

## **Recent Constitutional Amendments and the EU Harmonization Laws in Turkey: More Freedom, More Democracy and a More Civilian Order-An Overview**

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### **Introduction**

In line with the priorities of the 2001 National Programme for the Adoption of the Acquis (NPAA), the Grand National Assembly of Turkey (GNAT) adopted the most comprehensive constitutional amendment package on October 3, 2001 and, accordingly, a series of harmonization laws.[1]

Turkey's constitutional amendment process and the efforts to adopt the European Acquis by the newly elected Adalet ve Kalkınma Partisi, Justice and Development Party (AKP) Government has continued with astonishing speed since 2003. From the very beginning, the AKP Government declared its strong commitment to and engagement with the European Union (EU) bid. As Prime-Minister Recep T. Erdogan emphasized in his introductory remarks on the Action Plan of the 58th and 59th governments, "arrangements related to basic rights and freedoms will be speedily made within the framework of universally recognized standards and norms and the EU criteria." [2]

### **I. Fourth and Fifth Harmonization Packages with the Constitution and Copenhagen Political Criteria**

The EU Copenhagen Summit, which convened on December 12-13, 2002, postponed the decision to start the accession talks until the EU Summit to be held in December 2004.[3] Nevertheless, a broad group—including the new Government, the opposition party and major non-governmental organizations and the leading media—continued to promote the EU membership. As soon as the first AKP Government formed, the GNAT passed two harmonization packages with the Constitution and Copenhagen Criteria. The first package (fourth overall) was adopted at the Plenary Session of the Parliament on January 2, 2003 and put into effect starting on January 11, 2003.[4] On January 23, Parliament adopted the

fifth EU harmonization package, which permits the re-trial of persons in line with the decisions of the European Court of Human Rights (ECHR).[5]

In addition to this democracy package, three laws were adopted, ratifying: a United Nations (UN) convention against transnational crimes, a UN protocol to prevent illegal immigration and an appendix to a UN Convention aimed at the struggle against trafficking in human beings. The law adds an article to the Code of Civil Trial Procedure, enabling application to the Supreme Court of Appeals with a request for a re-trial process within one year following the decision of the ECHR. In addition, the law foresees amendments to the Law of Criminal Procedure parallel to this.

The Ankara State Security Court approved the application made by four former deputies of the banned pro-Kurdish Democracy Party (DEP), who demanded a retrial in line with an amendment to a law adopted by Parliament as a part of a reform package. Accordingly, the court will retry the former deputies, but it has rejected the request to acquit these deputies. The former DEP deputies, namely Hatip Dicle, Leyla Zana, Orhan Doğan and Selim Sadak, were convicted of aiding and abetting members of the PKK (Kurdish Workers' Party) terrorist organization and were sentenced to 15 years imprisonment in 1994. The convicts applied to the European Court, which decided that the former deputies had not been given a fair trial in the Turkish court.[6]

## **II. Two Attempts to Reduce the Minimum Age for Eligibility for Deputyship and Sale of Deforested Lands and Presidential Veto**

Soon after the election of Tayyip Erdogan to Parliament and the receipt of vote of confidence for the 59th Turkish Government under his Prime Ministry in March 2003, a total of 216 deputies from the AKP submitted a motion of proposal to amend three articles of the Constitution on March 24, 2003.[7] According to the reason statement of the first article of the proposal—which amends the first paragraph of Article 76 on “Right to Vote, to be Elected and to Engage in Political Activity”—both the European standard for age limitation and the demographic and political realities of Turkey require lowering the age limit for deputyship.[8] By the second article of the proposal, the phrase “to be operated” was added to the second sentence of Article 169 paragraph 2 of the Constitution.[9] Thus, the State could transfer the management of forests to the third persons legally. The most controversial amendment was designed to rewrite Article 170 facilitating the evaluation of areas that technically and scientifically ceased to be forests before 31 December 1981.[10] The public opinion was dominated by the idea that the Government would like to sell these lands and obtain a total of 25 billion dollars.

The Constitution Commission submitted its report to the Speakership on March 28, 2003. The General Assembly started to debate the whole proposal on April 1, 2003.[11] During the debates on the whole and individual articles of the proposal, the Cumhuriyet Halk Partisi-Republican Peoples' Party (CHP), the main opposition party, supported Article 1 on reducing the age limitation for eligibility, but vividly opposed the sale of deforested lands on several grounds. The CHP group submitted a motion to delete Article 2 of the proposal on the grounds that opening of the deforested lands to the private sector might threaten the sustainability of forestlands and make the real inhabitants of forestlands poorer in the near future. However, the motion was rejected by the AKP majority.[12]

The lengthiest discussions were held on Article 3 concerning the proposal to rewrite Article 170 of the Constitution. While the representatives of the AKP claimed that the sale of deforested lands was a public necessity due to illegal occupations and savings of individuals on these lands, the CHP representatives argued that this could cause enormous unjust gains at the expense of societal objectives. In addition, the CHP speakers underlined the fact that in Turkey only ten percent of forestlands were officially platted and registered. It

would be a great mistake to adopt such a regulation without sufficient infrastructure.[13] The CHP group submitted a motion for amendment of this article, according to which all revenues that would be received from the sale of deforested lands would be spent for forestation and the planning and realization of a technical and social infrastructure in deforested lands. In addition, lands within the borders of forest villages would be distributed to the inhabitants of forest villages for agricultural purposes without any payment. This motion was rejected by the majority of the general assembly.

