TÜSİAD

TURKISH INDUSTRIALISTS' AND BUSINESSMEN'S ASSOCIATION

"PERSPECTIVES ON DEMOCRATISATION IN TURKEY" AND "EU COPENHAGEN POLITICAL CRITERIA"

– VIEWS AND PRIORITIES –

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July 2001

(TÜSİAD Publication No-T/2001-07/305)

Meşrutiyet Caddesi, No.74 80050 Tepebaşı/İstanbul

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ISBN : 975-8458-21-3

Lebib Yalkin Publishing & Printing Co.

FOREWORD

TÜSİAD (Turkish Industrialists' and Businessmen's Association), which was founded in 1971, according to the rules laid by the Constitution and in the Associations Act, is a non-governmental organisation working for the public interest. Committed to the universal principals of democracy and human rights, together with the freedoms of enterprise, belief and opinion, TÜSİAD tries to foster the development of a social structure which conforms to Atatürk's principals and reforms, and strives to fortify the concept of a democratic civil society and a secular state of law in Turkey, where the government primarily attends to its main functional duties.

TÜSİAD aims at establishing the legal and institutional framework of the market economy and ensuring the application of internationally accepted business ethics. TÜSİAD believes in and works for the idea of integration within the international economic system, by increasing the competitiveness of the Turkish industrial and services sectors, thereby assuring itself of a well-defined and permanent place in the economic arena.

TÜSİAD supports all the policies aimed at the establishment of a liberal economic system which uses human and natural resources more efficiently by means of latest technological innovations and which tries to create the proper conditions of for a permanent increase in productivity and quality, thus enhancing competitiveness.

TÜSİAD, in accordance with its mission and in the context of its activities, initiates public debate by communicating its position supported by scientific research on current issues.

The following report entitled "Perspectives on Democratisation in Turkey and EU Copenhagen Criteria-Views and Priorities", commissioned by TÜSİAD Parliamentary Affairs Commission, Political Criteria Working Group and written by Prof. Süheyl Batum is the English version of the original report in Turkish.

July 2001

Prof. Süheyl Batum

Born in 1955 in Istanbul, Süheyl Batum graduated from the Galatasaray Lycee and then completed his higher education at the Faculty of Law, the University of Paris I (Pantheon Sorbonne). In 1980, he was appointed assistant in the Department of Constitutional Law at the Faculty of Law, the University of Istanbul. In 1985, he obtained his PhD in Law with his thesis "Referendum as a Means of Political Participation." In 1990, he became associate professor with his thesis "European Convention on Human Rights and Its Effects on the Turkish Constitutional System". In 1996, he became professor at the Galatasaray University. Between 1997-2000, he served as the Dean of the Faculty of Communication at the same university. He is currently the Dean of the Faculty of Law at the Bahçeşehir University.

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INTRODUCTION

At its December 1999 Summit in Helsinki, the European Council declared that it "welcomes recent positive developments in Turkey as noted in the Commission's progress report, as well as its intention to continue its reforms towards complying with the Copenhagen criteria" and that "Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States."

This decision in Helsinki was an important turning point for the EU-Turkish relations. It provided a legal and political base as well as a "sense of legitimacy" to the long-standing demands for political and legal reforms in Turkey.

In this framework, like all other candidate states, Turkey must carry out these reforms on the basis of its membership strategy to the European Union. At the moment, a pre-accession period, during which these reforms are to be carried out, is in progress.

The Accession Partnership for Turkey, an important step in this pre-accession strategy, determines the basic conditions of Turkey's candidacy.

The "political criteria" are defined in the Accession Partnership as they appear in the European Commission's Regular Progress Reports, particularly in the Regular Progress Report 2000, and aim at the implementation of the "Copenhagen Criteria" in Turkey.

In other words, these "political criteria," represent the common democratic values shared by all European countries. Thus, as mentioned above, unlike the economic and administrative criteria, they are not part of the negotiation process but a prerequisite for its commencement.

Certainly, differences in perceptions of the member states and various political views lead to different interpretations of these political criteria, which have a rather general framework. "Political criteria", which are very clear on issues like democracy, election law, and guarantee of fundamental rights and freedoms, may lead to different views and implementations on issues like "minority rights, constitutional guarantees for the protection of and respect for minorities."[1]

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(1) "Avrupa Birliği'ne Tam Üyeliğe Doğru - Siyasi Kıstaslar ve Uyum Süreci" (Towards Full Membership to the European Union - Political Criteria and Process of Harmonisation), TÜSİAD publication, December 1999, pub. No. TÜSİAD-T/99- 12/276

Regarding Turkey's membership, section 4.1 of the Accession Partnership defines political criteria under short and medium terms.

