight on institutional factors in Turkey's non-compliance with the EU's human rights policy.

The organization of the chapter is as follows: Firstly, an introduction on the operationalization of the theory and methodology will be made. The next sections will move onto analyze the legal and political argumentation on DTP's closure. With respect to legal argumentation, the reasons that the Constitutional Court uses in justifying the illegalization of DTP in the relevant 2009 reasoned decision will be analyzed. They will be compared with the reasons presented in the 2003 reasoned decision on HADEP in an attempt to identify whether there is a specific source of legitimacy in the DTP case.

Then, the focus will be on whether the reasons used in the legal argumentation correspond to the reasons used in the political argumentation. If they do not match, then it would be possible to make an institutional explanation on the Constitutional Court's non-compliance with the EU's human rights policy. On the other hand, if the political and legal argumentations match, more generalizable conclusions can be reached on Turkey's non-compliance with the EU policy and on its implications for the EU's influence as a human rights promoter. Accordingly, four key questions will be followed in this chapter: Firstly, which types of arguments are presented by the legal decision makers in the reasoned decision to illegalize DTP? Secondly, has the accession process led to a change in the type of arguments used in justifying a decision contrary to the EU policies, i.e. are there significant differences between the types of argumentation used in the 2009 decision on DTP and the 2003 reasoned decision on HADEP? Thirdly, to what extent the arguments presented in the legal decision are compatible with those used by the political actors in either supporting or criticizing the decision? Fourthly, what kind of an influence do the arguments used in the illegalization of DTP attribute to the EU as a human rights promoter?

5.3. Theoretical Framework: Studying justifications

A rationalist explanation to Turkey's divergence from the EU's human rights policy would be made through the interest maximization of the Turkish decision makers. This will be in accordance with the Schimmelfennig et al.'s conclusion that Turkey is likely to adopt changes when the domestic audience cost is small (Schimmelfennig, Engert, & Knobel, 2005). An unconventional explanation can be made with regard to the particular values that Turkish actors define themselves with, or alternatively to the established norms and principles. Studying arguments/reasons presented by the Turkish actors in justifying, and also possibly criticizing the decision to illegalize DTP, enables the researcher to assess the relevance of all three perspectives and therefore provides the research with a wider angle of explanation. Adopting Habermas's communicative action theory as the theoretical foundation of this analysis,

the actors are expected to present validity claims for their actions and in return to assess the legitimacy of the validity claims presented by others (Sjursen and Smith 2004, p.130). This being said, what type of validity claims the actors select to justify their action would reveal what they consider to be legitimate to the extent that they can persuade their audiences. In other words, the type of arguments that Turkish actors present for illegalization of DTP would map out the type of influence the EU has as a human rights promoter on Turkey, with potential gateways to draw conclusions on the limits of the EU's influence as such.

At this point it is important to further emphasize that the justifications can, and usually are, used to mask the actor's real intentions. Justifications are often disregarded in the traditional approaches since "[t]he conventional wisdom is that justifications are mere fig leaves behind which states hide their less savory and more self-interested reasons for actions" (Finnemore, 2002). This is to say, a rhetorically rational actor might present norm-based arguments for purely instrumental reasons whereas "an actor with strong normative reasons for promoting a policy (e.g. an environmentalist) might resort to utility-based arguments to persuade someone who does not share her conviction (e.g. an industrial manager)" (Lerch and Schwellnus 2006, p.307). The prospect for using one type of justification to mask a different type of motivation further contributes to the purposes of this analysis as it reveals that what actors select for justifications expose what they consider to be persuasive for their audience. It is in this regard that the theoretical basis of this analysis allows a conceptualization of arguments used to justify one's position as more than being rhetoric, provided that "even those who use brute force make arguments about why it was 'necessary' or 'wise' to do so" (Crawford 2004, p.12). Consequently, the study of justifications do not pursue the answers as to what really motivates the actors; but rather, seeks out what enables them to take a decision even when it is contrary to what is expected from them. Accordingly, the justifications are accepted as manifestations of what actors believe to mobilize support for their actions and thus, selection of justifications are expected to uncover what the actors consider their audience to find legitimate.

The pragmatic reasons are expected to be indicated by utility considerations. Following logic of consequentiality, an actor is expected to justify a decision with references to the costs and benefits that the decision is likely to produce. The choice of arguments would serve to present a policy decision "as legitimate on the basis of its

efficiency in reaching a given goal, or by referring to interests such as economic gains or increased security and stability" (Lerch and Schwellnus 2006, p.306). In this regard, justifications with references to pragmatic reasons would reveal themselves through utility based arguments while utility can be defined via security and economic interests of the actor. The alleged ties between the political party and terrorism bring about a substantial security component to the DTP which provides the necessary basis for the security related justifications. Stated as such, if it is the logic of consequentiality which drives Turkey's non-compliance with the EU, then one would expect to find references to protection of Turkey's security interests by outlawing DTP. Accordingly, a rationalist hypothesis would be: Turkey did not comply with the EU's human rights policy and closed DTP because not closing DTP was against Turkey's security interests. A couple of questions can be put in order to test this hypothesis: Are the justifying arguments reflect a cost and benefit analysis of complying with the EU policy and closing DTP? Is it possible to find arguments suggesting that the security costs of not closing DTP prevails the benefits of complying with the EU's human rights policy? Is the closure of DTP justified through the outputs that it is expected to produce?

The ethical-political reasons are those referring to traditions, identity and values of a community. When an actor is using ethical-political reasons in justifying a decision, the arguments are expected to be built on the notion of community. In line with the logic of appropriateness, the good behavior that should be followed will be automatically derived from the identity of the community. What is specific to the value-based argumentation then, is that "[i]t is the community or group of which one is a member that is the frame of reference for deciding these type of questions, which Habermas refers to as ethical" (Eriksen and Weigard 2003, p.135). Accordingly, the ethical-political justifications on the DTP's closure can be detected through references to shared values, more specifically to notions of 'who we are' and 'what we represent'. Described as such, value-based arguments would inevitably engage in identity (re)constructions as they attribute certain values to particular communities. In the light of these premises, the hypothesis from an ethical-political reasoning would be: Turkey did not comply with the EU's human rights policy and closed DTP because not closing DTP and/or complying with the EU's human rights policy was contradicting with the values with which Turkey defines itself. As empirical support to the second hypothesis,

one would look for references to Turkish, Kurdish and European identities and the values associated with them in a confronting fashion.

Unlike the ethical-political reasoning where validity is bound by the community, the moral reasoning enables the actor to make universally valid claims by referring to "what is just when everybody's interests and values are taken into consideration" (Sjursen, 2002). Making universally right justifications requires referring to universally recognized norms and principles in the form of legally binding rules. To put it in other words, while the source of action is sought in the intrinsic values of a community in the value-based arguments, the right-based arguments appeal to the established, legally binding rules and principles. In this context, in the case of DTP's illegalization, the moral justifications would be expected to be made on the validity of closing the party according to the universal standards of justice. To argue on the validity of a policy requires a communicatively rational process in which actors are expected to assess the validity of the others' arguments and to use valid arguments in order to justify their own policy choices. As Sjursen puts it, "[s]ome norms will be adhered to and others not, depending on the actor's rational assessment of their validity and legitimacy" (Sjursen, 2002). Thus, if moral justifications dominate the discourse, then Turkey would be attempting to present the closure of DTP as a valid decision and therefore justifying the decision by referring to mutually recognized norms and principles, which in this case would be democracy, human rights, international rules and the ECtHR rulings. Then the third hypothesis would be: Turkey did not comply with the EU's human rights policy and closed DTP because closing DTP was in accordance with the EU accepted norms and principles. Hence, references to legally binding rules, norms and principles would substantiate this hypothesis.

After introducing the methodological framework to categorize the arguments on the illegalization of DTP, it should be noted that the analytical distinction made between the types of arguments does not suggest a conceptual distinction. Conceptualization of arguments as 'means to mobilize support for one's actions which are not necessarily attached to actors' real motivations' requires an expectation for the use of different analytical categories in order to be more persuasive. In this manner, the aim of this analysis is not to pinpoint one type of argumentation but rather to analyze which type of arguments are presented to what extent in justifying a non-compliance behavior.

5.4. Legal Argumentation: The Reasoned Decision on DTP's closure

5.4.1. Justifications through Security

As noted above, pragmatic arguments are considered to be formulated on utility based reasons, in the case of the DTP's illegalization, on the security threats that DTP is claimed to constitute, and more specifically on the party's alleged ties with PKK. Given that the decision diverges from the EU's human rights policy, costs of non-compliance would be rationalized through the security interests to which a ban on a political party is expected to serve. In line with the expectations, the reasoned decision lay down the Articles 68 and 69 of the Constitution and the Articles 101 and 103 of the Political Parties Law which allow for a ban on political parties that become the center of activities in conflict with the indivisible national and territorial integrity of the state are laid down as the legal bases for the decision to illegalize DTP. Moreover, the party is accused for providing aid and support to the terrorist organization PKK. Presentation of such reasons feed into to the proposition as to the major role played by security related reasons in justifying the decision to close DTP. Likewise, the frequent references to the parties' alleged ties to terrorism and violence imply high domestic costs of the existence of the political party in the system. This seems to substantiate Schimmelfennig et. al.'s assertion that Turkey complies with the EU's human rights policy when the domestic cost of complying is small (Frank Schimmelfennig, Engert and Knobel 2005, p.44). Following this logic, the Constitutional Court's decision which contradicts the EU position can be linked to the high domestic cost of the DTP provided that DTP is associated with the terrorist organization PKK both in the indictment and in the reasoned decision of the Constitutional Court.

On the other hand, such a conclusion can be challenged by two empirical statements. First and foremost, the previous data indicate that the Turkish decision makers indeed are capable of making decisions and complying with the EU's human

rights policy even at those issues which has high domestic costs. A prominent example to this assertion would be the Turkish Parliament's 2003 decision to comply with the EU's human rights policy and to abolish death penalty in peace time under the Third Package for the Harmonization with the European Union despite the public association of the decision with the PKK leader Abdullah Öcalan. The ringleader had been captured and sentenced to death penalty in 1999, thus at the time of the decision to abolish death penalty was made, he was waiting on the death row. In other words, by deciding to abolish death penalty in peace time, Turkish Parliament ruled out Öcalan's death sentence. This decision was met with a considerable public discontent. A public survey reflects that by the time that death penalty was abolished 59.3 per cent of public was against lifting of the death penalty for all crimes and for everyone (Çarkoğlu, 2004, p.28). Further, the draft law received harsh political criticism from one of the coalition partners in the Parliament, MHP. The domestic resistance against the abolition of death penalty has been so durable that even almost a decade after the decision, in 2011, MHP used it as a political leverage in the Parliament discussions when a party member proudly stated that they were "the only party who said 'no' to the abolition of death penalty" ("İdam polemiğinde kim ne demişti," 2011). However, despite the high domestic costs, the Turkish decision makers complied with the EU's human rights policy and abolished death penalty. From this perspective, relying solely on high domestic costs in explaining why Turkey diverged from the EU policy seems problematic. If the domestic costs of the abolition of death penalty did not dissuade the Turkish decision makers from complying with the EU's policy, the security considerations might not be the only answer to explain Turkey's non-compliance in the DTP case.

A second empirical challenge to explaining non-compliance through high domestic costs would be the presentation of the Constitutional Court's decision itself. In the search for justifications for non-compliance in the reasoned decision, the only justifications that can be encountered are with regard to the compliance with the EU's human rights policies. In other words, neither in the text, nor in the judge's public statements, is the decision presented as non-compliance with the EU. Rather, there is a serious attempt to demonstrate that it is indeed in accordance with the EU's human rights policy. When looking more closely at references to terrorism, what emerges as a pattern is the coupling of them with references to the EU accepted norms and principles.

Moreover, there is a tendency to use references to indivisible or territorial integrity of the nation together with references to democracy, human rights and freedoms. For instance, there is a strong emphasis on the existence of political parties as necessary elements of a functioning democratic system and it is stated that the political freedoms that political parties must enjoy in a democratic society are guaranteed by the constitution as prescribed by the articles 10 and 11 of the European Convention on Human Rights. The extreme cases in which those freedoms may be interfered are also defined through the EU accepted norms and principles.

> "Political parties which are indispensable elements of democratic political life in democratic societies are required to put forward their opinions and projections on social life through democratic means, as well as not to threaten public order and social peace with their demands. On the other hand, if a party imposes its demands by provoking the society as a must have, uses threatening statements such as a lot of blood will be shed if their demands are not accepted, cannot be tolerated in any democratic country" (translated by author, Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009)

The extreme cases in which the actions of political parties cannot be tolerated and restrictions on the freedoms became plausible are further substantiated by drawing on the EU practices such as the ECtHR's ruling on Karatepe/Turkey case (Karatepe/Türkiye Davası, Başvuru No: 41551/98, Strazburg, 31 Temmuz 2007):

> "The ECtHR states in general lines that any shocking, confusing or disturbing 'information' or 'ideas' would not be sufficient to justify any interference to these freedoms; however, hate speeches glorifying violence would not be tolerated" (translated by author, Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009).

Correspondingly, the security-based reasons presented for the illegalization of DTP are continuously backed up via references to Venice Commission's reports which define the use and the advocating of the use of violence as a political means as necessary conditions for closing political parties (Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009). As a result, in the arguments related to the security considerations, the party's resort to violence emerges as the key concept over which DTP's closure is justified.