Another motion for amendment of Article 4 of the proposal, which was submitted by the CHP group, intended to put the articles of the proposal to the referendum individually if it would be submitted to referendum, but it was rejected by the majority of the general assembly, too.

During the first reading of the proposal, Article 1 of the proposal was supported by a majority of 318 versus 121, which is less than the three-fifths majority required for adoption. However, Article 2 of the proposal was adopted by a majority of 345 versus 112; Article 3 was adopted by a majority of 336 versus 109; and Article 4 on execution and the date of effectiveness was adopted by 365 versus 120. Since the number of votes for the adoption of the articles of the proposal was less than the two-thirds majority of the total number of deputies, the Constitution Commission wanted to withdraw the proposal according to Article 88 of the Rules of Procedure of the GNA prior to the voting on the whole of the proposal. However, Yilmaz Ates, the deputy-Speaker of the GNA, insisted that since the GNA completed the debate and voted on the articles of the proposal, he could not let the Commission take the proposal back. This caused a heavy debate on procedural matters. In the end, the general assembly adopted the whole proposal with the vote of 366 versus 19.

The second reading of the proposal was completed on April 4, 2003.[14] The CHP group submitted similar motions regarding Article 2, 3 and 4 of the proposal, but they were rejected by the general assembly. The proposal was adopted by the sufficient majority and *Law No. 4841 Amending Some Articles of the Constitution of Republic of Turkey* was sent to the President for approval.

President Ahmet N. Sezer referred the law back to the Parliament to be reconsidered.[15] In the President's veto statement, it was emphasized that the general principles governing the new constitutional regulation on the sale of deforested lands were in conflict with the principles of "public interest," "State governed by the rule of law," and "justice." In addition, new regulation may motivate the destruction of forestry as it was experienced in Turkey during the period of 1961-1983 as a consequence of a similar regulation. Considering the economic and social benefit of forests in societal order, it is required that forestlands, as national wealth, remain a public good under the rule and protection of the State. Sezer noted that, in order to protect, expand and develop forestlands, the State's supervision and observation of forestlands are required. Therefore, forestlands must belong to the State and be operated by the State.

The Constitution Commission first examined the statement of the presidential veto on *Law No. 4841 on June 26, 2003*, and approved Article 1 of the proposal with unanimity and Articles 2, 3 and 4 with majority without any change.[16] In order to facilitate the passage of the amendments in line with the presidential veto statement later on, the AKP group withdrew the amendment to Article 169 of the Constitution.[17] And, the phrase "transfer, appropriation, relinquishment, renting, and instituting a real right on it" was removed from

the proposed text of Article 170 in line with the President's veto statement and replaced by the phrase "administration."

During the first reading of the whole of the revised proposal on July 23, 2003, Orhan Sur, the CHP representative, stated that combining two different subjects—age limitation for eligibility to be a deputy and the sale of deforested lands—was cunning. Moreover, it was emphasized that it would not be easy to practically determine whether land technically and scientifically ceased to be forest before or after the year 1981. He added that the major objective of the proposal was real estate rent around the big cities. Furthermore, it was argued that the Minister of Finance, too, publicly declared that he owned fifty thousand square meters of land without a title deed. Sur also underlined the fact that the phrase "administration" may include many things. Mr. Osman Pepe, Minister of Environment and Forestry, stated that the AKP Government would like to solve a societal problem which lasted for decades. He explained that there were small cities, neighborhoods, individual or official building on these deforested lands. They attempted to legalize this *de facto* situation in and around the most developed 18 cities of Turkey. By selling these lands to those who occupied and possessed these lands illegally, the State Treasury would make some billion dollars. In return, he added, they would complete the work of platting, financially support forestation and help forest villagers. Mr. Kemal Unakitan, Minister of Finance, replied to the questions about his property by stating that his small land was bought from one who occupied and possessed it without any legal title.

Following the addresses of two CHP representatives on the proposal, the general assembly accepted the examination of the proposal article by article with a vote of 363 versus 2. During the debate on the articles, the CHP representatives stressed their strong opposition against the new formulation of Article 170. However, no motion for amendment of this article was submitted by the CHP group. While Article 1 of the proposal was supported by a majority of 361 versus 2, which is less than the three-fifths majority required for adoption, new Articles 2 and 3 of the proposal also received the support of 361 deputies without any "no" vote.

The second reading was held on July 29, 2003.[18] Article 1 of the proposal was supported by a majority of 365 versus 3, Article 2 of the proposal was adopted by a majority of 369, Article 3 by a majority of 371 and the whole proposal by a majority of 368 versus 2. Two weeks later, President Sezer vetoed *Law No. 4960* on the same grounds as he expressed in his first veto statement.[19]

Thus, the AKP Government's target to obtain 25 billion dollars in revenue through the sale of deforested lands failed to be realized. According to Article 175 of the Constitution, if the Parliament passed the bill without any change, the President could either approve it or call for a referendum. There were allegations that the bill had "triggered consecutive forest fires in Turkey's most valuable tourism areas" with the idea that newly damaged forest lands would also be included in the scope of the sale of deforested lands. Under those circumstances, the Government could not take a risk because a referendum would mean a vote of confidence at the same time.[20] The proposal together with the President's last veto statement has been on the agenda of the Constitution Commission since October 1, 2003.