Short-term political criteria;

- Freedom of expression
- Freedom of association and peaceful assembly
- Fight against torture practices
- Legal procedures concerning pre-trial detention
- Legal redress against all violations of human rights
- Training on human rights issues
- Improvement of state security courts in line with international standards
- Improvement of functioning and efficiency of the judiciary
- Maintain the de facto moratorium on capital punishment
- Remove any legal provisions forbidding the use of mother tongue in TV/radio broadcasting

Medium-term political criteria;

- Guarantee full enjoyment by all individuals without any discrimination of all human rights and fundamental freedoms
- Review of the Turkish Constitution and other relevant legislation with a view of guaranteeing rights and freedoms
- Abolish death penalty
- Ratify the twin covenants of the UN
- Improve detention conditions in prisons
- Change constitutional status and role of the National Security Council
- Lift the remaining state of emergency in the South-East
- Ensure cultural diversity and guarantee cultural rights, including the field of education, for all citizens

In this line, Turkey has prepared its National Programme that addresses the issues raised in the Accession Partnership.

Put together with the Accession Partnership, Turkey's programme doesn't take into account some of these "political criteria" and does not even mention some serious shortcomings.

However, even unclear expressions should not be seen adequate, let alone the ignorance of some obligations in the National Programme. It must be deemed imperative that these changes, which are vital for democratisation and rule of law in Turkey, are enacted and enforced. Therefore, the important point in this line is not the mere inclusion of certain abstract principles in the National Programme but identification of the Constitutional, legal and administrative arrangements that would concretise these principles. The enactment of these changes by the Turkish Grand National Assembly (TGNA) and their implementation by the administration should be provided.

Moreover, these political criteria mean more than a mere "prerequisite" to start negotiations with the European Union. Indeed, they overlap with the demands and efforts by various circles and organisations in Turkey for the improvement in the process of "democratisation" and establishment of "the rule of law" .

In this line, enforcement and materialisation of the criteria set forth in the Accession Partnership within the process of membership to the European Union, - as expressed, for instance, within the framework of 212 proposals in the report of Bülent Tanör, "Perspectives on Democratisation in Turkey", published by TÜSİAD in January 1997- are completely covered within the years long efforts in Turkey towards real "democratisation" and "full realisation of the Rule of Law with all of its institutions". It will appropriate to consider other fundamental constitutional and legal amendments together with the reforms related to the political criteria.

Political Criteria in the Turkish National Programme for the Adoption of the EU Aquis and Political Reforms

I. Political Parties

Although the 1982 Constitution, like the 1961 Constitution, defines political parties as "indispensable instruments of the democratic political life" it is the

organisational models and internal functioning of these political parties that create deadlocks and "political crisis".

"Lack of confidence in the political system and political actors" has been the leading cause of these political crises as long been argued. In other words, "a serious lack of trust" has created the impression that there is an increasing split between the society and political actors, which eroded the hopes and expectations that these political actors would bring solutions to the country's problems.

Moreover, the belief that "accountability" of parliamentarians -an indispensable necessity in democratic systems- is no more than a myth in Turkey, and that they are instead protected through a set of Constitutional arrangements enjoys widespread acceptance.

All research and opinion polls on the issue show that the public neither trusts its representatives, nor believes that those faced with corruption charges, will even be punished.

Among the main reasons of this lack of trust towards the political system are the failure of political parties to base their internal functioning on democratic principles, existence of the so-called "leadership dominance" in all political parties, inability of political parties to ensure and monitor sufficient and efficient use of economic resources and the dominant belief among the public that these resources are misused, that "clientalist" relations are still in effect and that the deputies are neither politically nor legally "accountable".

First and foremost, this erosion of trust towards the political system and political actors must be brought to an end and trust must be restored, in other words, an outline for a new "social contract" between the state and the society must be forged.

1) At this point, certain changes must be made to align the internal functioning of political parties with democratic principles and prevent the emergence of the leadership hegemony from damaging the "party structure" and functioning of the political system.

In this line, the articles of the Law on Political Parties on member recruitment, Party Leadership, regulation of party organisations in provinces and provincial districts and delegate systems, the selection of party candidates, which is among

the most important indicators of antidemocratic functioning of political parties, regulation and monitoring of donations made to the political parties and articles on the updating of punishments related to these matters must be rearranged.

2) Moreover, Part Four of the Law on Political Parties regulating the "Prohibitions Concerning Political Parties" and Part Five regulating the "Dissolution of Political Parties" must be revised in accordance with "the constitutional regulation accepting political parties as an indispensable elements of democratic political life" and relevant decisions of the European Court of Human Rights.

3) In democratic countries, "transparency and monitoring of party accounts and election expenditures" is a heavily regulated issue and aims at preventing the abuse of the operation of the political system, the maintenance of a legal, democratic operation as well as the creation of a "transparent system and operation" by political parties seeking to obtain political power. Indeed, European electoral legislations, like the one in France, include a comprehensive monitoring mechanism.

In this line, Turkey should also include certain detailed provisions on the matter of "regulation and monitoring of received and spent funds" or in other words, "financing of the elections" in both its Law on the Poltical Parties and Law on the Election of the Turkish Grand National Assembly members as it is in the legislations of democratic countries like France and Britain.

II. Electoral System*

Our electoral system, which seems to have facilitated and even, incited governmental instability has played an important role in the frequent economic crises of the last decade in Turkey. Current electoral system neither ensures justice nor can it contribute to stability even at the expense of giving up on justice. We can summarise the flaws and drawbacks of the current extremely high threshold and proportional D'Hondt electoral system, as follows.