> "As stated by international judicial branches and emphasized in the reports that the Venice Commission has adopted at various times, in the cases of advocacy of violence or the use of violence be political parties as a tool to abolish democratic system in a way to jeopardize rights and freedoms as guaranteed by constitution, or cooperation with and support other formations which resort to violence in order

> to realize same goals, prohibition or ban of political parties as a necessary measure can be acceptable.
>
> Thus, the Fifth Section of the ECtHR evaluated the application made by Herri Batasuna and Batasuna parties, which were banned by Spanish judiciaries on the grounf that they support terror and refuse to condemn terror, and decided that there was no breach of Convention (…)" (translated by author, Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009).

This is noteworthy because the compatibility of the language on the political party's resort to violence with the norms and principles acknowledged by the EU, such as the Venice Commission reports or the previous ECtHR judgments, suggests that the legal decision makers selected justifications through mutually recognized standards of justice over the high domestic costs of not closing DTP. Strikingly, the notions that are generally associated with pragmatic reasoning, such as terrorism and integrity of the nation, are largely embedded in a rights based discourse while even the arguments about the security interests of Turkey such as territorial integrity and terrorism are justified through maintenance of democracy.

> "(…) it is obvious that a decision to ban the defendant party would be proportional with the legitimate goal of protecting national security and constitutional order, addressing an essential and pressing social need in a democratic society" (translated by author, Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009).

5.4.2. Justifications through Values

The ethical-political reasoning is expected to be made through values and traditions that the Constitutional Court associates with Turkey and is found in the reasoned decision as the Court defines the indivisible integrity of the Turkish Republic through common language, culture, education and the principles of Atatürk nationalism ("DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009). In this way, common values that constitute the Turkish integrity are put in contradiction to DTP which is implied to engage in activities that would create a minority and threaten the national integrity. While the party is accused of creating an ethnic division within the Turkish nation by dividing the people as Turks and Kurds and of defining their

language and culture in a separatist manner, their activities are considered to be a threat to the common values that the Republic of Turkey constitutes. However, the justifications through ethical-political reasons are not only rare in the text but also they are backed up by references to the EU accepted norms and principles. While DTP is argued to damage the integrity of the nation and people, it is underlined that according to the principles defined in the current Turkish Constitution as well as in fundamental international documents and the ECHR jurisdiction, political parties cannot engage in activities that would contradict with democratic principles and that would abolish the social peace (Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009). For instance, an assertion such as:

> "according to the Constitution, the acknowledgement of anyone who has a citizenship bond to the Turkish State as Turk does not mean a denial of his/her ethnic identity but to maintain equality among every citizen in a country where the state is called 'Turkish state', the nation is called 'Turkish nation', the country is called 'Turkish land' and there exists various ethnic groups in its community structure. It is further to serve the purpose of preventing the ethnic groups which are actually part of majority to become minority"

is followed by statements in which engaging in "creation of minority, regionalism and racism" is acknowledged as a threat to societal peace and democracy. Further, such activities are presented as extreme cases in which prohibition of a political party can be justified according to the EU accepted norms and principles as well as the national provisions and constitution:

> "According to the principles as set by the provisions of law and the Constitution which are currently in force in our country together with the related international basic documents and ECtHR jurisprudence, political parties which are considered to be indispensable elements of democratic political life, cannot engage in activities that would challenge with democracy, weaken and disable democracy, abolish societal peace" (translated by author, Section VIII, "DTP'nin Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2009).

This is remarkable in the sense that while ethical-political arguments are considered to be community-bound, linking them to international documents and the ECHR jurisdiction brings about a universal legitimacy to the value-based justifications. This indicates that the Constitutional Court considers the universal right-based arguments as having a legitimate basis for justification. Such arguments might be used for strategic purposes as well, but no matter what the real motivations are for using moral reasons, it is important that the Constitutional Court accepts the legitimacy of

international documents and EU accepted norms and principles as constraints on its decision.

5.4.3. Justifications through Rights

Thus far it has been argued that even the utility and value-based arguments are linked to the EU accepted norms and principles and international rule. In other words, threats that DTP is claimed to pose against the security and the common values of Turkey are embedded in a right-based discourse where the justifications are made through moral reasons. The strong emphasis on universal recognition of the necessity of closing a political party that resorts to violence is corroborated via detailed references to the ECtHR rulings on three different cases, Venice Commission reports, the Charter of Paris for a New Europe and United Nations Security Council resolution 1624, all of which denounce violence and terrorism. Particularly, the extracts from the Venice Commission and the ECtHR ruling on Batasuna case suggest a political party's resort to violence as a necessary condition to close it as a mandatory measure to protect the functioning of democracy. The arguments that the Turkish Constitutional Court President Haşim Kılıç uses in the press statement on DTP decision are also built on the accordance of the decision with the ECHR jurisdiction which denounces political parties that resort to violence ("AIHM'e göre de terörün odağı," 2009). Accordingly, when Haşim Kılıç made the Court's decision public on 11 December 2009 before the reasoned decision was published in the Official Gazette, he explained the rationale behind the ban via DTP's engagement in activities and discourses that praise violence, and the democratic impediments of using violence as a political means.

> "Predominantly of course the Batasuna decision and the ECtHR's previous decisions… (…) [The Court] has examined and considered the ECtHR's breach decisions relating to the decisions we have made. It took into consideration the ECtHR's decision that there is no breach in the Batasuna decision of Spain" (translated by author, Haşim Kılıç quoted in"DTP kapatıldı," 2009).

In this respect, the reasons that Kılıç presented to public for the closure of DTP can be argued to have the intention to persuade the audience that the illegalization of DTP is in accordance with the EU policy.

Hitherto, the analysis suggests that the arguments used in the reasoned decision by the Turkish Constitutional Court are intended to justify that the illegalization of DTP is in accordance with the norms and principles acknowledged by the EU; whereas, in reality the EU's policy was to prevent the DTP from being banned. This leads to a puzzle as to how non-compliance with the EU's human rights policy can be in accordance with the EU accepted norms and principles. Possible explanations to this puzzle can be sought in the light of communicative action theory. Being a communicatively rational actor, Turkey is expected to assess the validity and legitimacy of the EU's human rights policies and to decide whether to comply or not to comply accordingly. Moreover, Turkey should be justifying its decision by using valid arguments. If Turkey is arguing for the validity of a decision that indeed contradicts with the EU's human rights position, then Turkey would be arguing against the validity of the EU's position. In other words, Turkey would be assessing and challenging the legitimacy of the EU's position to prevent DTP from being illegalized. But how can we operationalize the concept of 'valid and legitimate arguments'? According to Habermas, to reach an agreement, "the actors have to make the same claims on themselves that they are asking of others. They have to be consistent and recur to neutral rules and disinterested arguments in order solve conflicts" (Erik Oddvar Eriksen & Weigård, 1997, p.227). In this regard, for an argument to be legitimate, it needs to be (i) consistent in the sense that there should not be a contradiction between what is claimed from the others and what is being done by themselves (ii) referring to neutral rules and disinterested arguments. Sedelmeier and Schimmelfennig's operationalization of the legitimacy of rules is not very different from these two conditions. According to them, the legitimacy of the rules increases with (i) rules' clarity and their degree of acceptance (ii) rules' acceptance and application in all member states (iii) deliberative quality of the process of rule transfer (iv) international rule consensus. The first two conditions match with the conditions that have been deducted from Habermas's assertion. The third condition; deliberative quality is largely absent from the relationship between the EU and candidate countries given that the accession process "is a one-way process in which the new member states have to accept the entirety of the acquis" (Schimmelfennig & Sedelmeier, 2005, p.19). Thus for the scope of this analysis, the deliberative quality of the process cannot be used as a condition in measuring Turkey's consideration of the EU's rule as valid. On the other hand, references to international rule consensus in justifying non-compliance can be added to the analysis.

Concisely, three conditions can be determined as indicators for Turkey's acknowledgement of the validity and legitimacy of the EU's policy on DTP's illegalization case:

i. Consistency between the EU's policy and the EU's practices

ii. References to EU accepted norms and principles

iii. International rule consensus

Justification of DTP's illegalization by referring to a similar decision in a member state; i.e. Batasuna, and the ECtHR's ratification of the member state's decision points to a tendency in the Constitutional Court to argue for the legitimacy of its decision through the EU practices. To put it in a different way, whereas the Court's decision to ban DTP contradicts with the particular EU policy, when the Court argues for the legitimacy of its decision by referring to the EU practice, it is also implicitly arguing for an inconsistency between the EU human rights policy and practice. As a result, through referring to EU accepted norms and principles, such as Venice Commission reports and ECtHR rulings and to international rule consensus as the UN resolution 1624, the Constitutional Court is trying not only to legitimize DTP's closure via moral reasons but also arguing against the legitimacy of the EU's position in preventing the closure of DTP. Similarly, the attempt to draw parallelisms between the decisions to illegalize DTP and Batasuna by relying on the ECtHR judgments on the issue is also present in the speech of Haşim Kılıç. In this sense, while the Constitutional Court argues for the justness of outlawing DTP from politics by referring to the EU accepted practices, norms, principles and international rules; it is the logic of justification which dominates the arguments used in the reasoned decision and in the Chief Judge's press statement on DTP's illegalization. At this point, the question remains whether this is something specific to the DTP case. Such a question can be addressed by looking at how the Constitutional Court justified HADEP's closure in 2003.

5.4.4 The Reasoned Decision on HADEP's Prohibition

They are the same legal articles which led to the closure of both HADEP and DTP. That is to say, both HADEP and DTP were banned by the Constitutional Court for being the center of activities in conflict with the indivisible national and territorial integrity of the state and for providing aid and support to the terrorist organization PKK, following the Articles 68 and 69 of the Constitution and the Articles 101 and 103 of the Political Parties Law. Primary findings of the analysis demonstrate that reasons presented by the Constitutional Court in the reasoned decision on HADEP's closure, which was published in the Official Gazette on the July 19, 2003 are not distinct from those covered in the DTP decision. While main line of argumentation center around the alleged threat that HADEP constitutes against the indivisible integrity of the Turkish state and nation by creating a minority and supporting terrorism, the Constitutional Court principally relies on Turkish Constitution and legislation in this field but also refers to the European Convention on Human Rights, the Charter of Paris for a New Europe and to the World Conference on Human Rights when justifying intervention to political parties' freedom of association and organization ("HADEP'in Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2003). Koğacıoğlu's study on the political closure cases of Refah and HEP in Turkey further confirms that not only in the DTP case but also in the previous party closure cases, international law; particularly the Laussane Treaty, the ECHR and the ECtHR have been a reference point (Kogacioglu, 2003). This indicates that the attempt to justify the closure of a political party by referring to the EU accepted norms and international rule is not specific to the DTP decision. What is rather specific in the DTP decision is the particular and strong emphasis on the closure of the political parties which resort to violence, as a necessary measure to protect democracy. In this regard, although arguing through terrorism is not new, how the Court argues on terrorism differs between HADEP and DTP decisions.

To start with, in the HADEP decision, it is suggested that "any act that could harm the integrity of the nation and people should be forbidden to political parties" ("HADEP'in Kapatılması Üzerine Anayasa Mahkemesi Kararı," 2003, p.257). In this respect, the alleged ties between the party and terrorism are presented as an act harming

the integrity of the nation and people and served as the basis for justifications for illegalization of HADEP. However in the DTP decision, the justifications are built on the party's resort to use violence by providing support to terrorism. The nuance between relying on terrorism solely and terrorism as an indicator of violence is more than a matter of word choice; it is an indicator of the influence that Venice Commission reports and related ECtHR rulings have on the Constitutional Court's argumentation. The part III of the Venice Commission's Explanatory Report on Guidelines of Prohibition and Dissolution of Political Parties and Analogues Measures openly states that prohibition of political parties can be possible only if it is necessary for the maintenance of the democratic system and only when there are concrete evidences that the party is advocating violence in all forms as part of its political programme or aiming to overthrow the existing constitutional order by means of armed struggle, terrorism or the organization of any subversive activity (Part III, Paragraph 9, Explanatory Report on Guidelines of Prohibition and Dissolution of Political Parties and Analogous Measures, 1999). In this respect, Venice Commission defines two rationales under which prohibition of political parties can be possible: (i) when the change that the political party aims to bring collides with the principles of a democratic system and (ii) if the party uses violence as a means of achieving its goals. It is in this context that the argumentations in the DTP and HADEP cases differentiate while the particular prominence of arguments on the DTP's resort to violence is in perfect accordance with rationales defined in the Venice Commission guidelines. From this perspective, the arguments for the necessity of dissolution a political party which resorts to violence as prescribed by the EU acknowledged norms and principles indicate a right-based justification for the illegalization of DTP. However, justifying a political party's illegalization by pointing to the security threats to the integrity of the nation would be categorized as a utility-based argumentation, as it is the case in the reasoned decision on HADEP.

The difference between the type of arguments presented in DTP and HADEP cases is not only apparent in defining the grounds but also the objectives of illegalizing the parties. Remarkably, HADEP's dissolution is justified with the ultimate goal of defending the integrity of the nation and people. However, the reasoned decision to ban DTP sets the objective as "the maintenance of democracy". Once again, this is significant as it reveals the synchronization of the type of arguments used in the

reasoned decision with those in the EU accepted norms and principles. The ultimate goal of protecting democracy is cherished in the Venice Commission Guideline as the dissolution political parties are defined as possible "if there is concrete evidence that a party is engaged in activities threatening democracy and fundamental freedoms" (Part III, Paragraph 9). Similarly, it is also presented in the decisions that have been hold up by the ECtHR, such as the Spanish Supreme Court's decision on Batasuna ("Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002). Adopting the language of these documents, then, in the 2009 decision the objective is defined as to serve to the functioning of democracy, rather than the emphasis on the integrity of the nation and people as it was the case in the previous 2003 decision. It should be noted that in the reasoned decision on DTP protecting the integrity of nation is still a consideration but it is tied to the larger goal of maintaining democracy. In other words, while integrity of the nation and people is what is being protected in HADEP's decision, in DTP decision integrity of the nation and people are the means whose protection would enable the protection of democracy. What this tells us for the purposes of this study is that, even if not the real motives of the decision makers, the type of arguments they present to justify the illegalization of a Kurdish nationalist political party, have changed from 2003 to 2009.