### **III. Sixth, Seventh and Eighth Harmonization Packages and Priorities of the 2003 Turkish National Program for the Adoption of the Acquis**

The GNAT adopted a new harmonization package—which included significant legal changes expanding the freedom of expression, safeguard provisions on the rights of prisoners, religious freedom, right to life and retrial—by a series of amendments enacted to *Law No. 3713 Anti-Terror Law*; *Law No. 298 on the Basic Provisions on Elections and Electoral Registration*; *Law No. 3984 on the Establishment of Radio and Television Enterprises and Their Broadcasts* and *Law No. 3257 on Products of Movie, Video and Music*; *Law No. 2762 on Foundations*, *Law on No. 3194 Construction*; *Law No. 1587 on Census*; *Law No. 765 on Penal Code*; *Law No. 2845 on State Security Courts*; *Law No. 1412 on Criminal Trial Procedure*; and *Law No. 2577 on Code of Administrative Trial Procedure*; on June 30, 2003. [21] Among other changes, a number of amendments were enacted to *Law No. 3984* with this package. Article 3 was amended to reduce the restrictions in relation to monitoring. Article 4 was amended to make it possible for private as well as public radio and television corporations to broadcast in different languages and dialects traditionally used by Turkish citizens in their daily lives. An amendment to Article 6 removed the representative of the Secretariat-General for the National Security Council from the Board of Supervision. In addition, the amendment to Article 53 of Law on Administrative Trial Procedure paved the way for retrial in light of the decisions of the European Court of Human Rights for administrative law cases as well.

Soon after the adoption of the sixth harmonization package, the GNAT passed the seventh harmonization package on July 30, 2003.[22] This package included significant changes in the context of the expansion of the freedom of expression, freedom of association, safeguard provisions on the rights of prisoners, religious freedom, the rights of children, cultural rights, civilian-military relations and the functionality of the executive. It involved a series of amendments enacted to *Law No. 765 Penal Code*, *Law No. 3713 Anti-terror Law*, *Law No. 1412 Criminal Trial Procedure*, *Law No. 353 on the Establishment and Trial Procedures of Military Courts*, *Law No. 832 on the Audit Court*, *Law No. 2253 on the Establishment, Duties and Trial Procedures of Juvenile Courts*, *Law No. 2908 on Associations* and *Law No. 743 on Civil Code*, *Decree Law on the Establishment and Duties of the Directorate General for Foundations*, *Law No. 2911 on Assembly and Demonstration Marches*, *Law No. 2923 on Foreign Language Education and the Learning of Different Languages and Dialects by Turkish Citizens* and *Law No. 2945 on the National Security Council and the General Secretariat of the National Security Council*.[23]

Simultaneously, the Turkish Government issued a new and revised “National Program” indicating political, economic and social criteria in order for EU membership talks to begin in early 2005.[24] In line with the recent official statements of the European Union[25] the political criteria section of the 2003 Turkish Program for the Adoption of the Acquis underlined the following major objectives:[26]

- The Government is resolved to complete legislative measures relevant to the Copenhagen political criteria within the first legislative year of the 22nd legislative session of the Turkish Grand National Assembly. The Government is determined, in principle, that the impact of all concluded reforms will be observed simultaneously, in letter and spirit, by June 2004.

- The complete redrafting of all basic legislation is a long-term legislative process, which will also continue during the accession negotiations. The Government has opted to accelerate the harmonization of various laws in order to fulfill the political criteria—the prerequisite to the opening of accession negotiations—through “harmonization legislation packages.” However, the ultimate long-term aim is to renew basic legislation through an integrated approach.
- The Government attaches importance and priority to both the continuation and the expansion of the freedom of expression. Support for the development of civil society and its participation in democratic life will be continued. In this vein, the relevant legislation will continue to be reviewed in the light of the European Convention on Human Rights. Torture and maltreatment will be prevented and zero tolerance will be shown in this matter. The legislative and administrative measures adopted for this purpose will be strictly implemented. Human rights training for public officials will be expanded and intensified. Legal reforms will be emphasized as the basis of the democratization process. The effective implementation of the measures concerning the conditions in prisons and detention houses will be achieved.
- The Government is convinced that ensuring the full and equal enjoyment of all fundamental rights and freedoms and cultural rights by all individuals without discrimination is its fundamental duty. In this context, the freedoms of thought, conscience, religion and belief will be strictly safeguarded in accordance with Article 9 of the European Convention on Human Rights (ECHR). The legislation concerning freedom of worship will be simplified in implementation in light of the ECHR and its Additional Protocol No. 1, with a view to addressing the needs of different religions and faiths. Ensuring gender equality in practice will be prioritized. The implementation of provisions for the learning of and broadcasting in different languages and dialects used by Turkish citizens in their daily lives will be ensured.
- The functions of the National Security Council and the Secretariat-General of the National Security Council shall be harmonized with the consultative status as redefined through constitutional and legislative amendments.