(*) Prepared by Prof. Seyfettin Gürsel. Gürsel is currently the Head of Economics Department and lectures at Galatasaray University. Gürsel has several books, articles and research on economic history, economic theory, economic policies and electoral systems, published both in Turkey and abroad. Especially the report he prepared for TÜSİAD, "Political Stability and Two-Round Single District Electoral System Simulation Model" forms the basis for the views in this chapter.

1) Due to the unique conditions of our heavily fragmented political structure, current electoral system encourages a destructive political tug-of-war and populism. Multiparty coalition governments are formed without any regard to the preferences of the majority of voters, and government programmes are generally drafted based on narrow short-term interests. Since political parties are not encouraged to set up common government programmes during the campaign period, realistic programmes that are suitable for the country's conditions are not prepared and election campaigns lack depth and concentrate around excessively optimistic promises.

2) In a future election with a very low turnover rate due to a serious loss of credibility on the side of politics and political parties, certain characteristics of the current electoral system might allow a single party, despite having received votes below acceptable measures, assume political power alone. Such a result would create the worst imaginable case of political instability for Turkey.

3) Inequalities in the distribution of parliamentary deputies to the electoral districts (provinces) have worsened. This distribution disrupts the delicate political balance between urban and rural areas. This unbalanced distribution may also lead to discrepancies where the holder of the most parliamentary seats differs from the party with most votes. In such a case, questions over which party leader should be assigned as the legitimate Prime Minister might rise. For the same reasons, two radical right parties may obtain a majority of seats and form a coalition government that has a smaller number of seats than most of its alternatives.

4) Current electoral system has no positive contributions to governmental stability; on the contrary, it increases the sources of instability and has characteristics incompatible with the principle of fair representation. Due to the 10 percent electoral threshold, some candidates of People's Democracy Party, despite receiving the highest number of votes in their own constituencies, could not enter the parliament. No other democratic electoral system in the world would yield such a result. Moreover, in the last two elections, Nationalist Movement Party (1995) and Republican People's Party (1999) were not represented in the parliament despite having won more than two million votes. In every election, 13 to 14 percent of the votes is invalidated and "fair representation" is damaged. This proportion may well increase in the next election.

There is an obvious need for an electoral system reform that will eliminate these drawbacks as much as possible. This reform should be built on fundamental principles that encourage parties to form alliances and common government programmes, take into consideration not only the primary but also the latter party preferences of the voters and thus prevent the minority rule undesired by a majority of the voters, provide for the representation of parties that receive votes over a decent threshold or those winning over in a few constituencies, in the parliament, even if this might mean underrepresentation for them. The closest electoral system with this characteristics is the proportionally reinforced two-round single district electoral system. The weight of proportional reinforcement should be decided through an open public debate.

III. Parliamentary Inviolability and Parliamentary Investigation

"Accountability" of the elected representatives is an important defining element of a democratic political regime.[2]

Accountability shows itself in three forms: "accountability" of the elected to the voters (in the elections), to the Parliament (political accountability), and "in legal terms" (punitive or legal accountability).

Current application of "parliamentary immunity" (Article 83 of the 1982 Constitution) goes beyond the original intentions behind it as well as its reason d'etre and is implemented in an understanding that would work towards the abolition of "accountability" of the deputies. This application destroys the relation of "trust" between the deputies and the "voters" and emerges as yet another obstruction against democratisation.

Indeed, parliamentary inviolability is both a necessity and result of the "member of the legislative organ" status designed to enable the members of parliament to carry out their functions without pressure, threat, force or conspiracy.

However, in Turkey today, parliamentary inviolability and in connection with this, "Parliamentary investigation concerning the Prime Minister and other ministers" as regulated by Article 100 of the Constitution have long been discussed.

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(2) A. Przeworski, "Democracy, Accountability and Representation (Cambridge Studies in the Theory of Democracy)", 1999- Robert D. Behn, "Rethinking Democratic Accountability", 1999

Present Constitutional regulations (Constitution Art. 83 and 100) turns the members of the executive and legislative organs into "privileged people" with a "license to commit crime", and in its present form creates regulations "that deviate from its aims and goals" and violates legal equality.[3]

In many European democracies, both "parliamentary inviolability" and "parliamentary investigation" give absolute protection to the "ideas and votes" of the members of the parliament and the cabinet but denies such extensive coverage to their other actions.

1) In this respect, Article 83 of the Constitution should give absolute protection over parliamentary immunity only within a framework of "parliamentary irresponsibility" as defined in paragraph 1 of this Article, further regulation should give inviolability "only in the case of arrest or limitation of individual freedom", remaining processes of legal prosecution and trial should not be covered.

2) In the same line, the regulation of "Parliamentary Investigation" in Article 100 of the Constitution must be amended, and a regulation similar to the Article brought in France with the Constitutional amendment of 1995, which would reshape the parliamentary investigation in a way that "would include the judiciary in the investigation".

IV. Freedom of Expression

National Programme sets out a will to make the necessary Constitutional and other legal amendments on the matter. This is a positive development, since freedom of expression is an issue noted in the Accession Partnership, and a majority of the allegations against and convictions of Turkey at the European Court of Human Rights are based on this issue.