5.5. Political Argumentation: Justifications by Politicians

The analysis on the legal argumentation on DTP's illegalization revealed that justifications are made through rights where the EU accepted norms and principles, international rule and EU practices have been primary sources of reference. In the light of these findings it can be concluded that the Constitutional Court uses logic of justification and argues for universal validity of its decision to ban DTP. Having concluded on legal argumentation, this section takes the question a level further and asks: What about the political sphere? Despite the fact that illegalization of political parties in Turkey is a legal process in which political actors are not involved at any step, the legal decision to ban a political party has significant political outcomes, therefore it

is being discussed and commented on by politicians. The type of arguments that the politicians present in arguing either in favor or against the illegalization of DTP is significant due to its potential to expose whether the Constitutional Court is a marginalized institution whose decisions and justifications are not shared by the politicians. If this is the case, then institutional explanations to the decision ban DTP and diverge from the EU policy closure would be needed. On the other hand, if the political argumentation does not contradict with the legal argumentation, then it would be possible to detect generalizable conclusions from the analysis on reasoned decision.

In the immediate aftermath of the decision, the President of the Republic Abdullah Gül reminded the Turkish public that the Court's decision should be respected. In doing so, he referred to the alleged ties between DTP and PKK as the justifying reason for the Constitutional Court's decision. Moreover, Gül pointed to the DTP leaders as responsible for the party's illegalization as he condemned their reluctance in complying with Turkish Constitution by standing close to the terrorist organization:

> "I wish the party leaders had provided the necessary care and respect in order to maintain their party. The Constitution and laws are clear, what would the Constitutional Court do when the party does not provide the respect? What can the Court do as long as leaders of a political party declare a terrorist organization to be its reason for being?"("Gül: Saygı gösterilmeli, mahkeme ne yapsın," 2009).

In this way, Gül presented the decision to close DTP as a last resort for the Court faced with party leaders who refuse to distance with the terrorist organization and act according to the laws and Constitution. Such a discourse on 'prohibition of political parties that are linked to terrorism as a last resort in democracies' corresponds to the principles set in Venice Commission Guidelines where party closures are defined as possible in cases when there are concrete evidences that the party is advocating violence in all forms as part of its political programme, or aiming to overthrow the existing constitutional order by means of armed struggle, terrorism or the organization of any subversive activity (Part III, Paragraph 9, Explanatory Report on Guidelines of Prohibition and Dissolution of Political Parties and Analogous Measures, 1999).

The government party, AKP is principally against party closures as it has recently suffered from a party closure case itself. Accordingly, there is a general tendency among the AKP members to stress that they are not fond of party prohibitions. Yet,

there is no strong denouncement of DTP's closure at AKP side either. In the Parliament debate following the Constitutional Court decision, The Prime Minister Erdoğan emphasized AKP's opposition to party closures in principle, but also added that any political system that supports, praises and engages in an organic relationship with a terrorist organization cannot be allowed even in the world's most developed countries. Highlighting AKP's conviction in keeping any kind of contradictory opinion and difference within politics and democracy on the one hand, with regard to prohibition on DTP, just like the President Abdullah Gül, the Prime Minister Erdoğan accuses DTP leaders for not denouncing violence and terrorism:

> "However, we do not approve any damage given to a country due to irresponsibility of some politicians who cannot openly denounce terrorism and violence, cannot accord to the legal order and cannot pursue delicacy of politics and democracy" ("31'inci Birleşim," 2009).

Hence, both in the President's and Prime Minister's speeches, DTP is reflected as an extreme case where prohibition of a political party can be considered as legitimate given that the DTP leaders refuse to comply with the legal order and to put a distance between themselves and the terrorist organization. In this regard, although they do not give direct references to the EU, Gül and Erdoğan justify the Constitutional Court's decision to ban DTP by using arguments which are considered legitimate in the EU accepted laws and principles. The Deputy Prime Minister Cemil Çiçek, on the other hand, directly referred to the EU norms, principles and practices in the interview he gave to a Turkish mainstream newspaper, Milliyet, days before the Constitutional Court reached its decision on DTP. Çiçek stated that DTP's closure case is not a political but a legal issue and in order to approach the issue from a legal perspective, one needs to look at the ECtHR's decision on Batasuna and the principles set by the Venice Commission. He also referred to Venice Commission principle which maintains that any party that supports compulsion and uses violence as a means cannot be protected in a democratic system. Emphasizing that he did not know which decision the Constitutional Court would come up with, Çiçek recommended DTP to make a self evaluation in the light of measures set in the Venice Commission and Batasuna case (Bila, 2009).

The main opposition party CHP's position was not very different from the one of AKP. Following the release of the decision to close DTP, the spokesman of CHP Mustafa Özyürek stated that although they would not want any political party to be

closed, the Constitutional Court's decision is legally appropriate given that DTP failed to put a distance between itself and PKK. He referred to ECtHR decisions as he noted:

> "A party which is a proponent of a terrorist organization cannot be accepted. This is so in our constitution as well as in Europe and in the regulations of the ECtHR. From this perspective, the Constitutional Court's decision is legally right and valid. It is also in line with the ECtHR decisions" ("İşte ilk tepkiler," 2009).

In this way, Özyürek underlined DTP's alleged ties with terrorism as the justifying reason for the Court's decision while he referred to EU accepted norms, principles and practices to confirm the universal validity of the reason. Strikingly, similar line of argumentation was used also by the deputy head of the nationalist opposition party, MHP. Accordingly, the MHP member İsmet Büyükataman started by stressing that its party is against party closures and continued:

> "I particularly want to state that I approve the prohibition of political parties that resort to terrorist activities" (Ibid).

What emerges as a general pattern in the political argumentation on DTP's closure, then, is to express a general opposition to party closures but also to justify the Constitutional Court's decision to close DTP through the party's alleged ties with terrorism. The comparison of the reasoned decisions on HADEP and DTP revealed that the emphasis on a political party's resort to violence and terrorism is specific to the DTP case and seems to be triggered by the ECtHR decision to uphold the Spanish Supreme Court's ban on Batasuna. The arguments that the politicians use on DTP's closure reveal a similar emphasis on the legitimacy of prohibiting a political party that resorts to terrorism. In this way, the political line of argumentation overlaps the legal argumentation on the case of DTP.

5.6. Concluding Remarks

This chapter sought explanations to why Turkey decided to illegalize the Kurdish nationalist political party DTP. This question is important as it brings about a case in which a candidate country chose to not comply with the EU's human rights policy. This

is why; the potential answers to such a question are expected to provide insights on what type of an influence the EU has as a human rights promoter on Turkey. For this purpose, it adopts a communicative action perspective and draws conclusions from an analysis of the arguments presented by the Constitutional Court and Parliamentarians to justify the closure of DTP. The aim is to see which considerations, i.e. utility, values and/or rights have been regarded as valid by Turkish actors so that they were used as arguments to justify the decision to close DTP.

The first and a striking finding of the analysis is that in the reasoned decision, as well as in the President of the Constitutional Court's statements, the decision to close DTP is not presented as one of non-compliance with the EU human rights policy. Rather, the attempt is to demonstrate that the decision is in accordance with the EU norms, principles and practices. This is significant as it implies that the EU is a considerable human rights actor for Turkey as the actors pay the effort to adopt the EU discourse and refer to EU practices and norms in justifying the decision. This finding leads us to two significant conclusions: First, Turkey, as a candidate country has learned to adopt the European discourse in justifying its decisions. This conclusion is further strengthened by a comparative analysis on DTP and HADEP which has exposed the change in the type of arguments presented from the 2003 to the 2009 decision. Second, while the illegalization of DTP is constructed as a necessary measure for the sake of democracy, it is justified through rights based arguments. Even when there are references to the security interests of Turkey, such as the territorial integrity and terrorism, they are embedded in a rights based discourse while the EU accepted norms and principles, the Spanish Supreme Court's decision to ban Batasuna and the ECtHR's decision to upheld the ban as well as some international agreements are quoted to prove that the decision is in line with the EU human rights policy. There are also value-based arguments, such as the common values of Turkish nation, used together with the notion of indivisible integrity but they are very few in number and also backed up with references to the ECtHR jurisdiction.

In this regard, they are mainly rights based arguments which are used to justify the Turkish Constitutional Court's decision. This is puzzling in the sense that a decision which the EU criticizes is justified by the EU accepted norms, practices and international rules. The key to solve this puzzle can be the communicative action theory. Assuming Turkey as a communicatively rational actor, it is expected to assess the

validity of the EU's policy and to justify its own decision with valid arguments. References to the EU accepted norms and principles such as the ECtHR rulings and Venice Commission reports, to the EU practice such as the Batasuna case and some international covenants like the World Conference on Human Rights imply that Turkish actors do not consider the EU's policy on preventing the closure of DTP as a legitimate one as they mainly argue closing DTP corresponds with the general EU policy on such matters. At this juncture, the case of Batasuna emerges as a central point of reference around which the Turkish actors' discourse and the arguments on the DTP's closure is reconstructed. These grounds would provide us with the third and fourth conclusions of this analysis. Accordingly, the third conclusion would be; by arguing for the compatibility of a decision with the EU's human right policy by referring to the EU accepted norms, principles and practices while the decision is in reality in contradiction with the EU's position on the issue, Turkish actors challenged the legitimacy of the EU's arguments. In this respect, the case of Batasuna served a great room for maneuver for the Turkish actors. So fourthly, the ECtHR's ratification of the ban on Batasuna has enabled the Turkish actors to argue for the compatibility of illegalization of DTP with the EU's human rights policy. This final conclusion further confirms that the consistency between the EU practice and policy in human rights is a significant determinant of its influence as a human rights promoter.

Framed as such, some questions will be expected to arise from the conclusions of this chapter. For instance an anticipated question would be with regard to the compatibility of the Batasuna and DTP cases, to the validity of justifying the illegalization of DTP by referring to the ban on Batasuna. It should be reminded that the aim of this analysis is not to assess the validity of the arguments but to map out what type of arguments are considered to be valid by the actors to the extent that they chose to rely on them. In presenting right-based arguments with references to the EU accepted norms, principles, universal law and more specifically to the Batasuna case both the legal decision makers and the politicians from different political angles were putting forward validity claims to persuade their audiences. Hence, the validity of their claims is open to assessment to their audiences. Whether the Turkish actors' justifications through references to the legally binding documents and to the case of Batasuna are found plausible remains to be seen with the ECtHR decision on the DTP case.

A second possible question can be related to the extent of the influence that the EU might have on Turkey. That is to say, the relationship between the EU and Turkey is assumed to affect the level of influence the EU has on Turkish politics. This research starts with the assumption that it is primarily the endeavor to become a member to make a candidate state receptive to the EU influence and it does acknowledge that the EU's capacity to effect Turkey might change according to the level of Turkey's willingness to become a member. However, measuring the degree of influence of the EU on Turkey is not among the objectives of this study. What the analysis rather suggests is that, regardless of how much, the EU as a human rights promoter has a mainly right-based influence on Turkey.

CHAPTER 6

THE EU AS A HUMAN RIGHTS PROMOTER IN SPAIN: THE PROHIBITION OF BATASUNA

On 17 March 2003, a unanimous decision of sixteen judges of the Spanish Supreme Court declared the permanent illegalization of the Basque nationalist political party Batasuna, together with its predecessors Herri Batasuna and Euskal Herritarrok. This decision followed the adoption of the new 2002 Law of Political Parties (LOPP) which enabled the dissolution of political parties that give express or tacit political support, legitimate terrorist actions, excuse or minimize their significance, provide institutional or economic support to those who carry out such actions, and help "to create a 'culture of confrontation' that infringes the fundamental rights of those who take a contrary view" (Bale 2007, p.148). Batasuna was the first party closure case since Spain moved from the dictatorship of Franco and launched on a process of democratic consolidation in 1978. Unlike the DTP case where there was a strong EU position to prevent the party's illegalization; the EU did not take a critical stance either during or after the process of outlawing Batasuna. Although the possible reasons for such a difference in the EU's position constitute an appealing field of research to which explanations might vary from severe disparities between the conditions of the Basque and Kurdish problems in the states in question, to Turkish Constitutional Court's infamous record for illegalizing political parties; such explanations are out of the scope of this study. Nevertheless, acknowledging the difference in the EU's position between the two cases, it is important to note that the illegalization of Batasuna cannot be argued to be in direct contradiction with the EU policy on this issue. As Turano puts it, in the course of the decision making process of the Supreme Court, or in other words, even

before the EU included Batasuna into its list of terrorist organizations, the terrorism definition of the Union was already broad enough to include the parties like Batasuna and therefore the dissolution of Batasuna was not expected to confront the EU's human rights policies. Moreover the articles of 19 and 22 of the LOPP resembled the ECtHR articles 10 and 11 in the way that they allowed "for restrictions on freedom of expression and association where public order, national security, and the fundamental rights of others are at stake" (Turano 2003, p.737). Notwithstanding the non-confrontation between the ban on Batasuna and the position of the EU, the illegalization of Batasuna can still be argued to be a controversial decision given that some people remained committed that it was a human rights issue restricting the freedom of association and rights while for some others it was a security measure taken in the fight against terrorism. In this regard, an analysis of the arguments presented to justify the decision to illegalize Batasuna has the potential to reveal how the actors in Spain perceive the influence of the EU which sets itself the goal of promoting human rights not only in its external relations but also within its borders.