Considering some international conventions coordinated by the World Intellectual Property Organization, such as Copyright Convention dated 1996 and Convention for Protection of Producers of Phonograms dated 1978, and the requirements of the European Aquis and of this sector, some amendments to various laws were adopted by the GNA on March 3, 2004. [27] Law No. 5101 (the eighth harmonization package) aimed at solving the disputes on the usage of products, which are subject to intellectual property laws, between professional organizations representing the producers and consumers. By strengthening the intellectual property system, the promotion of national and foreign investments was also considered. These amendments were made to Law No. 1530 *on Municipalities*, Law No. 2464 *on Revenues of Municipalities*, Law No. 3984 *on the Establishment of Radio and Television Enterprises and Their Broadcasts*, Law No. 3257 *on Products of Movie, Video and Music* and Law No. 5846 *Intellectual and Artistic Products*.

#### **IV. Recent Constitutional Amendments: Gender Equality, Ban of Death Penalty, Supremacy of Universal Human Rights and Transparency for Military Expenditures**

The AKP parliamentary group submitted a new constitutional amendment package, which attempted to amend ten articles of the Constitution on April 27, 2004.[28] In the reason statement of the proposal signed by a total of 198 deputies, it was stated that the requirements and legal arrangements, which must be done by Turkey as a candidate member State for the European Union, had been determined by the 2003 National Program to be within the scope of the Copenhagen criteria.

The general statement on amendments also underlined that, on the one hand, as required by Protocol No. 13 *to the Convention for the Protection of Human Rights and Fundamental Freedoms*, concerning the abolition of the death penalty in all circumstances, to which Turkey is a signatory, “the right to life” is a fundamental value of democratic order and the abolishment of the death penalty is required to protect this right and to admit honor of all human beings by birth. On the other hand, in order to adapt with new openings in the world and in accordance with these openings to promote the fundamental rights and freedoms to the levels of both the universally accepted standards and norms and the European Union criteria, it was required to make amendments to the Constitution as well as the basic law and other legal arrangements.

According to Article 1 of the Proposal, in the 2003 Accession Partnership Document, Turkey was expected to guarantee in law and practice the full enjoyment of human rights and fundamental freedoms by all individuals without discrimination, in line with relevant international and European instruments to which Turkey is a party. In addition, according to Article 20 of the European Union Charter of Fundamental Rights, “everyone is equal before the law.” Furthermore Article 23 of the draft European Constitution states that “equality between men and women must be ensured in all areas, including employment, work and pay.” The second paragraph of the same Article declares that “the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.”

Although the Additional Protocol 13 *to the Convention for the Protection of Human Rights and Fundamental Freedoms* was signed by the Government but not yet ratified by the GNA, Article 2 of the proposal deleted the phrase “execution of death penalty” from Article 15 of the Constitution before its ratification.[29]

In a parallel action to the amendment to Article 15 of the Constitution, Article 3 of the Proposal redesigned paragraph four of Article 17 by deleting the phrase “death penalty” and narrowing the scope of the occurrences of death as a result of legal use of weapons. [30]

Article 4 of the proposal rearranged Article 30 of the Constitution by providing constitutional protection for printing facilities in light of the *2003 Accession Partnership* document and the former 1961 Constitution.[31]

In a parallel action to the amendments to Articles 15 and 17 concerning the “death penalty,” some amendments to Article 38 of the Constitution were made. First of all, paragraph 9—where the “death penalty” was made “legal in the time of war, imminent war and crimes of terror”—was deleted. The phrase “death penalty” was added to the beginning of

paragraph ten. Finally, the phrase “excluding the requirements of being a party in the International Criminal Court” was added to the last paragraph.[32]

Amendments were also made to Articles 15, 17 and 38. The phrase “confirming death sentences passed down by the courts” was deleted from Article 87 regulating general provisions on functions and powers of the GNA.[33]

Article 7 of the proposal added a new sentence to the last paragraph of Article 90 of the Constitution. Accordingly, the provision of international agreements on fundamental rights and freedoms, which were ratified pursuant to the procedure, would be taken as essential when a conflict arose between the provisions of a national law and these agreements.[34]

In order to civilianize the administration, paragraph two of Article 131 on the composition of the Council of Higher Education was redesigned and the representative of the General Chief of Staff was excluded.[35]

Article 143 on State Security Courts was repealed in parallel to the provisions of the 2003 Accession Partnership and the 2003 Progress Report.[36]

Finally, the last paragraph of Article 160 was deleted in parallel to the emphasis on transparency and efficiency made by the EU 2002 Progress Report. Thus, the expenditures of the Armed Forces would be open to auditing and parliamentary scrutiny.[37]

During the Commission debates, in order to establish a more egalitarian societal order, the CHP deputies added in their countersignature note that affirmative action (positive discrimination) for women must be included in the Constitution as a part of Article 10. The CHP group also opposed Article 7 of the proposal with the idea that the scope of international agreement on fundamental rights and freedoms to be superior to the national legislation must be clarified.