On the subject, and particularly in many of its decisions related to Turkey, the European Court of Human Rights have drawn the limits of freedom of expression

(3) S. Batum, "Yasama dokunulmazlığı zırhının yeni boyutu" (New Dimension of the Armor of Parliamentary Inviolability), Görüş, no. 25, April 1996, p. 61

and banned[4] remarks, "[that can be regarded as] incitement to the use of violence, hostility or hatred between citizens"[5],

"where such remarks incite to violence against an individual or a public official or a part of the population"[6],

"[that]constitute an incitement to armed struggle or an uprising"[7]

"[that] openly refuse democratic rules"[8] and,

"[that] contain racist rhetoric and are based on racism".[9]

While drawing the general framework, the Court has particular regard to the words used, the scope, content and means of expressions[10] and

"in addition to any calls for violence or disruption of order, whether there were any uprisings or armed action in connection with these statements"[11] are also taken into consideration.

Consequently, in the face of these judgements of the European Court of Human Rights, some of the regulations in our legislation, particularly those at the centre of the debate (Anti-terror Act Art. 8 – Turkish Penal Law, Art. 159, 312) must be revised. The attitude and decisions of the judges in Turkey, however, also contribute as much to the dispute around these Articles.

There are no Constitutional (Art. 90) obstructions against the interpretation of these articles in accordance with Article 10 of the European Convention on Human Rights or the decisions of the European Court of Human Rights. On the contrary, there is a legal obligation.

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(4) Jurisprudence relative a l'article 10 de la Convention Européenne des Droits de l'Homme, Quarante années de jurisprudence, Conseil de l'Europe, 1999

(5) Piermont v. France, 27.4.1995 – Zana v. Turkey, 25.11.1997 – Sürek (4) v. Turkey, 8.7.1999 – Erdogdu and Ince v. Turkey, 8.7.1999

(6) Sürek (2) v. Turkey, 8.7.1999 – Karatas v. Turkey, 8.7.1999 – Surek and Ozdemir v. Turkey, 8.7.1999

(7) Incal v. Turkey, 9.6.1998 – Aslan v. Turkey, 8.7.1999 – Gerger v. Turkey, 8.7.1999

(8) Socialist Party v. Turkey, 25.5.1998

(9) Jersild v. Denmark, 23.9.1994-As Commission decisions, Hosnik v. Austria, 18.10.1995 – Remer v. Germany, 6.9.1995 – Marais v. France, 24.6.1996

(10) Nilsen and Johnsen, 25.11.1999 – Sürek (2), 8.7.1999 – Aslan v. Turkey, 8.7.1999 – Sürek and Ozdemir v. Turkey, 8.7.1999 – Sürek (4), 8.7.1999 – Karatas v. Turkey, 8.7.1999 – Gerger v. Turkey, 8.7.1999

(11) Piermont v. France, 27.4.1995 – Incal v. Turkey, 9.6.1998

However, our judges, with some exceptions, have up to date refrained from rendering which takes into account international agreements or international law, neither on freedom of expression, nor on human rights in general.

Certainly, this shortcoming has various reasons; namely, judges lack professional training (knowledge of a foreign language, inclination towards international law from the beginning of their education), they are psychologically not ready to enforce international law, or they refrain from doing so.

Thus, these amendments must be made within the framework of the National Programme.

1) "General grounds for restriction" in Article 13 of the Constitution must be abolished and for each right and freedom, "special restrictions" fit for the characteristics of the given right should be legislated. Thus any possibility of an extensive restriction on the freedom of expression will be eliminated. Furthermore, current Constitution contains certain rights that must not be restricted in any case, due to their nature. An example to such rights is "Freedom of Thought and Opinion" defined in Article 25 of the Constitution. However, the general grounds for restriction in Article 13 of the Constitution legally permits restriction of even this Article. Therefore, "general grounds for restrictions" in Article 13 must be revised.

If this general restriction is not abolished, then the statement in Article 13, "fundamental rights and freedoms may be restricted by law ... of safeguarding ... and also for specific reasons set forth in the relevant Articles of the Constitution" should be replaced with "... of safeguarding ... or for specific reasons set forth in the relevant Articles of the Constitution". In addition to that, the statement "The general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms" must be removed from the Constitution.

In this way, depending on their nature, some rights would be restricted with the article on general grounds for restriction; special rights such as the freedom of expression would be restricted for special reasons as indicated in their own articles; and rights such as "freedom of thought and opinion" (Art. 25 of the Constitution) would not be restricted due to their nature.

2) Moreover, in line with the judgements of the European Court of Human Rights, the element of "targeting violence" and a qualification that "necessitates the

consideration of the place, time and conditions under which the action is carried out" must be added with an amendment of Article 8 of Anti-terror Act. Actually, even without such an amendment, a Turkish judge could use an element similar to the measure of the "clear and present danger". However, for reasons mentioned above, he did not choose to use this and clarify the article. For this reason, such an amendment must be made in article 8 of the Anti-terror Act.[12]

3) In addition, articles 159 and 312, particularly 312/1 must be amended since they are the most frequently applied regulations in the field of freedom of expression.