This chapter questions what kind of an influence the EU had on the illegalization of an extremist political party in a member state by analyzing the arguments used by the Spanish legislature, politicians and intellectuals in favor of and against illegalization of Batasuna. For this purpose, it analyzes the Supreme Court's decision to ban Batasuna, as well as the discussion among the politicians and intellectuals on the illegalization, as it was portrayed in the newspapers. Accordingly, not only the reasons presented in the Supreme Court's decision but also the arguments used by politicians and intellectuals will be put under scrutiny. The analysis follows three key questions: Firstly, how does the legislature in a member state, i.e. Spain justify their decision to ban a political party, i.e. which types of arguments are used in the overall argumentation of the legal document? Secondly, to what extent do the justifications used by the legal institution match with the arguments of the politicians and intellectuals? Thirdly, what kind of an influence can be deduced from the arguments used on the illegalization of Batasuna with regard to the EU's role as a human rights promoter? The possible similarities and differences would enable us to get a wider picture of the influence.

6.1. The Significance of Analyzing the Batasuna Case

There is a strong commitment in Spain to accuse Batasuna for being the political arm of the terrorist group ETA seeing that the party's members do not condemn political violence or ETA. It is such a commonly shared view that the Minister of Public Administration, Javier Arenas did not hesitate in saying:

> "we all know that Batasuna is a part of ETA" (Quotation translated by the author,"Arenas: 'Hace mucho tiempo que sabemos que Batasuna es una parte de ETA'," 2002).

Significantly in the political and legal discourse, the references to Batasuna as the instrument of ETA were not rare. For instance, speaking of the voting that was going to be held in the Parliament on a resolution to outlaw Batasuna[11], on 24 August 2002, the Prime Minister of the time José María Aznar stated:

> "This Monday, the final countdown for the political arm of ETA will start" (Quotation translated by the author, "Aznar asegura que Batasuna no tendrá ni 'un segundo de respiro'," 2002).

Similarly, the prosecutor of the National Court, Jesús Santos, declared that Batasuna was not only submissive to ETA order but also it was its most important instrument given that it provides the organization with material, technical and human resources ("La Fiscalía apoya la suspensión de actividades de Batasuna porque forma parte de ETA," 2002). The same expressions were also uttered in the Plenary Session of the Congress, by the PP spokesman Luis de Grandes as he mentioned "the unwavering submission of Batasuna to the dictates of the terrorist group" and defined the party as the "mere instrument" of the terrorists (Quotation translated by the

[11] On 26 August, on the same day that the Court imposed three-year suspension on Batasuna, the Parliament passed the resolution to outlaw Batasuna as illegal based on the Article 9 of the Political Parties' Law, with an overwhelming majority of 95 percent of the deputies while only smaller left-wing parties from Catalonia, Basque country and Galicia voted negatively (Wilkinson, 2002)

author, "Proceso de ilegalizacion de Batasuna: Pleno extraordinario del Congreso," 2002).

Such accusations are materialized through Supreme Court decisions such as the one on December 1, 1997 when 23 Batasuna leaders were condemned to seven years of imprisonment for "*having the intention* of showing a campaign spot made by ETA" where some ETA members were arguing for self-determination (Engeland and Rudolph 2008, p.73). On the other hand, for some others, Spanish Supreme Court´s decision to outlaw Batasuna was an extreme measure "at odds with the functioning of democratic society, and is equally dubious as a matter of European human rights law" (Cernic 2010, p.4). Those who criticize the Supreme Court's decision on democratic and human rights grounds are the ones who focus on the representative capacity of Batasuna rather than its alleged ties to terrorism. Notably, Batasuna had received the 10 percent of the Basque votes in the 2001 regional elections right before its illegalization. Moreover, at the time that it was banned, it had one representative in the European Parliament and it was controlling 62 town councils in the Basque autonomous region ("Profile: Batasuna," 2002). Moving from this basis, the criticals argue that "[d]espite all these discussions about the nature and the political status of Batasuna, one must acknowledge that the party reflects the thoughts, wishes and expectations of part of the Basque people" (Engeland and Rudolph 2008, p.73). According to Cernic, this decision "sends a disturbing message to states that they can do almost whatever they wish in the name of the protection of national security" (Cernic 2010, p.4).

The previous chapter sought out why Turkey did not comply with the EU's human rights policy and analyzed the arguments presented by the Constitutional Court and the politicians in justifying, supporting or criticizing the illegalization of DTP. As a result, the main justifying line of argumentation turned out to be right-based with a specific emphasis on the ECtHR's upholding of the Spanish Supreme Court's decision to ban Batasuna. In this regard, the illegalization of Batasuna is argued to have served as a source of justification for the legislature in Turkey in taking a controversial decision on human rights, which at the end contradicted with the EU's policy on that issue. It has been further argued that such a source of justification enabled Turkish actors to argue against the legitimacy of the EU's human rights policy on DTP. This proposal has been tied to the principle of consistency between the policy and the practice that is set as an indicator of legitimacy of an argument (Eriksen & Weigard, 2003; Schimmelfennig &

Sedelmeier, 2005). Framed as such, the process of illegalization of Batasuna becomes even more appealing for an analysis through its potential openings for the academic discussions on the internal and external consistency in the EU's human rights policies.

6.2. Theoretical framework: Studying the illegalization of Batasuna

It has already been mentioned in the previous chapters that the arguments that are used to justify, to support or to criticize the decision do not necessarily reflect the true motives of the actors but they reflect what they consider to be valid, i.e. what they consider to mobilize support for their position. Hence, the main level of argumentation reveals what the actors believe to be persuasive for others provided that the persuasiveness of an argument depends on the actors' conceptions of validity. At this point, it is important to note that validity can stem from the pragmatic considerations (utility) as well as the definition of an appropriate act associated with a given identity (values) and/or the principles that are mutually recognized to be 'just' independent from the conceptions of material outcomes and ethics (rights). To put it differently, neither utility, values nor rights are prerequisite for validity claims; on the other hand, all three can be present in an argumentation (Lerch & Schwellnus, 2006, p.307). Actually, it is usually a complex net of different types of arguments used to justify the same action with the purpose of increasing the persuasiveness of a justification: "as Aristotle noted, arguments are nested: more difficult social and political issues will often be tied to other complex and contested arguments and belief systems, linked to chains of prior argument" (Crawford 2004, p.27). In the light of these theoretical premises, one expects to encounter a blend of different types of justifications presented by the legal authorities as well as politicians and intellectuals. What is crucial in this blend would be the weaving of the justifications which has the potential to reveal the main source of legitimacy for Spanish legislature in closing Batasuna and how it is reflected by the politicians and intellectuals. Consequently, identifying which types of arguments have functioned as the 'mobilizing arguments' in the illegalization of Batasuna should help

us to provide a better understanding of the influence of the EU as a human rights promoter on Spain.

The utility based arguments are related to an actor's cost and benefit calculations, concerning the potential material outcomes of an action, simply to the "reasons pertaining to the utility of a policy for given interests" (Sjursen 2002, p.496). In the case of Batasuna, such arguments are expected mainly to be security related, emphasizing its alleged ties to terrorism and the threats that such a link poses to the security interests of the society and the state. Stated as such, security related arguments can be used both in favor and against Batasuna's closure. For instance, *'The illegalization of Batasuna is an adverse step taken in the fight against democracy as the closure of a political channel is likely to exacerbate the terrorist attacks'* would be an argument against the closure of Batasuna focusing on the material costs and benefits that the closure of the political party is likely to produce. On the other hand, *'Batasuna should be banned as it threatens the security of the society through its ties to terrorist organizations'* would be a pragmatic argument in favor of Batasuna's illegalization, as it assumes the elimination of security threats that Batasuna allegedly poses to the society.

Ethical-political reasons pertain to the principles, identity and shared values that a community would represent. When an actor is making a value based argumentation he/she is expected to identify himself/herself with the particular values of the community and to consider himself/herself "as belonging or aspires to belong to the invoked community" (Lerch and Schwellnus 2006, p.306). In so doing, the actor would advocate the obligation of acting in a particular way because of the certain way his/her community is. From this point of view, ethical-political justifications would reflect a specific sense of 'good life'. For instance, *'democracies require political plurality and application of the freedom of association, we cannot close a political party because we are a democratic European country'* would be a value-based argument, defining the group identity as a democratic one and calling from an automatic response deriving from that identity. A counter position to illegalization can also be made via value-based arguments, such as: *'Batasuna should be banned because its values collide with what Spanish nation represents.'* Applied to the Batasuna case, value-based justifications for the illegalization are identified by arguments and reasons that explicitly refer to what is considered appropriate or good for those who are a part of *the community*. In this way,

the justifications would emphasize the feeling of solidarity rather than dwelling on the potential concrete benefits of erasing Batasuna from the political sphere or on the considerations of what would be just for *all*. To put it differently, they are expected to make a distinction between *us and them* and therefore to emphasize the threat that the party poses to a *we-feeling*. Such an argumentation would be likely to (re)construct an identity particularly against Batasuna, presumably through a nationalist discourse on the one hand, and reconstructing an identity for Batasuna through attributing to it some other particular values. One might look ahead to find arguments that aspire to alienate Batasuna -and the values associated with it- from the community, while those arguments would ideally be accompanied by attempts to establish a sense of solidarity between the decision makers and the society. While the emphasis on community can be made on national grounds, it should also be possible to find references to a European community. Which community the actors select to define themselves with has the potential to answer the questions whether the EU's influence as a human rights promoter has an ethical basis.

The moral justifications would be related to the set of universally accepted norms and principles, with a specific aim to articulate the validity of closing a political party given the principles that are "recognised as 'just' by all parties irrespective of their particular interests, perceptions of the 'good life' or cultural identity" (Sjursen 2002, p.495). The operationalization of 'the arguments on the principles that are mutually recognized as just' can be in different forms. A typical substantiation for moral justification would be through the international rules and laws or principles which are universally accepted to be just and valid for everyone, as well as the references to the internationally acknowledged institutions that undertake the responsibility of carrying out such rules, laws and principles. Hence, as a pattern of rights based arguments, one may expect to find references to the existence of similar and mutually recognized cases accompanied with specifications "that the particular context is an instance covered by the prescriptive norm" (Crawford 2004, p.24) on the issue. Accordingly, an argument such as *'Batasuna should not be banned because illegalization of political parties is against the democratic principles encoded in the national and international law'* would be reflecting right-based reasoning. Likewise, *'Batasuna should be banned because its actions fulfill the conditions necessary for illegalization of political parties as prescribed by national and international law'* would reflect the presentation of same

line of reasoning in order to justify an opposite view. In the DTP's case this was the ECtHR's decision that found the Spanish Supreme Court right in illegalizing Batasuna. In the case of Batasuna, this can be any other decision of a universally recognized institution on a similar case. Accordingly, the right-based justifications are expected to stem from legally entrenched fundamental rights and democratic procedures.

6.3. Legal argumentation: The Reasoned Decision on Batasuna's closure

6.3.1. Justifications through Security

The rationalist approaches to state behavior would explain the decision to close Batasuna through the party's alleged ties to terrorism, the threat that the party poses to the national interests of the country in a way to reflect a consideration of the potential costs of the party's existence as well as benefits of putting an end to its existence. Given the context of the Batasuna case -even only by considering that the whole process was triggered when Batasuna denied to denounce ETA's Santa Pola attack- it would not be astonishing to find references to the party's alleged ties to terrorism in the legal decision. However, the crucial question for the purposes of this analysis is the extent to which those alleged ties are presented in a material gains perspective, i.e. what is the intensity of justifications that are made through the anticipated security gains from outlawing the party which assumed to be the face of ETA on the political scene?

In line with the expectations, security considerations mark the general line of argumentation, particularly through the accusations against Batasuna. At the outset, the historical and social context in which the Organic Law 6 / 2002 of June 27 is enacted is described through the struggle against terrorism

> "The historical and social context in which the Organic Law 6/2002 of 27 June, regulating political parties, is enacted; the background of the current process, in which various actors seek to outlaw three political parties, is characterized by the fight against terrorism and against the policy instruments and organizations

> which support and protect terrorism" (translated by author, Fundementos de Derecho, Primero/2, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

By this manner, the process is embedded in a 'fight against terrorism' context in which the decision to close Batasuna would require a reading through a winning-losing point of view. Correspondingly, the decision contains continuous references as to how the party makes the terrorist actions a daily issue and in this way enable highlighting of the costs derived from Batasuna's presence in the political system. In the legal decision, two ways of supporting terrorism, hence posing a security threat to society are identified for Batasuna. First, the party is argued to be magnifying and propagating the effects of terrorism via not condemning the attacks of ETA and in this way giving their tacit support to the terrorist organization. For instance, in the section of factual background, it is noted that:

> "Batasuna, consciously and voluntarily refrained from making any kind of conviction, and more precisely, the Batasuna representatives in the Board of Spokesmen of the City Council of San Sebastián, the spokesmen, representatives or members in Vitoria, Portugalete, Pamplona and Irun refused to sign any statement condemning the ETA attacks presented to them" (translated by the author, Antecedentes de Hecho, Sexto/4, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

Second, the participation of some members in the protests and demonstrations of the terrorist organization as well as their expressions of identification with ETA are categorized as the direct way in which Batasuna supports terrorism. Also the asserted threat that Batasuna poses is being substantiating by arguments such as

> "a manifestation of a threatening effect of terrorism and the groups that support terrorism is that in their demonstrations they point to some politicians, intellectuals, university professors, etc… who later received threatening letters and even in some cases their private cars are bombed" (translated by author, Fundementos de Derecho, Primero/2, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

By drawing on the physical (direct) and psychological (indirect) costs of having Batasuna as a functioning political party in the system, the benefits of eradicating them for the sake of society's wellbeing are implied.