The first reading of the proposal started on May 4, 2004.[38] Ms. Oya Arasli, the CHP deputy, pointed out that it would be more appropriate to stress the fact that these amendments were being introduced due to the demand of people for more democracy and not just for the sake of joining the European Union. She also noted that the amendments on gender equality were not sufficient. Ms. Arasli said that these amendments were introduced to harmonize with the European Union criteria. However, she added, there is another issue that has to be fulfilled for harmonization with the Copenhagen criteria. That is the establishment of the rule of law—to eliminate all obstacles preventing its proper practice. Immunity from prosecution has been one of the most important impediments preventing its establishment. She pointed out that the parliamentary immunity of deputies came at the top of the list. She continued that two major parties promised before the elections to abolish this immunity. Despite repeated requests to tackle the issue in earlier attempts, no such proposal had been initiated. The CHP falls short in the number of deputies for proposing such a constitutional amendment, but those with the sufficient number of deputies were obligated to fulfill this amendment.[39]

Ms. Arasli was also critical that “Turkey did not sign any agreement indicating the fact that we accepted the authority of the International Criminal Court and we are a party to it. It would be better to formulate a more abstract statement on this matter without naming it.” Then Arasli expressed her support for other amendments. Finally, she focused on Article 10 about gender equality as the foundation of the amendments. She underlined that women have always suffered gender bias. “Think of honor killings only . . . If a man faces the same situation, no one would consider killing him.” She said that they fully back the constitutional amendment on Article 10, but it would not be sufficient to meet the international criteria. It was open to question whether this amendment included the idea of



positive discrimination. She asked the general assembly: “We are only 24 female deputies here. We fail to initiate anything. We need your help. Vote for measures to lift the obstacles before women in exercising their rights . . . The only thing you have to do is to approve the proposal we have submitted . . . Grant this right to us. Pay the debt you owe to Turkish women for years.”[40]

Ms. Nimet Cubukcu, the AK Party deputy, stated that all modern constitutions included special articles that assure gender equality. In various international documents, to which Turkey is a party, gender equality is included. She said that the new Article 90 of the Constitution could be considered as a counter measure by accepting the superiority of international agreements, which were ratified pursuant to the procedure. Domestic law could regulate the issue in a greater scope. Therefore, she said there was no need to insert a constitutional statement of positive discrimination, which was a free individual choice.[41]

Mr. Cemil Cicek, Minister of Justice, stated that the Constitution had been amended by the Parliament eight times during the last 22 years, during which the philosophy of constitution-making changed considerably. When the 1982 Constitution was being drafted, “security” was the principle objective. Therefore, the Constitution was full of prohibitions to eliminate threats to security. Today, democracy, rights and freedoms, and individual’s rights and freedoms are priority considerations. If prohibitions guaranteed the unity and integrity of a State, the communist States, which practiced a detailed system of prohibitions, would be the most advanced States. He expressed that “the EU objective plays a motivating role in our efforts to pass what the people need and demand . . . EU membership is our national objective and our 41-year-old State policy. It is a project that has to be followed by Governments coming after us.”

Mr. Cicek argued that “in some of our laws, harmonization with EU norms was achieved, but there were still some aspects of our Constitution that did not correspond to our objectives, such as the death penalty. Each one of these changes benefits Turkey and a step forward. We put an effort to provide greater guarantees for rights and freedoms; we expand the scope of personal liberties and pave the way for civilian initiatives and expand it. These changes were made available after such a long time in many countries.” Cicek also noted in his speech that transparency of the State was also very crucial, adding that the cause of many problems Turkey faced in the past was due to this lack of transparency.[42]

Mr. Burhan Kuzu, Chairman of the Constitution Commission, noted that this mini package was an attempt to make a date for the European Union accession talks. Later a more comprehensive constitutional amendment may be submitted. He mentioned that, contrary to the press coverage, he had been in favor of promoting gender equality. However, Article 10 seemed to be sufficient in resolving problems because, according to the new constitutional prescriptions, the Constitutional Court would have to consider the international conventions, such as the CEDAW, in examining the cases brought before it. On the status of the International Criminal Court, Mr. Kuzu stated that Turkey was the only country which did not sign the Statute of the Court in Europe, including the European Union and Council of Europe. However, he had doubts about the Court’s functionality if its scope of activities did not cover terror crimes, which was very vital for Turkey. Finally, he emphasized that if you signed an international convention on human rights, you had to practice it. The courts would take these conventions superior to the Constitution and the domestic law.[43]

Mr. Ugur Aksoz, CHP deputy from Adana province, first stressed that without guaranteeing “judicial independence,” it would make no sense whether or not the State Security Courts were abolished. On gender equality, he pointed out that the Constitutional Court would annul a law promoting positive discrimination unless a binding statement was included in the Constitution. Moreover, Mr. Aksoz stated that while the procedure for adopting an international agreement required a simple majority vote, a constitutional amendment could be approved by a three-fifths majority. In other words, procedurally simple majority would amend the will of a qualified majority in this way. He pointed out that there are some constitutional articles that cannot be amended nor can their amendment be proposed. Consider what could you do if an international agreement would include a contrary provision to the provisions of these articles. For instance, it was stated that everyone could speak his/her native language and this convention was approved by the Parliament. “Well,” he said, “according to the Constitution the official language of the State is Turkish.” Which one would be taken into consideration as superior? “As we took international agreement as superior, three hundred languages would be spoken here. . . . Let’s consider these points carefully.”[44]

Following debate on the whole of the proposal, a vote to discuss individual articles was held. A total of 514 deputies voted in favor of starting debate on the articles, while five were against and six abstained. One ballot was blank.