In Article 159 of Turkish Penal Code, the phrase, "overtly insulting or vilifying the Turkish nation, the Republic ... the moral personality of the Government";

In Article 312/1 of the same code, the phrase, "publicly praising of an action that is Considered an offence by law" and

In Article 312/2, the phrase, "publicly incitement of the people to hatred or hostility" is included.

While keeping the essentials of these articles, elements of "insult, vilify, and incite" must be clarified, whether "such remarks incite to violence against an individual or a public official or a part of the population", and the elements of "place, time, effect" must be taken into consideration.

On the matter, the proposal to amend the Turkish Penal Code must be brought to the attention of TGNA promptly, and amendments must be made in accordance with the above-mentioned details.

In this way, these articles will no longer be "general articles used in every case", and another line will have been drawn to convictions in the European Court of Human Rights.

Provisions that restrict freedom of press, which is closely linked to freedom of expression must be completely removed from Turkish legislation or amended.

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(12) However, today, pamphlets that have never been distributed (Incal v. Turkey, 9.6.1998), words said in front of a very small group (Gerger v. Turkey, 8.7.1999) and actions that could pose serious threats are evaluated with the same article, in the same way.

V. Right to Assembly and Civil Society

The short-term political criteria of the Accession Partnership include the strengthening of constitutional and legal guarantees of the right to freedom of association and peaceful assembly and encouragement of the development of civil society. In this light, the National Programme envisages the "review of the relevant provisions" for this subject.

1) At this point, certain articles (particularly 15-16-17-19-20-21-23) of The Law on Assembly and Demonstrations No. 2911 (6.10.1983) need to be amended.

2) Associations Law should be revised in accordance with the European Court of Human Rights decisions related to Article 11 of the European Convention on Human Rights, and antidemocratic influences removed.

VI. Capital Punishment

National Programme contains an ambiguous clause pledging that "the observation of moratorium on the execution of death penalties would continue", and in the medium-term, "its abolishment will be put into consideration both in form and content".

In line with the observation of this moratorium since 1984, the most recent regulation that came with "The Law on the parole, postponement of cases and punishments for crimes committed prior to 23 April 1999" No. 4616 and dated 21.12.2000, states that death penalty will not be given for crimes other than those specified (regulated in article 1/5).

Nevertheless, a de facto rather than a legal behaviour and regulations pertaining to certain types of crimes committed within a certain time period is not adequate in legal terms.

Moreover, the clause "form and content" for the medium-term implies that TGNA might put certain limitations, that is for certain types of crimes or under certain circumstances it could deem capital punishment valid.

However, abolishment of the death sentence and withholding exceptions other than Article 2 of Appendix Protocol No. 6 have become a common application. With Russia signing on 16.4.1997 and Azerbaijan and Armenia on 25.01.2001,

among the 43 countries, Turkey is left as the only member of the Council of Europe that has not yet signed the Appendix Protocol No. 6 of the European Convention on Human Rights. With that in mind, on the matter of capital punishment, necessary Constitutional and other legal amendments in the medium-term must be made as soon as possible.

Indeed, drafts on changing the Turkish Penal Code in the TGNA all envisage the abolishment of death penalty.

1) In this line, Articles 15/2, 17/4 and 87 of the Constitution must be amended so as to abolish death penalty.

Similar amendments must also be made in other legal codes, particularly the Turkish Penal Code. Indeed, in our legislation, about 40 offences are punished with death penalty.[13]

2) Capital punishment may also and must be abolished simply through the signing and ratification and therefore the enforcement of Appendix Protocol No. 6.

However, after the Appendix Protocol is enforced, necessary Constitutional amendments (15/2, 17/4, 87) must still be made. These amendments will eliminate any chances that in the future death penalty might be revoked for certain offences and circumstances.

VII. Cultural Life and Individual Freedoms

The issue of "Cultural rights", encompassing freedoms in "the use of mother tongue in education and TV/Radio broadcasting", and even though not clarified in the National Programme, Turkey's need to make certain changes on the matter, constitutes a milestone in membership to the European Union as noted in the Accession Partnership and mentioned above.

Education and TV/Radio broadcasting in mother tongue, although complementary to each other and constitute the two basic aspects of the list of cultural rights, bear different characteristics and scopes.

Indeed, the only obligation of the State on the use of mother tongue in TV/Radio broadcasting is the elimination of legal obstructions to the freedom of

(13) Türkiye'de Demokratikleşme Perspektifleri (Perspectives on Democratisation in Turkey), TÜSİAD, 20 January 1997, p. 92

individuals to broadcast in a language of their choosing. Except for this, the State needs not assume any "positive obligations".

On the other hand, education in mother tongue poses a two-tiered obligation. First of all, the state must eliminate all sorts of legal obstructions and restrictions. And along with that, the State must also meet the demands for education in mother tongue within the scope of "the right to education", and must itself carry out positive acts. That is, it must carry out its "positive obligations". Execution of this obligation does not necessitate any obligatory changes in the educational system, but some changes in the curriculum, insertion of certain elective courses in this curriculum or arrangement of courses and programmes under the supervision and inspection of the State.

Recognition of cultural rights, as it appears in the Accession Partnership, within the framework of the "Copenhagen Criteria", is not solely required from Turkey. Actually, today, the issue of cultural rights has appeared in international documents (and most recently in the European Union's Charter of Fundamental Rights) as well as national Constitutions and legal legislations and has become a part of the EU's acquis communautaire.