This is so, even though, when talking about the security costs of the presence of Batasuna; the emphasis is often on the protection of pluralism and democracy. For

instance, the Public Prosecutor is quoted in the decision as he accuses Batasuna of increasing and generalizing the effects of the terrorist violence and fear among the society and in this way eliminating or diminishing the necessary conditions for pluralism and democracy

> "The Attorney General's office affirms that since their respective creations up until today, the three defendant political parties have been pursuing activities which have produced a repeated and serious failure of and democratic values and principles.This has been realized through legitimizing and justifying the existence and actions of the terrorist group ETA; through favoring, multiplying and generalizing the effects of terorist violence and the fear that it causes in the society, through promoting the creatin of a climate of intimidation aiming to eliminate or diminish the necessary conditions for the exercise of pluralism and democracy" (translated by author, Antecedentes de Hecho, Sexto/2, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

From this perspective, the utility-based arguments can be argued to have a right-based reinforcement. The justification of illegalizing a political party due to its alleged ties to terrorism for the greater good of maintaining democracy and human rights is also institutionalized through the LOPP which suggests that "[t]o give political support or acquiescence to terrorism by legitimizing terrorist actions to achieve political goals outside the peaceful and democratic avenues or exculpating and minimizing the significance and fundamental rights violation carries" (Article 9.3.a, "Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos" 2002). Strikingly, the Article 9.3 of the LOPP corresponds to the articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which allow for restrictions on freedom of association when the fundamental rights of others are at stake. In this way, the references to the party's alleged links to terrorism are tied to constitutional law while it has been synchronized with the European Convention.

6.3.2. Justifications through Rights

If the utility-based arguments are reinforced by rights-based arguments, what would be the weight of moral argumentation in the Supreme Court decision? To what

degree the dissolution of Batasuna is tied to the protection of universally acknowledged norms and principles, such as democracy and human rights and/or justified through references to a higher ranking law? At this point, it should be reminded that in the rights based justifications one needs to look for the conceptualization of a notion for universal justness for all. Although democracy can be regarded as a universal principle, as Eriksen notes, it actually does not necessarily address the universal humanity (Eriksen 2005, p.254). According to Eriksen, democracy indeed refers to a particular community and as such, in some cases can be in contradiction with the universal standards that human rights are seeking for. The existence of illiberal democracies substantiates this claim. Eriksen's point speaks to the immediate analysis of this chapter as it shows that each and every reference to democracy does not automatically indicate a rights-based argumentation. For an argument to contribute to moral justification, it needs to be bounded through law (Sjursen 2006, pp.244-5), i.e. the arguments on the principles of democracy and human rights should be made through referring to a higher ranking, mutually recognized legal system. Such a distinction is essential to differentiate between specifically the value- and right-based arguments. To put it more clearly, above, an argument like *'we should not close a political party because we are a democratic country'* has been presented as an indicator of a value-based justification. However, for instance, *'closing a political party would contradict with the democratic principles set in the Charter of Fundamental Rights of the European Union'* would be a right-based argument as it brings up the legal bindingness of a mutually accepted law on the decision; whereas in the former argument, the democracy is regarded as an intrinsic value of the country's identity which presupposes a particular way of good decision. In the Batasuna's case, these can be the ECtHR judgments, UN, EU documents. Which one is selected would give a clue about what the Supreme Court considers to be more effective to justify its decision.

The analysis of the arguments used in the Supreme Court decision reveals that although the accusations on Batasuna mainly develop on security-based arguments, there is a significant line of right-based argumentation in justifying the decision to close the party. In the decision to illegalize Batasuna, it is particularly stated that the preamble to the Organic Law 6/2002 allows any project or objective compatible with the Constitution, as long as it is not defended by means of an activity that violates the democratic principles and fundamental rights of citizens; nevertheless, this does not

mean prohibiting to advocate any kind of political ideas in democratic ways, even those that call into question the constitutional framework (Fundamentos de Derecho, Primero/1º.3,"Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002). In so doing, a legitimate legal basis that acknowledges what is just for everyone is being constructed. Furthermore, the compatibility of this particular legal basis with the articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly regarding the restrictions that might be placed on the exercise of the freedoms of expression, assembly and association point to the harmonization of the national law with that of the higher law. Thus, it is emphasized that the Organic Law based on which Batasuna is outlawed is allowing the exact democratic space which is considered to be legitimate by the ECtHR for the political parties to enjoy the freedom of expression, assemble and association full blast:

> "The Organic Law 6/2002 is not a repressive law of political dissent, as claimed by the representation of the defendant, but a law that ensures the supremacy of the Constitution and democratic principles with regard to the activities of the political parties, within the framework of the rights protected by the European Convention on Human Rights and the limits set by the jurisprudence of the Constitutional Court and the European Court of Human Rights" (*Ibid*).

Another substantiation of moral justification is evident in arguing about violence as a political method. One of the main lines of reasoning presented to justify the decision to ban Batasuna revolves around the claims about the party's resort to violence in order to achieve political objectives. These arguments are backed up with various references to the ECtHR decisions that condemn use of violence as a means to achieve political objectives:

> "Praise of violence or its justification, therefore, not only authorizes restrictions on political parties' activities but, also, on their freedom of expression. Also the Judgment of October 2, 2001, of the European Court of Human Rights, has pointed out that "It is essential to take into account the question of whether there has been a call for use of violence, uprising or any another form of rejection of the democratic principles (…) when there is provocation of violence against a person, or a public agent or a segment of population, the authorities of the State enjoy a wider margin of discretion to consider the need for an interference in the freedom of expression" (translated by author, Fundamentos de Derecho, Primero/1º.5, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

While the denunciation of the political parties' use, justification or praise of violence is supported by the EU accepted norms and principles, the alleged ties between the party and ETA are also articulated in this context. Such a line of reasoning is strikingly compatible with the EU accepted laws, particularly with the Venice Commission's Guidelines of Prohibition and Dissolution of Political Parties. In this sense, the decision can be argued to contain an implicit right-based argumentation given that as a justification it is used the content of to the principles that are recognized by a higher ranking law. In addition, it is also possible to find explicit reference for this; for instance, the source of legitimation for putting restrictions on democratic rights of parties that use violence as a means, is stated to be the Constitution and international conventions signed by Spain such as 1959 Rome Convention for the Protection of Human Rights and fundamental Freedoms. Furthermore, the ECtHR judgments prohibiting the use of violence as a political means are quoted, such as the case Petty Purcell and others v. Ireland, dated April 16, 1991 and the April 9, 2002 judgment on Yazar and Others v. Turkey case (Fundamentos de Derecho, Primero/1º.5, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002). In this way, once again, a direct link is being created between the Spanish law and the international law, revealing that the LOPP is in harmony with the mutually recognized higher ranking legal prescriptions.

An implicit reference to the Venice Commission Guidelines can also be found in the emphasis on the illegalization of Batasuna as a "last resort." The Guidelines define party prohibitions as possible only in cases where there are concrete evidences that the party is advocating violence in all forms as part of its political programme or aiming to overthrow the existing constitutional order by means of armed struggle, terrorism or the organization of any subversive activity (Part III, Paragraph 9, *Explanatory Report on Guidelines of Prohibition and Dissolution of Political Parties and Analogous Measures* 1999). In line with this, in the Supreme Court decision, there is a considerable attempt to present the illegalization of Batasuna as the only measure left. For this purpose, the 2001 ECtHR judgment on the case between Petersen and Germany is quoted as it mentions:

> "Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes accept to limit some of the freedoms they enjoy in order to ensure greater stability of the country a whole" (translated by author, quoted in Apreciacion de la Prueba/1,

"Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

So, the ban on Batasuna is argued to be a compromise for the greater stability of democracy, as prescribed by the ECtHR judgments. It is further emphasized that the Spanish system is not one of a militant democracy, but on the contrary, has been an extremely tolerant one, entailing that Batasuna's illegalization emerged as a necessity despite the extreme tolerance of the system. Although the reasons presented in the decision are in perfect conformity with the principles set by the Venice Commission, there is no direct reference to the Guidelines. Yet, the Supreme Court decision emphasizes that while the Court recognizes that dissolution of a political party is the most severe measurement that can be taken in a democracy, the circumstances of the Batasuna case meet the standards set by the international treaties and jurisdiction under the ECHR on the limitations of fundamental rights. In this way, the decision is presented as a step taken to protect the existence of democracy.

Batasuna is not the first case of banning a political party in a state which is within the jurisdiction of the ECHR. Hence, the related ECtHR judgments can also be expected to serve as a point of reference for right-based arguments. Among the states within the ECHR jurisdiction with a history of political party illegalization, for the most part Turkey provides several cases. However, with regard to the Turkish Constitutional Court's decisions to ban a political party, the ECtHR rulings often found Turkey guilty of breaching the Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In line with this, the arguments used by the Spanish Supreme Court to justify the decision to illegalize Batasuna reveal that the previous ECtHR rulings on the cases of political party closures in Turkey have been a significant concern for the Spanish legislature. Strikingly, by referring to some specific cases, such as the 2002 ECtHR ruling on Turkey vs. Democratic Party, the Supreme Court aims to stress that Batasuna case is different from the cases in Turkey

> "Yet, certainly these calls to violence that justify limitation of freedoms of the political parties can never be episodic or exceptional, but they have to be repeated, or even more, (…) as it is seen in our case, flow of distribution of conscious tasks between terrorism and politics (…) Therefore, the situation addressed in this procedure is quite different from the European Court in its judgment (Democratic Party v. Turkey) of December 10, 2002, in which interference in the activity of a party is not considered proportional on the basis of its statements if they were contained only in a single speech, even if they are provocating people to violence (in this same line, Incal v. Turkey judgment or

> Stankov and the United Macedonian Organization Ilinden v Bulgaria, October 2 2001)" (translated by author, Fundamentos de Derecho, Primero/1º.5, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

Highlighting the distinctiveness of Batasuna case from its counterparts in Turkey, constitute a preemptive attempt to prove the decision's compatibility with the binding law. This is simply because, the previous judgments of a higher ranking legal body are taken into account and are referred to for the purpose of justifying the decision. Moreover, in the decision, it is openly stated that the criteria established by the ECHR in relation to the dissolution of political parties are respected in making the decision on Batasuna. In a coherent manner, throughout the text, it is possible to find a wide range of references to various ECtHR judgments, especially those in which the European Court has been clear on allowing restrictions that could be directed against political parties which calls for violence, accompanied by a direct quotation from the 1991 ECtHR judgment on Petty Purcell and others v. Ireland:

> "Also, the above mentioned Court has directed some pronouncements for terrorism, recognizing, first, the difficulties that its combat bears (STEDH Ireland against the United Kingdom, case Aksoy against Turkey of December 18, 1996, Unified Communist Party and others against Turkey of January 30, 1998 Departed from the Prosperity against Turkey of July 31, 2001), and has declared that "the victory over terrorism is a primary public interest in a democratic society" (Judgment - case Petty Purcell and others against Ireland - of April 16, 1991" (translated by author, Fundamentos de Derecho, Primero/1º.5, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

6.3.3. Justifications through values

So far the analysis exposed a noteworthy degree of utility- and right-based arguments used to justify the decision. In the net of arguments provided to justify the illegalization of Batasuna, is there still any room for value-based justifications? To what extent the Supreme Court justifies the decision to illegalize Batasuna through arguments on the solidarity of the community –be it national or European- as well as the discrepancy between the values that the community represents and those associated with

Batasuna? An inexperienced reader in the Basque issue may expect the dissolution of a Basque nationalist party to be justified through specific value-based arguments which would make a distinction between a Basque and Spanish identity. However, as the current circumstances in Spain does not allow for articulating the Basque identity as counter and/or threatening to the Spanish identity, the Supreme Court decision does not contain any kind of reference that either points to or even implies a perceived threat from the Basque community. The problem that Batasuna poses is categorically not associated with the Basque values, in this sense; the arguments used in the decision do not contribute to construct a we-feeling against the Basque community. On the other hand, there are references to the defendant's use of such a distinction between the values that the Spanish state institutions represent and those that belong to the Basque community. For instance, the party's spokesman Arnoldo Otegui is quoted as calling for the Basque government to act with national responsibility and common sense while the Spanish state tries to close Batasuna. While he defines a proper way of acting for the government of the Basque community, originating from its identity, by quoting it as an indication of the threat that Batasuna poses to the society, the Court is actually constructing a community that also encompasses the Basque identity and in this way presenting the illegalization of Batasuna as a measure taken to protect the well being of the society as a whole, including the Basque government. Moreover, Otegui's value-based statements against the Spanish state, such as referring to the presiding judge as "fascist Spanish master" (*señorito fascista español*) or as **"**puppet in the service of the state" are also mentioned and argued to have the intention of diminishing the credibility of the judge. Nevertheless, once again, there is no sign of a value-based response that would feed into Otegui's distinction between the Spanish state versus the Basque community:

> "Also, the Batasuna leader described the presiding judge of the Central Court of Instruction number 5, National Court as the "puppet in the service of the state" and proclaimed that the Basque people is going to "get organized" and "fight" so that a "fascist Spanish master" could never again say to the Basques what they have to learn or how their institutions have to be" (Hechos Probados/14, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

In view of that, it can be maintained that while there is no community construction against the Basque identity, there is a significant community construction encompassing the Basque identity, against Batasuna. Strikingly, in the decision, there is

an extensive use of the adjective "our" (*nuestro/a*) particularly when describing the components of the Spanish nation and the national state, namely: our constitution, our supreme law, our society, our homeland, our rule of law, our Constitutional Court... Such a discourse is particularly evident in describing the threat that ETA and justification of terrorism at the political level pose to the society:

> "Therefore, the justification of violence in *our country* is not merely a theoretical attitude but the adoption of a political practice incompatible with respect for the Constitution which imposes its Article 6. (…) But undoubtedly the greatest impact terrorist activity has had on *our society* has been developed by ETA, which has been operating in *our country* for over 30 years" (Fundamentos de Derecho, Primero/2, "Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002).