The CHP deputies submitted two motions of amendment to Article 1 to include a statement of positive discrimination, which was underlined by the CEDAW, but both of them were rejected by the general assembly. Another motion of amendment was submitted by the CHP deputies on Article 7 of the proposal to count the origin of the international conventions such as the United Nations, but this motion was also rejected by the general assembly. Article 5 without debate and the rest with debate and the whole package were approved by more than two-thirds majority of the GNA.

The second reading of the proposal was started on May 7, 2004.[45] The CHP deputies submitted the same motions of amendments to Article 1 and 7, but they were rejected by the general assembly again. Following the debates on these two articles, the whole package was adopted by more than two-thirds majority of the GNA without debate. Thus, the constitutional amendment package was enacted by the Parliament almost unanimously. *Law No. 5170*, amending some articles of the Constitution of Turkey, was approved and signed by President Ahmet Necdet Sezer on May 21, 2004.[46]

The promulgation of these amendments led to many important political developments. Among others, the banned pro-Kurdish Democracy Party deputies were released. The Chief of General Staff’s authority to select a member to the Council of Higher Education ended. The death penalty became unconstitutional. Domestic laws were made subordinate to the international conventions on human rights, which were adopted pursuant to the procedure. Finally, military expenditures were made transparent and open to auditing.

Soon after the promulgation of the constitutional amendments, on June 23, 2004, the AKP Government submitted a motion of governmental draft intending to harmonize some provisions of domestic laws with the recent constitutional amendments and *Protocol No. 13 of the European Convention of Human Rights*, which was not adopted by the GNA yet. By *Law No. 5218 (9th harmonization package) on the Abolishment of Death Penalty and Amendments to Various Laws*, the phrases “death,” “death penalty” and “capital punishment” were deleted from various laws and replaced by the phrase “heavy lifetime imprisonment,” including *Law No. 765 on Penal Code*, *Law No. 1322 on Publication, Announcement and Effectiveness Date of Regulation*, *Law No. 1412 on Criminal Trial Procedure*, *Law No. 647 on Execution of Sentences*, *Law No. 1481 on Prevention of Some*

*Actions Affecting Public Order, Law No. 6831 on Forest, Law No. 2253 on the Establishment, Duties and Trial Procedure of Juvenile Courts, Law No. 2797 on High Court of Appeals, Law No. 3713 on Anti-terror, Law No. 4533 on Gallipoli National Park, the Law on Railway Security and Law No. 4771 on Amendments to Various Laws.*[47] Accordingly, those who had already been sentenced to death would instead have their sentences commuted to life imprisonment. Besides, some amendments were done in parallel to the amendments to Article 131 of the Constitution. By these amendments to Law No. 2547 on Higher Education, Law No. 2813 on Wireless, and Law No. 3984 on the Establishment of Radio and Television Enterprises and Their Broadcast, the practice of having members of the Chief of General Staff or the National Security Council sitting on the Council of Higher Education, the Supreme Board of Radio and Television, High Council of Communication and the Council of Protecting Minors from Harmful Publications appeared to be terminated.

## **V. Prospects**

During the Copenhagen Summit in December 2002, the European Council stated that if the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiation with Turkey without delay.

Since then, with these considerations the Turkish Government and the GNAT made great progress towards a more democratic order complying with the Copenhagen criteria.

The 2004 Progress Report, which was publicized on October 6, 2004, gave Turkey a conditional “yes” towards accession negotiation. On the basis of the report assessing the conditions regarding human rights, democracy, State governed by the rule of law and the protection of minorities, the European Commission recommended to start accession negotiations with Turkey provided that a certain key legislation, which is in preparation, enters into force.

It was argued that there are still some further steps to be taken in primary legislation and its effectiveness. For example, the Law on Associations, the Penal Code and the Law on Intermediate Courts of Appeal have not been entered into force yet. In addition, the Law on Criminal Trial Procedure, which establishes the judicial police, and the Law on Execution of Sentences and Measures were still to be adopted. The Commission suggested a three-pillar strategy to approach the negotiations. First, there is need for a strengthened cooperation to reinforce and support the reform process in Turkey. Second, negotiations will adapt to the specific challenges related to Turkey’s accession. Finally, a substantially strengthened political and cultural dialogue bringing people together from the EU member states and Turkey is considered.

It seems that Turkey’s democratization process through the liberalization of the Constitution will not end. With the spirit of high momentum gained by the European focus, it is likely that the Government will initiate more democratization packages. However, the “conditional” start of accession negotiation and an “open ended” process may cause negative waves in initiating new democratization legislation and implementing them. In this respect, the first pillar of the Commission’s strategy for negotiations seems to be the most crucial one. Despite the differences, obstacles and prejudices, a close and mutual cooperation between the parties can overcome some of the “if” questions. It is less likely that Turkey will become a full member of the EU. Neither will it have a new constitution in the near future. “Ebb and flow” in Turkey-EU relations will definitely affect the velocity of democratization. On the other hand, it is the time to consolidate the gains of the recent developments. In this respect, the domestic actors may take more responsibility to create a suitable environment for a more democratic order and increased stability. Both the administration and the masses need to incorporate the democratic values in their daily

exercises. These require the participation of the internal dynamics rather than the emphasis of external factors in the process.