Indeed, on this matter, along with countries like Spain, Belgium, even countries like France that do not recognise the concepts of "minority" and "minority rights" (and reflect this in a Constitutional Council decision), the teaching of "different cultures", "different languages" is permitted in a manner that does not eliminate the principle of "official language" and "the use of official language in educational system".

Moreover, it is not only the Western democracies, but also the Central and Eastern European countries of the post-Soviet era that emerged in the early 1990's or undergoing political restructuring within the framework of liberal democratic principles, have carried out such constitutional and other legal legislation in this direction.

Some examples might be useful;

Along with the concept of "official language" (article 3), the Bulgarian Constitution recognises "the right to develop mother tongue and to education in mother tongue" (article 36) and " the right to develop own culture" (Article 37).

The Hungarian Constitution includes "the rights to use mother tongue, education in mother tongue, develop own culture and determine name in own language " (article 68).

Along with the concept of "official language" (article 52), the Estonian Constitution recognises, "the right of ethnic minorities to use their own language along with the official language" (article 51-52), "the right to develop their own culture" (article 50) and "the right to education in their own mother tongue"(article 37).

The Romanian Constitution, although it "designates Romanian as the official language" (article 13) recognises "the rights to preserve and develop own culture" (article 6) and the "right to education in own mother tongue" (article 32).

Declaration of Fundamental Rights and Freedoms in the Czech Republic bestows upon the ethnic minorities the rights "to develop their own culture and education in their mother tongue" (article 25).

The Slovakian Constitution includes both the "State (official) language" (article 6), the concept of "other languages" (article 6), and "the right to develop own culture, establish own institutions of education and education in own mother tongue" (article 34).

In Turkey, necessary changes towards the recognition of "cultural rights" must be carried out within the framework of the Accession Partnership. Certainly, the use of these rights against "the indivisible integrity of the State" will be restricted by the Constitution and other laws. Moreover, "the State will determine how these rights will be used, and provide the implementation, supervision and inspection of this service at every stage".

In this line, the Fundamental Law on National Education, no. 1739 and dated 6.14.1973 does not constitute any obstacles, but facilitates the recognition of these rights and execution of this activity:

In article 5, the provision, "National education service is regulated according to the demands and abilities of Turkish people and needs of Turkish society";

In article 6, the provision, "Throughout their education, ... individuals are oriented to various programmes and schools in accordance with their ... interests";

In article 56, the provision, "Ministry of National Education is responsible for the administration, supervision and inspection of the education service on behalf of the State".

1) In this direction, first of all, relevant amendments in the Constitution must be made.

In this area, the distinction between "mother tongue" and "official language" (Articles 3 and 42 of the Constitution) must be clarified and the concept of "official language" must be kept.

The concepts of "the language... is Turkish" in article 3 and "the mother tongues" in article 42 must be amended as "official language" and preserved, but other constitutional and other legal regulations must be amended,

The provision, "no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education" in Article 42, paragraph 9 must be amended.

2) Likewise, National Programme, contrary to the Accession Partnership Document, does not include any regulations on the issue of "the right to broadcast in mother tongue", which is also related to the freedom of expression and freedom of press.

Regulations and prohibitions that stand out as the most important reason for restriction in this area continue to exist on the constitutional level as "prohibitions on language" in articles 26 and 28 of the Constitution.

Indeed, article 26, paragraph 3 of the Constitution provides that; "No language prohibited by law shall be used in the expression and dissemination of thought";

Article 28, paragraph 2 provides that; "Publication shall not be made in any language prohibited by law";

Article 42, paragraph 9 provides that; "No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education".

As long as these Constitutional regulations remain, "the use of mother tongue in TV/Radio broadcasting" will either be liberalised only through laws or as it was

the case with the "Law on the Use of Languages other than Turkish in Broadcasting" (1983) before the law dated 12.4.1991, banned with new prohibitions.

Indeed, article 4/t of the "Law on the Foundation and Broadcasting of Radio and TV Stations" no. 3984 leaves an extremely narrow space to the use of a language other than Turkish in TV-Radio broadcasts with the regulation, "radio and television broadcasts shall be made in Turkish, and languages that have contributed to the development of cultural and scientific works of universal quality can be used only for the purpose of teaching these languages or conveying news in these languages".

To eliminate this obstruction legally and choose a direction in conformity with the conditions stipulated in the Accession Partnership;

The phrases in articles 26 and 28, which are noted above, should be removed from the Constitution and the restrictions in relevant legislation (for instance, article 4/t of the Law no. 3984) should be abrogated.

VIII. National Security Council

European Union has been questioning the Constitutional and de facto role of the National Security Council in Turkish political system.

"Alignment of the constitutional role of the National Security Council as an advisory body to the government in accordance with the practice of EU member states" is included not in the "short-term" but "medium-term criteria" of the Accession Partnership, as well as it is noted in the Regular Progress Reports.

1) National Security Council first gained constitutional status with Article 111 of the 1961 Constitution and retained this status with Article 118 of the 1982 Constitution.

a) The Council was arranged initially in the 1961 Constitution as follows; "National Security Council shall be composed of the ministers that are pointed in the Law and the Chief of the General Staff and the Commanders of the Army".