Moving from this premise, it is possible to talk about a genuine nationalist discourse which constructs the values of Batasuna as opposed the values of the nation. Although this is not a very different depiction of Batasuna from the one it originally sets for itself, i.e. as representing the values against those of the Spanish state, it is distinct in its coverage and important in the sense that it is seeking to create solidarity among the society as a whole, including the Basque community, against Batasuna whereas Batasuna defines its values through the Basque community against the state. In this way, the reasons presented in the Supreme Court decision aim to portray Batasuna as a "common enemy of Spain" and by so doing, to otherize Batasuna.

The arguments claiming the 'just' for all by referring to legally binding structures have been classified to be right-based. However the profound emphasis on the EU law when referring to the universally accepted principles in the decision to close Batasuna can be interpreted as an implicit way of value-based arguments as well. In their analysis on the EU's justifications of its external human rights policies, Lerch and Schwelnuss group references either to the internal acquis of the Union or to the other European standards such as the Council of Europe norms, as indicating to value-based justifications (Lerch and Schwellnus 2006, p.306). In the case of the Supreme Court decision, the heavy reliance on the EU law and more specifically to the previous ECtHR judgments, rather than to any other international organizations, even not to the Venice Commission, can be regarded as an attempt to construct a European identity; i.e. we-feeling of a European Community in addition to the moral content.

6.4. Political argumentation: Justifications by Politicians

The analysis on the legal argumentation revealed that the references to the security threat that Batasuna poses are mainly wrapped in right-based arguments using the universally accepted wording of restrictions on freedom of association. On the other hand, the arguments used by the politicians and intellectuals reflect pure cost and benefit calculations without a significant attempt to support them through tying them to legally binding norms and principles. Strikingly, not only the arguments used in favor of the dissolution of Batasuna but also those against it reflect material outcomes considerations. For instance, those politicians and intellectuals who criticize the illegalization of the political party express their fear of retaliations from ETA. Namely, when the Spanish Government mandated its Attorney General and its Director of Public Prosecutions to launch proceedings to outlaw Batasuna on 6 August 2002, the PNV spokesman Josebe Egibar warned the government that such a decision will deteriorate the situation ("Debate político y social en torno a la posible ilegalización de Batasuna," 2002). The concerns for the costs that illegalizing Batasuna might produce were also shared by Eusko Alkartusuna. In the Plenary Session of the Congress, the party's representative Begoña Lasagabaster asserted that her formation would vote against the illegalization and raised the question:

> "Is it valid to apply a law that allows and encourages the retroactivity of the actions?" (Quotation translated by the author, "Proceso de ilegalizacion de Batasuna: Pleno extraordinario del Congreso," 2002).

Similarly, the general coordinator of Izquierda Unida, Javier Madrazó uttered his concerns that the illegalization of Batasuna would give more oxygen to ETA, as the political channel will be blocked; and in this regard it is possible to have more attacks ("Proceso de ilegalizacion de Batasuna: Posturas de los partidos," 2002). As Madrazó was notifying that this would be a wrong step taken in the fight against terrorism, he was using utility based arguments against the illegalization of Batasuna, reflecting a cost and benefit analysis. Hence, the potential drawbacks that might result from outlawing Batasuna have been a generic source of criticism for those against the decision. This can further be substantiated by the arguments used by the representatives of Iniciativa per Catalunya (IC-V), Eusko Alkartasuna (EA) and Esquerra Republicana

de Catalunya (ERC) who pointed to the possibility of more radicalization as a potential cost of the removal of Batasuna from the political space (*Ibid*).

The political arguments in favor of the illegalization were revolving around the references to the party's alleged ties to ETA in particular and to terrorism in general, reminiscent of the utility-based arguments used in the legal decision by the Supreme Court. However, distinct from the legal argumentation, politicians and intellectuals did not feel the need to present their references to terrorism in a right-based rhetoric and therefore did not link them to the universally valid principles. The spokesman of the PP in Congress, Luis de Grandes, uttered the relationship between Batasuna and ETA as he stated: "When ETA kills and Batasuna applauds, you cannot hide" reminding the death threats that were received by Idoia Correa; a Socialist councilor in the Basque Country ("Proceso de ilegalizacion de Batasuna: Pleno extraordinario del Congreso," 2002). In similar lines, the Minister of Justice, José María Michavila, drew a direct affiliation between the Batasuna's member of parliaments's and the attacks of ETA as he declared that:

> "The decision means that the seats in the parliament cannot be used to kill the Democrats" (Cadena Ser, 2004).

In this way, Michavile conceptualized the illegalization of Batasuna as a measure taken against terrorism and hence highlighted the security considerations in the decision. A further typical example of a pure utility-based argument can be the statement of Enrique Gimbernat, a Criminal Law Professor as he described the illegalization of Batasuna as a step further in the long way to finish terrorism ("Proceso de ilegalizacion de Batasuna: La opinión de los intelectuales," 2002). The illegalization was articulated as a part of the fight against terrorism by the Prime Minister Aznar as well. Following the Supreme Court decision, he expressed his satisfaction for the first judicial recognition that

> "ETA is not just their commands but also the fabric around it" (Aizpeolea, 2003).

The focus on the potential material benefits of Batasuna's dissolution can also be found in the words of a writer César Vidal, as he openly stated that:

> "It will bring a positive impact because it will mean the economic strangulation of ETA" ("Proceso de ilegalizacion de Batasuna: La opinión de los intelectuales," 2002).

The analysis of the arguments presented in the legal decision has revealed that Batasuna's refusal to condemn the ETA's attacks has been referred to as an evidence of the party's links to terrorism and in this way has served as a utility-based reason presented to justify the illegalization. The same type of arguments can be found in the political discourse as well. For instance, after the ETA's Santa Pola attack, the opposition party leader of the time, Jose Luis Rodriguez Zapatero declared that:

> "it is not compatible not to collaborate or support violence on the one hand and not to condemn an attack like the one from yesterday, on the other" ("Aznar: Batasuna es una 'basura'," 2002).

It has already been stated that the arguments used by the politicians and intellectuals are principally utility-based, revealing the cost and benefit calculations of the actors with regard to the illegalization of Batasuna. It has further been suggested that unlike the Supreme Court decision, such arguments are not reinforced by universally valid norms and principles. Such an assertion indicates the low level of moral argumentation in the political and intellectual discourse but does not entirely rule out the existence of right-based justifications. Accordingly, in some cases, the need to implement law has been emphasized. For instance, right before the Parliament voted on a resolution to outlaw Batasuna, Aznar explained the role of the Parliament in the illegalization of Batasuna as he stated that:

> "the body that represents national sovereignty has the moral obligation to publicly defend democracy" (Quotation translated by the author, "Aznar asegura que Batasuna no tendrá ni 'un segundo de respiro'," 2002).

In this way, Aznar was tying the illegalization of Batasuna to the purpose of maintaining democracy, in a similar argumentation that is also present in the legal decision of the Supreme Court. Moreover, by presenting it as a "moral obligation" he was clearly putting forward a right-based argument. However, the extent of use of right-based arguments by the politicians and intellectuals is limited compared to the legal document. The references to what is considered to be just in terms of universally recognized norms and principles can be argued to be minor in the political argumentation, however when they existed they were generally in the arguments in favor of Batasuna's illegalization. For instance, the president of the PP in the Basque Country, Carlos Iturgaiz described the Supreme Court decision as a "relief for democracy" and a "triumph of the rule of law" ("El Supremo ilegaliza Batasuna para 'proteger la democracia'," 2003). Strikingly, as it was also the case in the legal decision,

the arguments of the politicians and intellectuals did not rely on a distinction between Basque versus Spanish communities and value-based arguments did not very much mark the pace of the argumentation.

6.5. Concluding Remarks

In the charges, Batasuna is portrayed as an ETA extension enjoying the democratic rights provided by the Spanish Constitution and using the means such as public fund and media channels, which are intended for other political parties, to support terrorism while not consider either the rule of law or democratic forms ("Sentencia: Ilegalizacion de los Partidos Politicos Herri Batasuna, Euskal Herritarrok y Batasuna," 2002). The threat that Batasuna poses is intermingled with right-based arguments while it is implied that the party is not respecting democracy and rule of law but only using them to achieve terrorist aims. In this regard, the main argument made in the legal decision can be summarized as follows: Spain is a democratic country, even those ideas that aim to change the territorial shape of the country coexist peacefully in democracy and Spain is well aware of the fact that political parties and pluralism are essential to democracy. Yet again, Batasuna is jeopardizing the democratic system since it makes terror a daily activity. As also the international treaties and ECHR recognizes the limitations to fundamental freedoms in the case of resorting to violence, Spain has nothing to do but to dissolve Batasuna. Framed as such, the main argumentation can be argued to be security related with a strong right-based arguments support. To put it differently, the costs and benefits calculations revolving around the security threats associated with Batasuna are linked to the norms and principles recognized at the EU level, particularly to the previous judgments of the ECtHR. While these references indicate a significant right-based argumentation the extensive reliance on the European rules and institutions in justifying the decision can be regarded as a reflection of the community building around Europeanness.

The political justifications, on the other hand, diverge from the legal justifications in the sense that they mainly evolve through utility-based arguments without a significant effort to back them up with legally binding norms and principles. In this regard, while the legitimacy of the illegalization is derived from a blend of utility, right and value-based arguments with a particular weight of the legally binding norms and principles at the EU level, the political legitimation was sought through security related arguments. Such a difference can be interpreted to be diverging from the institutions and accordingly from the audience they need to persuade. It has already been emphasized that all of the justifications used by any institution can be rhetorical, hiding the true intentions and motivations of the actors but they reveal what those actors consider to be legitimate to the extent that they would mobilize support. Thus, it can be argued that while the European norms and values are regarded as a source of legitimation by the legal decision makers, the politicians and intellectuals preferred to rely on the security threats.

CONCLUSIONS

This thesis has aimed to provide an insight on what type of influence the EU has as a human rights promoter on the receiving countries by focusing on the specific examples of recent party prohibition cases from a member state and a candidate country. For this purpose, the arguments used in the decisions to ban DTP in Turkey and Batasuna in Spain are analyzed in a comparative fashion. It started by accepting that the EU has an influence on the human rights policies of the receiving countries while these receiving countries are defined as the recipients of the EU's diffusion of ideas inside and outside of the EU (Börzel & Risse, 2009). Hence, Turkey and Spain are aimed to exemplify an insider and outsider of the EU. As such, it has also enabled a comparison between internal and external policies.

7.1. Empirical Findings

The analyses of the legal decisions to ban DTP and Batasuna have suggested that when the judges presented their reasons to justify the prohibitions, they predominantly referred to the higher ranking law and to the EU accepted norms and principles. Indeed, in both decisions, the parties' alleged ties to terrorism and the threat that those parties pose to the well-being of the society mark the general line of argumentation. However the security-based reasons presented for the prohibition of the parties are continuously backed up with right-based arguments such as references to the ECHR, to the Venice Commission guidelines and the previous ECtHR decisions on similar issues. For instance, both DTP and Batasuna are presented as a threat to the functioning democracy

and the decisions to ban those parties are portrayed as the only measure left to the legislature for the sake of sustaining the maintenance of democracy and democratic freedoms. For this purpose, in the Batasuna decision the ECtHR judgment on Petersen v. Germany is quoted as it mentions the compromise that pluralism and democracy requires, that certain limits should be accepted in order to ensure greater stability of the country as a whole. Hence, the decision to ban Batasuna is portrayed as a compromise for the greater stability of democracy in Spain. Likewise, in the DTP decision it is emphasized that political parties must enjoy political freedom in democratic societies but some extreme cases in which these freedoms may be interfered are defined in the EU norms and principles. More specifically, for example, the decision on DTP refers to the ECtHR decision on Karatepe v. Turkey case where the Court is quoted as stating that not the information and ideas that offend shock or disturb but the hate speech glorifying violence may justify interference in freedom of expression. As such, DTP is presented as an extreme case to which interference would be in accordance with the EU accepted norms and principles.

In this regard prominent 'last resort' rhetoric is present both in the Batasuna and DTP decisions. Besides the legal documents, the emphasis on the prohibition of the political party as a last resort can also be found in the Turkish political argumentation process, for instance in the Turkish President Abdullah Gul's speeches as he stated: "The Constitution and laws are clear, what would the Constitutional Court do when the party does not provide the respect?" ("Gül: Saygı gösterilmeli, mahkeme ne yapsın," 2009). This is very important in terms of presenting a ban on a political party as the necessary measure to maintain democracy, to wrap an originally utility-based argument, which is the party's alleged ties to terrorism and the threat it poses to the society, with a rights-based rhetoric through placing it into the legal framework. In this respect it is also in perfect accordance with the Venice Commission guidelines for party prohibitions which states that "prohibition or dissolution of political parties can be envisaged only if it is necessary in a democratic society and if there is concrete evidence that a party is engaged in activities threatening democracy and fundamental freedoms" (Part III, Paragraph 9, *Explanatory Report on Guidelines of Prohibition and Dissolution of Political Parties and Analogous Measures*, 1999). This means that the EU accepted laws, norms and principles are considered as legitimate, that is, the universal dimension

of the human rights policies are considered to be a solid ground on which one's action can be justified.