### Footnotes:

[1] Ömer Faruk Gençkaya, "Politics of Constitutional Amendment in Turkey, 1987-2002," in "Turkey," Gisbert H. Flanz, ed., *Constitutions of the Countries of the World*, Dobbs Ferry, New York: Oceana Publications, Inc., Release 2003-1, February 2003, pp. xxiv-lv.

[2] Acil Eylem Planı (Emergency Action Plan), <http://www.akparti.org.tr/#>.

[3] [http://europa.eu.int/comm/copenhagen\\_council\\_20021212/index\\_en.html](http://europa.eu.int/comm/copenhagen_council_20021212/index_en.html).

[4] <http://www.byegm.gov.tr/on-sayfa/uyum/AB-4paket.analiz.htm>. See also Gençkaya, *op.cit.*, p. liv.

[5] <http://www.byegm.gov.tr/on-sayfa/uyum/AB-5paket.analiz.htm>. See also Gençkaya, *ibid.*, p.lv.

[6] For a historical overview of the DEP trial see *Turkish Probe*, 13 June 2004 Issue: 594.

[7] For the text of the original proposal and the Report of the Constitution Commission, see Attachment to the *Minutes of the GNAT*, Period: 22, Legislative Year: 1 Session: 59.

[8] First paragraph of Article 76 reads as follows: "Every Turk over the age of 30 is eligible to be a deputy."

[9] The second sentence of the second paragraph of Article 169 reads as follows: "State forests can be managed and exploited by the State in accordance with the law."

[10] Article 170 reads as follows:

Measures are introduced by law to secure co-operation between the State and the inhabitants of villages located in or near forests in the supervision and exploitation of forests for the purpose of ensuring their conservation and improving the living conditions of their inhabitants; the law also regulate the development of areas which technically and scientifically ceased to be forests before 31 December 1981, the identification of areas whose preservation as forest is considered technically and scientifically useless, their exclusion from forest boundaries, their improvement by the State for the purpose of settling all or some of the inhabitants of forest villages in them, and their allocation to these villages.

The State takes measures to facilitate the acquisition, by these inhabitants, of means and equipment of forestry and other inputs.

The lands owned by villagers resettled outside a forest are immediately reforested as a State forest.

Article 2/B of *Law No. 6831 on Forest dated 31 August 1956* describes such areas. That's why this amendment was expressed by the phrase of "2 B application" publicly.

[11] *Minutes of the GNAT*, Period: 22, Legislative Year: 1 Session: 59.

[12] *Ibid.*, p. 52.

- [13]** *Ibid.*, pp. 57-58 and 60-61.
- [14]** *Minutes of the GNAT*, Period: 22, Legislative Year: 1 Session: 62.
- [15]** For the President's statement see *Minutes of the GNAT*, Period: 22, Legislative Year: 1 Session: 69.
- [16]** *Minutes of the GNAT*, Period: 22, Legislative Year: 1 Session: 110.
- [17]** See the Additional Report of the Constitution Commission attached to the minutes of the same session.
- [18]** *Minutes of the GNAT*, Period: 22, Legislative Year: 1 Session: 112.
- [19]** *Turkish Daily News*, 16 August 2003.
- [20]** *Turkish Daily News*, 20 and 24 August 2003.
- [21]** Law No. 4928, Official Gazette, 19 July 2003 Issue: 25173. For a detailed summary of these legal changes, see <http://www.byegm.gov.tr/on-sayfa/uyum/uyum-ingilizce-59hukumet.htm> and Directorate for Political Affairs, Secretariat General for EU Affairs, Ministry of Foreign Affairs, "Political Reforms in Turkey," March 2004, <http://www.turkishembassy.com/II/O/Political%20Reforms%20in%20Turkey.doc>.
- [22]** Law No. 4963, Official Gazette, 7 August 2003 Issue: 25192.
- [23]** For a detailed analysis of these amendments, see <http://www.byegm.gov.tr/on-sayfa/uyum/AB-7paket-analiz.htm> and <http://www.turkishembassy.com/II/O/Political%20Reforms%20in%20Turkey.doc>.
- [24]** *The Briefing* (Ankara), 28 July 2004.
- [25]** Enhanced Political Dialogue and Political Criteria, Priorities (2003/2004), Official Journal of the European Union, L 145/40, 12.6.2003.
- [26]** [http://www.euturkey.org.tr/abportal/uploads/files/NPAA\\_executive\\_summary.doc](http://www.euturkey.org.tr/abportal/uploads/files/NPAA_executive_summary.doc). See also, <http://www.abgs.gov.tr/NPAA/up.htm> For Turkish full text see Official Gazette 24 July 2003 Issue: 25178 bis. See also <http://www.byegm.gov.tr/on-sayfa/ab/eu-np.htm>.
- [27]** Official Gazette, 12 March 2004 Issue: 25400.
- [28]** For the Report of the Constitution Commission, see *Minutes of the GNAT*, Period: 22, Legislative Year: 2 Session: 83 Annex.
- [29]** The Article 15 reads as follows:

In times of war, mobilization, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, and the integrity of his or her material and spiritual entity shall be inviolable except where death occurs through lawful act of warfare; no one may be compelled to reveal his or her religion,

conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgment.