.....

"The National Security Council shall submit to the Council of Ministers its views on taking decisions and ensuring necessary coordination with regard to national security".

b) With the Law no. 1488 and dated 20.9.1971 on Constitutional amendment, article 111 was amended as follows: "National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, the ministers that are pointed in the Law, and the Commanders of the Army".

.....

"National Security Council shall recommend the necessary basic views to the Council of Ministers on taking decisions and ensuring necessary coordination with regard to national security".

c) Article 118 of 1982 Constitution regulates this as follows; "The National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defense, Internal Affairs, and Foreign Affairs, the Commanders of the Army, Navy and the Air Force and the General Commander of the Gendarmerie."

.....

"The National Security Council shall submit to the Council of Ministers its views on taking decisions and ensuring necessary coordination with regard to the formulation, establishment, and implementation of the national security policy of the State. The Council of Ministers shall give priority consideration to the decisions of the National Security Council concerning the measures that it deems necessary for the preservation of the existence and independence of the State, the integrity and indivisibility of the country and the peace and security of society".

In addition to this constitutional process, both the Law on the National Security Council and the General Secretariat of the National Security Council, no. 2945 and dated 11.9.1985 and practice clearly show that, the Council has a very broad interpretation of the "concept of national security" and shows interest in all problems encompassing the political, economic, cultural and legal areas. Indeed, National Security Council is evidently influential in the determination of the basic policies on several issues including the economy, situation of the banks, financial markets, privatisation, and foreign policy.

Issues like the Constitutional status of the National Security Council, whether it should have any place in constitutions or not, and whether it exists in other countries or not have all been discussed extensively.[14]

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(14) (Perspectives on Democratization in Turkey), TÜSİAD, 20 January 1997, p. 72; Türkiye'de Demokratik Standartların Yükseltilmesi-Tartışmalar ve Son Gelişmeler (Perspectives on Democratization in Turkey-Progress Report), TÜSİAD, December 1999, p. 100.

At this stage, discussions focusing on the constitutional status of National Security Council and demands for its removal from the Constitution do not serve to any useful ends, but drag the debate into a deadlock. In such instances, justifications like "the special conditions of Turkey, unique situation of the Turkish armed forces, historical traditions" or legal claims that the phrases, "submit ... shall give priority consideration" in the Article 118 of the Constitution is only of advisory nature, are put forward.

2) The decent thing to do is rather than questioning the National Security Council, ensuring its conformity with the standards of the European Union and the political criteria stipulated in Accession Partnership.

For this adaptation, an "increase in the number of civilian members in the Council" must definitely be made. In this way, at least the image and claims of guardianship over the Council and political actors must be eliminated.

Within this framework, the Chief of the General Staff could attend the Council alone, on behalf of the entire armed forces, with the capacity of the commander of the armed forces, and convey his ideas and knowledge on national security and national defence. Besides, when the agenda entails, relevant ministers, other Commanders of the Army and relevant people should also be summoned to the Council meetings.

Nevertheless, such an arrangement aimed at increasing the number of civilian members is important, yet insufficient.

In line with this, article 118 of the Constitution must be amended and the Council's consultative quality must be stressed upon. Thus, the Council's de facto situation, and place in Turkish politics could be left aside and even its legal situation, which is not in compliance with the EU standards in its current form, would be straightened out.

Accordingly, Article 118, paragraph 3 of the Constitution could be amended as follows:

"The National Security Council shall submit to the Council of Ministers its views on taking decisions with regard to the formulation, establishment, and implementation of the national security policy and on protection of the integrity and indivisibility of the country.

By the same token, the Law on the National Security Council and the General Secretariat of the National Security Council, no. 2945, dated 11.9.1985 must also be amended.

On this matter, particularly the definition of national security must be revised in a way not to encompass an extensive area as it is currently in Article 1/a, "protection of all interests including those of political, social, cultural, economic in the international arena". And the Council agenda should only be comprised of national defence and terrorist acts targeting the integrity of the country. The inclusion of other issues to the agenda of the Council by way of holding an extensive scope for the concept of "national security", gives the impression not only in the international platform but also in Turkey that all political, social or economic decisions of the political power are taken under the influence of the National Security Council and creates such an expectation.

In article 9, regulations that give all responsibilities and authority to the General Secretariat of the National Security Council must be amended and Prime Ministry must be designated as the authorised and responsible body in this area and for "following the implementation of the decisions" (Article 9/2 and 3).

In article 13, the regulations as to the duties of the General Secretariat of National Security Council, particularly those in paragraphs a–b–d –e–f–g and h must be amended, and rearranged in accordance with the function of the National Security Council as a "consultative body".

And powers of the General Secretariat of National Security Council, defined in article 14, should be changed and brought into conformity with the Constitutional and other legal changes.

IX. Torture and Maltreatment

These matters, also mentioned in the Accession Partnership, are important, yet as deficient, for the development of an understanding for the protection of human rights and the rule of law in Turkey.