The value-based arguments, on the other hand, are scattered throughout the legal decisions, yet they are relatively few in number. In the DTP decision, even the community-bound arguments are backed up with international documents, more specifically with the ECHR articles, and standards of democracy. In the Batasuna decision, the community constructing arguments are more openly stated. Accordingly, there is a particular emphasis on the word "our" when describing the components of Spanish nation. These are used in such a way that they construct a Spanish identity encompassing the Basque identity in contrast to the values represented by Batasuna. Moreover, the profound emphasis on the EU law can further be interpreted as an attempt to construct a common European identity. This may also be true in the case of DTP; that is, intensive references to the EU accepted higher ranking law in the reasoned decision of the judges might be interpreted as a form of constructing European identity. However, it should be noted that in the reasoned decision on Batasuna the only higher ranking law that is referred to is the European one while there are references to other international legal documents in the reasoned decision on DTP. In this regard, while the Spanish judges do not even mention the name of Venice Commission, international documents such as Charter of Paris, UN resolutions were referred to by the Turkish Constitutional Court. Thus the references to the EU higher ranking law are not exclusive in the reasoned decision on DTP, as this is so in the Batasuna decision.

Another significant finding that comes out of the analyses is that the argumentative factors play a role in the effectiveness of the EU's human rights policies. By arguing that a decision which is actually in contradiction with the EU's position is in accordance with the EU's laws, norms and practices, Turkey is acting through logic of justification. In so doing, it firstly challenges the validity of the EU's human rights position. Further, it attempts to make valid arguments about the legitimacy of banning DTP, and for this purpose it refers to the mutually accepted standards of justice within a legal framework as set by the EU, more specifically to the EU practices, ECtHR rulings, Venice Commission reports. As such, the proposition put in this thesis challenges Schimmelfennig et al.'s proposition that Turkey is likely to adopt human rights reforms when the domestic audience cost is small. Instead the analysis on the prohibition of DTP suggests that it is rather the perceived opportunity to argue against the legitimacy

of the EU's position which enabled Turkey to be able to justify its decision to ban DTP. The recent ECtHR decision which upheld the Spanish Supreme Court's ban on Batasuna seems to be influential on Turkey's perception of such an opportunity. That is, the 2009 ECtHR decision on Batasuna has been a reference point both in Turkish Constitutional Court's reasons in the decision to ban DTP and the politicians' justification of the Court decision. In this way, the case of Batasuna facilitates to justify the prohibition of DTP in Turkey.

This is a rather strong statement, given that Turkish Constitutional Court has already banned more than 20 political parties before DTP and in most of the cases, those parties were banned at the expense of receiving criticisms from the EU and punishment from the ECtHR. That is, it can well be argued that DTP would be banned even if Batasuna case had not occurred. Counter speculations can be made to such an argument. For instance, based on the 2008 decision in which Turkish Constitutional Court ruled against banning AKP and pointing to the Europeanization process going on in Turkey, it can be argued that in the recent political conjuncture, Turkey cannot easily ban political parties as it used to, and as such it could not have afforded to ban DTP if the recent ECtHR decision which upheld the ban on Batasuna did not exist. However, such speculative arguments are out of the scope of this analysis. Finding out the influence of the Batasuna case on the decision to prohibit DTP has not been among the objectives of this thesis. Further, making predictions on whether DTP would have been banned if there were no perceived opportunity to argue against the EU's related policy, has not been an objective of this research. What matters for the purposes of this study is that the case of Batasuna, i.e. the Spanish Supreme Court's decision to ban Batasuna and the following ECtHR decision which upheld this ban, has been a main reference point in justifying the prohibition of DTP; a point which is used both by legal decision makers and politicians. As mentioned before, justifications can be argued to be rhetorical, to be hiding the real motives of actors. This study has started by acknowledging that justifications may not reflect the real motivation but rather reveal what is considered as legitimate by the actors. The empirical finding that Turkey justifies its actions with the EU practices, the ECHR rulings and the general norms and principles as they are acknowledged by the EU suggests that Turkish actors feels more secure in mainly using right-based arguments to justify its decision. This is important as it implies a right-based influence for the EU as a human rights promoter.

A comparison between the DTP and Batasuna decisions puts forward that discourse and argumentation used in two cases are very much alike. The sequence of the decisions suggests that Turkish Constitutional Court might have copied the justifications used in the Supreme Court's decision to ban Batasuna. This is crucial for two reasons: firstly, it points to a learning behavior in Turkey. The adoption of the EU-acknowledged discourse by the Turkish legislature can be regarded as a prominent indicator of Europeanization. Europeanization is defined by Radaelli as "[p]rocesses of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies" (Radaelli, 2000, p.4). In this regard, by keeping the track of the justifications used for Batasuna case, the decision on DTP's prohibition indicates incorporation of EU discourse into the logic of domestic argumentation in Turkey. This argument is further substantiated through a comparative analysis of the justifications in the DTP and HADEP decisions. Accordingly, the change in discourse and arguments in the reasoned decisions from HADEP to DTP reveals a Europeanization effect.

Secondly, this similarity also suggests that the legislature in Turkey evaluate the validity of the EU's policies and compare them with similar other cases from the EU. In other words, Turkey is keeping an eye on the EU legal framework and EU practices when it is asked to comply with a human rights policy. Hence, the compliance behavior in a candidate country follows an evaluation of the validity of the EU's policies. This is also reflected by the Turkish Constitutional Court President Haşim Kılıç as he openly stated that when making the decision on the prohibition of DTP, the Constitutional Court studied the recent and older rulings of the ECtHR, including the ECtHR's previous decisions of infringement on Turkey's party closure cases but more specifically the ECtHR's non-infringement decision on Batasuna ("DTP kapatıldı," 2009). This further suggests that the EU's actions have an influence on the effectiveness of its policies. As such, this finding also substantiates the proposition presented in the Chapter 2 which claimed that Turkey is less likely to comply with the EU's human rights policies when it perceives a form of inconsistency on the application of it. Moreover, it is also in line with the conditions determined from the accounts of Habermas and, Sedelmeier and Schimmelfennig, which suggested that consistency

between the EU's policy and the EU's practices is an indicator for Turkey's acknowledgement of the validity and legitimacy of the EU's related policy. In this respect, consistency emerges as a significant element determining the influence of the EU as a human rights promoter.

Such an assertion is also confirmed by the justifications used by the Supreme Court in the Batasuna decision. Accordingly, not only the decision on DTP refers to Batasuna but also the decision on Batasuna refers to the previous party prohibition cases in Turkey and the related ECtHR decisions. Accordingly, in the Batasuna decision there is a preemptive attempt to justify that prohibition of Batasuna is different from the previous party prohibitions cases in Turkey, to which the ECtHR has concluded to be breaching the Article 10 and/or 11 of the ECHR on freedom of expression and freedom of assembly and association. On the one hand this reveals the Spanish Supreme Court's willingness to prove the compatibility of its decision with the higher ranking law by making direct references to the previous ECtHR judgments. On the other hand, this demonstrates that a member state also studies the related decisions of the ECtHR, the EU's policies on similar cases and evaluates the EU's position accordingly. Hence, not only the communicative action theory is proved right in proposing that actors evaluate the validity of others' claims, but also an interaction between the cases of Batasuna and DTP is revealed. The interaction suggests that actors whether member states or candidate states, consider that right-based arguments would mobilize support for their action, would persuade the audience to the legitimacy of their position. This is why the judges attempt to justify their decisions by referring to the higher ranking law and to the previous ECtHR decisions which might constitute an example for the immediate decision. Hence, the decisions on Batasuna and DTP demonstrate that both in a member state and a candidate country, before making a significant decision on human rights issues, similar cases that have occurred, the EU's position towards them and the related ECtHR decisions on those cases are examined, evaluated and used in a way to justify the particular decision's accordance with the legal framework. As such, not only the written rules and procedures but also how they are practiced are regarded as the EU's policy and assessed by actors.

This is important as it indicates that any misfit in the EU's practices would risk the effectiveness of the EU's human rights policies. Consequently, it contributes empirical data to the argument that the EU needs to be consistent in its actions in order

to pursue an effective human rights policy. It further reveals that this is valid both for candidate countries and member states. The perceived inconsistencies in the EU's human rights policies have generally been studied from the third actors' perspective. By putting forward that actors in a member state study the EU's related practices before making a decision on human rights and that they adjust their justifications accordingly, this study has suggested that the effectiveness of the EU's human rights policies towards not only candidate countries but also member states depends on consistency in the EU's practices.

However, in contrast with the several direct references to the Venice Commission in the Turkish Constitutional Court's decision to ban DTP, there is no mention of the Venice Commission on the Supreme Court's decision to ban Batasuna. This is also the case for politicians. In the DTP case, the Turkish officials gave direct references to the Venice Commission whereas Spanish officials did not mention it in their speeches. More strikingly, in the decision to ban Batasuna, there is a silence about the Venice Commission although the content of its reports and guidelines are present in the formulation of justifications.

In addition to the absence of direct references to the Venice Commission in the legal decision, the political argumentation in Spain with regard to Batasuna also differs from the political argumentation in Turkey on the prohibition of DTP. Accordingly, the in the case of DTP the political argumentation backed up the legal argumentation in the sense that the justifications used by the politicians and intellectuals were in line with those used in the reasoned decision with a predominantly right-based arguments. In the case of Batasuna, on the other hand, the political argumentation differ from the legal argumentation in the sense that the utility-based justifications overweigh the right-based justifications, that politicians do not try to back up their positions either with legally binding norms and principles or with the EU respected institutions. This is a significant difference between the justifications used in DTP and Batasuna cases which can lead to distinctive conclusions.

Analyzing the justifications in the reasoned decisions and further comparing them with an analysis of the justifications used by the politicians with regard to the Court decision enabled the researcher to compare and contrast different levels of argumentation on the same closure case. That is to say, as each level of argumentation

has a different audience to persuade for different purposes, analyzing the justifications used by legal and political actors provided insights on whether the justifications used by the judges are also used by the politicians to raise support for their political positions. Hence, the harmony of the legal and political argumentation on right-based justifications in the DTP case suggest that both the legal and political audience in Turkey are believed to consider the EU acknowledged norms and principles as legitimate. In Turkey, then, different from Spain, the EU emerges as an instrument of legitimation, almost a magic word that would persuade the audience that the decision is valid. Therefore both the legal decision-makers and politicians tend to back up their positions with the EU accepted rules, laws and principles. On the other hand, the Spanish judges are not as bold in mentioning the name of the EU related institutions. The influence of the EU is hinted by the content but not outspoken unlike the decision on DTP. Further, in the Spanish political argumentation on Batasuna ban, utility-based arguments are widely used without an attempt to back them up with references to the EU related institutions, norms and principles, which is in contrast with the Turkish political argumentation on the prohibition of DTP. In other words, "The ban on DTP is in accordance with the EU law" is an argument used by Turkish politicians to persuade Turkish public, the Spanish politicians portray the Batasuna decision as a national problem, solved by national actors drawing on national means by the Spanish politicians. Thus, at the political level, only the costs and benefits of a ban on Batasuna is discussed both by those who are in favor of the ban and those who are against.

This variance between the levels of argumentation among Turkey and Spain can be interpreted as an indicator of the difference of the EU's influence as a human rights promoter internally and externally. Thus, while the EU comes out as an explicit legitimation mechanism both at political and legal levels in a candidate country, in a member state it is not considered as a legitimation mechanism for the political audience and it is not as explicitly referred to at the legal argumentation as in the DTP case. This further suggests that while the EU has a more explicit right-based influence on a candidate country, such an influence is weaker on a member state. This is an interesting finding which has the potential for further research as to what extent this can be generalized as member state vs. candidate country influence.

Lastly, to suggest that the EU has a right-based influence as human rights promoter on a candidate country does not automatically mean that the EU has become a right-based entity in the accession process. What this entails is that, the actors in candidate countries choose to refer to the EU through right-based arguments, considering that this will persuade their audiences. As such, even if justifications may not reflect the real motivations of the actors, and in return the real type of influence of the EU, they reflect what is considered as a legitimate type of argumentation to rely on to raise support for actos' positions. The reliance on a right-based EU, even if it may be only at the rhetorical level, is promising in terms of suggesting what type of an entity the EU will evolve into.

7.2. Contribution to the Literature

The EU claims to be a human rights promoter both internally and externally. While the EU's human rights policies towards third parties, including the candidate countries, neighbor states and trade partners have drawn significant academic interest, the internal aspect of the EU's human rights promotion have remained rather understudied. More specifically, notwithstanding the diversity of studies on Turkey and the EU's human rights policies (See, for instance: Arıkan, 2002; Dalacoura, 2003; Dağı, 2001; Hale, 2003; Müftüler Baç, 2005; Yildiz, 2005), the influence of the EU's human rights policies specifically on Spain has not been a popular topic for academic research. At this point, this study has the merit of contributing to the literature by focusing on a member state in analyzing the influence of the EU on a human rights decision in Spain. In this way, this thesis is among the few which examines a member state as a receiving country of the EU's human rights policies. As such, it provides an account on the internal dimension of the promotion of human rights by the EU and accordingly, contributes to the literature by addressing this gap.