**[30]** Article 17 reads as follows:

Everyone has the right to life and the right to protect and develop his material and spiritual entity.

The physical integrity of the individual can not be violated except under medical necessity and in cases prescribed by law; and can not be subjected to scientific or medical experiments without his consent.

No one can be subjected to torture or ill-treatment; no one can be subjected to penalties or treatment incompatible with human dignity.

The cases such as the execution of death penalties, the act of killing in self-defense, the occurrences of death as a result of the use of a weapon permitted by law as a necessary measure during apprehension, the execution of warrants of arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during martial law or state of emergency, are outside of the scope of the provision of paragraph 1.

**[31]** Article 30 reads as follows:

A printing press or its annexes duly established as a publishing house under law can not be seized, confiscated, or barred from operation on the grounds of being an instrument of crime, except in cases where offences are against the indivisible integrity of the State with its territory and nation, against the fundamental principles of the Republic or against national security leading to conviction are involved.

**[32]** Article 38 reads as follows:

No one can be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one can be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.

The provisions of the above paragraph also apply to the statute of limitations on offences and penalties and one the results of conviction.

Penalties, and security measures in lieu of penalties, are prescribed only by law.

No one can be held guilty until proven guilty in a court of law.

No one can be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence.

Findings obtained in a manner not in accordance with the law cannot be considered as evidence.

Criminal responsibility is personal.

No one can be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

The death penalty can not be imposed excluding the cases in time of war, imminent threat of war and terrorist crimes.

General confiscation can not be imposed as a penalty.

The administration cannot impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding internal order of the Armed Forces.

No citizen can be extradited to a foreign country on account of an offence.

**[33]** Article 87 reads as follows:

The functions and powers of the Turkish Grand National Assembly comprise the enactment, amendment, and repeal of laws; the supervision of the Council of Ministers and the Ministers; authorization of the Council of Ministers to issue governmental decrees having the force of law on certain matters; debating and approval of the budget draft and the draft law of the final accounts, making decisions regarding the printing of currency and declaration of war; ratifying international agreements, deciding with the three fifths of the Turkish Grand National Assembly on the proclamation of amnesties and pardons of the Constitution; confirming death sentences passed down by the courts; and exercising the powers and executing the functions envisaged in the other articles of the Constitution.

**[34]** Article 90 reads as follows:

The ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey, are subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.

Agreements regulating economic, commercial and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the State, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these agreements are brought to the knowledge of the Turkish Grand National Assembly within two months of their promulgation.

Agreements in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative agreements which are concluded depending on an authorization given by law is not required to be approved by the Turkish Grand National Assembly. However, agreements concluded under the provision of this paragraph and affecting the economic or commercial relations and private rights of individuals can not be put into effect unless promulgated.

Agreements resulting in amendments to Turkish laws are subject to the provisions of the first paragraph.

International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional.

**[35]** Article 131 reads as follows:

The Higher Education Council is established to plan, organize, administer, and supervise the education provided by institutions of higher education, to orient teaching activities, education and scientific research, to ensure the establishment and development of these institutions in conformity with the objectives and principles set forth by law, to ensure the effective use of the resources allotted to the universities, and to plan the training of the teaching staff.

The Higher Education Council is composed of members appointed by the President of the Republic from among the candidates who are nominated by the Council of Ministers, the Chief of the General Staff and the universities, and in accordance with the numbers, qualifications and procedure prescribed by law, priority being given to those who have served successfully as faculty members as rectors, and of members directly appointed by the President of the Republic himself.

The organization, functions, authority, responsibility and operating principles of the Council are regulated by law.

**[36]** Article 143 reads as follows:

State Security Courts are established to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State. However, provisions concerning state of martial law and state of war are reserved.

State Security Courts consists of a president, two regular members and one substitute, one chief public prosecutor and a sufficient number of public prosecutors.

The president, two regular and one substitute members and the chief public prosecutor from among the first category judges and public prosecutors, the public prosecutors from the other public prosecutors of the Republic are appointed by the Supreme Council of Judges and Public Prosecutors for a four-year term in accordance with the procedures prescribed by special law; those whose term of office has expired may be reappointed.

The High Court of Appeals is the competent authority to examine appeals against the judgments of the State Security Court.

Other provisions relating to the functioning, the duties and jurisdiction and the trial procedures of the State Security Court are prescribed by law.

**[37]** The last paragraph of Article 160 reads as follows:

The procedure for auditing, on behalf of the Turkish Grand National Assembly, of State property in possession of the Armed Forces shall be regulated by law in accordance with the principles of secrecy required by national defense.

**[38]** *Minutes of the GNAT*, Period: 22, Legislative Year: 2 Session: 83.

**[39]** *Ibid.*, p. 20.

**[40]** *Ibid.*, pp. 21-22.

**[41]** *Ibid.*, pp. 23-24.



**[42]** *Ibid.*, pp. 25-26.

**[43]** *Ibid.*, pp. 27-29.

**[44]** *Ibid.*, pp. 30-31.

**[45]** *Minutes of the GNAT*, Period: 22, Legislative Year: 2 Session: 86.

**[46]** Official Gazette, 22 May 2004 Issue: 25469.

**[47]** Official Gazette, 21 July 2004 Issue: 25529.