The issue of torture and maltreatment in Turkey and the fact that they occur at the stage of arrest and detention, is reflected both in the Regular Progress Reports and the Accession Partnership as well as in the decisions of the European Committee on the Prevention of Torture and European Court of Human Rights.

On the other hand, new regulations are brought about in legal level (Amendments in Criminal Procedure Law-Law no. 4229, amendments in some articles of the Turkish Penal Code-Articles 243/245/354), in the realm of administrative regulations (the Bylaw on Arrest-Detention) and in the international dimension (Additional Protocols of the European Convention on the Prevention of Torture).

Yet, despite all these legal settings, the existence of torture and maltreatment, and the decisions and reports of international organisations as well as the decisions[15] of the European Court of Human Rights continue.

Turkey must make the necessary amendments in the Turkish Penal Code, and relevant laws along with changes in the legislation that would allow for the investigation and trial of the public servants and punishment of those who have done torture, in order to bring these allegations and torture to an end.

2) In this area, it is imperative to make amendments on the regulations, like in Turkish Penal Code, Law of Criminal Procedure, Law on Duties and Authority of Police, Law on the Organisation, Duties and Authority of Gendarmerie, Regulation on Duties and Authority of Police.

3) In addition, the regulations that hinder the investigation or trial of officials who are subject to imputation of torture and maltreatment and that give way to the evaluation by the European Court of Human Rights that "exhaustion of all internal legal remedies is no longer necessary"[16] in Turkey must be revoked. In this framework, despite the fact that the Law on the Trial of Public Servants is repealed, some provisions of the Law on the Trial of the Public Servants and Other State Officials, no. 4483, (2.12.1999) must also be revised.

X. Rule of Law

Other than the elements of country, population and sovereign power, the modern state bears certain qualities and must conform to certain criteria. And at the top of these qualities comes "the fact that the state must be restricted, and bound by the law, and legal rules". In another words, it must rely on the "rule of law".

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(15) Tekin v. Turkey, 9.6.1998- Çakıcı v. Turkey, 8.7.1999- Bilgin v. Turkey, 16.11.2000- Büyükdağ v. Turkey, 21.12.2000- Berktay v. Turkey, 1.3.2001)

(16) All trials related to the claims of torture, maltreatment, lost people and setting fire to villages in Turkey)

Among the factors upon which a democratic state that depends on the rule of law is founded, particularly one is very important and fundamental;

"That the state and individuals act in accordance with the legal rules, shall not merely be left to the conscience of the officials or good will of the state, but checked by independent judiciary bodies, and accordingly, all state agencies, including the legislative body shall be bound by the Constitution and rule of law and exposed to review both in respects of the principles of the organization and functioning. Within this framework, independence and impartiality of judiciary bodies that assume this important function will be guaranteed both legally and in practice."

It is possible to discern this interpretation and tendency of seeing "the judicial review carried out by the independent judiciary bodies" as the most fundamental component of the rule of law in the decisions of the European Court of Human Rights as well as in the decisions of the Constitutional Court.[17]

This characteristic of modern state is reflected in all international legal documents. Indeed, "improvement of the effectiveness of judiciary and its functioning" is regulated in the Copenhagen Criteria as "stabilisation of the institutions that secure the protection of and respect for ... the rule of law". The same principle appears in the Accession Partnership for Turkey under the "short-term criteria".

At this point, the mere existence of judicial review does not constitute an adequate guarantee for the existence of the rule of law and its smooth functioning. In order to speak of the rule of law, existence of "an efficient, effective, independent and impartial judicial review" is necessary.

1) Accordingly, articles 105, 125/2, 129/final, 148, 159 and Provisional Article 15 of the constitution must be amended in accordance with all decisions of the European Court of Human Rights as to the functioning of the rule of law in Turkey and all real dimensions of the "the right of fair trial".[18]

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(17) Süheyl Batum, "Türkiye'de Hukuk Devleti Anlayışı ve Sorunları" (The consept of Rule of Law and the questions in Turkey), Görüş, November 1997 p 63-64.

(18) Determining the grounds at sentences; bringing competent criteria for arrestments, duration of trial; right of defence; obligation of effective and serious investigation; organization and working principles of State Security Courts.

2) It is absolutely necessary to make the necessary changes on the relevant legislation including Criminal Procedure Law and Civil Procedure Law, the Law on Judges and Prosecutors, and the Law on Supreme Council of Judges and Prosecutors.

* * *

Besides, utter conformity with the matters in the National Programme and materialisation of the mentioned changes, which will facilitate Turkey's membership to the European Union, are seen as the instruments that would conclude the process of democratisation in Turkey, which has long been promoted and vehemently desired.

Conclusion

It is a clearly discernible fact that, in order to earn a place among the developed countries, Turkey needs a democracy that could govern and function healthily. The precondition of becoming a respectable country in today's world is to offer citizens a political and social environment imbued with rights and freedoms.

Our country has made great strides towards becoming a democratic society. Nevertheless, there are yet many steps to be taken, as has been argued in this report. Our citizens have both the desire and potential to take these steps. What we need the most is the reflection of these demands in political life and the materialisation of the political transformation.

That Turkey is able to catch contemporary democratic standards, is a right of the Turkish people and this aim must be turned into a matter of honour for our country.

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