The analysis on the decision to ban DTP is taken as a case in which Turkey deviates from the EU's human rights policy, and hence regarded as a case of non-

compliance. This perspective is significant and relatively novel for the Europeanization literature on two grounds. First of all, political and legal reforms that Turkey has been undertaking in relation to its goal of EU membership have been extensively studied and the EU's role in this process has been highlighted by the EU scholars. However, these studies have focused on the rules and norms adopted by Turkey in the accession process. Agreeing with the previous studies on the substantial role played by the EU in the reforms made by Turkey especially since it was accepted as a candidate country in 1999, this study looks at a non-compliance behavior in order to understand the EU's influence. By putting the question why a candidate country diverges from the EU's human rights policy, it brings about a different angle to the widely acknowledged influence of the EU as a human rights promoter in Turkey. Further, by proposing that Turkey argues for the compatibility of its non-compliance behavior with the EU policy, the empirical findings confirm that Turkey considers the EU as a significant human rights promoter. Its attempt to argue for the compatibility of a divergence behavior, on the other hand, paves the way for a new level of articulation for the EU's human rights policies which would acknowledge the role of arguments in studying an actor behavior.

Secondly, as the thesis brings a non-compliance behavior of Turkey under scrutiny, it enables to have a closer look at the rule adoption process in a candidate country. In this regard, it elaborates on the lacunae in the literature as defined by Schimmelfennig and Sedelmeier. As they have suggested, "the process of adoption in candidate countries is seriously understudied" (Frank Schimmelfennig & Sedelmeier, 2005). In this regard, this study takes up Sedelmeier and Schimmelfennig's approach and provides a closer perspective to the adoption process in a candidate country.

Moreover, by providing an account on the type of influence that the EU has on receiving countries this thesis directly contributes to the literature on the impact of international organizations on democratization in the nation states. Accordingly, it focuses on the linkages between domestic and international politics and suggests that the universally valid norms and principles have been important in determining the international organizations' influence on receiving countries. It further suggests that consistency in the international organizations' practices is required for an effective democracy and human rights promotion in the receiving countries. Thus, this study offers insights on the international influences on nation states' behavior in terms of human rights.

7.3. Theoretical implications

The communicative action theory provided the research with distinctive tools which in return enabled to bring about a distinct perspective to the literature on the EU conceptualized as a human rights promoter. To begin with, this thesis has been intended to be a supplementary reading to the rationalist explanations. It adopted an extended conceptualization of rationality which treats the actors as rational to the extent that they can justify their actions through utility, value and/or right-based arguments. In so doing, it has suggested that not only material factors but also norms play a role in international politics. Thus, by moving from the premise that "actors can act out of a sense of justice" the approach of this study "expands the range of possible options available at the international level" (Eriksen, 2006, p.253). In the International Relations literature but more specifically in the EU literature, norms are not new factors in explaining agent behavior. Yet, operationalizing norms on a rational basis and treating both normative and material factors as analytical tools on equal grounds is promising in terms of providing an explanation that would take into account both the ideational and rational factors as well as the possible interaction between them.

As expected, this thesis has granted an alternative perspective to the rational choice explanations on the EU as a human rights promoter. Putting forward that predominantly right-based justifications are used in the DTP and Batasuna decisions, it has suggested that norms are important in understanding what type of influence the EU has as a human rights promoter on receiving countries. In this way, the findings of this thesis proved right the assertion that rational choice theories may not be sufficient in explaining the EU policies, that norm-based explanations can be useful in making sense of the EU as an international actor.

In the analysis, all three analytical categories have been detected. Accordingly, utility- value- and right-based arguments do not only coexist in the reasoned decisions but also they are often used together in a way to back up one another. This suggests that

both rational and normative considerations can be present in a decision. As such, it confirmed the Communicative Action Theory's premise that explanations relying on one of these categories may not be sufficient.

Moreover, this study has adopted an analytical distinction between norms and treated ethical-political and moral considerations as two distinct analytical categories. Hence, it has distinguished between the norms which are followed because following them is the appropriate thing to do and those which are followed because they are considered to be legitimate given the universal standards of law. In this way it presented a more detailed analysis on norms. On the methodological ground, this enabled a further operationalization of norms as analytical tools and enhanced the analytical framework. On the theoretical and empirical grounds, it allowed to reach conclusions not only on whether normative factors have a role in the influence of the EU's human rights policies but also on what kind of norms have an influence and to what extent. This is important for bringing about an extended perspective on how to study norms in international politics. Accordingly, both in Batasuna and DTP decisions, references to EU acknowledged norms and principles have significantly outnumbered the community-bound value-based reasons. As such, the empirical findings have confirmed the efficacy of an analytical distinction between values and rights in studying norms.

But what is innovative in bringing about a norm-based explanation to the EU's influence as a human rights promoter? It has already been mentioned that norms are commonly studied in EU literature. The particular influence that the EU has on international politics has long been elaborated on by scholars. The academic discussions on how to describe its influence can be traced back to 1970s when the Community's incompetence in military power led to new conceptualizations such as civilian power. Defined as pursuing civilian means to reach civilian ends in world politics, the concept of civilian power had room for normative explanations. However, it was the concept of normative power which brought norms into foreground. In this respect, the question would be: what do the empirical findings of this thesis add to the theoretical discussion on normative power? Sjursen suggested that the argument that the EU is normative power needs to be further specified and that "explicit criteria for assessing if the EU's putative pursuit of norms is legitimate are necessary. Without such criteria we are simply left to trust the assessment of the analyst and her – personal – assessment of whether or not the EU is, has been, or is moving in the direction of, a 'normative'

power" (Sjursen, 2006, p.248). At this point, this thesis makes a contribution to the normative power debate by applying on objective criteria derived from the communicative action theory in the analysis. In this regard, it brings about an analytical edge on which the theory can prosper.

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APPENDIX I

Venice Commission's Explanatory Report on Guidelines of Prohibition and Dissolution of Political Parties and Analogous Measures

Strasbourg, 2 December 1999

Restricted
CDL-PP (99)
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

EXPLANATORY REPORT
ON GUIDELINES
OF PROHIBITION AND DISSOLUTION
OF POLITICAL PARTIES
AND ANALOGOUS MEASURES

I. Introduction

1. At the request of the Secretary General of the Council of Europe, the European Commission for Democracy through Law conducted a survey on the prohibition of political parties and analogous measures.

2. This comparative survey of the legislation and practice in the states participating in the Venice Commission's work identified common values in European constitutional heritage in this field, with a view to improving information on the subject and, where appropriate, learning from solutions implemented abroad. It was based on replies to a questionnaire (documentCDL-PP(98)1) on the prohibition of political parties, covering both the existence of rules prohibiting political parties or providing for similar measures and the extent to which they are applied.

3. The Commission received replies from the following countries: Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Kyrghyzstan, Latvia, Liechtenstein, Lithuania, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Slovenia, Sweden, Switzerland, Turkey, Ukraine, Uruguay (see documentCDL-PP(98)2).

4. The Commission adopted the report on prohibition of political parties and analogous measures (CDL-INF(98) 14) at its 35th plenary meeting in Venice, 12-13 June 1998. Considering the importance of the issue the Commission decided to continue the study of this problem with a view to drafting guidelines in this field.

5. The Sub-Commission on democratic institutions at its 6th meeting (Venice, 10 December 1998) appointed a Rapporteur to draw up preliminary draft guidelines on the prohibition of political parties and analogous measures for its first meeting in 1999.

6. The draft guidelines on the prohibition of political parties were discussed by the Sub-Commission on democratic institutions during its meeting on 17 June 1999. Members of the Sub-Commission introduced a number of changes in the text prepared by Mr Alexandru Farcas and revised by the Secretariat on the basis of comments by Messrs Kaarlo Tuori (Finland) and Joseph Said Pullicino (Malta). In addition, the Secretariat was asked to prepare an explanatory memorandum to the guidelines.

II. Explanatory report to guidelines on the prohibition of political parties and analogous measures

The Venice Commission report on the prohibition of political parties and analogous measures revealed that there is a wide variety of approaches to this issue in different States. The aim of the guidelines on the prohibition of political parties and analogous measures is to establish a set of common principles for all member States of the Council of Europe and other countries, sharing the same values, which are reflected in the European Convention on Human Rights. The European Convention on Human Rights appears to be not only an effective instrument of international law but also "a constitutional instrument of the European public order". Therefore, the best way to explain certain provisions of the guidelines is by reference to the relevant articles of this particular Convention.

I

1. The right to associate freely in political parties forms an integral part of the freedom of association protected under Article 11 of the European Convention on Human Rights in the following terms:

   "*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others [...]*

   2. 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. 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 the administration of the State."

2. Although this Article does not mention specifically freedom to form political parties but freedom of association in general, the European Court of Human Rights has repeatedly applied this provision in cases directly related to freedom of association within the framework of political parties.

3. The right to receive and impart information without interference by public authority and regardless of frontiers is rooted in Article 10 of the European Convention on Human Rights providing that:

"*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2 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".

4. At present the right of freedom of association in the context of the Convention is interpreted, in most cases, together with Article 10. In its case law the European Court of Human Rights established that:

"*Notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy*".

5. Whereas freedom of association, including freedom to form political parties must be regarded as one of the corner stones of pluralist democracy, restrictions to this right may be justified in a democratic society, in accordance with para.2 of Article 11. Moreover, Article 17 of the European Convention allows a state to impose a restraint upon a programme a political party might pursue. It provides:

"*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*".

6. Therefore, the usual practice in a number of European States requiring registration of political parties, even if it were regarded as a restriction of the right to freedom of association and freedom of expression, would not *per se* amount to a violation of rights protected under Articles 11 and 10.

On the other hand any restriction must be in conformity with principles of *legality* and *proportionality*.

II

7. No State can impose limitations based only on its internal legislation, ignoring its international obligations.

This rule should be applied in normal times as well as in cases of public emergencies. This approach is confirmed by the practice of the European Court on Human Rights.

7. The European Court of Human Rights upheld on several occasions in its jurisprudence that political parties are a form of association essential to the proper functioning of democracy and that in view of the importance of democracy in the European Convention on Human Rights system, an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions.

8. Any derogation to the European Convention should be made in respect of the provisions of Article 15 of the European Convention on Human Rights, that provides that they should not be in breach of other international obligations of the State (para.1) and should be of a temporary duration (para.3).

III

9. As mentioned in the previous paragraph, prohibition or dissolution of political parties can be envisaged only if it is necessary in a democratic society and if there is concrete evidence that a party is engaged in activities threatening democracy and fundamental freedoms. This could include any party that advocates violence in all forms as part of its political programme or any party aiming to overthrow the existing constitutional order through armed struggle, terrorism or the organisation of any subversive activity.

10. Most contemporary constitutions establish mechanisms of protection of democracy and fundamental freedoms. In numerous states the general ban on the creation of para-military formations, parties that are a threat to the existence of the state or its independence, is expressly included in legislation on political parties or in the constitution.

11. A party that aims at a peaceful change of the constitutional order through lawful means cannot be prohibited or dissolved in the light of freedom of opinion. Merely challenging the established order in itself is not considered as a punishable offence in a liberal and democratic state. Any democratic society has other mechanisms to protect democracy and fundamental freedoms through such instruments as free elections and in some countries through referendums when it can express its attitude to any proposal to change the constitutional order in the country.

IV

12. No political party should be held responsible for the behaviour of its members. Any restrictive measure taken against a political party on the basis of the behaviour of its members should be supported by evidence that he or she acted with the support of the party in question or that such behaviour was the result of the party's programme or political aims. In the case that these links are missing or cannot be established the responsibility should fall entirely on the party member.

V

13. The prohibition or dissolution of a political party is an exceptional measure in a democratic society. If relevant state bodies take a decision to seize the judicial body on the question of prohibition of a political party they should have sufficient evidence that

there is a real threat to the constitutional order or citizens' fundamental rights and freedoms.

14. As was indicated in part III of this report the competent bodies should have sufficient evidence that the political party in question is advocating violence (including such specific demonstrations of it such as racism, xenophobia and intolerance), is clearly involved in terrorist or other subversive activities. State authorities should also evaluate the level of threat to the democratic order in the country and whether other measures, such as fines, other administrative measures or bringing to justice individual members of the political party involved in such activities, could remedy the situation.

15. Obviously, the general situation in the country is an important factor in such an evaluation. At the same time, standards of the developing European democracy practice must also be taken into consideration as was already observed in previous paragraphs, even in the case of a state of emergency, international obligations of the State should be observed and any measures of exceptional character should have a clearly defined temporary effect in compliance with Article 15 of the European Convention on Human Rights.

VI

16. Both points 6 and 7 of the guidelines deal with the role of the judiciary in prohibition or dissolution of political parties, therefore they can be treated together.

17. The role of the judiciary is essential in prohibition or dissolution of political parties. As is clear from the Venice Commission report, there can be different jurisdictions competent in this field. In some states it lies within the sole competence of Constitutional courts whereas in others it is within the sphere of ordinary jurisdictions.

18. Regardless of the judicial authority competent in this field the first stage should be to find unconstitutionality in the activities of a political party. The court should examine the evidence presented against a political party and define whether the latter has committed a serious offence against the constitutional order. If this is the case, the competent jurisdiction should decide on the prohibition or dissolution in a procedure offering all guarantees of due process, openness and fair trial {and in respect of the standards established by the European Convention on Human Rights}.